

# Examining and Resolving Issues in the Implementation of Transfer of Sentenced Persons Agreements in the Philippine Context

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This Note is an abridged version of the Author's J.D. Thesis. Several parts have been omitted to comply with publication requirements. A copy of the complete Thesis is on file with the Professional Schools Library, Ateneo de Manila University.

Cite as 56 ATENEO L.J. 909 (2012).

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## I. INTRODUCTION

The Overseas Filipino Worker (OFW) phenomenon, wherein Filipinos find work in foreign countries with the government's encouragement, has had both positive and negative impacts in the Republic of the Philippines (RP) on various levels. The most touted and evident benefit this migration has brought about is the influx of foreign currency remittances, which have kept the Philippine economy afloat.<sup>1</sup> Unfortunately, working abroad has its perils and consequences. One issue that the government has had to confront the past few decades is that of OFWs being convicted of crimes abroad and being imprisoned therein as a result. In some instances, the punishment is not limited to imprisonment but extends to corporal punishment and the death penalty. There was Flor Contemplacion, a domestic helper who was convicted of murder and executed in Singapore, and Sarah Balabagan, convicted of manslaughter and subjected to the punishment of lashing with 100 strokes of a cane.<sup>2</sup> More recently, Jakatia Pawa, a domestic helper from Zamboanga, was sentenced to death for allegedly killing her ward in Kuwait.<sup>3</sup> As of 2009, an estimated 5,000 Filipinos are behind bars or are facing criminal prosecution overseas.<sup>4</sup>

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1. Saul T. De Vries, *Mobilizing the Use of Remittances Towards Poverty Reduction and Economic and Social Development Through Government Initiatives: The Philippine Experience* (An Unpublished Paper Submitted to the United Nations Conference on Trade and Commerce for the Single-Year Expert Meeting on Maximizing the Development Impact of Remittances) 1, available at [http://www.unctad.org/sections/wcmu/docs/ciem4\\_Country\\_Paper\\_Philippines\\_De\\_Vries\\_en.pdf](http://www.unctad.org/sections/wcmu/docs/ciem4_Country_Paper_Philippines_De_Vries_en.pdf) (last accessed Feb. 24, 2012).
  2. See Flor Contemplacion — A Diplomatic Incident, available at <http://www.capitalpunishmentuk.org/flor.html> (last accessed Feb. 24, 2012); Philippine Maid Gets Symbolic 100 Lashes, available at <http://www.corpun.com/aeju9602.htm> (last accessed Feb. 24, 2012).
  3. Veronica Uy, *VP to Appeal Filipina's Death Sentence*, PHIL. DAILY INQ., Jan. 24, 2012, available at <http://globalnation.inquirer.net/news/breakingnews/view/20100124-249164/VP-to-appeal-Filipinas-death-sentence> (last accessed Feb. 24, 2012).
  4. J. Eduardo Malaya, *Humanitarian Essence of Prisoner Transfer*, PHIL. DAILY INQ., Sep. 27, 2009, available at <http://opinion.inquirer.net/inquireropinion/columns/view/20090927-227107/Humanitarian-essence-of-prisoner-transfer> (last accessed Feb. 24, 2012). See also Senate of the Fourteenth Congress of the

The government's response to these reports, especially in cases where a Filipino has been sentenced to death in a foreign country, has been to use diplomatic channels in efforts to commute the penalty, or to request for executive clemency or royal pardon.<sup>5</sup> Some of these efforts have been fruitful, such as in the case of two women meted the death penalty in Saudi Arabia, who were beneficiaries of royal pardon secured through a series of letters of appeal sent by the President of the Philippines to King Abdullah — they returned to the Philippines in January 2010 after being imprisoned in Kuwait for over eight years.<sup>6</sup> This royal pardon also secured the release of other Filipinos incarcerated for common crimes.<sup>7</sup> Unfortunately, these attempts at diplomacy between heads of state have not always been successful<sup>8</sup> nor are they very efficient, and it would be useful to explore other possibilities for alleviating the situation of Filipinos incarcerated abroad through the use of international instruments. One instrument that has been gaining ground in international relations in this respect is the transfer of sentenced persons agreement (TSPA).

In the '60s and '70s, the United States (U.S.) saw a rise of Americans imprisoned in foreign jurisdictions, with approximately one-third of these cases in Mexico because of the underground drug trade between the two

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Republic of the Philippines, Press Release, Push for prisoner-exchange treaties with other countries — Chiz, *available at* [http://www.senate.gov.ph/press\\_release/2009/0908\\_escudero1.asp](http://www.senate.gov.ph/press_release/2009/0908_escudero1.asp) (last accessed Feb. 24, 2012). The press release cites a report from the Department of Foreign Affairs showing that some 4,770 Filipinos are imprisoned in 63 jails in different countries with the most being in Malaysia (1,600), Japan (734), Qatar (554), United States (406), Abu Dhabi (198), Saudi Arabia (161) and Hong Kong (127). Senate of the Fourteenth Congress of the Republic of the Philippines, *supra* note 4.

5. Department of Foreign Affairs, Press Release, OFW sentenced to death in Saudi Arabia released, thankful to embassy for tireless work, *available at* <http://www.gov.ph/2011/04/18/ofw-sentenced-to-death-in-saudi-arabia-released-thankful-for-embassy%E2%80%99s-relentless-work/> (last accessed Feb. 24, 2012). *See also* Jose Rodel Clapano, *One more appeal to save 3 Pinoys*, PHIL. STAR, Mar. 26, 2011, *available at* <http://www.philstar.com/Article.aspx?articleId=669857&publicationSubCategoryId=> (last accessed Feb. 24, 2012).
6. *See* Cynthia Balana, *2 Filipinas saved from Saudi death row to return on Thursday*, PHIL. DAILY INQ., Jan. 27, 1010, *available at* [http://globalnation.inquirer.net/news/breakingnews/view/20100127-249\\_793/2-Filipinas-saved-from-Saudi-death-row-to-return-Thursday](http://globalnation.inquirer.net/news/breakingnews/view/20100127-249_793/2-Filipinas-saved-from-Saudi-death-row-to-return-Thursday) (last accessed Feb. 24, 2012).
7. *Id.*
8. Andreo C. Calonzo, VP Binay confirms deaths of 3 convicted Pinoys in China, *available at* <http://www.gmanews.tv/story/216491/pinoy-abroad/vp-binay-confirms-death-of-3-pinoy-drug-mules-in-china> (last accessed Feb. 24, 2012).

countries.<sup>9</sup> The Americans under Mexican custody often reported abuse, intolerable living conditions, and extortion by prison officials and fellow prisoners,<sup>10</sup> which prompted the U.S. to enter into a prisoner transfer treaty with Mexico (U.S.-Mexico TSPA).<sup>11</sup> This Treaty permitted Americans to be incarcerated and to serve their sentences in the U.S. instead of in Mexico.

In the same vein, the Philippines has entered into several treaties of this nature to facilitate the transfer of Filipinos jailed abroad to the Philippines. To date, five such treaties exist with the countries of Canada,<sup>12</sup> Cuba,<sup>13</sup> Hong Kong,<sup>14</sup> Thailand,<sup>15</sup> and, most recently, Spain.<sup>16</sup> While the treaties with Spain, Hong Kong, and Thailand have been concurred in by the Senate, those with Canada and Cuba have yet to receive concurrence;<sup>17</sup> only the RP-Spain, RP-HK, and RP-Thailand TSPAs have been implemented with the Department of Justice's (DOJ) issuance of Department Circular No. 90.<sup>18</sup> The RP-Spain TSPA was signed by the parties on 18 May 2007 and concurred in by the Philippine Senate on 19 November 2007; Resolution

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9. Maureen T. Walsh and Bruce Zagaris, *The United-States Mexico Treaty on the Execution of Penal Sanctions: The Case for Reevaluating the Treaty and its Policies in View of the NAFTA and Other Developments*, 2 SW. J.L. & TRADE AMERICAS 385, 388 (1995).

