NOT ALL ROADS LEAD TO ROME: PHILIPPINE OFFICIAL IMMUNITIES AND THE ROME STATUTE*

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ABSTRACT

This paper discusses the interplay between the Rome Statute of the International Criminal Court and the domestic law of the Philippines with respect to sovereign immunity. In particular, it questions whether the Philippines has complied with international obligations following its ratification of the Rome Statute in 2011. Following a discussion on the concepts of official immunity and presidential immunity in Philippine jurisprudence, the paper focuses on the use of sovereign immunity as a bar to prosecution for human rights violations and other international crimes. The running theme is how sovereign immunity is an integral tool in a state's mythmaking process.

"The idea that you surrender your identity when you relinquish national powers is unhelpful. No, indeed, precisely the opposite is the case: if done in an intelligent way, you attain the sovereignty to better solve national problems in cooperation with others."

—Ulrich Beck[1]

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[1] Interview with Ulrich Beck, *in Muslim Societies and the Western World Can No Longer Be Considered to Be Separate Entities*, Qantara.de, *at* http://en.qantara.de/content/ulrich-beck-muslim-societies-and-the-western-world-can-no-longer-be-considered-to-be (last visited Apr. 29, 2014).

PROLOGUE

Monday mornings in schools across the Philippines offer a glimpse of the elaborate military marches and well-choreographed protestations of support for the Great Leader of North Korea or *Der Führer* of Nazi Germany, albeit on a much smaller and less sophisticated scale. Upon hearing the first notes of the National Anthem, Filipino eight year-olds stand in attention, right hands on left chests, looking in the direction of the national flag and singing of the joy of being given the opportunity to die in the name of their *Lupang Hinirang*. Whether these schoolchildren understand the gravity of what they sing during schoolyard ceremonies is not nearly as important as being taught that they belong to something great, a body politic much bigger than their families, their group of playmates, or their neighborhoods. The consciousness of Philippine Statehood, both majestic and mythical, is ingrained in the minds of most Filipinos from a very young age.

The initial comparison of the Philippines, North Korea and Nazi Germany may be a little out of line. But at the end of it all, why the Philippines does not carry out the intense and incessant marching and relentless leader-praising in North Korea and the former German Reich under the Nazis is an essential part of how all three countries choose to portray their State as bodies politic. The self-characterization of the State as a compulsory political association of human beings has been an ongoing project shaped through centuries of historical development. Through its own project of characterization, the State generates, consciously or otherwise, an image which it projects to both the individual and the international community. This image—consisting of, among others, the State's ideals, its preconceived notions of right and wrong, its institutions, its laws, and its relationship with the persons subject to its coercive authority—is a necessary consequence of its formidable capability to affect, alter, or end human life within the confines of its territorial jurisdiction. Through the reinforcement of this image, the State is able to set limits on permissible individual human attitudes, encourage human endeavors, or hinder them altogether.

The Peace of Westphalia was instrumental in crystallizing this admittedly proud image of the State within the purview of the then newly emerging concept of sovereignty. As a basic example, a State's choice to characterize itself as a Republic, a Kingdom, or a Union of autonomous, self-governing "States" definitely affects how it comports with other states and individuals subject to its sovereign authority.

Before the progressive developments of the mid-nineteenth century, it sufficed that the State was capable of political survival: protecting itself from enemy invasions, acquiring more territory and resources for its people, establishing trade and foreign relations, etc. For a great portion of recorded history, much of human physical and psychological energies were heavily channeled into the unobstructed carrying out of the State's endeavors. Those who dared, on the strength of their personal convictions, to trammel with or refuse to participate in the process have suffered in many ways, to the extent of losing their lives. Wars were waged in the name of one's sovereign State, alliances were forged, and colonies were established.

Several centuries later, sovereign States began allowing their citizens "concessions," albeit mainly by way of exception. Eventually, such concessions developed and became entrenched within national legal systems, forming what are now legally-enforceable rights.

When the Philippines finally ratified the Rome Statute of the International Criminal Court ("Rome Statute") on November 1, 2011, many applauded the move. Arguably considered to be "the most important institutional innovation since the founding of the United Nations"[2] and the culmination of international law-making of the twentieth century,"[3] the Rome Statute is expected to address the issue of accountability for serious international crimes of individuals separately and distinctly from the responsibility of their States. The Rome Statute represents a major departure from the traditional Westphalian concept of statehood. But even as many have hailed it as major progress in the matter of enforcing respect for human rights across the world, one can still cast doubt as to its viability.

The first among these concerns is the readiness of States to apply human rights norms other than those recognized under their domestic law. The State, often portrayed as an ideal being, has shielded itself from embarrassment in its political relations using immunities intended to bar the "forced submission of one sovereign to the jurisdiction of another," as Marasinghe observes."[4] However, Marasinghe is quick to add that such a theory of state dignity

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[2] Sen. Miriam Defensor-Santiago, *The Rome Statute of the International Criminal Court,* Sponsorship Speech as Chair of the Subcommittee on the Rome Statute of the International Criminal Court (Aug. 16, 2011), *available at* http://www.senate.gov.ph/press_release/2011/0816_santiago2.asp (last visited Apr. 29, 2011).

[3] Marc Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78 INT'L AFFAIRS 693, 693 (2002).

[4] Lakshman Marasinghe, *The Modern Law of Sovereign Immunity*, 54 MOD. L. REV. 664, 666 (1991).

"supports an absolutist view of sovereign immunity,"[5] therefore making such a theory inadequate in offering a plausible explanation as to States behavior with respect to treaties creating international tribunals for criminal acts, such as the Rome Statute. The State may welcome developments in international law, but only insofar as these developments may be reconciled with its own self-generated myth.

This essay shall focus on the actual value of the terms and consequences of Article 27 of the Rome Statute in the light of well-settled legal truisms with respect to Philippine sovereign and official immunities. The provision reads:

> *Irrelevance of official capacity*
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> (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.*[6]

Given the terms of the above provision, it appears counter-intuitive for any state to ratify the Rome Statute, since it runs afoul of the well-entrenched immunity of the State from standing in prosecution for its acts before other national courts. Describing Article 27 of the Statute as revolutionizing centuries of state practice and drawing from the experiences of both post-war and contemporary war crimes tribunals, Scheffer and Cox noted:

> [S]ince the ICC essentially focuses on leadership crimes it would be incompatible with the purpose of the Court to permit the highest leaders of a government, engaged in the planning an execution of atrocity crimes, to avoid persecution while subordinates were held accountable.[7]

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[5] *Id.* at 667.

[6] Rome Statute of the International Criminal Court, July 17, 1998 [hereinafter "Rome Statute"], art. 27, *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_ english.pdf (last visited Apr. 29, 2014). (Emphasis supplied.)

[7] David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOL. 983, 1056 (2008). (Citations omitted.)

Article 27 has been substantially reproduced in Section 9 of the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity ("PIHL Act"),[8] which was enacted prior to the Senate's concurrence in the ratification of the Rome Statute. Section 9 recognizes by exception that the immunities of the President during his or her term of office as well as other official immunities existing *under international law* may limit the application of the PIHL Act.[9] In 2009, Section 9 appeared to make perfect sense, resulting in the passage of the law. However, the Philippines' ratification of the Rome Statute in 2011 potentially created friction between its domestic law and its obligations under international law. Such tension, this author suggests, is unlike any other interplay between international law and Philippine domestic law, for this one goes into the very manner through which the Philippine State *characterizes* itself. It raises the existential question: in terms of the domestic law, just how irrelevant can the Philippine State allow official capacity to be with respect to violations of human rights?

I. BREACHING THE WALLS OF IMMUNITY: THE ARTICLE 27 CHALLENGE IN PHILIPPINE LAW

One of the most obvious difficulties to be encountered in the implementation and enforcement of Article 27 of the Rome Statute is that it carries the realistic necessity of effecting constitutional amendments to bring the States Parties into full compliance. Simply stated, there arise concerns regarding

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[8] Rep. Act No. 9851 (2009) [hereinafter "PIHL Act"], § 9.

