ARTICLE

THE US-PHILIPPINES IMPUNITY AGREEMENT: VIOLATING INTERNATIONAL LAW AND MUNICIPAL LAW WITH IMPUNITY

Raymond Vincent G. Sandoval

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THE US-PHILIPPINES IMPUNITY AGREEMENT: VIOLATING INTERNATIONAL LAW AND MUNICIPAL LAW WITH IMPUNITY*

*Raymond Vincent G. Sandoval***

"Politics is a field in which you can make compromises, but you cannot make compromises in justice."
- M. Cherif Bassiouni[1]

July 1, 2002, was a historic day for the international community as it marked the entry into force of the Rome Statute of the International Criminal Court (ICC), with seventy-six countries ratifying the Statute,[2] more than the sixty required for the Statute to come into effect.[3] United Nations (UN) Secretary-General Kofi Annan enthused that:

> The entry into force of the Rome Statute of the International Criminal Court is a historic occasion. It reaffirms the centrality of the rule of law in international relations. It holds the promise of a world in which the perpetrators of genocide, crimes against humanity and war crimes are prosecuted when individual States are unable or unwilling to bring them to justice. And it gives the world a potential deterrent to future atrocities.[4]

The entry into force of the Rome Statute marked the success of almost a century of efforts to establish a permanent international court despite all the political difficulties such an institution entailed.[5]

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* This article is dedicated to the memory of my late grandfather E. Voltaire Garcia (1912-2002), a brilliant lawyer and a doting *lolo*. This article won the 2004 Myres S. McDougal Award in Public International Law and Jurisprudence.

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[1] Transcript # 35-2, DIPLOMATIC LICENSE (CNN), August 14, 1994, cited in B. Brown, *The International Criminal Tribunal for the Former Yugoslavia*, in III INTERNATIONAL CRIMINAL LAW (2d ed.1999).

[2] At present there are 92 parties and 139 signatories to the Rome Statute, http://www.iccnow.org/countryinfo/worldsigsandratifications.html (last visited November 8, 2003).

[3] Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9 (1998) [hereinafter ROME STATUTE], art. 126 (Entry into force): "1. This Statute shall enter into force on the first day of the month after the 60th day following the date of deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."

[4] *Available at* http://www.un.org/News/Press/docs/2002/sgsm8293.doc.htm (last visited on February 17, 2004).

[5] See discussion *infra* starting on page 469.

Despite considerable emasculation of the authority and powers of the Court, mostly due to American insistence,[6] the United States still vehemently objects to the ability of the Court to obtain jurisdiction over the 365,000 American servicemen (as of June 2003)[7] deployed across the globe despite its not having ratified the treaty.[8] Former president Bill Clinton signed the Rome Statute last December 31, 2000, with the qualification that "I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied." President George W. Bush retracted the signature of the US on May 6, 2002.[9]

The US has taken advantage of a legal loophole found in the Rome Statute, Article 98(2), which was inserted also as a result of a mixture of American diplomacy and arm-twisting.[10] Under this provision of the Rome Statute, the US is allowed to enter into bilateral agreements with States Parties to the Statute which would require the State Party to surrender any American national accused of crimes within the jurisdiction of the ICC to the US and not to the ICC. Coupled with the 2002 American Servicemembers' Protection Act (ASPA),[11] many countries have been forced to enter into such Article 98 Agreements, more appropriately referred to as "Impunity Agreements." These bilateral agreements are termed as such for they would effectively allow American nationals to commit international crimes with impunity,[12] as these agreements purportedly assure that American nationals will not be brought before the ICC. The ASPA, signed into law last August 2, 2002 by US President George W. Bush, prohibits, among others, the granting of military assistance to any country that has ratified the Rome Statute (with few exceptions) and any form of cooperation with the ICC. The Philippines, like many other developing countries, relies heavily on US aid[13]

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[6] See discussion *infra* starting on page 470.

[7] A. Dragnich, *Jurisdictional Wrangling: US Military Troops Overseas and the Death Penalty*, 4 CHI. J. INT'L L. 571, 572 (2003).

[8] http://www.iccnow.org/countryinfo/worldsigsandratifications.html (last visited November 8, 2003).

[9] L. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537, 542-543 (2003).

[10] See discussion *infra* starting on page 471.

[11] The American Servicemembers' Protection Act, Pub. L. No. 107-206, 116 Stat. 899 (2002), enacting H.R. 4775 (S. 2551) [hereinafter ASPA].

[12] The United Nations Commission on Human Rights has defined impunity as "the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims." *Questions of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)* UN Doc. E/CN.4/Sub.2/1997/20 (1997).

[13] Philippine Secretary of the Department of Defense Eduardo Ermita reported that US contributions to the country in assistance and investments amounted to $808.2 million ever since President Arroyo pledged total support to the US's war on terrorism. Of this staggering amount, twelve percent or $114.6 million (nearly P6 billion) was released to the Philippine government in military aid in the first 10 months of 2003. This military aid included $19.87 million for the maintenance of the equipment of the Armed Forces of the Philippines (AFP), $30 million for counter-terrorism training and equipment, $25 million

and the aforementioned consequences of ratifying the Rome Statute are very serious indeed.

The Philippines signed the Rome Statute on December 28, 2000,[14] but has not yet ratified it. President Gloria Macapagal-Arroyo, with clearly pro-American leanings,[15] has not yet transmitted the Statute to the Senate for ratification and refuses to do so.[16]

The Philippines is one such nation that was coerced to sign such an Impunity Agreement. Last May 13, 2003, through the mere exchange of diplomatic notes between the late Philippine Secretary of Foreign Affairs Blas F. Ople and US Ambassador Francis J. Ricciardone, Jr., the Philippines agreed not to surrender any American "persons" without the consent of the US to "any international tribunal for any purpose, unless such tribunal has been established by the UN Security Council." American "persons" include current or former government officials, employees (including contractors), military personnel and nationals. Furthermore, under the Agreement, when the Philippines transfers a person of the US to a third country, the Philippines will not agree to the surrender of such individual to "any international tribunal for any purpose, unless such tribunal has been established by the UN Security Council." The US likewise binds itself to do the same with respect to Filipino persons.

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for combat engineering enhancement and support and $10 million as part of US President George W. Bush's drawdown authority for the maintenance of AFP equipment. The AFP also received 15,000 M16 rifles, 33 trucks, three UH-1H helicopters, and a Cyclone patrol vessel all amounting to $25.69 million. $47 million was devoted to the RP-US military "Balikatan" exercises in Basilan, with another $6 million provided for humanitarian assistance and civic action. The $114.6 million the Philippines received was markedly higher than the $94.5 million the country received in 2002 and the $38.03 million in 2001. See *US military aid at highest level*, THE PHILIPPINE STAR, December 7, 2003, p. 5.

[14] See note 2, *supra*.

[15] President Arroyo was one of the few national leaders in Asia and the rest of the world to openly support the American war on Iraq despite lack of UN Security Council authorization. In gratitude for her support, President Bush hosted a rare state dinner for President Arroyo and the rest of her delegation at the White House last May 19, 2003. See http://www.whitehouse.gov/president/statevisit20030522 (last visited February 2, 2004). In addition, President George W. Bush risked spending a full eight hours in Manila last October 18, 2003 despite numerous terrorist threats and in spite of recent events aimed at destabilizing the country's political and economic stability, during which he addressed a joint session of the Philippine Congress and stayed for a quick dinner at the Malacanan Palace. See http://www.ops.gov.ph/pgwbvisit2003/news_releases.htm#Bush%20visit (last visited February 2, 2004).

[16] There is an ongoing petition for mandamus pending before the Supreme Court filed by University of the Philippines College of Law professor H. Harry Roque, Congresswoman Roseta Rosales, Sen. Aquilino Pimental, et al., to compel the executive department to transmit the Rome Statute to the Senate for ratification. Philippine Secretary for Foreign Affairs Blas Ople has stated, however, that "this executive agreement does not in any way prevent us from becoming a state party to the ICC Statute nor would it diminish our obligations or duties under the Statute." DFA Press Release No. 269 (June 2, 2003), *available at* http://www.dfa.gov.ph/news/pr/pr2003/jun/pr269.htm (last visited November 17, 2003) [hereinafter DFA Press Release].

[17] The Impunity Agreement denominated as Note No. BFO-028-03. See also DFA Press Release, see note 16, *supra*.

This Agreement was entered into without public disclosure causing much controversy.[18] This article outlines various defects of the Impunity Agreement in light of both international law and Philippine municipal law.

I. HISTORICAL BACKOUND

A. Nuremberg and Tokyo

Any discussion of international criminal law will inevitably begin with the trials held in 1945-1946 at Nuremberg, Germany and at Tokyo, Japan. The Nazi and Japanese military commanders and subordinates were responsible for committing atrocities during World War II of a scale never before witnessed by the international community. Prosecutions pursuant to the Treaty of Versailles after World War I never ensued and the domestic prosecutions held in Germany were largely farcical.[19] Of ironic significance is one reason why no international tribunal was established after World War I is the difference of American opinion with regard to existence of international crimes after the two world wars. After the First World War, the US took the position that "crimes against the laws of humanity" did not exist in positive international law. The

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[18] See Gerald G. Lacuarta, *VP Seeks Full Disclosure of RP-US Accord*, PHILIPPINE DAILY INQUIRER, 18 June 2003 at A2. According to a press release issued by Representative Satur Ocampo, there is speculation that "the agreement was signed it in time for [President] Arroyo's US state visit to finally secure an initial $30 million in military aid being dangled by the Bush government since last year." [Agence France Presse, June 2, 2003] Communist rebels and other activists condemned a Philippine accord with Washington exempting Americans from prosecution by a new international criminal court, saying it removed a safeguard against possible U.S. military abuses there. [Associated Press Worldstream, June 3, 2003, Communist rebels, militants condemn accord exempting Americans from prosecution by international court] Vice President Teofisto Guingona has branded the Impunity Agreement "unfair" and discriminatory, and called upon the administration to submit the agreement to the Senate for ratification. He called the agreement unconstitutional and contrary to the equal protection clause of the constitution. [Agence France Presse, June 24, 2003, "Immunity pact with US 'unfair' and discriminatory: Philippine VP".] US ambassador to the Philippines Francis J. Ricciardone said yesterday that the US government is not exerting pressure on the Philippine government against the ratification of Rome Statute, but remarked that "the consequences though needed to be studied carefully." [BusinessWorld, July 10, 2003.] Senator Manuel Villar Jr., chairman of the committee on foreign relations has assailed Malacanang's practice of classifying international treaties as executive agreements to avoid Senate scrutiny. He has asked the Executive department to furnish the Senate with copies of the agreements it entered into with foreign countries, including the BIA, to determine if they were treaties disguised as executive agreements. [Manila Standard, July 10, 2003.]

There is a case pending before the Supreme Court questioning the constitutionality of the Agreement. Party-list Bayan Muna representatives Satur Ocampo, Crispin Beltran and Liza Maza, petitioners in the certiorari proceeding, have assailed the Agreement, saying it is a "flagrant violation of Philippine sovereignty" as Filipinos are denied their right of redress before the ICC on possible cases involving Americans [Manila Standard, 12 September 2003].

[19] M. C. Bassiouni, *International Criminal Investigations and Prosecutions: From Versailles to Rwanda*, III INTERNATIONAL CRIMINAL LAW 36-39 (2d ed. 1999).

US abruptly changed its position on the existence of such international crimes only after the Second World War, paving the way for international prosecutions.[20]

The International Military Tribunal (IMT) was established at Nuremberg, Germany pursuant to an Agreement for the Establishment of an International Military Tribunal entered into by the victors of the Second World War: France, the United Kingdom, the United States and the USSR. The Tribunal was "for the trial of war criminals whose offences have no particular geographical location." Under Article 6 of the Tribunal's Charter, the IMT had jurisdiction over three crimes: crimes against peace, war crimes and crimes against humanity. This Tribunal was established upon the insistence primarily of US President Truman and Justice Robert Jackson against the will of Britain, who preferred a summary execution of the major war criminals such as Hitler or Himmler since "their guilt was so black" and were "beyond the scope of all judicial processes." The Americans and the French viewed the erection of an international tribunal as an opportunity to record history, educate the world, and deter future atrocities.[21] In like manner, the International Military Tribunal for the Far East (IMTFE) was modeled after the Nuremberg Charter and prosecuted the same crimes.[22]

As politicized as these tribunals may have been,[23] they nevertheless represented a breakthrough in international criminal law. The establishment of these tribunals proved that with enough political will, it was possible to ensure that state-sanctioned acts of the most deplorable kind could and would be dealt with most severely (the penalty of death was meted out to the major war criminals) and that the criminal justice system was no longer territorially confined. The community of nations (or at least the victors of World War II) spoke out in unison that war criminals would no longer be allowed to hide behind their national legal systems that they themselves control and manipulate.

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[20] *Id.*, at 43.

[21] *Id.*, at 41.

[22] There were some significant differences between the IMT and IMTFE, particularly as to the nature of their charter. The IMT was created by the victorious Allied powers acting in condominium as the sovereign authority in Germany, while the IMTFE was created pursuant to the terms of Japan's surrender agreement. At no time were the Japanese authorities not in control of their county. Thus, there are those who contest the international nature of these military tribunals. *id.*, at 46-48; M. Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, in INTERNATIONAL CRIMES, PEACE AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 245-252 (2000).

[23] Bassiouni, *op. cit. supra* note 19 at 41, 50-51, to wit: "The proceedings were not without flaws. The U.S.S.R. used the tribunal to rewrite history: they covered up their infamous nonaggression pact with the Nazi regime which paved the way for the invasion of Poland and then sat in judgment over Germans accused of crimes for which the Soviet Union was responsible, like the murder of approximately 15,000 Polish prisoners, including between 8,300 and 8,400 Polish officers. Moreover, Britain's fears that the IMT proceedings would provide the accused with a platform for self-justification were validated when Goering outdid Robert Jackson during his cross-examination and as his lawyer harangued the Tribunal for two days." (p. 41)

From 1955 to 1992, however, was a long period of "silence," wherein international criminal law hibernated as a result of the Cold War between the US and the USSR,[24] with the exception of a handful of countries that conducted national prosecutions of war criminals.[25]

B. Post-Cold War Developments

By 1992, however, the Cold War had ended and there was renewed interest in international justice. The end of the conflict between the two superpowers of the world, the US and USSR, freed the plane of international relations of political tension. Friendly relations between the Western and Eastern bloc could finally be established, and the successor states to the USSR began to accept and abide by general principles of international law. Thus, the stalemate between the US and USSR and their allies within the UN Security Council (SC) that had hindered any definitive action by the Council had finally been overcome, and the SC could finally reach an agreement on the responsibilities imposed upon it by the UN Charter.[26] Indeed, in the first forty-five years of its existence, the SC issued 646 resolutions, whereas in the following six years, it would issue over 400 more.[27]

The end of the Cold War likewise ushered in an era of renewed respect and need for international criminal justice as the delicate balance of power the US and USSR had maintained before was dismantled, leading to a fragmentation of the international community and threatening chaos and disorder as nationalism and fundamentalism gave rise to numerous internal armed conflicts. Gross violations of international humanitarian law erupted.[28] The growth of the field of human rights as a distinct subset of international law granting rights and imposing obligations upon nations and individuals,[29] increased the pressure upon states to respect human dignity and to punish all those who strive to take away such dignity.[30]

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[24] Bassiouni, *op. cit. supra* note 19 at 53.

[25] See generally Attorney-General of the Government of Israel v. Eichmann (1961) 36 I.L.R. 5; Federal Republic of Germany v. Rauca, 38 O.R. (2d) 705 (1983); *Barbie*, France, Cour de cassation (1988) 100 ILR 330-7.

[26] A. CASSESE, INTERNATIONAL CRIMINAL LAW 334-335 (2003).

[27] F. P. King, *Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers Under Chapter VII of the Charter*, 10 EMORY INTL L. R. 509 (1996).

[28] CASSESE, *op. cit. supra* note 26 at 335.

[29] Charter of the United Nations, June 26, 1945, T.S. No. 933 [hereinafter UN CHARTER], arts. 1(3), 55 and 56; Universal Declaration of Human Rights, G.A. Res. 217A (III), 10 December 1948; R. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GEORGIA J. INT'L & COMP. L. 1 (1995/1996); J. Gibson, *International Human Rights Law: Progression of Sources, Agencies, and Law*, 14 SUFFOLK TRANSNATIONAL L. J. 41 (1990); *The Effect of Reservations on the Entry into Forces of the American Convention on Human Rights (Articles 74 and 75)*, 2 Inter-Am. Ct. Hum. Rts. (ser. A), 3 H.R.L.J. 153 (1982), wherein the Inter-American Court of Human Rights noted: "...modern human rights treaties in general...are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other

Nevertheless, the UN SC was demonstrably paralyzed in responding to the threat to international peace and security in Yugoslavia and Rwanda.[31] In the wake of the disintegration of the Federal Republic of Yugoslavia in the early 1990s, approximately 200,000 Yugoslavs were killed, 50,000 tortured and 20,000 raped, and there were found to be 700 concentration camps and 150 mass graves. These atrocities were committed pursuant to a policy of "ethnic cleansing" conducted by Serbs in pursuit of a "Greater Serbia."[32] Despite much skepticism and reluctance in its establishment,[33] the International Criminal Tribunal for the Former Yugoslavia (ICTY) was eventually created by the SC pursuant to SC Resolution 827 (1993).

Similarly, the International Criminal Tribunal for Rwanda (ICTR) was established pursuant to SC Resolution 955 of November 8, 1994. A civil war broke out in Rwanda after the plane carrying President Habayarimana of Rwanda and President Ntaryamira of Burundi crashed. Political and ethnic issues led to the massacres of Hutu opposition and intelligentsia, members of the Tutsi minority and other supporters of the Rwandese Patriotic Front. Tens of thousands of people were killed within two weeks, with the numbers of deaths increasing exponentially. In this case, it was the UN Secretary-General who wrote to the SC, exhorting it to take action.[34]

Like Yugoslavia, however, the international community dragged its feet in responding to the tragedy. The UN Secretary-General opined that the lethargic reaction of the world community "demonstrated graphically its extreme inadequacy to respond with prompt and decisive action to humanitarian crises entwined with armed conflict."[35] There was, however, greater urgency behind the creation of the ICTR due to the overwhelming magnitude of the atrocities being committed and the certainty that such acts amounted to genocide.[36]

The ICTY and ICTR, as ad hoc tribunals, unfortunately ran into many problems. The ICTY, for example, lacked political support from the very start. The SC and the relevant states were remiss in its responsibility to enforce arrest warrants and other orders of the court. As of 1999, only twenty of the seventy-five people publicly

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contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction."

[30] *Ibid.*

[31] Brown, *op. cit. supra* note 1 at 489-492.

[32] *Id.*, at 491.

[33] *Id.*, at 489-492. Many view the establishment of the Yugoslavia Tribunal as a "face-saving measure" due to the half-hearted and tardy response of the international community to the atrocities in the said country. See CASSESE, *op. cit. supra* note 26 at 336.

[34] Larry D. Johnson, *The International Criminal Tribunal for Rwanda*, in III INTERNATIONAL CRIMINAL LAW 549-555 (2d ed., 1999).

[35] Report of the Secretary-General Pursuant to Paragraph 5 of Security Resolution 955 (1994), at para. 6. UN Doc. S/1995/134 (1995) *cited in* Johnson, 552.

[36] CASSESE, *op. cit. supra* note 26 at 339.

indicted were in the custody of the tribunal. Many of these individuals are roaming free in certain countries.[37] Indeed, without American arm-twisting, Slobodan Milosevic, the biggest catch of the ICTY thus far, would not have been surrendered by the former Yugoslavia.[38] The ICTR performed even more poorly than the ICTY, having accomplished practically nothing during its first three years of operation due to inefficiency and neglect.[39] Both tribunals require large budgets in order to operate properly,[40] and administrative issues concerning the two tribunals often dominated the SC's agenda.[41] The SC was thus understandably discouraged from setting up additional international tribunals,[42] having reached a point of "tribunal fatigue."[43] Nevertheless, the two tribunals garnered worldwide recognition and provided the impetus to the establishment of a permanent international criminal court that would be free from the problems associated with the ad hoc tribunals.[44]

C. The Rome Conference

It was in 1989 that Trinidad and Tobago suggested to the UN General Assembly that an international criminal court be set up to deal with drug trafficking.[45] Since then, the aforementioned developments in the past decade or so renewed interest in the establishment of a permanent international penal tribunal, and enabled the resurgence of the body of work on the matter generated as far back as 1948 by the International Law Commission. Momentum towards the realization of this lofty ideal snowballed and eventually culminated in the Rome Statute's adoption n 1998 and its entry into force on July 1, 2002.[46]

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[37] Brown, *op. cit. supra* note 1 at at 514.

