Republic of the Philippines

SUPREME COURT

Manila

EN BANC

BAYAN MUNA, as represented by Rep. SATUR OCAMPO, Rep. CRISPIN BELTRAN, and Rep. LIZA L. MAZA,

Petitioner,

- versus -

ALBERTO ROMULO, in his capacity as Executive Secretary,

G.R. No. 159618

Present:

CORONA, *C.J.*,

CARPIO,

CARPIO MORALES,

VELASCO, JR.,

NACHURA,

LEONARDO-DE CASTRO,

BRION,

PERALTA,

BERSAMIN,

DEL CASTILLO,

ABAD,

VILLARAMA, JR.,

and BLAS F. OPLE, in his capacity as Secretary of Foreign Affairs,

Respondents.

PEREZ,

MENDOZA, and

SERENO, *JJ*.

Promulgated:

February 1, 2011

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D E C I S I O N

VELASCO, JR., *J*.:

The Case

This petition1[1] for certiorari, mandamus and prohibition under Rule 65 assails and seeks to nullify the Non-Surrender Agreement concluded by and between the Republic of the Philippines (RP) and the United States of America (USA).

1[1] *Rollo*, pp. 241-265.

The Facts

Petitioner Bayan Muna is a duly registered party-list group established to represent the marginalized sectors of society. Respondent Blas F. Ople, now deceased, was the Secretary of Foreign Affairs during the period material to this case. Respondent Alberto Romulo was impleaded in his capacity as then Executive Secretary.2[2]

Rome Statute of the International Criminal Court

Having a key determinative bearing on this case is the Rome Statute3[3] establishing the International Criminal Court (ICC) with "*the power to exercise its jurisdiction over persons for the most serious crimes of international concern* x x x *and shall be complementary to the national criminal jurisdictions*."4[4] The serious crimes adverted to cover those considered grave under international law, such as genocide, crimes against humanity, war crimes, and crimes of aggression.5[5]

2[2] He is now the DFA Secretary.

3[3] *Rollo*, pp. 74-145.

4[4] ROME STATUTE, Art. 1.

5[5] Id., Art. 5.

On December 28, 2000, the RP, through *Charge d'Affaires* Enrique A. Manalo, signed the Rome Statute which, by its terms, is "subject to ratification, acceptance or approval" by the signatory states.6[6] As of the filing of the instant petition, only 92 out of the 139 signatory countries appear to have completed the ratification, approval and concurrence process. The Philippines is not among the 92.

RP-US Non-Surrender Agreement

On May 9, 2003, then Ambassador Francis J. Ricciardone sent US Embassy Note No. 0470 to the Department of Foreign Affairs (DFA) proposing the terms of the non-surrender bilateral agreement (*Agreement*, hereinafter) between the USA and the RP.

Via Exchange of Notes No. BFO-028-037[7] dated May 13, 2003 (E/N BFO-028-03, hereinafter), the RP, represented by then DFA Secretary Ople, agreed with and accepted the US proposals embodied under the US Embassy Note adverted to and put in effect the *Agreement* with the US government. *In esse*, the *Agreement* aims to protect what it refers to and defines as "persons" of the RP and US from frivolous and harassment suits that might be brought against them in

6[6] ROME STATUTE, Article 125.

7[7] *Rollo*, pp. 68-69.

international tribunals.8[8] It is reflective of the increasing pace of the strategic security and defense partnership between the two countries. As of May 2, 2003, similar bilateral agreements have been effected by and between the US and 33 other countries.9[9]

The *Agreement* pertinently provides as follows:

> 1. For purposes of this Agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
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> 2. Persons of one Party present in the territory of the other shall not, absent the express consent of the first Party,
>
> (a) be surrendered or transferred by any means to any international tribunal for any purpose, unless such tribunal has been established by the UN Security Council, or
>
> (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to any international tribunal, unless such tribunal has been established by the UN Security Council.
>
> 3. When the [US] extradites, surrenders, or otherwise transfers a person of the Philippines to a third country, the [US] will not agree to the surrender or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the Republic of the Philippines [GRP].

8[8] Id. at 72, Paper on the RP-US Non-Surrender Agreement.

9[9] Id. at 70.

> 4. When the [GRP] extradites, surrenders, or otherwise transfers a person of the [USA] to a third country, the [GRP] will not agree to the surrender or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the [US].
>
> 5. This Agreement shall remain in force until one year after the date on which one party notifies the other of its intent to terminate the Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

In response to a query of then Solicitor General Alfredo L. Benipayo on the status of the non-surrender agreement, Ambassador Ricciardone replied in his letter of October 28, 2003 that the exchange of diplomatic notes constituted a legally binding agreement under international law; and that, under US law, the said agreement did not require the advice and consent of the US Senate.10[10]

In this proceeding, petitioner imputes grave abuse of discretion to respondents in concluding and ratifying the *Agreement* and prays that it be struck down as unconstitutional, or at least declared as without force and effect.

For their part, respondents question petitioner's standing to maintain a suit and counter that the *Agreement*, being in the nature of an executive agreement, does not require Senate concurrence for its efficacy. And for reasons detailed in their comment, respondents assert the constitutionality of the *Agreement*.

10[10] Id. at 175.

The Issues

I. WHETHER THE [RP] PRESIDENT AND THE [DFA] SECRETARY x x x GRAVELY ABUSED THEIR DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION FOR CONCLUDING THE **RP-US NON SURRENDER AGREEMENT** BY MEANS OF [*E/N*] *BFO-028-03 DATED 13 MAY 2003*, WHEN THE PHILIPPINE GOVERNMENT HAS ALREADY SIGNED THE *ROME STATUTE OF THE [ICC]* ALTHOUGH THIS IS PENDING RATIFICATION BY THE PHILIPPINE SENATE.

A. Whether by entering into the x x x **Agreement** Respondents gravely abused their discretion when they capriciously abandoned, waived and relinquished our only legitimate recourse through the *Rome Statute of the [ICC]* to prosecute and try "persons" as defined in the x x x **Agreement**, x x x or literally any conduit of American interests, who have committed crimes of genocide, crimes against humanity, war crimes and the crime of aggression, thereby abdicating Philippine Sovereignty.

B. Whether after the signing and pending ratification of the *Rome Statute of the [ICC]* the [RP] President and the [DFA] Secretary x x x are obliged by the principle of good faith to refrain from doing all acts which would substantially impair the value of the undertaking as signed.

C. Whether the x x x **Agreement** constitutes an act which defeats the object and purpose of the *Rome Statute of the International Criminal Court* and contravenes the obligation of good faith inherent in the signature of the President affixed on the *Rome Statute of the International Criminal Court*, and if so whether the x x x **Agreement** is void and unenforceable on this ground.

D. Whether the **RP-US Non-Surrender Agreement** is void and unenforceable for grave abuse of discretion amounting to lack or excess of jurisdiction in connection with its execution.

II. WHETHER THE **RP-US NON SURRENDER AGREEMENT** IS VOID *AB INITIO* FOR CONTRACTING OBLIGATIONS THAT ARE EITHER IMMORAL OR OTHERWISE AT VARIANCE WITH UNIVERSALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW.

III. WHETHER THE x x x **AGREEMENT** IS VALID, BINDING AND EFFECTIVE WITHOUT THE CONCURRENCE BY AT LEAST TWO-THIRDS (2/3) OF ALL THE MEMBERS OF THE SENATE x x x.11[11]

The foregoing issues may be summarized into two: *first*, whether or not the *Agreement* was contracted validly, which resolves itself into the question of whether or not respondents gravely abused their discretion in concluding it; and *second*, whether or not the *Agreement*, which has not been submitted to the Senate for concurrence, contravenes and undermines the Rome Statute and other treaties. But because respondents expectedly raised it, we shall first tackle the issue of petitioner's legal standing.

The Court's Ruling

This petition is bereft of merit.

11[11] Id. at 25-27.

Procedural Issue: *Locus Standi* of Petitioner

Petitioner, through its three party-list representatives, contends that the issue of the validity or invalidity of the *Agreement* carries with it constitutional significance and is of paramount importance that justifies its standing. Cited in this regard is what is usually referred to as the emergency powers cases,12[12] in which ordinary citizens and taxpayers were accorded the personality to question the constitutionality of executive issuances.

Locus standi is "a right of appearance in a court of justice on a given question."13[13] Specifically, it is "a party's personal and substantial interest in a case where he has sustained or will sustain direct injury as a result"14[14] of the act being challenged, and "calls for more than just a generalized grievance."15[15] The term "interest" refers to material interest, as distinguished from one that is merely incidental.16[16] The rationale for requiring a party who challenges the validity of a law or international agreement to allege such a personal stake in the outcome of the controversy is "to assure the concrete adverseness which sharpens

12[12] *Philconsa v. Gimenez*, No. L-23326, December 18, 1965, 15 SCRA 479; *Iloilo Palay & Corn Planters Association*, No. L-24022, March 3, 1965, 13 SCRA 377; *Araneta v. Dinglasan*, 84 Phil. 368 (1949).