[9] *Id.* The provision reads:

> *Irrelevance of Official Capacity.*—This Act 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 Act, nor shall it, in and of itself, constitute a ground for reduction of sentence. However:
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> (a) Immunities or special procedural rules that may be attached to the official capacity of a person under Philippine law other than the established constitutional immunity from suit of the Philippine President during his/her tenure, shall not bar the court from exercising jurisdiction over such a person; and
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> (b) Immunities that may be attached to the official capacity of a person under international law may limit the application of this Act, nut only within the bounds established under international law.

the provision's compatibility with existing constitutional frameworks of States,[10] such as the Philippines. In States Parties with constitutional monarchies, such as Spain and Belgium, where the King's person is constitutionally inviolable and not subject to accountability under domestic law, the Article 27 dilemma is pronounced.

To counter the rather intrusive effects of Article 27 on national sovereignty, the Rome Statute recognizes the principle of complementarity, or the primacy of a State's national jurisdiction over that of the International Criminal Court (ICC) with respect to the prosecution of international crimes.[11] In support of this principle, the Rome Statute provides four instances in which a case is considered inadmissible for adjudication before the ICC:

> (a) The case is being investigated or prosecuted by a State having jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or the prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and such State decides not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person has already stood trial for the conduct subject of the complaint (i.e. the *ne bis in idem* principle); and
> (d) The case is not of sufficient gravity to justify further Court action.[12]

Notably, the exceptions to these instances of inadmissibility critically hinge upon the finding of a genuine unwillingness or inability of the State to prosecute offenders, which triggers the operation of the jurisdiction of the ICC. This author submits that such a standard could very well vary in each case insofar as it is couched in rather ambiguous terms.

An additional counterbalancing measure is incorporated in the Rome Statute in its Article 98. The provision is reproduced in full below:

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[10] Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT'L L. 5 (2001).

[11] Rome Statute, preamble, ¶¶ 6, 10.

[12] Rome Statute, art. 17(1).

> ARTICLE 98
> *Cooperation with respect to waiver of immunity and consent to surrender*
>
> (1) The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
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> (2) 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.

While Article 27 does not bar the ICC from assuming jurisdiction over the persons of officials with recognized international immunity, Article 98 proscribes the Court from proceeding in such manner that "would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State[.]"[13] But even with Article 98 under consideration, Article 27 leaves room for a contrary construction. In fact, to completely eradicate doubts about the availability of international immunities for state officers prosecuted by the ICC, the express language of Article 27(2) "shall not bar the Court from exercising its jurisdiction over" a person on account of "[i]mmunities or special procedures which may attach to [his] official capacity."[14]

Notwithstanding pragmatic safeguard mechanisms installed in the Rome Statute through Articles 17 and 98, the principle of complementarity, to be fully operationalized and appreciated within the premises of the Rome Statute, may require States Parties to "enhance the national jurisdiction over the core crimes prohibited in the Statute, and to *perfect a national legal system so as to meet the needs of investigating and prosecuting persons who committed the international crimes listed in the Statute.*"[15] While Article 17 is an express recognition of the primacy of national jurisdiction in international criminal offenses, it implicitly exerts political

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[13] Rome Statute, art. 98; Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 420 (2004).

[14] Akande, *supra* note 13, at 420.

[15] Lijun Yang, *On the Principle of Complementarity in the Rome Statute of the International Criminal Court*, 4 CH. J. INT'L L. 121, 122 (2005). (Emphasis supplied.)

pressure upon States Parties to bring domestic legislation in alignment with the terms of the Rome Statute.

The pressure to legislate in accordance with treaty commitments is not a new phenomenon in the Philippines. For instance, the Congress enacted the Baselines and Territorial Sea Act in order to conform to the terms of Article 121 of the United Nations Convention on the Law of the Sea ("UNCLOS"), which the Philippines is a State Party to.[16] In addition, the Philippine Constitution expressly "adopts the generally accepted principles of international law as part of the law of the land".[17] While conformity with the UNCLOS might prove useful in furthering and securing Philippine territorial claims in the West Philippine Sea and is not inimical to the sovereign character of the Philippine State, it is submitted that the same situation does not obtain with Article 27 in relation to Article 17 of the Rome Statute. Toon makes the important observation that Article 27 clearly contravenes the terms of a prior treaty, the 1961 Vienna Convention on Diplomatic Relations, which grants diplomatic immunities to government representatives of foreign states. Under these circumstances, she writes, a State "runs the risk of breaching an earlier commitment."[18] The Philippines, it must be stated, is a party to both the 1961 Vienna Convention and the Rome Statute.

In the context of the Philippine legal framework, the doctrine of state immunity is an express Constitutional declaration under Article XVI, Section 3, which states that "[t]he State may not be sued without its consent."[19] Such immunity traces its roots from the "logical and practical ground that there can be no legal right against the authority that makes the law on which the right depends."[20] In a decision penned by Justice Lucas Bersamin in 2011,[21] the Supreme Court explained the most compelling rationale behind Article XVI, Section 3:

> A continued adherence to the doctrine of non-suability is not to be deplored for as against the inconvenience that may be caused private parties, the *loss of governmental efficiency and the obstacle to the performance of its multifarious functions* are far greater if such a

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[16] Rep. Act No. 9522, § 2 (2009).

[17] CONST. art II, § 2.

[18] Valerianne Toon, *International Criminal Court: Reservations of Non-State Parties in Southeast Asia*, 26 CONTEMP. S.E. ASIA 218, 225 (2004).

[19] CONST. art. XVI, § 3.

[20] Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

[21] Air Transportation Office v. Spouses Ramos, G.R. No. 159402, 644 SCRA 36, Feb. 23, 2011.

> fundamental principle were abandoned and the availability of judicial remedy were not thus restricted. *With the well-known propensity on the part of our people to go to court, at the least provocation, the loss of time and energy required to defend against law suits, in the absence of such a basic principle that constitutes such an effective obstacle, could very well be imagined.*[22]

Viewed from the standpoint of governmental efficiency, the immunity of the State from suit becomes a convenient shield against litigation for suits, civil or otherwise. Even if exceptions can be made from the instances of inadmissibility of cases under Article 17 of the Rome Statute, one wonders whether the exceptions are operational when all of the instances are couched in terms of *investigation, prosecution,* or *cases.* In other words, the exceptions presuppose that there was prior recourse to the domestic judicial system, which under the existing domestic law is generally programmed to discourage suits against the sovereign. Unless it should favor the interests of the prosecuting State, there is actually little incentive "for States to prosecute their own nationals for crimes perpetrated against the people of another State, especially one with which they are at war."[23] Actual prosecutions for international crimes are few and far in between.[24]

Importantly, in the event that a suit against the State is allowed to prosper, a favorable judgment obtained therein does not necessarily mean that its execution immediately follows. In the case of *National Home Mortgage Finance Corp. v. Abayari*[25] and later *Agra v. Commission on Audit*,[26] the Supreme Court held that while a government-owned and controlled corporation ("GOCC") may not escape the adverse effects of a judgment against it in the guise of the State's immunity from suit, the monetary awards made therein are not readily executable against the GOCC for the simple reason that prior to execution, the funds to be used in the satisfaction of such monetary awards retain their public character. An affirmative act is required of the State in order to produce satisfaction of the claim. The judgment creditor must file his favorable judgment with the Commission on Audit, as a monetary claim before it is allowed. In both

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[22] *Id.* at 42, *citing* Providence Washington Insurance Co. v. Republic, G.R. No. 26386, 29 SCRA 598, 601-602, Sept. 30, 1969. (Emphasis supplied.)

[23] Melissa Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute,* 49 DUKE L.J. 825, 826 (1999).

[24] *See generally* John Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders*, 324 INT'L REV. RED CROSS 445 (1998).

[25] G.R. No. 166508, 602 SCRA 242, Oct. 2, 2009.

[26] G.R. No. 167807, 661 SCRA 563, Dec. 6, 2011.

cases, the shielding of public funds from judicial garnishment and execution is a concrete manifestation of the immunity of the State from suit.

