Re-Examining the Philippine Extradition Law in Light of Current International Anti-Terrorism Efforts

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I. INTRODUCTION

In Resolution 1373,[1] the Security Council of the United Nations (U.N.) laid down the duty for all States to bring terrorists to justice and to "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens."[2] One of the means to implement said duty is through extradition, which is recognized as an international law enforcement mechanism.[3] Extradition is accepted to be the only regular system that has been devised to return fugitives to the jurisdiction of a court competent to try them in accordance with municipal and international law.[4]

Despite its recognition as a major instrument for the suppression of crime, some nations believe that there is an urgent need to reform the law on extradition in view of its great complexity and present inability to deal with the growing problems in the international community. These problems include terrorism,[5] the alleged lack of applicable normative standards,[6] the ineffectiveness of domestic legal systems,[7] and the practical difficulties with regard to the principles of double criminality and the political offense exception.[8]

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1. U.N. S.C. Res. 1373, U.N. S/RES/1373 (Sep. 28, 2001).
2. *Id.*
3. Joshua H. Warmund, *Removing Drug Lords and Street Pushers: The Extradition of Nationals in Colombia and the Dominican Republic*, 22 FORDHAM INT'L L.J. 2373, 2378 (1999).
4. Government of the United States of America v. Purganan, 389 SCRA 623, 652-53 (2002).
5. IVOR STANBROOK & CLIVE STANBROOK, THE LAW AND PRACTICE OF EXTRADITION xxviii-xxix (1980).
6. ANDREA BIANCHI, ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 494 (2004).
7. INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES (A Report by the International Bar Association's Task Force on International Terrorism) 136 (2003).
8. *See, e.g.* Jonathan O. Hafen, *International Extradition: Issues Arising under the Dual Criminality Requirement*, 1992 B.Y.U. L. REV. 191 (1992); Gavan Griffith & Claire Harris, *Recent Developments in the Law of Extradition*, 6 MELB. J. INT'L. L. 33, 38-46 (2005); Roberta Arnold, *Terrorism as a Crime Against Humanity under the ICC Statute*, in INTERNATIONAL COOPERATION IN COUNTER-

The impact of political considerations in the extradition process and the various degrees of assistance and support some nations provide to terrorist groups make it virtually impossible to gain custody of terrorists using traditional methods.[9] Thus, one of the legal mechanisms used by states against international terrorists is the principle of *aut dedere aut judicare* — extradite or prosecute.[10] Although terrorism is accepted as a political crime by some authorities due to its highly political nature or its relation to nationality, ethnicity, or religious views,[11] efforts exist at the international and national level to criminalize terrorism. Resolutions like Security Council Resolution 1373 particularly provide that, "claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists."[12] Moreover, the creation of several anti-terrorist conventions requires parties either to extradite alleged offenders of acts of terrorism or submit the matter to prosecution in their own courts.

The political offense exception to extradition, usually found in extradition treaties that safeguard individual rights, is one of the more controversial topics in extradition law today. The changing global landscape of the past several decades has prompted a significant re-examination of the scope of the political offense that increasing attention has been drawn to "acts of terrorism."[13] At present, there is neither an exhaustive definition nor an international consensus as to what constitutes a political offense.[14] Because

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TERRORISM: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS IN THE FIGHT AGAINST TERRORISM 123 (Giusseppe Nesi ed., 2006); Miriam E. Sapiro, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 655 (1986); Antje C. Petersen, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L.J. 767 (1992); R. Stuart Phillips, *The Political Offense Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for its Future*, 15 DICK. J. INT'L L. 337 (1997).

9. JACKSON NYAMUYA MAOGOTO, BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR ON TERROR 65 (2005 ed.).

10. *Id.* at 51.

11. Jeffrey Bean, *Terrorism, Extradition and International Law*, 9 J. INT'L. REL. 21 (2007).

12. U.N. S.C. Res. 1373, U.N. S/RES/1373 (Sep. 28, 2001).

13. David M. Lieberman, *Sorting the Revolutionary From the Terrorist: The Delicate Application of the "Political Offense" Exception in U.S. Extradition Cases*, 59 STAN. L. REV. 181, 182 (2006).

14. Sapiro, *supra* note 8, at 655. The 1935 Draft Extradition Convention developed under the support of the faculty at Harvard Law School suggested a broad definition for political offense, which would include "any offense connected with the activities of an organized group directed against the security or governmental system of the requesting State; and it does not exclude other

the parameters of the political offense exception have not been drawn with precision,[15] it has been difficult for the judiciary to determine what transforms a common crime into a political offense on a consistent basis and whether acts of terrorism fall within the protection of the political offense exception.[16] Although the exception was created for the protection of individuals from unjust persecution for political beliefs and actions, it can be used by perpetrators of common crimes with political overtones,[17] as with terrorists to avoid extradition, and thus, subsequent prosecution or punishment.[18]

The existing extradition law in the Philippines is Presidential Decree No. 1069.[19] It contains only procedural requirements with regard to extradition cases. Since its promulgation in 1977, it has not been amended even though several House Bills and Senate Bills have been filed.[20] This has resulted in several difficulties in the extradition of fugitives, particularly recognized international terrorists like the Abu Sayyaf Group (ASG), the New People's Army (NPA), and the Communist Party of the Philippines (CPP),[21] especially as contemporary terrorism appears to be a growth industry spanning much of the world.[22] With this, it is also important to link

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offenses having a political objective." Research in International Law, *Draft Convention on Extradition*, art. 5 (b), 29 AM. J. INT'L L. 1, 22, 112-13 (1935).

15. The application of the exception may depend upon a variety of factors, such as the requested state's ideological goals, its domestic laws, and the status of bilateral relations. Manuel R. García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1257 (1962).

16. Sapiro, *supra* note 8, at 656.

17. Common crimes, such as murder, aggravated assault, or robbery, which involve political motives, are frequently characterized as relative political offenses.

18. Sapiro, *supra* note 8, at 656.

19. *See* Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country [Philippine Extradition Law], Presidential Decree No. 1069 (1967).

20. *See* H.B. No. 5254, 12th Cong., 2d Sess. (Sep. 30, 2002); H.B. No. 5290, 12th Cong., 2d Sess. (Oct. 7, 2002); S.B. No. 1113, 13th Cong., 1st Sess. (June 30, 2004); S.B. No. 793, 14th Cong., 1st Sess. (July 7, 2007).

21. *See* DAVID J. WHITTAKER, TERRORISTS AND TERRORISM IN THE CONTEMPORARY WORLD Appendix II (Eric J. Evans & Ruth Henig eds., 2004); Sarah E. Tilstra, *Prosecuting International Terrorists: The Abu Sayyaf Attacks and the Bali Bombing*, 12 PAC. RIM L. & POL'Y J. 835, 843 (2003) (citing Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?* 14 MICH. J. INT'L LAW 222, 242 (1993) [hereinafter Joyner & Rothbaum]).

22. WHITTAKER, *supra* note 21, at 130.

the Philippine Extradition Law with the Human Security Act of 2007.[23]

This Note, then, seeks to discuss the dynamic interplay between terrorism and extradition as well as its relevant human rights aspect, with the author's proposition that the Philippine Extradition Law should be amended in view of the pressing concerns of the international community and its present inability to deal with the growing problems of terrorism so as to make it an integrated, responsive, and a comprehensive law and system of international cooperation in the suppression of heinous crimes like terrorism. This can be achieved by examining the current problems of extradition at the international and local context, including problems pertaining to the scope of the political offense exception, the status of the principle of *aut dedere aut judicare*, the need to ensure the protection of the human rights of the person sought, and the relationship of the obligation to extradite with national extradition laws.

II. THE MODERN FACE OF TERRORISM AND THE EXTRADITION PROCESS

A. Current State of Terrorism

Terrorism involves both the international legal system and national jurisdictions.[24] At the beginning of the 21st century, particularly after the 11 September 2001 World Trade Center attacks in New York, there was a concerted global effort to assess and respond to the growing threat of terrorism. Nations developed legal protocols for dealing with terrorism.[25] Some of these protocols have been implemented to promote international cooperation, and others have been adopted as matters of domestic policy.[26]

As contemporary terrorism appears to be evolving, becoming more intensified and becoming a growth industry spanning much of the world, "opinion generally calls for a global response and a coalition of some sort to frame principles and practice."[27] In 2005, the U.N. General Assembly adopted a Global Counter-Terrorism Strategy,[28] where all Member States "agreed to a common strategic approach to fight terrorism ... sending a clear

23. An Act to Secure the State and Protect Our People from Terrorism [Human Security Act of 2007], Republic Act No. 9372 (2007).

24. BIANCHI, *supra* note 6, at 530.

25. GUS MARTIN, UNDERSTANDING TERRORISM: CHALLENGES, PERSPECTIVES, AND ISSUES 476, 478 (2006).

26. *Id.*

27. WHITTAKER, *supra* note 21, at 130.

28. UN Action to Counter Terrorism, United Nations General Assembly Adopts Global Counter-Terrorism Strategy, *available at* http://www.un.org/terrorism/strategy-counter-terrorism.shtml (last accessed Oct. 28, 2009).

message that terrorism is unacceptable in all forms and manifestations."[29] The Strategy required each nation to implement and fully cooperate with all General Assembly and Security Council resolutions opposing terrorism,[30] to address the conditions conducive to the spread of terrorism, to undertake measures to prevent and combat terrorism, and to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.[31] Thus, nations are continuously developing legal protocols to deal with terrorism, like counterterrorist laws which attempt to criminalize terrorist behavior and international agreements which attempt to combat terrorism by permitting them no refuge or sanctuary for their behavior.[32]

B. Terrorism as a Crime Against Humanity

To date, efforts by the U.N. to draft a single, broad definition of terrorism acceptable to all states, have failed.[33] This is probably because of terrorism's highly subjective and politicized nature.[34] Due to the absence of a universally accepted definition of terrorism, it is the submission of the author that terrorism be prosecuted as a crime against humanity as supported by several commentators[35] and international jurisprudence.[36] In *Prosecutor v. Slobodan*

29. UN Action to Counter Terrorism, International Instruments to Counter Terrorism, Counter-Terrorism Strategy, *available at* http://www.un.org/terrorism/instruments.shtml (last accessed Oct. 28, 2009).

30. G.A. Res. 60/288, ¶ 2, U.N. Doc. A/Res/60/288/Annex (Sep. 8, 2005).

31. *Id.*

32. MARTIN, *supra* note 25, at 478.

33. MAOGOTO, *supra* note 9, at 58 (citing Justice Rosalyn Higgins, *The General International Law of Terrorism*, in TERRORISM AND INTERNATIONAL LAW 13, 14 (Rosalyn Higgins & Maurice Flory eds., 1997)).

34. Christopher C. Joyner, *International and Global Terrorism: Bringing International Criminals to Justice,* 25 LOY. L.A. INT'L & COMP. L. REV. 493, 496 (2003).

35. *See, e.g.* Marcello Di Filippo, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes*, 19 EUR. J. INT'L L. 533 (2008); Vincent Joel-Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?* 19 AM. U. INT'L L. REV. 1009 (2004); James D. Fry, *Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT'L L. & FOREIGN AFF. 169 (2002); Christian Much, *The International Criminal Court (ICC) and Terrorism as an International Crime*, 14 MICH. ST. J. INT'L L. 121 (2006); Douglas R. Burgess, *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293 (2006).

36. Arnold, *supra* note 8, at 126.

Milosevic, et al.,[37] the second amended indictment against Slobodan Milosevic charged the former President of Serbia with crimes against humanity for having "planned, instigated, ordered, committed[,] or otherwise aided and abetted in a deliberate and widespread or systematic campaign of terror and violence directed at Kosovo Albanian civilians living in Kosovo" in the Federal Republic of Yugoslavia.[38] In *Prosecutor v. Krstic*,[39] Radislav Krstic was found guilty of "genocide, persecution for murders, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property of Bosnian Muslim civilians, murder as a violation of the laws or customs of war."[40] The Trial Chamber concluded that the "offence of persecution as a crime against humanity was impermissibly cumulative with the conviction for genocide."[41] In *Prosecutor v. Kayishema and Ruzindana*,[42] the prosecutor observed that the use of terrorist methods may bring about such serious mental and physical harm that it may amount to genocide, provided that it was committed with the required *mens rea*.[43] It should in fact be recalled that genocide is a special type of crime against humanity. Thus, international jurisprudence supports the argument that terrorism may be prosecuted under the customary definition of crimes against humanity.[44] Responsibility can also be attributed to non-state actors as several commentators have argued that events like the attacks on the World Trade Center in New York City and on the Pentagon in Washington, D.C. on 11 September 2001, orchestrated by Al-Qaeda, an Afghanistan-based network with terrorist cells across the globe, may be prosecuted as a crime against humanity.[45] These attacks satisfy the elements of a crime against humanity[46] as they were part of a widespread and

37. Prosecutor v. Slobodan Milosevic et al., Second Amended Indictment, Cast IT-99-37-PT (Oct. 29, 2001).

38. *Id.*

39. Prosecutor v. Krstic, Case No. IT-98-33 (Aug. 2, 2001).

40. *Id.*

41. *Id.*

42. Prosecutor v. Kayishema, Case No. ICTR-95-1-A (June 1, 2001).

43. *Id.*

44. Arnold, *supra* note 8, at 130-31.

45. *Id.* at 125. *See also* R.S. LEE, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 92-93 (1999); Fry, *supra* note 35, at 190-92 (2002); Joel-Proulx, *supra* note 35, at 1036-40.

46. Crimes against humanity involve the following elements:

(i) there must be an attack;

(ii) the acts of the perpetrator must be part of the attack;

(iii) the attack must be directed against any civilian population;

systematic war against the United States (U.S.),[47] the attacks were against a civilian population,[48] and the attacks were intended to destroy the U.S. and kill as many Americans as possible that Al-Qaeda's leader and wanted terrorist Osama Bin Laden admitted to have ordered the attacks.[49]

As described in Article 7 of the 1998 International Criminal Court (ICC) Statute,[50] crimes against humanity have a large scope, comprising a wide

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(iv) the attack must be widespread or systematic; and

(v) the perpetrator must know that his or her acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his or her acts fit into such a pattern (i.e. knowledge of the wider context in which his or her acts occur and knowledge that his or her acts are part of the attack).

See, e.g. Prosecutor v. Limaj et al., Case No. IT-03-66-T, ¶ 181 (Nov. 30, 2005); Prosecutor v. Momir Stakic, Case No. IT-97-24-T, ¶ 621 (July 31, 2003); Prosecutor v. Galic, Case No. IT–98–29–T, ¶ 140 (Dec. 5, 2003).

47. Fry, *supra* note 35, at 190.

48. *Id.* at 191.

49. *Id.* at 192.

50. Rome Statute of the International Criminal Court, July 17, 1998, art. 7, 2187 U.N.T.S. 3 [hereinafter 1998 Rome Statute]. Article 7 of the Rome Statute provides:

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

range of acts, including murder, enslavement, torture, rape, persecution, and enforced disappearance, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" pursuant to or in furtherance of a state or organizational policy.[51] Crimes against humanity are also said to be crimes of universal jurisdiction under customary international law,[52] in the sense that any state having custody over the alleged offender is entitled to try him or her.[53] The universality principle permits a state to define and prescribe punishment for certain offenses recognized by the community of nations as a universal concern, such as piracy or hijackings, where there is no connection between the territory and the offence or of nationality with the persons involved.[54] With this, governments have the opportunity to expand their law enforcement internationally to exercise extradition proceedings[55] under crimes against humanity. The alleged offenses of international terrorism could then be prosecuted in an international forum based on the principle of universal jurisdiction, and not in a domestic forum based solely on the domestic criminal statutes implemented by an individual nation. Thus, the universality principle provides grounds for governments to extend their scope of jurisdiction over terrorists abroad to extradite and bring them to justice.[56]

C. Current State of Extradition

Extradition is an international judicial rendition of fugitives that requires cooperation between two sovereign systems, often different in fundamental

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(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

51. Guy S. Goodwin-Gill, *Crime in International Law: Obligations Erga Omnes and the Duty to Prosecute*, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 207 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999) (citing 1998 Rome Statute, art. 7 (1), (2); Prosecutor v. Tadic, Opinion and Judgment, No. IT-94-1-T (May 7, 1997)).

52. Fry, *supra* note 35, at 183. *See* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2555, 2560 n.91, 2593-94 (1991); 1 OPPENHEIM'S INTERNATIONAL LAW 998 (Robert Jennings et al. eds., 1992); Theodore Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 568 (1995).

53. Goodwin-Gill, *supra* note 51, at 206.

54. MAOGOTO, *supra* note 9, at 64 (citing Restatement (Third) of Foreign Relations Law S 402 cmt.f (1987)).

55. Joyner, *supra* note 34, at 506.

56. *Id.*

legal theory and procedures.[57] An extradition treaty represents an "attempt by nation-states, through diplomatic and legal means, to cooperate in rendering fugitive criminals to one another."[58]

The sources of extradition today generally remain similar with those of the past — international courtesy based on the principle of reciprocity, international law, and national legislation.[59] National extradition laws may lay down the procedural rules and define the conditions to be incorporated in future extradition treaties.[60] As for the international legal text, they may be bilateral extradition treaties, or multilateral extradition conventions like the European Convention on Extradition,[61] the Commonwealth Scheme for the Rendition of Fugitive Offenders,[62] the Arab League Extradition Convention,[63] the Interamerican Extradition Convention,[64] and the Economic Community of West African States Extradition Convention,[65] or international conventions which, without being strictly extradition conventions, incorporate provisions relating to extradition law.[66]

Extradition is essential today for it is seen as an international process for bringing international fugitives to justice in states where their alleged criminal offenses, including terrorist activities, were committed.[67] The U.N. has sponsored and promoted various international instruments relating to the suppression of crimes, particularly conventions to suppress acts of terrorism, and in nearly all of these instruments, extradition is assigned the central role

57. CHRISTOPHER L. BLAKESLEY, TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY 172 (1992).

58. *Id.*

59. INTERPOL, Legal Fact Sheets on Extradition, *available at* http://www.interpol.int/Public/ICPO/LegalMaterials/FactSheets/FS11.asp (last accessed Oct. 28, 2009).

60. *Id.*

61. European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273.

62. Commonwealth Scheme for the Rendition of Fugitive Offenders (1966) as amended in 1990, *available at* http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B717FA6D4-0DDF-4D10-853E-D250F3AE65D0%7D_London_Amendments.pdf (last accessed Oct. 28, 2009).

63. Pact of the League of Arab States, U.N. 1950, 70:237 (Mar. 22, 1945).

64. Inter-American Extradition Convention, Feb. 25, 1981, 1752 U.N.T.S. 190 [hereinafter Inter-American Convention].

65. Economic Community of West African States: Convention on Extradition, *available at* http://www.issafrica.org/AF/RegOrg/unity_to_union/pdfs/ecowas/4ConExtradition.pdf (last accessed Oct. 28, 2009).

66. INTERPOL, *supra* note 59.

67. Joyner, *supra* note 34, at 499-500.

in law enforcement,[68] thus highlighting extradition as an integral means for multilateral law enforcement.[69] Nevertheless, some nations believe that governments should be given wider legal scope for bringing alleged terrorist perpetrators to trial, and that "extradition practice should be reformed."[70]

Because of the reality that some states deliberately harbor terrorists or choose to circumvent their obligations under international conventions, this has led to a highly controversial form of action that violates territorial sovereignty, commonly called abduction, to secure perpetrators or masterminds of terrorist activities.[71] Abduction is the forcible, unconsented removal of a person by agents of one state from the territory of another state.[72] With these illegal rendition[73] or "self-help" methods[74] being condemned by the international community[75] and other problems posed by extradition today, there is a close link not only between terrorism and human rights,[76] but also between extradition and human rights.[77] Therefore, one of the crucial challenges facing the international community is balancing

68. *Id.* at 501.