[38] *The Arrest of Milosevic*, available at http://www.frontlineonnet.com/fl1808/18080520.htm (last visited on February 17, 2004); see also US President's Statement on the Arrest of Milosevic, http://www.whitehouse.gov/news/releases/2001/04/20010401.htm (last visited on February 17, 2004).

[39] M. C. Bassiouni, *Historical Survey: 1919-1998*, in III INTERNATIONAL CRIMINAL LAW 617 (1999).

[40] UN General Assembly appropriated close to a total of half a billion dollars for the operation expenses of both ad hoc tribunals for the biennium 2002-2003. See UN GA Res. 57/288 (LVII), available at http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/560/55/PDF/N0256055.pdf?OpenElement (last visited on February 20, 2004); UN GA Res. 57/289 (LVII), available at http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/560/63/PDF/N0256063.pdf?OpenElement (last visited on February 20, 2004).

[41] Bassiouni, *op. cit. supra* note 39 at 617.

[42] The UN has thus resorted to other arrangements for situations similar to those in Yugoslavia and Rwanda. A Special Tribunal in Sierra Leone and Cambodia have been proposed by the UN Secretary-General, while the UN Transitional Administration in East Timor (UNTAET) have set up special "Panels" with jurisdiction over "serious-crime offenses." See A. Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 15-16 (2002).

[43] *Id.*, at 15.

[44] Bassiouni, *op. cit. supra* note 39 at 617.

[45] Cassese, *supra* note 42 at 16.

[46] See generally, James Crawford, *The Work of the International Law Commission*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 23-24 (Antonio Cassese, et al., eds., 2002); Adriaan Bos, *From the International Law Commission to the Rome Conference (1994-1998)* in I THE ROME

American Participation

It was indeed a breakthrough that the Rome Statute was adopted, much more so that it garnered enough ratifications to enter into force. The drafters of the Rome Statute decided that in order for the ICC to be effective, the treaty creating it must admit of no reservations.[47] The negotiation model in drafting the Rome Statute was that of compromise, in order to convince enough states to sign and eventually ratify the treaty. However, as with all the prior aborted attempts at establishing a permanent court, States had numerous concerns regarding the Court's exercise of jurisdiction vis-à-vis their sovereignty. While the crimes the ICC was established to punish were *jus cogens* crimes,[48] with States more or less in agreement as to the need to punish such acts, the exact manner by which those accused of such crimes would be tried by the Court was a difficult question to resolve.

As such, concessions were made, preventing the ICC from being as powerful and as encompassing as other states would have preferred,[49] many of which were made in order to retain American involvement in the ICC. The dispute over the precise definition of the crime of aggression resulted in its watered-down recognition in the Rome Statute, with the proviso that the ICC would only exercise jurisdiction over this crime once a definition was adopted.[50] The scope of war crimes was allowed to cover internal armed conflicts but less restrictive than those provided in Additional Protocol II to the 1949 Geneva Conventions (AP II).[51] There was likewise a proposal to extend

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STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 35-65 (Antonio Cassese, et al., eds., 2002) ; Philippe Kirsch, QC and Darryl Robinson, *Reaching Agreement at the Rome Conference*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 67-91 (Antonio Cassese, et al., eds., 2002).

[47] ROME STATUTE, art. 120 on "Reservations": "No reservations may be made to this Statute."

[48] *Jus cogens* literally means "compelling law." L. HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA AND PRESENT STATUS 16 (1988). See discussion starting on page 478.

[49] The Like-Minded Group, a group of over sixty States which agreed that a strong and independent court was needed, along with non-governmental organizations (NGOs), pushed for a strong court, with automatic jurisdiction, minimal hurdles for the Court to obtain jurisdiction, an independent prosecutor, jurisdiction over internal armed conflicts, and sensitivity to gender concerns. See P. Kirsch, QC & D. Robinson, *op. cit. supra* note 46 at 70-72.

[50] ROME STATUTE, art. 5(2): "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

[51] P. Kirsch, QC & D. Robinson, *op. cit. supra* note 46 at 78-79. See also CASSESE, *op. cit. supra* note 26 at 59-62. Cassese points out that in Article 8(2)(e) of the Rome Statute which covers non-international armed conflicts, there is a puzzling phrase qualifying the crime: "within the established framework of international law." He opines that this would necessitate that the ICC will have to determine each and every time whether the conduct in question is punishable under customary international law. This would seem to indicate that the Rome Statute's definition of a war crime under this provision is merely tentative, and the ICC possesses the broad discretion to determine whether customary norms dictate an act's punishment. In addition, Cassese deplores the clear distinction in the Rome Statute between international and non-

the privilege of a seven-year opt-out period under Article 124 of the Rome Statute to non-parties, but was rejected.[52]

The US argued that the consent of the state of the accused's nationality should be an essential precondition to the ICC's exercise of jurisdiction. It proposed an amendment requiring both the consent of the territorial state and the state of nationality before the ICC could take cognizance of a situation. This proposal, however, was rejected at the Rome Conference. The view that the Rome Conference adhered to was that the consent of the state of nationality was irrelevant, and thus nationals of third States could be tried by the ICC even without such third States having ratified the Statute.[53] Similarly, the US' attempt to include an "official acts exception" wherein the ICC would not be able to assume jurisdiction over nationals of non-parties when the state of nationality acknowledges that the accused were acting under its "overall direction," was rejected at Rome.[54]

In addition, the US introduced a proposal for the Rules of Procedure and Evidence in December 1999 at the Preparatory Committee (PrepCom) session in order to add three broad factors to be considered in determining admissibility under Article 17 of the Rome Statute. These factors were: the independence of the country's justice system, the past practice of that system, and whether the State in question has communicated to the ICC that the acts in question were performed in the course of official duties. This proposal was likewise not acceptable to the PrepCom, and only token utilization was made use of the above factors in the final draft package of the Rules.[55]

Since the indirect attempt to weaken the ICC's jurisdiction in December 1999 failed, the US took a more direct yet informal approach in the March 2000 PrepCom session. This time, the point of contention was the Relationship Agreement between the UN and the ICC.[56] The US wished to characterize the Relationship Agreement as

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international armed conflicts when the current trend is to disregard the difference and apply a uniform set of rules. Indeed, the ICTY Appeals Chamber in the Tadic (Interlocutory Appeal) case declared that there is no longer any reason to distinguish between the two. Cassese likewise notes the word "protracted" in Article 8(2)(f) of the Rome Statute which qualifies Article 8(2)(e), implying that an act committed during an internal armed conflict may only be punished as a war crime if the non-international armed conflict has been "protracted." Furthermore, the Rome Statute prohibits certain weapons which unnecessarily maim or terrorize combatants in international armed conflicts while not doing the same for non-international armed conflicts. Again, Cassese notes that this is not reflective of the current status of general international law.

[52] B. BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 175 (2003).

[53] G. Danileko, *ICC Statute and Third States*, in II THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1875 (2002).

[54] BROOMHALL, *op. cit. supra* note 52 at 173-174.

[55] *Id.*, at 172.

[56] No Relationship Agreement has been adopted as of the date of this writing. See generally P. Szasz & T. Ingadottir, *The UN and the ICC: The Immunity of the UN and Its Officials*, 14 LEIDEN J. INT'L L. 867 (2001).

an "international agreement" for purposes of Article 98(2) of the Rome Statute, which allowed States not to surrender their nationals to the ICC if such would conflict with their international obligations, such as Status of Force Agreements. The US plan was to insert a provision into the Relationship Agreement that would prevent its nationals from being surrendered to the ICC. The US tried to bring forth once again a proposal which had already been rejected, that of the "official acts exception." It suggested a situation wherein the ICC could not proceed with a request for surrender where the national of a non-party is involved, and the State of nationality acknowledges that such individual was acting under its "overall direction," unless either the State of nationality consents, or the Security Council passes a Chapter VII resolution authorizing the continuation of the proceedings.[57] This provision was formally proposed in the June 2000 PrepCom session, wherein the US broadened the scope of the international agreement to also cover the international obligations of the requested State.[58] Despite the objectionable nature of this proposal,[59] the Rule of Procedure was adopted, thus granting the US leeway to negotiate insertion of exemption provisions in the Relationship

> The Court may not proceed with a request for the surrender of a person without the consent of sending State if, under Article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required pri to the surrender of a person of that State to the Court.

However, a proviso was included in the PrepCom's Summary of Proceedings, to wit:

> It is generally understood that Rule [195, sub-rule 2] should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or State.[60]

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[57] BROOMHALL, *op. cit. supra* note 52 at 173-174.

[58] F. Harhoff & P. Mochochoko, *International Cooperation and Judicial Assistance*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURES 668 (Roy S. Lee, et al. eds., 2001).

[59] BROOMHALL, *op. cit. supra* note 52 at 173-174. This rule was proposed separate and independent from the larger US package pushing for limitations on the Court's jurisdiction, in order to ensure that the provision would be incorporated into the Rome Statute, despite the overwhelming opposition to the US package. Even during the proposal of Article 98(2) to the PrepCom, majority of the delegations agreed that the provision was contrary to the spirit and the letter of the Rome Statute. These countries, however, were hesitant to block its inclusion for fear of alienating the US and the possibility, however slight, of American ratification of the Rome Statute. See C. Keitner, *Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)*, 6 UCLA J. INT'L L. & FOREIGN AFFAIRS 215 (2001).

[60] Harhoff & Mochochoko, *op. cit. supra* note 58.

This proviso was inserted to ensure that the above Rule could not be utilized to compel the ICC to accept a limitation of its own jurisdiction. Thus, no reference to the requested State was made in Rule 195(2), although a reference to Article 98(2) was included. As such, this procedural rule is still within the ambit of Article 98(2), although it is safe to assume that the ICC is only required to abstain from proceeding with a request in cases where the requested State is under an international legal obligation not to surrender the accused to the ICC without the sending state's consent. There is no obligation for the ICC to enter into any agreement with any State or international organization for the purpose or having the effect of restricting its jurisdiction over the crimes included in the Statute. It should be noted, however, that the Summary of the Commission's Proceedings is not legally binding.[61]

Nevertheless, insertion of Article 98(2) into the Rome Statute was a major achievement of the US delegation to the PrepCom proceedings.[62] The provision reads as follows:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Even close to midnight at the very last session of the Committee of the Whole (the organ responsible for carrying out the negotiations) the US, along with India, sought to introduce last-minute amendments to the "package" which was to become the Rome Statute. Fortunately, the Chairman of the Committee acted "boldly and decisively" to spearhead a "no action" vote on the proposals to prevent the collapse of the entire regime of negotiations.[63]

Other provisions successfully inserted by the US in order to prevent frivolous investigations and prosecutions that were accepted by the PrepCom, in the hope of garnering US support, include:

> the rigorous complementarity standard, the stringent procedural requirements ensuring deference to legitimate national proceedings, the careful definitions of crimes restricted to the most serious violations of humanitarian law, the agreement to further elaborate upon these definitions in 'Elements of Crimes', the specific defences reflecting national practices, the important due process protections, the special protection for national

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[61] *Id.*, at 669.

[62] E. Rosenfeld, *Application of the US Status of Force Agreements to Article 98 of the Rome Statute*, 2 WASH. U. GLOBAL STUD. L. REV. 273 (2003).

[63] Bassiouni, *op. cit. supra* note 39 at 630.

> security information, the procedures for election of qualified officials, the balanced provisions on extradition and cooperation with States, the arrangements for financing of the Court, the oversight by an Assembly of States Parties, and the exceptionally stringent amendment procedures.[64]

In sum, it is clear from the above overview of American participation in the PrepCom and the Rome Conference that the US' only objective was to ensure that it would have exclusive jurisdiction over its nationals when such were accused of crimes cognizable by the ICC. Even President Clinton's signing of the Rome Statute on December 31, 2000, evinced an intention not to be bound by it, qualifying his signature with the statement "I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied."[65] In spite of such qualification, John Bolton, now US Undersecretary of State for Arms Control and International Security, accused former President Clinton of taking "a stealth approach to eroding our constitutionalism and undermining the independence and flexibility that our military forces need to defend our interests around the world."[66] Subsequently, the Bush administration "unsigned" the Rome Statute by retracting the signature of the US on May 6, 2002.[67] This withdrawal of the signature took place despite US Ambassador Scheffer's own earlier admission that "short of one hundred percent protection, for which there is no plausible multilateral formula, we successfully negotiated into the treaty regime an impressive body of safeguards that critics continue to overlook in their zeal to trash the treaty."[68]

II. ARTICLE 98 AGREEMENTS

As the US failed in the Rome Conference to prevent the ICC from assuming jurisdiction over American nationals found in the territories of states parties, the US has resorted to other means to accomplish the same. The US has maintained that the processes of the ICC will be taken advantage of by smaller States through the filing of spurious, politically motivated charges against American troops in order to harass the lone world superpower.[69]

A. American Servicemembers' Protection Act (ASPA)

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[64] Kirsch & Robinson, *op. cit. supra* note 46 at 90.

[65] Faulhaber, *op. cit. supra* note 9, at 542.

[66] J. Bolton, *Unsign That Treaty*, Washington Post, January 4, 2001, at A21.

[67] Faulhaber, *op. cit. supra* note 9.

[68] David John Scheffer, former Ambassador-at-Large for War Crimes Issues, quoted in E. Rosenfeld, *supra* note 62 at 276. Scheffer was nominated by former US President William J. Clinton to serve as the head of the US delegation to the UN negotiations for the establishment of a permanent International Criminal Court.

[69] E. Schwartz, *The United States and the International Criminal Court: The Case for Dexterous Multilateralism*, 4 CHICAGO INT'L L. REV. 226 (2003); *For Us or Against Us?*, The Economist, November 22, 2003, at 27.

Signed into law on August 2, 2002, the ASPA prohibits cooperation with the ICC[70] and the States Parties to the Rome Statute. It bars any US government entity from cooperating with a request for cooperation from the ICC, such as transmitting any letters rogatory from the ICC, aiding in the transfer of an American citizen or permanent resident alien to the ICC, or assisting in the extradition of any person to the ICC. No federal funds may likewise be used to assist any action against a US citizen or permanent resident alien before the ICC.[71] The US President is mandated to install appropriate safeguards to prevent national security information from being transferred, either directly or indirectly, to the ICC.[72] US courts and government bodies are instructed to read the ASPA into the provisions of any mutual legal assistance treaties.[73]

The ASPA further restricts the US from participating in UN peacekeeping operations unless UN Security Council Resolutions authorizing Chapter VI or Chapter VII operations "permanently exempts, at a minimum, members of the armed forces of the United States participating in such operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court."[74] The ASPA has also been referred to as the "Hague Invasion Act"[75] because of its Section 2008, captioned "Authority to Free Covered US Persons...Detained or Imprisoned By or On Behalf of the ICC." The US is authorized to use "all means necessary and appropriate"[76] to free all Americans detained by the ICC, thus evoking vigilante scenarios, although diplomatic means will most likely be resorted to.[77]

Of particular importance to the Philippines is Section 2007 of the ASPA denominated "Prohibition of United States Military Assistance to Parties to the International Criminal Court." Under Section 2007 of the ASPA, the US is prohibited from providing military aid to a country that ratifies the Rome Statute, unless such government enters into an Article 98 agreement with the US or is a NATO or major non-NATO ally.[78] As such, the US has undertaken a global campaign to enter into such Article 98 or bilateral non-surrender agreements with as many countries as possible, utilizing this provision of the ASPA as a coercive measure. Numerous countries

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[70] ASPA, sec. 2004 – Prohibition on Cooperation with ICC; ASPA, *supra* note 11, Section 2006 – Prohibition on Direct or Indirect Transfer of Classified National Security Information and Law Enforcement Information to the ICC

[71] ASPA, sec. 2004 – Prohibition on Cooperation with the ICC

[72] ASPA, sec. 2006 – Prohibition on Direct or Indirect Transfer of Classified National Security Information and Law Enforcement Information to the International Criminal Court

[73] Faulhaber, *op. cit. supra* note 9 at 537.

[74] ASPA, sec. 2005a, *cited in* M. T. Johnson, *The American Servicemembers' Protection Act: Protecting Whom?*, 43 VIRGINIA J. OF INT'L L. 405, 466-467 (2003).

[75] Faulhaber, *op. cit. supra* note 9 at 546.

[76] *Id.*, at 546.

[77] Johnson, *op. cit. supra* note 74 at 468.

[78] *Id.*, at 467.

dependent on US military aid, such as the Philippines,[79] have been constrained to enter into the so-called bilateral Article 98 Agreements. In July 2003, the Bush administration announced the suspension of millions of dollars of military aid to thirty-five of the ICC proponents who refused to sign such agreements. Thirty-one other countries face the same dismal fate if they remain obstinate in their refusal to give in to US demands.[80] As of November 8, 2003, there have been four such executive agreements, including that of the Philippines, in addition to twelve Article 98 Agreements having been ratified along with sixty Impunity Agreements having been signed.[81]

B. Article 98(2) of the Rome Statute

Article 98 of the Rome Statute is entitled "[c]ooperation with respect to waiver of immunity and consent to surrender." The US now brandishes this provision, particularly paragraph two thereof, to prevent the ICC from touching US nationals, who unlike all the other nationals tried by international tribunals established with US support,[82] for some unfathomable reason may only be tried by US courts or military tribunals. This is the double standard of the US, a glaring example of American "exceptionalism,"[83] whereby it has actively campaigned for the international prosecution of international criminals and human rights violators all over the world, as long as the

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[79] See note 13.

[80] *For Us or Against Us?*, supra note 69.

[81] http://www.iccnow.org/documents/otherissues/impunityart98/BIASignatories31Oct03.pdf (last visited November 8, 2003). In addition to the Philippines, the following countries have entered into Impunity Agreements with the US either by signing executive agreements or ratifying such bilateral treaties: Gambia, Ghana, Mauritiana, Sierra Leone, Colombia, Honduras, Nicaragua, Panama, Israel, India, Albania, Georgia, Macedonia FYR, and Tajikistan. Fortunately, however, there are at least 63 States Parties to the Rome Statute which have not signed such agreements, while 31 States Parties have not signed despite loss of US aid. In addition, 33 countries have publicly refused signing.

[82] The US supported the establishment of the ICTY and the ICTY, enacting domestic legislation implementing the provisions of their Statutes. Notably, this law (Judicial Assistance to the International Tribunal for Yugoslavia and to the International Tribunal for Rwanda of 1996) authorized the "surrender of persons, including United States citizens" to the international tribunals, based on US extradition procedures. Even prior to this law, the Senate passed the Persian Gulf War Criminal Act of 1991, which behooved the US President to propose to the UN Security Council the establishment of an international criminal tribunal "for the prosecution of Persian Gulf War criminals." In the event that the Security Council failed to establish such a tribunal, an alternative international criminal tribunal would be set up by the US and its Gulf War allies. This act was not acted upon, however, by the House of Representatives. Instead the Foreign Relations Authortization Act for fiscal year 1994-1995 was enacted, section 517 of which provided:

The establishment of an international criminal court with jurisdiction over crimes of an international character would greatly strengthen the international rule of law;

Such a court would thereby serve the interests of the United States and the world community; and

The United States delegation should make every effort to advance this proposal at the United Nations.

Based on this clear support of the US Congress, President Clinton, on the 50th Anniversary of the Nuremberg Trials, declarted that "nations all around the world who value freedom and tolerance [should] establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law." Johnson, *op. cit. supra* note 74 at 424-426.

[83] John Parker, *A Nation Apart (A Survey of America)*, THE ECONOMIST, November 8, 2003.

perpetrators are not Americans.[84] It is thus necessary to analyze this provision upon which the sixteen or so Impunity Agreements are based.