13[13] *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160.

14[14] *Jumamil v. Café*, G.R. No. 144570, September 21, 2005, 470 SCRA 475; citing *Integrated Bar of the Philippines v. Zamora*, G.R. No. 141284, August 15, 2000, 338 SCRA 81.

15[15] Id.

16[16] Id.

the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."17[17]

Locus standi, however, is merely a matter of procedure and it has been recognized that, in some cases, suits are not brought by parties who have been personally injured by the operation of a law or any other government act, but by concerned citizens, taxpayers, or voters who actually sue in the public interest.18[18] Consequently, in a catena of cases,19[19] this Court has invariably adopted a liberal stance on *locus standi.*

Going by the petition, petitioner's representatives pursue the instant suit primarily as concerned citizens raising issues of transcendental importance, both for the Republic and the citizenry as a whole.

When suing as a citizen to question the validity of a law or other government action, a petitioner needs to meet certain specific requirements before he can be

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17[17] *Fariñas v. Executive Secretary*, G.R. Nos. 147387 & 152161, December 10, 2003, 417 SCRA 503; citing *Baker v. Carr*, 369 U.S. 186 (1962). See also *Gonzales v. Narvasa*, G.R. No. 140835, August 14, 2000, 337 SCRA 733.

18[18] *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, G.R. Nos. 155001, 155547 & 155661, May 5, 2003, 402 SCRA 612.

19[19] *Constantino, Jr. v. Cuisia*, G.R. No. 106064, October 13, 2005, 472 SCRA 515; *Agan, Jr.*, supra note 18; *Del Mar v. Philippine Amusement and Gaming Corporation*, G.R. No. 138298, November 29, 2000, 346 SCRA 485; *Tatad v. Garcia*, G.R. No. 114222, April 6, 1995, 243 SCRA 436; *Kilosbayan v. Guingona, Jr.*, G.R. No. 113375, May 5, 1994, 232 SCRA 110.

clothed with standing. *Francisco, Jr. v. Nagmamalasakit na mga Mananganggol ng mga Manggagawang Pilipino, Inc.*20[20] expounded on this requirement, thus:

> In a long line of cases, however, concerned citizens, taxpayers and legislators when specific requirements have been met have been given standing by this Court.
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> When suing as a *citizen*, the interest of the petitioner assailing the constitutionality of a statute must be direct and personal. He must be able to show, not only that the law or any government act is invalid, but also that he sustained or is in imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers thereby in some indefinite way. It must appear that the person complaining has been or is about to be denied some right or privilege to which he is lawfully entitled or that he is about to be subjected to some burdens or penalties by reason of the statute or act complained of. In fine, when the proceeding involves the assertion of a public right, the mere fact that he is a citizen satisfies the requirement of personal interest.21[21]

In the case at bar, petitioner's representatives have complied with the qualifying conditions or specific requirements exacted under the *locus standi* rule. As citizens, their interest in the subject matter of the petition is direct and personal. At the very least, their assertions questioning the *Agreement* are made of a public right, i.e., to ascertain that the *Agreement* did not go against established national policies, practices, and obligations bearing on the State's obligation to the community of nations.

At any event, the primordial importance to Filipino citizens in general of the issue at hand impels the Court to brush aside the procedural barrier posed by the

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20[20] G.R. No. 160261, November 10, 2003, 415 SCRA 45.

21[21] Id. at 136-137.

traditional requirement of *locus standi*, as we have done in a long line of earlier cases, notably in the old but oft-cited emergency powers cases22[22] and *Kilosbayan v. Guingona, Jr*.23[23] In cases of transcendental importance, we wrote again in *Bayan v. Zamora*,24[24] "The Court may relax the standing requirements and allow a suit to prosper even where there is no direct injury to the party claiming the right of judicial review."

Moreover, bearing in mind what the Court said in *Tañada v. Angara*, "that it will not shirk, digress from or abandon its sacred duty and authority to uphold the Constitution in matters that involve grave abuse of discretion brought before it in appropriate cases, committed by any officer, agency, instrumentality or department of the government,"25[25] we cannot but resolve head on the issues raised before us. Indeed, where an action of any branch of government is seriously alleged to have infringed the Constitution or is done with grave abuse of discretion, it becomes not only the right but in fact the duty of the judiciary to settle it. As in this petition, issues are precisely raised putting to the fore the propriety of the *Agreement* pending the ratification of the Rome Statute.

Validity of the RP-US Non-Surrender Agreement

22[22] Supra note 12.

23[23] Supra note 19.

24[24] G.R. No. 138587, October 10, 2000, 342 SCRA 2000.

25[25] G.R. No. 118295, May 2, 1997, 272 SCRA 18, 48-49.

Petitioner's initial challenge against the *Agreement* relates to form, its threshold posture being that E/N BFO-028-03 cannot be a valid medium for concluding the *Agreement*.

Petitioners' contention—perhaps taken unaware of certain well-recognized international doctrines, practices, and jargons—is untenable. One of these is the doctrine of incorporation, as expressed in Section 2, Article II of the Constitution, wherein the Philippines adopts the generally accepted principles of international law and international jurisprudence as part of the law of the land and adheres to the policy of peace, cooperation, and amity with all nations.26[26] An exchange of notes falls "into the category of inter-governmental agreements,"27[27] which is an internationally accepted form of international agreement. The United Nations Treaty Collections (Treaty Reference Guide) defines the term as follows:

> An "exchange of notes" is a record of a routine agreement, that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or, sometimes, to avoid the process of legislative approval.28[28]

26[26] Cruz, PHILIPPINE POLITICAL LAW 55 (1995).

27[27] Harris, CASES AND MATERIALS ON INTERNATIONAL LAW 801 (2004).

28[28] Official Website of the UN <http://untreaty.un.org/English/guide.asp.>; cited in *Abaya v. Ebdane*, G.R. No. 167919, February 14, 2007, 515 SCRA 720.

In another perspective, the terms "exchange of notes" and "executive agreements" have been used interchangeably, exchange of notes being considered a form of executive agreement that becomes binding through executive action.29[29] On the other hand, executive agreements concluded by the President "sometimes take the form of exchange of notes and at other times that of more formal documents denominated 'agreements' or 'protocols.'"30[30] As former US High Commissioner to the Philippines Francis B. Sayre observed in his work, *The Constitutionality of Trade Agreement Acts*:

> The point where ordinary correspondence between this and other governments ends and agreements – whether denominated executive agreements or exchange of notes or otherwise – begin, may sometimes be difficult of ready ascertainment.31[31] x x x

It is fairly clear from the foregoing disquisition that E/N BFO-028-03—be it viewed as the Non-Surrender Agreement itself, or as an integral instrument of acceptance thereof or as consent to be bound—is a recognized mode of concluding a legally binding international written contract among nations.

Senate Concurrence Not Required

Article 2 of the Vienna Convention on the Law of Treaties defines a treaty as "an international agreement concluded between states in written form and governed

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29[29] *Abaya v. Ebdane*, supra.

30[30] Id.; citing *The Constitutionality of Trade Agreement Acts* by Francis Sayre.

31[31] Cited in *Commissioner of Customs v. Eastern Sea Trading*, 113 Phil. 333 (1961).

by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."32[32] International agreements may be in the form of (1) treaties that require legislative concurrence after executive ratification; or (2) executive agreements that are similar to treaties, except that they do not require legislative concurrence and are usually less formal and deal with a narrower range of subject matters than treaties.33[33]

Under international law, there is no difference between treaties and executive agreements in terms of their binding effects on the contracting states concerned,34[34] as long as the negotiating functionaries have remained within their powers.35[35] Neither, on the domestic sphere, can one be held valid if it violates the Constitution.36[36] Authorities are, however, agreed that one is distinct from another for accepted reasons apart from the concurrence-requirement

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32[32] Executive Order No. 459, dated November 25, 1997, contains a similar definition.

33[33] B.A. Boczek, INTERNATIONAL LAW: A DICTIONARY 346 (2005).

34[34] *Bayan v. Zamora*, supra note 24; citing Richard Erickson, "The Making of Executive Agreements by the US Department of Defense," 13 Boston U. Intl. L. J. 58 (1955); Randall, The Treaty Power, 51 Ohio St. L.J., p. 4; *see also* Restatement (Third) of Foreign Relations Law § 301 (1987), which states that "[t]he terminology used for international agreements is varied. Among the terms used are: treaty, convention, agreement, protocol, covenant, charter, statute, act, declaration, concordat, **exchange of notes**, agreed minute, memorandum of agreement, memorandum of understanding, and modus vivendi. Whatever their designation, all agreements have the same legal status, except as their provisions or the circumstances of their conclusion indicate otherwise." (Emphasis supplied.)

35[35] Id. at 489; citing 5 Hackworth, DIGEST OF INTERNATIONAL LAW 395; cited in *USAFE Veterans Association Inc. v. Treasurer of the Philippines*, 105 Phil. 1030, 1037 (1959).

