

## PROSECUTING THE PRESIDENT: WHAT IS, AND WHAT CAN BE\*

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Mine is a democratic country. When Martial Law was imposed in the 1970s, the Filipinos, in the face of threats to life and liberty, fought hard for their rights and freedom against tyranny. Three decades later, their cherished hard-won rights are again on the brink of falling over the edge of a precipice, *only* to be swallowed up by a sea of greed, corruption, and avarice of politicians and public administrators.

Under the administration of Gloria Macapagal-Arroyo, Filipino activists and militants have been killed.<sup>1</sup> The increase in the number of extrajudicial killings was so disturbing that it alarmed not only the country's civil society groups, but also the international community. Eventually, the administration felt pressured to investigate the killings leading to the constitution of three (3) working groups.<sup>2</sup> Among these was the Independent Commission to Address Media and Activist Killings, more popularly known as the "Melo Commission."<sup>3</sup> On the other hand, the Supreme Court of the Philippines, in an unprecedented move, convened a National Summit<sup>4</sup> to brainstorm a role for the judiciary to address this human rights crisis. It was a groundbreaking move by the Court, paving the way for the promulgation of the Writs of *Amparo*<sup>5</sup> and *Habeas Data*.<sup>6</sup>

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<sup>1</sup> Amnesty International, *Philippines: Political Killings, Human Rights and the Peace Process*, ASA 35/006/2006, (Jan. 15, 2006).

<sup>2</sup> *Id.*; Fides Angeli Sabio, *Where the Buck Stops: Command Responsibility in Extrajudicial Killings – Educating Reasonable Standards for Imposing Criminal Responsibility Liability on Responsible Military Officers*, 54 ATENEO L.J. 164, 170-173 (2009).

<sup>3</sup> Adm. Order No. 157 (2006).

<sup>4</sup> National Consultative Summit on Extrajudicial Killings and Enforced Disappearances Searching for Solutions Centennial Hall, Manila Hotel, Philippines, Jul. 16-17, 2007, *see* summation at <http://sc.judiciary.gov.ph/publications/summit/summation1.pdf>

<sup>5</sup> RULE ON THE WRIT OF AMPARO, A.M. No. 07-9-12-SC, Sep. 25, 2007.

<sup>6</sup> RULE ON THE WRIT OF HABEAS DATA, A.M. No. 08-1-16-SC, Jan. 22, 2008.

However, until the present day, no one has been prosecuted or made accountable to the extrajudicial killings and enforced disappearances. This is despite the findings of the Melo Commission which unequivocally implicated elements of the Philippine Army. The explanation partly lies in the intricate Medusa's lair of Philippine politics where justice and accountability are always trapped in. Rocked by numerous scandals, President Arroyo's almost decade-long stay in power is a constant struggle to cling to the throne. Following the distortion of EDSA I, the second so-called People Power revolution unconstitutionally overthrew the incumbent movie star President, and installed Arroyo in power. Arroyo's term underscored the pivotal, well-nigh importance of the Armed Forces of the Philippines for a universally disliked President, so much so that she paid homage and dispensed feudal gifts to influential military officers. What more a criminal prosecution? The impeachment of the President to remove her immunity from suit sizzles, then fizzles like an antacid dropped on stale water, thanks to her numerous allies in the House of Representatives who would block any move for such process. This loyalty will of no doubt lead to more projects, more houses, more shares of stocks – money, for the loyal dogs.

The other part of the explanation stems from the inadequate legal mechanisms in place to actually prosecute the person most responsible for the acts of the perpetrators – the President. Under our system of government, the President is not only the head of State, but also the Commander-in-Chief of the Armed Forces. Hence, she has direct control over the whole military, some elements of which have been continuously pointed at as directly liable for the killings and disappearances. She also has knowledge, or at least, consciously disregarded information, that indicated her subordinates committing these atrocities. We need not even look very far than the act of the President herself, in creating the Melo Commission, of which its report, furnished to the President, directly implicated a military officer. The President obviously failed to take all necessary and reasonable measures within her power to prevent or even repress the commission of these crimes. She twice promoted the said military commander, and in her 2006 State of the Nation Address, publicly commended him. She neither initiated any criminal prosecution against those responsible for the crimes, nor did she exert any effort to compel the prosecution machinery of the State to prioritize investigation and punishment of perpetrators of the crimes.