C. United Nations Security Council

The US has likewise flexed its muscle as a permanent member of the UN Security Council in order to prevent the ICC from exercising jurisdiction over American nationals. After failing to exempt its peacekeepers in East Timor,[85] the US threatened to utilize its veto power to prevent the renewal of the UN mission in Bosnia and Herzegovina unless its nationals were granted immunity from ICC prosecution. The Security Council eventually gave in, and in response to international criticism against the US, granted immunity for a one-year period to nationals of not just the US but also of all other non-States Parties to the Rome Statute who are sent as members of UN peacekeeping forces.[86] UN SC Resolution 1422 (July 12, 2002) was issued pursuant to Article 16 of the Rome Statute regarding twelve-month deferral of any case which should arise involving members of peacekeeping forces contributed by states not party to the Rome Statute. This twelve-month period began on July 1, 2002, and the Resolution expressed the "intention to renew" the deferral "under the same conditions each 1 July for further 12-month periods for as long as may be necessary." SC Resolution 1487 (June 12, 2003) did precisely that by renewing the immunity of all peacekeepers sent by non-States Parties to the Rome Statute. Most recently, SC Resolution 1497 (August 1, 2003) authorized the establishment of a Multinational Force to quell the situation in Liberia. Paragraph 7 of the Resolution effectively deprives the ICC of jurisdiction, providing that:

> ... current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall

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[84] Former US President Jimmy Carter was one of the first presidents to link US foreign assistance to human rights. Former US President William Clinton emphasized that it was in the best interest of the US to promote democracy and the rule of law, along with respect for human rights:

"So promoting democracy does more than advance our ideals. It reinforces our interests. Where the rule of law prevails, where governments are held accountable, where ideas and information flow freely, economic development and political stability are likely to take hold and human rights are likely to thrive. History teaches that democracies are less likely to go to war, less likely to traffic in terrorism and more likely to stand against the forces of hatred and destruction...So promoting democracy and defending human rights is good for the world and good for America." See Johnson, *supra* note 74.

The US was likewise a key supporter of ad hoc tribunals in the former Yugoslavia and Rwanda. Former President Clinton, upon speaking with survivors of genocide in Rwanda, opined that a permanent international court was necessary in order to overcome the problems faced by the ad hoc tribunals. See Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANNUAL SURVEY INT'L & COMP. L. 22-23 (2003).

[85] BROOMHALL, *op. cit. supra* note 52, at 180.

[86] M. El Zeidy, *The United States Dropped The Atomic Bomb Of Article 16 Of The ICC Statute: Security Council Power Of Deferrals And Resolution 1422*, 35 VANDERBILT J. OF TRANSNAT'L L. 1503 (2002).

> be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State;

These UN SC Resolutions have been criticized as *ultra vires* for being violative of the UN Charter, general international law and *jus cogens* norms.[87]

III. INVALIDITY OF THE US-PHILIPPINES IMPUNITY AGREEMENT UNDER INTERNATIONAL LAW

A. Article 98(2) of the Rome Statute Did Not Envision Impunity Agreements

First and foremost, it should be emphasized that Article 98 must be read in the context of the entire treaty it is a part of, and thus should not defeat the object and purpose of the Rome Statute.[88] In line with this, it is of particular significance that no reservations may be made to the Rome Statute, as provided for in Article 120 of the same. As such, any interpretation of Article 98 should not be read in any way so as to indirectly allow reservations.[89] The States Parties to the Rome Statute affirm "that the most serious crimes of concern to the international community as a whole must not go unpunished" and are "[d]etermined *to put an end to impunity* for the perpetrators of these crimes (emphasis supplied)."[90]

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[87] *Ibid.* See also S. Zappalà, *The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*, 1 J. OF INT'L CRIM. JUSTICE 122 (2003); *The Adoption of Security Council Resolution 1497: A Setback for International Justice*, *available at* http://www.iccnow.org/documents/declarationsresolutions/ unbodies/1497/HRWPaperSCRes1497.pdf (last visited February 15, 2004). The validity of these UN SC Resolutions, however, is beyond the scope of this article. For a discussion on the limitations of the authority of the Security Council, see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ 56; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. U.S.), Provisional Measures, 1992 ICJ REP. 114 (Orders of Apr. 14 and Weeramantry, J., dissenting); M. BEDJAOUI, THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS 12 (1994); N. Angelet, *International Law Limits to the Security Council*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 71-82 (2001); King, *supra* note 27; T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers Under Chapter VII of the Charter*, 26 NETHERLANDS YB OF INT'L L. 67 (1995). Article 24(2) of the UN CHARTER, *supra* note 29, provides that the Security Council is to "act in accordance with the Purposes and Principles of the United Nations," while Article 55(c) establishes that the UN shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

[88] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLOT], art. 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." See also Zappalà, *supra* note 87 at 122.

[89] *Ibid.*

[90] ROME STATUTE, preamble.

Article 98(2) must be construed in such a way as to incorporate an implicit proviso wherein such international agreements will only be respected if the sending State ensures that the accused are brought to justice.[91] Under the complementarity regime of the Rome Statute,[92] the ICC may only exercise jurisdiction when the State in a position to exercise jurisdiction, normally the State where the crime was committed (territorial state) or the State of nationality of the accused or of the victim, is "unwilling or unable genuinely to carry out the investigation or prosecution."[93] It follows that Article 98 Agreements were never meant to be Impunity Agreements but rather mere agreements that enable States to comply with their other international obligations. As the ICC itself will determine whether a genuine prosecution is being carried out by the

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[91] Zappalà, *op. cit. supra* note 87 at 122.

[92] ROME STATUTE, paragraph 10 of the preamble, provides in part, "Emphasizing that the International Criminal Court established under this Statute shall be ***complementary*** to national criminal jurisdictions (emphasis supplied)."

Article 1 of the Rome Statute reads, "An International Criminal Court (the Court) is hereby established...shall be ***complementary*** to national criminal jurisdiction...(emphasis supplied)"

Article 17(1) of the Rome Statute, on Issues of Admissibility, stipulates:

"1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissibile where:

The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

....

Article 18 of the Rome Statute, on "Preliminary rulings regarding admissibility," provides in part:

"1. When a situation has been referred to the Court pursuant to article 13(a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13(c) and 15, the Prosecutor ***shall*** notify all States Parties ***and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned***...(emphasis supplied)

"2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor ***shall defer*** to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation (emphasis supplied).

....

Article 19, on "Challenges to the jurisdiction of the Court or the admissibility of a case," provides in relevant part:

"2. Challenges to the admissibility of a case on the grounds referred to in Article 17 or challenges to the jurisdiction of the Court may be made by:

....

"(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted;"

See J. Holmes, *Complementarity: National Courts versus the ICC*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667-691 (2002).

[92] Keitner, *supra* note 59 at 236-7.

[93] ROME STATUTE, art. 17(1)(a).

concerned State,[94] such an Agreement will not prevent it from taking cognizance of the case if it decides that no effective prosecutions are taking place.

It is to be noted that the wording of Article 98(2) does not preclude the surrender of nationals to the ICC when an Impunity Agreement has been entered into, for it provides the possibility for the ICC to "obtain the cooperation of the sending State for the giving of consent for the surrender." At any rate, it is for the ICC itself to decide whether it may proceed with a request for surrender. A court has the inherent power to determine its own jurisdiction, its *compétence de la compétence*.[95] The Rome Statute itself explicitly provides that the ICC possesses the ability to determine its own jurisdiction.[96]

The language alone of Article 98(2) indicates that it is intended to encompass Status of Forces Agreements (SOFAs) and not the Impunity Agreements as presently worded.[97] The provision particularly refers to the "sending State," which is a legal term found in SOFAs between host states and the state of origin of visiting forces. Hans-Peter Kaul (now one of the 18 judges of the ICC[98]) and Claus Kress, members of the German delegation to the PrepCom stress that:

> The idea behind the provision [Article 98(2)] was to solve legal conflicts which might arise because of Status of Forces Agreements which are already in place. On the contrary, Article 98(2) was not designed to create an incentive for (future) States Parties to conclude Status of Forces Agreements which amount to an obstacle to the execution of requests for cooperation issued by the Court.[99]

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[94] ROME STATUTE, art. 17.

[95] Interpretation of the Greco-Turkish Agreement, 1928 PCIJ (ser. B) No. 16 at 20; Free Zones Case (Judgment), PCIJ Ser. A/B 46, at 138-9; Norwegian Loans case (France v. Norway), 1957 ICJ, separate opinion of Judge Lauterpacht; Interhandel case (Switzerland v. US), 1959 ICJ 23, separate opinion of Judge Spender; *Ambatielos Case*, Greece/U.K., 1952 ICJ Reports 28; ICTY Appeals Chamber, Prosecutor v. Tadic; Nottebohm Case (Liechtenstein v. Guatemala), 1955 ICJ 4 (April 6); Peace Treaties case (1st Phase) (ICJ, 1950, 72); The *Betsy Case*, 4 Int. Adj., M.S., p. 179; G. FITZMAURICE, II THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE 451 (1995); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 275-278 (1987).

[96] ROME STATUTE, art. 19(1): "The Court shall satisfy itself that it has jurisdiction in any case brought before it..."

Art. 119(1) of the Rome Statute, on "Settlement of disputes," reads: "Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court."

[97] *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crime*, at 7, Amnesty International August 2002, AI Index: IOR 40/025/2002, at 17-18, *available at* http://www.iccnow.org/html/aiusimpunity200208.pdf (last visited January 1, 2004) [hereinafter Amnesty International].

[98] See http://www.icc-cpi.int/chambers/judges.php (last visited February 19, 2004).

[99] Amnesty International, *supra* note 94, at 8, quoting H. P. Kaul & C. Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 Y.B. INT'L HUM. L. 143, 165 (1999).

It is a fundamental principle under the law of treaties that the *travaux préparatoires* or preparatory work of a treaty and the circumstances of its conclusion provide supplementary means of interpretation.[100] Article 98(2) thus covers currently existing SOFAs, in line with the concern that the Rome Statute should not override pre-existing obligations of States parties to non-States parties under other treaties.[101]

As the Impunity Agreements deal with criminal jurisdiction, reference should be made to Article VII of the North Atlantic Treaty Organization (NATO) SOFA, upon which is modeled the criminal jurisdiction provisions of most contemporary SOFAs. The rules contained in the NATO SOFA, due to their "fairness and plausibility," may already constitute customary law.[102] Indeed, the 1999 US-Philippines Visiting Forces Agreement,[103] entered into pursuant to the 1951 US-Philippines Mutual Defense Treaty,[104] incorporates many of these NATO SOFA provisions.

The purpose of such provisions in the NATO SOFA was to assure that only one jurisdiction had the right to proceed in any given case, according to a system of established priorities.[105] Under paragraphs 3 and 4 of Article VII, the sending state possesses primary jurisdiction in only two cases: (1) where the offense was solely against the security or property of the sending state or the person or property of a member of the force or civilian component of that sending state, or a dependent of a member of a force or civilian component of that state (regardless of the nationality of the dependent) and (2) where the offense arose out of an act done in the performance of official duty.[106] As with the Rome Statute, the US attempted to obtain exclusive jurisdiction over its personnel during the negotiations leading to the NATO SOFA, but was forced to accept a cpromise.[107] The only instances wherein the US waived its right to exercise primary jurisdiction were when holding the trial in the courts of the receiving state would best serve the interests of justice and the accused's constitutional rights would be protected.[108]

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[100] VCLOT, art. 32.

[101] VCLOT, art. 30(4); Restatement (Third), § 323, para. 2.

[102] D. Fleck, *Introduction*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 6 (2001).

[103] Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines, signed February 10, 1998, ratified on May 27, 1999, entered into force on June 1, 1999 [hereinafter VFA].

[104] *Bayan (Bagong Alyansang Makabayan) vs. Zamora*, Philippine Supreme Court, G.R. 138570, 342 SCRA 449 (October 10, 2000).

[105] P. Conderman, *Jurisdiction*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 111 (2001).

[106] *Id.*, at 110; B. J. George, Jr., *Jurisdiction Over Embassies, Consulates, International Organizations and Their Personnel, and Armed Forces Stationed Abroad*, in II INTERNATIONAL CRIMINAL LAW 136-7 (1999).

[107] *Id.*, at 139, Conderman, *op. cit. supra* note 105 at 112.

[108] *Id.*, at 139-141, Conderman, *op. cit. supra* note 105 at 117

Evident from the above discussion is that SOFAs are not intended to grant immunity to the troops stationed in a host state; rather, they simply allocate responsibility for investigating and prosecuting such crimes, allocating jurisdiction between the sending state and the receiving state.[109] The Impunity Agreements as presently worded clearly do not allocate jurisdiction but instead provide immunity to American "persons" with no guarantee of prosecution on US soil. Further, SOFAs generally do not cover individuals aside from troops and their dependents. The Impunity Agreements cover even contractors of the US, whether they be American or not. As such, these Agreements cannot be considered SOFAs in the sense that the drafters of the Rome Statute understood such term vis-à-vis Article 98(2). Consequently, the Impunity Agreements should not be considered an obstacle to a request for surrender under Article 98(2).

B. Impunity Agreements Violate *Jus Cogens* Norms

A *jus cogens* norm contains two elements: (1) it is a norm of general international law, and (2) it is accepted and recognized by the international community of States as a whole from which no derogation is permitted.[110]

There are three general preconditions for the existence of *jus cogens* norms:

> 1) There is a capability to create rules which bind all the subjects of international law.
>
> 2) The States form a society or community, sufficiently adherent to have an identity of its own so as to be able to express its own interests, and there is a corresponding recognition by its members that they have obligations towards that society or community.
>
> 3) There exists capability to react adequately to violations of peremptory norms, particularly to deny the lawfulness and validity – or before the Vienna Convention on the Law of Treaties the enforceability – of treaty provisions, special customs and titles in conflict with allegedly peremptory norms.[111]

With respect to international crimes in particular, there are two essential factors which establish their *jus cogens* status: (1) threat to the peace and security of

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[109] Amnesty International, *supra* note 97, at 13.

[110] M. Magallona, *The Concept of Jus Cogens in the Vienna Convention on the Law of Treaties*, 51 PHIL. L. J. 527 (1976).

[111] HANNIKAINEN, *supra* note 48 at 16.

humanity. In addition, there are three considerations in the determination of the jus cogens status of international crimes: (1) historical legal evolution of the crimes; (2) numbers of states that have incorporated the given proscription in their national laws; and (3) number of international and national prosecutions for the given crimes and how they have been characterized.[112]

Under Article 53 of the Vienna Convention on the Law of Treaties (VCLOT), to which the Philippines is a party[113] and to which the US is a signatory (but has not ratified),[114]

> [a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Furthermore, under Article 64 of the VCLOT, "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." It should be emphasized that though the US has not ratified the VCLOT, it has accepted many of its principles and has in fact invoked it in opposing the Rome Statute. The US's opposition is premised on the misguided notion that the Rome Statute violates the VCLOT by enabling nationals of non-party states to be subject to the Court's jurisdiction.[115] According to the July 23, 1998 Statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the US delegation to the US diplomatic conference before the Senate Committee on Foreign Relations, the second of the nine specific objections to the Rome Statute is that "[t]he Statute would permit the Court to assert jurisdiction over the nationals of non-signatories, a novelty which seemingly contradicts both customary practice and black-letter treaty law."[116]

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[112] M. C. Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, LAW AND CONTEMP. PROB. (1996).

[113] *Tanada, et al. v. Angara*, G.R. No. 118295, May 2, 1997.

[114] There were 91 States Parties to the VCLOT as of June 29, 2001. See http://www.walter.gehr.net/frame24.html (last visited on January 2, 2004).

[115] R. Wedgwood, *The International Criminal Court: An American View*, 10 EJIL 93, 99-102 (1999); B. Brown, *US Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 868-873 (1999); See generally F. Mégret, *Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law*, 12 EJIL 247, 247-268 (2001); J. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT'L L. R. 1, 18-37 (2000); J. Taulbee, *A Call to Arms Declined: The United States and the International Criminal Court*, 14 EMORY INT'L L. R. 105, 134-136 (2000); to name a few of the articles discussing the pros and cons of the US argument that the third-party jurisdiction of the ICC violates the law of treaties.

[116] Taulbee, *op. cit. supra* note 114.

In the *North Sea Continental Shelf* cases,[117] the ICJ supported the concept of non-derogable *jus cogens* norms, wherein it qualified the statement "it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties" with the phrase "[w]ithout attempting to enter into, still less pronounce upon any question of *jus cogens* (par. 72)."

By insisting on immunity of its nationals from ICC prosecution, the US is in effect asking the world community to allow their nationals to commit the gravest international crimes within the Court's jurisdiction with impunity. By preventing the ICC from assuming jurisdiction over Americans, the latter in effect can get away with committing the gravest crimes known to mankind when they are not prosecuted in US courts. The US fails to understand that the ICC regime is simply a back-up mechanism, wherein the Court will only act when national courts are unable to perform their duties. This is the essence of the complementarity regime of the Rome Statute, where genuine national prosecutions of the accused will prevent the ICC from taking cognizance of the case. With such an advanced judicial system where constitutional rights are given the highest regard as that of the US, it is difficult to posit that trials in the US will ever be deemed inadequate for purposes of the complementarity regime. Thus, in order to prevent the ICC from assuming jurisdiction over American nationals, all the US has to do is to ensure that any of its nationals who commit international crimes in territories of states parties will be prosecuted in American courts.

The Impunity Agreements, having been designed to guarantee immunity from prosecution for the most serious international crimes, are void for violating *jus cogens* norms that prohibit war crimes, genocide, and crimes against humanity.[118]

It has long been established that the prohibition of and the need to punish crimes over which the ICC exercises jurisdiction have become *jus cogens* norms. Even prior to the Nuremberg principles, there existed the doctrine that higher international legal obligations prevail over national legal norms.[119] Indeed, the participants in the Rome Conference deemed themselves as mere codifiers of *lex lata* or existing customary international law, rather than as legislators prescribing *lex ferenda* or a progressive development of international law.[120] The treatment under international law of each of the crimes covered by the Impunity Agreement should thus be examined in detail in order to verify their *jus cogens* status.

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[117] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), 1969 I.C.J. 3 (Judgment of Feb. 20) [hereinafter North Sea Continental Shelf Cases].

[118] Keitner, *op. cit. supra* note 59.

[119] M. C.BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 215 (2d. ed., 1999).

[120] M. Scharf, *The United States And The International Criminal Court: The ICC's Jurisdiction Over The Nationals Of Non-Party States: A Critique Of The U.S. Position*, 64 LAW & CONTEMP. PROB. 80 (2001).

1. Genocide

The prohibition against genocide, that is, the intentional killing, destruction or extermination of groups or members of a group as such, was initially envisioned as a sub-category of crimes against humanity, as such was defined in Article 6(c) of the 1945 IMT Charter, to wit:

> ...murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Genocide was discussed in a few trials of Nazi war criminals, such as *Hoess*, decided by a Polish court in 1948 and *Greifelt and others*, decided by a US military tribunal sitting at Nuremberg.[121] Genocide was officially recognized as an independent crime in 1948, when the UN GA adopted the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). This convention entered into force on January 12, 1951, to which both the US and the Philippines are parties.[122] Article 2 of the Genocide Convention provides that genocide is comprised of "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:"

> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

This definition of genocide was copied verbatim in Article 6 of the Rome Statute. The UN GA explicitly recognized an act of genocide for the first and only time in its resolution 37/123 D of December 16, 1982, involving the case of *Sabra and Shatila*, wherein the massacre carried out by Christian falangist troops was characterized as "an act of genocide." In 1993, the first case involving genocide was filed by a State before the ICJ in *Bosnia and Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)*.

There have likewise been several cases of genocide brought before national courts: *Eichmann*, a case decided in 1961 by the District Court of Jerusalem and

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[121] CASSESE, *supra* note 26 at 96.

[122] The United States signed the Genocide Convention on November 12, 1948 and ratified it on November 25, 1988. The Philippines signed the Convention on December 11, 1948 and ratified it on July 7, 1950. See http://www.un.org/documents/ga/docs/51/plenary/a51-422.htm (last visited January 26, 2004).

eventually elevated to the Israeli Supreme Court; *Jorgic*, decided in 1997 by the Higher State Court (*Oberlandsgericht*) of Düsseldorf and confirmed by the Federal High Court (*Bundesgerichtshof*) in 1999, and eventually decided with finality by the Constitutional Court in 2000; *Sokolovic* and *Kušljic* were likewise ruled upon by the Federal High Court in 2001.[123] Similarly, there have been numerous international cases dealing with genocide, since both the ICTY and ICTR Statutes explicitly provide the international tribunals with competence over acts of genocide within their particular territorial and temporal jurisdictions.[124]

The above discussion on the efforts of the international community to prohibit genocide clearly establishes the unanimity among the world's nations that genocide is prohibited and all acts amounting to genocide are to be punished severely. Such belief is thus binding on all nations, even those not among the 133 parties[125] to the Genocide Convention. The customary status of the Genocide Convention was established by the ICJ in its Advisory Opinion on *Reservations to the Convention on Genocide*, wherein it declared that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." This was affirmed by the UN Secretary-General in his 1993 Report to the Security Council regarding the need to establish the ICTY, wherein he stated that "the Convention is today considered part of international customary law."[126] The Convention's customary status was reiterated by the ICTR in *Akayesu* (§ 495) and by the ICTY in *Kristic* (§ 541).[127]

The ICJ in the *Barcelona Traction* case opined that outlawing acts of genocide are obligations *erga omnes*, that is, obligations in which "all States can be held to have a legal interest[128] in their protection." The ICJ further held in *Reservations to the Convention on Genocide* that "it follows from the object and purpose of the Convention that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*." *Jus cogens* norms and obligations *erga omnes* are two sides of the same coin,[129] though not necessarily identical, as the former is narrower in scope than the latter despite some overlap.[130] *Jus cogens* status refers to the legal status of certain international

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[123] CASSESE, *op. cit. supra* note 26 at 97-98.