10. *Id.* at 393.

11. See Treaty on the Execution of Penal Sentences, U.S.-Mex., Nov. 25, 1976, 28 U.S.T. 7399 [hereinafter U.S.-Mexico TSPA].

12. Treaty between the Government of the Republic of the Philippines and the Government of Canada on the Transfer of Sentenced Persons and on Cooperation in the Enforcement of Penal Sentences, Phil.-Can., Jan. 29, 2002 [hereinafter RP-Canada TSPA].

13. Agreement Between the Government of the Republic of the Philippines and the Government of the Republic of Cuba on the Transfer of Sentenced Persons, Phil.-Cuba, Nov. 22, 2002 [hereinafter RP-Cuba TSPA].

14. Agreement Between the Government of the Republic of the Philippines and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Transfer of Sentenced Persons, Phil.-H.K., Apr. 28, 2000 [hereinafter RP-HK TSPA].

15. Treaty Between the Republic of the Philippines and the Kingdom of Thailand on the Transfer of Sentenced Persons and on Co-operation in the Enforcement of Penal Sentences, Phil.-Thai., Oct. 12, 2001 [hereinafter RP-Thailand TSPA].

16. Treaty on the Transfer of Sentenced Persons Between the Republic of the Philippines and the Kingdom of Spain, Phil.-Spain, May 18, 2007 [hereinafter RP-Spain TSPA].

17. S. JOURNAL Sess. No. 36, at 710, 114th Cong., 1st Reg. Sess. (Nov. 19, 2007).

18. Department of Justice, Prescribing Rules in the Implementation of the Transfer of Sentenced Persons Agreements, Department Circular No. 90 [DOJ Dept. Circ. No. 90] (Dec. 6, 2010).

No. 39 of the Senate's concurrence in the ratification of the treaty was adopted on 26 November 2007.<sup>19</sup> Because of its nature as a bilateral agreement, not only may Filipinos be transferred from a foreign penal institution to a Philippine one, it is also possible for foreign nationals convicted of crimes committed in the Philippines and serving sentence here to be transferred to their home countries to serve the remainder of their sentence therein. This was where a controversy arose in 2009 regarding the transfer of an individual of Filipino and Spanish heritage from Manila to Madrid.<sup>20</sup>

*A. Contextual Background of the Study*

On 6 October 2009, Francisco "Paco" Larrañaga, who was found guilty beyond reasonable doubt for the special complex crime of kidnapping and serious illegal detention with homicide and rape,<sup>21</sup> left the Philippines for Spain.<sup>22</sup> He had been sentenced to death by lethal injection in 2004 but this was commuted to *reclusion perpetua*<sup>23</sup> when the death penalty was abolished in 2006.<sup>24</sup> Larrañaga had served just a few years of his sentence and yet, he was permitted by the government to leave the country because of the RP-Spain TSPA. The Agreement permits Filipino nationals sentenced in Spain for certain crimes committed therein to serve their sentences in the Philippines and conversely, Spanish nationals convicted for certain crimes in the Philippines are permitted to serve their sentences in Spain, subject to several conditions. Larrañaga, whose mother is Filipino and father is Spanish, is an

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19. Resolution Concurring in the Ratification of the Treaty on the Transfer of Sentenced Persons between the Republic of the Philippines and the Kingdom of Spain, S. Res. No. 39, 14th Cong., 1st Reg. Sess. (2007).

20. See Edu Punay, *DOJ awaits go-signal from Spain for Larrañaga's prison transfer*, PHIL. STAR, Sep. 10, 2009, available at <http://www.philstar.com/article.aspx?articleid=503924&publicationcategoryid=63> (last accessed Feb. 24, 2012).

21. *People v. Larrañaga*, 421 SCRA 530, 585 (2004).

22. See Sandy Araneta, *Convicted rapist Larrañaga leaves for Spain*, PHIL. STAR, Oct. 7, 2009, available at <http://www.philstar.com/Article.aspx?articleid=511899> (last accessed Feb. 24, 2012); Andreo Calonzo, *Rape-slay Convict Larrañaga en route to Spain*, available at <http://www.gmanews.tv/story/173934/rape-slay-convict-larranaga-en-route-to-spain-doj-chief> (last accessed Feb. 24, 2012).

23. See An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, arts. 25 & 27 (1932). *Reclusion perpetua* is 30 years imprisonment. *Id.* art. 27.

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

individual holding both Filipino and Spanish citizenship.<sup>25</sup> This, according to the DOJ, made him eligible for transfer to Spain.<sup>26</sup>

Among the generally recognized purposes or rationales for the implementation of TSPAs are to facilitate the social rehabilitation of the convict for humanitarian considerations and in furtherance of international criminal cooperation among states.<sup>27</sup> This Note embarks on an extensive discussion and analysis of TSPAs and the conditions contained in these agreements to be eligible for transfer. In conjunction with this, this Note evaluates and critiques the first instance of the implementation of such a treaty in the country, particularly the adequacy of the implementing rules and regulations (RP-Spain TSPA IRRs)<sup>28</sup> promulgated by the DOJ in executing the RP-Spain TSPA.

### *B. Legal Issues*

A primary legal issue this Note contends with is the manner of the implementation of TSPAs in the country. Of note is the fact that there is no statutory process in place for the implementation and execution of TSPAs in general, although legislators on more than one occasion had attempted to pass a bill that would provide a uniform procedure for carrying out this type of treaty.<sup>29</sup>

This Note posits that this lack of legislation must be addressed through the promulgation of a law that will implement all TSPAs, both current and future, and that the IRRs to the RP-Spain TSPA, although a step in the right direction, insufficiently provides guidelines for implementing this particular TSPA. Therefore, these IRRs should not be used as a template for the future implementation of TSPAs without modification.

The inadequacies in implementation are best viewed through two lenses: (1) with the Philippines acting as the State receiving and administering the

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25. See Araneta, *supra* note 22.

26. See Punay, *supra* note 20.

27. See generally William V. Dunlap, *Dual Criminality in Penal Transfer Treaties*, 29 VA. J. INT'L L. 813, 820 (1989); Michael Plachta, *Human Rights Aspect of the Prisoner Transfer in a Comparative Perspective*, 53 LA. L. REV. 1043, 1043-45 (1993).

28. Department of Justice, Department Circular No. 15-09 [DOJ Dept. Circ. No. 15-09] (Mar. 20, 2009).

29. See, e.g., An Act Authorizing the Transfer of Sentenced Persons to or from Foreign Countries, H.B. No. 2863, 15th Cong., 1st Reg. Sess. (2010); An Act Authorizing and Providing for the Procedure for the Transfer of Sentenced Persons to or from Foreign Countries and for Other Purposes, H.B. No. 2703, 15th Cong., 1st Reg. Sess. (2010).

sentence of a Filipino convicted abroad; and (2) with the Philippines as the State sending or transferring an offender outside the country.

When the Philippines is the receiving or administering State, the initial stumbling block this Note hurdles is that of recognition and enforcement of a foreign penal judgment. It is worth noting that jurisdiction is one of the primary grounds that the DOJ rejected concluding such an agreement in 1987.<sup>30</sup> The DOJ held that a generally accepted principle in criminal law is that criminal laws are territorial in character and therefore, have no application beyond the limits of the sovereignty which enacted them.<sup>31</sup> Consequently, it was the DOJ's opinion that it should not deviate from this principle and rejected overtures by the United Kingdom to transfer a prisoner.<sup>32</sup> Twenty years later, this position has changed.

In cases when the Philippines is the sending State, the immediate problem that must be resolved is on what grounds the other country will permit a request for transfer and the body that will exercise this discretion. Contrary to assertions of certain public officials,<sup>33</sup> the transfer of an offender is not in fact a legal obligation but a discretionary act.<sup>34</sup> This discretion is to be exercised not only by the State which convicted the individual<sup>35</sup> but also by the potential receiving State<sup>36</sup> and the very offender.<sup>37</sup> Thus, a mechanism for assuring and securing the consent of all parties must be set in place, with special emphasis on how the sentencing State should determine whether or not to give its consent and on how to verify the offender's consent to be transferred.