The foregoing shows the President's liability on the basis of superior responsibility under international law. Pursuant to Article II, section 2 of the 1987 Constitution, international law forms part of Philippine law through incorporation. This notwithstanding, President Arroyo is immune from prosecution, by constitutional fiat, at least until June 2010. Furthermore, another question is what crimes to charge her with? Enforced disappearances, murder and extermination as

crimes against humanity are already part of customary international law, and following *Kuroda v Jalandoni*<sup>7</sup> should be considered domestic law. Yet, the practical difficulties remain for the judiciary, especially the lower courts, to prosecute persons by resorting to international law standards which they are not familiar with. More remarkably, the President's carrot and stick tactic has reached far and beyond her executive domain and into the other separate branches of the government. Corruption has made justice put up the for sale sign, while political horse-trading decides when justice is to be dispensed with – almost always not for the powerful.

It has been suggested by numerous sectors that the President's crimes should be brought to the International Criminal Court where the defense of immunity will not be a bar to her prosecution. The problem with this is simple: ratification. The Supreme Court decision in *Pimentel, Jr. v Executive Secretary*<sup>8</sup> resulted in the failed attempt for Senator Pimentel, through a *mandamus*, to compel the Office of the Executive Secretary and the Department of Foreign Affairs to transmit the Rome Statute to the Philippine Senate for ratification. The High Court ruled that the signature of a State's representative does not signify the final consent of the State to the Treaty. It is by ratification where a State expresses its willingness to be bound by the provisions of a Treaty. The President has the discretion even after signing the treaty to have it ratified or not, which is an executive act. Unfortunately, the Filipino people have time and again experienced that the President's discretion is an ugly thing, exercised not for the good of the People, but for herself and her allies.

Before we all subscribe to fatalism, there is hope for the future. The Philippine National Red Cross International Humanitarian Law National Committee drafted a legislative bill to implement the IHL, heavily modeled on the 1998 Rome Statute. The bill was passed as law just December of last year, entitled "An Act Defining And Penalizing Crimes Against International Humanitarian Law, Genocide And Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, And For Related Purposes."<sup>9</sup> This new law, Republic Act No. 9851, fleshes out concretely the crimes under the Rome Statute and customary international law as part of Philippine law and provides for penalties for their violation.

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<sup>7</sup> No. 2662, 83 Phil. 185, Mar. 26, 1949.

<sup>8</sup> G.R. No. 158088, 462 SCRA 622, Jul. 6, 2005.

<sup>9</sup> Rep. Act. No. 9851 (2009). This is the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity.

R.A. No. 9851 defines and penalizes war crimes, genocide and crimes against humanity. It also provides for “superior responsibility,” “irrelevance of official capacity,” “superior orders” and “almost universal jurisdiction.” In the context of the unresolved killings and enforced disappearances, the Philippines will finally have an opportunity to prosecute within its own soil, those guilty of atrocities committed within its territory and against its people. In terms of logistics, this will mean less expense, availability of witnesses, and easy retrieval of evidence. The significance of this law cannot be understated. Aside from the problem of extrajudicial killings and enforced disappearances, the Philippines in 2008 has seen a major outbreak of armed hostilities between the Moro Islamic Liberation Front (MILF) and the Armed Forces of the Philippines (AFP), following the aborted signing of the Memorandum of Agreement on Ancestral Domain (MOA-AD). More than that, for four decades, our government has been engaged in armed conflict against the New People’s Army (NPA). Top that with the recent “Maguindanao Massacre” that killed more than 50 people, of which at least 37 were journalists.

Much hope lies with the people serving in the Prosecution Department, and in the Judiciary not to reduce R.A. No. 9851 as a mere scrap of waste paper. The President must be brought to answer for all the things she has done or allowed to be done lest the Philippines become a country ruled not by the People, but by impunity. It is my dream that soon, *what can be* done to bring justice to the victims will actually be *what is*.

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