[124] S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808, Annex (1993) [hereinafter ICTY Statute], art. 4; S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955, Annex (1994) [hereinafter ICTR Statute], art. 2.

[125] As of October 9, 2001. See http://www.unhchr.ch/html/menu3/b/treaty1gen.htm (last visited on February 19, 2004).

[126] A. Cassese, *Genocide*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 337 (2002).

[127] CASSESE, *op. cit. supra* note 26 at 98.

[128] For a discussion on the meaning of legal interest, see A. DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES 22-36 (1996).

[129] Bassiouni, *op. cit. supra* note 115; Bassiouni, *op. cit. supra* note 121 at 211-2.

[130] T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY NORMS 194 (1989).

crimes, whereas the characterization of an obligation as *erga omnes* is concerned with the legal implications arising out of a certain crime's characterization as a *jus cogens* norm.[131]

The prohibition against genocide was frequently cited as a peremptory norm at the Vienna Conference leading to the adoption and ratification of the VCLOT.[132] The above discussion thus clearly places the prohibition of genocide on the level of a *jus cogens* norm and thus permits no derogation from such a norm. As such, entering into Impunity Agreements with as many countries as possible, which will prevent those nations from surrendering Americans who commit genocide and other international crimes within the territory of these states to the ICC, violates the *jus cogens* norm against genocide.

The Impunity Agreement entered into between the Philippines and the US last May 13, 2003, provides that "[p]ersons of one Party present in the territory of the other shall not, absent the express consent of the first Party, (a) be surrendered or transferred by any means to any international tribunal for any purpose, unless such tribunal has been established by the UN Security Council, or (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender or transfer to any international tribunal, unless such tribunal has been established by the UN Security Council." It is noteworthy that the Philippine version of the Impunity Agreement prohibits transfer of American "persons," which include current or former Government officials, employees, military personnel and nationals of the US, to *any* international tribunal unless established by the UN Security Council. It is apparent from this definition that not just American nationals are covered by the agreements. Curiously, employees include contractors, so even Filipinos contracted by the US in the Philippines are covered by the Impunity Agreement.

The text of Article 98 Agreements as proposed by the US itself[133] is narrower in scope, focusing only on the ICC, but involves an identically broad coverage of the persons covered. However, the Proposed Text makes no exception for international tribunals established by the UN Security Council. The East Timor Impunity Agreement signed on August 23, 2002,[134] likewise focused only on the ICC. However, this Agreement was based on UN SC Resolution 1422, which was issued precisely in response to US pressure to exempt US peacekeepers in East Timor and Bosnia-Herzegovina.[135]

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[131] Bassiouni, *op. cit. supra* note 112; Bassiouni, *op. cit. supra* note 119 at 211-2.

[132] HANNIKAINEN, *op. cit. supra* note 48 at 177, 200-201, 295, 456-466.

[133] Available at http://www.iccnow.org/documents/declarations/resolutions/governments /USArticle98Agreement1Aug02.doc (last visited on January 1, 2004).

[134] Available at http://www.oup.co.uk/pdf/bt/cassese/intcrimlaw/ch23/2002_usa _east _timor.pdf (last visited on January 1, 2004).

[135] BROOMHALL, *op. cit. supra* note 52, at 180. See discussion on pages 276-277

It is clear that the US intends to use these Impunity Agreements in order to prevent the surrender of Americans under Article 98(2) of the Rome Statute. The US has embarked on a worldwide campaign to prevent the ICC from exercising jurisdiction over American nationals and nationals of other non-states parties. As stated by Philip Recker, a US State Department spokesperson, the US is "...working with a number of countries to conclude similar agreements, a large number of countries," where the ultimate goal is to have every single country in the world sign such an agreement.[136] This campaign has taken a two-pronged approach, through the Security Council [UN SC Resolutions 1422 (2002), 1487 (2003) and 1497 (2003)][137] and through the Impunity Agreements.[138]

Even granting *arguendo* that these Impunity Agreements were envisioned by the drafters of the Rome Statute, such Agreements would still be rendered void by Article 53 of the VCLOT. Under Article 2(a) of the VCLOT, a treaty is defined as "an international agreement 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." The Impunity Agreements fall squarely within this definition and is thus covered by Article 53 of the VCLOT.

Furthermore, the Agreements require the Philippines and the other concerned States, when extraditing, surrendering or otherwise transferring the accused to a third country, not to agree to that third State surrendering said accused to the ICC, or in the case of the Philippines, to any international tribunals not established by the UN Security Council. There is, however, no obligation imposed on the third state to investigate or prosecute the acts of such individuals, again allowing acts of genocide and other international crimes to be committed with impunity.[139]

In addition, the US does not have jurisdiction over acts of genocide committed on non-US soil by non-American members of US armed forces or by foreign civilians.[140] Indeed, among the suggested amendments to the US War Crimes Act of 1996 is a provision for universal jurisdiction over genocide. Under the Act, the US may only prosecute persons for acts of genocide on the basis of nationality and territoriality principles of jurisdiction.[141] As observed by one

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[136] *For Us or Against Us?*, *supra* note 69.

[137] See discussion on pp. 476-477.

[138] Amnesty International, *supra* note 94 at 18.

[139] *Id.*, at 22.

[140] *Id.*, at 21.

[141] M. Zaid, *The U.S. War Crimes Act of 1996*, in III INTERNATIONAL CRIMINAL LAW 338-9 (M. C. Bassiouni, ed., 2d ed., 1999).

commentator, "It would seem farcical to provide universal jurisdiction with respect to war crimes, yet maintain the jurisdictional limitations imposed by the Act on crimes of genocide."[142] This further emphasizes the granting of impunity through the Article 98 Agreements. Not only did the US fail to guarantee prosecution of their nationals accused of acts of genocide committed in non-US soil, but neither does it have the ability to do so as its own legislation (the US War Crimes Act of 1996) inexplicably prevents it.

Furthermore, the US-Philippines Impunity Agreement indicates that the two states have "each expressed their intention to, *where appropriate*, investigate and prosecute war crimes, crimes against humanity, and genocide alleged to have been committed by their respective officials, employees, military personnel, and nationals (italics supplied)." The phrase "where appropriate" evidences that the decision to investigate and prosecute is a matter solely within the discretion of the US when it comes to alleged crimes of American "persons."[143] Nowhere is there to be found in these Agreements any guarantee that the US will prosecute accused American nationals in its own courts.

In sum, the prohibition of genocide and the need to investigate and prosecute all perpetrators of genocide is a *jus cogens* norm from which no derogation is permitted. The Impunity Agreements being entered into by the US with nations all over the world would allow acts of genocide to be committed with impunity and thus derogates from the *jus cogens* norm against genocide. As such, the Impunity Agreements are void *ab initio* under Article 53 of the VCLOT for conflicting with a peremptory norm of general international law.[144]

2. War Crimes

War crimes comprise another category of international crimes over which the ICC has jurisdiction. War crimes are based principally on the four Geneva Conventions of 1949 and the Additional Protocols of 1977 thereto. Even prior to the Conventions, however, the concept of war crimes could be traced to various sources.[145] It was, however, the Peace Treaty of Versailles after World War I, that explicitly introduced war crimes into international treaty law. Article 228 of the Treaty of Versailles provided for

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[142] *Id.*, at 339.

[143] Amnesty International, *supra* note 97 at 21.

[144] I. M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 85 (1973). Article 53 deals with the absolute nullity of a treaty, wherein the treaty itself is void "by reasons of considerations of what one might term international public policy," an example of which is conflict with a *jus cogens* norm.

[145] Ancient civilizations have been known to come to an agreement as to permissible modes of conducting warfare. The US Lieber Code of 1863, is a set of instructions issued by then US President Abraham Lincoln to the soldiers of the US during the American Civil War which provided for, among others, the punishment of prisoners of war for crimes "against the captor's army or people."

"the right of the allied and associated powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."[146]

Article 6 of the Nuremberg Charter defined war crimes in the following manner:

> ...shall include violations of the laws or customs of war, but not be limited to, namely murder; ill-treatment or deportation of civilian population of or in occupied territory, to slave labour for any other purpose; ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

The Nuremberg Tribunal has ruled that "by 1939 these rules laid down in the [1907 Hague Regulations and Geneva Conventions] were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war."[147]

The Philippine Supreme Court ruled on the customary nature of war crimes as early as 1949 in the case of *Kuroda v. Jalandoni, et al.*[148] In this case, Shigenori Kuroda, a Lieutenant-General of the Japanese Imperial Army and Commanding General of the Japanese Imperial Forces in the Philippines, was convicted of war crimes despite the Philippines not being a party at the time to the Hague Regulations and Geneva Conventions. The Court ruled thus:

> It cannot be denied that the rules and regulations of the Hague and Geneva Conventions form part of and are wholly based on the generally accepted principles of international law. In fact, these rules and principles were accepted by the two belligerent nations, the United States and Japan, who were signatories to the two Conventions. Such rules 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 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.

Nowhere in the Conventions can the phrase "war crimes" be found. Instead, it focuses on "grave breaches" of the Conventions.[149] This was the result of a political

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[146] *Quoted in* M. Bothe, *War Crimes*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 382 (2002).

[147] T. Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 359 (1987).

[148] See note 127, *supra*.

[149] "Grave breaches" are defined in GC I, art. 50; GC II, art. 51; GC III, art. 130; GC IV, art. 147, as:

> "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health,

compromise wherein the Soviet bloc occupied a hardline position on the treatment of prisoners of war convicted as "war criminals."[150] It is only in Article 85(5) of Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (AP I) that war crimes were referred to, providing that grave breaches of the Conventions amount to war crimes.[151] The four Geneva Conventions apply in the context of international armed conflicts, that is, between two states. Article 3 common to the four Conventions provides the minimum protection for participants in a non-international armed conflict. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II) supplements by applying the norms found in the four Conventions to internal armed conflicts, that is, "large-scale armed hostilities, other than international disturbances and tensions, or riots or isolated or sporadic acts of armed violence, between State authorities and rebels, or between two or more organized armed groups within a State."[152]

There is universal acceptance of the Conventions, with there being an equal number of UN member states and states parties to the Conventions.[153] The Philippines and the US are both parties to the four Geneva Conventions, while the former is also a party to AP II.[154] It is hardly contested that the norms found in the Conventions have crystallized into norms of customary international law.[155] The ICJ in the *Nicaragua* judgment opined that the Geneva Conventions represent "in some respects a development, and in other respects no more than the expression" of fundamental principles of humanitarian law. The Court found that common Articles 1 and 3 of the Conventions reflected customary law. Article 1 provides that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Common Article 3 provides the minimum standards of conduct to be observed in non-international armed conflict, for the Conventions pertain to international armed conflicts. As such, the Court ruled that:

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unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

[150] F. KALSHOVEN & L. ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 81 (2001).

[151] *Id.*, at 149.

[152] CASSESE, *op. cit. supra* note 26 at 54.

[153] There are 191 UN member states and 191 states parties to the Geneva Conventions as of June 3, 2003. However, the Marshall Islands and Nauru, being neither UN members or parties to the Statute of the ICJ, are not parties to the Conventions. See http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc (last visited January 2, 2004).

[154] The Philippines ratified the four Geneva Conventions on June 10, 1952, and acceded to Additional Protocol II on November 12, 1986. The United States ratified the four Geneva Conventions on February 8, 1955. See http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20GenSve%20et%20Protocoles%20additionnels%20ENG-logo.pdf (last visited on February 19, 2004).

[155] Meron, *op. cit. supra* note 147 at 348.

> [T]here is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in the Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions...

Soviet publicist Tunkin thus reached the conclusion that the prohibition of war crimes is an "old norm that has acquired the character of *jus cogens*."[156] The customary status of the Protocols, however, is still highly debatable. There are 161 states parties to AP I and 156 states parties to AP II.[157] Nevertheless, the ICJ and the ad hoc tribunals have established that the norms laid down in the four Geneva Conventions applicable to international armed conflict are likewise applicable to internal armed conflict, as was the purpose of AP II.[158]

In the *Tadic (Interlocutory Appeal)* case, the ICTY Appeals Chamber held that there was no longer any reason to distinguish between international and armed conflicts, to wit:

> Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? (§ 97)[159]

The insight of the ICTY into the customary basis of war crimes in the context of non-international armed conflicts ushered in an innovation in the ICTR Statute, this court having been established only two years after the ICTY. The ICTR Statute conferred jurisdiction on the tribunal over violations of common Article 3 of the Conventions and of AP II.[160]

Article 8 of the Rome Statute makes explicit reference to the four Geneva Conventions [Article 8(2)(a)] and their customary law equivalents [Article 8(2)(b)], although the former has already been widely accepted as comprising the latter.[161]

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[156] K. Parker and L.B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 428 (1989), *citing* Tunkin, *Jus Cogens in Contemporary International Law*, 1971 U. TOL. L. REV. 107, 117.

[157] As of June 3, 2003. See http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc (last visited January 2, 2004).

[158] Meron, *op. cit. supra* note 147 at 348.

[159] Quoted in CASSESE, *supra* note 26 at 62.

[160] Bothe, *op. cit. supra* note 146 at 417.

[161] Meron, *op. cit. supra* note 143 at 348. See also Bothe, *op. cit. supra* note 146 at 395.

Subparagraphs 2(c) to 2(f) and paragraph 3 of Article 8 of the Rome Statute pertain to internal armed conflicts, with subparagraphs 2(c) and (d) referring to common Article 3 of the Conventions and subparagraph 2(e) pertaining to the customary equivalents of common Article 3. AP II to the Conventions concerning internal armed conflicts is not referred to in the Rome Statute; however, numerous provisions reflect those found in the Protocol.[162]

It is thus apparent that the need to punish war crimes represent fundamental interests of the world community, as in the case of the prohibition of genocide, and thus constitute not only customary international law but also *jus cogens* norms. The Geneva Conventions, particularly common Article 3, embody fundamental human rights of individuals. The ICJ in the *Barcelona Traction* case held that with regard to these rights, "all States can be held to have a legal interest in [their] protection; they are obligations *erga omnes*."[163] As such, it can be said that the obligation to "respect and ensure respect" the norms of the Conventions is an obligation *erga omnes* which flows from a *jus cogens* norm which cannot be derogated from by any treaty under Article 53 of the VCLOT, and thus may not be derogated from by the Impunity Agreement. Such Agreement, in the same way that they allow genocide to be perpetrated with impunity, prevents the Philippines from surrendering American "persons" accused of committing war crimes to the ICC, with no guarantee of prosecution by the US or the third states to which the accused may be surrendered to.

3. Crimes Against Humanity

As mentioned above with respect to genocide, crimes against humanity were first explicitly prohibited in Article 6(c) of the 1945 Charter of the IMT at Nuremberg,

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[162] Subparagraph (2)(d) repeats the negative definition of Article 1(2) of AP II. Subparagraph 2(e)(i) regarding attacks against the civilian population is reflective of Article 13(2) of AP II. Subparagraph 2(e)(ii) concerning protection of medical personnel, units and transports, which is identical to subparagraph 2(b)(xxiv), incorporates the protective provisions of Articles 9, 11 and 12 of AP II. Subparagraph 2(e)(iv), which repeats subparagraph 2(b)(ix) on attacks on specially protected buildings, reiterates the protection of cultural objects and places of worship as found in Article 16 of AP II. The prohibition against mutilation and medical or scientific experiments discussed in subparagraphs 2(e)(xi) and 2(b)(x) is parallel to Article 5(2)(e) of AP II. The norm against sexual violence found in subparagraphs 2(e)(vi) and 2(b)(xxii) reflects Article 4(2)(e) of AP II. The regulation of the participation of children in subparagraph 2(e)(vii) and 2(b)(xxvi) is strikingly similar to Article 4(3)(c) of AP II. Subparagraphs 2(e)(v) and 2(b)(xvi) prohibits pillage, as does Article 4(2)(g) of AP II. The provision criminalizing the displacement of the civilian population in subparagraph 2(e)(viii) is inspired by Article 17 of AP II. The scope of application of subparagraph 2(e) as delimited by subparagraph 2(f) is likewise inspired in part by Article 1(1) of AP II. The clause in Article 8(3) of the Rome Statute stressing the inherent power of states to defend themselves against attacks on their territorial integrity is clearly inspired by Article 3 of AP II. For a thorough discussion of these points, see Bothe, *supra* note 146 at 420-424.

[163] Meron, *op. cit. supra* note 143 at 355.

wherein acts of genocide were subsumed under crimes against humanity.[164] To reiterate, crimes against humanity were defined as follows in the IMT Charter:

> ...murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The international community clearly possesses an overarching interest in upholding the legal values protecting life and human dignity enunciated in the above provision. It is this universal interest that elevates these legal values to *jus cogens* status, superior to any competing norms which would allow derogation from such values.[165] As acts of genocide are often viewed as a species of crimes against humanity, it follows that the interests upheld by the international community in categorizing genocide as a *jus cogens* crime likewise applies to the prohibition of the broader range of dastardly acts constituting crimes against humanity. Genocide, slavery, and racial discrimination, those crimes which the ICJ referred to as giving rise to obligations *erga omnes*,[166] all embody crimes against humanity[167] and thus the latter quite logically is collectively a *jus cogens* crime.

Article 5(c) of the IMFTE Charter and Article 2(c) of Control Council Law No. 10 similarly provided for the prosecution of crimes against humanity.[168] Post-World War II cases abound evincing the uniform state practice condemning crimes against humanity. The German Supreme Court in the British Occupied Zone ruled on the basis of Control Council Law No. 10 that "[t]here exist in the circle of civilized peoples certain principles connected with the value and dignity of human persons which are so essential for the social life of human beings and for the existence of each person that no State belonging to this circle is entitled to break such principles."[169] The Court went on further to use the phrase "principles of humanity," the infringement of which was a "punishable crime."[170] The same Court, albeit in another case, proclaimed that "[c]rimes against humanity in the end offend against and injure a transcendent good, the value of being human in the moral order, a value that cannot be compromised."[171] Numerous national prosecutions of those accused of committing crimes against

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[164] A. Cassese, *Crimes Against Humanity*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 353 (2002).

[165] BASSIOUNI, *op. cit. supra* note 112 at 211.

[166] Barcelona Traction, Light, and Power Co. (Belgium v. Spain), 1970 I.C.J. Reports 3, at 33-35 (Judgment of February 5).

[167] BASSIOUNI, *op. cit. supra* note 112, citing Professor Whiteman.

[168] M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L. L. 120 (2001).

[169] Cassese, *supra* note 164 at 355.

[170] Cassese, *supra* note 164 at 355.

[171] Cassese, *supra* note 164 at 355.

humanity[172] and national legislations enabling such national prosecutions[173] have since followed.

Common Article 3 to the Geneva Conventions, also known as the Martens clause, providing the minimum standards of treatment to persons not taking active part in hostilities as well as the wounded and the sick, similarly embodies basic principles of humanity, whether in an international or internal armed conflict. In particular, it prohibited "[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well as "[o]utrages upon personal dignity, in particular humiliating and degrading treatment."

The ICTY and ICTR possesses *ratione materiae* over crimes against humanity. Article 5 of the ICTY Statute provides:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;
> (g) rape;
> (h) persecutions on political, racial and religious grounds;
> (i) other inhumane acts.

Article 3 of the ICTR Statute, on the other hand, reads as follows:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
>
> (a) murder;
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;

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[172] The *Einsatzgruppen* case, in Trials of War Criminals, vol. IV, p. 49; *Albrecht*, Dutch Special Court of Cassation, 1949, cited in Cassese, *supra* note 164 at 355-6; *Menten*, Dutch Special Court of Cassation, 1981; *Veit Harlan*, the Court of Assizes of Hamburg, 1950; *Enigster*, District Court of Tel Aviv, 1951, discussed in CASSESE, *supra* note 26 at 65-66.