36[36] *Reid v. Covert*, 354 U.S. 77 S. Ct.1230.

aspect.37[37] As has been observed by US constitutional scholars, a treaty has greater "dignity" than an executive agreement, because its constitutional efficacy is beyond doubt, a treaty having behind it the authority of the President, the Senate, and the people;38[38] a ratified treaty, unlike an executive agreement, takes precedence over any prior statutory enactment.39[39]

Petitioner parlays the notion that the *Agreement* is of dubious validity, partaking as it does of the nature of a treaty; hence, it must be duly concurred in by the Senate. Petitioner takes a cue from *Commissioner of Customs v. Eastern Sea Trading*, in which the Court reproduced the following observations made by US legal scholars: "[I]nternational agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties [while] those embodying adjustments of detail carrying out well established national policies and traditions and those involving arrangements of a more or less temporary nature take the form of executive agreements." 40[40]

37[37] In the US constitutional system, it is the legal force of treaties and executive agreements on the domestic plane.

38[38] Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 224 (2nd ed., 1996).

39[39] Prof. Edwin Borchard, Treaties and Executive Agreements – Reply, Yale Law Journal, June 1945; cited in Justice Antonio T. Carpio's Dissent in *Nicolas v. Romulo*, G.R. Nos. 175888, 176051 & 176222, February 11, 2009, 578 SCRA 438.

40[40] No. L-14279, October 31, 1961, 3 SCRA 351, 356.

Pressing its point, petitioner submits that the subject of the *Agreement* does not fall under any of the subject-categories that are enumerated in the *Eastern Sea Trading* case, and that may be covered by an executive agreement, such as commercial/consular relations, most-favored nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and settlement of claims.

In addition, petitioner foists the applicability to the instant case of *Adolfo v. CFI of Zambales and Merchant*,41[41] holding that an executive agreement through an exchange of notes cannot be used to amend a treaty.

We are not persuaded.

The categorization of subject matters that may be covered by international agreements mentioned in *Eastern Sea Trading* is not cast in stone. There are no hard and fast rules on the propriety of entering, on a given subject, into a treaty or an executive agreement as an instrument of international relations. The primary consideration in the choice of the form of agreement is the parties' intent and desire to craft an international agreement in the form they so wish to further their respective interests. Verily, the matter of form takes a back seat when it comes to effectiveness and binding effect of the enforcement of a treaty or an executive

41[41] No. L-30650, July 31, 1970, 34 SCRA 166.

agreement, as the parties in either international agreement each labor under the *pacta sunt servanda*42[42] principle.

As may be noted, almost half a century has elapsed since the Court rendered its decision in *Eastern Sea Trading*. Since then, the conduct of foreign affairs has become more complex and the domain of international law wider, as to include such subjects as human rights, the environment, and the sea. In fact, in the US alone, the executive agreements executed by its President from 1980 to 2000 covered subjects such as defense, trade, scientific cooperation, aviation, atomic energy, environmental cooperation, peace corps, arms limitation, and nuclear safety, among others.43[43] Surely, the enumeration in *Eastern Sea Trading* cannot circumscribe the option of each state on the matter of which the international agreement format would be convenient to serve its best interest. As Francis Sayre said in his work referred to earlier:

42[42] Latin for "agreements must be kept," BLACK'S LAW DICTIONARY (8th ed., 2004). The principle of *pacta sunt servanda*, in its most common sense, refers to private contracts, stressing that these pacts and clauses are the law between the parties, and implying that the non-fulfilment of respective obligations is a breach of the pact.

With regard to international agreements, Art. 26 of the Vienna Convention on the Law of Treaties (signed on May 23, 1969 and entered into force on January 27, 1980) states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." *Pacta sunt servanda* is based on good faith. This entitles states to require that obligations be respected and to rely upon the obligations being respected. This good-faith basis of treaties implies that a party to the treaty cannot invoke provisions of its domestic law as justification for a failure to perform. The only limit to *pacta sunt servanda* is *jus cogens* (Latin for "compelling law"), the peremptory norm of general international law.

43[43] Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YLJ 140, 152 (2009).

> x x x It would be useless to undertake to discuss here the large variety of executive agreements as such concluded from time to time. Hundreds of executive agreements, other than those entered into under the trade-agreement act, have been negotiated with foreign governments. x x x They cover such subjects as the inspection of vessels, navigation dues, income tax on shipping profits, the admission of civil air craft, custom matters and commercial relations generally, international claims, postal matters, the registration of trademarks and copyrights, etc. x x x

And lest it be overlooked, one type of executive agreement is a treaty-authorized44[44] or a treaty-implementing executive agreement,45[45] which necessarily would cover the same matters subject of the underlying treaty.

But over and above the foregoing considerations is the fact that—save for the situation and matters contemplated in Sec. 25, Art. XVIII of the Constitution46[46]—when a treaty is required, the Constitution does not classify any subject, like that involving political issues, to be in the form of, and ratified as, a treaty. What the Constitution merely prescribes is that treaties need the concurrence of the Senate by a vote defined therein to complete the ratification process.

44[44] Rotunda, Nowak and Young, TREATISE ON CONSTITUTIONAL LAW 394; cited in then Chief Justice Puno's dissent in *Bayan v. Zamora*, supra.

45[45] *Nicolas*, supra note 39.

46[46] Sec. 25. After the expiration in 1991 of the [RP-US Military Bases Agreement] foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate, and when Congress so requires, ratified x x x in a national referendum held for that purpose, and recognized as a treaty by the contracting state.

Petitioner's reliance on *Adolfo*47[47] is misplaced, said case being inapplicable owing to different factual milieus. There, the Court held that an executive agreement cannot be used to amend a duly ratified and existing treaty, i.e., the Bases Treaty. Indeed, an executive agreement that does not require the concurrence of the Senate for its ratification may not be used to amend a treaty that, under the Constitution, is the product of the ratifying acts of the Executive and the Senate. The presence of a treaty, purportedly being subject to amendment by an executive agreement, does not obtain under the premises.

Considering the above discussion, the Court need not belabor at length the third main issue raised, referring to the validity and effectivity of the *Agreement* without the concurrence by at least two-thirds of all the members of the Senate. The Court has, in *Eastern Sea Trading*,48[48] as reiterated in *Bayan*,49[49] given recognition to the obligatory effect of executive agreements without the concurrence of the Senate:

> x x x [T]he right of the Executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage. From the earliest days of our history, we have entered executive agreements covering such subjects as commercial and consular relations, most favored-nation rights, patent rights, trademark and copyright protection, postal and

47[47] Supra note 39.

48[48] Supra note 41.

49[49] Supra note 31.

navigation arrangements and the settlement of claims. The validity of these has never been seriously questioned by our courts.

The Agreement Not in Contravention of the Rome Statute

It is the petitioner's next contention that the *Agreement* undermines the establishment of the ICC and is null and void insofar as it unduly restricts the ICC's jurisdiction and infringes upon the effectivity of the Rome Statute. Petitioner posits that the *Agreement* was constituted solely for the purpose of providing individuals or groups of individuals with immunity from the jurisdiction of the ICC; and such grant of immunity through non-surrender agreements allegedly does not legitimately fall within the scope of Art. 98 of the Rome Statute. It concludes that state parties with non-surrender agreements are prevented from meeting their obligations under the Rome Statute, thereby constituting a breach of Arts. 27,50[50] 86,51[51] 8952[52] and 9053[53] thereof.

50[50] Article 27

Irrelevance of official capacity

1. This Statue 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.

51[51] Article 86

General Obligation to Cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

52[52] Article 89

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of neb is in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

53[53] Article 90

Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is inadmissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

Petitioner stresses that the overall object and purpose of the Rome Statute is to ensure that those responsible for the worst possible crimes are brought to justice in all cases, primarily by states, but as a last resort, by the ICC; thus, any agreement—like the non-surrender agreement—that precludes the ICC from exercising its complementary function of acting when a state is unable to or unwilling to do so, defeats the object and purpose of the Rome Statute.

Petitioner would add that the President and the DFA Secretary, as representatives of a signatory of the Rome Statute, are obliged by the imperatives of good faith to refrain from performing acts that substantially devalue the purpose and object of the Statute, as signed. Adding a nullifying ingredient to the *Agreement*, according to petitioner, is the fact that it has an immoral purpose or is otherwise at variance with a priorly executed treaty.

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Contrary to petitioner's pretense, the *Agreement* does not contravene or undermine, nor does it differ from, the Rome Statute. Far from going against each other, one complements the other. As a matter of fact, the principle of complementarity underpins the creation of the ICC. As aptly pointed out by respondents and admitted by petitioners, the jurisdiction of the ICC is to "be complementary to national criminal jurisdictions [of the signatory states]."54[54] Art. 1 of the Rome Statute pertinently provides:

> Article 1
>
> The Court
>
> An International Crimininal Court ("the Court") is hereby established. It x x x **shall have the power to exercise its jurisdiction** over persons for the most serious crimes of international concern, as referred to in this Statute, and **shall be complementary to national criminal jurisdictions**. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute. (Emphasis ours.)