69. *Id.* at 538.

70. *Id.*

71. MAOGOTO, *supra* note 9, at 65.

72. *Id.*

73. Irregular rendition devices fall into three categories: (1) the abduction of an individual from one nation by agents of another nation; (2) the informal surrender of an individual by one nation to another without formal or legal process; and (3) when nations use immigration laws to realize rendition. Although the latter two methods of irregular rendition circumvent the process of extradition, they are said not to violate sovereign rights and are undertaken in cooperation with the agents of the other nation. Extraterritorial abduction, however, violates another nation's territorial integrity and, therefore, violates international law. Kai I. Rebane, *Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights*, 19 FORDHAM INT'L L.J. 1636, 1656-57 (1996).

74. *Id.* at 1647. Self-help pertains to the utilization of unilateral methods to capture a fugitive such as in the form of kidnapping or collusion, which although occasionally accepted and even approved historically, has been condemned by the international community.

75. *Id.*

76. Kalliopi Koufa, *The UN, Human Rights and Counter-terrorism*, in INTERNATIONAL COOPERATION IN COUNTER-TERRORISM: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS IN THE FIGHT AGAINST TERRORISM 54 (Giusseppe Nesi ed., 2006).

77. *See* Christine Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L 187 (1998).

or ensuring respect for human rights of the extraditee in the context of suppressing terrorism,[78] particularly through the modality of extradition.

III. RECONCILING TERRORISM AND EXTRADITION: THE NEED FOR INTERNATIONAL COOPERATION AND PREVENTIVE LAW ENFORCEMENT

A. Political Offense Exception

The political offense exception, incorporated in most extradition treaties,[79] addresses the prevention of extradition of an individual who may be "unfairly treated or unjustly tried based on feeling as it relates to their nationality, ethnicity, or religious views."[80] The changing global landscape of the past several decades has prompted a significant re-examination of the political offense exception's scope that increasing attention has been drawn to "acts of terrorism, internal conflict, and totalitarian oppression."[81] Although the political offense exception was created for the protection of individuals from unjust persecution for political beliefs and acts, it can be used by perpetrators of common crimes with political overtones[82] to avoid extradition, and thus, subsequent prosecution or punishment.[83] Therefore, in recent years, political offenders including terrorists have successfully invoked the political offense exception to avoid extradition.[84]

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78. Koufa, *supra* note 76, at 45.

79. Lorenzo L. Lorenzotti, *In Re Extradition of Atta: Tension Between the Political Offense Exception and U.S. Counterterrorism Policy*, 1 PACE Y.B. INT'L L. 163, 166 (1989) (*citing* S.P. SINHA, ASYLUM AND INTERNATIONAL LAW 173 (1971)).

80. Bean, *supra* note 11, at 21.

81. Lieberman, *supra* note 13, at 182.

82. Common crimes, such as murder, aggravated assault, or robbery, which involve political motives, are frequently characterized as relative political offenses.

83. Sapiro, *supra* note 8, at 656.

84. Petersen, *supra* note 8. *See* In re Doherty (*Doherty I*), 599 F. Supp. 270 (S.D.N.Y. 1984) (denying extradition to United Kingdom of PIRA member convicted of murder because offense was political), later proceeding, United States v. Doherty (*Doherty II*), 615 F. Supp. 755 (S.D.N.Y. 1985) (dismissing United States's action for collateral review of order denying extradition by vehicle of declaratory judgment), aff'd, (*Doherty III*), 786 F.2d 491 (2d Cir. 1986); In re Mackin (*Mackin I*), 80 Cr. Misc. 1, 54 (S.D.N.Y. Aug. 13, 1981) (LEXIS, Genfed library, Dist file) (denying extradition to United Kingdom of PIRA member charged with attempted murder because offense was political), appeal dismissed, (*Mackin II*), 668 F.2d 122 (2d Cir. 1981); In re McMullen, No. 3-78-1899 MG (N.D. Cal. May 11, 1979) (denying extradition to United Kingdom of PIRA member sought for bombing military barracks because offense was political), reprinted in Extradition Act of 1981: Hearing on S. 1639 Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 294 (1981), later proceeding, 17 I. & N. Dec. 542 (Bd. of Immigration Appeals (BIA) 1980)

Many countries have adopted different frameworks in making their own definition of the "political." The most common and widely used tests are: (1) the French Political Objective or Injured Rights Test, where an act is considered political only if it directly affects the political organization of the state, excluding an examination of the offender's political motives,[85] and thus, the nature of rights injured is the sole criterion;[86] (2) the Anglo-American Political Incidence Test, where an act is considered political only if it is related to the furtherance of a revolt or struggle to overthrow the government;[87] and (3) the Swiss Predominant Motive Test, where subjective criteria as to the actor's motive and the circumstances surrounding the act is dominantly employed,[88] requiring either that the means used be proportionate to the political ends sought or that the political elements predominate over the common crime elements.[89] By providing a loophole for perpetrators of terrorist acts, together with the lack of uniformity brought about by the varying tests,[90] the political offense exception undermines the commitment of a state to fight terrorism with all available means[91] and may actually be a "liability both to the humanitarian principles it was designed to further and to the interests of international cooperation it has come to represent."[92] As a consequence, the exception poses a major hurdle to the

(reversing immigration judge's finding that McMullen was not deportable), rev'd, 658 F.2d 1312 (9th Cir. 1981) (finding that BIA's rejection of extensive evidence that McMullen was likely to be persecuted by PIRA if deported to Ireland was not supported by substantial evidence), on remand, I. & N. Interim Dec. No. 2967 (BIA 1984) (finding McMullen deportable because claimed persecution was not based on political opinion and ineligible for asylum because there were reasons to believe he had committed serious nonpolitical crimes), aff'd, 788 F.2d 591 (9th Cir. 1986). Sapiro, *supra* note 8, at footnote 2.

85. In re Giovanni Gatti, 14 Ann. Dig. 145, 145-46 (Cours d'appel, Grenoble, Fr. 1947) (ordering extradition of a San Marino national for the attempted homicide of a Communist cell member).

86. García-Mora, *supra* note 15, at 1249.

87. Ornelas v. Ruiz, 161 U.S. 502, 511-12 (1896).

88. *See* García-Mora, *supra* note 15, at 1251-55.

89. Thomas E. Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created*, 1A STUDENT INT'L L. SOCIETIES INT'L L.J. 1, 25-29 (1977).

90. Todd M. Sailer, *The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Dismissal of U.S. Objections*, 13 TEMP. INT'L & COMP. L.J. 311, 333 (1999).

91. Sapiro, *supra* note 8, at 701.

92. Petersen, *supra* note 8, at 776.

international extradition process and hinders the international community's efforts to bring terrorists to justice.[93]

It should be noted that political offenses are generally divided into two kinds: pure and relative political offenses. Pure political offenses are acts perpetrated directly against the government, which do not involve the commission of common crimes or injury to private individuals[94] like treason, sedition, and espionage.[95] These offenses are known as political crimes because they lack the essential motivating elements of a common crime — malice or personal gain and injury to private right, and thus, are generally recognized as non-extraditable.[96] In contrast, relative political offenses are often violent crimes that occur in connection with political uprisings.[97] Most acts of terrorism may be classified as relative political offenses, because they normally involve a combination of common crimes and purportedly political motives.[98]

B. Principle of aut dedere aut judicare

One of the modalities of international cooperation in penal matters[99] as well as one of the legal responses used by states against international terrorists is the principle of *aut dedere aut judicare*.[100] This mechanism, incorporated within the framework of international conventions, requires states to extradite or investigate and prosecute serious offences.[101] If a custodial state declines to extradite an alleged offender, it is required to submit the case to

93. Joyner & Rothbaum, *supra* note 21, at 246.

94. Aimee J. Buckland, *Offending Officials: Former Government Actors and the Political Offense Exception to Extradition*, 94 CAL. L. REV. 423, 439 (2006).

95. Petersen, *supra* note 8, at 775 (citing Banoff & Pyle, "*To Surrender Political Offenders:" The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U. J. INT'L L. & POL. 169, 170 (1984)).

96. *See* García-Mora, *supra* note 15, at 1234.

97. *See* Petersen, *supra* note 8.

98. Patricia Cristina T. Ngochua, Terrorism on the High Seas: Subsuming Certain Acts of Maritime Terrorism under Piracy *Jure Gentium* (2007) (citing Kittrie, *A New Look at Political Offenses and Terrorism*, in INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD 363-69 (M. Livingston ed. 1978)) (unpublished J.D. note, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

99. INTERNATIONAL TERORRISM, *supra* note 7, at 2; *see* CHERIF BASSIOUNI & EDWARD WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO PROSECUTE OR EXTRADITE IN INTERNATIONAL LAW (1995).

100. MAOGOTO, *supra* note 9, at 51.

101. *Id.* at 62.

its competent authorities for the purpose of prosecution.[102] The purpose of this principle is to ensure that those who commit crimes under international law are not granted safe haven anywhere in the world and are prosecuted.[103]

Despite the use of the principle of *aut dedere aut judicare* as a mechanism to fight terrorism, it is flawed in respect with its application to international criminal law in general and to terrorism in particular.[104] There exists the question as to the obligation's status and scope, as well as uncertainty as to whether the existence of the obligation to prosecute or extradite is alternative or cumulative, and whether the duty to prosecute has priority over that of extradition or the other way around.[105]

It is said that customary international law has consistently upheld that the main thrust of international extradition law is of positivism and that it is one of national sovereignty; for states to be legally obligated to extradite accused persons, they must be bound by a treaty.[106] This is in opposition to Hugo Grotius and Emmerich de Vattel, who argued that there exists a natural law compelling extradition.[107] Current studies show that conflicting views still remain on this matter. Pursuant to the U.N. General Assembly Resolution 61/34 of 4 December 2006,[108] states were invited to provide information to the International Law Commission (ILC) on international treaties to which they were bound, particularly with regard to the application of the principle of *aut dedere aut judicare*. According to the ILC, the information gathered were often "partial, contradictory[,] or simply mistaken."[109] On one hand, some states asserted that the "obligation to extradite or prosecute does not exist outside international treaties."[110] The U.S., in particular, stated that it does "not believe that there is a general obligation under customary international law to extradite or prosecute individuals for offences not

102. *Id.*

103. *Id.*

104. INTERNATIONAL TERRORISM, *supra* note 7, at 133.

105. *Id.*

106. Bean, *supra* note 11, at 20.

107. *Id.*

108. Report of the International Law Commission (ILC) on the work of its 58th Session, G.A. Res. 61/34, 61st Sess., agenda item 78 (2006).

109. Amnesty International, *International Law Commission: The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)*, IOR 40/001/2009, (February 3, 2009). As of May 31, 2008, 24 States have submitted reports to the ILC — Austria, Croatia, Japan, Monaco, Qatar, Thailand, United Kingdom, Chile, Ireland, Lebanon, Mexico, Slovenia, Sweden, Tunisia, United States of America, Latvia, Serbia, Sri Lanka, Kuwait, Poland, Guatemala, Mauritius, Netherlands, and Russian Federation.

110. *Id.*

covered by international agreements containing such obligation."[111] Nevertheless, it cited no evidence in support of its claim. Others, on the other hand, stated that a "rule of customary international law in respect of certain categories of crimes could not be *a priori* ruled out" and requires further note by the Special Rapporteur.[112] Russia, in particular, stated:

> We do not yet see such convincing evidence of the existence of a customary rule *aut dedere aut judicare*. [T]he question of the establishment of an obligation *aut dedere aut judicare* in customary international law with respect to a small number of criminal acts that arouse the concern of the entire international community merits separate analysis. This concerns primarily genocide, war crimes[,] and crimes against humanity.[113]

Thus, although there is a need to strengthen and amplify the principle of *aut dedere aut judicare* especially in the suppression of terrorism, it is problematic because of contradicting views as to whether the obligation to extradite precedes the obligation to prosecute, and whether the principle of *aut dedere aut judicare* is based not only on treaty, but also on customary law.

C. Principle of Dual Criminality

The principle of dual criminality requires that an "alleged crime for which extradition is sought be punishable in both the requested and requesting states."[114] A traditional method of giving effect to the principle has been the enumeration in extradition treaties of lists of specific extraditable offences.[115] This approach, which emphasized terminology, was "susceptible to a rigid and technical formality," and presented difficulties for emerging categories of more complex crime.[116] An effort to address this problem is through the modern approach, where, instead of a specific list of offenses, a general requirement, that the conduct in question be punishable under the laws of both state-parties, is provided.[117] Article 2 of the Model Treaty on Extradition[118] provided by the U.N., for example, states: "[f]or the purposes

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111. *Id.* (citing A/CN.4/579/Add.2, ¶ 2 (June 5, 2007)).

112. *Id.* at 21.

113. *Id.* (citing A/CN.4/599, ¶¶ 47-55 (May 30, 2008).

114. Griffith & Harris, *supra* note 8, at 38.

115. *Id.*

116. *Id.*

117. *Id.*

118. The U.N. General Assembly Resolution 45/116 (1990) adopted the Model Treaty on Extradition "[r]ecognizing the importance of a model treaty on extradition as an effective way of dealing with the complex aspects and serious consequences of crime, especially in its new forms and dimensions," and "[c]onscious that in many cases existing bilateral extradition arrangements are outdated and should be replaced by modern arrangements which take into

of the present Treaty, extraditable offences are offences that are punishable under the laws of both Parties ...."[119]

In spite of this, difficulties as to the double criminality requirement still persist, and there are views that such requirement is declining in significance.[120] As experts Cherif Bassiouni and Ivan Shearer argue, the dual criminality principle should not be an impediment to the request for extradition, particularly pertaining to that of a suspected terrorist.[121]

D. Human Rights Issues

Human rights are non-negotiable[122] and thus, it is vital that states' counter-terrorist legislation and measures take into account an offender's human rights and fundamental freedoms.[123] Not only the U.N. Commission on Human Rights, but also other competent organs and bodies of the U.N. system have repeatedly affirmed that, "all measures to counter terrorism must be in strict conformity with international law, including international human rights standards."[124] Therefore, an important challenge for nations today is balancing each step toward countering terrorism, through the means of extradition, with the duty to respect human rights.[125]

The rights of a person subject to extradition are governed by extradition treaties, local extradition laws, international law, and international relations.[126] International treaties that are relevant to extradition include the

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account recent developments in international criminal law." Moreover, U.N. General Assembly Resolution 52/88 (1997) recognizes that "United Nations model treaties on international cooperation in criminal matters provide important tools for the development of international cooperation," and "that existing arrangements governing international cooperation in law enforcement must be continuously reviewed and revised to ensure that the specific contemporary problems of fighting crime are being effectively addressed at all times."

119. Model Treaty on Extradition, G.A. Res. 45/116, annex, GAOR Supp. (No. 49A) at 212, U.N. Doc. A/45/49 (1990), subsequently amended by International Cooperation in Criminal Matters, G.A. Res. 52/88, GAOR, 52d Sess., 3d plen. mtg., U.N. Doc. A/RES/52/88 (1997) [hereinafter U.N. Model Treaty on Extradition].

120. *Id.* at 42.

121. Bean, *supra* note 11, at 21.

122. WHITTAKER, *supra* note 21, at 140.

123. Koufa, *supra* note 76, at 64.

124. *Id.* at 58.

125. INTERNATIONAL TERRORISM, *supra* note 7, at 129.

126. Linda McKay-Panos, Extradition and human rights (human rights law) (2006), *available at* http://www.encyclopedia.com/doc/fullarticle/1G1-160104874.html (last accessed Oct. 28, 2009).

Convention Against Torture.[127] Article 3 of the Convention provides that a state must not extradite a person to another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[128]

Cases examining whether a surrender would be unjust or oppressive have had mixed results.[129] Said cases illustrate that the human rights aspect pertaining to extradition is somewhat discretionary on the part of the Court that many bilateral treaties regard as a "*discretionary* ground for refusal of extradition the fact that an extraditee would be subjected to torture or cruel or degrading treatment or punishment."[130] It cannot be denied that alongside the duty to extradite and bring terrorists to justice exists a network of international human rights treaties that prescribe a universal set of safeguards for the protection of all persons, regardless of citizenship or status.[131] The human rights treaty of general application most relevant to extradition is the International Covenant on Civil and Political Rights (ICCPR),[132] which imposes an obligation on a requested state to abstain from extraditing when there is a "real and substantial risk of a future violation of the fugitive's right to life and right to be free from serious forms of ill-treatment."[133] Therefore, it can be said that security for all means human rights for all and that "[r]eal security can only be achieved through full respect for human rights."[134]

It is also important to point out that the grounds for refusing extradition which are based on established anti-discrimination and human rights standards[135] have obvious parallels with existing obligations of *non-refoulement*

127. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

128. *Id.* art. 3.

129. McKay-Panos, *supra* note 126.

130. Griffith & Harris, *supra* note 8, at 48. *See* Australia–Mexico Extradition Treaty, art. 14.

131. Joanna Harrington, *The Absent Dialogue: Extradition and the International Covenant on Civil and Political Rights*, 32 QUEEN'S L.J. 82, 83 (2006).

132. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, [hereinafter ICCPR].

133. Harrington, *supra* note 131, at 84.

134. WHITTAKER, *supra* note 21, at 141. The Amnesty International's recently-published Annual Report for 2003 recognizes that contemporary terrorism needs addressing urgently and firmly. However, security for all means human rights for all. A more secure world, in Amnesty's view, demands a paradigm shift in the concept of security, a shift that recognizes that insecurity and violence are best tackled by effective, accountable states which uphold, not violate human rights. Amnesty International Report 7-8, 10 (2003).

135. Griffith & Harris, *supra* note 8, at 46.

in the international law of asylum and refugee law.[136] The principle of *non-refoulement* is recognized as fundamental to refugee law.[137] Article 33 of the 1951 Refugee Convention[138] provides: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[139] The principle requires that refugees or asylum seekers shall not be returned, in any manner, to a country in which their life or freedom would be threatened, or where they may face persecution;[140] lawfully resident refugees are also protected against expulsion, save on the most serious grounds and subject to having the opportunity for challenge.[141]

Nevertheless, refugee protection is not absolute. Article 1 (F) of the 1951 Refugee Convention[142] provides that its benefits shall not apply to any person who, there are serious reasons to believe, has committed a crime against peace, war crime, crime against humanity, or a serious non-political crime before admission to the country of refuge, or who acts contrary to U.N. principles.[143] One who thus commits a crime, which falls within Article 1 (F) of the 1951 Refugee Convention will not be eligible for asylum

136. Griffith & Harris, *supra* note 8, at 48 (citing Charles Colquhoun, *Human Rights and Extradition Law in Australia* 6 (2) AUSTRALIAN JOURNAL OF HUMAN RIGHTS 101, 103–04 (2000)).

137. Jessica Rodger, Defining the Parameters of the Non-refoulement Principle (2001) (unpublished research paper, Victoria University of Wellington).

138. *See* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].

139. *Id.* art. 33.

140. 1951 Refugee Convention, *supra* note 138, art. 33.

141. *Id.* art. 32.

142. *Id.* art. 1 (F). Article 1 (F) of the 1951 Refugee Convention provides:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has commited a crime against peace, a war crime, or acrime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principle of the United Nations.