[173] Canadian Criminal Code, para. 7(3.76); French Criminal Code, Art. 212-1, para. 1, cited in Cassese, *supra* note 164 at 356.

(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

While crimes against humanity originated from Nuremberg and its context of war, thus requiring a nexus with armed conflict, the ICTY Appeals Chamber in *Prosecutor v. Tadic*[174] ruled that the Nuremberg definition of crimes against humanity no longer reflected customary international law as a nexus to armed conflict was no longer required. Under the Nuremberg Charter, the sole difference between war crimes and crimes against humanity was that the former pertained to acts committed against nationals of another state, while the latter referred to acts committed against nationals of the same state as that of the perpetrators.[175]

Article 7 of the Rome Statute, with a few deviations,[176] largely codifies the existing customary law definition of crimes against humanity,[177] to wit:

> 1. For the purpose of this Statute, "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) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) 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;

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[174] Case No. IT-94-1-T (May 7, 1997), 36 I.L.M. 913.

[175] M. Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 AUT LAW & CONTEMP. PROBS. 53 (1996).

[176] For an in-depth discussion of these differences, see Cassese, *supra* note 159 at 375-7. See also T. McCormack & S. Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23 MELBOURNE U. L. REV. 635, 651-661 (1999). McCormack and Robertson point out several innovations in the definition of crimes against humanity in the Rome Statute. Article 7(1) of the Rome Statute incorporated the *Tadic* ruling and removed the nexus with an armed conflict that crimes against humanity used to require under the Nuremberg definition. Second, the PrepCom settled on "widespread" and "systematic" as the threshold requirements of gravity for the crime. Third, apartheid and enforced disappearance were new additions to the list of acts constituting crimes against humanity. Fourth, the definition of torture was broadened beyond that laid down in the Torture Convention. Fifth, the Rome Statute includes an expanded list of sexual offenses comprising crimes against humanity. It incorporated the dicta in various ICTY and ICTR cases which broadened the definition of rape beyond the technical definition, holding that rape may constitute discrimination, torture and genocide. Lastly, Articles 7(2)(g) and 7(1)(k) of the Rome Statute were included as catch-all provisions to enable the ICC to deal with "new, currently unimagined, expressions of human depravity."

[177] Cassese, *op. cit. supra* note 159 at 373.

> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any form of sexual violence of comparable gravity;
> (h) Prosecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender...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 within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

As such, crimes against humanity constitute a collection of *jus cogens* crimes, regardless of the instruments in which their prevention and punishment are provided for. The Rome Statute is one such convention that establishes a mechanism by which the *jus cogens* norm prohibiting the commission of crimes against humanity is upheld and protected. Accordingly, the operation of this mechanism should not and cannot be impaired by any state. However, this is precisely what the Impunity Agreement between the Philippines and the US seeks to accomplish. By preventing the Philippines from surrendering American "persons" who have committed crimes against humanity to the ICC, the Impunity Agreement once again enables the derogation of a *jus cogens* norm by affording impunity to such perpetrators. Such derogation renders the Impunity Agreement void pursuant to Article 53 of the VCLOT.

Even assuming *arguendo* that the component crimes of crimes against humanity do not all comprise *jus cogens* norms, at the very least their prohibition is customary in nature and binding on all states, including the US and the Philippines. No circumstance is present which would justify derogation from such customary norms.

The US-Philippines Impunity Agreement thus created a situation where American "persons," including non-American individuals employed or contracted by the US government, within Philippine territory, and who stand accused of committing genocide, war crimes, or crimes against humanity, may not be prosecuted at all for their acts constituting "the most serious crimes of concern to the international community as a whole."

The Impunity Agreement prevents these perpetrators from being surrendered to the ICC, or to third states which will surrender them to the ICC. The agreement contains no guarantee by the US that it will prosecute these accused individuals in their own courts, nor does it contain any assurance that third states to whom these persons are surrendered will conduct their own prosecutions. This clearly constitutes derogation of the peremptory norms prohibiting the commission of genocide, war crimes, and

crimes against humanity. These violations of *jus cogens* norms nullify the Impunity Agreement. Furthermore, such derogation engages the responsibility of the US for willfully enabling such violation.[178] Lastly, the Philippines and the US, as parties to a void treaty, are mandated by Article 71(1) of the VCLOT to restore legality through the following means:

> (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
> (b) bring their mutual relations into conformity with the peremptory norm of general norm of general international law.

C. The Impunity Agreements Violate the Principle of *Aut Dedere Aut Judicare*

Intertwined yet distinct from the characterization of genocide, war crimes and crimes against humanity as *jus cogens* crimes is the concomitant duty to prosecute said crimes under the principle of *aut dedere aut judicare* (to extradite or to prosecute). This principle is a modern adaptation of the expression *aut dedere aut punire* (to extradite or to punish) discussed by the father of international law, Hugo Grotius.[179] Grotius' work *De Jure Belli ac Pacis*, which was published in 1625, contained a chapter on the "[s]haring of punishments":

> 4. And as it is not unusual or expedient for one state to allow the armed force of another to enter its territory for the sake of inflicting a punishment, it follows that the state in which the culprit lives should, on receiving the complaint, do one of two things, either punish him itself as he deserves or deliver him to the judgment of the complainant. This latter course means surrendering him...
>
> The surrender here meant is nothing more than delivering up a citizen to the power of another people to decide on his case as it wishes. This surrender neither gives nor takes away right; it only removes an impediment to the exercise of one. So, if that other nation makes no use of the right granted it, the person surrendered is in a position where he may still be punished by his own people.

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[178] *Responsibility of States for Internationally Wrongful Acts*, G.A. Res.56.83, U.N. GAOR, 56th Sess., Agenda Item 62, Annex at 2, arts. 1 & 2, U.N. Doc. A/RES/56/83 (2002) [hereinafter, ARTICLES ON STATE RESPONSIBILITY]. Under Article 1, "[e]very internationally wrongful act of State entails the international responsibility of that State. Article 2 provides that an internationally wrongful act comes about when conduct consisting of an action or omission (1) is attributable to the State under international law and (2) constitutes a breach of an international obligation of the State. Articles 40 and 41 deal with serious breaches of obligations under peremptory norms of general international law.

[179] E. Wise, *Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite*, in II INTERNATIONAL CRIMINAL LAW 17 (1999).

> What we have said of surrendering or punishing offenders applies not only to those who have always been subjects of the state in whose territory they are now found, but to those also who, after committing a crime, have fled to some other state for refuge.[180]

The principle of *aut dedere aut judicare* obliges states to prosecute perpetrators of international crimes, and if unwilling to prosecute, to extradite the accused to states capable and willing to prosecute them. This obligation is intertwined with the duty not to afford impunity with regard to *jus cogens* crimes, in addition to other international crimes such as piracy, drug trafficking, hijacking of aircraft, terrorism and the like. Impunity will only be eradicated if there is a likelihood of prosecution and punishment. Such likelihood is enhanced when national criminal justice systems are empowered to prosecute these crimes that are not normally within their jurisdiction.[181]

The principle of *aut dedere aut judicare* stems from the hypothesis of a *civitas maxima*, a world community or society of states, wherein certain crimes are of concern to all nations regardless of where they were committed.[182] This, in turn, gives rise to the concept of universal jurisdiction, whereby states may exercise criminal jurisdiction over perpetrators of *jus cogens* crimes, without regard to the traditional bases[183] of jurisdiction. Universal jurisdiction envisions states prosecuting perpetrators of *jus cogens* crimes solely on the basis of the utmost severity of such crimes.[184] Belgium,[185] Spain[186] and France[187] have already exercised universal jurisdiction, albeit not the true universal jurisdiction

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[180] H. GROTIUS, THE LAW OF WAR AND PEACE (DE JURE BELLI AC PACIS) Book II, Chap. XXI (Louise Loomis trans., 1949) (1625).

[181] BASSIOUNI, *op. cit. supra* note 119 at 217-8.

[182] Wise, *supra* note 179 at 23-28.

[183] These four traditional theories of jurisdiction are: (1) Territoriality, based on the *locus commissi delicti*, or where the crime was committed; (2) Active Personality or Nationality, based on the nationality of the accused; (3) Passive Personality, based on the nationality of the victim and (4) Protective, based on the national interest affected.

[184] BASSIOUNI, *op. cit. supra* note 112 at 227-242; M. C. Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Va. J. Int'l. L. 81 (2001); B. Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399 (2001); J. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MSU-DCL J. INT'L L. 1 (2000); M. Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish this Goal?*, 15 TRANSNAT'L LAW. 357 (2002).

[185] Hans, at 368-375; Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium), I.C.J., Judgment of 14 February 2002; T. Ongena & I. Van Daele, *Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium*, 15 LEIDEN J. INT'L L. 687, 687-701 (2002).

[186] Hans, *op. cit. supra* note 184, at 375-378; Bassiouni, *op. cit. supra* note 168 at 139-152.

[187] Case Concerning Criminal Proceedings in France (France v. Congo), ICJ, Order of 11 July 2003, available at http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iorder_20030711.PDF (last visited January 31, 2004).

envisioned by Bassiouni, for these states still required domestic legislation and the presence of the accused in their territory to carry out prosecutions.[188]

The goals of the *judicare* aspect of the obligation to extradite or prosecute are the following:

> 1. upholding the principle of fairness through equal application of the law in an impartial legal process;
> 2. vindicating victim's rights;
> 3. permitting the accused to atone for his crime and possibly to remove or alleviate the sense of guilt resulting from the secrecy of the crime and the absence of its public vindication;
> 4. reinforcing public values;
> 5. increasing public knowledge and awareness of the crime;
> 6. strengthening general prevention and general deterrence; and
> 7. consolidating the *civitas maxima* that all nations must cooperate in the prevention, prosecution, and punishment of international crimes as a means for upholding the international rule of law.[189]

In particular, the crimes covered by the Rome Statute and by the Impunity Agreements involve the correlative duty of states to prosecute those responsible for such crimes or if not able, to extradite the accused to states who are willing and able to prosecute. The 1948 Genocide Convention (notably having passed into the realm of customary law) obligates States Parties to prevent and punish genocide. Article 1 provides:

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake ***to prevent and to punish*** (emphasis supplied).

The Genocide Convention provides an absolute obligation to prosecute perpetrators of genocide.[190] Article 4 states that these perpetrators "shall" be punished, regardless of their official positions. Article 5 adds that "effective penalties" are to be provided by Contracting Parties. These are thus obligations upon the United States and the Philippines, not only as customary obligations but as treaty obligations as well.

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[188] Bassiouni, *op. cit. supra* note 168 at 139-152; Ongena & Van Daele, *op. cit. supra* note 185.
[189] BASSIOUNI, *op. cit. supra* note 112 at 220.
[190] Scharf, *op. cit. supra* note 175 at 44.

The four Geneva Conventions of 1949 explicitly provide for an *aut dedere aut judicare* obligation upon States parties in their common articles regarding grave breaches:[191]

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.[192]

Crimes against humanity as defined by Article 7 of the Rome Statute include torture[193] and apartheid.[194] While the definitions of torture and apartheid under the Rome Statute are broader than those found in the 1984 UN Torture Convention and the 1976 Apartheid Convention,[195] the original conventions are still of importance given their customary status[196] and the provisions they contain on prosecution and extradition. In fact, torture as defined under Article 1(1) of the Torture Convention was characterized by the ICTY Appeals Chamber in *Prosecutor v. Furundzia* as a *jus cogens* crime, the prevention and prosecution of which was an obligation *erga omnes*.[197] Both the Philippines and the US are parties to the Torture Convention,[198] while the former is likewise a party to the Apartheid Convention.[199] The Torture Convention contains the following relevant provisions:

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[191] For the definition of grave breaches, see note 158.

[192] GC I, art. 49; GC II, art. 50; GC III, art. 129; GC IV, art. 146.

[193] ROME STATUTE, art. 7(1)(f) in relation to art. 7(2)(e).

[194] ROME STATUTE, art. 7(1)(j) vis-à-vis art. 7(2)(h).

[195] McCormack & Robertson, *op. cit. supra* note 176 at 654-656.

[196] There are 132 States Parties to the 1984 Torture Convention (as of May 2003). See http://www.irct.org/usr/irct/home.nsf/unid/BKEN-5JHH34 (last visited on February 19, 2004); Regina v. Bartle and the Commissioner of Police for the Metropolis, ex parte Pinochet (No. 1), 37 I.L.M. 1302 (1998); Regina v. Bartle and the Commissioner of Police for the Metropolis, ex parte Pinochet (No. 2), 38 I.L.M. 581 (1999); Filartiga v. Pena-Irala, 630 F.2d 876, 19 I.L.M. 966 (1980); Hilao v. Marcos; Charles Pierson, *Pinochet And The End Of Immunity: England's House Of Lords Holds That A Former Head Of State Is Not Immune For Torture*, 14 TEMP. INT'L & COMP. L.J. 263 (2000); O'Shea points out that the Torture Convention is declaratory of customary international law insofar as the prohibition on torture is concerned. See A. O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 231 (2002). As for the customary status of the prohibition of apartheid, see R. Slye, *Apartheid As A Crime Against Humanity: A Submission To The South African Truth And Reconciliation Commission*, 20 MICH. J. INT'L L. 267 (1999).

[197] Prosecutor v. Furundzia, Appeals Chamber, July 21, 2000, 121 I.L.R. 215, paras. 134-58.

[198] The Philippines acceded to the 1984 Torture Convention on June 19, 1986 while the United States signed the Convention on April 18, 1988 and ratified it on October 21, 1994. See http://www.unhchr.ch/html/menu2/6/cat/treaties/conratification.htm (last visited on February 19, 2004).

[199] The Philippines signed the Apartheid Convention on May 2, 1974 and ratified it on January 26, 1978. See http://www.unhchr.ch/html/menu3/b/treaty8_asp.htm (last visited on February 19, 2004).

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

Article 5

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

Article 7

1. The State Party in the territory under whose jurisdiction a person is alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Article 8

1. The offences referred to in Article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences in every extradition treaty to be concluded between them.

Article 4 of the Apartheid Convention stipulates that:

The States Parties to the present Convention undertake:

(a) To adopt any legislative or other measures necessary to ***suppress*** as well as to prevent any encouragement of the crime of Apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime;

(b) To adopt legislative, judicial and administrative measures to ***prosecute, bring to trial and punish*** in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other state or are stateless persons.

Further bolstering the customary nature of the obligation to prosecute or extradite is the 1973 UN General Assembly Resolution entitled "Principles of International Cooperation in the Detention, Arrest, Extradition and Punishment of

Persons Guilty of War Crimes and Crimes Against Humanity."[200] With respect to this obligation, the Resolution (with a vote of 94 to none against, with 29 abstentions[201]) provides the following:

> 1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment...
>
> ....
>
> 3. States shall cooperate with each other on a bi-lateral and multi-lateral basis with a view to halting and preventing war crimes and crimes against humanity, and take the domestic and international measures necessary for that purpose.
>
> 4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them...
>
> ....
>
> 7. States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.

Principle I of the above UN GA Resolution has been reiterated by UN GA Resolution 35/199 of December 15, 1980 which reaffirmed "that the prosecution and punishment of war crimes and crimes against peace and humanity...constitute a universal commitment for all states."

UN GA Resolution 2840 (XXVI) (1971),[202] likewise stresses that a State's refusal "to cooperate in the arrest, extradition, trial and punishment" of persons accused or convicted of war crimes and "crimes against humanity" is "contrary to the United Nations Charter and to generally recognized norms of international law."

The UN GA Resolutions focusing on the conflicts in Yugoslavia and Rwanda further buttress the existence of *opinio juris* on the matter of the duty to prosecute perpetrators of genocide. UN GA Resolution 50/200 of December 22, 1995 emphasizes "the obligations of all States to punish all persons who commit or authorize genocide or other grave violations of humanitarian law or those who are responsible for grave violations of human rights..." UN GA Resolution 49/206 of December 23, 1994

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[200] *Principles of International Cooperation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, GA Res 3074 (XXVIII), 28 UN GAOR Supp. (No. 30) at 78, UN Doc A/9030, Dec. 3, 1973.

[201] O'SHEA, *op. cit. supra* note 196 at 248.

[202] 26 UN GAOR Supp. (No. 29) at 88, UN Doc A/8429 (1971).

regarding the situation of human rights in Rwanda requested States "that have given refuge to persons involved in serious breaches of international humanitarian law, crimes against humanity or acts of genocide to take the necessary steps, in cooperation with the International Tribunal for Rwanda, to ensure that they do not escape justice." As for Yugoslavia, UN GA Resolution 47/147 of December 18, 1992 "*[r]eaffirms* that all persons who perpetrate or authorize crimes against humanity and other grave breaches of humanitarian law are individually responsible for those breaches and that the international community will exert every effort to bring them to justice..."

There is likewise a host of treaties and conventions which have incorporated this duty to prosecute international crimes other than *jus cogens* crimes, such as drug trafficking, hijacking, and terrorism,[203] evidencing substantial state practice and *opinio juris*, giving rise to a corresponding state obligation under customary law.[204]

Evidently, there is a customary duty on States to prosecute or extradite perpetrators of international crimes, particularly those within the jurisdiction of the ICC. The obligation to extradite entails extradition to a State, or in the case of the ICC, a non-State entity, which will be able to carry out the prosecution of the accused that the first State was unwilling or unable to do. The US-Philippines Impunity Agreement constitutes an obstacle to this obligation, for it limits the options of the Philippines to extraditing American "persons" to the US or to third States which will not surrender such individuals to the ICC. As discussed earlier, there is no guarantee in the Impunity

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[203] M. C. Bassiouni, *Policy Considerations on Inter-State Cooperation on Criminal Matters*, in II INTERNATIONAL CRIMINAL LAW 17-19 (1999), citing International Convention for the Suppression of Counterfeiting Currency, Apr. 20, 1929, 112 L.N.T.S. 371; Convention for the Suppression of Illicit Traffic in Dangerous Drugs, June 26, 1936, arts. 7 & 8, 198 L.N.T.S. 299; Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, arts. 9 & 10, 19 L.N.O.J. 23 (1938); Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, Mar. 21, 1950, art. 9, 96 U.N.T.S. 271; Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151; Convention of Psychotropic Substances, Feb. 21, 1971, art. 22(2)(a)(iv), T.I.A.S. No. 9725, 1019 U.N.T.S. 175; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 28 U.N.T.S. 493; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, Dec. 17, 1979, G.A. Res. 34/146, U.N. GAOR Supp. (No. 46), at 245, U.N. Doc. A/34/46 (1980), 18 ILM 1456 (1979); International Atomic Energy Agency Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, IAEA Legal Series No. 12 (1982), 18 ILM 1419 (1979); International Maritime Organization Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, IMO Doc. SUA/CON/15, 27 ILM 672 (1988); International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, GA Res 44/34, adopted Dec. 4, 1989, UN Doc A/Res/44/34 (Dec. 11, 1989), 29 ILM 89 (1990); Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, art. 5, 27 U.S.T. 3949, TIAS No. 8413, 10 ILM 255 (1971); European Convention on the Suppression of Terrorism, Jan. 27, 1977, art. 7, Eur. TS No. 90, 15 ILM 1272; Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, art. 14, OAS TS No. 67, OAS Doc. OEA/Ser. P, AG/Doc, 2023/85 rev. 1, Mar. 12, 1986; among others.

[204] BASSIOUNI, *op. cit supra* note 112 at 217-224.

constitutes an obstacle to this obligation, for it limits the options of the Philippines to extraditing American "persons" to the US or to third States which will not surrender such individuals to the ICC. As discussed earlier, there is no guarantee in the Impity Agreements that the US or these third States will effect such prosecutions, contrary to the obligation of *aut dedere aut judicare* which is meant to ensure prosecution. Under the complementarity principle of the Rome Statute, the ICC will only assume jurisdiction over crimes within its *ratione materiae* if the States concerned are unwilling or unable to prosecute such crimes.[205] All the US has to do to prevent the ICC from assuming jurisdiction over its nationals is ensure that genuine prosecutions will take place in the US.[206] Such an assurance could have easily been incorporated into the text of the Impunity Agreements so as for such Agreements not to run counter to *erga omnes* norms and to the obligation of States to prosecute *jus cogens* crimes.