Significantly, the sixth preambular paragraph of the Rome Statute declares that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." This provision indicates that primary jurisdiction over the so-called international crimes rests, at the first instance, with

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54[54] Tenth preambular paragraph of the ICC Statute.

the state where the crime was committed; secondarily, with the ICC in appropriate situations contemplated under Art. 17, par. 155[55] of the Rome Statute.

Of particular note is the application of the principle of *ne bis in idem*56[56] under par. 3 of Art. 20, Rome Statute, which again underscores the primacy of the jurisdiction of a state vis-a-vis that of the ICC. As far as relevant, the provision states that "no person who has been tried by another court for conduct x x x [constituting crimes within its jurisdiction] shall be tried by the [International Criminal] Court with respect to the same conduct x x x."

The foregoing provisions of the Rome Statute, taken collectively, argue against the idea of jurisdictional conflict between the Philippines, as party to the non-surrender agreement, and the ICC; or the idea of the *Agreement* substantially

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55[55] 1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

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

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

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

56[56] Latin for "not twice for the same," a legal principle that means no legal action can be instituted twice for the same cause of action. In gist, it is a legal concept substantially the same as or synonymous to double jeopardy.

impairing the value of the RP's undertaking under the Rome Statute. Ignoring for a while the fact that the RP signed the Rome Statute ahead of the *Agreement*, it is abundantly clear to us that the Rome Statute expressly recognizes the primary jurisdiction of states, like the RP, over serious crimes committed within their respective borders, the complementary jurisdiction of the ICC coming into play only when the signatory states are unwilling or unable to prosecute.

Given the above consideration, petitioner's suggestion—that the RP, by entering into the *Agreement*, violated its duty required by the imperatives of good faith and breached its commitment under the Vienna Convention57[57] to refrain from performing any act tending to impair the value of a treaty, e.g., the Rome Statute—has to be rejected outright. For nothing in the provisions of the *Agreement*, in relation to the Rome Statute, tends to diminish the efficacy of the Statute, let alone defeats the purpose of the ICC. Lest it be overlooked, the Rome Statute contains a proviso that enjoins the ICC from seeking the surrender of an erring person, should the process require the requested state to perform an act that would violate some international agreement it has entered into. We refer to Art. 98(2) of the Rome Statute, which reads:

Article 98

Cooperation with respect to waiver of immunity

57[57] A state is obliged to refrain from acts that would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

and consent to surrender

x x x x

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.

Moreover, under international law, there is a considerable difference between a State-Party and a signatory to a treaty. Under the Vienna Convention on the Law of Treaties, a signatory state is only obliged to refrain from acts which would defeat the object and purpose of a treaty;58[58] whereas a State-Party, on the other hand, is legally obliged to follow all the provisions of a treaty in good faith.

In the instant case, it bears stressing that the Philippines is only a signatory to the Rome Statute and not a State-Party for lack of ratification by the Senate. Thus, it is only obliged to refrain from acts which would defeat the object and purpose of the Rome Statute. Any argument obliging the Philippines to follow any provision in the treaty would be premature.

As a result, petitioner's argument that State-Parties with non-surrender agreements are prevented from meeting their obligations under the Rome Statute,

58[58] VIENNA CONVENTION ON THE LAW OF TREATIES, Art. 18.

specifically Arts. 27, 86, 89 and 90, must fail. These articles are only legally binding upon State-Parties, not signatories.

Furthermore, a careful reading of said Art. 90 would show that the *Agreement* is not incompatible with the Rome Statute. Specifically, Art. 90(4) provides that "[i]f the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court. x x x" In applying the provision, certain undisputed facts should be pointed out: *first*, the US is neither a State-Party nor a signatory to the Rome Statute; and *second*, there is an international agreement between the US and the Philippines regarding extradition or surrender of persons, i.e., the *Agreement*. Clearly, even assuming that the Philippines is a State-Party, the Rome Statute still recognizes the primacy of international agreements entered into between States, even when one of the States is not a State-Party to the Rome Statute.

Sovereignty Limited by International Agreements

Petitioner next argues that the RP has, through the *Agreement*, abdicated its sovereignty by bargaining away the jurisdiction of the ICC to prosecute US nationals, government officials/employees or military personnel who commit serious crimes of international concerns in the Philippines. Formulating petitioner's argument a bit differently, the RP, by entering into the *Agreement*, does thereby abdicate its sovereignty, abdication being done by its waiving or

abandoning its right to seek recourse through the Rome Statute of the ICC for erring Americans committing international crimes in the country.

We are not persuaded. As it were, the *Agreement* is but a form of affirmance and confirmance of the Philippines' national criminal jurisdiction. National criminal jurisdiction being primary, as explained above, it is always the responsibility and within the prerogative of the RP either to prosecute criminal offenses equally covered by the Rome Statute or to accede to the jurisdiction of the ICC. Thus, the Philippines may decide to try "persons" of the US, as the term is understood in the *Agreement*, under our national criminal justice system. Or it may opt not to exercise its criminal jurisdiction over its erring citizens or over US "persons" committing high crimes in the country and defer to the secondary criminal jurisdiction of the ICC over them. As to "persons" of the US whom the Philippines refuses to prosecute, the country would, in effect, accord discretion to the US to exercise either its national criminal jurisdiction over the "person" concerned or to give its consent to the referral of the matter to the ICC for trial. In the same breath, the US must extend the same privilege to the Philippines with respect to "persons" of the RP committing high crimes within US territorial jurisdiction.

In the context of the Constitution, there can be no serious objection to the Philippines agreeing to undertake the things set forth in the *Agreement*. Surely, one

State can agree to waive jurisdiction—to the extent agreed upon—to subjects of another State due to the recognition of the principle of extraterritorial immunity. What the Court wrote in *Nicolas v. Romulo*59[59]—a case involving the implementation of the criminal jurisdiction provisions of the RP-US Visiting Forces Agreement—is apropos:

> Nothing in the Constitution prohibits such agreements recognizing immunity from jurisdiction or some aspects of jurisdiction (such as custody), in relation to long-recognized subjects of such immunity like Heads of State, diplomats and members of the armed forces contingents of a foreign State allowed to enter another State's territory. x x x

To be sure, the nullity of the subject non-surrender agreement cannot be predicated on the postulate that some of its provisions constitute a virtual abdication of its sovereignty. Almost every time a state enters into an international agreement, it voluntarily sheds off part of its sovereignty. The Constitution, as drafted, did not envision a reclusive Philippines isolated from the rest of the world. It even adheres, as earlier stated, to the policy of cooperation and amity with all nations.60[60]

By their nature, treaties and international agreements actually have a limiting effect on the otherwise encompassing and absolute nature of sovereignty. By their voluntary act, nations may decide to surrender or waive some aspects of their state

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59[59] Supra note 39.

60[60] CONSTITUTION, Art. II, Sec. 2.

power or agree to limit the exercise of their otherwise exclusive and absolute jurisdiction. The usual underlying consideration in this partial surrender may be the greater benefits derived from a pact or a reciprocal undertaking of one contracting party to grant the same privileges or immunities to the other. On the rationale that the Philippines has adopted the generally accepted principles of international law as part of the law of the land, a portion of sovereignty may be waived without violating the Constitution.61[61] Such waiver does not amount to an unconstitutional diminution or deprivation of jurisdiction of Philippine courts.62[62]

Agreement Not Immoral/Not at Variance

with Principles of International Law

Petitioner urges that the *Agreement* be struck down as void *ab initio* for imposing immoral obligations and/or being at variance with allegedly universally recognized principles of international law. The immoral aspect proceeds from the fact that the *Agreement*, as petitioner would put it, "leaves criminals immune from responsibility for unimaginable atrocities that deeply shock the conscience of

61[61] *Tañada v. Angara*, G.R. No. 118295, May 2, 1997, 272 SCRA 18.

62[62] *Dizon v. Phil. Ryubus Command*, 81 Phil. 286 (1948); cited in Agpalo, PUBLIC INTERNATIONAL LAW 222-223 (2006).

humanity; x x x it precludes our country from delivering an American criminal to the [ICC] x x x."63[63]

The above argument is a kind of recycling of petitioner's earlier position, which, as already discussed, contends that the RP, by entering into the *Agreement*, virtually abdicated its sovereignty and in the process undermined its treaty obligations under the Rome Statute, contrary to international law principles.64[64]

The Court is not persuaded. Suffice it to state in this regard that the non-surrender agreement, as aptly described by the Solicitor General, "is an assertion by the Philippines of its desire to try and punish crimes under its national law. x x x The agreement is a recognition of the primacy and competence of the country's judiciary to try offenses under its national criminal laws and dispense justice fairly and judiciously."

Petitioner, we believe, labors under the erroneous impression that the *Agreement* would allow Filipinos and Americans committing high crimes of international concern to escape criminal trial and punishment. This is manifestly

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63[63] *Rollo*, pp. 53-54.