143. Goodwin-Gill, *supra* note 51, at 202.

under the political offense exception.[144] He or she is therefore "someone who should be extradited under the applicable treaty, for lack of eligibility for such international protection."[145]

IV. EXTRADITION AND TERRORISM IN THE PHILIPPINES

A. Philippine Extradition and Existing Laws on Extradition

The Philippines recognizes the view that there is no right to extradition apart from treaty.[146] Nevertheless, it also recognizes that the "surrender of fugitive criminals in the absence of treaty provisions still takes place on occasion, but in such cases the act is one not of legal obligation, but of international comity."[147] As of 2001, the Philippines has entered [into] 10 extradition treaties with other countries, namely: the U.S., Indonesia, Australia, Switzerland, Canada, South Korea, Thailand, China, Hong Kong, and Micronesia.[148] As of today, the Philippines has entered into a total of 12 extradition treaties with other countries, with Spain and India added to the list.[149]

In the Philippines, extradition is governed by Presidential Decree No. 1069 or the "Philippine Extradition Law"[150] and by the applicable extradition treaty in force.[151] The Philippine Extradition Law was enacted by then President Ferdinand Marcos in 1977,[152] and as the long title suggests, the law contains only procedural requirements with regard to extradition cases. Although the law is not divided into several chapters like the updated or modified extradition laws of other countries, the Philippine Extradition

144. *Id.*

145. *Id.* at 259.

146. *Extradition As a Jurisdictional Cooperation Between or Among States*, 322 SCRA 238, 240 (*citing* Factor v. Laubenheimer, U.S. Marshall, 290 U.S. 276, 287 (1933)).

147. *Id.* at 241 (CITING HARVARD RESEARCH, DRAFT CONVENTION ON EXTRADITION: MOORE, DIGEST, VOL. IV, 579-622).

148. *Id.* at 239. The data was also provided by Atty. Allan Casupanan of the Department of Foreign Affairs (DFA) during an interview with him by the author on May 25, 2009 at the DFA office in Roxas Boulevard, Pasay City.

149. Data was provided by Atty. Allan Casupanan of the Department of Foreign Affairs (DFA) during an interview with him by the author on May 25, 2009 at the DFA office Roxas Boulevard, Pasay City. The extradition treaty between the Philippines and Spain as well as that between the Philippines and India was entered into force only last February 2009.

150. *See* Philippine Extradition Law.

151. SEVERINO H. GANA, EXTRADITION AND LEGAL ASSISTANCE: THE PHILIPPINE EXPERIENCE 51 (1999).

152. *Id.*

Law consists of a total of 21 sections. Since its promulgation in 1977, it has not been amended.

It is notable that two House Bills as well as two Senate Bills have been submitted proposing to amend the Philippine Extradition Law. House Bill No. 5254,[153] also known as the Philippine Extradition Law, was principally authored by Rep. Constantino G. Araula and filed on 2 September 2002. This Bill basically focuses on only one aspect of the Philippine Extradition Law — the arrest of the person to be extradited. Said Bill proposes that no immediate arrest shall be made on any Filipino citizen, residing in his own country, before a final determination that such citizen is extraditable.[154] Furthermore, it proposes that no articles found in the possession of the arrested accused may be seized, unless said articles has an intimate relation or are the products of the crime for extradition is sought.[155] A week after House Bill No. 5254 was filed, House Bill No. 5290,[156] entitled "An Act Amending Presidential Decree No. 1069, Otherwise Known as Philippine Extradition Law, Giving the Accused the Right to Bail," was filed, which was principally authored by Rep. Joey D. Hizon. This Bill mainly focuses on allowing the accused to post bail for temporary liberty during the pendency of the extradition case in an amount to be determined by the Regional Trial Court depending on the gravity of the offense for which extradition is sought.[157]

In the Senate, two bills on extradition are to be noted. Senate Bill No. 1113,[158] entitled "An Act Prescribing the Procedure for the Implementation of Extradition Treaties Between the Philippine Government and a Foreign Country, and Appropriating Funds Therefor,"[159] was introduced by Sen. Franklin M. Drilon and filed on 30 June 2004. It seeks to revise the Philippine Extradition Law by "rectifying the flaws in said law."[160] Said Bill recognizes that "[c]ertain inadequacies of the law have caused delays in extradition proceedings here in the Philippines."[161] Three years later, Senate Bill No. 793[162] was introduced by Sen. Ramon "Bong" Revilla, Jr., seeking

153. *See* H.B. No. 5254, 12th Cong., 2d Sess. (Sep. 30, 2002).

154. House Bills and Resolutions Online Query, *available at* http://www.congress.gov.ph/bis/qry_show.php (last accessed Oct. 28, 2009).

155. *Id.*

156. *See* H.B. No. 5290, 12th Cong., 2d Sess. (Oct. 7, 2002).

157. House Bills and Resolutions Online Query, *supra* note 154.

158. *See* S.B. No. 1113, 13th Cong., 1st Sess. (June 30, 2004).

159. *Id.*

160. *Id.* Explanatory note.

161. *Id.*

162. *See* S.B. No. 793, 14th Cong., 1st Sess. (July 7, 2007).

also to revise the Philippine Extradition Law with exactly the same title and rationale as that of the previous bill submitted.[163]

Although the two aforementioned House Bills were intended to give more protection to the fundamental rights of the accused, one focusing on the aspect of arrest and the other on the right to bail of the accused, they remain as pending bills. The same goes for the two aforementioned Senate Bills, which were submitted for practically the same consideration. Thus, the Philippine Extradition Law remains untouched. Moreover, the Senate Bills contain only 14 sections as opposed to the current Philippine Extradition Law which contains 21 sections. Also, the provisions proposed by both Senate Bills are almost exactly the same as that of the Philippine Extradition Law. It seems as if only the format of the law and the arrangement of the provisions have been revised by the Bills, except for the inclusion of the provision with regard to bail in both Senate Bills. Thus, no substantial changes, other than the proposed provisions on bail, have actually been made by the proposed Senate Bills.

B. Philippine Terrorism and Existing Laws on Terrorism

The Philippines is no stranger to terrorism. International commentators and scholars identify the ASG, the NPA, the CPP, and the Moro Islamic Liberation Front (MILF) as active, contemporary terrorist groups.[164] The ASG is said to be the smallest, most active and most violent Islamic separatist group in the southern Philippines,[165] because the ASG engages in kidnapping for ransom, assassinations, beheading, and bombing of public places,[166] and is said to be linked with Al-Qaeda[167] that it is suspected of receiving funds and organizational support from Osama Bin Laden's associate and brother-in-law Muhammad Jamal Khalifa, the U.S. State Department designated the ASG a foreign terrorist organization in 1997.[168] The group

163. *Id.* Explanatory note.

164. *See* WHITTAKER, *supra* note 21, at Appendix II; *See also* Tilstra, *supra* note 21, at 838.

165. Anti-Defamation League, The Philippines and Terrorism, April 2004, *available at* http://www.adl.org/ Terror/tu/tu_0404_philippines.asp (last accessed Oct. 28, 2009).

166. Harry L. Roque, Jr., *The Philippines: the weakest link in the fight against terrorism*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 307, 308 (Victor V. Ramraj, et al. eds., 2005).

167. Tilstra, *supra* note 21, at 839 (citing Council on Foreign Relations, Abu Sayyaf Group (Philippines, Islamist separatists), *available at* http://www.cfr.org/ publication/9235/ (last accessed Oct. 28, 2009)).

168. The Philippines and Terrorism, *supra* note 165.

has been committing terrorist attacks since 1991,[169] including an attack on a Christian town in 1995 that left 53 dead[170] and two separate kidnappings in 2000 of over 25 individuals including foreign tourists.[171] In May 2001, the ASG kidnapped 20 people from a resort island in the Philippines and murdered several of the hostages, including American citizen Guillermo Sobero.[172] In June 2002, in an attempt to rescue three hostages held by the ASG on Basilan Island, two of the hostages, including American citizen Martin Burnham, were killed in the resulting shootout.[173] In January 2009, three International Committee of the Red Cross workers were kidnapped by the ASG, and up to now, one of them, Italian Red Cross worker Eugenio Vagni, is still being held hostage in Sulu.[174] The ASG finances its operations primarily through robbery, piracy, and ransom kidnappings.[175]

The CPP, founded by Jose Maria Sison, is ideologically Maoist,[176] and has the NPA as its military arm. They aim "to unite the Filipino people against all anti-imperialist forces and to overthrow the government that is influenced by foreigners,"[177] believing that genuine reforms can only be achieved if the structure itself is completely changed and the existing government is overthrown by means of a violent revolution. The CPP-NPA primarily targets Philippine security forces, politicians, judges, government informers, and former NPA rebels,[178] and in doing so, has also killed and injured many civilians. In 1992, exploratory talks on peace negotiations between the Government of the Republic of the Philippines (GRP) and the CPP-NPA began, which eventually paved the way for formal peace

169. Tilstra, *supra* note 21, at 839. (citing The International Policy Institute for Counter-Terrorism, Abu Sayyaf Group (ASG), *availabe at* http://www.ict.org.il/inter_ter/orgdet.cfm?orgid=3 (last accessed Oct. 28, 2009)).

170. *Id.*

171. *Id.*

172. The Philippines and Terrorism, *supra* note 165.

173. *Id.*

174. Roel Pareno, *8 killed as Marines clash with Vagni kidnappers*, THE PHILIPPINE STAR, June 12, 2009, at 2.

175. The Philippines and Terrorism, *supra* note 165.

176. VICENTE L. RAFAEL, WHITE LOVE AND OTHER EVENTS IN PHILIPPINE HISTORY 153 (2000).

177. Edmundo Garcia, *Resolution of Internal Armed Conflict in the Philippines*, in WAGING PEACE IN THE PHILIPPINES 85 (Ed Garcia & Carol G. Hernandez eds., 1988).

178. The Philippines and Terrorism, *supra* note 165.

negotiations.[179] The peace talks, however, stalled in June 2001 after the NPA admitted killing a Filipino congressman.[180] In September 2002, the CPP-NPA claimed responsibility for assassinating a mayor, attacking a police station and killing the police chief, and blowing up a mobile telecommunications transmission station.[181] The CPP-NPA has an estimated strength of over 10,000 members, and is said to have links with international terrorism, particularly with Jemaah Islamiyah and Al-Qaeda.[182] Thus, the U.S. and the European Union (E.U.) designated the CPP-NPA a foreign terrorist organization in August 2002 and in October 2002 respectively.[183] Subsequently, the U.S. and the E.U. listed Jose Maria Sison as a Specially Designated Global Terrorist[184] in August 2002 and February 2003 respectively.[185] Because of this, authorities in the Netherlands, where Sison was in exile with the status of a political refugee,[186] froze his bank accounts and cut off his social benefits.[187]

The MILF is the largest Islamic extremist group in the Philippines, who up to now, are continuously struggling for their right to self-determination of the Bangsamoro.[188] Headed by Islamic cleric Salamat Hashim, the MILF seeks a separate Islamic state in the southern Philippines.[189] In 1997, peace talks between the GRP and the MILF began, which eventually led to formal peace talks in 2004.[190] Although the MILF signed a peace agreement with the GRP in 2001, MILF-sponsored violence has continued.[191] The MILF

179. The GRP-NDF Peace Negotiations (Compendium of Documents) 2 (published by The Office of the Presidential Adviser on the Peace Process with the support of The United Nations Development Programme) (2006).

180. The Philippines and Terrorism, *supra* note 165.

181. *Id.*

182. *Id.*

183. Gary Leupp, Maoism is the "Greatest Internal Security Threat: Maoist and Muslim Insurgencies in the Philippines, Apr. 26, 2005, *available at* http://dissidentvoice.org/Apr05/Leupp0426.htm (last accessed Oct. 28, 2009).

184. *Id.*

185. *Id.*

186. *Id.*

187. The Philippines and Terrorism, *supra* note 165.

188. *See* Ruby B. Rodil, *Finding New Paths to Peace: Ancestral Domain and Moro Self-Determination*, in NEW THINKING IN THE MINDANAO PEACE PROCESS, AUTONOMY & PEACE REVIEW: A QUARTERLY PUBLICATION OF THE INSTITUTE FOR AUTONOMY AND GOVERNANCE (July-Sep. 2007).

189. The Philippines and Terrorism, *supra* note 165.

190. Global Security, Moro Islamic Liberation Front, *available at* http://www.globalsecurity.org/military/world/para/milf.htm (last accessed Oct. 28, 2009).

191. The Philippines and Terrorism, *supra* note 165.

has been accused of being responsible for the March 2003 Davao City airport bombing that killed 21 people and for harboring members of the small militant Pentagon gang accused of kidnapping foreigners in recent years.[192] In December 2007, peace talks between the GRP and the MILF stalled due to the unresolved issue as to the scope of the Moro's ancestral domain.[193]

The Philippine government initially treated the ASG and the CPP-NPA as nothing more than common criminals and bandit groups.[194] However, as their attacks became more widespread and violent, involving a large number of civilian casualties, and taking into account the time when the ASG kidnapped and held hostage three American nationals from a resort in Palawan in 2001 and the military repeatedly failed to rescue such hostages for almost a year, the government revised its policy and labelled the ASG as part of an international network of terror groups.[195] Moreover, the Philippine government also lobbied for the inclusion of the CPP-NPA as terror groups within the meaning of the U.S.A. PATRIOT Act.[196] It cannot be denied then that the Philippine government recognizes the threats and the acts of terrorism that these terror groups can bring to the civilian population, and thus, great concern is placed by the government in countering these acts of terrorism.

It is notable that the U.S. State Department has considered the southern Philippines a "terrorist safe haven" since the classification was created in 2006.[197] The Philippines is not only a haven to international terrorists or militant groups such as the ASG, CPP-NPA, and MILF, but also to the Jemaah Islamiyah, the Alex Boncayao Brigade, and the Pentagon Gang.[198] These groups have conducted over 100 attacks within the Philippines since

192. *Id.*

193. Al Jacinto, *MILF: We Stand Firm on Self-Determination*, THE SUNDAY TIMES, May 4, 2008, at A2.

194. Roque, Jr., *supra* note 166, at 313.

195. *Id.* at 308-12.

196. *Id.* at 318. The official title of the U.S.A. PATRIOT Act of 2001 is "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." Its purpose, among others, is to deter and punish terrorist acts in the U.S. and around the world and to enhance law enforcement investigatory tools. The Act expands the definition of terrorism to include domestic terrorism, thus enlarging the number of activities to which the U.S.A. PATRIOT Act's expanded law enforcement powers can be applied. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, H.R. 3162 RDS, 107th Congress, 1st Sess. (2001).

197. Preeti Bhattacharji, Terrorism Havens: Philippines (updated June 1, 2009), *available at* http://www.cfr.org/publication/9365/ (last accessed Oct. 28, 2009).

198. *Id.*

2004, the largest of which was a ferry bombing that killed 130 people.[199] Although the Philippine government has taken steps to combat terrorism, terrorists continue to use the country as a base to organize, raise funds, train, and operate.[200] Moreover, U.S. and Filipino counterterrorism experts say Al-Qaeda and Jemaah Islamiyah operate in the Philippines, but its influence appears to be channeled through regional and local organizations such as the ASG and CPP-NPA.[201]

Therefore, with the security of the State and the protection of the people from terrorism in mind, Congress enacted into law the Human Security Act of 2007.[202] It served as the anti-terrorism law of the country, which proved the country's commitment to fighting global terror.[203] The Human Security Act of 2007 makes terrorism a crime punishable with a maximum prison term of 40 years, defining terrorism as any of at least 12 violent crimes found in the Revised Penal Code, including rebellion, piracy, mutiny, murder, and kidnapping, "sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand."[204] The Law also outlaws groups engaged in terror acts.[205] According to Pres. Gloria Macapagal-Arroyo, the Human Security Act of 2007 would bring to a higher level the Philippines' successful campaign against the ASG and CPP-NPA, which are now being carried out in a broader front of national and regional vigilance.[206] Thus, the Human Security Act of 2007 seems to follow the U.S. and E.U.'s classification of the CPP-NPA and the ASG as terrorist organizations.[207]

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199. *Id.*

200. *Id.*

201. *Id.*

202. *See* Human Security Act of 2007.

203. Paolo Romero, *No haven for terror in RP*, THE PHILIPPINE STAR, Mar. 7, 2007, at 1 [hereinafter Romero, *No haven*].

204. *See* Human Security Act of 2007, § 3.

205. *Id.* § 17.

206. Juliet Labog-Javellana, *Anti-terror law: For bombers only*, PHILIPPINE DAILY INQUIRER, Mar. 7, 2007, at 1 [hereinafter Labog-Javellana, *Anti-terror law*]. *See also* Paolo Romero, *1st targets: Rogue AFP, red terrorists*, THE PHILIPPINE STAR, July 11, 2007, at 1. (President Aroyo vowed that: "Communist rebels, religious extremists, and rogue military and police elements who sow terror will be the first targets of the Human Security Act.").

207. Juliet Labog-Javellana & Leila B. Salaverria, *Reds target of terror law: CPP, NPA, Abu Sayyaf to be outlawed*, PHILIPPINE DAILY INQUIRER, July 11, 2007, at 1.

The enactment of the anti-terror law drew praise from the country's allies, but condemnation from militant groups and human rights groups.[208] The U.S. Embassy said: "This new law will help provide Philippine law enforcement and judicial authorities with the legal tools they need to confront the threats posed by international terrorism, while ensuring protection of civil liberties and human rights."[209] Australian Foreign Minister Alexander Downer said that the Human Security Act of 2007 "would strengthen the legal regime for investigating, prosecuting, and bringing to justice terrorists and their supporters who are captured in the Philippines."[210] In contrast, left-leaning groups denounced the passage of the Human Security Act saying it ushered the "dark ages for civil liberties and democracy"[211] because the wording of the law is "dangerously vague" and would trample their human rights as citizens.[212] Former Senator Rene A.V. Saguisag of the Movement of Attorneys for Brotherhood, Integrity and Nationalism commented that the government should issue the implementing rules and regulations (IRR) before rushing to implement the anti-terrorism law because without a set of IRR, "the line between national security imperatives and human freedom may not be clear to every law enforcer."[213]

Although the enactment of the Human Security Act of 2007 has received criticisms from various groups, it is a fact that the Act is the first anti-terrorism law in the Philippines which specifically addresses terrorist offenses.[214] Thus, it is important to discuss the relation and relevance of the Human Security Act of 2007 with the extradition of terrorists in our jurisdiction.

C. Reconciling Terrorism and Extradition: The Extradition of Communist Leader Jose Maria Sison

One of the recent and controversial issues in the Philippines is the extradition of communist leader Jose Maria Sison from the Netherlands, where he has been seeking refuge for more than 20 years.[215] Sison had been charged with rebellion and murder by the Arroyo regime,[216] and is on the

208. Romero, *No haven*, *supra* note 203.

209. Labog-Javellana, *Anti-terror law*, *supra* note 206.

210. Romero, *No haven*, *supra* note 203.

211. *Id.*

212. *Id.*

213. Labog-Javellana & Salaverria, *supra* note 207.

214. *Id.*

215. Delfin T. Mallari, *Joma on extradition bid: You can't touch me*, PHILIPPINE DAILY INQUIRER, June 30, 2006, at A13.

216. *Id.*

international terrorist list.[217] Sison, however, claims that the charges lacked factual and legal basis[218] and that the charges were "politically motivated and meant to deceive the people and divert their attention from the criminal culpabilities of the Arroyo regime for electoral fraud, corruption and gross human right violations."[219] Sison also stressed that he is beyond the jurisdiction of Philippine laws.[220] Although the Dutch government has thrice rejected Sison's plea for political asylum, Sison invoked his right as a political refugee under international humanitarian laws to stay in Utrecht, Amsterdam.[221] Sison maintained that he is a recognized political refugee but one who is not legally admitted.[222] He particularly cites the protection afforded him by the 1951 Refugee Convention and Article 3 of the European Convention on Human Rights, claiming that the Dutch government could not just expel him "to anywhere he was in danger of torture and other ill treatment."[223] It is notable that the Council of State, the highest Dutch administrative court, issued in 1995 the judgment reaffirming its previous ruling that Sison is a political refugee under Article 1 (F) (a) of the 1951 Refugee Convention and that he is under the protection of Article 3 of the European Convention on Human Rights.[224] It ruled that Article 1 (F) of the 1951 Refugee Convention did not apply to him because there was no sufficient evidence against him for crimes that would exclude him from consideration as a refugee.[225] Article 1 (F) of the 1951 Refugee Convention states that the provisions shall not apply to any person with respect to whom there are serious reasons for considering that he has committed among other things: "a crime against peace, a war crime, or a crime against humanity."[226]

At first, the existence of the death penalty in the Philippines was the obstacle to Sison's extradition because the "Dutch government has a policy

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217. *See* critical2, Philippines wants extradition of Joma Sison, *available at* http://www.zimbio.com/President+Gloria+MacapagalArroyo/articles/85/Philippines+wants+extradition+Joma+Sison (last accessed Oct. 28, 2009) [hereinafter Extradition of Sison].