The 1988 case of *Sanders v. Veridiano* offers some solace, albeit via *obiter dictum*.[27] Sanders was the Special Services Director of the United States Naval Station in Olongapo City. In 1975, he advised Anthony Rossi and Ralph Wyers, who were employed as game room attendants in the Special Services division in a full-time capacity, that their employment had been converted into a part-time capacity. The Commanding General of the Naval Station, A.S. Moreau, explained in a letter the reason behind the change in the employment of Rossi and Wyers. The letter prompted Rossi and Wyers to sue Sanders and Moreau for libel. Sanders and Moreau interposed the defense that the act was performed in the discharge of their official duties and therefore the court had no jurisdiction on account of the non-suability of the United States. While the Supreme Court ultimately dismissed the complaint on the ground of the immunity of the United States from suit, it recognized that the mere invocation of the official character of an act does not suffice to insulate the official "from suability and liability for damages for an act imputed to him as a personal tort committed without or in excess of his authority."[28] Further, the Court also held by way of exception that the doctrine of state immunity "cannot be used as an instrument for perpetrating an injustice."[29]

However, one must not lose sight of what *Sanders* is good for: it illustrates how the immunity of the State from suit is used by the State's officers, agents, functionaries or instrumentalities to shield themselves from litigation arising from or on account of official conduct. Official immunity, according to De Leon and De Leon, grounds itself upon the necessity of (1) the "promotion of fearless, vigorous, and effective administration of policies for government"; and (2) the eradication of the fear of suit which "could also deter competent people from accepting public office."[30] While it is settled that official "immunity from suit cannot institutionalize irresponsibility and non-accountability, nor grant a privileged status to a public officer found to have acted beyond the scope of their jurisdiction or authority,"[31] a problem arises when good faith in the execution of official duty is actually interposed as a defense to evade criminal liability.

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[27] G.R. No. 46930, 162 SCRA 88, June 10, 1988.

[28] *Id.* at 94.

[29] *Id.* at 97. (Citations omitted.)

[30] DE LEON & DE LEON, JR., THE LAW ON PUBLIC OFFICERS & ELECTION LAW 268 (2011).

[31] Chavez v. Sandiganbayan, G.R. No. 91391, 193 SCRA 282, Jan. 24, 1991.

Aside from the immunity of the State from suit as provided for in Article XVI of the Constitution, the conceptual development of official immunity is largely left to the Supreme Court, which creates jurisprudence that forms part of the legal system of the Philippines.[32] Very much different from the ordinary immunity granted to officials and functionaries of the Philippine government, the immunity of the *President* from suit during his tenure is a well-settled doctrine in Philippine jurisprudence, albeit not expressly provided in the Constitution. Interestingly, until the enactment of the PIHL Act in 2009, presidential immunity from suit was not expressly provided in statutes. Dean Agabin writes that the doctrine of absolute presidential immunity

> is a judge-made creation of the common-law, conveniently tacked onto the sovereignty of the state. In other words, the law of privilege as a defense to damages actions against officers of the Government has in large part been part of judicial legislation.
>
> Before the judges created this privilege, not only was there no doctrine of immunity from suit, but *the courts were even harder on public officers who committed positive wrongs.* As late as 1703, Chief Justice Holt of England ruled in one case that *"if public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from like offenses."*[33]

Presidential immunity from suit is a legacy of the Spanish and American legal systems carried over into this jurisdiction through centuries of colonial rule. Such immunity, even if couched as absolute, is of qualified applicability in the American sense.[34] However, as Agabin discusses, the Philippines fashioned presidential immunity "so as to shield the President not only from civil claims but also from criminal cases and other claims" and "enlarged its scope so that it would cover even acts of the President outside the scope of official duties," seeking to "do the Americans one better by enlarging and fortifying the absolute immunity concept".[35]

In the case of *Rubrico v. Macapagal-Arroyo,*[36] Lourdes Rubrico alleged that a group of armed men belonging to the 301st Air Intelligence and Security

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[32] CIVIL CODE, art. 8.

[33] Pacifico Agabin, *Presidential Immunity and All the King's Men: The Law of Privilege as a Defense to Actions for Damages*, 62 PHIL. L.J. 113 (1987). (Emphasis supplied; citations omitted.)

[34] *See* Nixon v. Fitzgerald, 451 U.S. 731 (1982).

[35] Agabin, *supra* note 33, at 114.

[36] G.R. No. 183871, 613 SCRA 233, Feb. 18, 2010.

Squadron abducted her while she was attending a Lenten *pabasa* in Dasmariñas, Cavite. For one week, she was relentlessly interrogated by hooded individuals with what she described as verbal abuse and mental harassment. She also claimed that an officer of the Air Force harassed her daughters. Rubrico was released only after she signed an agreement to become an asset for the military. On two separate occasions after her release, Rubrico alleged that she was followed by men on board motorcycles who wore bonnets. Seeking an end to the threatening acts against the security of her person and her family, she filed an original petition for a writ of *amparo* before the Supreme Court, impleading former president Gloria Macapagal-Arroyo and high-ranking officers of the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP). The high tribunal referred Rubrico's petition to the Court of Appeals, which dismissed the petition with respect to AFP Chief of Staff General Hermogenes Esperon and PNP Police Director General Avelino Razon, and dropped President Arroyo as party-respondent.

In her recourse to the Supreme Court, Rubrico raised the issue as to the propriety of the appellate court's dropping of President Arroyo as party-respondent in her petition for writ of *amparo*. Rubrico contended that the 1987 Constitution had removed the immunity previously enjoyed by the President under the 1935 and 1973 Constitutions. Justice Presbitero Velasco, Jr., writing for the Court, cited the following ruling from the same Court's 2006 decision in *David v. Macapagal-Arroyo:*

> Settled is the doctrine that *the President, during his tenure of office or actual incumbency, may not be sued in any civil or criminal case, and there is no need to provide for it in the Constitution or law.* It will degrade the dignity of the high office of the President, the Head of State, if he can be dragged into court litigations while serving as such. Furthermore, it is important that he be freed from any form of harassment, hindrance or distraction to enable him to fully attend to the performance of his official duties and functions. Unlike the legislative and judicial branch, only one constitutes the executive branch and anything which impairs his usefulness in the discharge of the many great and important duties imposed upon him by the Constitution necessarily impairs the operation of the Government.[37]

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[37] David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 224, May 3, 2006. (Emphasis supplied; citations omitted.)

On a side note, *Rubrico* took into consideration the fact that, at the time the decision was promulgated, the Philippines had yet to ratify the Rome Statute.

The characterization of presidential immunity from suit is stable in Philippine jurisprudence. It takes into account the high dignity that the Philippine State accords upon its chief executive, a dignity which is inextricably linked to how the State views itself. The dignities attached by law to the office of the President, as part of the State's mythmaking, are given actual form (and a strong one) through the immunities created for the office by law and jurisprudence. In fact, while the government of the Philippines is dressed in the American presidential form, the philosophical underpinnings of the immunities of the President may be found in the anachronistic and outdated pomp of absolute monarchies. As Scheuerman observes, even as modern democracies boast of the progressive concept of separation of powers, "only a monarchical executive outfitted with the requisite majesty and dignity could guarantee an effective independent executive and thereby preserve a 'balanced' government."[38]

Some opposing views are found in jurisprudence by way of dissent. In *Estrada v. Desierto*,[39] the Supreme Court qualified that Presidential immunity only exists in concurrence with the President's actual incumbency. In contrast, in *Balao v. Macapagal-Arroyo*,[40] another case involving a petition for writ of *amparo*, majority of the Court voted to deny the relief prayed for. While the trial court in that case ruled that the Presidential immunity cannot be properly invoked in an *amparo* proceeding, the majority of the High Court upheld the long-settled immunity of the sitting President from suit, especially in the absence of any allegation with respect to a specific presidential act or omission which violated or threatened to violate the petitioners' protected rights. This view was upheld notwithstanding the ratification of the Rome Statute a month before *Balao* was decided.