These discussions, analyses, and critiques are the bases for and facilitate the construction of this Note's recommendation — the Transfer of Sentenced Persons Act of 2010.

### *C. Scope and Limitations*

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30. See Department of Justice, DOJ Opinion No. 080, Series of 1986 (July 28, 1986).

31. *Id.*

32. *Id.* See also Department of Justice, DOJ Opinion No. 118, Series of 1987 (Nov. 5, 1987).

33. See Christian V. Esguerra & Christine Avendaño, *RP obliged to transfer rapist*, PHIL. DAILY INQ., Sep. 27, 2009, available at <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20090907-223970/RP-obliged-to-transfer-rapist> (last accessed Feb. 24, 2012).

34. See DOJ Dept. Circ. No. 90, § 3.

35. *Id.* § 3, ¶ d.

36. *Id.*

37. *Id.*

The scope of this Note will be broad in order to distill various studies on the issue into one work that will reflect a TSPA's many facets as they are applied today. Thus, a history of TSPAs is necessary to encapsulate the rationales, motivations, and purposes for such an agreement. The contents of a TSPA are also presented and discussed for a more comprehensive understanding of what a transfer entails and its accompanying rights and obligations. Nevertheless, the Note will not dwell on how effectively these agreements have been implemented in foreign jurisdictions. Furthermore, this Note will not discuss the diplomatic efforts between states which result in the conclusion of these types of treaties, but it is concerned with the rules and regulations consequently promulgated in order to implement them. Given that a TSPA has not been found to be unconstitutional or to contravene any law on its face, the executive prerogative to enter into such a treaty and the mechanisms of diplomacy is not within the scope of this Note. The validity of its implementation, however, is within the scope of this Note's inquiry.

Being a fairly new instrument not embodied in the traditional laws of countries but in treaties, the literature on TSPAs is scattered and much of the work concerning its implementation has been focused on transfers involving the U.S. and those under the Council of Europe Convention on the Transfer of Sentenced Persons (European Transfer Convention).<sup>38</sup> Thus, it is necessary to rely heavily on journal articles evaluating these transfers as sources for examining and understanding these agreements. U.S. cases on the matter are also referenced because no case respecting TSPAs has been brought before Philippine courts yet at the time of this writing.

Prisoner transfer agreements are one facet of the general framework on international cooperation and mutual assistance in criminal law and justice developing today, and should not be confused with extradition,<sup>39</sup> another aspect of the framework. Although extradition will be briefly discussed and used as a point of comparison *vis-à-vis* prisoner transfer, it should be remembered that the two have entirely different orientations such that it is not necessary to expand the coverage of this Note to other forms of international criminal cooperation.

Despite this Note's focus on implementation, however, it does not purport to examine in detail all aspects of implementation such as those purely procedural in form. Rather, this Note has identified certain gray areas to focus on that need clarification in future regulation or legislation.

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38. Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, E.T.S. No. 112, 25 U.S.T. 2867 [hereinafter European Transfer Convention].

39. Extradition is defined as "[t]he official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged." BLACK'S LAW DICTIONARY 665 (9th ed. 2009).



*D. Significance of the Study*

The study is significant in that it explores a subject not often applied and even less understood, but which is becoming increasingly important because of globalization and the growing number of individuals imprisoned in countries not their homes. It is relevant to the Philippines because of the growing number of Filipinos, including, but not limited, to OFWs, in prisons abroad. As previously mentioned, there are approximately 5,000 Filipinos behind bars or facing criminal prosecution overseas.<sup>40</sup> In recent news, two Filipinas are currently serving life imprisonment in China for allegedly acting as “drug mules” of a drug syndicate.<sup>41</sup> It is unfortunate that they were pregnant at the time of their arrest; believing that they would simply be deported if detected, they eventually gave birth to their children under detention and the Philippines has managed to secure the repatriation of these infants while their mothers serve their sentences abroad.<sup>42</sup> A TSPA with China would provide these mothers the opportunity to see their children grow, albeit behind bars, and will allow these children to know their mothers.

It is worth noting as well that legislators have recognized the utility of these agreements as a tool for helping Filipinos imprisoned abroad.<sup>43</sup> Although the first instance of a TSPA being utilized by the Philippines resulted in an individual implicated in a highly publicized case being sent out of the country, all TSPAs should not immediately be viewed with suspicion. It is an agreement that will be useful nonetheless when the flipside of the situation is considered, that is, when Filipinos are sent back to the Philippines. As part of the state’s responsibility to protect its citizens within and without its borders, the Philippines should enter into more of these agreements to adequately protect them and to give them the option to serve their sentence in their home country in the company of family and friends

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40. Malaya, *supra* note 4.

41. See Cynthia Balana, *2 babies of Filipino drug mules repatriated from China*, PHIL. DAILY. INQ., June 3, 2010, available at <http://globalnation.inquirer.net/news/breakingnews/view/20100603-273639/2-babies-of-Filipino-drug-mules-repatriated-from-China> (last accessed Feb. 24, 2012); *Babies of convicted Filipino drug mules repatriated from China*, PHIL. STAR, June 3, 2010, available at <http://www.philstar.com/Article.aspx?articleId=580983&publicationSubCategoryId=200> (last accessed Feb. 24, 2012).

42. *Id.*

43. See Senate of the Fourteenth Congress of the Republic of the Philippines, *supra* note 4. See also H.B. No. 2863, *supra* note 29; H.B. No. 2703, *supra* note 29.

and in a familiar environment. In fact, two Filipinos convicted in Spain are also seeking transfer to the Philippines under the RP-Spain TSPA.<sup>44</sup>

Furthermore, the humanitarian and social rehabilitation purposes of these transfer agreements echo one of the basic principles for the treatment of prisoners contained in a United Nations (UN) General Assembly Resolution,<sup>45</sup> which states that, “[w]ith the participation and help of the community and social institution, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.”<sup>46</sup> As a guideline for how states should treat prisoners, a TSPA would fall squarely under creating the most favorable conditions for reintegrating an ex-prisoner into society. Arguably, an offender who is transferred to his home state wherein he intends to reside once freed will have more of an incentive to earn allowances for good behavior and early release. After all, an efficient criminal justice system should protect the rights of not only the offended party, but also of the offender; conviction for criminal activity does not strip a person of his rights,<sup>47</sup> including those that would create the best conditions for social rehabilitation and reintegration.

The final output of this Note — a proposed law for the implementation of all transfer treaties already entered into but not yet implemented and those still to be entered — is significant because it will be a source of rights for prisoners desiring transfer to their home state. It will provide the avenue for setting in motion those treaties already concurred in by the Senate but awaiting implementation and may spur the request for more transfers. Instituting a uniform procedure to cover the future implementation of treaties of this nature will also reduce ambiguity, controversy, and possible uproar over their enforcement.

### *E. Definitions*

The general definitions provided in transfer treaties and as used in this work are as follows:

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44. See Punay, *supra* note 20; Maricar Bautista & Timi Nubia, No Spanish revision, DOJ Chief says on Larrañaga jail term, *available at* [www.abschnnews.com/print/73645](http://www.abschnnews.com/print/73645) (last accessed Feb. 24, 2012).

45. G.A. Res. 45/III, U.N. Doc. A/Res/45/III (Dec. 14, 1990).

46. *Id.* annex, ¶ 10.

47. See Valerie Anne D. Gonzales, Rights Behind Bars: Implementing the International Covenant on Civil and Political Rights in the Treatment of Prisoners (2000) (unpublished J.D. Thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University). The Thesis discusses the rights of prisoners under international and domestic law in the Philippines.