218. Mallari, *supra* note 215.

219. Gil C. Cabacungan, Jr., *Gov't wants The Hague to expel Joma*, PHILIPPINE DAILY INQUIRER, June 29, 2006, at 1.

220. *Id.*

221. Loui Galicia, Joma Sison twits NSA Gonzales, April 2, 2009, *available at* http://www.abs-cbnnews.com/nation/04/01/09/joma-sison-twits-nsa-gonzales (last accessed Oct. 28, 2009).

222. *Id.*

223. Cabacungan, Jr., *supra* note 219.

224. Galicia, *supra* note 221.

225. *Id.*

226. *Id. See* 1951 Refugee Convention, *supra* note 138, art. 1 (F) (a).

of not making available a fugitive of justice to a country that has the death penalty."[227] After Congress abolished the death penalty in 2006,[228] the Philippine government faced another challenge with the enactment of the Human Security Act of 2007. Criticisms were made on particular provisions of the law, and even with just the concept of the anti-terror law itself. One of such criticisms when the law was still a pending bill was that it may improperly extradite Sison and other leaders of national liberation movements.[229] Human rights lawyer Edre U. Olalia of the Public Interest Law Center and convenor of the new lawyers' group Counsels for the Defense of Liberties contends that with the passage of such law, Sison, Luis Jalandoni, and other leaders of the CPP-NPA based abroad may be "erroneously charged with terrorism, and improperly extradited" such that "[t]he long arm of Philippine law can now extend even outside its territorial jurisdiction by putting terrorism as one of the crimes that the RPC can be applied."[230] For Olalia then, and perhaps other human rights lawyers, groups like the CPP-NPA cannot be considered as terrorists. Therefore, several issues exist as to whether groups like the CPP-NPA and the ASG are to be treated as terrorist organizations and whether their members and leaders of can be extradited within the context of the Human Security Act of 2007. The Author will discuss this issue further in the following chapter.

Another major obstacle to the extradition of Sison is the fact that the Philippines does not have an extradition treaty with the Netherlands.[231] Because of this, the Dutch government decided to prosecute Sison for the charges against him; however, the Dutch authorities cleared Sison of the charges.[232] In an interview, National Security Adviser Secretary Norberto B. Gonzales said that the "Dutch prosecutor dropped the case against Sison not because there was no evidence, but because there were no witnesses who came out to testify."[233] Moreover, Gonzales said that the Philippine Government will "use diplomacy to seek Sison's return since the Philippines currently does not have an extradition treaty with [t]he Netherlands."[234]

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227. *Id.*

228. *See* An Act Prohibiting the Imposition of Death Penalty in the Philippines, Republic Act No. 9346 (2006).

229. Dabet Castaneda, Anti-Terror Bill May Improperly Extradite Joma Sison, Others, *available at* http://www.bulatlat.com/news/6-10/6-10-atb.htm (last accessed Oct. 28, 2009).

230. *Id.*

231. Galicia, *supra* note 221.

232. *Id.*

233. *Id.*

234. *Id.*

VI. ANALYSIS

A. Depoliticization of the political offense doctrine

Extradition treaties, regional and international conventions on terrorism,[235] U.N. resolutions,[236] and jurisprudence[237] support and illustrate that a trend exists towards deactivating political considerations resulting in the treatment of terrorists as common criminals.[238] The same may be evidence of state practice and *opinio juris*[239] of the narrowing of the political offense exception in extradition law that what the political offense exception primarily protects are pure political offenses, which include treason, sedition, and espionage. Pure political offenses are generally victimless acts directed not at individuals but at the structure of government,[240] and thus, are not categorized as

235. *See* Inter-American Convention, *supra* note 64, arts. 11 & 12. *See also* Hague Convention for the Suppression of Unlawful Seizure of Aircraft Dec. 16, 1970, art. 7, 860 U.N.T.S. 105 [hereinafter Hague Convention]; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1973, art. 8, 1035 U.N.T.S. 167 [hereinafter New York Convention]; International Convention Against the Taking of Hostages, Dec. 17, 1979, art. 10, 1316 U.N.T.S. 204 [hereinafter Hostage Taking Convention]; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, arts. 9, 10 & 11, 1456 U.N.T.S. 1987 [hereinafter Nuclear Materials Convention]; International Convention for the Suppression of Terrorist Bombings, *opened for signature* Jan. 12, 1998, art. 11, 2149 U.N.T.S. 256 [hereinafter Terrorist Bombing Convention]; European Convention on the Suppression of Terrorism, Jan. 27, 1977, art. 1, 1137 U.N.T.S. 93 [hereinafter European Convention]; South Asian Association for Regional Cooperation Convention on Suppression of Terrorism, Nov. 4, 1987, arts. 1 & 2, *available at* http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf (last accessed Oct. 28, 2009); Supplementary Extradition Treaty, June 25, 1985, art. 1, U.S.-U.K., 24 I.L.M. 1105.

236. *See, e.g.* G.A. Res. 51/210, U.N. GAOR, 51st Sess., Supp. No. 49, at 346, U.N. Doc. A/RES/51/210 (1996); A.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001).

237. *See, e.g.* In the Matter of the Extradition of Atta, 706 F. Supp. 1032 (E.D.N.Y. 1989); In re Extradition of Singh, 170 F. Supp. 2d 982 (E.D. Cal. 2001); In Re Gomez Ces, Corte di Cassazione, in Gius. Pen. II at 394; In Re Extradition of Khaled Mohammed El Jassem, Corte di Cassazione, Sez. Penale I/a, Sentence No. 767 (Feb. 17, 1992).

238. Jan Klabbers, *Rebel with a Cause? Terrorists and Humanitarian Law*, 14 EUR. J. INT' L. 299, 301-08 (2003).

239. The basic elements of a custom are: (1) the general and consistent practice of states and (2) *opinio juris* or the belief that a certain form of behavior is obligatory. JOAQUIN G. BERNAS, S.J., AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 10, 13 (2002 ed.).

240. Petersen, *supra* note 8, at 776.

common crimes, but rather as political crimes. This does not hold true with relative political offenses which are common crimes, like murder, kidnapping, and assault that occur in connection with political uprisings or are connected with a political act.[241] As previously discussed, the goal of terrorism is to instill fear in a given civilian population by means of violence,[242] and thus, such violence is not directly committed against the structure of government. It was clearly held by the French Court of Appeals in the case of *In re Giovanni Gatti*[243] that what distinguishes the political crime from the common crime is the fact that "the former only affects the political organisation of the state, the proper rights of the state, while the latter exclusively affects rights other than those of the state."[244] This pertains to the Injured Rights Test, and courts of other countries have taken a similar position, as in the cases of *Chandler v. United States*,[245] *In re Fabijan*,[246] *In re Ockert*,[247] and *In re Barratini*,[248] where the courts held that purely political offenses include high treason, capital treason, rebellion, and incitement to civil war,[249] and that purely political offenses are, in essence, directed against the political regime.[250] Thus, the French Injured Rights Test, as opposed to the subjective Swiss Predominant Motive Test and Anglo-American Political Incidence Test, is preferred by most scholars, as well as by the U.N., as shown by the language of its resolutions unequivocally condemning "all acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whomever committed."[251] This is so because of the

241. *Id.* at 775.

242. Jeffrey Addicott, *Legal and Policy Implications for a New Era: The War on Terror*, 4 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 209, 213-14 (2002).

243. In re Giovanni Gatti, 14 ANN. DIG. 145 (Cour d'appel, Grenoble 1947).

244. *Id.*

245. Chandler v. United States, 171 F.2d at 935.

246. In re Fabijan, 7 ANN. DIG. 360 (1933).

247. In re Ockert, 7 ANN. DIG. 369, Tribunal federale, Switzerland (1933).

248. In re Barratini, 9 ANN. DIG. 412, Liege (1936).

249. *See* Chandler v. United States, 171 F.2d at 935; In re Fabijan, 7 ANN. DIG. 360 (1933); In re Ockert, 7 ANN. DIG. 369, Tribunal federale, Switzerland (1933).

250. In re Barratini, 9 ANN. DIG. 412, Liege (1936).

251. G.A. Res. 48/122, U.N. GAOR, 48th Sess., Supp. No. 49, at 241, U.N. Doc. A/RES/48/122 (1993). *See also* G.A. Res. 49/60, U.N. GAOR, 49th Sess., Supp. No. 49, at 303, U.N. Doc. A/RES/49/60 (1994); G.A. Res. 50/53, U.N. GAOR, 50th Sess., Supp. No. 49, at 319, U.N. Doc. A/RES/50/53 (1995); G. A. Res. 51/210, U.N. GAOR, 51st Sess., Supp. No. 49, at 346, U.N. Doc A/RES/51/210 (1996); G.A. Res. 52/165, U.N. GAOR, 52d Sess., Supp. No. 49, at 394, U.N. Doc. A/RES/52/165 (1997); G.A. Res. 53/108, U.N. GAOR, 53d Sess., Supp. No. 49, at 364, U.N. Doc. A/RES/53/108 (1999); G.A. Res. 50/53, U.N. GAOR, 50th Sess., Supp. No. 49, at 319, U.N. Doc.

objectivity of the French Injured Rights Test since it clearly makes a distinction between pure political offenses and relative political offenses.

Since terrorist acts typically involve a combination of common crimes and purportedly political motives,[252] such that it is the political goal which motivates the common crime,[253] terrorism falls under the classification of relative political offenses rather than that of pure political offenses. This assertion is further reinforced by the author's previous proposition that acts of terrorism may be prosecuted as crimes against humanity. In this light, terrorism may be regarded by the international community as so heinous that the perpetrators cannot rely on the political offense exception on extradition. Thus, the treatment of terrorist acts as relative political offenses as well as crimes against humanity is significant because it reinforces the author's proposition that the breadth of the political offense exception should be restricted such that terrorist acts are not be considered within the realm of the political offense exception, and would therefore, resolve one of the existing problems of extradition in combating terrorism.

B. Principle of aut dedere aut judicare as a legal obligation vis-à-vis terrorism

After addressing the problem of the political offense exception in relation to acts of terrorism, it is significant to resolve the problem as to existing contrasting views of whether the principle of *aut dedere aut judicare* has actually been accepted as a positive norm of customary international law. This is significant because leaving said issue unresolved would result in further questions as whether a country can extradite an offender who has commited acts of terrorism in another country with which it has no extradition treaty, and can thus affect the effectiveness of extradition as a law enforcement mechanism against terrorism. Therefore, two problems need to be addressed with regard to the principle of *aut dedere aut judicare*: first, the status and scope of the principle under international law; and second, whether the obligation to extradite has priority over the obligation to prosecute or vice versa.[254]

A/RES/50/53 (1995); G. A. Res. 51/210, U.N. GAOR, 51st Sess., Supp. No. 49, at 346, U.N. Doc A/RES/51/210 (1996); G.A. Res. 52/165, U.N. GAOR, 52d Sess., Supp. No. 49, at 394, U.N. Doc. A/RES/52/165 (1997); G.A. Res. 55/158, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/RES/55/158 (2001).

252. Sapiro, *supra* note 8, at 660.

253. Bradley Larschan, *Extradition, the Political Offense Exception and Terrorism: An Overview of the Three Principal Theories of Law*, 4 B.U. INT'L L.J. 231, 250 (1986).

254. Zdzislaw Galicki, The Obligation to Extradite or Prosecute ("aut dedere aut judicare") in International Law: Preliminary remarks, *available at* http://untreaty.un.org/ilc/reports/2004/english/annex.pdf (last accessed Oct. 28, 2009).

Before pursuing the two problems, it should be recalled that the author has proposed to include terrorism in the category of crimes against humanity due to the absence of a universally accepted definition of terrorism. The position of taking the crime of terrorism as a crime against humanity is supported by various scholars.[255] National case law also seems to offer indications in that direction.[256] One of the reasons for such proposition is because the crime of terrorism satisfies the material threshold or the element of "systematic or widespread attack" of the crime against humanity.[257] As mentioned, the definition of crimes against humanity in Article 7 of the ICC Statute has a large scope, comprising a wide range of acts, including murder, enslavement, torture, rape, persecution, and enforced disappearance, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" pursuant to or in furtherance of a State or organizational policy.[258] Taken separately, "widespread" refers to the magnitude of single acts, while "systematic" means the repetition of similar acts, showing a consistent pattern of action.[259] Although it may be argued that the two elements should concur, the use of the alternative conjunction "or" would lead to the conclusion that the "repetition of acts with a small number of victims amounts to a crime against humanity (the systematic dimension)," as well as a "single act striking at a considerable number of victims (the wide spread)."[260] Moreover, the international community clearly condemns terrorism in general because it has been described as the greatest threat to world peace.[261] Acts of terrorism are increasingly accepted by the international community as so egregious and discriminatory as to warrant definition as a crime against humanity, and scholars believe that the 2001 September 11 attacks are the clearest example of such an egregious and discriminatory terrorist attack.[262] There are several benefits, for the purposes of this Note, in classifying terrorism as a crime against humanity, which is a customary law crime. Firstly, it will extend its jurisdictional scope far beyond that of conventional international law offenses

255. *See, e.g.* Di Filippo, *supra* note 35; Joel-Proulx, *supra* note 35; Fry, *supra* note 35; Much, *supra* note 35; Burgess, *supra* note 35.

256. *See, e.g.* Milosevic et al., *supra* note 37; Krstic, *supra* note 39; Kayishema, *supra* note 42; Quinlivan et al., 3 IR 154, High Court, Ireland (2000); Case 1292, Cauchi, Augusto s/ extradición, Corte Suprema de Justicia (Aug. 13, 1998); Case 01-847, Ballestas Tirado, Sup Ct of Venezuela (Dec. 10, 2001).

257. Di Filippo, *supra* note 35, at 568.

258. Goodwin-Gill, *supra* note 51, at 207 (citing 1998 Rome Statute, art. 7 (1), (2); Prosecutor v. Tadic, Opinion and Judgment, No. IT-94-1-T (May 7, 1997)).

259. Di Filippo, *supra* note 35, at 568.

260. *Id.*

261. Fry, *supra* note 35, at 179.

262. *Id.*

suffering from the evils of non[-]ratification.[263] Secondly, it facilitates and improves the prosecution of terrorists by all states because universal jurisdiction is available with crimes against humanity.[264] Hence, the usual problems brought about by the limitations of extradition such as the political offense exception and the dual criminality requirement will not hinder the obligation to extradite terrorists. This is in addition to the trend of depoliticizing terrorist acts and narrowing the political offense exception. Lastly, there will be absolutely no safe havens for terrorists, and thus, more terrorists are likely to be brought to justice.

The above discussion on terrorism as a crime against humanity is relevant because for the purpose of this Note, the discussion of the principle of *aut dedere aut judicare* as a general obligation under customary international law will be limited to acts of terrorism taken as crimes against humanity. Having then established terrorism as a crime against humanity, the issues pertaining to the principle of *aut dedere aut judicare* will now be discussed.

As to the first problem of what is the scope and status of the principle of *aut dedere aut judicare* under international law, the author asserts that the principle of *aut dededere aut judicare* should not only be derived exclusively from treaties, but should also apply as a matter of customary law to certain classes of international offenses, particularly to serious crimes which are of universal concern deserving condemnation in themselves and deemed to affect the moral and even peace and security interests of the entire international community,[265] more specifically, to war crimes and crimes against humanity.[266] To be a rule of customary international law, the

263. Miles M. Jackson, *The Customary International Law Duty to Prosecute Crimes Against Humanity: A New Framework*, 16 TUL. J. INT'L & COMP. L. 117, 120 (2007).

264. *Id.* at 119.

265. Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law*, 35 NEW ENG. L. REV. 399, 402 (2001).

266. *See, e.g.* ZHU Lijiang, *Chinese Practice in Public International Law: 2007 (II)*, 7 CHINESE J. INT'L L. 735 (2008); Jackson, *supra* note 263; Micah S. Myers, *Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations*, 25 MICH. J. INT'L L. 211 (2003); Colleen Enache-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL L.J. 613 (1998); Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terorrists — Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491 (2003). *Cf.* Mark A. Summers, *The International Court of Justice's Decision in Congo v. Belgium: How Has it Affected the Development of a Principle of Universal Jurisdiction that would Obligate All States to Prosecute War Criminals?* 21 B.U. INT'L L.J. 63 (2003).

principle of *aut dedere aut judicare* has to be in general and consistently practiced by states and regarded by them as legally binding.[267]

The view that the principle of *aut dedere aut judicare* is an obligation under customary law as to particular classes of international offenses is supported by several jurists such as Grotius, Bodin, and de Vattel. Bassiouni asserts that "the principle is a customary rule with respect to a whole class of international offences, or with respect to international offences as a whole."[268] In addition, international terrorism may "constitute an exception to the modern rule that, in the absence of a treaty, the surrender of a fugitive cannot be demanded as a matter of right"[269] on the ground that all states are bound to cooperate in ensuring that their perpetrators are brought to justice.[270] Furthermore, the incorporation and reiteration of the principle of *aut dedere aut judicare* in numerous treaties and conventions, particularly those against terrorism, like the European Convention on the Suppression of Terrorism, the Hague Convention, and the Montreal Convention and its application by states in their mutual relations may be taken as evidence of the principle's status as a general duty under customary international law. Although the language occasionally differs, all in all, over 70 international conventions include the principle.[271] It is notable that treaty provisions play a significant part in the development of customary rules because they have been "accepted and applied as a matter of general practice" by states.[272] The quasi-legislative effect to resolutions of the U.N. such as the U.N. Security Council Resolution 1373 which specifically laid down the duty to bring

267. Kelly, *supra* note 266, at 500-01.

268. BASSIOUNI & WISE, *supra* note 99, at 20.

269. *Id.* at 21 (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 315 (4th ed. 1990)).

270. *Id.* (citing Statement of the Rules of International Law Applicable to International Terrorism, adopted by the International Law Association in 1984, in International Law Association, Report of the Sixty-First Conference 6-7 (1985)).

271. Jackson, *supra* note 263, at 127 (citing BASSIOUNI & WISE, *supra* note 99, at 3). *See, e.g.* Terrorist Bombing Convention, *supra* note 235, arts. 6 & 8; International Convention for the Suppression of the Financing of Terrorism, art. 10, G.A. Res. 54/109, U.N. GAOR, 54th Sess., 76th mtg. U.N. Doc. A/RES/54/109 (2000); Hague Convention, *supra* note 235, art. 7; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sep. 23, 1971, art. 7, 974 U.N.T.S. 177 [hereinafter Montreal Convention]; New York Convention, *supra* note 235, art. 6; Nuclear Materials Convention, *supra* note 235, art. 10; European Convention on Terrorism, *supra* note 235, arts. 6 & 7.