In her dissenting opinion, Justice Ma. Lourdes Aranal-Sereno wrote that following the Court's decision in *Estrada*, a non-sitting president does not enjoy immunity from suit even for acts committed during the latter's tenure. In her view, "dismissal should be on a finding that petitioners [...] failed to make

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[38] William Scheuerman, *American Kingship? Monarchical Origins of Modern Presidentialism*, 37 POLITY 24, 32 (2005).

[39] G.R. No. 146710, 353 SCRA 452, Mar. 2, 2001. (Resolution on the Motion for Reconsideration.)

[40] G.R. Nos. 186050, 662 SCRA 312, Dec. 13, 2011.

allegations or adduce evidence to show her responsibility or accountability for violation of or threat to [the petitioner's] right to life, liberty and security."[41]

While this may be a reasonable standard, the reality is that efforts to allege the complicity of a president or any other public officer in the commission of human rights violations is often rendered impossible by logistical and institutional challenges. In *Navia v. Pardico*,[42] the Supreme Court dismissed the petition for writ of *amparo* in the absence of any showing that the act complained of "was carried out with the direct or indirect authorization, support or acquiescence of the government."[43] The participation of the State being an indispensable element for *amparo* proceedings in relation to the PIHL Act,[44] the failure to allege or prove the same can defeat the petition.

In addition to the logistical difficulty of establishing the complicity of the President in an act violative of human rights, he or she also enjoys the privilege of confidentiality in presidential communications. In other words, in the unlikely event that the President is made to stand for litigation before Philippine courts, he or she can still claim the executive privilege of confidentiality as a matter of law. In *Neri v. Senate Committee on Accountability of Public Officers and Investigations*,[45] the Supreme Court explained that the privileged communications of the President are grounded upon the following elements:

> (1) The protected communication must relate to a "quintessential and non-delegable presidential power[;]
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> (2) The communication must be authored or "solicited and received" by a close advisor of the President or the President himself. The judicial test is that an advisor must be in "operational proximity" with the President[; and]
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> (3) The presidential communications privilege remains a qualified privilege that may be overcome by a showing of adequate need, such

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[41] *Id.* at 359. (Sereno, *J.*, *dissenting.*)

[42] G.R. No. 184467, 673 SCRA 618, Jun. 19, 2012.

[43] *Id.* at 635.

[44] The Court cited the PIHL Act's definition of *enforced or involuntary disappearances* as follows: "'Enforced or involuntary disappearance of persons' means the arrest, detention, or abduction of persons by, or with the authorization support or acquiescence of, a State or a political organization followed by a refusal to acknowledge that deprivation of freedom to give information on the fate or whereabouts of those persons, with the intention of removing from the protection of the law for a prolonged period of time." *Id.* at 633, *citing* PIHL Act (2009), § 3(g).

[45] G.R. No. 180643, 549 SCRA 77, Mar. 25, 2008.

> that the information sought "likely contains important evidence," and by the unavailability of the information elsewhere by an appropriate investigating authority.[46]

Surprisingly, with respect to the third element, the Court held that the President's "generalized interest in confidentiality" must give way to "demonstrated, specific need for evidence in pending criminal trial."[47] It must be remembered that in *Neri,* the respondent Senate Committees were seeking executive information to be used in aid of legislation; in contrast, in *United States v. Nixon,* the case cited by the Court in *Neri,* a criminal prosecution against President Nixon had already commenced. But whether or not this statement may be taken as the judicial green light in disregarding the presidential communications privilege when invoked in a criminal prosecution against him or her remains to be seen in the Philippine setting.

Even with the ratification of the Rome Statute, presidential immunity from suit is still a heavily protected privilege of the President of the Philippines, and to drag a head of state into litigation constitutes an affront into the dignity of the Philippine State. To subject the President to judicial processes, even those not necessarily fully determinative of criminal liability, remains unacceptable. In *Secretary of National Defense v. Manalo,*[48] the Supreme Court characterized the writ of *amparo* as a remedy providing

> rapid judicial relief as it partakes of a summary proceeding that requires not only substantial evidence to make the appropriate reliefs available to the petitioner; *it is not an action to determine criminal guilt beyond reasonable doubt, or liability for damages requiring preponderance of evidence, or administrative responsibility requiring substantial evidence that will require full and exhaustive proceedings.*[49]

The quoted *ratio decidendi* of *Manalo* is replicated in the later decision of the Supreme Court in *Razon v. Tagitis,*[50] which involved a case of enforced disappearance. In that case, Mary Jean Tagitis sought the issuance of a writ of *amparo* directed against generals and other high-ranking officers of both the AFP and the PNP for the alleged disappearance of World Bank consultant Morced Tagitis in the early morning of October 31, 2007 in Jolo, Sulu. Both the Court of Appeals and the Supreme Court ruled for the issuance of the writ sought, and

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[46] *Id.* at 121, *citing* Toten v. United States, 92 U.S. 105 (1876).
[47] *Id.* at 200, *citing* United States v. Nixon, 418 U.S. 683 (1974).
[48] G.R. No. 180906, 568 SCRA 1, Oct. 7, 2008.
[49] *Id.* at 42. (Emphasis supplied.)
[50] G.R. No. 182498, 606 SCRA 598, Dec. 3, 2009.

without making a specific pronouncement as to authorship and responsibility, declared the government, through the PNP and the PNP Criminal Investigation and Detection Group (CIDG) "accountable for the enforced disappearance of [Tagitis]."[51] Promulgated a mere eight days before the PIHL Act became fully effective, and in addition to reiterating the nature of a writ of *amparo* as laid down in *Manalo*, *Razon* makes the following pronouncement:

> As the law now stands, extra-judicial killings and enforced disappearances in this jurisdiction are *not crimes penalized separately* from the component criminal acts undertaken to carry out these killings and enforced disappearances and are now penalized under the Revised Penal Code and special laws. *The simple reason is that the Legislature has not spoken on the matter;* the determination of what acts are criminal [...] are matters of substantive law that only the Legislature has the power to enact.[52] (Emphasis supplied.)

However, the decision in *Razon* did not include then-President Macapagal-Arroyo as a party-respondent. Nonetheless, it is hereby submitted that the inclusion of the sitting President of the Philippines as a party-respondent to a petition for writ of *amparo* must not be construed as an undue and unjustified intrusion into the non-suability of the State and the incidental immunity that the President enjoys on account of being the Head of State. Proceeding from this premise, it is also suggested that presidential immunity from suit cannot be properly invoked because no criminal liability may attach from the threshing of issues in a mere summary proceeding like the writ of *amparo*—a full determination on the merits may only be done in a full-blown, separate criminal case. The traditional discourse on presidential immunity from suit should find no application where the courts have no jurisdiction to issue an adverse decree of liability, criminal or otherwise, against the State. That way, the practical value of *amparo* proceedings is realized, and is not reduced to an idle ceremony each time it collides against the seemingly impenetrable wall of immunity.

Yet, even in the apparent reluctance of Philippine, foreign and international tribunals to prosecute erring heads of state, head-of-state litigation is not altogether impossible.

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[51] *Id.* at 709.

[52] *Id.* at 666.

In *Prosecutor v. Taylor*,[53] former Liberian President Charles Taylor argued that his indictment for crimes against humanity allegedly committed during the Sierra Leone civil war was of no effect during his continuance in office, invoking the immunities of his presidency. The Special Court for Sierra Leone was unconvinced and, citing the statutes of the ICC and the Nuremberg and Tokyo war tribunals, held that "the principle seems now established that the sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."[54]

More recently, the ICC Prosecutor, pursuant to Article 15(3) of the Rome Statute, notified the President of the ICC of his intention to start an investigation into the situation in Kenya after widespread violence broke out following the 2007 presidential elections. Former Kenyan Deputy Prime Minister and Finance Minister Uhuru Kenyatta was charged with organizing attacks on members of ethnic groups allegedly supporting Raila Odinga, an opposition presidential candidate who narrowly lost the 2007 Kenyan elections.[55]

Particularly interesting in Kenyatta's defense submissions before the ICC is that in questioning the jurisdiction of the Court, he did not invoke his sovereign or official immunities in his capacities as former Deputy Prime Minister and, subsequently, as the incoming President of Kenya. Instead, Kenyatta's jurisdictional challenge focused on denials of the criminal acts allegedly attributable to him in the light of the provisions of the Rome Statute, namely: (1) the absence of an attack against the civilian population pursuant to a State or "organizational policy" under Article 7; (2) the principle of *nullum crimen sine lege* under Article 22; and (3) the absence of showing that the acts allegedly committed are properly describable as crimes against humanity—a critical finding that triggers the operation of the jurisdiction of the Court.[56] As Kenyatta's case reveals, head of state litigation need not suffer debilitating paralysis with unbridled invocation of sovereign and official immunities. The erring head of state can actually question the Court's jurisdiction squarely through a defense that properly addresses the issues raised against him, instead of stubbornly insisting on his immunities under domestic and international law.