64[64] Under VIENNA CONVENTION ON THE LAW OF TREATIES, Art. 18, a State has the obligations not to defeat the object and purpose of a treaty prior to its entry into force when (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

incorrect. Persons who may have committed acts penalized under the Rome Statute can be prosecuted and punished in the Philippines or in the US; or with the consent of the RP or the US, before the ICC, assuming, for the nonce, that all the formalities necessary to bind both countries to the Rome Statute have been met. For perspective, what the *Agreement* contextually prohibits is the surrender by either party of individuals to international tribunals, like the ICC, without the consent of the other party, which may desire to prosecute the crime under its existing laws. With the view we take of things, there is nothing immoral or violative of international law concepts in the act of the Philippines of assuming criminal jurisdiction pursuant to the non-surrender agreement over an offense considered criminal by both Philippine laws and the Rome Statute.

No Grave Abuse of Discretion

Petitioner's final point revolves around the necessity of the Senate's concurrence in the *Agreement*. And without specifically saying so, petitioner would argue that the non-surrender agreement was executed by the President, thru the DFA Secretary, in grave abuse of discretion.

The Court need not delve on and belabor the first portion of the above posture of petitioner, the same having been discussed at length earlier on. As to the second portion, We wish to state that petitioner virtually faults the President for performing, through respondents, a task conferred the President by the Constitution—the power to enter into international agreements.

By constitutional fiat and by the nature of his or her office, the President, as head of state and government, is the sole organ and authority in the external affairs of the country.65[65] The Constitution vests in the President the power to enter into international agreements, subject, in appropriate cases, to the required concurrence votes of the Senate. But as earlier indicated, executive agreements may be validly entered into without such concurrence. As the President wields vast powers and influence, her conduct in the external affairs of the nation is, as *Bayan* would put it, "executive altogether." The right of the President to enter into or ratify binding executive agreements has been confirmed by long practice.66[66]

In thus agreeing to conclude the *Agreement* thru E/N BFO-028-03, then President Gloria Macapagal-Arroyo, represented by the Secretary of Foreign Affairs, acted within the scope of the authority and discretion vested in her by the Constitution. At the end of the day, the President—by ratifying, thru her deputies, the non-surrender agreement—did nothing more than discharge a constitutional duty and exercise a prerogative that pertains to her office.

While the issue of ratification of the Rome Statute is not determinative of the other issues raised herein, it may perhaps be pertinent to remind all and sundry that about the time this petition was interposed, such issue of ratification was laid to rest

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65[65] *Bayan v. Zamora*, supra.

66[66] Id.; citing *Commissioner of Customs*, supra.

in *Pimentel, Jr. v. Office of the Executive Secretary*.67[67] As the Court emphasized in said case, the power to ratify a treaty, the Statute in that instance, rests with the President, subject to the concurrence of the Senate, whose role relative to the ratification of a treaty is limited merely to concurring in or withholding the ratification. And concomitant with this treaty-making power of the President is his or her prerogative to refuse to submit a treaty to the Senate; or having secured the latter's consent to the ratification of the treaty, refuse to ratify it.68[68] This prerogative, the Court hastened to add, is the President's alone and cannot be encroached upon via a writ of mandamus. Barring intervening events, then, the Philippines remains to be just a signatory to the Rome Statute. Under Art. 12569[69] thereof, the final acts required to complete the treaty process and, thus, bring it into force, insofar as the Philippines is concerned, have yet to be done.

Agreement Need Not Be in the Form of a Treaty

67[67] G.R. No. 158088, July 6, 2005, 462 SCRA 622.

68[68] Id. at 637-638; citing Cruz, INTERNATIONAL LAW 174 (1998).

69[69] Signature, ratification, acceptance, approval or accession.

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

On December 11, 2009, then President Arroyo signed into law Republic Act No. (RA) 9851, otherwise known as the "Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity." Sec. 17 of RA 9851, particularly the second paragraph thereof, provides:

> **Section 17.** *Jurisdiction.* – x x x x
>
> In the interest of justice, the relevant Philippine authorities ***may*** dispense with the investigation or prosecution of a crime punishable under this Act if another court or international tribunal is already conducting the investigation or undertaking the prosecution of such crime. **Instead, the authorities *may* surrender or extradite suspected or accused persons in the Philippines to the appropriate international court, if any, or to another State pursuant to the applicable extradition laws and treaties**. (Emphasis supplied.)

A view is advanced that the *Agreement* amends existing municipal laws on the State's obligation in relation to grave crimes against the law of nations, i.e., genocide, crimes against humanity and war crimes. Relying on the above-quoted statutory proviso, the view posits that the Philippine is required to surrender to the proper international tribunal those persons accused of the grave crimes defined under RA 9851, if it does not exercise its primary jurisdiction to prosecute them.

The basic premise rests on the interpretation that if it does not decide to prosecute a foreign national for violations of RA 9851, the Philippines has only two options, to wit: (1) surrender the accused to the proper international tribunal; or (2) surrender the accused to another State if such surrender is "pursuant to the applicable extradition laws and treaties." But the Philippines may exercise these

options only in cases where "another court or international tribunal is already conducting the investigation or undertaking the prosecution of such crime;" otherwise, the Philippines must prosecute the crime before its own courts pursuant to RA 9851.

Posing the situation of a US national under prosecution by an international tribunal for any crime under RA 9851, the Philippines has the option to surrender such US national to the international tribunal if it decides not to prosecute such US national here. The view asserts that this option of the Philippines under Sec. 17 of RA 9851 is not subject to the consent of the US, and any derogation of Sec. 17 of RA 9851, such as requiring the consent of the US before the Philippines can exercise such option, requires an amendatory law. In line with this scenario, the view strongly argues that the *Agreement* prevents the Philippines—without the consent of the US—from surrendering to any international tribunal US nationals accused of crimes covered by RA 9851, and, thus, in effect amends Sec. 17 of RA 9851. Consequently, the view is strongly impressed that the *Agreement* cannot be embodied in a simple executive agreement in the form of an exchange of notes but must be implemented through an extradition law or a treaty with the corresponding formalities.

Moreover, consonant with the foregoing view, citing Sec. 2, Art. II of the Constitution, where the Philippines adopts, as a national policy, the "**generally accepted principles of international law as part of the law of the land**," the Court is further impressed to perceive the Rome Statute as declaratory of customary international law. In other words, the Statute embodies principles of law which constitute customary international law or custom and for which reason it assumes the status of an enforceable domestic law in the context of the aforecited constitutional provision. As a corollary, it is argued that any derogation from the Rome Statute principles cannot be undertaken via a mere executive agreement, which, as an exclusive act of the executive branch,

can only implement, but cannot amend or repeal, an existing law. The *Agreement*, so the argument goes, seeks to frustrate the objects of the principles of law or alters customary rules embodied in the Rome Statute.

Prescinding from the foregoing premises, the view thus advanced considers the *Agreement* inefficacious, unless it is embodied in a treaty duly ratified with the concurrence of the Senate, the theory being that a Senate- ratified treaty partakes of the nature of a municipal law that can amend or supersede another law, in this instance Sec. 17 of RA 9851 and the status of the Rome Statute as constitutive of enforceable domestic law under Sec. 2, Art. II of the Constitution.

We are unable to lend cogency to the view thus taken. For one, we find that the *Agreement* does not amend or is repugnant to RA 9851. For another, the view does not clearly state what precise principles of law, if any, the *Agreement* alters. And for a third, it does not demonstrate in the concrete how the *Agreement* seeks to frustrate the objectives of the principles of law subsumed in the Rome Statute.

Far from it, as earlier explained, the *Agreement* does not undermine the Rome Statute as the former merely reinforces the primacy of the national jurisdiction of the US and the Philippines in prosecuting criminal offenses committed by their respective citizens and military personnel, among others. The jurisdiction of the ICC pursuant to the Rome Statute over high crimes indicated thereat is clearly and unmistakably complementary to the national criminal jurisdiction of the signatory states.

Moreover, RA 9851 clearly: (1) defines and establishes the crimes against international humanitarian law, genocide and other crimes against humanity;70[70] (2) provides penal sanctions and criminal liability for their commission;71[71] and (3) establishes special courts for the prosecution of these crimes and for the State to exercise primary criminal jurisdiction.72[72] Nowhere in RA 9851 is there a proviso that goes against the tenor of the *Agreement*.

The view makes much of the above quoted second par. of Sec. 17, RA 9851 as **requiring** the Philippine State to surrender to the proper international tribunal those persons accused of crimes sanctioned under said law if it does not exercise its primary jurisdiction to prosecute such persons. This view is not entirely correct, for the above quoted proviso clearly provides **discretion** to the Philippine State on whether to surrender or not a person accused of the crimes under RA 9851. The statutory proviso uses the word "***may***." It is settled doctrine in statutory construction that the word "may" denotes discretion, and cannot be construed as having mandatory effect.73[73] Thus, the pertinent second pararagraph of Sec. 17, RA 9851 is simply permissive on the part of the Philippine State.