272. BASSIOUNI & WISE, *supra* note 99, at 47. *See also* N. Sea Cont'l Shelf Cases, 1969 I.C.J. 41 (requiring a widespread and representative participation); Andreas O'Shea, Amnesty for Crime in International Law and Practice 216 n.96 (2002).

terrorists to justice and to "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens,"[273] and the U.N. General Assembly Resolution 52/88 which seeks to ensure the effective application of the principle of *aut dedere aut judicare*[274] may also be a manifestation of the principle's status as a customary law. These manifestations are significant because it illustrates one of the basic elements of a custom which is the general and consistent practice of states.[275]

At a time when violent and harmful crimes such as terrorism have increased and intensified, the importance of the principle of *aut dedere aut judicare* cannot be denied. The obligation to extradite or prosecute is based on a common interest in supressing acts of terrorism — an increasing concern shared by members of the international community. This sense of legal obligation is manifested by the existence of the principle of *aut dedere aut judicare* in treaties and conventions and U.N. General Assembly resolutions.[276] As Special Rapporteur Zdzislaw Galicki pointed out in one of his reports, the number of international and regional treaties establishing and confirming the obligation to extradite or prosecute is growing every year and this could be an indication of an appropriate customary norm.[277] This is significant because the other element of custom aside from the general and consistent practice of states is *opinio juris* or the "belief that a certain form of behavior is obligatory."[278] It is then reasonable to assert that if a state has signed and ratified a significant number of treaties containing the principle of *aut dedere aut judicare*, then that state has demonstrated through this practice that the principle of *aut dedere aut judicare* is a customary norm.[279] The State, through the act of signing related international agreements, articulates the belief that the "principle of *aut dedere aut judicare* is an accepted norm and that it is the most effective way of preventing certain forms of conduct"[280] such as terrorism, and thus, the State intends to be bound by such principle.

It is worth noting that there has also been judicial practice dealing with the principle of *aut dedere aut judicare* and has confirmed its existence in

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273. *See* U.N. S.C. Res. 1373, U.N. S/RES/1373 (2001).

274. *See* G.A. Res. 52/88, GAOR, 70th plen. mtg., U.N. Doc. A/RES/52/88 (1997).

275. BERNAS, S.J., *supra* note 239, at 10.

276. U.N. General Assembly resolutions are often viewed as reflective of world opinion because a majority of the world's countries necessarily vote to adopt them. However, for customary law purposes, they are also considered reflective of developing *opinio juris*. Kelly, *supra* note 266, at 515.

277. Amnesty International, *supra* note 109, at 27.

278. BERNAS, S.J., *supra* note 239, at 13.

279. Enache-Brown & Fried, *supra* note 266, at 629.

280. *Id.*

contemporary international law.[281] The Austrian Supreme Court held that when the government has refused an extradition request from a third country, then the government must, as a consequence, offer the foreign defendant's home state the right to prosecute.[282] In addition, an Israeli court held that where Israeli law prohibited the prosecution of a foreign national, Israel was obligated to extradite the individual pursuant to international law.[283] In the case of *Libyan Arab Jamahiriya v. United Kingdom*,[284] one of five dissenting judges recognized the obligation to extradite or prosecute as part of general international law. Particularly, Judge Mohammed Bedjaoui, argued that the Montreal Convention's right to extradite or prosecute is a right recognized by general international law.[285] Several decisions by national courts[286] also seem to confirm said interpretation, at least regarding crimes under international law, like genocide, crimes against humanity, war crimes, torture, enforced disappearances, and extralegal, arbitrary or summary executions.[287] These court decisions should be taken into account when considering the trends of contemporary development of the principle of *aut dedere aut judicare* because it reinforces the author's submission that the

281. Galicki, *supra* note 254, at 5.

282. Kelly, *supra* note 266, at 502 (citing Michael Plachta, *(Non-)Extradition of Nationals: A Neverending Story?* 13 EMORY INT'L L. REV. 77, 127-28 (1999)).

283. *Id.*

284. Libyan Arab Jamahiriya v. United Kingdom, Order of. June 29, 1999, I.C.J. Reports 1999 (1999).

285. *Id.*

286. In Peru, the Constitutional Court recalled that all states are permitted to exercise universal jurisdiction regarding crimes under international law and ordinary crimes of international concern. It ruled that torture and enforced disappearances are subject to universal jurisdiction based on the obligation to extradite or prosecute. Tribunal Constitucional, Exp. No. 01271-2008-PHC/TC, *Huaura, José Enrique Crousillat López Torres (2008);* In Spain, the investigating judge in Madrid asserted that the *aut dedere aut judicare obligation* is based not only on conventional law, but also on customary international law and it arises out of the *jus cogens* character of the prohibition of genocide and crimes against humanity. According to the judge, Guatemala has violated its duty under international law by refusing either to investigate former President Ríos Montt in Guatemala or extradite him to Spain. Tribunal Supremo, Sala de lo Penal, Sección: 1, N° de Recurso: 2027/2006, N° de Resolución: 554/2007 (2007); In Australia, the Federal Court recognizes the the customary character of the principle of *aut dedere aut judicare* in the cases concerning the *Native Title Amendment Act* 1998 and the *Arabunna People*. Federal Court of Australia, *Re Thompson; Ex parte Nulyarimma* (1998) 136 ACT 9, 1 September 1999, *available at* http://www.austlii.edu.au/cgibin/sinodisp/ au/cases/cth/FCA/1999/1192.html?query=duty%20to%20extradite (last accessed Oct. 28, 2009).

287. Amnesty International, *supra* note 109, at 27-28.

principle may be based on custom when dealing particularly with acts of terrorism taken as crimes against humanity. Thus, the widespread acceptance of the obligation to extradite or prosecute those accused of international crimes represents, at the very least, "a growing recognition by the international community that states must act affirmatively against individuals who harm the interests of the international community."[288]

The author recognizes that questions may exist as to the consistency and generality of the practice of the obligation to extradite especially when questions on whether the obligation to extradite precedes the obligation to prosecute or the other way around. Thus, as to the second problem of whether the obligation to extradite has priority over the obligation to prosecute or vice versa, it is the submission of the author that the obligation to extradite is to be given priority over the obligation to prosecute in line with the previous discussion in the former sections of this Note that extradition is accepted by many states today as the most important modality of international cooperation in the suppression of increased forms and manifestations of international crimes causing major harmful consequences such as terrorism.[289] This is because the obligation to extradite or prosecute is based on the actual jurisdiction or control of the state over an individual.[290] Thus, the main factor to consider is where the offense was committed. This is in recognition that the injured state has a right to punish the perpetrator of crimes against mankind at large[291] to the point that the state where the perpetrator lives or is seeking refuge must extradite the perpetrator to the requesting state or the state where the perpetrator has committed the offense. Several international conventions illustrate the author's argument that the obligation to extradite takes precedence over the obligation to prosecute. The European Convention on the Suppression of Terrorism provides that the obligation to prosecute is subordinate to a prior request to extradition.[292] Article 7 of said Convention particularly provides:

> A Contracting State in whose territory a person suspected to have committed an offence mentioned in Article 1 is found and which has received a request for extradition under the conditions mentioned in Article 6, paragraph 1, shall, *if it does not extradite that person, submit the case,*

288. Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations*, 39 VA. J. INT'L L. 425, 447 (1999).

289. BASSIOUNI & WISE, *supra* note 99, at 408 (citing M. Cherif Bassiouni, *Accountability for Violations of InternationalHumanitarian Law and Other Serious Violations of Human Rights, in* POST-CONFLICT JUSTICE 3 (M. Cherif Bassiouni ed., 2002)); BLAKESLEY, *supra* note 57.

290. Lijiang, *supra* note 266, at 760.

291. Steven, *supra* note 288, at 444.

292. *See* European Convention on Terrorism, *supra* note 235, art. 7.

> *without exception* whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.[293]

Thus, the wording and intent of the above provision demonstrates that prosecution may be done only when extradition has been requested and refused. Other conventions are also worded in the same way, such as the Montreal Convention, where Article 7 provides:

> The Contracting State in the territory of which the alleged offender is found shall, *if it does not extradite him*, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.[294]

In the recent case of Jose Maria Sison, as discussed in the previous chapter, the Netherlands decided to prosecute him in their courts after it was established that his extradition to the Philippines cannot be granted because no extradition treaty existed between the Netherlands and Philippines. It may be argued, however, that extradition is not necessarily accorded priority as in the case of the Hague Convention where the requested state seems to have the choice of deciding as to which alternative — to extradite or to prosecute — it wishes to pursue. Here, the state which apprehends the offender is entitled to prosecute the offender itself instead of extraditing him first. Nevertheless, the author recognizes that "uniformity and generality of practice need not be complete, but it must be substantial."[295] Thus, as long as the obligation is practiced and recognized by many states, said element is sufficient for the existence of custom.

According to Prof. Anthony D'Amato, despite the existence of thousands of extradition treaties, extradition is not regarded as obligatory as a matter of customary international law because there is an "equally valid customary law permitting the requested state to grant asylum and to refuse extradition in the absence of a treaty requiring it."[296] This, however, can be addressed by the proposition that crimes of terrorism are to be taken as crimes against humanity. This would make terrorist acts fall under Article 1 (F) (a) of the 1951 Refugee Convention, thus, making the Convention

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293. *Id.* art. 7 (emphasis supplied).

294. Montreal Convention, *supra* note 271, art. 7 (emphasis supplied).

295. BERNAS, S.J., *supra* note 239, at 12 (citing Nicaragua v. United States, 1986 I.C.J. 14 (1986)).

296. BASSIOUNI & WISE, *supra* note 99, at 48 (citing ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 143-44 (1971)).

inapplicable to any person who has committed a crime against humanity.[297] Furthermore, with terrorism as a crime against humanity, the universality principle is applied which "vests in every State the power to try those who participated in the preparation of such crimes, and to punish them therefor ...."[298] The universal character of terrorism would thus obligate states to extradite the offender to the requesting state for prosecution even in the absence of an extradition treaty because acts of terrorism constitute acts which "damage vital international interests ... they impair the foundations and security of the international community; they violate the moral values and humanitarian principles ...."[299] It can be said then that the obligation to extradite has been significantly strengthened with the principle of universality of suppression of terrorist acts, which would mean that, as a result of application of the obligation to extradite or prosecute between states concerned, there is no place where an offender could find safe haven and avoid criminal responsibility.[300] With this, no conflict will exist between or among customary norms, particularly that of the principle of *aut dedere aut judicare* and the customary law permitting the requested state to grant asylum and to refuse extradition in the absence of a treaty.

Therefore, extradition should take priority such that the state requesting extradition, which is normally the state where the offense was committed, has the primary interest in seeing that the offender is brought to justice and in most cases, will also be the most convenient location for a trial.[301] In that case then, the requested state is under the obligation to prosecute the offender itself *only* when extradition is otherwise barred.

C. Balancing the obligation to extradite with the protection of fundamental human rights

After establishing the obligation to extradite offenders of terrorist acts as customary international law, it is important to relate and balance this obligation with human rights obligations. This is because concerns may arise as to how the protection of fundamental human rights of the offender is ensured when the obligation to extradite is based on customary international law, especially when the traditional practice has been that the extradition treaties normally contain the human rights safeguards for the offenders.

To ensure then the protection of the offender's human rights in carrying out extradition requests especially in the absence of an extradition treaty,

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297. *See* 1951 Refugee Convention, *supra* note 138, art. 1 (F) (a).

298. BERNAS, S.J., *supra* note 239, at 197 (*citing* Eichmann v. Attorney-General of Israel, 136 I.L.R. 277 (1962)).

299. *Id.* at 195.

300. Galicki, *supra* note 254, at 3.

301. BASSIOUNI & WISE, *supra* note 99, at 57.

human rights obligations must be incorporated in the the country's national law, particularly with its extradition law and anti-terrorism law, since governments are legally bound to obey their domestic laws.[302] The grounds for refusal of an extradition request should be clearly enumerated in the extradition law so as not to provide for any loopholes enabling the requested state to violate the human rights of an offender. The U.N. Model Treaty on Extradition, for example, enumerates 12 grounds for refusal of an extradition request[303] such as the discrimination clause,[304] which is inspired by the principle of *non-refoulment* contained in the Convention relating to the Status of Refugees. Another ground to note is torture, cruel, inhuman, or degrading treatment or punishment, which provides that extradition shall not be granted if "the person sought [has been or] would be subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment."[305] This human rights exception to extradition takes into account some basic requirements in the ICCPR. It is included as a mandatory bar on extradition to justify refusal to extradite where a punishment of mutilation or other corporal punishment may be imposed or where a person may not receive the minimum guarantees in criminal proceedings, as contained in the Covenant.[306] The incorporation of the aforementioned provisions from the 1951 Refugee Convention and the ICCPR is relevant because it illustrates that the governments are bound to protect the human rights of the offender not only based on their domestic laws, but also based on international laws that have either become customary

302. Kouta, *supra* note 76, at 64-65 (citing Advisory Council of Jurists, Reference on the rule of law in combating terrorism, Draft Preliminary Report submitted by Justice Glazerbrook, Asia Pacific Forum of National Human Rights Institutions 46 (2003)).

303. *See* United Nations Office on Drugs and Crime, Model Treaty on Extradition, §§ 4-15 (2004) [hereinafter UNODC Model Treaty on Extradition]. The 12 grounds for refusal of an extradition request are: (1) Offences of a political nature; (2) Discrimination clause; (3) Torture, cruel, inhuman or degrading treatment or punishment; (4) Fair trial standards - judgement in absentia - extraordinary or ad hoc court or tribunal; (5) Ne bis in idem; (6) Statute of limitation; (7) Military offences; (8) Nationality; (9) Death penalty; (10) Extraterritoriality; (11) Surrender to International Criminal Court or Tribunals; (12) Prosecution in case of non-extradition.

304. This ground for refusal of extradition is included in numerous international instruments such as the 1988 Drug Convention (Art. 6, ¶ 6), the Palermo Convention (Art. 16, ¶14), the Merida Convention (Art. 44, ¶ 15), and the recent counter-terrorism conventions.

305. UNODC Model Treaty on Extradition, § 6.

306. United Nations Office on Drugs and Crime, Revised Manual on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters 20 (2002).

international law or those to which the government of that state has voluntarily chosen to become bound, including international human rights treaties, refugee and humanitarian law, and the U.N. Charter.[307]

As discussed, the principle of *non-refoulement* requires that refugees or asylum seekers shall not be returned, in any manner, to a country in which their life or freedom would be threatened, or where they may face persecution.[308] Furthermore, Article 3 of the European Convention on Human Rights provides that a government cannot extradite a person where there is danger of torture and other forms of ill-treatment.[309] These international standards of human rights, which provide both substantive and procedural guarantees, can also come under threat when fighting against terrorism.[310] It should be recalled that terrorists have often successfully invoked the political offense exception as well as the principle of *non-refoulement* to prevent prosecution[311] because terrorists claim to be political offenders with a legitimate cause and perhaps because terrorists are often found in countries where their governments are sympathetic to their cause. Because of this, the requesting state has often resorted to illegal means of capturing the offender and has adopted policies and practices that exceed the bounds of what is permissible under international law such as by forcible abduction,[312] extra-judicial executions, torture, unfair trials, and other acts of

307. Koufa, *supra* note 76, at 64-65 (citing Advisory Council of Jurists, Reference on the rule of law in combating terrorism, Draft Preliminary Report submitted by Justice Glazerbrook, Asia Pacific Forum of National Human Rights Institutions 46 (2003)).

308. 1951 Refugee Convention, *supra* note 138, art. 33.

309. *See* Convention Against Torture, *supra* note 127.

310. Koufa, *supra* note 76, at 67 (citing Report by the International Bar Association's Task Force on International Terrorism, entitled 'International Terrosim: Legal Challenges and Responses,' 58 (2003)).

311. The political offense exception protects the right of persons to rebel against any government they find unsatisfactory or oppressive, even by armed resistance under certain circumstances, by eliminating the threat of extradition. Lorenzotti, *supra* note 79, at 173; The principle of *non-refoulement* requires that refugees or asylum seekers shall not be returned, in any manner, to a country in which their life or freedom would be threatened, or where they may face persecution. 1951 Refugee Convention, *supra* note 138, art. 33.

312. An example would be the case of *Ker v. Illinois*, where the court held that: "Such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court." Ker v. Illinois, 119 U.S. 436 (1886).

unlawful repression, which violate the human rights not only of the terrorists but of innocent civilians as well.[313]

The Author seeks to resolve such human rights violations with the proposition that acts of terrorism are relative political offenses which are not covered by the political offense exception. Furthermore, taking acts of terrorism as a crime against humanity takes the offender out from the scope of the 1951 Refugee Convention. As previously discussed in this Note, refugee protection is not absolute. Article 1 (F) (a) of the 1951 Refugee Convention[314] provides that its benefits shall not apply to any person where there are serious reasons to believe that he has committed a crime against peace, a war crime, or a crime against humanity. Thus, terrorists can no longer seek refuge and prevent prosecution as provided for by law, and the requested state has the obligation to extradite the offender to the requesting state so that he may be brought to justice for the crime he has committed. This would prevent the requesting state from resorting to illegal means which are violative of the human rights of the offender just so they can try him for his offense.

D. Application of the interplay of the principle of aut dedere aut judicare, the political offense exception, and the human rights safeguards to the current Philippine Extradition Law and the relationship between the Philippine Extradition Law and relevant provisions of the Human Security Act of 2007.

The most pressing issue pertinent to extradition and terrorism in the Philippines is the extradition of communist leader Jose Maria Sison. The major obstacle to his extradition is the fact that there is no extradition treaty between the Netherlands and the Philippines. The human rights safeguards of Sison may also be an obstacle to his extradition because Sison claims that under the European Convention on Human Rights and the 1951 Refugee Convention, the Dutch government cannot extradite him to the Philippines or any other country where he is at risk of being subjected to torture, or

313. Koufa, *supra* note 76, at 54.

314. 1951 Refugee Convention, *supra* note 138, art. 1 (F). Article 1 (F) provides:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has commited a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principle of the United Nations.

otherwise inhuman and degrading treatment or punishment.[315] These obstacles may be resolved by recalling the previously discussed propositions of the author.

First, acts of terrorism are classified as relative political offenses and are thus excluded from the scope of the political offense exeption. Second, acts of terrorism when prosecuted as crimes against humanity are subject to the universality principle, and thus, the obligation to extradite or prosecute will come into play. This ensures that offenders of such heinous crimes will be brought to justice such that the obligation makes it feasible to extend the reach of the law over persons that are physically outside the territorial jurisdiction of a victimized or injured state.[316] Consistent with the object and purpose of suppression and punishment, state parties are obliged to take the alleged offender into custody, or to take such other measures as will ensure his or her presence for the purpose of extradition or prosecution[317] even in the absence of an extradition treaty. Third, in order to ensure the effectiveness of the extradition process and to ensure that no terrorist will be granted safe haven anywhere, the principle of *aut dedere aut judicare* shall be based not only on treaty, but also on custom, particularly when dealing with terrorist acts as crimes against humanity. Lastly, to afford and ensure the protection of the offender's human rights especially in the absence of an extradition treaty, the human rights standards and safeguards must be expressly enumerated and incorporated in the states' national extradition laws such as in the form of mandatory grounds for refusal to extradite an offender.