*Sentence* means any punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time on account of a criminal offense; parole and probation, involving as they do a deprivation or restraint of liberty, are also within the contemplation of a sentence if provided in the relevant transfer treaty.<sup>48</sup>

*Sentenced Person* or *Offender* means the person on whom a punishment or measure involving deprivation of liberty ordered by a court of the sentencing State on account of a criminal offense has been imposed.<sup>49</sup>

*Sentencing State* or *Transferring State* or *Sending State* means the State in which the sentence was imposed on the person who may be subject to transfer, or has been transferred.<sup>50</sup>

*Administering State* or *Receiving State* or *Enforcing State* means the State to which the sentenced person may be, or has been, transferred in order to serve his sentence.<sup>51</sup>

## II. TRANSFER OF SENTENCED PERSONS AGREEMENTS

The general underlying principle, the basic premise, upon which a TSPA is grounded and which is enunciated in various TSPAs but with slight variations is simply that a person sentenced in the territory or jurisdiction of a party-state may be transferred to the territory or jurisdiction of the other party-state of which he or she is a citizen or national in accordance with the provisions of the treaty in order to serve the sentence imposed on him or her.<sup>52</sup> TSPAs are also called prisoner transfer treaties,<sup>53</sup> penal transfer treaties,<sup>54</sup> or transfer of penal sanctions treaties.<sup>55</sup>

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48. See RP-Spain TSPA, *supra* note 16, art. I; European Transfer Convention, *supra* note 38, art. I; and Treaty Between the United States of America and Canada on the Execution of Penal Sentences, U.S.-Can., art. I, Mar. 2, 1977, 30 U.S.T. 6263 [hereinafter U.S.-Canada TSPA].

49. *Id.*

50. *Id.*

51. *Id.*

52. See generally RP-Spain TSPA, *supra* note 16, art. II; RP-Cuba TSPA, *supra* note 13, art. II; RP-HK TSPA, *supra* note 14, art. II; RP-Thailand TSPA, *supra* note 15, art. II; and RP-Canada TSPA, *supra* note 12, art. II.

53. See, e.g., Ronald M. Emanuel, *Intervention of Constitutional Powers: The Prisoner Transfer Treaties*, 2 FLA. J. INT'L L. 203 (1986); Liana E. Olivarez, *The Mexican-American Prisoner Transfer Treaty: Current Problems and Solutions*, 30 TEX. INT'L L. J. 395 (1995).

54. See, e.g., Dunlap, *supra* note 27.

*A. Origins of the TSPA*

The first treaty to provide for transfer was entered into in 1951 in the Judicial Convention between Syria and Lebanon.<sup>56</sup> This earlier agreement limited the punishment that could be carried out by the other state to two months only and a fine given by the court of the contracting state.<sup>57</sup> In 1954, the Status of Forces Agreement between the U.S. and South Korea included a provision that the latter would give “sympathetic consideration” to a request for custody by the U.S. for its nationals sentenced in Korean courts.<sup>58</sup> This was deemed a precursor to the penal transfer treaties that were to come in the years following — in 1963, the Scandinavian countries (Denmark, Norway, and Sweden) enacted identical domestic legislation on prisoner transfer between them;<sup>59</sup> in 1964, the Council of Europe formulated the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders,<sup>60</sup> which was supplemented by the European Convention on the International Validity of Criminal Judgments in 1970;<sup>61</sup> the U.S. entered into a series of penal transfer treaties in the ’70s and ’80s and even the Eastern European socialist countries entered into the Convention on the Transfer of Persons Sentenced to Imprisonment to Serve Their Sentences in the State of Their Citizenship.<sup>62</sup>

Two significant instruments that were subsequently drawn and that embodied these earlier developments but with a view to involving more states in the process are the European Transfer Convention, also known as the Strasbourg Convention, made by the European Council in 1983<sup>63</sup> and the United Nations (UN) Model Agreement on the Transfer of Foreign Prisoners and Recommendations for the Treatment of Foreign Prisoners

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55. See, e.g., Abraham Abramovsky, *Transfer of Penal Sanctions Treaties: An Endangered Species?*, 24 VAND. J. TRANSNAT’L L. 449 (1991).

56. Mark Andrew Sherman, *Review on Transfer of Prisoners Under International Instruments and Domestic Legislation: A Comparative Study*, by Michael Plachta, 28 GEO. WASH. J. INT’L L. & ECON. 495, 506 (1995).

57. *Id.*

58. *Id.*

59. *Id.* at 507 (citing MICHAEL PLACHTA, TRANSFER OF PRISONERS UNDER INTERNATIONAL INSTRUMENTS AND DOMESTIC LEGISLATION: A COMPARATIVE STUDY 145 (1993)).

60. European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, *entered into force* Aug. 8, 1975, E.T.S. No. 51.

61. European Convention on the International Validity of Criminal Judgments, *entered into force* July 26, 1974, E.T.S. No. 70.

62. See Sherman, *supra* note 56, at 507-08.

63. See European Transfer Convention, *supra* note 38.

(UN Model Agreement),<sup>64</sup> which came about during the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan, Italy from 26 August to 6 September 1985.<sup>65</sup>

*B. Purposes of the TSPA*

Before delving directly into the purposes of a TSPA, it is necessary to take one step back and review the rationale for imprisonment in the first place. The purpose of imprisonment, apart from the prerogative of the state to punish those who have violated its laws, is for the offender's rehabilitation, social reintegration and to prevent more crimes from being committed. Philippine penal law, based on the Spanish Penal Code,<sup>66</sup> has elements of the positivist theory of criminal law which views the purpose for imposing a penalty as the reformation of the offender; the state is concerned not only with protecting society against the destructive acts of individuals but also to redeem them for economic usefulness and for other social ends.<sup>67</sup> Furthermore, as pointed out by the Supreme Court in *De Joya v. Jail Warden of Batangas*,<sup>68</sup> "penalties imposed must not only be retributive but must also be reformatory, to give the convict an opportunity to live a new life and rejoin society as a productive and civic-spirited member of the community."<sup>69</sup> This concept of reformation and rehabilitation, recognized in the Philippine jurisdiction, is similarly the foundation from which a TSPA legitimizes its role in international criminal justice.

What may be gleaned from the preambles contained in transfer treaties is the best way to exemplify their rationale. Thus, the European Transfer Convention states in its preamble:

Desirous of further developing *international co-operation* in the field of criminal law;

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64. Draft Resolution on the Model Agreement on the Transfer of Foreign Prisoners [hereinafter UN Model Agreement] is annexed to the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, Aug. 26-Sept. 6, 1985, *Formulation and Application of United Nations Standard and Norms in Criminal Justice, Model Agreement on the Transfer of Foreign Prisoners and Recommendations for the Treatment of Foreign Prisoners, Note by the Secretariat*, A/Conf.121/10 (Apr. 25, 1985) [hereinafter Secretariat's Note].

65. See UN Model Agreement, *supra* note 64.

66. CÓDIGO PENAL [C.P.] (Spain).

67. ANTONIO L. GREGORIO, *FUNDAMENTALS OF CRIMINAL LAW REVIEW* 4 (10th ed. 2008). See also *De Joya v. Jail Warden of Batangas*, 417 SCRA 636, 645 (2003) (citing *People v. Ducosin*, 59 Phil. 109, 118 (1933)).

68. *De Joya*, 417 SCRA at 636.

69. *Id.* at 645 (citing Sir Edward Fry, 5 CRIM. L., May 16; 1 WHARTON'S CRIMINAL LAW 1).