70[70] RA 9851, Secs. 4-6.

71[71] Id., Secs. 7-12.

72[72] Id., Secs. 17-18.

73[73] *Republic Planters Bank v. Agana, Sr.*, G.R. No. 51765, May 3, 1997, 269 SCRA 1, 12.

Besides, even granting that the surrender of a person is mandatorily required when the Philippines does not exercise its primary jurisdiction in cases where "another court or international tribunal is already conducting the investigation or undertaking the prosecution of such crime," still, the tenor of the *Agreement* is not repugnant to Sec. 17 of RA 9851. Said legal proviso aptly provides that the surrender may be made "to another State pursuant to the applicable extradition laws and treaties." The *Agreement* can already be considered a treaty following this Court's decision in *Nicolas v. Romulo*74[74] which cited *Weinberger v. Rossi*.75[75] In *Nicolas*, We held that "an executive agreement is a 'treaty' within the meaning of that word in international law and constitutes enforceable domestic law *vis-à-vis* the United States."76[76]

Likewise, the Philippines and the US already have an existing extradition treaty, i.e., RP-US Extradition Treaty, which was executed on November 13, 1994. The pertinent Philippine law, on the other hand, is Presidential Decree No. 1069, issued on January 13, 1977. Thus, the *Agreement*, in conjunction with the RP-US Extradition Treaty, would neither violate nor run counter to Sec. 17 of RA 9851.

74[74] Supra note 39.

75[75] 456 U.S. 25 (1982).

76[76] *Nicolas v. Romulo*, G.R. Nos. 175888, 176051 & 176222, February 11, 2009, 578 SCRA 438, 467.

The view's reliance on *Suplico v. Neda*77[77] is similarly improper. In that case, several petitions were filed questioning the power of the President to enter into foreign loan agreements. However, before the petitions could be resolved by the Court, the Office of the Solicitor General filed a Manifestation and Motion averring that the Philippine Government decided not to continue with the ZTE National Broadband Network Project, thus rendering the petition moot. In resolving the case, the Court took judicial notice of the act of the executive department of the Philippines (the President) and found the petition to be indeed moot. Accordingly, it dismissed the petitions.

In his dissent in the abovementioned case, Justice Carpio discussed the legal implications of an executive agreement. He stated that "an executive agreement has the force and effect of law x x x [it] cannot amend or repeal **prior** laws."78[78] Hence, this argument finds no application in this case seeing as RA 9851 is a subsequent law, not a prior one. Notably, this argument cannot be found in the *ratio decidendi* of the case, but only in the dissenting opinion.

The view further contends that the RP-US Extradition Treaty is inapplicable to RA 9851 for the reason that under par. 1, Art. 2 of the RP-US Extradition Treaty, "[a]n offense shall be an extraditable offense if it is ***punishable*** **under the laws in**

77[77] G.R. No. 178830, July 14, 2008, 558 SCRA 329.

78[78] Id. at 376. (Emphasis supplied.)

both Contracting Parties x x x,"79[79] and thereby concluding that while the Philippines has criminalized under RA 9851 the acts defined in the Rome Statute as war crimes, genocide and other crimes against humanity, there is no similar legislation in the US. It is further argued that, citing *U.S. v. Coolidge*, in the US, a person cannot be tried in the federal courts for an international crime unless Congress adopts a law defining and punishing the offense.

This view must fail.

On the contrary, the US has already enacted legislation punishing the high crimes mentioned earlier. In fact, as early as October 2006, the US enacted a law criminalizing war crimes. Section 2441, Chapter 118, Part I, Title 18 of the United States Code Annotated (USCA) provides for the criminal offense of "war crimes" which is similar to the war crimes found in both the Rome Statute and RA 9851, thus:

> (a) Offense – Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
> (b) Circumstances – The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in Section 101 of the Immigration and Nationality Act).

79[79] Par. 1, Art. 2, RP-US Extradition Treaty, Senate Resolution No. 11, November 27, 1995 (emphasis supplied).

(c) Definition – As used in this Section the term "war crime" means any conduct –

(1) Defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
(2) Prohibited by Article 23, 25, 27 or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
(3) Which constitutes a grave breach of common Article 3 (as defined in subsection [d]) when committed in the context of and in association with an armed conflict not of an international character; or
(4) Of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.80[80]

Similarly, in December 2009, the US adopted a law that criminalized genocide, to wit:

§1091. Genocide

(a) Basic Offense – Whoever, whether in the time of peace or in time of war and with specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group as such–

(1) kills members of that group;
(2) causes serious bodily injury to members of that group;
(3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
(4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
(5) imposes measures intended to prevent births within the group; or
(6) transfers by force children of the group to another group;

shall be punished as provided in subsection (b).81[81]

80[80] 18 U.S.C.A. § 2441.

81[81] 18 U.S.C.A. § 1091.

Arguing further, another view has been advanced that the current US laws do not cover every crime listed within the jurisdiction of the ICC and that there is a gap between the definitions of the different crimes under the US laws versus the Rome Statute. The view used a report written by Victoria K. Holt and Elisabeth W. Dallas, entitled "On Trial: The US Military and the International Criminal Court," as its basis.

At the outset, it should be pointed out that the report used may not have any weight or value under international law. Article 38 of the Statute of the International Court of Justice (ICJ) lists the sources of international law, as follows: (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (2) international custom, as evidence of a general practice accepted as law; (3) the general principles of law recognized by civilized nations; and (4) subject to the provisions of Article 59, judicial decisions and **the teachings of the most highly qualified publicists of the various nations**, as subsidiary means for the determination of rules of law. The report does not fall under any of the foregoing enumerated sources. It cannot even be considered as the "teachings of highly qualified publicists." A highly qualified publicist is a scholar of public international law and the term usually refers to legal scholars or "academic writers."82[82] It has not been shown that the authors83[83] of this report are highly qualified publicists.

82[82] Malcolm Shaw, INTERNATIONAL LAW 112 (2008).

83[83] Victoria K. Holt and Elisabeth W. Dallas, "On Trial: The US Military and the International Criminal Court," The Henry L. Stimson Center, Report No. 55, March 2006, p. 92; available at <http://www.stimson.org/images/uploads/research-pdfs/US_Military_and_the_ICC_FINAL_website.pdf> last visited January 27, 2011. We quote Holt and Dallas' profiles from the report:

Assuming *arguendo* that the report has weight, still, the perceived gaps in the definitions of the crimes are **nonexistent**. To highlight, the table below shows the definitions of genocide and war crimes under the Rome Statute vis-à-vis the definitions under US laws:

Rome Statute	US Law

Victoria K. Holt is a **senior associate** at the Henry L. Stimson Center, where she co-directs the Future of Peace Operations program. She has co-authored a study of peacekeeping reforms at the United Nations, analyzing the implementation of the 2000 Brahimi Report recommendations, and recently completed reports on African capacity for peace operations and the protection of civilians by military forces. Ms. Holt joined the Stimson Center in 2001, bringing policy and political expertise on UN and peacekeeping issues from her work at the US Department of State, in the NGO community and on Capitol Hill. She served as Senior Policy Advisor at the US State Department (Legislative Affairs), where she worked with Congress on issues involving UN peacekeeping and international organizations. Prior to joining State, she was Executive Director of the Emergency Coalition for US Financial Support of the United Nations, and also directed the Project on Peacekeeping and the UN at the Center for Arms Control and Nonproliferation in Washington, DC. From 1987 to 1994, Ms. Holt worked as a senior Congressional staffer, focusing on defense and foreign policy issues for the House Armed Services Committee. She served as Legislative Director for Rep. Thomas H. Andrews and as Senior Legislative Assistant to Rep. George J. Hochbrueckner. Ms. Holt is a graduate of the Naval War College and holds a B.A. with honors from Wesleyan University.

Elisabeth W. Dallas is a **research associate** with the Henry L. Stimson Center's Future of Peace Operations program and is focusing her work on the restoration of the rule of law in post-conflict settings. In particular, she is analyzing what legal mechanisms are required to allow for international criminal jurisdiction within UN peace operations. Prior to working at the Stimson Center, Ms. Dallas was a Senior Fellow with the Public International Law & Policy Group in Washington, DC, where she served as a political and legal advisor for parties during international peace negotiations taking place in the Middle East, the Balkans and South Asia. Ms. Dallas earned an MA from Tufts University's Fletcher School of Law & Diplomacy with a concentration in International Negotiation & Conflict Resolution and Public International Law, as well as a Certificate in Human Security and Rule of Law. She earned her BA from Haverford College. (Emphasis supplied.)