It must be recalled that the existing Philippine Extradition Law contains only the procedure for the extradition of persons who have committed crimes in a foreign country.[318] Section 3 of the Law provides that "[e]xtradition may be granted only pursuant to a treaty or convention."[319] From the time that President Macapagal-Arroyo abolished the death penalty up to this date, the fact that no extradition treaty exists between the Netherlands and the Philippines has allowed Sison to seek refuge in the Netherlands for over 20 years now, although he is not legally admitted as a political refugee.[320] With the submission of the author that acts of terrorism,

315. Mallari, *supra* note 215.

316. Sailer, *supra* note 90, at 326.

317. Goodwin-Gill, *supra* note 51, at 209. *See also* Convention Against Torture, *supra* note 127, art. 6 (1), (3), (4), (12); Hostage Taking Convention, *supra* note 235, art. 6 (1); New York Convention, *supra* note 235, art. 6 (1); Hague Convention, *supra* note 235, art. 6 (1); Montreal Convention, *supra* note 271, art. 6 (1).

318. *See* Philippine Extradition Law.

319. *Id.* § 3.

320. Galicia, *supra* note 221.

such as the murder charges against Sison, are to be prosecuted as crimes against humanity for which the universality principle applies, states are obliged to extradite or prosecute the offender so that he will not be able to avoid punishment. This is further reinforced by the author's submission that the principle of *aut dedere aut judicare* may be rooted on customary international law, particularly with regard to certain classes of internationational offences such as crimes against humanity. It is important to note that the Human Security Act of 2007 seems to support the author's proposition with regard to making the crime of terrorism as a crime against humanity. Section 2 of the Human Security Act of 2007 provides:

> It is declared a *policy of the State* to protect life, liberty, and property from acts of terrorism, to condemn terrorism as inimical and dangerous to the national security of the country and to the welfare of the people, and *to make terrorism a crime against the Filipino people, against humanity, and against the law of nations.*[321]

Therefore, with the crime of terrorism as a crime against humanity and with the obligation to extradite offenders of terrorist acts as customary international law, the requested state has the duty to extradite the offender regardless of whether or not an extradition treaty exists between the requested and requesting states. With this argument, even if no extradition treaty exists between the Netherlands and Philippines, Sison should be extradited. As for Sison's claim that he may validly seek refuge in the Netherlands as provided for by the 1951 Refugee Convention, it must be recalled that the grant of refugee status or political asylum is not absolute. The Conventions provide for exceptions such as when that person seeking the grant of refugee status or political asylum is considered to have committed a crime against humanity.[322] Since Sison is internationally recognized as a terrorist,[323] and since the Philippine government seems to treat groups such as the CPP-NPA and ASG as terrorist groups, and granting that the CPP-NPA falls under the definition of a terrorist according to the Human Security Act of 2007,[324] the author's propositions would lead to the

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321. Human Security Act of 2007, § 2 (emphasis supplied).

322. *See* 1951 Refugee Convention, *supra* note 138, art. 1 (F) (a).

323. Extradition of Sison, *supra* note 217.

324. *See* Human Security Act of 2007, § 17. This section provides:

> Any organization, association, or group of persons organized for the purpose of engaging in terrorism, or which, although not organized for that purpose, actually uses the acts to terrorize mentioned in this Act or to sow and create a condition of widespread and extraordinary fear and panic among the populace in order to coerce the government to give in to an unlawful demand shall, upon application of the Department of Justice before a competent Regional Trial Court, with due notice and opportunity to be heard given to the organization, association, or

conclusion that Sison cannot claim nor be granted the status of political refugee. Thus, it is imperative for the Dutch government to extradite him to the Philippines so that he may be legally prosecuted for the acts of terrorism charged against him.

Militant and human rights groups have criticized the Human Security Act of 2007 because it may improperly extradite Sison and other leaders of national liberation movements.[325] However, it is the submission of the author that the CPP-NPA, of which Sison is co-founder and leader, and the ASG are recognized by the Philippine government as well as the international community as active terrorist groups or organizations.[326] This proposition has also been supported by various conventions on terrorism as well as by U.N. General Assembly and Security Council Resolutions, which show the trend of depoliticizing and condemning all terrorist acts. Various General Assembly resolutions particularly reiterate that the General Assembly "unequivocally condemns all acts, methods[,] and practices of terrorism in all its forms and manifestations, wherever and by whomever committed."[327] Since no reservation is made with regard to groups fighting for self-determination in the recent resolutions, such groups, if they perpetrate acts of terrorism, will be considered as terrorists as accepted by contemporary trends.

The author recognizes that groups such as the ASG and the CPP-NPA may be viewed not as terrorists, but rather as freedom fighters or revolutionaries with a political cause, aimed at liberation and self-

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group of persons concerned, be declared as a terrorist and outlawed organization, association, or group of persons by the said Regional Trial Court.

325. Castaneda, *supra* note 229.

326. *See* WHITTAKER, *supra* note 21, at Appendix II; *see also* Tilstra, *supra* note 21, at 838.

327. *See* G.A. Res. 48/122, U.N. GAOR, 48th Sess., Supp. No. 49, at 241, U.N. Doc. A/RES/48/122 (1993). *See also* G.A. Res. 49/60, U.N. GAOR, 49th Sess., Supp. No. 49, at 303, U.N. Doc. A/RES/49/60 (1994); G.A. Res. 50/53, U.N. GAOR, 50th Sess., Supp. No. 49, at 319, U.N. Doc. A/RES/50/53 (1995); G.A. Res. 51/210, U.N. GAOR, 51st Sess., Supp. No. 49, at 346, U.N. Doc A/RES/51/210 (1996); G.A. Res. 52/165, U.N. GAOR, 52d Sess., Supp. No. 49, at 394, U.N. Doc. A/RES/52/165 (1997); G.A. Res. 53/108, U.N. GAOR, 53d Sess., Supp. No. 49, at 364, U.N. Doc. A/RES/53/108 (1999); G.A. Res. 50/53, U.N. GAOR, 50th Sess., Supp. No. 49, at 319, U.N. Doc. A/RES/50/53 (1995); G.A. Res. 51/210, U.N. GAOR, 51st Sess., Supp. No. 49, at 346, U.N. Doc A/RES/51/210 (1996); G.A. Res. 52/165, U.N. GAOR, 52d Sess., Supp. No. 49, at 394, U.N. Doc. A/RES/52/165 (1997); G.A. Res. 55/158, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/RES/55/158 (2001).

determination.[328] However, it is important to note that a legitimate people's struggle could not be carried out by whatever means available such as resorting to deliberate violence against civilians; it has to remain subject to the rules of the armed conflicts.[329] When a group or organization chooses terrorism, its aim of national liberation does not help it nor can it justify its actions.[330] In this vein, for example, U.S. Senator Henry Jackson stated:

> Freedom fighters or revolutionaries don't blow up buses containing non-combatants; terrorist murderers do. Freedom fighters don't set out to capture and slaughter school-children; terrorist murderers do. Freedom fighters don't assassinate innocent businessmen, or hijack and hold innocent men, women and children; terrorist murderers do. It is a disgrace that some democracies would allow the treasured word "freedom" to be associated with acts of terrorists.[331]

Therefore, although groups like the ASG and the CPP-NPA may be labeled as freedom fighters or revolutionary groups, such is not the case when they opt to perpetrate acts of terrorism in achieving their political goals. To reiterate, relative political offenses, which are violent crimes that occur in connection with political uprisings,[332] are not covered by the political offense exception. Thus, when political motives are coupled with common crimes such as the kidnapping for ransom, assassinations, beheading, and bombing of public places by the ASG,[333] and the killing of a

328. Gerhard Hafner, *The Definition of the Crime of Terrorism*, in INTERNATIONAL COOPERATION IN COUNTER-TERRORISM: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS IN THE FIGHT AGAINST TERRORISM 38 (Giusseppe Nesi ed., 2006). Regional Conventions such as the Arab Convention for the Suppression of Terrorism (1998), the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999), and the Organization of African Unity Convention on the Prevention and Combating of Terrorism (1998) provide the provision that "people's struggle, including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terorrist crime." Michael De Feo, *The Political Offence Concept in Regional and International Conventions Relating to Terrorism*, in INTERNATIONAL COOPERATION IN COUNTER-TERRORISM: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS IN THE FIGHT AGAINST TERRORISM 114-15 (Guisseppe Nesi ed., 2006).

329. Hafner, *supra* note 328, at 38.

330. BOAZ GANOR, THE COUNTER-TERRORISM PUZZLE: A GUIDE FOR DECISION MAKERS 14 (2005).

331. *Id.*

332. Petersen, *supra* note 8.

333. Roque, Jr., *supra* note 166, at 308.

Filipino congressman and police chief,[334] assassination of a mayor, and bombing of a mobile telecommunications transmission station by the CPP-NPA,[335] and when such crimes are part of a "widespread or systematic attack directed against any civilian population, with knowledge of the attack"[336] in line with the author's proposition that crimes of terrorism are to be taken as crimes against humanity, then such groups will be regarded as having committed the crime of terrorism. Even the Human Security Act of 2007 justifies the author's argument, for such Act defines terrorism as certain acts punishable under the Revised Penal Code and special penal laws[337] sowing and creating a condition of "widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand."[338] Furthermore, Section 17 of the same Act reiterates the

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334. The Philippines and Terrorism, *supra* note 165.

335. *Id.*

336. 1998 Rome Statute, art. 7.

337. The Human Security Act of 2007 covers the following acts which are punishable under the Revised Penal Code:

(a) Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters);

(b) Article 135 (Rebellion or Insurrection);

(c) Article 134-A (Coup d'Etat), including acts committed by private persons

(d) Article 248 (Murder)

(e) Article 267 (Kidnapping and Serious Illegal Detention);

(f) Article 324 (Crimes Involving Destruction);

or under

(1) Presidential Decree No. 1613 (The Law on Arson);

(2) Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waster Control Act of 1990);

(3) Republic Act No. 5207 (Atomic Energy Regulatory and Liability Act of 1968);

(4) Republic Act No. 6235 (Anti-Hijacking Law);

(5) Presidential Decree No. 532 (Anti-piracy and Anti-highway Robbery Law of 1974);

(6) Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives).

Human Security Act of 2007, § 3.

338. *Id.*

same elements of terrorism with regard to terrorist organizations, associations, or groups of persons.[339]

Thus, despite the existence of political motives, if such political motives are combined with widespread or systematic attack against the civilian population, then the perpetrators will have to be extradited or prosecuted for their offenses.

With regard to particular provisions related to the extradition of terrorists found in the Human Security Act of 2007, Sections 58 and 57 of the Act are relevant. Section 58 provides for the extra-territorial application, subject to existing treaty obligations or any other laws of preferential application.[340] Beyond the territorial jurisdiction of the Philippines, the Human Security Act, in accordance with Section 58 of the same law, will apply:

> (1) to individual persons who commit any of the crimes defined and punished in this Act within the terrestrial domain, interior waters, maritime zone, and airspace of the Philippines;
>
> (2) to individual persons who, although physically outside the territorial limits of the Philippines, commit, conspire[,] or plot to commit any of the crimes defined and punished in this Act inside the territorial limits of the Philippines;
>
> (3) to individual persons who, although physically outside the territorial limits of the Philippines, commit any of the said crimes on board Philippine ship or Philippine airship;
>
> (4) to individual persons who commit any of said crimes within any embassy, consulate, or diplomatic premises belonging to or occupied by the Philippine government in an official capacity;
>
> (5) to individual persons who, although physically outside the territorial limits of the Philippines, commit said crimes against Philippine citizens or persons of Philippine descent, where their citizenship or ethnicity was a factor in the commission of the crime; and
>
> (6) to individual persons who, although physically outside the territorial limits of the Philippines, commit said crimes directly against the Philippine government.[341]

The above provision is significant because it shows that the Act considers the concept of the obligation to extradite or prosecute terrorists or offenders of the Human Security Act of 2007 such that it can be deduced from the provision that it is the injured state or the country where the crime or acts of terrorism were committed which has the right or priority to prosecute the

339. *Id.* § 17.

340. *Id.* § 58.

341. *Id.*

case. Thus, if the acts of terrorism were committed in the Philippine territory and the person liable for such acts is seeking refuge in another country, such person must be extradited to the Philippines so that he can be properly tried by the Philippine Courts. With the extra-territoriality application of the Human Security Act of 2007, the chances of terrorists escaping the hands of justice will be reduced.

Section 57 of the Human Security Act of 2007 is also relevant. It provides for the ban on extraordinary rendition subject to certain exceptions:

> No person suspected or convicted of the crime of terrorism shall be subjected to extraordinary rendition to any country unless his or her testimony is needed for terrorist related police investigations or judicial trials in the said country and unless his or her human rights, including the right against torture, and right to counsel, are officially assured by the requesting country and transmitted accordingly and approved by the Department of Justice.[342]

The above provision strengthens the author's proposition that the international community, as well as our own country, does not opt for illegal rendition and forcible abduction. Such provision indirectly points to the importance of extradition, which is recognized to be the most effective and legal means of rendition, as well as major effective instrument of international cooperation in the suppression of crime. As already mentioned, extradition is recognized as the only regular system that has been devised to return fugitives to the jurisdiction of a court competent to try them in accordance with municipal and international law.[343]

Granting that extraordinary rendition would necessarily be resorted to, Section 57 provides for an "unless" clause which ensures that the human rights of the person sought to be extradited are assured and respected.[344] Said clause provides: "unless his or her human rights, including the right against torture, and right to counsel, are officially assured by the requesting country and transmitted accordingly and approved by the Department of Justice."[345] This shows that in fighting terrorism, such as through the modality of extradition, a state cannot be allowed to commit its own human rights violations against the person sought. Although such provision in the Human Security Act of 2007 recognizes the importance of respecting the human rights of the person sought to be extradited, it is the proposition of the author that the human rights standards and safeguards should also be expressly incorporated in the Philippine Extradition Law. Doing so will ensure the protection of the fundamental human rights of offenders of

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342. *Id.* § 57.

343. *Government of the United States of America*, 389 SCRA at 653.

344. Human Security Act of 2007, § 57.

345. *Id.*

terrorist acts sought to be extradited because at present, the Philippine Extradition Law lacks such standards and safeguards. This will be explained further in the next section, where the Philippine Extradition Law will be discussed and compared with updated or recently amended extradition laws of other countries.

VII. CONCLUSION AND RECOMMENDATION

Having discussed and reconciled the problems of contemporary terrorism and extradition in the international community and applying such discussion to the Philippine context, the need to revise the Philippine Extradition Law cannot be emphasized more. Thus, before the author presents its proposed Act revising the Philippine Extradition Law, it is significant to recall and point out the deficiencies and loopholes in the Philippine Extradition Law or Presidential Decree No. 1069 (P.D. No. 1069).

First, the use of the term "accused"[346] in P.D. No. 1069 is legally erroneous and misleading. As previously mentioned, the extradition proceeding is not criminal in character, and thus, it does not involve the determination of the guilt or innocence of the person sought to be extradited.[347] Thus, "accused" should be changed to "person sought" so as to remove any misconcepcion or bias.

Second, P.D. No. 1069 only provides for provisions when Philippines is the *requested state*.[348] Thus, it lacks provisions, both procedural and substantive conditions, when Philippines is the *requesting state*.

Third, P.D. No. 1069 only provides for the possibility of extradition when there is a treaty or convention.[349] It does not explicitly provide for a legal basis of extradition when there is no applicable treaty or agreement in force. As previously discussed, since the extradition law of a country can be a basis for extradition, a provision such as "In the absence of an extradition treaty or agreement, extradition may be governed by the provisions of the present law"[350] should be included in the extradition law.

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346. *See* Philippine Extradition Law, § 2 (c).

347. *Id.* at 386 (citing Defensor-Santiago, *Procedural Aspects of the Political ffence Doctrine*, 51 PHIL. L.J. 238, 258 (1976)).

348. This problem was actually pointed out by Atty. Clifford Macalalad of the Law Division of the Department of Foreign Affairs (DFA) who handles extradition during the author's interview with him last May 26, 2009 at the DFA Office in Roxas Boulevard, Pasay City.

349. *See* Philippine Extradition Law, § 3.

350. *See* U.N. Model Treaty on Extradition, Part 1, § 2.

Fourth, P.D. No. 1069 is purely procedural, and thus, it does not provide for the substantive conditions for extradition such as exhaustive provisions on the double criminality requirement.

Fifth, P.D. No. 1069 does not provide for the grounds for which an extradition request shall or may be refused.[351] By explicitly providing for an enumeration of the grounds for refusal of an extradition request, the national extradition law can serve as a guide for future extradition treaties that Philippines will enter into with other countries and will ensure at the same time the proper implementation of the extradition treaties. Moreover, the fundamental human rights of the person sought will be assured, since enumerating the grounds for refusal of an extradition request in the extradition law, which will most likely be reiterated in the extradition treaty, will prevent any loopholes enabling the requested state to violate the human rights of an offender.

Sixth, P.D. No. 1069 does not provide for any provision with regard to prosecution in case of non-extradition. This is important because as discussed, the principle of *aut dedere aut judicare* is an important tool in ensuring that perpetrators of crimes especially heinous crimes are to be brought to justice. Thus, the integration of the principle in the national extradition law is significant because it shows that the Philippines recognizes and binds itself to bring perpetrators of crimes to justice.

Last but not least, P.D. No. 1069 does not provide for any substantive provision with regard to the protection of the fundamental rights of the person sought. Although P.D. No. 1069 includes a statement that: "under the Constitution the Philippines adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation[,] and amity with all nations,"[352] it is the submission of the author that human rights obligations, particularly those based on international conventions and international human rights treaties to which the Philippines has chosen to be bound,[353] must be explicitly incorporated in the the country's national law, particularly with its extradition law, so that the government will be legally bound to obey such international obligations through their domestic laws.[354]

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351. Grounds for refusal of an extradition request include: (1) Offences of a political nature; (2) Discrimination clause; (3) Torture, cruel, inhuman or degrading treatment or punishment; (4) Fair trial standards; and (5) Nationality clause. See U.N. Model Treaty on Extradition, Part 2, Chapter 2, §§ 4-13.

352. *See* Philippine Extradition Law, 1st WHEREAS Clause.

353. Examples of such international conventions or treaties are the 1951 Refugee Convention, U.N. Charter, and the ICCPR.

354. Koufa, *supra* note 76, at 64-65 (citing Advisory Council of Jurists, Reference on the rule of law in combating terrorism, Draft Preliminary Report submitted by

Taking into consideration the current trends in international law with regard to extradition as an important modality in the suppression of terrorism as well as the U.N. Model Treaty on Extradition and the extradition laws of selected countries, the author seeks to recommend the Revised Philippine Extradition Law as presented below. It is notable that none of the procedural provisions from P.D. No. 1069 have been removed, since the author's focus in this Note is more on the substantive conditions which are lacking in P.D. No. 1069. Such procedural provisions are incorporated into the author's proposed revised extradition law, although such provisions may be worded in a different manner.

APPENDIX A

AN ACT REVISING THE PHILIPPINE EXTRADITION LAW AND PRESCRIBING THE PROCEDURE FOR THE IMPLEMENTATION OF EXTRADITION TREATIES BETWEEN THE PHILIPPINE GOVERNMENT AND A FOREIGN COUNTRY, AND APPROPRIATING FUNDS THEREOF

Be it enacted by the Senate and the House of Representatives of the Philippines in Congress assembled:

PART 1: GENERAL PROVISIONS

Section 1. *Title.* — This law shall be known as the "Revised Philippine Extradition Law."

Section 2. *Purpose.* — This law is enacted for the purpose of ensuring normal extradition, guiding the executive department and the courts in the proper implementation of the extradition treaties to which the Philippines is a signatory, strengthening international cooperation in punishing crimes, protecting the lawful rights and interests of individuals and organizations, safeguarding national interests, and maintaining public order.