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[53] Prosecutor v. Charles Ghankay Taylor, Immunity from Jurisdiction, No. SCSL-03-01-T (May 31, 2004).

[54] *Id.* at ¶ 52.

[55] BBC News Africa, *Uhuru Kenyatta challenges ICC case, at* http://www.bbc.co.uk/news/world-africa-21828831 (last visited Mar. 18, 2013).

[56] Prosecutor v. Muthaura, Uhuru Mugai Kenyatta, and Mohammed Hussein Ali, Submission on Jurisdiction on Behalf of Uhuru Kenyatta, ICC-01/09-02/11, ¶ 12-14 (Sept. 19, 2011). As of the date of this writing, ICC proceedings are ongoing.

As for the issue of suits against public officers impeding governmental efficiency, the same may be addressed, aside from outright dismissal on account of official immunity, through (1) the court's inquiry into whether or not such suit is being brought for the mere purpose of harassing the defendant-public officer; (2) the consideration of the gravity of the case in light of the enactment of the PIHL Act and the treaty commitments of the Philippines to the Rome Statute; or (3) the creation of a rebuttable presumption in favor of the defendant-public officer that a suit is being brought to harass him. The third option transforms the solid wall of immunity into a more workable presumption which, through the allegation of proper facts and circumstances, can be overturned, moving litigation to actual resolution, instead of immediate dismissal.

II. BUSTING STATE MYTHS: DO ALL ROADS EVENTUALLY LEAD TO ROME?

Recognizing that a proud tradition of state sovereignty is something that cannot be easily thrown aside, we turn to the further prospect of casting off the immunities that necessarily come with the fact of being sovereign. To this end, it is imperative to first consider that a cursory review of various domestic legal systems across the world will, almost consistently, reveal features prohibiting *lèse majesté*[57] in many different forms, while not all have statutes replicating provisions of the International Covenant on Civil and Political Rights ("ICCPR"), an international treaty embodying widely-accepted human rights norms.

It was recently proposed that the State, in the legitimate exercise of its monopoly of violence in society, has sought to reinforce its image through its own mythmaking, employing symbols, persons and laws, for its own survival. To this end, the State employs a general framework through which it maintains order, and that such "image persists *as a mechanism essential to the very existence of the State*, despite its having undergone criticism for numerous violations of human rights." In sum, it was further proposed that

> whether a State has the right in international law to the unadulterated image of itself or to the fabrication of its own myths at the expense of

[57] French for "injured majesty." It is defined as a crime against the state, especially against the ruler, or an attack on a custom or traditional belief. *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

> human rights can be the subject of intense debate, but affirmatively or otherwise, the portrayal of its majesty in the manner of its own choosing just is.[58]

From this premise, it is suggested that the euphoria that naturally follows the ratification of any instrument of human rights is immediately tempered by the sober realization that the State is not altogether prepared to shed off substantive portions of its sovereignty in favor of generally-accepted principles of international law, even if such principles be codified in the form of treaties and other instruments. While over 50,000 international treaties covering nearly every aspect of international relations have been entered into by the twenty-first century, it is relevant to ask the following: (1) why do countries commit to human rights treaties?[59] and (2) do States care about the rule of law internationally, or does their behavior merely reflect other interests?[60]

It must be noted here that the road to the Philippine ratification of the Rome Statute was not a smooth one. While it was adopted by the Philippines and several other countries at a diplomatic conference in Rome in July 1998, its ratification would not take place until more than 13 years thereafter. In the interim, when the case of *Pimentel v. Executive Secretary* was decided in 2005,[61] the Supreme Court discussed the steps involved in treaty-making, and in the process, maintained that the ratification (or the refusal) of a treaty is a matter "within the competence of the President alone, which cannot be enjoined by [the] Court via a writ of mandamus."[62] This was a return to the traditional concept of absolute sovereignty, which recognized the chief executive's role as chief diplomat.

Hathaway offers some interesting insight into the difficulty of ratifying treaties like the Rome Statute:

> Treaties have no binding legal power unless and until states ratify them. Hence, understanding why some states ratify a treaty immediately after it opens for signature while others wait forty or more years to do so is important for understanding the growth and

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[58] Alexis Ian Dela Cruz, Note, *Royal Pains: Lèse Majesté in an International Rights-Based Legal Framework,* 86 PHIL. L.J. 948 (2012).

[59] Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOLUTION 588 (2007).

[60] Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Non-Surrender Agreements,* 101 AM. POL. SCI. REV. 573, 586 (2007).

[61] G.R. No. 158088, 462 SCRA 622, July 6, 2005.

[62] *Id.* at 638.

> evolution of international human rights law during the last half-century. This knowledge can be used, moreover, to fashion more effective international human rights law.
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> * * *
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> Human rights treaties provide an ideal starting point for understanding state commitment decisions because they constitute the paradigmatic hard case.[63]

On a related note, Wotipka and Tsutsui observe that "unlike international treaties on security and trade [...] human rights treaties deal primarily with purely domestic issues and do not offer any tangible incentives for national governments to ratify them."[64] The baffling mystery is why national governments have become so much more willing now to compromise traditional sovereign immunities by seriously committing to the Rome Statute. Incidentally, what are the gains that come with the Philippine ratification of the said treaty? How will the Philippine ratification affect the exercise by the Philippines of its sovereign immunities?

Almost a year before the Philippine ratification of the Rome Statute, the International Court of Justice (ICJ) promulgated its decision on the merits of the *Diallo* case,[65] finding the Democratic Republic of the Congo (DRC) in violation of the rights of Guinean businessman Ahmadou Sadio Diallo under the ICCPR and the African Charter on Human and People's Rights for his wrongful arrest, detention and expulsion from the DRC in 1995 and 1996. The Republic of Guinea, Diallo's state of nationality, filed an Application before the ICJ, claiming that it is entitled to the exercise of its diplomatic protection over its national. What is interesting in *Diallo* is, as Professor Giorgio Gaja points out, "the scope *ratione materiae* of diplomatic protection [...] widened to include, inter alia, internationally-guaranteed human rights." He is quick to point out, however, that with respect to human rights, the state of nationality does not have an exclusive right to invoke responsibility.[66]

The argument cuts the other way as well, but even more contentiously: internationally recognized human rights may be enforced as a source of

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[63] Hathaway, *supra* note 59, at 589. (Emphasis supplied.)

[64] Christine Min Wotipka & Kiyoteru Tsutsui, *Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965-2001*, 23 SOCIO. FORUM 724, 728 (2008).

[65] Ahmadou Sadio Diallo (Rep. Guinea v. D. Rep. Congo), Merits, 2010 I.C.J. ¶ 165 (Nov. 30).

[66] Giorgio Gaja, *The Position of Individuals in International Law: An ILC Perspective*, 21 EUR. J. INT'L L. 11, 12 (2010).

substantive relief against erring individuals of non-parties to the Rome Statute, provided that the exercise of jurisdiction by the tribunal is not otherwise prohibited by some norm of international law. Bassiouni espouses the Roman concept of *actio popularis* to support the exercise of universal jurisdiction. In *actio popularis*, the assumption of jurisdiction by one state is predicated upon "an interest in the preservation of world order as a member of [the] community [of states]."[67] Two cases are presented below in support of this proposition.