There is likewise no reason why the extradition aspect of the *aut dedere aut judicare* principle cannot apply to surrender of the accused to the ICC. In fact, as early as 1948 when the Genocide Convention was adopted, the international community already foresaw an international tribunal exercising jurisdiction over individuals. Article 6 of the Genocide Convention provides:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such ***international penal tribunal*** as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction. (emphasis supplied)

The obligation to extradite to another state if unable to prosecute, stems from the reality that until recently, there was no international criminal court to speak of. As such, Bassiouni opined that "[i]n the absence of a system of direct enforcement through prosecution before an international criminal court, reliance has to be placed on individual states to prosecute international offenders for justice will be frustrated if states do not accept a duty to prosecute or else extradite them to a state which is prepared to prosecute."[207] Thus, with the establishment of the ICC, it would be illogical to insist that the obligation to extradite pertains only to states and excludes surrender to an international court.

In this regard, the preclusion of prosecution by the ICC due to the Impunity Agreements clearly disregards the principle of *aut dedere aut judicare*. As the Philippines

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[205] See note 90.

[206] Keitner, *op. cit. supra* note 59 at 236-7.

[207] M.. C. B%.3205UASSIOUNI AND EDWARD WISE, AUT DEDERE AUT JUDICARE: THE DUT EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 20 (1995), cited in O'SHEA, *op. cit. supra* note 196 at 204.

will very likely be unwilling or unable to prosecute *jus cogens* crimes in its own courts,[208] it should be able to surrender the perpetrators to other states or entities fully equipped to prosecute such crimes. The Philippines, however, is explicitly barred by the Impunity Agreement from pursuing the latter course of action. Thus, the US and the Philippines, along with all the other nations that have entered into Impunity Agreements with the US, are in breach of their *aut dedere aut judicare* obligations under treaty and customary law.

D. Entering into Impunity Agreements Violates the Vienna Convention on the Law of Treaties

As mentioned at the outset, the Philippines signed the Rome Statute on December 28, 2000,[209] but has yet to ratify it. While treaties enter into force only upon ratification,[210] signatories thereto already possess the obligation "to refrain from acts which would defeat the object and purpose of a treaty," as provided for under Article 18 of the Vienna Convention on the Law of Treaties (VCLOT). As discussed earlier, the Philippines is a party to the VCLOT while the US is a signatory thereto.[211] Despite not having ratified the VCLOT, the US has consistently objected to the jurisdiction of the ICC over its nationals on the basis of the VCLOT.[212] As such, both the Philippines and the US hold themselves bound by the provisions of the VCLOT, particularly Article 18.

The VCLOT is a codification of the customary rules in the law of treaties and is also instrumental in advancing customary international law.[213] The International Law Commission (ILC), the UN organ tasked with the drafting of this Convention, noted that Article 18 embodies a concept that is "generally accepted."[214] It is well established that this concept pertains to a general principle of law regarding good faith in treaty relations, long before this obligation was codified in the VCLOT.[215]

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[208] The Philippines has not enacted any legislation penalizing *jus cogens* crimes (even when obligated by treaty to do so), and has not included any provision in the Rules of Court enabling the prosecution of these crimes, as well as empowering Philippine courts to exercise universal jurisdiction over the perpetrators of such crimes. It is thus highly unlikely that *jus cogens* crimes will be prosecuted in Philippine courts despite the case of *Kuroda v. Jalandoni* (*supra* note 149) and other jurisprudence involving the prosecution of Japanese war criminals after World War II.

[209] http://www.iccnow.org/countryinfo/worldsigsandratifications.html (last visited on November 8, 2003).

[210] VCLOT, art. 24; ROME STATUTE, *supra* note 3, art. 126; *Ambatielos Case*, *supra* note 92. The ICJ in the Ambatielos case held that "[t]he ratification of a treaty which provides for ratification...is an indispensable condition for bringing it into operation."; LORD MCNAIR, THE LAW OF TREATIES 132 (1961).

[211] There were 91 States Parties to the VCLOT as of June 29, 2001. See http://www.walter.gehr.net/frame24.html (last visited on November 8, 2003).

[212] See page 482.

[213] D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 765-6 (5th ed., 2000).

[214] *Id.*, at 787.

[215] CHENG, *supra* note 95 at 111. Cheng cites the Greco-Turkish Arbitral Tribunal in the Megalidis Case (1926), 8 T.A.M., p. 390, at p. 395, wherein the tribunal held that "[i]t is a principle of law that already

The ICJ has recognized the effect of signing a treaty in its Advisory Opinion on *Reservations to the Convention on Genocide* in 1951.[216] With respect to the purpose of objecting to reservations, the ICJ pointed out that signing

> ...establishes a provisional status in favour of that State [i.e. one which has signed]. This status may decrease in value and importance before the Convention enters into force. But, both before and after the entry into force, this status would justify more favourable treatment being meted out to signatory States in respect of objections [to reservations] than to States which have neither signed nor acceded.
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> As distinct from the latter States, signatory States have taken certain of the steps necessary for the exercise of the right of being a party. Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification.

The US signed the Rome Statute but later on retracted its signature, thus removing itself from the coverage of Article 18. By "unsigning," the US itself admitted the existence of interim obligations it was bound to as long as its signature remained.[217] Ambassador Prosper, in response to the questions as to why the US unsigned the treaty rather than just allowing it to remain ungratified, explained that the United States, "to maintain our flexibility – not only to protect our interests but to pursue alternative judicial mechanisms – decided to make clear that we will not be part of this treaty and thus be able to take different approaches that may be different to the object and purpose [of] the ICC treaty."[218]

The Philippines, however, remains a signatory to the Rome Statute and maintains its intention to respect the object and purpose of this treaty. The late Philippine Secretary for Foreign Affairs Blas Ople stressed that the Impunity Agreement "does not in any way prevent us from becoming a state party to the ICC Statute ***nor would it diminish our obligations or duties under the Statute***

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with the signature of a treaty and before its entry into force, there exists for the contracting parties an obligation to do nothing which may injure the Treaty by reducing the importance of its provisions..." MCNAIR, *supra* note 207 at 135, 199-200.

[216] 1951 I.C.J. Reports 28.

[217] E. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2081-2 (2003); BROOMHALL, *op. cit. supra* note 52, at 179.

[218] Swaine, quoting Pierre-Richard Prosper, U.S. Ambassador for War Crimes Issues, Issues Update: US Has No Legal Obligation to the International Criminal Court (May 6, 2002), available at http://www.wfa.org/issues/wicc/unsigning/prosperunsigning.html (last visited on November 8, 2003).

(emphasis supplied)."[219] As was pointed out earlier, the principal purpose of the Rome Statute, as provided for in its preamble, is to enable the effective prosecution of international crimes both at the national and international level, in order to ensure that the impunity with which these crimes are committed is done away with. With a stroke of a pen, the Philippines has rendered the ICC inutile with respect to American "persons" within its territory. The Impunity Agreement between the Philippines and the US runs counter to the objectives of the establishment of an international penal tribunal, ensuring the continuation, rather than the end, of impunity in the commission of *jus cogens* crimes. The Impunity Agreement between the Philippines and the US is clearly illegal for having been entered into in violation of the Philippines' obligation under Article 18 of the VCLOT.

As for States Parties to the Rome Statute who have likewise entered into Article 98(2) Agreements with the US, the breach of treaty obligations is all the more evident. Under Article 26 of the VCLOT, the principle of *pacta sunt servanda* obliges parties to the Rome Statute and other treaties to perform the provisions of the said treaties in good faith. In addition, Article 41(b)(ii) of the VCLOT provides that modifications to treaties between only certain of the parties to such treaties cannot derogate from their objects and purposes.

E. The Impunity Agreement Violates the Sovereignty of the Philippines

1. Violation of the Principle of Non-Intervention

As the Philippines (along with many other states which have entered into Article 98(2) agreements with the US) signed the Impunity Agreement in large part due to the threat of withdrawal of economic aid from the US,[220] the Agreement is a result of economic coercion. As discussed earlier, this threat has already been carried out in thirty-five countries, and will in all likelihood be effected in many other countries who refuse to sign such agreements. This threat has become all the more imminent as the withdrawal of aid has become a statutory obligation on the part of the US government, by virtue of the 2002 American Servicemembers' Protection Act (ASPA).[221] The international community was indignant over the "heavy-handedness" of the US, declaring that the Article 98 agreements were inconsistent with international law and unnecessary. The European Union warned the thirteen countries wishing to join the organization against signing such

[219] DFA Press Release, *supra* note 16.
[220] See discussion starting on page 474.
[221] See discussion starting on page 474.

agreements. Switzerland explicitly declared that it refuses to sign any such agreement.[222]

While the Philippines has been declared a "major non-NATO ally" by US President George W. Bush as a result of the former's staunch support of the US war on terrorism,[223] theoretically exempting it from the aid withdrawal provisions of the ASPA,[224] there is no obstacle to the US President revoking that designation and cutting off aid in the event that the Philippines acts contrary to US interests. After all, the Philippines earned the title of "major non-NATO ally" only because it ran counter to the sentiment of the international community when the US invaded Iraq. The US has little to gain from a developing country such as the Philippines, particularly since the US no longer has military bases in the country, except to bolster its claim that it did not act unilaterally in invading Iraq despite insufficient evidence of Saddam Hussein's weapons of mass destruction. Thus, in order to ensure continued exemption from the ASPA, the Philippines may enter into an Article 98 agreement with the US.[225] Clearly, the Philippines had reasonable ground to believe that it too would suffer the same fate as these other nations,[226] and this heavily militated against refusing to sign the Impunity Agreement.[227]

Economic coercion, unless utilized as a legitimate countermeasure, is a prohibited use of force under international law.[228] Under Article 52 of the VCLOT, "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." It is a fundamental principle of international law that all states possess sovereign equality and each state is supreme within the sphere of its own affairs. This supremacy is otherwise known as reserved domain jurisdiction.[229] Article 2(1) of the United Nations (UN) Charter provides that the UN "is based on the principle of the sovereign equality of all its Members." Corollary to the sovereignty of states is the principle of non-intervention, whereby states are obligated to refrain from intervening in the internal or external affairs of other states. Article 2(4) of the UN Charter embodies this principle, along with the intertwined principle of the non-use of force, providing that "[a]ll Members shall refrain in their international relations from the threat or use of force against the

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[222] Johnson, *op. cit. supra* note 74 at 555.

[223] *Bush Designates Philippines Major Non-NATO Ally*, October 7, 2003, available at http://www.inq7.net/brk/2003/oct/07/brkpol_8-1.htm (last visited February 16, 2004).

[224] Johnson, *op. cit. supra* note 74.

[225] Johnson, *op. cit. supra* note 74 at 546.

[226] See discussion starting on page 474.

[227] See discussion starting on page 474.

[228] O. Y. ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW 197 (1998).

[229] BROWNLIE, *op. cit. supra* note 129 at 289-290, 293-294.

territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

This principle of non-intervention has long crystallized into a norm of customary international law. In the *Corfu Channel Case*,[230] the ICJ ruled that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations."[231] This statement was further utilized by the ICJ in the *Nicaragua Case*, wherein it elucidated upon the contents of the principle of non-intervention:

> The principle forbids all states or groups of states to intervene directly or indirectly in internal or external affairs of other states. A prohibited intervention must accordingly be one bearing on matters in which each state is permitted, by the principle of state sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.

UN GA Resolution 2625 (XXV), entitled the *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*,[232] cited by the ICJ in *Nicaragua*, likewise imposes upon states the duty to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. The second principle found in this Declaration is the "principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter." Under this principle, the UN GA Resolution provides in relevant part:

> No State or group of States has the right to intervene, ***directly or indirectly***, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention ***and all other forms of interference or attempted threats*** against the personality of the State or against its political, ***economic*** and cultural elements, are in violation of international law.
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> ***No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.*** Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State." (emphasis added)

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[230] Corfu Channel Case, 1959 I.C.J 35.

[231] *Ibid.*

[232] UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1971), adopted by consensus on October 24, 1970.

Further, this UN GA Resolution provides that under the principle of "[t]he duty of States to co-operate with one another in accordance with the Charter," States are mandated to "conduct their international relations in the ***economic***, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention. (emphasis added)" The principle of the sovereign equality of States and the dictum of the ICJ in the *Nicaragua* case on the matter are likewise reiterated in this GA Resolution. An element of the sovereign equality of states is "the right freely to choose and develop its political, social, economic and cultural systems."

Furthermore, UN GA Resolution 2131 (XX), the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*,[233] further bolsters the customary status of the principle of non-intervention, having been adopted by a vote of one hundred nine (109) in favor, none against, and one abstention (109-0-1). It provides that "full observance of the principle of non-intervention in the internal and external affairs of other States is essential to the fulfillment of the purposes and principles of the UN." The UN GA declared that "direct intervention, subversion and all forms of indirect intervention are contrary to these principles and, consequently, constitute a violation of the United Nations Charter." Following the preambular paragraphs, the UN GA stressed the following:

> 1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.
>
> 2. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.
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> ....
>
> 5. Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

[233] December 21, 1965.

These provisions of the UN Charter, decisions of the ICJ and UN GA Resolutions all indicate the overwhelming state practice and *opinio juris* necessary to establish the status of non-intervention coupled with the non-use of force as customary norms. These similarly indicate that economic coercion amounts to a use of force and is covered by the prohibition on the use of force. Consequently, the US' threat of withdrawal of economic aid, which eventually became a statutory obligation on the part of the US government (the ASPA), in order to subordinate the Philippines along with other States to its will, constitutes a use of force contrary to the UN Charter and customary international law. This results in the nullity of the Impunity Agreement as well as in the engagement of the US' state responsibility under international law, for which the US is liable for reparations to the Philippines.[234]

2. Violation of the Sovereign Right to Exercise Territorial Jurisdiction

The Impunity Agreement impinges upon the Philippines' exercise of jurisdiction over American "persons" accused of committing *jus cogens* norms. The exercise of jurisdiction is a corollary of the sovereignty of states.[235] Jurisdiction includes both prescriptive or legislative and enforcement jurisdiction. Prescriptive jurisdiction pertains to "the power to make decisions or rules,"[236] whereas enforcement jurisdiction is "the power to take executive action in pursuance of or consequent upon the making of decisions or rules."[237] As *jus cogens* norms undoubtedly comprise "generally accepted principles of international law" which are "part of the law of the land" in the Philippines,[238] the Philippines possesses the sovereign right to exercise enforcement jurisdiction to enforce compliance with these universally accepted legal norms. The Philippines may choose to surrender the American "persons" to the ICC, to any other state willing and able to prosecute them, or to prosecute them itself. The determination of the course of action the Philippines will take with respect to the American "persons" constitutes an exercise

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[234] ARTICLES ON STATE RESPONSIBILITY, *supra* note 167; CHENG, *op. cit. supra* note 92 at 169; Chorzow Factory Case, 1928 PCIJ (ser. A) No. 17, at 47 [hereinafter Chorzow Factory case]; Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), 1949 ICJ 184 [Reparations case]; See note 190.

[235] BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 289 (2001).

[236] K. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILLANOVA L. REV. 770 (2003).

[237] BROWNLIE, *op. cit. supra* note 222 at 301.

[238] CONST., art. II, sec. 2.

of prescriptive jurisdiction, while the actual execution of such course of action comprises an exercise of enforcement jurisdiction.

The violation of the Philippines' sovereign right to exercise prescriptive and enforcement jurisdiction over American "persons" is apparent considering that the Impunity Agreement applies to American "persons" within the territory of the Philippines. American "persons" within Philippine territory are subject to the nation's territorial jurisdiction, in addition to the country's universal jurisdiction if such persons are accused of *jus cogens* crimes. Territoriality is the primary basis of jurisdiction, long accepted by states.[239] The Permanent Court of International Justice (PCIJ), the predecessor of the ICJ, asserted in the *Lotus* case that "in all systems of law the principle of the territorial character of criminal law is fundamental."[240] The US Supreme Court, in the *Schooner Exchange v. McFaddon*,[241] ruled:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restrictions upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and investment of that sovereignty to the same extent in that Power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Further, the US case of *Rivard vs. United States* declared that "[a]ll the nations of the world recognize the principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done." The Canadian Supreme Court held in *United States vs. Burns* that "individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedures and punishments which the foreign state applies to its own residents."[242] In this jurisdiction, the relationship between sovereignty and the exercise of jurisdiction has likewise been emphasized. In *US v. Bull*,[243] decided when the Philippines was still a colony of the US, the Philippine Supreme Court stated:

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[239] Lotus Case (France v. Turkey), 1927, P.C.I.J. (ser. A) No. 10 [hereinafter Lotus case], at 70; M. SHAW, INTERNATIONAL LAW 330 (4th ed., 1997); BROWNLIE, *op. cit. supra* note 222 at 303-306; CASSESE, *op. cit. supra* note 26 at 277-279 (2003); Scharf, *op. cit. supra* note 117 at 110-117.

[240] Lotus case.

[241] 7 Cranch (U.S.) 116 (1812).

[242] *Quoted in* CASSESE, *op. cit. supra* note 26 at 277-278.

[243] G.R. No. 5270, January 15, 1910.

> No court of the Philippine Islands had jurisdiction over an offense or crime committed on the high seas or within the territorial waters of any other country, but when she came within 3 miles of a line drawn from the headlands which embrace the entrance to Manila Bay, she was within territorial waters, and a new set of principles became applicable. (Wheaton, Int. Law (Dana ed.), p. 255, note 105; Bonfils, Le Droit Int., sec. 490 et seq.; Latour, La Mer Ter., ch. 1.) The ship and her crew were then subject to the jurisdiction of the territorial sovereign subject to such limitations as have been conceded by that sovereignty through the proper political agency. This offense was committed within territorial waters.

As such, the ICJ in the *Asylum case* (Merits)[244] denied the assertion of Colombia that it had the right to grant the Peruvian rebel Victor Raul Haya dela Torre diplomatic asylum in the Colombian embassy in Peru. The Court emphasized the right to grant diplomatic asylum must be strictly construed as it constitutes an abrogation of territorial sovereignty, to wit:

> In the case of diplomatic asylum, the refugee is within the territory of the State where where the offence was committed. decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matter (sic) which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.

While state sovereignty may be limited by treaty obligations, the Impunity Agreement does not fulfill the municipal requirements in the Philippines so as to validly abrogate the sovereign right of the Philippines to exercise jurisdiction over American "persons" within its territory.[245]

Moreover, considering that the designation American "persons" covers not only American nationals, but also employees and contractors of the US, regardless of their nationality, all the more may the US not impose its will on the Philippines with regard to individuals who are not even American nationals. The US possesses no legitimate interest in protecting mere employees who are not even American nationals. The situation becomes ridiculous when a Filipino employee or contractor of the US cannot be surrendered by his own country to the ICC because of the dictates of the US. This is clear "subordination" of the Philippines' sovereign rights to the US, an act of intervention in the Philippines' affairs explicitly prohibited by

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[244] 1950 I.C.J. 10.

[245] See discussion *infra* starting on p. 511.

the UN Charter and customary law.[246] This likewise engages the responsibility of the US, making it liable for reparations to the Philippines.[247]

Summary

In sum, the Impunity Agreements entered into by various States, particularly the Philippines, with the US, are invalid under international law on five grounds:

(1) The Impunity Agreements derive no validity from Article 98(2) of the Rome Statute, for the US interpretation of this provision is erroneous and not in line with the object and purpose of the Rome Statute, as evidenced by the *travaux préparatoires.*

(2) The Impunity Agreements violate the *jus cogens* norms prohibiting genocide, war crimes and crimes against humanity. Any agreement in conflict with peremptory norms is void under international law.

(3) The Impunity Agreements violate the customary duty of States to extradite or prosecute perpetrators of international crimes, as embodied in the principle of *aut dedere aut judicare.*

(4) The Impunity Agreement between the Philippines and the US was entered into by the former in violation of its obligation under Article 18 of the Vienna Convention on the Law of Treaties "to refrain from acts which would defeat the object and purpose of a treaty."

(5) The Impunity Agreement violates the sovereignty of the Philippines, in violation of the UN Charter and customary law, as the country was coerced to sign such agreement, and has been precluded from exercising its sovereign right to exercise jurisdiction over individuals within its territory in the manner it deems best.

While the Philippines "adopts the generally accepted principles of international law as part of the law of the land,"[248] and the above discussion suffices to nullify the Impunity Agreement, there are grounds exclusively under Philippine municipal law which likewise render the said Agreement invalid.

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[246] See discussion *supra* starting on p. 505.