Section 3. *Definition of Terms.* — For the purposes of this Act, the following definitions shall apply:

(1) "Extradition" — the surrender of any person who is sought by the requesting state for criminal prosecution for an extraditable offense or for the imposition or enforcement of a sentence in respect of such an offense.

Justice Glazerbrook, Asia Pacific Forum of National Human Rights Institutions 46 (2003)).

(2) "Requesting State" — a State which requests the extradition of a person or the provisional arrest of a person with a view to extradition.

(3) "Extradition treaty or Convention" — an extradition agreement between the Republic of the Philippines and one or more foreign states or governments.

(4) "Person sought" — a person whose extradition or provisional arrest with a view to extradition is requested by means of submitting a relevant request to the competent authorities ofthe Philippines.

(5) "Foreign Diplomat" — any authorized diplomatic representative of the requesting state or government and recognized as such by the Secretary of Foreign Affairs of the requested state.

(6) "Secretary of Foreign Affairs" — the head of the Department of Foreign Affairs of the Republic of the Philippines, or in his absence, any official acting on his behalf or temporarily occupying and discharging the duties of that position.

(7) "Secretary of Justice" — the head of the Department of Justice of the Republic of the Philippines.

(8) "Transferee" — person transferred through the territory of the Philippines while being extradited from a third State (transferring State) to the receiving one.

Section 4. *Legal Bases of Extradition.*

(1) A person may be extradited in accordance with the present law or a relevant extradition treaty or agreement on the request of a requesting state for the purpose of prosecution or imposition or enforcement of a sentence in respect of an extraditable offense, as such offense is defined under Section 5 (1) (a), and if applicable Section 5 (2), of the present law or under the terms of the extradition treaty or agreement.

(2) Extradition pursuant to a treaty shall be governed by extradition treaties or agreements in force between the requested state and the requesting state. Notwithstanding the foregoing, the procedures applicable to extradition and transit proceedings taking place in the Philippines, as set forth in Sections 17-39 of the present law, shall apply to all requests for extradition, unless otherwise expressly provided for in the applicable treaty or agreement in force. In the absence of an extradition treaty or agreement, extradition may be governed by the provisions of the present law.

(3) Extradition may be granted by virtue of comity or where, on the basis of assurances given by the competent authorities of the requesting state, it can be anticipated that this State would comply with a comparable request by the Philippines, or where it is otherwise deemed in the interests of justice to do so.

PART 2: EXTRADITION FROM THE PHILIPPINES

CHAPTER 1: Substantive Conditions for Extradition

Section 5. *Extraditable Offenses.* — Double criminality requirement.

(1) Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, extradition shall be granted to the requesting state, if:

(a) the offense for which it is requested is punishable under the law of the requesting State by imprisonment or other deprivation of liberty for a minimum period of at least one year or more, or by a more severe penalty; and

(b) the conduct that constitutes the offense would, if committed in the Philippines, constitutes an offense, which, however described, is punishable under the law of the Philippines by imprisonment or other deprivation of liberty for a minimum period of at least one year or more, or by a more severe penalty.

(2) Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, the extradition of a person who has been sentenced to imprisonment or other deprivation of liberty imposed for such an offense, as defined in Subsection (1), shall not be granted unless a period of at least six months of such sentence remains to be served or a more severe punishment remains to be carried out.

(3) In determining whether an offense is an offense punishable under the laws of the Philippines and the requesting state, it shall not matter whether:

(a) the laws of both the Philippines and the requesting state place the acts or omissions constituting the offense within the same category of offenses or denominate the offense by the same terminology or define or characterize it in the same way;

(b) the constituent elements of the offense may be different under the laws of both the Philippines and the requesting state, it being understood that the totality of the acts or omissions as presented by the requesting state shall be taken into account.

(4) Acts that infringe the law of the requesting state relating to taxes, duties, customs and exchange may be extraditable offenses in accordance with Subsection (1), if they correspond to offenses of the same nature under the law of the Philippines. Extradition may not be refused on the ground that the law of the Philippines does not impose the same kind of tax or duty or does not contain a tax,

duty, customs or exchange regulation of the same kind as the law of the requesting state.

(5) If the request for extradition includes several offenses each of which is punishable under the laws of both the requesting state and the Philippines, but some of which are not extraditable in accordance with Subsections (1) (a) and (2) as to the penalty requirement, extradition may be granted for the latter offenses provided that the person sought is to be extradited for at least one extraditable offense.

CHAPTER 2: Grounds for Refusal of an Extradition Request

Section 6. *Offenses of Political Nature.*

(1) Extradition shall not be granted, if the offense for which it is requested is an offense of a political nature.

(2) Where extradition is impeded on the ground provided in Subsection (1), the competent authorities of the Philippines and the requesting state shall, as appropriate, consult with a view to facilitating the resolution of the matter.

(3) Subsection (1) shall not apply to offenses in respect of which the Philippines has assumed an obligation, pursuant to any multilateral convention or bilateral treaty or arrangement, either not to consider them as offenses of a political nature for the purpose of extradition or to take prosecutorial action in lieu of extradition.

(4) The following conduct also does not constitute an offense of political nature for the purpose of extradition:

(a) murder or manslaughter;

(b) inflicting serious bodily harm;

(c) kidnapping, abduction, hostage-taking or extortion;

(d) using explosives, incendiaries, devices or substances in circumstances in which human life is likely to be endangered or serious bodily harm or substantial property damage is likely to be caused; and

(e) an attempt or conspiracy to engage in, councelling, aiding or abetting another person to engage in, or being an accessory after the fact in relation to, the conduct referred to in any of the Subsections (4) (a) to (4) (d).

Section 7. *Discrimination Clause.* — Extradition shall not be granted, if, in the view of the Secretary of Foreign Affairs of the Philippines, there are substantial grounds to believe that the request for extradition has been made for the purpose of prosecuting or punishing the person sought on account of his race, religion, nationality, membership of a particular social group or political opinion, or his position may be prejudiced for any of those reasons.

Section 8. *Torture, Cruel, Inhuman or Degrading Treatment or Punishment.* — Extradition shall not be granted, if, in the view of the Secretary of Foreign Affairs of the Philippines, the person sought would be subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment.

Section 9. *Fair Trial Standards.*

(1) Extradition may be refused, if, in the view of the Secretary of Foreign Affairs of the Philippines, the person sought would not receive the minimum fair trial guarantees in criminal proceedings in the requesting state.

(2) Extradition requested for the imposition or enforcement of a sentence may be refused, if the judgement has been rendered in absentia in the requesting state, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his defense, and he has not had or will not have the opportunity to have the case retried in his presence, unless the competent authorities of the requesting state give assurances considered sufficient to guarantee to that person the right to a re-trial which safeguards his rights of defense, or unless the person has been duly notified and has had the opportunity to appear and arrange for his defense and has elected not to do so.

(3) Extradition may be refused, if the person sought would be liable to be tried or sentenced in the requesting State by an extraordinary or ad hoc court or tribunal, unless the competent authorities of the requesting state give assurances considered sufficient that the judgement will be passed by a court which is generally empowered under the rules of judicial administration to pronounce on criminal matters.

Section 10. *Ne bis in idem (Principle of Double Jeopardy).* — Extradition shall be refused, if there has been a final judgement rendered and enforced against the person sought in the Philippines in respect of the offense for which extradition is requested.

Section 11. *Statute of Limitation.* — Extradition shall be refused, if prosecution or punishment against the person sought is barred, under the law of the Philippines or the requesting state, by lapse of time, prescription or statute of limitation at the time of receipt of the request for extradition.

However, no statutory limitation applies to war crimes, crimes against humanity, as well as to crimes of genocide and apartheid as provided for by the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

Section 12. *Military Offenses.* — Extradition shall not be granted, if the offense for which it is requested is an offense under military law, which is not also an offense under ordinary criminal law in the requesting state.

Section 13. *Nationality.* — Extradition shall not be refused on the ground that the person sought is a national of the Philippines.

Section 14. *Death Penalty.* — If the offense for which extradition is requested carries the death penalty under the law of the requesting state and is not so punishable under the law of the Philippines, extradition shall not be granted, unless the competent authorities of the requesting state give assurances considered sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.

Section 15. *Extraterritoriality.* — Extradition may be refused, if the offense for which it is requested has been committed outside the territory of the requesting state and the law of the Philippines does not allow prosecution for the same offense when committed outside its territory.

Section 16. *Prosecution in Case of Non-Extradition.*

(1) An act or omission committed outside the territory of the Philippines shall be deemed to have been committed in the Philippines, and the Secretary of Foreign Affairs of the Philippines shall submit the relevant case without undue delay to the Secretary of Justice of the Philippines for the purpose of prosecution of the person committing the act or omission, if:

   (a) that person is after the commission of the act or omission present in the territory of the Philippines; and

   (b) a request for the extradition of that person has been refused on one of the grounds provided in Sections 6, 13, or 14 of the present law, as well as in Section 7 of this law, where the position of the person sought may be prejudiced after his extradition on account of his race, religion, nationality, ethnic origin, political opinions, gender, or status; and

   (c) the State that requested extradition has subsequently sought the prosecution of the person in the Philippines in respect of the offense for which extradition was requested; and

   (d) the conduct that constitutes the offense would, if committed in the Philippines, constitute an offense, which, however described, is punishable under the law of the Philippines, and, under these circumstances, the person sought would be liable to sanction if he had committed the offense in the Philippines.

(2) For the purpose of Subsection (1), the fact that extradition has been refused and that the foreign state has requested prosecution of the person sought in the Philippines may be proved by a certificate to that effect issued by the Secretary of Foreign Affairs of the Philippines.

(3) Subsection (1) shall not apply, if prosecution or punishment against the person sought is barred under the law of the Philippines by lapse of time, prescription or statute of limitation at the time of receipt of the request for assumption of prosecution.

CHAPTER 3: Documentary Requirements for Extradition Proceedings

Section 17. *Incoming Extradition Requests and Required Supporting Documents.* — Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, extradition shall only be granted on the basis of a written request submitted by the Foreign Diplomat of the requesting state to the Secretary of Foreign Affairs of the Philippines and accompanied by the following supporting documents and information:

(1) In all cases:

(a) as accurate a description as possible of the person sought, together with any other information that may help to establish that person's identity, nationality and location; and

(b) the text of the relevant provision of the law creating the offense and prescribing the scale of penalties for this offense, or, where the offense is not created by statute, a description of the elements of the offense and its origin, and a statement of the penalty that can be imposed for this offense; and

(c) the text of the relevant provision(s) of the law establishing jurisdiction of the requesting State in respect of the offense.

(2) If the person sought is accused of an offense, by:

(a) the original or certified copy of a warrant issued by a competent judicial authority for the arrest of that person, a statement of the offense for which extradition is requested and a description of the acts or omissions constituting the alleged offense, including an indication of the time and place of its commission, as well as of the degree of participation in this offense by the person sought; and

(b) evidence admissible under the present law, considered sufficient to establish a prima facie case that the person sought had committed the offense for which extradition is requested.

(3) If the person sought has been convicted of an offense, by a statement of the offense for which extradition is requested, a description of the acts or omissions constituting the offense, the original or certified copy of the judgement or any other document setting out the conviction and the sentence imposed, the fact that the sentence is enforceable and the extent to which the sentence remains to be served.

(4) If the person sought has been convicted of an offense in his absence, in addition to the documents set out in Subsection (c), by a statement indicating that he has been summoned in person or otherwise informed of the date and place of the hearing which led to the decision, or specifying the legal means available to him to prepare his defence or to have the case retried in his presence.

(5) If the person sought has been convicted of an offense but no sentence has been imposed, by a statement of the offense for

which extradition is requested, a description of the facts or omissions constituting the offense, a document setting out the conviction and a statement affirming that there is an intention to impose a sentence.

Section 18. *Concurrent Requests for Extradition.* — When two or more States request the extradition of the person sought either for the same offense or for different offenses, the Secretary of Foreign Affairs, after consultation with the Secretary of Justice of the Philippines, shall determine which, if any, extradition request to authorize under Section 19 (3) of the present law. Copies of the former's decision thereon shall promptly be forwarded to the attorney having charge of the case, if there be one, through the Department of Justice. For this purpose, the Secretary of Foreign Affairs of the Philippines shall take into account existing treaty obligations and, where appropriate, all the relevant circumstances, such as: time and place of the offense; time sequence of receipt of the requests; nationality of the person sought and the victims; ordinary place of residence of the person sought and the victims; possibility of re-extradition of the person sought; whether extradition is requested for the purposes of prosecution or imposition or enforcement of a sentence; whether, in the judgement of the Secretary of Foreign Affairs of the Philippines, the interests of justice are best met; and, if the requests relate to different offenses, the seriousness of the offenses.

Section 19. *Preliminary Verification of Extradition Request.* — Additional information.

(1) After receiving an extradition request and its supporting documents, the Secretary of Foreign Affairs of the Philippines shall examine whether the documentary requirements and substantive provisions set out in the applicable extradition treaty or agreement, or, in the absence of such treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, the documentary requirements set out in Section 17 and the substantive conditions set out in Section 5 (1) (a), and if applicable Section 5 (2), as well as in Section 5 (1) (b) of the present law, are met.

(2) Where the Secretary of Foreign Affairs of the Philippines, acting in accordance with Subsection (1), considers that the information provided by the competent authorities of the requesting State in support of a request for extradition does not suffice for rendering a decision on the granting of extradition, it may request that additional information be furnished within the period set forth in the applicable extradition treaty or agreement, or otherwise as soon as practicable within a period of 30 days.

(3) Where the requirements referred to in Subsection (1) are met, the Secretary of Foreign Affairs of the Philippines shall forward the extradition request together with the related documents to the Secretary of Justice of the Philippines, who shall immediately designate and authorize an attorney in his office to take charge of these case.

(4) The attorney so designated shall file a written petition with the proper Regional Trial Court of the province or city having jurisdiction of the place, with a prayer that the court take the request under consideration. All related documents shall be attached to the petition. The filing of the petition and the service of the summons to the person sought shall be free from the payment of docket and sheriff's fees.

(5) Immediately upon receipt of the petition, the presiding judge of the Court shall, as soon as practicable, summon the person sought to appear and to answer the petition on the day and hour fixed in the order. Upon receipt of the answer, or should the person sought after having received the summons fail to answer within the time fixed, the presiding judge shall hear the case or set another date for the hearing thereof.

Section 20. *Provisional Arrest.*

(1) In case of urgency, the Secretary of Foreign Affairs of the Philippines, after receiving a request by a foreign state for the provisional arrest of a person sought by virtue of a multilateral or bilateral treaty or agreement, may authorize the Director of the National Bureau of Investigation of Manila, to apply to the Regional Trial Court of the province or city having jurisdiction of the place, for the provisional arrest of that person pending the presentation of the extradition request, if satisfied that the criteria of the applicable extradition treaty or agreement are met, or, in the absence of such treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of Philippines, if satisfied that there are reasonable grounds to believe that:

(a) the person sought is ordinarily resident of the Philippines, or is in or on his way or routinely travels to the Philippines; and

(b) the request for provisional arrest relates to an offense which meets the requirements set out in Section 5 (1) (a), and if applicable Section 5 (2) of the present law, and to conduct that meets the requirements set out in Section 5 (1) (b) of the present law; and

(c) the foreign state shall submit a request for the extradition of that person within 20 days.

(2) The Regional Trial Court of the Philippines may, on ex parte application of the Director of the National Bureau of Investigation, Manila, order the provisional arrest of the person sought, if satisfied that the criteria of the applicable extradition treaty or agreement are met, or, in the absence of such treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, if satisfied that there are reasonable grounds to believe that:

(a) a warrant for that person's arrest or an order of a similar nature has been issued or the person has been convicted in the foreign state; and

(b) it is necessary in the public interest to arrest that person, including to prevent him from escaping or committing an offense.

(3) The provisional arrest of the person sought shall be ordered in accordance with Subsection (2) by means of a provisional arrest warrant issued by the Regional Trial Court of the province or city in the Philippines having jurisdiction of the place. The warrant shall order that the person be arrested and brought without undue delay before the Regional Trial Court of the province or city having jurisdiction of the place. It shall also include the name of the issuing authority, the date of its issuance, as well as information on the person sought (name and description), the foreign State that requested the provisional arrest and the offense in respect of which provisional arrest is requested. The Director of the National Bureau of Investigation through the Secretary of Foreign Affairs shall inform the requesting state of the result of its request.

(4) A person who has been provisionally arrested in accordance with Subsections (2) and (3) shall be discharged if:

(a) the provisional arrest was requested under an extradition treaty or agreement that provides for a period after the date of provisional arrest within which an extradition request and its supporting documents should be submitted, and:

i. the requesting state has not made a formal extradition request within that period; or

ii. the requesting state has made a formal extradition request within that period, but the Secretary of Foreign Affairs of the Philippines, acting in accordance with Subsection (1), has not authorized the proceedings within 10 days after the expiry of that period.

(b) the provisional arrest was not requested under an extradition treaty or agreement or was requested under an extradition treaty or agreement that does not provide for a period within which an extradition request and its supporting documents should be submitted, and:

i. the requesting state has not made a formal extradition request within 20 days after the date of provisional arrest; or

ii. the requesting state has made a formal extradition request within 20 days, but the Secretary of Foreign Affairs of the Philippines, acting in

accordance with Subsection (1), has not authorized the proceedings before the expiry of 10 additional days.

(5) The discharge of the person shall not prevent his re-arrest and the initiation of proceedings with a view to his extradition if the extradition request and its supporting documents are subsequently submitted by the competent authorities of the requesting State.

Section 21. *Extradition Arrest Warrant.*

(1) Where the Secretary of Foreign Affairs of the Philippines has authorized the proceedings under the applicable extradition treaty or agreement, or Section 19 (3) of the present law and unless the person sought has already been arrested under the applicable extradition treaty or agreement, or Section 20 of the present law, the Secretary of Foreign Affairs of the Philippines shall authorize the Secretary of Justice of the Philippines to apply to the Regional Trial Court of the province or city in the Philippines having jurisdiction of the place to issue an extradition arrest warrant against that person.

(2) The Regional Trial Court of the province or city having jurisdiction of the place shall, on ex parte application of the Secretary of Justice of the Philippines, issue an extradition arrest warrant against the person sought, which may be served any where within the Philippines if it appears to the presiding judge that the immediate arrest and temporary detention of the person sought will best serve the ends of justice, and if satisfied that the criteria of the applicable extradition treaty or agreement are met, or, in the absence of such treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, if satisfied that there are reasonable grounds to believe that:

(a) a warrant of that person's arrest or an order of a similar nature has been issued or the person has been convicted in the requesting state in respect of the offense for which extradition is requested; and

(b) the information available would justify the issuance of a domestic arrest warrant if the person were accused of the offense in the Philippines or were unlawfully at large after conviction in the Philippines.

(3) Section 20 (3) of the present law shall apply accordingly.

Section 22. *Proceedings After the Arrest of the Person Sought.* — A person arrested under the applicable extradition treaty or agreement, or under Section 20 or 21 of the present law shall be brought without undue delay before the Regional Trial Court of the province or city having jurisdiction of the place, which:

(1) shall order the detention of that person in custody; and

(2) shall set the date for the extradition hearing and remand the person sought accordingly.

Section 23. *Extradition Hearing.*

(1) The Regional Trial Court to which the petition referred to in Section 19 (4) was filed shall have and continue to have the exclusive power to hear and decide the extradition case.

(2) The hearing shall be public unless the person sought requests, with leave of court, that it be conducted in chamber.