Considering that such co-operation should *further the ends of justice* and the *social rehabilitation* of sentenced persons;

Considering that these objectives require that foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the *opportunity to serve their sentences within their own society*; and

Considering that this aim can best be achieved by having them transferred to their own countries.<sup>70</sup>

The UN Model Agreement provides:

Desirous of further developing *mutual cooperation* in the field of criminal justice,

Believing that such co-operation should *further the ends of justice* and the *social resettlement* of sentenced persons,

Considering that these objectives require that foreigners who are deprived of their liberty as the result of a criminal offense should be given the opportunity to serve their sentences within their own society,

Convinced that this aim can best be achieved by transferring foreign prisoners to their own countries,

Bearing in mind that the full *respect of human rights*, as laid down in universally recognized principles should be ensured.<sup>71</sup>

The U.S.-Mexico TSPA begins with:

The United States and the United Mexican States, desiring to render *mutual assistance* in combating crime insofar as the effects of such crime extend beyond their borders and to provide *better administration of justice* by adopting methods *furthering the offender's social rehabilitation*, have resolved to conclude a Treaty on the execution of penal sentences.<sup>72</sup>

The RP-Spain TSPA opens as follows:

Considering that the objective of sentences is the *social rehabilitation* of the sentenced persons and that for the attainment of this objective it would be beneficial if nationals who are deprived of their liberty abroad were given the opportunity to serve their sentences in their own countries;

Desiring to *cooperate in the transfer* of sentenced persons to *facilitate their reintegration* into society.<sup>73</sup>

From these Preambles, it seems clear that TSPAs are underpinned, generally, by the following goals:

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70. European Transfer Convention, *supra* note 38, pmbl. (emphasis supplied).

71. UN Model Agreement, *supra* note 64, pmbl. (emphasis supplied).

72. U.S.-Mexico TSPA, *supra* note 11, pmbl. (emphasis supplied).

73. RP-Spain TSPA, *supra* note 16, pmbl. (emphasis supplied).

- (1) To develop international cooperation in the field of criminal justice;
- (2) To further the ends of justice;
- (3) To further the reformation and social resettlement or reintegration of offenders into society by giving them the opportunity to serve their sentence in their own countries; and
- (4) To respect human rights.

That TSPAs are recognized as tools for international criminal justice cooperation and harmonization is important given the fast rising pace of globalization and the corresponding rise in transnational crime. The UN Congress on the Prevention of Crime and Treatment of Offenders has devised numerous instruments to facilitate international cooperation and assistance, including a Model Agreement on Extradition.<sup>74</sup> Another area of cooperation involves the transfer of proceedings in criminal matters.<sup>75</sup> International organizations such as the International Criminal Police Organization or Interpol, have also been established to help countries promote justice within their borders. They foster better international relations among states by helping relieve law enforcement concerns, with the long-term effect being that there is closer cooperation in international law enforcement.<sup>76</sup> Furthermore, international criminal cooperation promotes international comity and encourages reciprocal treatment of prisoners.<sup>77</sup>

Those critical of a TSPA might argue that the ends of justice are not furthered but instead are bypassed when a prisoner is transferred out of the sentencing State's territory.<sup>78</sup> In response to this, one must keep in mind that the sentenced person nevertheless carries out his or her sentence even when in the receiving State's territory. Justice is still served, albeit in another state.

The humanitarian considerations embraced within these objectives include the opportunity to serve sentence in one's home country in order to have the support of family and friends and in order to be in an environment

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74. G.A. Res. 45/116, U.N. Doc. No. A/RES/45/116 (Dec. 14, 1990).

75. Candido Cunha, Current Issues in Correctional Treatment and Effective Countermeasures: Transfer of Sentenced Persons (A Paper Presented at the 115th International Training Course of the United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders, Resource Material Series No. 57), available at [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no57/57-20.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no57/57-20.pdf) (last accessed Feb. 24, 2012).

76. Emanuel, *supra* note 53, at 215.

77. Louis Antonacci, *Lessons from Lagrand: An Argument for the Domestic Enforceability of Treaty-Based Rights Under International Prisoner Transfer Treaties*, 3 SANTA CLARA J. INT'L L. 22 (2005).

78. See Cunha, *supra* note 75, at 268.

whose norms, traditions and customs one is familiar with.<sup>79</sup> Incarceration in a foreign environment can be isolating and may be detrimental to the enlightened end for which deprivation of liberty is imposed upon those convicted of crimes. The enlightened end, as espoused by the positivist theory of criminal law discussed above, is to rehabilitate the offender in order that he may once more take his place in society.

Penal transfers have a humanitarian purpose in that they recognize the “extreme hardship imposed by language barriers, alienation from local culture and customs, lack of contacts with relatives and friends, unfamiliar food or climate, and hostility or indifference to one’s religious practices in a foreign prison.”<sup>80</sup> Foreigners are susceptible to discriminatory treatment due to prejudicial attitudes in an environment they are not accustomed to, which may result in “double punishment” — the first punishment is that for a criminal violation and the second is that once in prison, they are susceptible to unfair treatment.<sup>81</sup> Prisoner transfer treaties are recognized as an avenue for ameliorating this situation, thereby protecting and upholding human rights.

A fifth and more novel factor that has influenced the creation of transfer treaties in recent years has been the savings the transferring State stands to gain by having a lower number of inmates to provide for. This is particularly true in certain prisons in the U.S. where the cost to incarcerate one inmate is estimated to range from \$15,000–21,000 annually — state governments view the lower costs as an incentive for transferring prisoners outside of the country.<sup>82</sup>

### *C. Differentiating a TSPA from Extradition*

A TSPA as a tool for international criminal justice cooperation emphasizes that the sentencing State is simply requesting the other state’s assistance in enforcing the sentence.<sup>83</sup> It is not legal assistance in that one state is requesting another to render assistance in the interest of the requesting State’s criminal justice system, as in the case of extradition.<sup>84</sup> Extradition is the “the official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged; the return of a fugitive from justice, regardless of consent, by the authorities where the fugitive is found.”<sup>85</sup> Thus, in extradition, the transfer of an individual is to serve the

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79. Dunlap, *supra* note 27, at 820–21.

80. *Id.* at 815.

81. Sherman, *supra* note 56, at 500.

82. Walsh & Zagaris, *supra* note 9, at 393.

83. Sherman, *supra* note 56, at 511.

84. *Id.*

85. BLACK’S LAW DICTIONARY 665.



proper administration of justice wherein a crime was committed but from where the offender has fled; in contrast, a prisoner transfer is no longer concerned with criminal proceedings but merely seeks to rehabilitate the offender in a familiar environment.<sup>86</sup> Furthermore, in extradition proceedings, the consent of the person to be extradited is not necessary, neither does it depend on the will of that person; in transfer proceedings, the express consent of the transferee is required as a condition before transfer may take place.<sup>87</sup>

Thus, extradition is focused on international legal assistance, that is, helping states who *need* assistance to prosecute individuals culpable of violating their laws, while prisoner transfers are focused on international cooperation, that is, helping states who merely *want* assistance in enforcing the sentences they have already imposed, but who are nevertheless capable of enforcing the sentence without another state's help.<sup>88</sup>

Despite this fundamental difference, however, it must be noted that as instruments of international criminal cooperation, extradition and prisoner transfer are embodied in treaties and require specific procedures for implementation. The Philippines has an Extradition Law<sup>89</sup> enacted under former President Ferdinand Marcos's dictatorship soon after entering into an extradition treaty with Indonesia — the first extradition treaty concluded and ratified by the Philippine government.<sup>90</sup> The Extradition Law was promulgated in order to “guide the executive departments and the courts in the proper implementation of the extradition treaties to which the Philippines is a signatory.”<sup>91</sup> Similarly, this Note propounds the viewpoint that legislation is needed to implement all TSPAs entered into by the state, instead of promulgating individual implementing rules and regulations as in the case of the RP-Spain Treaty. This is expounded upon in the next Chapter.

That extradition is viewed and treated separately from prisoner transfer is evident in transfer treaties which have a provision on specialty. The Principle of Specialty is found in every extradition treaty which dictates that once a state transfers an individual to the requesting State under the terms of the extradition treaty, that person can be prosecuted only for the crime specified

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86. Sherman, *supra* note 566, at 511.

87. *Id.* at 521.

88. *Id.* at 511.

89. Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country [Philippine Extradition Law], Presidential Decree (P.D.) No. 1069 (1977).

90. *Id.* whereas cl.