In 1812, the United States Supreme Court decided *Schooner Exchange v. McFaddon*,[68] where a French military vessel, formerly an American commercial schooner, sought to be recovered by its former owners in a suit before an American court. Speaking for the Court, Chief Justice Marshall wrote that national jurisdiction "is susceptible of no limitation by itself" and that all exceptions thereto "must be traced up to the consent of the nation itself."[69] However, such consent, while effectively shielding the State from standing in litigation, proves immaterial in violations of *jus cogens* norms. In this context, no immunity may be asserted by States as a matter of inherent entitlement; neither can they seek refuge in such immunity to prevent being prosecuted in human rights litigation.[70]

More than a century later, the Permanent Court of International Justice (PCIJ) promulgated its decision concerning the *S.S. Lotus*, another French vessel.[71] The *S.S. Lotus* collided with a Turkish ship on the high seas, resulting in the death of Turkish nationals. Upon entering a Turkish port, the vessel was taken into Turkish custody. Its officer, a French national, stood trial before a Turkish court for his alleged negligence. Before the PCIJ, France argued that unless Turkey showed some valid title of jurisdiction conferred by international law, it had no business prosecuting officers who were nationals of the vessel's flag nation. The PCIJ found for Turkey, holding that France failed to convince the court that Turkey, in exercising jurisdiction over the matter, was in violation of some prohibitive rule of international law. As Scharf notes, thus came about one of the oft-quoted lines from PCIJ jurisprudence: "Restrictions upon the independence of states cannot [...] be presumed" and that states are allowed "a

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[67] Mahmoud Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 86 (2001).

[68] 11 U.S. 116 (1812).

[69] *Id.* at 136.

[70] Lee Caplan, *State Immunity, Human Rights, and* Jus Cogens: *A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741 (2003).

[71] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

wide measure of discretion which is only limited in certain cases by prohibitive rules."[72]

From this point it is suggested that two divergent schools of thought emerged respecting the involvement of the state in international criminal acts—one that tends to view individual criminal liability separately from the State, and one that does not. Essentially, if criminal liability can attach to an individual person separately from his State, it only means that the latter's sovereign immunities are inoperative in that context and are incapable of shielding the offender from the legal consequences of his acts. This view is supported by the idealist school, arguing that "with regard to international crimes and fundamental human rights[,] [S]tates are obliged to deny sovereign immunity."[73] In contrast, the realists "emphasize the indispensable importance of upholding sovereign immunity for maintaining good and peaceful relations among states."[74]

A. Separate Individual Liability from State Responsibility

On one hand, even as globalization tends to push the acceptable limits of international comity, it is highly improbable that States will give up the exercise of primary jurisdiction over criminal offenses committed within their respective territories. Neither is it likely that a judicial decree can be obtained, much less enforced, against foreign sovereigns even for violations of *jus cogens* norms where such jurisdiction can be properly invoked under the proper law and factual circumstances. In private international law, penal law remains a recognized exception to the application of foreign law within the forum.[75] More importantly, the norm of non-intervention in matters falling within the domestic jurisdiction of any State is firmly enshrined in the Charter of the United Nations itself.[76] Pragmatic considerations of the time-honored notions of sovereign immunity militate against the increasingly progressive strides taken in the field of international human rights.

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[72] Michael Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position*, 64 L & CONTEMP. PROBS. 67, 72 (2001), *citing* S.S. Lotus, at 19, ¶ 46.

[73] Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT'L L. 853, 854 (2011).

[74] *Id.* at 854.

[75] JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 67 (1995).

[76] U.N. CHARTER, art. 2, ¶ 4.

Even the European Court of Human Rights, in a hotly contested decision,[77] ruled that though the prohibition against torture possesses a *jus cogens* character in international law, the violation of such a norm does not necessarily compel the "denial of state immunity in civil suits."[78]

A useful illustration of this proposition can be seen in a decision rendered by the Ontario Superior Court in Canada in 2002.[79] Houshang Bouzari, an Iranian businessman with substantive property holdings in Canada, filed a suit under the tort exception to Canada's State Immunity Act against the Islamic Republic of Iran for allegedly inflicting torture upon his person after his refusal to pay bribes for an oil and gas-drilling project. Bouzari alleged that he "was deprived of food, sleep and sanitation," and that his head "was forced into a bowl of excrement and held there[.] [...] His ears were beaten until his hearing was impaired" over a period of eight months.[80] After his family paid some of the ransom money to obtain his release, Bouzari managed to escape to Vienna and later moved to Canada in 1998. In denying Bouzari's claim for relief, Justice Swinton of the Ontario court wrote that while the prohibition against torture is a recognized rule of *jus cogens* across various jurisdictions,[81]

> [t]hat still raises the important question of the scope of the norm. Mr. Greenwood disagreed with Mr. Morgan that the prohibition of torture includes *an obligation to provide a civil remedy against a foreign state for acts that occurred within that state.* Indeed, Mr. Morgan conceded during cross-examination that *states do not universally embrace the view that there must be a civil remedy for torture*, and this is not currently accepted as an element of the prohibition of torture. Nevertheless, he urged me to rely on the dissenting opinions in the European Court of Human Rights in Al-Adsani v. The United Kingdom (November 21, 2001) and in the International Court of Justice in Democratic Republic of the Congo v. Belgium (The Arrest Warrant Case), dated February 14, 2002, and to find that state immunity should give way when damages are claimed for torture. This is *not really an argument based on* jus cogens, *but rather a suggestion that I should take a step in developing a new exception to state immunity.*[82]

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[77] *See* Caplan, *supra* note 70, at 742 n.8; a detailed summary of the case of *Al-Adsani v. United Kingdom* is available in *International Decisions* (Bernard Oxman, ed.), 96 AM. J .INT'L L. 677, 699 (2002).

[78] Caplan, *supra* note 70, at 741, 742.

[79] Bouzari v. Islamic Republic of Iran, OJ No. 1624 (2002).

[80] Bouzari v. Islamic Republic of Iran, OJ No. 2800 Docket No. C38295, ¶ 12 (2004).

[81] Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet (No. 3), 1 A.C. 147 (2000).

[82] Bouzari v. Islamic Republic of Iran, OJ No. 1624, ¶ 62 (2002). (Emphasis supplied.)

Furthermore, Justice Swinton wrote:

> An examination of the decisions of national courts and tribunals, as well as state legislation with respect to sovereign immunity, indicates that there is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to *jus cogens*.[83]

Expressing deep concern over the above decision, Novgorodsky points out that the Ontario court found Bouzari's case "did not fall within one of the enumerated exceptions of Canada's State Immunity Act," whose tort exception finds no application to injuries sustained outside Canada.[84] After Bouzari's case was dealt its *coup de grâce* by the Canadian Supreme Court's denial of the appellant's leave for appeal in 2005, the United Nations Committee Against Torture (CAT)[85] issued a recommendation that Canada "review its position under article 14 of the Convention Against Torture to ensure the provision of compensation through its civil jurisdiction to all victims of torture."[86]

Despite this, Scharf recognizes that talking in terms of state sovereign immunities can be rather limiting because it fails to consider that the State is separate and distinct from its nationals. In support of this view, he offers the following lessons from the Nuremberg Trials:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.
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> The Nuremberg judgment represented a departure from the traditional rules of international law, which were primarily concerned with the conduct of states and their responsibility for violations of international norms. It is not contested that the existence of the ICC

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[83] *Id.*, ¶ 63.

[84] Noah Benjamin Novgorodsky, *Immunity for Torture: Lessons from Bouzari v. Iran*, 18 EUR. J. INT'L L. 939, 941 (2007).

[85] The CAT is the body that monitors the implementation of the Convention Against Torture. Canada is a State Party.

[86] Novgorodsky, *supra* note 84, at 942 *citing* UN Committee Against Torture, *Conclusions and Recommendations of the Committee against Torture: Canada*, CAT/C/CR34/CAN (2005).