[247] ARTICLES ON STATE RESPONSIBILITY, *supra* note 167; CHENG, *op. cit. supra* note 95 at 169; Chorzow Factory Case, *supra* note 221; Reparations case, *supra* note 221; See note 167.

[248] CONST., art. II, sec. 2.

IV. INVALIDITY OF THE US-PHILIPPINES IMPUNITY AGREEMENT UNDER PHILIPPINE CONSTITUTIONAL LAW

As discussed earlier, the Impunity Agreement falls within the definition of a treaty under Article 2(a) of the VCLOT. As a treaty, the Agreement must conform with certain requirements not only under international law but under Philippine municipal law as well.

A. Article VII, Section 21, of the 1987 Constitution

No less than the 1987 Philippine Constitution, the supreme law of the land,[249] provides for the process by which a treaty must undergo in order to render it operational in the Philippine setting. Article VII, Section 21 provides:

> 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.

The Impunity Agreement between the Philippines and the United States was effected through a mere exchange of diplomatic notes between the late Philippine Secretary of Foreign Affairs Blas F. Ople and US Ambassador Francis J. Ricciardone, Jr. This Agreement was surreptitiously entered into, with no disclosure to the public[250] and without being transmitted to the Senate for concurrence.

The only manner by which the Impunity Agreement may be valid despite lack of Senate ratification is if it is a properly constituted executive agreement. This is an essentially American practice that has been adopted in this jurisdiction. The Philippine Supreme Court has long affirmed the validity of international agreements in the form of executive agreements, if entered into for certain limited purposes.[251] It is thus necessary

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[249] I. CRUZ, PHILIPPINE POLITICAL LAW 12-13 (1998).

[250] Even Vice-President Teofisto Guingona, who was the Secretary for Foreign Affairs prior to the late Blas Ople, was not made aware of the contents of the Impunity Agreement. He called for a "full public disclosure" of the Agreement, given its serious implications. See Lacuarta, *op. cit. supra* note 18.

[251] Executive agreements are generally valid under international law. The International Law Commission (ILC) originally intended to include in the Vienna Convention on the Law of Treaties a definition of agreements in simplified form, referring to "a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure." However, criticisms of this definition led the ILC to delete the definition as the concept lacked sufficient precision for it to be an adequate criterion in determining the application of legal rules. In the *Advisory Opinion on the Customs Regime between Germany and Austria* [PCIJ, Ser. A/B, No. 41 (1931) at 47], the PCIJ held that "[f]rom the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchange of notes." See L. Wildhaber, *Executive Agreements*, in 7 ENCYCLOPEDIA OF INTERNATIONAL LAW 81-82 (1984).

to glean from these decisions what conditions allow executive agreements to be valid without violating the Constitution.

B. Survey of Philippine Jurisprudence

In *USAFFE Veterans Association, Inc. vs. Treasurer of the Philippines, et al.*,[252] the Supreme Court was tasked to determine the validity of the 1950 Romulo-Snyder Agreement whereby the Philippines undertook to return to the US government the unspent portion of the latter's loan to the Philippines. The Philippines was to return around thirty-five million dollars in ten annual installments. The USAFFE veterans objected to this agreement, among others, on the basis that the agreement was invalid due to the lack of Senate ratification. The agreement was entered into between then-Philippine Secretary of Foreign Affairs, Carlos P. Romulo, and then-American Secretary of the Treasury, John W. Snyder. The Court reproduced the arguments of the defendants supporting the validity of executive agreements entered into without Senate ratification, particularly the following relevant portions:

> There are now various forms of such pacts or agreements entered into by and between sovereign states which do not necessarily come under the strict sense of a treaty and which do not require ratification or consent of the legislative body of the State, but nevertheless, are considered valid international agreements...
>
> In the leading case of Altman vs. U.S., 224, U.S. 583, it was held that 'an international compact negotiated between the representatives of two sovereign nations and made in the name and or behalf of the contracting parties and dealing with important ***commercial relations*** between the two countries, is a treaty both internationally although as an executive agreement it is not technically a treaty requiring the advice and consent of the Senate. (Herbert Briggs, The Law of Nations, 1947 ed., p. 489). (emphasis supplied)

The Court further quoted a discourse on the two types of executive agreements:

> Nature of Executive Agreements
> Executive Agreements fall into two classes: (1) agreements made purely as executive acts affecting external relations and independent of or without legislative authorization, which may be termed as presidential agreements, and (2) agreements entered into in pursuance of acts of Congress, which have been designated as Congressional-Executive Agreements (Sinco, supra, 304; Hackworth, supra, 390; McDougal and Lans, supra, 204-205; Hyke, International Law, 2nd ed., Vol. II, 1406; et seq.)

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[252] G.R. No. L-10500, 105 SCRA 1030, June 30, 1959 [hereinafter USAFFE case].

Commissioner Aquino took this distinction in to account during the 1986 Constitutional Commission deliberations.[253] However, all the Court opined about this discourse was that "[s]uch considerations seem persuasive." The Court ruled that there was no need to determine the validity of the executive agreement in question as the Senate had "practically" admitted the validity of the said agreement in one of its resolutions, and Congress impliedly ratified the agreement by appropriating funds to implement such agreement.

In *Commissioner of Customs vs. Eastern Sea Trading*,[254] Eastern Sea Trading was the consignee of several shipments of onion and garlic from Japan and Hong Kong which were seized and subjected to forfeiture proceedings instituted by the customs authorities. The shipments allegedly violated Central Bank circulars and the Revised Administrative Code. The Court of Tax Appeals ruled in favor of Eastern Sea Trading, and the Commissioner of Customs elevated the case to the Supreme Court. Among the grounds of the Commissioner's appeal is the allegation of the nullity of the executive agreement sought to be implemented by Executive Order No. 328. This executive order was issued on June 22, 1950, providing that, *inter alia*, no commodity may be exported to or imported from Japan without an export or import license from the Central Bank of the Philippines or the Import Control Administration.

This Executive Order extended the effectivity of two executive agreements, the Trade and Financial Agreements between the Philippines and Japan. The Trade Agreement, dated April 24, 1957, provided for

> ...the adoption of a trade plan, on an annual basis, between the Philippines and Occupied Japan; that, subject to exceptions, all trade shall be conducted in ac□ Lcordance with the Financial Agreement between the two countries, and through specified channels; that subject to exchange, import and export control restrictions, both countries would permit the importation from and exportation to each other of the commodities specified in the trade plan, within specified limits; that consultations would be held for necessary modifications of the trade plan; that a machinery would be established to ensure accurate and up-to-date information regarding the operation of the agreement and to insure the implementation of the trade plan; and that the parties would do everything feasible to ensure compliance with the export-

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[253] 2 RECORDS OF THE CONSTITUTIONAL COMMISSION (July 31, 1986).
"MS. AQUINO: Would that depend on the parties or would that depend on the nature of the executive agreement? According to common usage, there are two types of executive agreement: one is purely proceeding from an executive act which affects external relations independent of the legislative and the other is an executive act in pursuance of legislative authorization. The first kind might take the form of just conventions or exchanges of notes or protocol while the other, which would be pursuant to the legislative authorization, may be in the nature of commercial agreements."

[254] G.R. No. L-14279, 3 SCRA 351, October 31, 1961 [hereinafter Eastern Sea Trading case].

> import control, exchange control and such other controls pertaining to international trade as may be in force in their respective territories from time to time.

The Trade Agreement likewise stipulated the method of revision or cancellation thereof, the procedure for the review of the trading position between the parties and the time of its effectivity. It was to take effect upon exchange of formal ratification, pending which it shall take effect upon signature by authorized representatives as *modus vivendi* between the parties.

The Financial Agreement, on the other hand, was entered into on the same day and declared that:

> all transactions...shall be invoiced in USA dollars and shall be entered into the account of each party to be maintained in the books of the principal financial agent banks designated by each party; that debits and credits shall be offset against each other in said accounts and payments shall be made on the net balance only; that the Agreement may be revised in the manner therein stated; that the representatives of both parties may negotiate and conclude of (sic) the agreement; and that the same shall be effective upon exchange of formal ratification, pending which it shall take effect upon signature of the agreement as a *modus vivendi* between the parties.

The Commissioner of Customs impugned the determination of the Court of Tax Appeals that the forfeiture of goods could not be justified on the basis of Executive Order No. 328, as the agreements upon which this order is founded are "of dubious validity," as the Senate had not concurred with their execution. The Supreme Court held that the agreements were valid and consequently, the Executive Order was likewise valid. The Court explicitly declared that executive agreements may be validly entered into without Senate concurrence. The Court noted that executive agreements have long been utilized to cover such subjects as "commercial and consular relations, most-favored-nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims," as well as "inspection of vessels, income tax on shipping profits, the admission of civil aircraft, customs matters." However, the Court qualified the constitutionality of executive agreements with respect to political issues:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying *adjustments of detail* carrying out well-established national policies

> and traditions and those involving arrangements of a more or less *temporary* nature usually take the form of executive agreements.[255]

The Court likewise pointed out that the "United States Supreme Court has expressly recognized the validity and constitutionality of executive agreements entered into without Senate approval." The Court then concluded that the Trade and Financial Agreements were valid even without the concurrence of the Senate. The extensive discussion of the Court on the validity of executive agreements quoted from American sources was in turn quoted by Commissioner Fr. Joaquin Bernas, during the deliberations on Article VII, Section 21 of the Constitution.[256]

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[255] GR No. L-14279, Oct. 31, 1961, 3 SCRA 356 (1961).

[256] 2 RECORDS OF THE CONSTITUTIONAL COMMISSION (July 31, 1986).

> MS. AQUINO: It is my humble submission that we should provide, unless the Committee explains to us otherwise, an explicit proviso which would except executive agreements from the requirement of concurrence of two-thirds of the Members of the Senate. Unless I am enlightened by the Committee I propose that tentatively, the sentence should read. "No treaty or international agreement EXCEPT EXECUTIVE AGREEMENTS shall be valid and effective."
>
> FR. BERNAS: I wonder if a quotation from the Supreme Court decision might help clarify this:
>
> The right of the executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage. From the earliest days of our history, we have entered into executive agreements covering such subjects as commercial and consular relations, most favored nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims. The validity of this has never been seriously questioned by our Courts.
>
> Agreements with respect to the registration of trademarks have been concluded by the executive of various countries under the Act of Congress of March 3, 1881 (21 Stat. 502) International agreements involving political issues or changes of national policy and those involving international agreements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail, carrying out well established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.
>
> MR. ROMULO: Is the Commissioner, therefore, excluding the executive agreements?
>
> FR. BERNAS: What we are referring to, therefore, when we say international agreements which need concurrence by at least two-thirds are those which are permanent in nature.
>
> MS. AQUINO: And it may include commercial agreements which are executive agreements essentially but which are proceeding from the authorization of Congress. If that is our understanding, then I am willing to withdraw that amendment.
>
> FR. BERNAS: If it is with prior authorization of Congress, then it does not need subsequent concurrence by Congress.
>
> MS. AQUINO: In that case, I am withdrawing my amendment.

In *Gonzales v. Hechanova*,[257] Gonzales, likewise cited by Fr. Bernas during the 1986 Constitutional Commission deliberations,[258] the president of the Iloilo Palay and Corn Planters Association, assailed the importation by the Philippine government of 67,000 tons of rice. This importation was authorized by the Executive Secretary, despite the prohibition found in Republic Act No. 3452 against the importation of rice and corn by "the Rice and Corn Administration or any other government agency." The respondent government officials (Executive Secretary, Secretary of Defense, Auditor General, Secretary of Commerce and Industry and Secretary of Justice) argued, among others, that the contracts entered into with Vietnam and Burma for the sale of rice constituted valid executive agreements. The Court disposed of this contention, reasoning that the status of such contracts as executive agreements was not established. The parties to the contracts did not appear to consider them as executive agreements. Even granting *arguendo* their status as executive agreements, the contracts were void for being contrary to RA 3452. The Court's discourse on the matter is noteworthy:

> ...Although the President may, under the American constitutional system, enter into executive agreements ***without*** previous legislative authority, he may ***not***, by executive agreement, enter into a transaction which is ***prohibited*** by statutes enacted prior thereto. Under the Constitution, the main function of the Executive is to enforce laws enacted by Congress. The former may not interfere in the performance of the legislative powers of the latter, except in the exercise of his veto power. He may not defeat legislative enactments that have acquired the status of law, by ***indirectly repealing the same*** through an executive agreement ***providing for the performance of the very act prohibited by said laws.***[259]

Thus, the Court invalidated the contracts as RA 3452 prohibited all importations of rice and corn into the Philippines, and that the Office of the President is among those government agencies prohibited from importing rice. The intention of the law was to leave the importation of rice and corn to private parties.

In the more recent case of *Commissioner of Internal Revenue vs. John Gotamco & Sons, Inc.*,[260] there was cursory mention of the validity of certain international agreements even without Senate concurrence. John Gotamco & Sons, Inc. contested the Bureau of Internal Revenue's assessment of the former's liability for contractor's tax incurred during the construction of the World Health Organization (WHO) building in Manila. As the WHO is an international organization enjoying special privileges and immunities defined in the Host Agreement between the Philippines and the organization, it was

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[257] G.R. No. L-21897, 9 SCRA 230, October 22, 1963.

[258] 2 RECORDS OF THE CONSTITUTIONAL COMMISSION (July 31, 1986).
FR. BERNAS: On other matters touching also on executive agreements, the case of Gonzales vs. Hechanova, page 230, 9 SCRA 230 (1963) would also be helpful.

[259] Gonzales v. Hechanova, *supra* note 245, at 242.

[260] G.R. No. L-310912, 148 SCRA 36, February 27, 1987.

exempt from the payment of all direct and indirect taxes. The Court ruled that the respondent was not liable for contractor's tax as this constituted an indirect tax upon the WHO, from which the latter was exempted, as provided for in the Host Agreement. Consequently, the exemption contemplated an exemption of those normally liable to pay indirect tax as well, since taxes such as this, "although not imposed upon or paid by the Organization directly, form part of the price paid or to be paid by it."

In contesting the exemption of the contractor from contractor's tax, the Commissioner impugned the validity of the Host Agreement granting tax exemptions to the WHO, such Agreement not having been ratified by the Senate. The Court quickly disposed of this argument, to wit:

> While treaties are required to be ratified by the Senate under the Constitution, less formal types of international agreements may be entered into by the Chief Executive and become binding without the concurrence of the legislative body [citing USAFFE Veterans Association, Inc. vs. Treasurer of the Philippines]. The Host Agreement comes within the latter category: it is a valid and binding international agreement even without the concurrence of the Philippine Senate. The privileges and immunities granted to the WHO under the Host Agreement have been recognized by this Court as legally binding on Philippine authorities (citing World Health Organization and Dr. Leonce Verstuyft v. Hon. Benjamin Aquino, et al., 48 SCRA 242).[261]

Lastly, the case of *Commissioner of Customs vs. Eastern Sea Trading* was reiterated in the 2000 case of *Bayan (Bagong Alyansang Makabayan) vs. Zamora.*[262] This case involved the constitutionality of the Visiting Forces Agreement (VFA) entered into between the Philippines and the US, allowing US troops to temporarily stay in the Philippines to train Philippine troops. The VFA was ratified by the Philippine Senate. The issue of the validity of executive agreements was brought up in relation to the US. While the Philippines considered the VFA as a treaty, thus requiring Senate concurrence, the US treated it as a mere executive agreement.

Article XVIII, Section 25 of the 1987 Philippine Constitution disallows foreign military bases, troops, or facilities in the country, unless the following conditions are met: (a) it must be under a treaty; (b) the treaty must be duly concurred in by the Senate and, when so required by Congress, ratified by a majority of the votes cast by the people in a national referendum; and (c) recognized as a treaty by the other contracting state The last requisite was invoked in challenging the constitutionality of the VFA, as the US apparently did not recognized it as a treaty. The Court disregarded this argument, explaining that an executive agreement is binding as a treaty under international law, referring to the definition of a treaty under the VCLOT. Then the Court cited the *Eastern Sea Trading* case to bolster that in our jurisdiction, the binding effect of executive

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[261] *Id.*, at 39-40.

[262] G.R. Nos. 138570, 138572, 138587, 138680, 138698; 342 SCRA 449; October 10, 2000.

agreements even without the concurrence of the Senate or Congress is well established. The Court stressed that "the power to ratify is vested in the President and not, as commonly believed, in the legislature." The Senate is limited to "giving or withholding its consent, or concurrence, to the ratification."[263]

The above survey of Supreme Court decisions clearly indicate that executive agreements are valid in this jurisdiction, as long as they carry out "well-established national policies," "adjustments of detail" of such traditions or arrangements of a "more or less temporary nature"[264] and are not contrary to law.[265] Agreements involving political issues, changes of national policy, or of a permanent nature are properly embodied in duly ratified treaties.[266] It is *apropos* to note that the Impunity Agreement is indefinite, remaining in force "until one year after the date on which one party notifies the other of its intent to terminate the Agreement," thus not constituting a temporary agreement executive agreements often embody.

C. Survey of Selected US Supreme Court Doctrines

US jurisprudence also provides guidance on the matter, for the Philippine Supreme Court itself has referred to relevant US cases in the course of determining the validity of an executive agreement.[267] Article II, Section 2, paragraph 2 of the United States Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur..."

In *Altman & Co. v. US*,[268] which was quoted in *Eastern Sea Trading*, the US Supreme Court held that an international compact is not always a treaty which requires the participation of the Senate. This case concerned section 3 of the Tariff Act of 1897 which authorized the President to enter into commercial agreements with foreign countries regarding certain matters. The Court held that the agreement entered into by the President under this law was a valid treaty despite lack of Senate ratification.

In *US vs. Belmont*,[269] citing the *Altman* case, the Court held that the President was authorized, even without the advice and consent of the Senate as would be required in the case of a treaty, to do the following: to enter into negotiations with the Soviet government to settle its claims with the US government, to accept an assignment by the Soviet government of claims against American nationals (Litinov Assignment), as well

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[263] *Id.*, at 492.

[264] Eastern Sea Trading, *supra* note 254.

[265] Gonzales v. Hechanova, *supra* note 258.

[266] Eastern Sea Trading, *supra* note 254.

[267] [267] USAFFE case, *supra* note 239; Eastern Sea Trading case, *supra* note 252, which in turn were cited by the later Supreme Court cases.

[268] 224 US 583 (1912).

[269] 301 US 324 (1937).

as to enter into an agreement with the Soviet government that the latter would be notified of amounts realized by the US government from such assignment. The Court ruled that "the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted."

In *US vs. Curtiss-Wright Export Corp.*,[270] the issue of undue delegation of authority to the President was raised in response to a joint resolution of Congress which authorized the President to determine whether embargo on sale of arms and munitions to belligerents in the Chaco war would contribute to re-establishment of peace, to make proclamation to bring resolution into operation, to impose conditions upon operation of resolution, and to order cessation of operation. In holding that there was no undue delegation, the Court emphasized that:

> ...the federal power over external affairs in origin and essential character different from that over internal affairs. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it.

In *US vs. Pink*,[271] the Court upheld the validity of the Litinov Assignment which was likewise discussed in US vs. Belmont. While the *Belmont* case discussed the right of the US, under the Litinov Assignment, to a deposit of a nationalized Russian corporation in a New York bank, the Court in *US vs. Pink* focused on the executive agreement through which the Litinov Assignment was made. The Court opined that "[t]he powers of the President in the conduct of foreign relations involved the power, without the consent of the Senate, to determine the public policy of the US with respect to the Russian nationalization decrees."

In *US v. Guy W. Capps, Inc.*,[272] the US Court of Appeals for the Fourth Circuit struck down an executive agreement entered into between the US and Canada whereby potatoes imported from Canada would not be used for table stock purposes. While the agreement was entered into pursuant to the Agricultural Act of 1948, the requirements of the statute limiting the power of the President to impose restrictions on the importation of agricultural products were not complied with. As such, the Court ruled that "while the President has certain inherent powers under the Constitution, such as the power pertaining to his position as Commander in Chief of Army and Navy and the power necessary to see that the laws are faithfully executed, the power to regulate

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[270] 299 US 304 (1936).

[271] 315 US 203 (1942).

[272] 204 F.2d 655 (1953), affirmed on other grounds, 348 US 296 (1955)

interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in Congress."