(3) The attorney having charge of the case may upon request represent the requesting state or government throughout the proceeding. The requesting state or government may, however, retain private counsel to represent it for particular extradition case.

(4) Should the person sought fail to appear on the date set for hearing, or if he is not under detention, the Court shall forthwith issue a warrant for his arrest, as mentioned in Section 21, which may be served upon the person sought anywhere in the Philippines.

(5) The extradition hearing before the Regional Trial Court of the province or city having jurisdiction of the place shall be conducted in accordance with the provisions of the Rules of Court of the Philippines insofar as practicable and not inconsistent with the summary nature of the proceedings, and the hearing shall be conducted in such a manner as to arrive as a fair and speedy disposition of the case.

(6) The Regional Trial Court of the province or city having jurisdiction of the place shall examine the person sought with regard to his personal circumstances and shall ask him whether, and if so on what grounds, he agrees with his extradition. It shall also explain to him the conditions of extradition and make reference to his right to apply for judicial review, to retain a counsel or to have a court-appointed counsel. If on the date set for the hearing the person sought does not have a legal counsel, the presiding judge shall appoint any law practitioner residing within his territorial jurisdiction as counsel de oficio for the person sought to assist him in the hearing.

(7) Sworn statements offered in evidence at the hearing of any extradition case shall be received and admitted as evidence if properly and legally authenticated by the principal diplomatic or consular officer of the Republic of the Philippines residing in the requesting State. Evidence that would be otherwise be admissible under the law of the Philippines shall be admitted as evidence at the extradition hearing. The following shall also be admitted as evidence at the extradition hearing, even if it would not otherwise be admissible under the law of the Philippines:

(a) the contents of the documents submitted in accordance with Section 17 of the present law or in conformity with the terms of an extradition treaty or agreement;

(b) evidence adduced by the person sought that is relevant to the test set out in Section 24 (1) (c) of the present law, if the Regional Trial Court of the province or city having jurisdiction of the place of the Philippines considers it reliable.

Section 24. *Decision on Eligibility for Extradition.*

(1) The Regional Trial Court of the province or city having jurisdiction of the place shall decide that the person sought is eligible for extradition, if satisfied that the criteria of the applicable extradition treaty or agreement have been fulfilled, or, in the absence of such treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, if satisfied that:

(a) the conduct constituting the offense(s) for which extradition is requested meets the requirements set out in Section 5 (1) (b) of the present law; and

(b) the person brought before the Regional Trial Court of the province or city having jurisdiction of the place is the person sought for extradition.

(c) in case extradition is requested for the purpose of prosecution in the requesting state, there is evidence admissible under the present law, considered sufficient to establish a prima facie case that the person sought had committed the offense for which extradition is requested.

(2) Notwithstanding Subsection (1), the Regional Trial Court of the province or city having jurisdiction of the place shall not find the person sought eligible for extradition, if mandatory grounds for refusal set forth in the applicable extradition treaty or agreement have been established, or, in the absence of such a treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, if satisfied that there are substantial grounds to believe that any of the grounds for refusal set out in Sections 6-14 of the present law is applicable.

(3) If the Regional Trial Court of the province or city having jurisdiction of the place rules that the person sought is eligible for extradition to the requesting state, it shall give his reasons therefor upon showing of the existence of a prima facie case, and shall:

(a) remand that person in custody until the Regional Trial Court of the province or city having jurisdiction of the place renders a decision under Section 26 of the present law, and if extradition is ordered, until the surrender of the person to the requesting State;

(b) advise the person sought of his right to lodge an appeal against its decision on his eligibility for extradition in accordance with applicable law.

(4) If the Regional Trial Court of the province or city having jurisdiction of the place rules that the person sought is not eligible for extradition to the requesting State, it shall order the discharge of that person, unless Section 16 of the present law applies.

(5) The decision of the Court shall be promptly served on the person sought if he was not present at the reading thereof, and the clerk of the court shall immediately forward two copies thereof to the Secretary of Foreign Affairs through the Department of Justice of the Philippines.

Section 25. *Appeal.*

(1) Within a period of 10 days after the decision of the Regional Trial Court granting extradition has been rendered under Section 24 of the present law, an appeal may be lodged before the Court of Appeals of the Philippines by:

(a) the person sought, if the competent Regional Trial Court has found him eligible for extradition; or

(b) the public attorney or private counsel having charge of the case, acting on behalf of the requesting state, if the competent Regional Trial Court has found the person sought not eligible for extradition.

(2) The appeal shall stay the execution of the decision of the Regional Trial Court.

(3) The provisions of the Rules of Court governing appeal in criminal cases in the Court of Appeals shall apply in appeal in extradition cases, except that the parties may file typewritten or mimeograph copies of their brief within 15 days from receipt of notice to file such briefs.

(4) The decision of the Court of Appeals with regard to extradition cases shall be final and immediately executory.

(5) Where the Court of Appeals of the Philippines renders a final decision that the person sought is eligible for extradition, it shall transmit to the person sought and the Secretary of Foreign Affairs, through the Department of Justice of the Philippines a copy of the order and any reasoning for the decision.

(6) Where the Court of Appeals of the Philippines renders a final decision that the person sought is not eligible for extradition, it shall promptly serve the person sought and the Secretary of Foreign Affairs, through the Department of Justice of the Philippines, copies of its decision, and it shall order the discharge of that person, unless Section 16 of the present law applies.

Section 26. *Executive Discretion.*

(1) Where the competent Court of the Philippines has rendered a final decision ruling that the person sought is eligible for extradition, the Secretary of Foreign Affairs of the Philippines may order his surrender to the requesting state.

(2) Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, the Secretary of Foreign Affairs of the Philippines may seek from the competent authorities of the requesting state the assurances referred to in Sections 9 (2), 9 (3) and 14 of the present law or may subject the surrender of the person sought to the condition set forth in Section 33 (1) of the present law.

(3) If the Secretary of Foreign Affairs of the Philippines subjects the surrender of the person sought to assurances or conditions under Subsection (2), the order of surrender shall not be executed until the Secretary of Foreign Affairs of the Philippines is satisfied that the assurances are given or the conditions agreed to by the competent authorities of the requesting state.

(4) Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, the Secretary of Foreign Affairs of the Philippines may refuse to order the surrender of the person sought to the requesting state, if satisfied that there are substantial grounds to believe that:

(a) a prosecution against that person in respect of an offense for which extradition is requested is pending in the Philippines; or

(b) the offense for which extradition is requested is regarded under the law of the Philippines as having been committed in whole or in part within the territory of the Philippines; or

(c) the extradition of that person would be incompatible with humanitarian considerations in view of his age or health.

(5) Further to Subsection (4) and without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, the Secretary of Foreign Affairs of the Philippines may refuse to order the surrender of the person sought to the requesting state, if satisfied that that there are substantial grounds to believe that any of the grounds for refusal set out in Sections 6-14 of the present law is applicable.

(6) If the Secretary of Foreign Affairs of the Philippines refuses to order the surrender of the person sought to the requesting state, that person shall be discharged, unless Section 16 of the present law applies.

Section 27. *Surrender of the Person Sought.*

(1) After the decision of the Court in an extradition case has become final and executory, the person sought shall be placed at the disposal of the authorities of the requesting state or government, at a time and place to be determined by the Secretary of Foreign Affairs, after consultation with the foreign diplomat of the requesting state.

(2) The surrender of the person sought shall be ordered by means of a surrender warrant or other final order of extradition issued by the competent Court of the Philippines.

(3) If the person sought is not surrendered to the requesting state within the date provided for in the applicable extradition treaty or agreement, or, in the absence of such a treaty or agreement or specific date provided for therein, or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, within 20 days after the date the surrender warrant or other final order of extradition was issued in accordance with Subsection (2), or entered into force in case of postponement of surrender, the Secretary of Foreign Affairs of the Philippines may seek to obtain a judicial order for the discharge of that person.

Section 28. *Postponement of Surrender.*

(1) Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, the Secretary of Foreign Affairs of the Philippines may postpone the surrender of the person sought to the requesting state, if:

(a) a proceeding is pending in the Philippines against that person or he is to serve a sentence in the Philippines for an offense other than that for which extradition is requested; or

(b) the surrender of that person would have been dangerous to his life or extremely prejudicial to his health or there is any other very serious humanitarian reason for delay in surrendering him to the requesting State.

(2) In case of postponement of surrender in accordance with Subsection (1) (a), the surrender warrant or other final order of extradition issued in accordance with Section 27 (2) of the present law shall not take effect until the person sought has been discharged, whether by acquittal, by expiry of the sentence or otherwise. If postponement has been decided in accordance with

Subsection (1) (b), the surrender of the person sought shall take place as soon as these humanitarian reasons have ceased to exist.

Section 29. *Temporary Surrender.*

(1) In case the person sought is serving a sentence in the Philippines for an offense other than that for which extradition is requested, the Secretary of Foreign Affairs of the Philippines may, instead of postponing his surrender in accordance with Section 28 of the present law, order his temporary surrender to the requesting state, if:

(a) the surrender is requested for an offense of which the person sought is accused but has not been convicted; and

(b) the competent authorities of the requesting state have given assurances considered sufficient that the person sought shall remain in custody while temporarily surrendered and shall be returned to the Phlippines within 20 days after the completion of the trial or, in case of appeal, after the completion of proceedings for which the presence of that person in the requesting State is required.

(2) If extradition of the person sought is requested for the purpose of prosecution for an offense committed outside the territory of the Philippines, and denied on the ground provided in Section 13 of the present law, the Secretary of Foreign Affairs of the Philippines may permit the temporary surrender of that person to the requesting state, if the competent authorities of the latter give assurances considered sufficient that he shall be returned after his trial to the Philippines in order to serve his sentence there.

(3) Any assurance referred to in Subsections (1) (b) and (2) that is included in a relevant extradition treaty or agreement need not be repeated as a specific assurance.

(4) The temporary surrender of the person sought under Subsections (1) and (2) shall be ordered by means of a temporary surrender warrant or other equal order of temporary surrender issued by the competent Court of the Philippines. Section 27 (2) of the present law shall apply accordingly.

(5) A surrender warrant or other equal order of temporary surrender issued under Subsection (4) shall prevail over a prior warrant or other order under which the person to whom it applies is otherwise detained in the Philippines.

(6) A person sought shall be surrendered to the requesting state without a further request for extradition after that person:

(a) has been temporarily surrendered; and

(b) has been convicted by the competent Court of the Philippines and had a term of imprisonment imposed on him; and

(c) has been returned to the Philippines; and

(d) has finished serving the period of sentence imposed in the Philippines at the time of the temporary surrender, unless the Secretary of Foreign Affairs of the Philippines orders his earlier surrender.

(7) When the sentence that the person sought is serving in the Philippines expires within the period during which that person is temporarily surrendered to the requesting state, his surrender shall be considered to be a final one.

Section 30. *Search and Seizure.*

(1) Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, the competent Court of the Philippines may, after the person sought has been arrested in accordance with Section 20 or Section 21 of the present law and upon request of the requesting state, order that the premises in which that person was found be searched and all articles found in his possession at the time of arrest or discovered at any subsequent time be seized or otherwise secured in the Philippines, if satisfied that there are reasonable grounds to believe that this article:

(a) has been acquired as a result of the offense for which the provisional arrest with a view to extradition of that person was requested or the relevant extradition request was presented; or

(b) may be required as evidence in proving such an offense.

(2) Such articles seized from the person sought shall be delivered to the foreign diplomat of the requesting state who shall issue the corresponding receipt therefor.

Section 31. *Surrender of Property.*

(1) Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, the Secretary of Foreign Affairs of the Philippines may, upon request of the requesting state, direct that any property seized or otherwise secured in accordance with Section 29 of the present law be surrendered to the requesting state. The property may be surrendered to the requesting state notwithstanding that the surrender of the person sought cannot be carried out.

(2) Where national legislation of the Philippines and the rights of bona fide third parties so require, the Secretary of Foreign Affairs of the Philippines shall not order the surrender of the property referred to in Subsection (1), unless the competent authorities of

the requesting state have given assurances considered sufficient that this property shall be returned to the Philippines free of charge as soon as the criminal proceedings in this State have been terminated.

PART 3: EXTRADITION TO THE PHILIPPINES

Section 32. *Competence to Transmit Extradition or Other Related Requests.* — The Secretary of Foreign Affairs of the Philippines may make a request to a foreign state for the extradition of a person for the purpose of criminal prosecution or imposition or enforcement of a sentence in respect of an offense over which the Philippines has jurisdiction. The same authority may also make a request to a foreign state for the provisional arrest of a person pending the presentation of the extradition request, or submit a request for consent after the surrender of a person on the waiver of the rule of speciality in accordance with Section 33 (1) (a) of the present law.

Section 33. *Treatment of Surrendered Persons (Rule of Speciality).*

(1) A person who has been extradited from a foreign state to the Philippines shall not be proceeded against, sentenced, detained, subjected to any other restriction of personal liberty in the territory of the Philippines or re-extradited to a third state for any offense committed prior to his surrender other than that for which he was extradited, unless:

   (a) the foreign diplomat or competent executive authority of the foreign state has expressly given its consent; or

   (b) the extradited person, having had an opportunity to voluntarily leave the territory of the Philippines, has not done so within 30 days of his final discharge in respect of the offense for which he was extradited or if he has voluntarily returned to that territory after leaving it; or

(2) When the description of the offense charged is altered in the course of proceedings in the Philippines, the extradited person may only be proceeded against, sentenced, detained or subjected to any other restriction of personal liberty in so far as the offense is based on the same facts and under its new description is shown to be offense which would allow extradition carrying out the same or lesser penalty as the original offense for which extradition to the Philippines was granted.

Section 34. *Temporary Detention of Surrendered Person Pending a Decision on the Waiver of the Rule of Speciality.*

(1) Where the charge or charges for which the person has been extradited have been dismissed in the Philippines following surrender from a foreign state, and that person has been discharged from custody for such charge or charges, the Secretary of Foreign Affairs of the Philippines may authorize the Secretary of Justice of the Philippines to apply to the competent Regional Trial Court of the Philippines to issue a detention warrant for a period of time

necessary in order to enable the submission of a request to the foreign diplomat or competent executive authority of the foreign state to give its consent on the waiver of the rule of speciality and, if the request is granted, to allow the initiation of proceedings against the person for charges other than those for which he was extradited.

(2) The application for issuing a detention warrant made in accordance with Subsection (1) shall set forth the charge or charges for which waiver of the rule of speciality is sought, an explanation of the evidence in support of such charge or charges, and such other information as may be relevant to the determination of the competent Regional Trial Court of the Philippines that there is just cause to issue the warrant. The competent Regional Trial Court of the Philippines shall consider the totality of the relevant circumstances in determining whether to grant the warrant and the duration thereof.

(3) If the request for consent on the waiver of the rule of speciality is denied, the person shall be discharged. If the consent has not been granted within the period specified in Subsection (1), an application may be made for, and the competent Regional Trial Court of the Philippines may grant extension of the warrant where there is just cause for doing so.

Section 35. *Persons Surrendered Temporarily.*

(1) Where a person was serving a term of imprisonment or has otherwise lawfully been deprived of his liberty in a foreign state and has been temporarily surrendered to the Philippines for the purpose of prosecution or appeal, the competent Regional Trial Court of the Philippines shall, on ex parte application of the Secretary of Justice of the Philippines, and at any time before the temporary surrender, order the detention in custody of that person.

(2) The order referred to in Subsection (1) shall contain a provision that the person shall not be detained in custody after:

(a) a date specified in the order; or

(b) in the case of surrender for a trial, 30 days after the completion of the trial; or

(c) in the case of surrender for an appeal, 20 days after the completion of the proceedings for which the presence of the person is required.

(3) An order made under Subsection (1) shall prevail over an order made by any judicial authority in the Philippines, in respect of anything that occurred before the person is transferred to the Philippines.

(4) Upon completion of the proceedings in the Philippines for which the person was temporarily surrendered or on the expiry of the period set out in the order referred to in Subsection (2), whichever is sooner, the person shall be returned to the competent authorities of the foreign state.

(5) The enforcement of a sentence imposed on the person who has been temporarily surrendered and convicted in the Philippines shall not commence until his final extradition to the Philippines.

PART 4: TRANSIT PROCEEDINGS

Section 36. *Principle.* — Where a person is being extradited from a third state (transferring state) to a foreign state (receiving state) through the territory of the Philippines, the Secretary of Foreign Affairs of the Philippines may permit, upon request of the receiving state, the transit of that person through the territory of the Philippines.

Section 37. *Allowability of Transit.* — Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, transit of a person through the territory of the Philippines shall be allowed under Section 36 of the present law, unless:

(1) the conduct that constitutes the offense in respect of which transit permission is requested would not, if committed in the Philippines, constitute an offense, which, however described, is punishable under the law of the Philippines; and

(2) the essential interests of the Philippines would be prejudiced.

Section 38. *Detention During Transit.*

(1) After transit permission has been granted under Section 36 of the present law, the transferee shall be held in custody in the Philippines for a period not exceeding 24 hours or for a longer period, if so requested by the transferring or receiving state pursuant to Subsection (2). Law enforcement officers of the Philippines may provide such assistance as is reasonable and necessary to facilitate the transporting of the transferee in custody.

(2) Upon application of the transferring or receiving state, the competent Regional Trial Court of the Philippines, on ex parte application of the Secretary of Foreign Affairs of the Philippines, shall issue a warrant authorizing further custody of the transferee for such period as deemed to be necessary to facilitate his transporting to the receiving state. The warrant shall include information on the transferee, the state that extradited him, the receiving state and the reason for the extension of his detention.

(3) The Secretary of Foreign Affairs of the Philippines may authorize the Secretary of Justice of the Philippines to direct any person having custody of the transferee under Subsections (1) and (2) to

discharge him where the conditions of transfer imposed on the transferring or receiving state are not fulfilled.

Section 39. *Unscheduled Landing.*

(1) Section 36 of the present law shall not apply where air transport is used for the transit and no landing in the territory of the Philippines is scheduled. Where, however, an unscheduled landing occurs, the transferee may, upon request of the escorting officer, be held in custody in the territory of the Philippines, in accordance with Section 38 (1) of the present law, for a maximum period of 24 hours pending receipt of the transit request from the receiving state.

(2) Section 38 (3) of the present law shall apply accordingly where the competent authorities of the receiving state do not submit a formal transit request within the period defined in Subsection (1).

PART 5: FINAL PROVISIONS

Section 40. *Costs of Extradition Proceedings.* — Except when the relevant extradition treaty provides otherwise, all costs or expenses incurred in any extradition proceeding and in apprehending, securing and transmitting a person sought shall be paid by the requesting state. The Secretary of Justice of the Philippines shall certify to the Secretary of Foreign Affairs of the Philippines the amounts to be paid by the requesting state on account of expenses and costs, and the Secretary of Foreign Affairs shall cause the amounts to be collected and transmitted to the Secretary of Justice for deposit in the National Treasury of the Philippines.

Section 41. *Regulations.* — The Secretary of Foreign Affairs of the Philippines may promulgate any regulation considered necessary to give effect to the present law. The regulations may provide for modifications, which, without being inconsistent with the provisions of this law, shall be convenient for its implementation in the Philippines.

Section 42. *Entry into Force.* — Retrospectivity.

(1) The present law may be cited as the Revised Philippine Extradition Act. Its entry into force shall take place according to the existing national procedure provided for under the domestic legislation of the Philippines.

(2) Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation of the Philippines, extradition may be granted in respect of an offense or conviction occurred before or after the present law or the relevant extradition treaty or agreement comes into force.

(3) The present law shall apply to extradition requests made after its entry into force. Nevertheless, Section 5 shall apply to requests pending before the competent authorities of the Philippines at the time the present law enters into force.