> infringes the impunity of persons charged with serious international crimes; but there is no "right" to impunity.[87]

What becomes apparent at this point is that the sovereign immunity of a State is immaterial to international criminal responsibility as far as prosecuting individuals for violations of international criminal law is concerned. When an individual person stands for prosecution for the commission of international criminal acts under the Rome Statute, prosecution should not necessarily entail unjustified intrusion into state sovereignty, but rather a careful and reasonable characterization of the jurisdiction of the ICC. Of course, one must respect the primary jurisdiction of States over such cases, where applicable.

There is at present a new recognition that the atrocities committed by an individual or a group of individuals are not necessarily sanctioned by the State or any of its instrumentalities. Consequently, the efficacy of a human rights treaty such as the Rome Statute should not be limited by various jurisdictional barriers established by the sovereignty of States because the relief sought to be enforced is not against the State itself but against the individual offender.

B. Inseparable Individual Liability and State Responsibility

The obvious difficulty in the characterization of individual liability with respect to State responsibility lies primarily in the great measure of faith it seems to accord upon the benevolence of the State, which is presumed to be incapable of committing any wrong in the traditional discourse of the doctrine of state immunity. In the generation of its own myths, the State always portrayed itself as the ideal being, and many of the immunities attached to statehood arose from that premise. But all too well, numerous incidents of state-sponsored violence and other forms of human rights violations in the past are more than sufficient to cast serious doubts upon this presumption.

The sovereign, possessed of the awesome powers of the State and of the complete disposal of its institutional machinery, is in a perfect position to commit potential violations and abuses of human rights, even if such acts or omissions be executed within the scope of official duty and in good faith. The State's characterization of itself—in the sum-total of its laws, institutions, values, beliefs, morals and customs—makes good faith a particularly unreliable standard to use in the examination of the sovereign's actions, especially before its own courts. Greig's view, citing the decision of the Canadian Supreme Court in *Democratic Republic of Congo v. Venne*, is illuminating:

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[87] Scharf, *supra* note 72, at 74-75. (Emphasis supplied; citations omitted.)

> Neither the independence nor the dignity of States, nor international comity require vindication through a doctrine of absolute immunity. *Independence as a support for absolute immunity is inconsistent with the absolute territorial jurisdiction of the host State*; and dignity, which is a projection of independence or sovereignty, does not impress when regard is had to the submission of States to suit in their own Courts.[88]

Yet, it may be futile to sidetrack the reality entirely, for all States are necessarily engaged in the perpetual and evolving process of self-characterization, and the only choice available to advocates of human rights is to address this phenomenon squarely with respect to the State's own requisites of self-characterization.

Official immunity, which is afforded to certain persons on account of their discharge of a portion of the State's sovereign functions, owes its existence from the immunity of the State itself from suit. While the immunity of such officials is more limited in scope than that of sovereign immunity, De Leon and De Leon recognize that official immunity collaterally protects the sovereign "by protecting the public official in the performance of his government function."[89] As Akande and Shah pertinently recount:

> [A]cts which constitute international crimes are often carried out by individuals invested with state authority and regularly undertaken for state rather than private purposes. Thus, "[t]o deny the official character of such offences is to fly in the face of reality." *Such acts are characterized as acts of the state for the purpose of imputing state responsibility, and it would be artificial to impose a different test in the context of individual responsibility.*[90]

In the alternative, the US Supreme Court has inconsistently characterized sovereign immunity as a mere personal defense which can either be recognized by the courts *motu proprio* or raised by the State or the respondent-public officer even for the first time on appeal.[91] Either way, this proposition

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[88] 22 Dom. L. Rep. (3d) 669, 684 (1971) *in* D.W. Greig, *Forum State Jurisdiction and Sovereign Immunity under the International Law Commission's Draft Articles*, 38 INT'L & COMP. L. Q. 243, 244-245 (1989). (Emphasis supplied.)

[89] DE LEON & DE LEON, JR., *supra* note 30, at 269.

[90] Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 832 (2011). (Emphasis supplied; citations omitted.)

[91] Katherine Florey, *Insufficiently Jurisdictional: The Case against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CA. L. REV. 1375, 1423 (2004).

only strengthens the view that the immunity of the State is inseparable from the privilege being claimed by public officers under prosecution.

A conceptual middle ground is said to have been reached in the 1990s by Reisman, who adopts what he calls "people's sovereignty," observing that "no serious scholar still supports the contention that internal human rights are 'essentially within the domestic jurisdiction of any state' and hence insulated from international law."[92] He further argues that the immunities of the sovereign, while still protected in international law, can now be viewed as belonging to the people in their sovereign capacity, instead of the traditional sovereign itself.

But even with its inherent frailties and failures, the State remains a vital manifestation of the necessity of maintaining order within and between human societies. Inayatullah and Rupert observe that the "sovereign state is exalted as the singular solution to the problem of human aggression, by displacing that aggression from within the territory of the state into the realm of interstate relations".[93]

III. WALKING THE TALK: TREATY COMMITMENTS AS PART OF STATE MYTHMAKING

What is the value of traditional jurisdictional limitations and sovereign immunities in the enforcement of the Rome Statute? Why is there an apparent insistence in the correlation of individual, personal transgressions of human rights, and State responsibility for such transgressions? Künnemann offers an interesting view:

> Every right is actually three-fold, consisting of the *right* itself, the *existential status* derived from this right, and the *State obligations* following from this right. The derivations of human rights [...] are therefore paralleled by specifications linked in the existential status and related obligations.[94]

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[92] W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, Paper 872, *in* YALE FACULTY SCHOLARSHIP SERIES 869 (1990).

[93] N. Inayatullah & M.E. Rupert, *Hobbes, Smith and the Problem of Mixed Ontologies, in* THE GLOBAL ECONOMY AS POLITICAL SPACE 61-85 (1987), *cited in* John Agnew, *Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics*, 95 ANN. ASSOC. AM. GEOG. 437, 440 (2005).

[94] Rolf Künnemann, *A Coherent Approach to Human Rights*, 17 HUM. RTS. Q. 323, 327 (1995). (Emphasis supplied.)

Thus, in as far as the commissions of criminal acts under international law are framed as violations of human rights, States become interested in maintaining the existential status that are necessarily attached to the enjoyment of such rights. To employ a more familiar example, in the Maguindanao massacre of November 2009, the worst death toll for journalists was recorded by the Committee to Protect Journalists ("CPJ"), a New York-based non-profit organization that avowedly defends the rights of journalists across the world. In the aftermath of the atrocity, the CPJ named the Philippines as "the second most dangerous place for journalists in the world behind Iraq."[95]

The fact that the massacre occurred within the domestic jurisdiction of the Philippines proved no hindrance for the rest of the world to express concern about the capability of the Philippines to respect the rights of journalists. While such expression of international concern hardly creates legal consequences upon the Philippines, it is submitted that it is a fundamental step in the direction of making the sovereign accountable for its actions or omissions with respect to human rights, among others. This proposition is made upon the premise that human rights are universal on account of a shared humanity, regardless of culture, political creed or legal system. [96] Such universality, according to Kirchschlaeger, is an essential attribute of human rights.[97] Thus, while "states have historically been exceedingly protective of their sovereignty and reluctant to forfeit any prerogative unless it is clearly in their interest to do so," State sovereignty may give way to international legal notions of "crimes against humanity" as a result of the conviction that "such crimes violate not only the individual victim but all of humanity."[98]

In the Philippines, the deliberations of the 1986 Constitutional Commission are instructive of the general leaning of the Philippines toward the

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[95] Alcuin Papa, *Maguindanao massacre worst-ever for journalists*, *at* http://newsinfo.inquirer.net/breakingnews/nation/view/20091126-238554/Maguindanao-massacre-worst-ever-for-journalists (last modified Nov. 26, 2009).

[96] Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 365 (1997). *See generally* Louis Henkin, *The Universality of the Concept of Human Rights*, 506 ANN. AM. ACAD. POL. & SOC. SCI. 10 (1989).

[97] Peter Kirchschlaeger, *Universality of Human Rights*, *at* http://www.theewc.org/uploads/files/Universality%20of%20Human%20Rights%20by%20Peter%20Kirchschlaeger2.pdf (last accessed Apr. 29, 2014).