Article 6 **Genocide** For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.	**§1091. Genocide** (a) Basic Offense – Whoever, whether in the time of peace or in time of war and with specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group as such– (1) kills members of that group; (2) causes serious bodily injury to members of that group; (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques; (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part; (5) imposes measures intended to prevent births within the group; or (6) transfers by force children of the group to another group; shall be punished as provided in subsection (b).
Article 8 **War Crimes** 2. For the purpose of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: x x x84[84]	(a) Definition – As used in this Section the term "war crime" means any conduct – (1) Defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; (2) Prohibited by Article 23, 25, 27 or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of

84[84] (i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following	War on Land, signed 18 October 1907; (3) Which constitutes a grave breach of common Article 3 (as defined in subsection [d]85[85]) when committed

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(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

85[85] (d) Common Article 3 violations. –

(1) Prohibited conduct – In subsection (c)(3), the term "grave breach of common Article 3" means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows:

(A) Torture. – The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

(B) Cruel or inhuman treatment. – The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanction), including serious physical abuse, upon another within his custody or control.

(C) Performing biological experiments. – The act of a person who subjects, or conspires or attempts to subject, one or more person within his custody or physical control to biological experiments without a legitimate medical or dental purpose and in so doing endangers the body or health of such person or persons.

(D) Murder. – The act of a person who intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no

active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.

(E) Mutilation or maiming.— The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.

(F) Intentionally causing serious bodily injury.— The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.

(G) Rape.— The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.

(H) Sexual assault or abuse.— The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact with one or more persons, or causes, or conspires or attempts to cause, one or more persons to engage in sexual contact.

(I) Taking hostages.— The act of a person who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons.

(2) Definitions.— In the case of an offense under subsection (a) by reason of subsection (c)(3)—

(A) the term "severe mental pain or suffering" shall be applied for purposes of paragraphs (1)(A) and (1)(B) in accordance with the meaning given that term in section 2340 (2) of this title;

(B) the term "serious bodily injury" shall be applied for purposes of paragraph (1)(F) in accordance with the meaning given that term in section 113 (b)(2) of this title;

(C) the term "sexual contact" shall be applied for purposes of paragraph (1)(G) in accordance with the meaning given that term in section 2246 (3) of this title;

(D) the term "serious physical pain or suffering" shall be applied for purposes of paragraph (1)(B) as meaning bodily injury that involves—

acts: x x x x (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against	in the context of and in association with an armed conflict not of an international character; or (4) Of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as

(i) a substantial risk of death;

(ii) extreme physical pain;

(iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or

(iv) a significant loss or impairment of the function of a bodily member, organ, or mental faculty; and

(E) the term "serious mental pain or suffering" shall be applied for purposes of paragraph (1)(B) in accordance with the meaning given the term "severe mental pain or suffering" (as defined in section 2340(2) of this title), except that —

(i) the term "serious shall replace the term "sever" where it appears; and

(ii) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term "serious and non-transitory mental harm (which need not be prolonged)" shall replace the term "prolonged mental harm" where it appears.

(3) Inapplicability of certain provisions with respect to collateral damage or incident of lawful attack.— The intent specified for the conduct stated in subparagraphs (D), (E), and (F) or paragraph (1) precludes the applicability of those subparagraphs to an offense under subsection (A) by reasons of subsection (C)(3) with respect to —

(A) collateral damage; or

(B) death, damage, or injury incident to a lawful attack.

(4) Inapplicability of taking hostages to prisoner exchange.— Paragraph (1)(I) does not apply to an offense under subsection (A) by reason of subsection (C)(3) in the case of a prisoner exchange during wartime.

(5) Definition of grave breaches. – The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.

persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: x x x x (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: x x x.	amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.86[86]

Evidently, the gaps pointed out as to the definition of the crimes are not present. In fact, the report itself stated as much, to wit:

> Few believed there were wide differences between the crimes under the jurisdiction of the Court and crimes within the Uniform Code of Military Justice that would expose US personnel to the Court. Since US military lawyers were instrumental in drafting the elements of crimes outlined in the Rome Statute, they ensured that most of the crimes were consistent with those outlined in the UCMJ and gave strength to complementarity for the US. Small areas of potential gaps between the UCMJ and the Rome Statute, military experts argued, could be addressed through existing military laws.87[87] x x x

86[86] 18 U.S.C.A. § 2441.

87[87] Victoria K. Holt and Elisabeth W. Dallas, supra note 83, at 7.

The report went on further to say that "[a]ccording to those involved, the elements of crimes laid out in the Rome Statute have been part of US military doctrine for decades."88[88] Thus, the argument proffered cannot stand.

Nonetheless, despite the lack of actual domestic legislation, the US notably follows the doctrine of incorporation. As early as 1900, the esteemed Justice Gray in *The Paquete Habana*89[89] case already held international law as part of the law of the US, to wit:

> **International law is part of our law**, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for the trustworthy evidence of what the law really is.90[90] (Emphasis supplied.)

Thus, a person can be tried in the US for an international crime despite the lack of domestic legislation. The cited ruling in *U.S. v. Coolidge*,91[91] which in

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88[88] Id. at 35.

89[89] 175 U.S. 677, 20 S.Ct. 290 (1900).

90[90] Id. at 700; citing *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215, 40 L. ed. 95, 108, 125, 126, 16 Sup. Ct. Rep. 139.

91[91] 14 U.S. 415, 1816 WL 1770 (U.S.Mass.) (1816).

turn is based on the holding in *U.S. v. Hudson*,92[92] only applies to common law and not to the law of nations or international law.93[93] Indeed, the Court in *U.S. v. Hudson* only considered the question, "whether the Circuit Courts of the United States can exercise a **common law** jurisdiction in criminal cases."94[94] Stated otherwise, there is no common law crime in the US but this is considerably different from international law.

The US doubtless recognizes international law as part of the law of the land, necessarily including international crimes, even without any local statute.95[95] In fact, years later, US courts would apply international law as a source of criminal liability despite the lack of a local statute criminalizing it as such. So it was that in *Ex Parte Quirin*96[96] the US Supreme Court noted that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy

92[92] 11 U.S. (7 Cranch) 32 (1812).

93[93] Jordan J. Paust, CUSTOMARY INTERNATIONAL LAW AND HUMAN RIGHTS TREATIES ARE LAW OF THE UNITED STATES, 20 MIJIL 301, 309 (1999).

94[94] 11 U.S. (7 Cranch) 32, 32 (1812).

95[95] "x x x [C]ustomary international law is part of the law of the United States to the limited extent that, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." *U.S. v. Yousef*, 327 F.3d 56, 92 (2003).

96[96] 317 U.S. 1 (1942).

individuals."97[97] It went on further to explain that Congress had not undertaken the task of codifying the specific offenses covered in the law of war, thus:

> It is no objection that **Congress** in providing for the trial of such offenses **has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns**. An Act of Congress punishing 'the crime of piracy as defined by the law of nations is an appropriate exercise of its constitutional authority, Art. I, s 8, cl. 10, 'to define and punish' the offense since it has adopted by reference the sufficiently precise definition of international law. x x x Similarly by the reference in the 15th Article of War to 'offenders or offenses that x x x by the law of war may be triable by such military commissions. Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war x x x, and which may constitutionally be included within that jurisdiction.98[98] x x x (Emphasis supplied.)

This rule finds an even stronger hold in the case of crimes against humanity. It has been held that genocide, war crimes and crimes against humanity have

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97[97] Id. at 27-28; citing *Talbot v. Jansen*, 3 Dall. 133, 153, 159, 161, 1 L.Ed. 540; *Talbot v. Seeman*, 1 Cranch 1, 40, 41, 2 L.Ed. 15; *Maley v. Shattuck*, 3 Cranch 458, 488, 2 L.Ed. 498; *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch 185, 199, 2 L.Ed. 591; *The Rapid*, 8 Cranch 155, 159-164, 3 L.Ed. 520; *The St. Lawrence*, 9 Cranch 120, 122, 3 L.Ed. 676; *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch 191, 197, 198, 3 L.Ed. 701; *The Anne*, 3 Wheat. 435, 447, 448, 4 L.Ed. 428; *United States v. Reading*, 18 How. 1, 10, 15 L.Ed. 291; *Prize Cases (The Amy Warwick)*, 2 Black 635, 666, 667, 687, 17 L.Ed. 459; *The Venice*, 2 Wall. 258, 274, 17 L.Ed. 866; *The William Bagaley*, 5 Wall. 377, 18 L.Ed. 583; *Miller v. United States*, 11 Wall. 268, 20 L.Ed. 135; *Coleman v. Tennessee*, 97 U.S. 509, 517, 24 L.Ed. 1118; *United States v. Pacific R.R.*, 120 U.S. 227, 233, 7 S.Ct. 490, 492, 30 L.Ed. 634; *Juragua Iron Co. v. United States*, 212 U.S. 297, 29 S.Ct. 385, 53 L.Ed. 520.