91. *Id.*

in the extradition request.<sup>92</sup> Transfer treaties make clear that a prisoner transfer may not be used as extradition in disguise because not only would this be abusing the transfer procedure, it would also violate the principle that treaties must be executed in good faith.<sup>93</sup> As an example, the RP-Spain TSPA provides that for a sentenced person to be “judged, convicted[,] or subjected to any restriction of his personal liberty on account of previous acts that are different from those which gave rise to his transfer, action shall be taken in accordance with the terms provided under the Treaty of Extradition in force between the Parties.”<sup>94</sup> Clearly, prisoner transfer and extradition are related instruments but necessitate separate instruments for their existence. They are independent of each other with distinct objectives.

#### *D. Overview of the General Contents of a TSPA*

This Section uses the UN Model Agreement and the Secretariat’s Notes<sup>95</sup> to this Model Agreement as discussed during the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders as the basis for presenting the typical contents of a TSPA. Only the salient provisions, as identified by Candido Cunha<sup>96</sup> and by other commentators on this issue, are discussed for the purposes of this Note. Procedural concerns (e.g., exchange of documents, application form for transfer, physical transfer, etc.) are omitted from the discussion since their operation is relatively straightforward and uncontroversial. The contents of TSPAs actually entered into by states, including the Philippines and the U.S., are cross-referenced as points of comparison in order to arrive at a more comprehensive understanding of the treaties and variations in their application.

#### 1. General Conditions for Transfer

##### *a. Nationality or Citizenship*

The Model Agreement provides that, “[t]he social resettlement of offenders should be promoted by facilitating the return of persons convicted of crime abroad to their *country of nationality or residence* to serve their sentence at the earliest possible stage.”<sup>97</sup> In the Secretariat’s Notes, the Model Agreement

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92. See Mary-Rose Papandrea, *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship Between Individual and Sovereign*, 62 U. CHI. L. REV. 1187, 1187 (1995).

93. Cunha, *supra* note 75, at 280.

94. RP-Spain TSPA, *supra* note 16, art. 15.

95. See Secretariat’s Note, *supra* note 64.

96. See Cunha, *supra* note 75, at 263. Cunha was the Head of the Division of Criminal Law and Justice of the Council of Europe.

97. UN Model Agreement, *supra* note 64, pmb. (emphasis supplied).

leaves it to the states to decide whether or not a prisoner should be transferred to the country of nationality or of residence, if these are different, because it will be up to the administering State to determine whether or not to receive non-nationals residing in its territory.<sup>98</sup>

In line with the purpose of the offender's effective social reintegration and rehabilitation, transfer treaties require that a person to be transferred has some affinity to the administering State and this has been articulated as that of nationality or citizenship and residency. Nationality and citizenship are used interchangeably in this case and the state's choice boils down to whether it will accept a non-national who is nevertheless a resident. Dr. Micheal Plachta, an eminent scholar on prisoner transfer treaties, has identified four tests used in determining and defining the scope of eligibility with respect to this condition in his review of transfer treaties.<sup>99</sup> These are the nationality test, the limited nationality test, the hybrid test (nationality or domicile test), and the domicile test.<sup>100</sup> These can be narrowed into two primary tests: (i) nationality and (ii) domicile, as indicated in the Model Agreement.<sup>101</sup>

#### i. Nationality Test

The Nationality Test is considered the "standard criterion" in prisoner transfers.<sup>102</sup> An offender may request for transfer only to the state of his nationality. Plachta uses nationality interchangeably with citizenship.<sup>103</sup> This does not pose a problem when an individual is a national or citizen of only one state. Issues may arise, however, when one is citizen of two different states. Does the offender have the option of transferring to either state if, for example, he was sentenced in a third state? In a case where the sentencing State is also the offender's state of citizenship should he still be given the option to transfer to the state of his other nationality? This question is particularly relevant in the Larrañaga case wherein by virtue of his dual nationality, Larrañaga secured his transfer to Spain, and will be fleshed out in Chapter V of this Note.

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98. Secretariat's Note, *supra* note 64, at 4.

99. Plachta, *supra* note 27, at 1046.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

## ii. Domicile Test

Also referred to as the residence test, Plachta identifies this as the most flexible solution.<sup>104</sup> Instead of focusing simply on the state which issued a person's passport, more substantive qualifications are taken into consideration, such as the offender's social, family, and professional ties, and the roots he has developed in a country even if not the state of his nationality — an individual imprisoned in his own country of nationality may even request transfer to his country of domicile for compelling reasons such as these.<sup>105</sup> At the heart of this option is the purpose of TSPAs to further the social resettlement and reintegration of an individual because it takes into account a person's genuine ties to a state,<sup>106</sup> which ties are not necessarily in the form of citizenship or nationality.

In the implementation of transfer treaties in Canada, it has taken genuine ties into consideration when determining whether to grant a request for transfer. In a decision by a Canadian federal court on a request of a Canadian national to be transferred from the U.S. to Canada, the denial of his request was upheld because it was found that the Canadian national had spent most of the last 25 years in the U.S.<sup>107</sup> The court upheld the administrative body's finding that the offender had insufficient ties in Canada to warrant transfer and that he appeared to have left Canada with no intention of returning.<sup>108</sup> Incidentally, these two considerations (i.e., whether the offender left Canada with an intention to abandon it as a permanent residence and whether the offender has social or family ties in Canada) are actually provided for in Canada's International Transfer of Offenders Act as factors to be taken into account when deciding upon a Canadian offender's request for transfer.<sup>109</sup>

## iii. Formulation in Existing Treaties

Most treaties, however, have maintained that only a national or citizen is eligible for transfer. The U.S.-Canada TSPA<sup>110</sup> uses "citizen" instead of "national" when referring to the subjects of transfer. But it does make the further qualification that "citizen" includes one who may be a dual national of the Parties.<sup>111</sup> In all five TSPAs the Philippines has entered into thus far,

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104. *Id.* at 1047.

105. Plachta, *supra* note 27, at 1046.

106. *Id.* at 1045.

107. *Kozarov v. Canada* (Minister of Public Safety and Emergency Preparedness) (F.C.), 2007 F.C. 866, [2008] 2 F.C.R. 377.

108. *Id.*

109. International Transfer of Offenders Act, S.C. 2004, c. 21, § 10 (Can.).

110. U.S.-Canada TSPA, *supra* note 48.

111. *Id.* art. I.

only the words “national” or “citizen” appear, with no regard for residence or domicile. Of note is the RP-Spain TSPA, entered into in 2007 long after the promulgation of the Dual Citizenship Law of the Philippines,<sup>112</sup> because it does not clarify whether or not a national embraces dual nationals and whether this may be a bar to transfer. The administering State is left to decide who a national might be.

The U.S.-Mexico TSPA is clear that only a national may be transferred to the receiving State provided that this national is not a domiciliary of the transferring State.<sup>113</sup> The treaty has a limited definition of “domiciliary,” which is a person “who has been present in the territory of one of the parties for at least five years with an intent to remain permanently therein.”<sup>114</sup> Thus, in the U.S.-Mexico TSPA, there seems to be the tacit recognition of the role of genuine ties as a factor in determining eligibility or ineligibility for transfer. Despite having the requisite nationality, the fact that one has established his residence in the sentencing State is a bar to transfer under this particular treaty.

*b. Final Judgment*

The Model Agreement states that a “transfer shall be made only on the basis of a final and definitive sentence having executive force.”<sup>115</sup> This simply means that all remedies have been exhausted or the time for filing an appeal has lapsed; this does not bar a subsequent review of the sentence in the sentencing State, however, on the grounds of newly produced evidence.<sup>116</sup> The judgment cannot be reviewed in the receiving State without being in danger of offending the sentencing State’s sovereignty and authority to punish those guilty of crimes within its jurisdiction.

In addition to the final judgment, treaties also generally require that the sentenced person has satisfied all liabilities incurred under the sentence such as fines, court costs, civil indemnities, and/or pecuniary sanctions.<sup>117</sup>

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112. An Act Making the Citizenship of Philippine Citizens Who Acquire Foreign Citizenship Permanent, Amending for the Purpose Commonwealth Act No. 63, as Amended, and for Other Purposes, [Citizenship Retention and Re-acquisition Act of 2003], Republic Act No. 9225 (2003).