Lastly, in *Dames & Moore v. Regan*,[273] the US Supreme Court upheld the Executive Order implementing the January 19, 1981 Executive Agreement between Iran and the US. This agreement was entered into subsequent to the hostage-taking of diplomatic personnel of the US Embassy in Tehran, Iran. Following the release of the hostages, the US entered into an agreement with Iran establishing an Iran-US Claims Tribunal. On January 19, 1981, the President issued a series of Executive Orders implementing the terms of the agreement, revoking all attachments on Iranian assets and suspending all claims against the Iranian government. These executive orders were held authorized by the International Emergency Economic Powers Act and congressional approval of claims settlement procedures. In reaching this decision, the Court noted that international agreements settling claims by nationals of one state against the government of another comprise "established international practice reflecting traditional international theory." The Court likewise pointed out that while these settlements have been carried out through treaties, there has also been a longstanding practice of settling such claims by way of executive agreements without the advice and concurrence of the Senate.

As Philippine jurisprudence regarding executive agreements is largely based upon American precedents, it is of no surprise the above US Supreme Court cases discuss the same limitations upon the authority of the President to enter into such agreements. It is clear that both Philippine and American jurisprudence establish that executive agreements entered into without Senate concurrence are valid, provided that the President derives authority from statute or treaty (in the case of the US, Congressional authorization as well), and in strict compliance with the terms of the latter. As such, the question now arises whether the Impunity Agreement entered into through an exchange of diplomatic notes between the late Secretary Ople and US Ambassador Riccardione implement well-established national policies of the Philippines. In order for the said agreement to constitutional, one must be able to point to an existing statute or a treaty[274] the Philippines has ratified which the executive agreement in question merely implements.

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[273] 453 US 654 (1981).

[274] 2 RECORDS OF THE CONSTITUTIONAL COMMISSION (July 31, 1986). Chief Justice Concepcion clarified during the 1986 Constitutional Commission deliberations that "[e]xecutive agreements are generally made to implement a treaty already enforced or to determine the details for the implementation of the treaty."

D. Analysis of Duly Ratified Treaties the Impunity Agreement May Implement

Recourse to the Impunity Agreement itself is of little aid in determining the source of the President Arroyo's authority to enter into such an agreement. The Agreement merely reaffirms "the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes" and considers that the Philippines and the US "have each expressed their intention to where appropriate, investigate and prosecute war crimes, crimes against humanity, and genocide alleged to have been committed by their respective officials, employees, military personnel, and nationals." No reference whatsoever is made to any Philippine law or treaty obligation with the US enabling such an agreement, unlike the US-East Timor Impunity Agreement which made mention of UN Security Council Resolution 1422 as a legal basis in its preamble.[275] As argued earlier, the President is in fact obligated ***not*** to enter into such an agreement under Article 18 of the VCLOT. Under this provision, the Philippines is obliged "to refrain from acts which would defeat the object and purpose of a treaty" as a signatory to the Rome Statute.

Secretary Ople opined that "no fundamental change in policy"[276] was effected by the Impunity Agreement. From the outset, however, one should take note of a state policy enshrined in no less than the 1987 Philippine Constitution. Article II, Section 7 of the 1987 Constitution provides:

> The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.

Thus, the Impunity Agreement cannot possibly be pursuant to any valid national policy, being contrary to the fundamental principle of state sovereignty explicitly laid down by the supreme law of the land. Vice-President Teofisto Guingona has expressed deep reservations about the validity of the Impunity Agreement, saying that "[i]t would appear that the executive agreement, reportedly embodied in an exchange of diplomatic notes, touches upon the aspect of criminal jurisdiction, and as such this would not be a matter for the Executive Department alone to decide on."[277] While it is the Department of Foreign Affairs that is tasked with the determination of whether an international agreement is an executive

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[275] See US-EAST TIMOR IMPUNITY AGREEMENT.

[276] DFA Press Release, *supra* note 16.

[277] Lacuarta, *op. cit. supra* note 18.

agreement,[278] the courts are not precluded from determining whether such an agreement complies with the requirements of the Constitution.[279]

Nevertheless, while state sovereignty may be a fundamental principle of international law, a state may consent to limitations upon its sovereignty through treaties. In *Tañada, et al. v. Angara, et al.*,[280] the Philippine Supreme Court pointed out that "while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations." The Court went on to explore the various treaty obligations the Philippines entered into which validly imposed limitations upon its sovereignty:

> Apart from the UN Treaty [UN Charter author], the Philippines has entered into many other international pacts — both bilateral and multilateral — that involve limitations on Philippine sovereignty. These are enumerated

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[278] Mem. Cir. No. 89, s. 1988, *Providing for the Procedure for the Determination of International Agreements as Executive Agreements*:

"In the event of any serious question as to whether an international agreement is a treaty which should be submitted to the Senate for concurrence, or an executive agreement which does not require such concurrence, the matter should be brought to the attention of the Secretary of the Department of Foreign Affairs by a memorandum of the official responsible for the negotiation of said agreement. The said memorandum shall be referred to the Legal Adviser of the said Department and the Assistant Secretary in charge of the liaison between the Department of Foreign Affairs and the Senate, for their comment."

"Whenever circumstances permit, consultation shall be made with the leadership and members of the Senate."

"The Secretary of the Department of Foreign Affairs shall forthwith make the proper recommendation to the President."

Exec. Order No. 459 (1997), *Providing for the Guidelines in the Negotiation of International Agreements and its Ratification*:

"SECTION 9. Determination of the Nature of the Agreement. – The Department of Foreign Affairs shall determine whether an agreement is an executive agreement or treaty."

[279] Batas Blg. 129 (1980), sec. 19(6):

"Sec. 19. Jurisdiction in Civil Cases. – Regional Trial Courts shall exercise exclusive original jurisdiction:

"....

(6) In all cases not within the exclusive jurisdiction of any court, tribunal, person or body exercising judicial or quasi-judicial functions;"

No court possesses exclusive jurisdiction over cases involving the constitutionality of treaties and executive agreements, thus such authority is bestowed upon the Regional Trial Courts.

CONST., art. VIII, sec. 5(2)(a):

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 question.

[280] G.R. No. 118295, May 2, 1997.

> by the Solicitor General in his Compliance dated October 24, 1996, as follows:
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> (a) Bilateral convention with the United States regarding taxes on income, where the Philippines agreed, among others, to exempt from tax, income received in the Philippines by, among others, the Federal Reserve Bank of the United States, the Export/Import Bank of the United States, the Overseas Private Investment Corporation of the United States. Likewise, in said convention, wages, salaries and similar remunerations paid by the United States to its citizens for labor and personal services performed by them as employees or officials of the United States are exempt from income tax by the Philippines.
>
> ....
>
> (k) Multilateral Convention on the Law of Treaties. In this convention, the Philippines agreed to be governed by the Vienna Convention on the Law of Treaties.
>
> (l) Declaration of the President of the Philippines accepting compulsory jurisdiction of the International Court of Justice. The International Court of Justice has jurisdiction in all legal disputes concerning the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of international obligation.'
>
> In the foregoing treaties, the Philippines has effectively agreed to limit the exercise of its sovereign powers of taxation, eminent domain and police power. The underlying consideration in this partial surrender of sovereignty is the reciprocal commitment of the other contracting states in granting the same privilege and immunities to the Philippines, its officials and its citizens.

It is thus necessary to analyze the Philippines' treaty obligations with the US that the Impunity Agreement may validly implement.

1. The 1951 Mutual Defense Treaty

One treaty between the Philippines and the US, of such nature as could serve as the basis of the Impunity Agreement, is the 1951 Mutual Defense Treaty (MDT).[281] The MDT entered into force on August 27, 1952, and is to remain in force indefinitely, or until one year after either party has notified the other of the intention to terminate.[282] A rather brief treaty, consisting of only eight articles, it contains no provision which could be construed as allowing an agreement as to the non-surrender of American "persons" to an international penal tribunal. As the

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[281] 177 UNTS 133.

[282] MDT, art. VIII.

title connotes, the treaty was entered into for both countries to aid each other in times of "external armed attack."[283]

The Mutual Defense Treaty (MDT) was meant to strengthen "present efforts for collective defense for the preservation of peace and security pending the development of a more comprehensive system of regional security in the Pacific area."[284] A perusal of the convention's articles all relate to security against armed attack. This is understandable, given the political milieu at the time. The Philippines was still recovering from the devastatiwrought upon it by World War II. The Philippines clearly intended to maintain strong relations with the US in order that an occurrence such as the Japanese occupation and the resulting destruction and suffering would never happen again.

Article VI of the MDT provides that it "does not affect and shall not be interpreted as affecting in any way the rights and obligations of the Parties under the Charter of the United Nations or the responsibility of the United Nations for the maintenance of international peace and security." Given this limitation, the MDT cannot be a source of authority for the President to sign the Impunity Agreement. As discussed earlier, the Philippines was subjected to economic coercion in order to sign the Agreement, in violation of the UN Charter and customary law. The UN Charter likewise does not countenance the violation of *jus cogens* norms. Article 1(1) of the UN Charter provides that the purposes of the UN includes the maintenance of international peace and security, the prevention and removal of threats to the peace, the suppression of acts of aggression or other breaches of the peace, all in conformity with the principles of justice and international law. *Jus cogens* crimes have accompanied all threats to international peace, such as in World War II, Yugoslavia and Rwanda. The situations in the latter two events were explicitly deemed threats to international peace and security by the Security Council under its Chapter VII powers.[285]

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[283] MDT, preamble, para. 3.

[284] MDT, preamble, para. 4.

[285] Security Council Resolution 827 creating the International Criminal Tribunal for the former Yugoslavia (1992), preamble, paras. 3 and 4:

> "*Expressing once again its grave alarm* at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory,
>
> "*Determining* that this situation continues to constitute a threat to international peace and security."
>
> Security Council Resolution 955 creating the International Criminal Tribunal for Rwanda (1994), preamble, paras. 5 and 6:

Even assuming *arguendo* that the Impunity Agreement was executed pursuant to the MDT, the Philippine government has already impliedly admitted that such an agreement would still require Senate concurrence in order to be valid. The Visiting Forces Agreement (VFA) was entered into explicitly pursuant to the MDT[286] and yet was transmitted to the Senate by deposed President Joseph Ejercito Estrada for ratification in compliance with Article VII, Section 21 of the 1987 Constitution.[287] This indicates that the MDT only provides general obligations of cooperation between the Philippines and the US, and does not provide sufficient authority to the President to incorporate the provisions of the VFA, more so that of the Impunity Agreement, in a mere executive agreement.

2. The 1999 Visiting Forces Agreement

The Visiting Forces Agreement (VFA) itself may be considered as a potential embodiment of national policy which the Impunity Agreement seeks to implement, given that the VFA was duly ratified by the Senate on May 27, 1999 and its constitutionality was recently upheld by the Supreme Court.[288] Article V of the VFA on criminal jurisdiction incorporates the corresponding NATO SOFA provisions that allocate criminal jurisdiction between the sending and receiving states,[289] with no provisions precluding the surrender of American "persons" to the ICC.

Under the VFA, the US possesses exclusive jurisdiction over US personnel "with respect to offenses, including offenses relating to the security of the United States, punishable under the laws of the United States, but not under the laws of the Philippines."[290] While the Philippines has not enacted any laws punishing genocide, war crimes and crimes against humanity, it is a party to all the relevant conventions and treaties punishing these acts.[291] These duly ratified treaties are part of Philippine law, the Philippines following the monist system of law whereby no municipal legislation is necessary to incorporate treaties into the body of municipal law.[292] Furthermore, *jus cogens* norms undoubtedly comprise "generally accepted principles of international law"

"*Expressing once again* its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

"*Determining* that this situation continues to constitute a threat to international peace and security,"

[286] VFA, *supra* note 103, preamble, para. 3: "Reaffirming their obligations under the Mutual Defense Treaty of August 30, 1951"

[287] Bayan v. Zamora, 342 SCRA 449, 466-7 (2000).

[288] *Id.*, at 449.

[289] As with the VFA, the Criminal Jurisdiction provisions of the 1947 US-Philippines Military Bases Agreement are based on the corresponding NATO SOFA provisions. See generally R. Porrata-Doria, Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 MIL. L. REV. 67, 75-78 (1992).

[290] VFA, art. V, sec. 2(b).

[291] See notes 118, 150, 187, 188.

[292] Tañada v. Angara, G.R. No. 118295, May 2, 1997.

which are "part of the law of the land."[293] In this respect, the US does not have exclusive jurisdiction over *jus cogens* crimes, nor may any other country claim to have such. The Philippines possesses territorial and universal jurisdiction over American "persons" found within Philippine territory accused of committing *jus cogens* crimes, including the jurisdiction to surrender them to the ICC. As such, the VFA cannot be construed in such a way as to justify the non-surrender of American "persons" under the Impunity Agreement.

In all other instances aside from the above situations, the authorities of the Philippines and the US shall have concurrent jurisdiction. However, under Article V, Section 3(b) of the VFA, US military authorities shall have the primary right to exercise jurisdiction over US personnel subject to the military law of the US in relation to (1) offenses solely against the property or security of the US or offenses solely against the property or person of US personnel; or (2) offenses arising out of any act or omission done in performance of official duty. Either government may request the authorities of the other government to waive their primary right to exercise jurisdiction in a particular case.[294] The Philippines is mandated to waive its primary right to exercise jurisdiction upon request by the US, "except in cases of particular importance to the Philippines."[295] The determination that cases are of particular importance is to be communicated to the US within twenty (20) days after the Philippines receives the US request. Lastly, if the government having the primary right does not exercise jurisdiction, it shall forthwith notify the authorities of the other government.[296]

The question thus arises as to whether the US possesses the primary right to exercise jurisdiction over acts of genocide, war crimes and crimes against humanity committed by American "persons" when carried out solely against American personnel or when performed in the course of official duty. These situations do not grant exclusive jurisdiction to the US. The US is merely given a preferential right to exercise jurisdiction upon request. The Philippines is still allowed to exercise jurisdiction in cases it deems particularly important. Cases involving genocide, war crimes, or crimes against humanity, given their *jus cogens* character, quite naturally constitute cases "of particular importance" not only to the Philippines, but to the entire international community, even if such acts are solely against American personnel. The situation becomes all the more relevant to the Philippines when such atrocities are committed in its territory, and even more so when the acts are committed in the course of official duty of US personnel. Consequently, as the Philippines cannot be obligated to waive its sovereign right to exercise jurisdiction over *jus cogens* crimes, the VFA cannot be interpreted in such manner as would mandate the Philippines to do so. Corollarily, President Gloria Macapagal-Arroyo cannot point to the VFA as a source of authority

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[293] CONST., art. II, sec. 2.
[294] VFA, art. 3(c).
[295] VFA, art. 3(d).
[296] VFA, art. 3(e).

for the Impunity Agreement's provisions preventing the surrender of American "persons" to the ICC or to third states which will surrender said persons to the ICC.

The VFA and the Impunity Agreement differ in terms of the individuals they cover. "United States personnel" are defined under Article 1 of the VFA as "United States military and civilian personnel temporarily in the Philippines in connection with activities approved by the Philippine Government." US military personnel pertain only to military members of the US Army, Navy, Marine Corps, Air Force and Coast Guard. US civilian personnel, on the other hand, refer to "individuals who are neither nationals of nor ordinarily resident in the Philippines and who are employed by the United States armed forces or who are accompanying the United States armed forces, such as employees of the American Red Cross and the United States Services Organization." The coverage of the VFA is thus much more limited than that of the Impunity Agreement. The latter covers all American "persons," including current or former US government officials, even if they do not accompany US armed forces; employees of the US, including contractors, regardless of nationality; and all American nationals, including those not employed by or accompanying US armed forces, as well as mere transients. In this regard, the VFA cannot authorize the president to enter into an executive agreement preventing the Philippines from surrendering individuals, especially those in whom the US possesses no or little interest in protecting, to the ICC.

The Impunity Agreement cannot be construed to be an exercise of the US' primary right to exercise jurisdiction as it does not apply solely to the US personnel and the situations covered by the VFA. Even if the officials involved are covered by the VFA, there can be no predetermination that such acts arise out of official duty. Under the VFA, the US military commander is to issue a certificate attesting to the official nature of the acts of the accused, and transmit it to the Philippine authorities.[297] Subsequently, the Philippine authorities may require a review of the duty certificate, leading to consultations between US and Philippines authorities.[298] Clearly, a case-to-case determination must be made as to the official nature of the actions involved and cannot be categorized beforehand.

Moreover, the "official acts exception" does not prevent surrender to and prosecution by the ICC. As noted earlier, the US' attempt to insert such an exception into the Rome Statute during the Rome Conference was rejected.[299] As history has demonstrated, majority of the *jus cogens* crimes committed in the past were committed or sanctioned by political authorities, leading to impunity as the perpetrators were protected by the latter. As such, exempting acts of this sort would run counter to the objective of ending impunity with which such crimes are committed. Indeed, it would be ironic for acts committed in the course of official duty to be subject to the exclusive

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[297] VFA, art. 3(e).

[298] VFA, art. 3(e).

[299] See discussion on p. 471.

or even primary jurisdiction of the US, to the exclusion of the ICC, when it is in fact within such situations that acts shocking the conscience of humanity are made possible. One man or even a band of murders may embark on a killing spree to claim the lives of several, or maybe scores of individuals before being subdued. However, the number of victims multiply a thousand fold when sponsored or sanctioned by the ste or by a powerful oppositionist political group. Consequently, the Rome Statute explicitly provides that the accused individual's official capacity does not bar the ICC from assuming jurisdiction over his person.[300]

Significantly, the Impunity Agreement does not even refer to the exercise of jurisdiction by the US, whether exclusive or primary. It embodies a limitation upon the Philippines' exercise of jurisdiction, with no indication of assumption of jurisdiction by the US over the accused individuals. The VFA allows the American "persons" to be prosecuted in the Philippines or in third states, as long as such prosecutions will not result in their surrender to the ICC. In this regard, the VFA provisions on the primary right of the US to exercise jurisdiction likewise cannot be construed as treaty provisions which the Impunity Agreement implement in the form of an executive agreement.

In sum, it is evident that the VFA, like the MDT, cannot be referred to as an embodiment of national policy that the Impunity Agreement merely executes. The VFA and the Impunity Agreement are incompatible on many points. Consequently, the Impunity Agreement cannot be considered an executive agreement that is valid even without Senate ratification. It is void for having failed to comply with Article VII, Section 21 of the 1987 Constitution. Nonetheless, even if the Impunity Agreement were to be ratified by the Senate, it would still be void for having violated international law. An act that is illegal under international law remains as such despite lawfulness under municipal law.[301]

CONCLUSION

We live in an exciting age, wherein the notion of a *civitas maxima* is becoming a reality. The United Nations, considered by many during the Cold War era to be an

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[300] Rome Statute, art. 27, on "Irrelevance of official capacity" provides:

"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."

[301] ARTICLES OF STATE RESPONSIBILITY, *supra* note 167, art. 3.

"The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

inutile yet expensive bureaucracy, is becoming increasingly relevant in international affairs. The UN Security Council, despite its political shortcomings, has been aggressive and creative in the use of its Chapter VII powers to maintain international peace and security. International law is beginning to mirror municipal law, wherein more rules and regulations are being effectively enforced. The Camelot-like dream embodied in the UN Charter is taking shape, limiting the freedom with which individual states may act on the international plane. Despite the emergence of unilateralism in its most deplorable form in the past year, it is clear that there exists a community of nations willing to act together to oppose such unilateralism, even if such opposition failed to stem such bullishness.

The establishment of the International Criminal Court stands testament to this enlightened international community. Despite all the political obstacles in the path of the creation of this Court, the desire to prevent and punish *jus cogens* crimes prevailed. The *civitas maxima* has spoken, wanting to ensure that individuals may be held accountable for their grave crimes in spite of the inability or unwillingness of their country's own courts to prosecute them. While these crimes have long been punishable by treaties and customary law, such punishment was largely theoretical and rarely effected. The ICC has changed all that; it has made real and omnipresent the possibility of punishment, and leaders of states guilty of such crimes can no longer hide behind the cloak of their positions and corresponding powers and immunities. International criminal law is fast evolving, and the Philippines and the US should aid such development rather than hinder it. Unfortunately, it appears that the Philippines, along with the US, refuses to be part of the world of civilized nations. The Philippines, by entering into an Impunity Agreement with the US, has dealt a severe blow upon the effectivity of the ICC. The Philippines should stop kowtowing to US self-interest and act as the sovereign nation it is and should be. Such an agreement is void under both international law and municipal law, and the Philippines should waste no time in revoking it. Most importantly, as a signatory to the Rome Statute, the Philippines should forthwith ratify this treaty and join the community of nations in putting an end to the impunity with which genocide, war crimes, crimes against humanity, and crimes of aggression are committed.

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