98[98] Id. at 29-30.

attained the status of customary international law. Some even go so far as to state that these crimes have attained the status of *jus cogens*.99[99]

Customary international law or international custom is a source of international law as stated in the Statute of the ICJ.100[100] It is defined as the "general and consistent practice of states recognized and followed by them from a sense of legal obligation."101[101] In order to establish the customary status of a particular norm, two elements must concur: State practice, the objective element; and *opinio juris sive necessitates*, the subjective element.102[102]

State practice refers to the continuous repetition of the same or similar kind of acts or norms by States.103[103] It is demonstrated upon the existence of the following elements: (1) generality; (2) uniformity and consistency; and (3)

99[99] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Merits, I.C.J. judgment, February 26, 2007, § 161; M. Cherif Bassiouni, INTERNATIONAL CRIMES: JUS COGENS AND OBLIGATIO ERGA OMNES, 59-AUT Law & Contemp. Probs. 63, 68.

100[100] I.C.J. Statute, art. 38, ¶ 1 (b) international custom, as evidence of a general practice accepted as law.

101[101] *North Sea Continental Shelf*, 1969 I.C.J. ¶ 77; cited in Patrick Simon S. Perillo, *Transporting the Concept of Creeping Expropriation from De Lege Ferenda to De Lege Lata: Concretizing the Nebulous Under International Law*, 53 ATENEO L.J. 434, 509-510 (2008).

102[102] *North Sea Continental Shelf*, 1969 I.C.J. ¶ 77; D.J. Harris, CASES AND MATERIALS ON INTERNATIONAL LAW, 22 (2004).

103[103] *North Sea Continental Shelf*, 1969 I.C.J. at 175 (Tanaka, J., dissenting).

duration.104[104] While, *opinio juris*, the psychological element, requires that the state practice or norm "be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."105[105]

"The term '*jus cogens*' means the 'compelling law.'"106[106] Corollary, "a *jus cogens* norm holds the highest hierarchical position among all other customary norms and principles."107[107] As a result, *jus cogens* norms are deemed "peremptory and non-derogable."108[108] When applied to international crimes, "*jus cogens* crimes have been deemed so fundamental to the existence of a just international legal order that states cannot derogate from them, even by agreement."109[109]

104[104] Fisheries Jurisdiction (*U.K. v. Ice*) (Merits), 1974 I.C.J. 3, 89-90 (de Castro, J., separate opinion).

105[105] *North Sea Continental Shelf*, 1969 I.C.J. ¶ 77.

106[106] M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59-AUT Law & Contemp. Probs. 63, 67.

107[107] Id.

108[108] Id.

109[109] Carlee M. Hobbs, THE CONFLICT BETWEEN THE ALIEN TORT STATUTE LITIGATION AND FOREIGN AMNESTY LAWS, 43 Vand. J. Transnat'l L. 505, 521 (2009-2010); citing Jeffrey L. Dunoff, et al., INTERNATIONAL LAW: NORMS, ACTORS PROCESS 58-59 (2d ed., 2006).

These *jus cogens* crimes relate to the principle of universal jurisdiction, i.e., "any state may exercise jurisdiction over an individual who commits certain heinous and widely condemned offenses, even when no other recognized basis for jurisdiction exists."110[110] "The rationale behind this principle is that the crime committed is so egregious that it is considered to be committed against all members of the international community"111[111] and thus granting every State jurisdiction over the crime.112[112]

Therefore, even with the current lack of domestic legislation on the part of the US, it still has both the doctrine of incorporation and universal jurisdiction to try these crimes.

Consequently, no matter how hard one insists, the ICC, as an international tribunal, found in the Rome Statute is ***not*** declaratory of customary international law.

The first element of customary international law, i.e., "established, widespread, and consistent practice on the part of States,"113[113] does not, under

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110[110] Id.; citing Jeffrey L. Dunoff et al., INTERNATIONAL LAW: NORMS, ACTORS PROCESS 380 (2d ed., 2006).

111[111] Id.

112[112] Id.

113[113] *Pharmaceutical and Health Care Association of the Philippines v. Duque III,* G.R. No. 173034, October 9, 2007, 535 SCRA 265.

the premises, appear to be obtaining as reflected in this simple reality: As of October 12, 2010, only 114114[114] States have ratified the Rome Statute, subsequent to its coming into force eight (8) years earlier, or on July 1, 2002. The fact that 114 States out of a total of 194115[115] countries in the world, or roughly 58.76%, have ratified the Rome Statute casts doubt on whether or not the perceived principles contained in the Statute have attained the status of customary law and should be deemed as obligatory international law. The numbers even tend to argue against the urgency of establishing international criminal courts envisioned in the Rome Statute. Lest it be overlooked, the Philippines, judging by the action or inaction of its top officials, does not even feel bound by the Rome Statute. *Res ipsa loquitur*. More than eight (8) years have elapsed since the Philippine representative signed the Statute, but the treaty has not been transmitted to the Senate for the ratification process.

And this brings us to what Fr. Bernas, S.J. aptly said respecting the application of the concurring elements, thus:

> Custom or customary international law means "a general and consistent practice of states followed by them from a sense of legal obligation [*opinio juris*] x x x." This statement contains the two basic elements of custom: the material factor, that is how the states behave, and the psychological factor or subjective factor, that is, why they behave the way they do.
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> x x x x

114[114] See <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited January 26, 2011).

115[115] <http://www.nationsonline.org oneworld /states.org> (last visited October 18, 2010). The list does not include dependent territories.

> The initial factor for determining the existence of custom is **the actual behavior of states**. This includes several elements: duration, consistency, and generality of the practice of states.
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> The required duration can be either short or long. x x x
>
> x x x x
>
> Duration therefore is not the most important element. More important is the consistency and the generality of the practice. x x x
>
> x x x x
>
> **Once the existence of state practice has been established,** it becomes necessary **to determine why states behave the way they do**. Do states behave the way they do because they consider it obligatory to behave thus or do they do it only as a matter of courtesy? *Opinio juris*, or the belief that a certain form of behavior is obligatory, is what makes practice an international rule. Without it, practice is not law.116[116] (Emphasis added.)

Evidently, there is, as yet, no overwhelming consensus, let alone prevalent practice, among the different countries in the world that the prosecution of internationally recognized crimes of genocide, etc. **should be handled by a particular international criminal court**.

Absent the widespread/consistent-practice-of-states factor, the second or the psychological element must be deemed non-existent, for an inquiry on why states behave the way they do presupposes, in the first place, that they are actually behaving, as a matter of settled and consistent practice, in a certain manner. This implicitly requires belief that the practice in question is rendered obligatory by the

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116[116] Joaquin G. Bernas, S.J., AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 10-13 (2002); cited in *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, supra note 113, at 292.

existence of a rule of law requiring it.117[117] Like the first element, the second element has likewise not been shown to be present.

Further, the Rome Statute itself rejects the concept of universal jurisdiction over the crimes enumerated therein as evidenced by it requiring State consent.118[118] Even further, the Rome Statute specifically and unequivocally requires that: "This **Statute is *subject* to ratification**, acceptance or approval by signatory States."119[119] These clearly negate the argument that such has already attained customary status.

More importantly, an act of the executive branch with a foreign government must be afforded great respect. The power to enter into executive agreements has

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117[117] *Pharmaceutical and Health Care Association of the Philippines*, supra note 113, at 290-291; citation omitted.

118[118] Article 12. Preconditions to the exercise of jurisdiction.

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of Article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.

(b) The State of which the person accused of the crime is a national.

119[119] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Art. 25, par. 2.

long been recognized to be lodged with the President. As We held in *Neri v. Senate Committee on Accountability of Public Officers and Investigations*, "[t]he power to enter into an executive agreement is in essence an executive power. This authority of the President to enter into executive agreements without the concurrence of the Legislature has traditionally been recognized in Philippine jurisprudence."120[120] The rationale behind this principle is the inviolable doctrine of separation of powers among the legislative, executive and judicial branches of the government. Thus, absent any clear contravention of the law, courts should exercise utmost caution in declaring any executive agreement invalid.

In light of the above consideration, the position or view that the challenged RP-US Non-Surrender Agreement ought to be in the form of a treaty, to be effective, has to be rejected.

WHEREFORE, the petition for certiorari, mandamus and prohibition is hereby **DISMISSED** for lack of merit. No costs.

SO ORDERED.

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PRESBITERO J. VELASCO, JR.

Associate Justice

WE CONCUR:

RENATO C. CORONA

Chief Justice

See dissenting opinion

ANTONIO T. CARPIO

Associate Justice

I join the dissent of J. Carpio

CONCHITA CARPIO MORALES

Associate Justice

ANTONIO EDUARDO B. NACHURA

Associate Justice

TERESITA J. LEONARDO-DE CASTRO

Associate Justice

No Part

ARTURO D. BRION

Associate Justice

DIOSDADO M. PERALTA

Associate Justice

LUCAS P. BERSAMIN

Associate Justice

MARIANO C. DEL CASTILLO

Associate Justice

ROBERTO A. ABAD

Associate Justice

MARTIN S. VILLARAMA, JR.

Associate Justice

JOSE PORTUGAL PEREZ

Associate Justice

JOSE CATRAL MENDOZA

Associate Justice

I concur in the result

MARIA LOURDES P. A. SERENO

Associate Justice

C E R T I F I C A T I O N

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

RENATO C. CORONA

Chief Justice