113. U.S.-Mexico TSPA, *supra* note 11, art. II (2) & (3).

114. *Id.* art. IX (4).

115. UN Model Agreement, *supra* note 64, ¶ 11.

116. Secretariat’s Note, *supra* note 64, ¶ 21.

117. See RP-Spain TSPA, *supra* note 16, art. 4 (6).

*c. Minimum Period of Sentence to Serve*

Paragraph 12 of the Model Agreement provides that the prisoner, as a general rule, shall have at least six months of the sentence left to serve at the time the request is made, even in the case of an indeterminate sentence.<sup>118</sup> The six-month limit was set as a reasonable minimum that would still have an effect on the ends of prisoner transfer — ensuring the social resettlement of the offender.<sup>119</sup> Nevertheless, states have also agreed on longer minimums, such as one year, because a transfer process may take time to effect such that it is possible for an offender to have served sentence even before a decision on the request for transfer is made.<sup>120</sup>

*d. Consent of the Sentenced Person*

A general principle found in the Model Agreement is that a transfer, either to the country of nationality or of residence, “should be effected only with the expressed free will of the prisoner.”<sup>121</sup> The consent of the prisoner is an essential requirement ensuring that the prisoner is aware of all the consequences of the transfer and the conditions that may be imposed on the transfer. It is necessary because an individual may not want to be transferred in the first place. Only a voluntary transfer would achieve the humanitarian goals of prisoner transfer by giving the prisoner the choice to serve sentence in his home state or to remain in the sentencing State if he believes his rehabilitation would be better facilitated there.<sup>122</sup>

Consent is also important because as will be discussed in Chapter IV, it constitutes a waiver on the part of the offender to further challenge his or her conviction outside the jurisdiction of the sentencing State.

*e. Dual Criminality*

The Model Agreement provides that

[a] transfer of prisoners should be effected in cases where the offence giving rise to conviction is punishable by deprivation of liberty by the judicial authorities of both the sending (sentencing) State and the State to which the transfer is to be effected (administering State) according to their national laws. Offences of political nature as well as merely fiscal and military offences may be excluded.<sup>123</sup>

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118. UN Model Agreement, *supra* note 64, ¶ 12.

119. Secretariat’s Note, *supra* note 64, ¶ 22.

120. See RP–Spain TSPA, *supra* note 16, art. 4 (5).

121. UN Model Agreement, *supra* note 64, ¶ 7.

122. See Plachta, *supra* note 27, at 1050–51.

123. UN Model Agreement, *supra* note 64, ¶ 3.

This Provision captures what is known as dual criminality.<sup>124</sup> Essentially, a person cannot be transferred unless the crime for which he or she was convicted of in the sentencing State is also considered an offense in the administering State; otherwise, he or she cannot apply for transfer.<sup>125</sup> This is a generally accepted feature not only in extradition treaties but also in transfer treaties, as may be gleaned from the Model Agreement.<sup>126</sup> However, some commentators have argued that the condition of dual criminality should not be imposed in transfer treaties in light of its underlying humanitarian rationale.<sup>127</sup>

Professor William V. Dunlap reasons that it is acceptable to include dual criminality as a feature of extradition treaties because in extradition, state A is requesting state B for assistance in prosecuting an offender such that it would be illogical for state B to help state A in the first place if it considers an act legal within its jurisdiction.<sup>128</sup> In transfer treaties, there is a markedly different situation:

By allowing a prisoner to serve a foreign sentence in its penitentiary, the administering State is neither taking a role in the prosecution nor increasing the likelihood of punishment. The prisoner has already been tried and convicted of an offense. The offender will serve the sentence whether the administering State cooperates or not. Nor does agreeing to the transfer imply that the administering State approves the conviction or the sentence. It simply indicates that all three parties have recognized that cooperation is beneficial.<sup>129</sup>

Therefore, Dunlap argues, dual criminality is not an indispensable feature so far as transfer treaties are concerned; “abolishing the dual criminality rule in penal transfer appears to be an exercise in humanitarianism and social reform” because it will permit the effective social rehabilitation of a state’s nationals.<sup>130</sup>

This Note neither agrees with nor promotes Dunlap’s view because of the fundamental principle in criminal law, *nullum crimen, nulla poena sine praevia lege poenali*.<sup>131</sup> A state simply cannot be expected to execute a sentence for a crime it does not punish under its law because it would be

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124. Secretariat’s Note, *supra* note 64, ¶ 10.

125. *Id.*

126. *Id.*

127. *See generally* Dunlap, *supra* note 27.

128. *Id.* at 828.

129. *Id.* at 845.

130. *Id.* at 857–58.

131. Latin. It is translated to “no crime, no punishment without a previous penal law.”

against its public policy. Thus, dual criminality forestalls possible legal or constitutional conflicts that may arise from enforcing a foreign criminal judgment which has no basis under its domestic laws.<sup>132</sup> Furthermore, if a prisoner is transferred to another state wherein his or her offense is not considered a crime, he or she might challenge his or her deprivation of liberty and attempt to circumvent serving sentence.<sup>133</sup> This is also why the prisoner's express consent is important — it ensures that he or she knows the conditions and reasons for which they will continue to be deprived of liberty in the receiving State.

Existing transfer agreements, including the RP TSPAs, the U.S.-Mexico and U.S.-Canada TSPAs, and the European Transfer Convention, maintain dual criminality as a condition for transfer, with the clarification that the offense does not have to be identically defined in the parties' jurisdictions.<sup>134</sup> Of note is the RP-Thailand TSPA which provides that a sentenced person will not be transferred from the Philippines if he or she committed a crime against the internal or external security of the state or against the President of the Philippines and his or her spouse, sons, or daughters.<sup>135</sup> This reflects the caveat provided in the Model Agreement that those guilty of political or military offenses may be ineligible for transfer.<sup>136</sup>

In response to concerns that maintaining dual criminality as a requirement for prisoner transfer would eliminate offenders guilty of crimes not punished in both states as candidates for transfer, it must be remembered that TSPAs are not exclusive agreements. Even if a transfer treaty is in effect between states, nevertheless it is possible for transfers to be effected through diplomatic channels or negotiation between parties because it would still be within the prerogative of the executive. A transfer may still be carried out through a process called *ad hoc* prisoner transfer.<sup>137</sup> Eligibility for transfer, procedure, and execution of the remaining sentence are determined on a case-by-case basis.<sup>138</sup> Under an *ad hoc* transfer agreement, it would then be possible to transfer a Filipino imprisoned in Saudi Arabia for violating a provision of Islamic law under the terms negotiated upon between the Philippines and Saudi Arabia; at the same time, those convicted of common crimes may still avail of transfer without having to go through the arguably

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132. Choy Dick Wan, *Prisoner Transfer Between Hong Kong and Mainland China: A Preliminary Assessment*, 33 BROOK. J. INT'L L. 463, 469 (2008).

133. See Cunha, *supra* note 75, at 273.

134. See U.S.-Mexico TSPA, *supra* note 11, art. II; U.S.-Canada TSPA, *supra* note 48, art. II; and European Transfer Convention, *supra* note 38, art. III.

135. RP-Thailand TSPA, *supra* note 15, art. 4 (c).

136. UN Model Agreement, *supra* note 64, ¶ 3.

137. See Wan, *supra* note 132, at 494.

138. *Id.*



more lengthy procedure of *ad hoc* transfer if a TSPA was in place. Recognizing that *ad hoc* transfer may operate side by side with a TSPA addresses the apprehension that maintaining the dual criminality requirement would bar Filipinos convicted for offenses not considered crimes in the Philippines from seeking transfer.