[98] Margaret McAuliffe de Guzman, *The Road from Rome: The Developing Law of Crimes against Humanity*, 22 HUM. RTS. Q. 335, 338 (2000).

adoption of a universal approach to human rights in the drafting of the Bill of Rights: [99]

> MR. BENGZON. That is precisely my difficulty because civil and political rights are very broad. The Article on the Bill of Rights covers civil and political rights. Every single right of an individual involves his civil right or his political right. So, where do we draw the line?
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> MR. GARCIA. Actually, these civil and political rights have been made clear in the language of human rights advocates, as well as in the Universal Declaration of Human Rights which addresses a number of articles on the right to life, the right against torture, the right to fair and public hearing, and so on. These are very specific rights that are considered enshrined in many international documents and legal instruments as constituting civil and political rights, and these are precisely what we want to defend here.
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> MR. RAMA. In connection with the discussion on the scope of human rights, I would like to state that in the past regime, every time we invoke the violation of human rights, the Marcos regime came out with the defense that, as a matter of fact, they had defended the rights of people to decent living, food, decent housing and a life consistent with human dignity. So I think we should really limit the definition of human rights [under the Bill of Rights] to political rights. Is that the sense of the committee, so as not to confuse the issue?
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> MR. SARMIENTO. Yes, Madam President.
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> * * *
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> MR. GARCIA. There are two international covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The second covenant contains all the different rights the rights of labor to organize, the right to education, housing, shelter, etc.
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> MR. GUINGONA. So we are just limiting at the moment the sense of the committee to those that the Gentleman has specified.

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[99] III RECORDS OF THE CONST. COMMISSION 722-723, 731, 738-739, *cited in* Simon v. Commission on Human Rights, G.R. No. 100150, 229 SCRA 117, Jan. 5, 1994, *cited in* Diane Desierto, *A Universalist History of the 1987 Philippine Constitution (II)*, 11 HISTORIA CONSTITUCIONAL 427, 464-465 (2010).

MR. GARCIA. Yes, to civil and political rights.

MR. GUINGONA. Thank you.

Returning to the Maguindanao massacre, even if it be assumed that the Philippine government had no involvement in the deaths of journalists,[100] the Philippines is naturally hard-pressed to disassociate itself with such an unpleasant branding, which constitutes an unfortunate breakdown in the country's existential status as a safe haven for free journalistic expression. The situation holds even as we take into consideration the long-settled rule that no relief from wrongs committed by private, non-state individuals may be derived from the Constitution's Bill of Rights.[101] Following Künnemann's linkage of related obligations and existential status, it appears that the Philippine State had failed in the discharge of its Constitutionally guaranteed obligations corresponding to such right.

Additionally, notwithstanding an inability to make the proper attribution of a human rights violation upon the State under the terms of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts,[102] the failure of a State, ostensibly or otherwise, to maintain the existential status inherent in the enjoyment of a particular recognized human right is actually detrimental to the State's portrayal of its own dignity or majesty. Such a situation represents a failure on the part of the State to make good on its actual capability (not even its obligation) to realize its own avowed ideals. The State's self-mythmaking is seriously jeopardized, both locally and internationally, and it raises serious questions about the very foundations of the State existence, such that the ratification of human rights treaties, even to the extent of accepting increased limitations upon sovereignty, becomes an important, if not integral, part in the State's self-mythmaking process.

Also as equally important as the international enforcement of the Rome Statute is domestic legal enforcement. While scholars are still in disagreement as to whether or not international law is in fact law, no disagreement exists with respect to domestic law. While relief at the international level is inaccessible to individual complainants for the most part, recourse to the State's own

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[100] Following the traditional formulation of the doctrine of state immunity, the State is incapable of inflicting any wrong. Thus, this author opines that such an assumption is plausible and fair under the premises.

[101] *See generally* People v. Marti, G.R. No. 81561, 193 SCRA 57, Jan. 18, 1991.

[102] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, UN Doc. A/56/83 (2001).

institutions is actually more achievable. Therefore, a strong domestic legal institutional framework is crucial in the implementation of the Statute. As Hathaway observes:

> Where powerful actors can hold the government to account, international legal commitments are more meaningful. *Where there are no such constraints, even formally binding treaties may be ignored with relative impunity.*[103]

Recounting the difficulties encountered in the Philippine ratification of the Rome Statute, Toon discusses the reservations of other Southeast Asian countries, finding the Statute a high-handed mode of application to be an infringement of their sovereign rights. Nonetheless, assurances were made. In support of the case for the Statute, she writes of the Philippine experience:

> The Statute's preamble and articles 1, 17, 18 and 19 all affirm that the ICC will be employed only when a state proves to be unwilling or unable to deal with the alleged offence. If it can be shown that reasonable attempts have been made at the national level to investigate the alleged misdeeds, fulfilling the due diligence criteria, the state's verdict will be respected. Furthermore, the Statute also stresses the importance of updating a state on the development of its citizen's case, thereby attesting to the continual efforts to involve states. Indeed, the Philippines House of Representatives had accentuated these assurances in trying to persuade the President to submit the Statute to the Senate for ratification.[104]

As an essential part of the State's self-characterization and self-actualization as an entity capable of keeping the existential status accorded by the enjoyment of human rights, the State finds itself drawn to the expedient of making binding commitments to treaties like the Rome Statute. As a result of making the decision to commit, the State finds it necessary to take the further step of institutionalizing the terms of the Statute into its domestic legal framework in order to give life to the recently concluded treaty. Gains in the field of human rights are not achieved with an adamant and uncompromising view of State sovereignty.

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[103] Hathaway, *supra* note 55, at 593. (Emphasis supplied.)

[104] Toon, *supra* note 18, at 222-223.

EPILOGUE

The ratification of the Rome Statute brings the Philippines into an exciting new chapter in the generation of its own State myths. Only a few years since its ratification, the Philippines is bound to experience more contradictions as it finds itself drawn in equally legally defensible but opposite directions by its seemingly irreconcilable new treaty commitments and the requirements of its own domestic law. While exciting times loom ahead with the prospect of the prosecution of Philippine national officials for the commission of international crimes becoming more feasible in the light of the terms of the Rome Statute, one is cautioned to take a more prudent stance.

A universalist conception of human rights, clearly integrated into the Philippine Bill of Rights, should encourage the paradigmatic movement into the other direction—one in which we are able to question or reexamine the legal and philosophical relevance of the State's sovereign and official immunities with respect to how the State treats those subject to its sovereign authority. Because while Article 27 seems to be the beginning of the quest to bring down the walls of sovereign immunity, the reality is that it remains deeply etched as an integral component of the State's mythmaking. However, the vast difference between State and individual capacities should be a sufficient-enough justification to commence such a reexamination.

Additionally, if there is a transformed characterization of State sovereignty into people's sovereignty "premised upon the acceptance of [a] dual notion of self-determination: the capacity of the individual to govern herself or himself and the capacity of individuals as citizens to govern themselves as a political community,"[105] then a continuing and stubborn insistence on the institutional, de-personalized enjoyment by the State of sovereign immunities may become increasingly difficult to reconcile with developments in the field of international human rights.

Still, before one can endeavor to sue the sovereign for the commission of a human rights violation or a crime against humanity, he must contend with various considerations: (1) the jurisdictional complementarity of the ICC to the jurisdiction of Philippine courts; (2) the Philippines' sovereign and official immunities; (3) the immunity of public funds from judicial garnishment or execution; and (4) the difficulty of adducing actual evidence of the complicity of the Philippine State in the commission of a violation of human rights. All

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[105] Roland Axtmann, *The Model of the Modern State and Its Contemporary Transformation,* 25 INT'L POL. SC. REV. 259, 262 (2004). *See also* Reisman, *supra* note 92.

militate against the full appreciation and operation of the terms of Article 27 of the Statute in the Philippine setting. This is because in the generation of State myths, the irrelevance of official capacity with respect to criminal responsibility may itself remain a myth even in the face of revolutionizing treaty commitments.

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