*f. Consent of the Administering and Sentencing States*

Not only is the consent of the prisoner necessary, but both the sentencing and receiving States must agree to the transfer.<sup>139</sup> This is in recognition of the fact that the transfer of prisoners “should be effected on the basis of mutual respect for national sovereignty and jurisdiction.”<sup>140</sup> A decision concerning a transfer “lies within the sole competence” of the party-states and in deference to state sovereignty, their consent is required.<sup>141</sup> As will be discussed in detail in Chapter V, a state does not have the obligation to request a transfer or to grant a transfer because the transfer of a prisoner in a single case is based on mutual confidence and respect for state’s sovereignty and jurisdiction.<sup>142</sup> Thus, despite a TSPA’s nature as a treaty and therefore binding and having the force of law, the way it is structured gives a state elbow room to decline a transfer.

2. Post-Transfer Concerns

*a. Review of Sentence*

In the Model Agreement, only the sentencing State is competent to review the sentence while the administering State is bound by the latter’s findings of fact and judgment.<sup>143</sup> This is a natural consequence of respecting the sovereignty of states and its imposition of a penalty for an offense committed within its jurisdiction. Without this Provision, it is unlikely that a state would permit the transfer of a prisoner. Other treaties also strictly state that only the sentencing State may decide any application for review of judgment<sup>144</sup> or that the transferring State has exclusive jurisdiction over any proceedings, regardless of form, intended to challenge, modify, or set aside

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139. UN Model Agreement, *supra* note 64, ¶ 5.

140. *Id.* ¶ 2.

141. Secretariat’s Note, *supra* note 64, ¶ 13.

142. *Id.* ¶ 9.

143. UN Model Agreement, *supra* note 64, ¶ 17.

144. European Transfer Convention, *supra* note 38, art. 13.

sentences.<sup>145</sup> This Provision is also referred to as “Retention of Jurisdiction.”<sup>146</sup>

*b. Enforcement of Sentence*

The enforcement of a sentence is not as straightforward as review of judgment and may prove to be even more controversial. Once an offender is transferred, the enforcement of his sentence may either be subject to continued enforcement or conversion. These two options are laid out in the Model Agreement:

14. The competent authorities of the administering State shall: (a) continue the enforcement of the sentence immediately or through a court or administrative order; or (b) convert the sentence, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the law of the administering State for the same offence.

15. In the case of *continued enforcement*, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State. If, however, this sentence is by its nature or duration incompatible with the law of the administering State, this State may adapt the sanction to the punishment or measure prescribed by its own law for similar offences.

16. In the case of *conversion of sentence*, the administering State shall be entitled to adapt the sanction as to its nature or duration according to its national law, taking into due consideration the sentence passed in the sentencing State. A sanction involving deprivation of liberty shall, however, not be converted to a pecuniary sanction.

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21. The enforcement of the sentence shall be governed by the law of the administering State.<sup>147</sup>

The European Transfer Convention gives the parties the same options to either continue enforcement or to convert the sentence.<sup>148</sup> It also explains that in case of continued enforcement, the administering State will be “bound by the legal nature and duration of the sentence” unless the sentence “by its nature or duration is incompatible with the law of the administering State.”<sup>149</sup> In these cases, the administering State may adapt the sanction prescribed for an offense similar to its own law by a court or administrative

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145. See U.S.–Mexico TSPA, *supra* note 11, art. VI; U.S.–Canada TSPA, *supra* note 48, art. V.

146. See RP–Spain TSPA, *supra* note 16, art. 12.

147. UN Model Agreement, *supra* note 64, ¶¶ 14–16 & 21 (emphasis supplied).

148. See European Transfer Convention, *supra* note 38, arts. 9–11.

149. *Id.* art. 10.

order.<sup>150</sup> Adapting the sentence in this case is strictly construed in two ways. First, in cases where the states have different nomenclatures for its penalties (e.g., in the Philippines' Revised Penal Code (RPC),<sup>151</sup> penalties such as *reclusión perpetua* and *prisión mayor* may not be easily understood in another jurisdiction), adaptation is necessary to reach the nearest equivalent sentence to be able to enforce it.<sup>152</sup> Secondly, in cases where adaptation is necessary so that it "does not exceed the maximum prescribed by the law of the administering State."<sup>153</sup> The underlying rule, after all, in both continued enforcement and conversion, is that enforcement is governed by the law of the receiving State.<sup>154</sup> If a penalty was not adapted to conform to the law of the receiving State, the validity of the transfer would be susceptible to attack before a court for offending the public policy of the state.

If the states opt for conversion of sentence, the administering State effectively substitutes the sanction imposed by the sentencing State for the same or a similar offense on the condition that the administering State is bound by the findings of fact, cannot convert a sanction of deprivation of liberty into pecuniary sanction, and cannot aggravate the sanction.<sup>155</sup> This arrangement circumvents a situation wherein a person transferred to his home country ends up serving a substantially longer sentence than fellow inmates incarcerated for the same or similar crimes.<sup>156</sup> Conversion assumes that the sentencing State transfers the responsibility for the execution of the sentence to the receiving State such that the latter may reduce the sanction following current sentencing practices.<sup>157</sup>

The U.S.-Canada TSPA permits the receiving State to carry out the offender's sentence according to its laws and procedures, including application of any provisions for reducing the term of confinement by parole, conditional release, or otherwise.<sup>158</sup> This Provision does not clearly state whether it is adopting the practice of continued enforcement or of conversion of sentence. However, it does permit a conversion of the sentence to the extent that the terms of parole and conditional release may be applied.

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150. *Id.*

151. REVISED PENAL CODE.

152. Cunha, *supra* note 75, at 275.

153. *Id.*

154. See UN Model Agreement, *supra* note 64, ¶ 21; Cunha, *supra* note 75, at 275.

155. Secretariat's Note, *supra* note 64, ¶¶ 26-29.

156. See Dunlap, *supra* note 27, at 855.

157. Secretariat's Note, *supra* note 64, ¶ 26.

158. See U.S.-Canada TSPA, *supra* note 48, art. IV.

The RP TSPAs generally provide for continued enforcement. The RP-Spain TSPA clarifies that the administering State: “(a) shall be bound by the duration of the sentence or measure of deprivation of liberty; (b) shall be bound by the findings of facts indicated in the judgment; and (c) shall not convert the sentence or deprivation of liberty into pecuniary sanction.”<sup>159</sup> That a state is bound by the facts is another safeguard to a state’s sovereignty because it assures that the administering State cannot evaluate the facts on which the judgment is based and therefore, cannot modify the judgment itself.<sup>160</sup>

*c. Pardon and Amnesty*

Although the Model Agreement provides that “both the sentencing and the administering State shall be competent to grant pardon and amnesty,”<sup>161</sup> in practice, states have agreed upon different terms. While the parties to the European Convention subscribe to this Model as long as it is in accordance with the party-state’s constitution and other laws,<sup>162</sup> the U.S. TSPAs limit the power to pardon or grant amnesty to the sending or transferring State.<sup>163</sup> In the case of the Philippines, only the RP-Spain TSPA explicitly dedicates an article on pardon, amnesty, or commutation and only the sentencing State may grant it pursuant to its constitution and law; but the administering State may nevertheless request the sentencing State to grant pardon, amnesty, or commutation based on sufficient grounds.<sup>164</sup> Again, this reinforces basic principles of respect for state sovereignty and jurisdiction.

*d. Ne Bis In Idem*

*Ne bis in idem* or simply stated, double jeopardy, is provided for in the Model Agreement to the effect that a “person transferred for the enforcement of a sentence passed in the sentencing State may not be tried again in the administering State for the same act upon which the sentence to be executed is based.”<sup>165</sup> This prevents a person from being punished for the same acts twice, which is generally repulsive to the public policy of states and protects the finality of judgment. The principle is also articulated in the UN

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159. RP-Spain TSPA, *supra* note 16, art. 10 (2).

160. Secretariat’s Note, *supra* note 64, ¶ 27.

161. UN Model Agreement, *supra* note 64, ¶ 22.

162. European Transfer Convention, *supra* note 38, art. XII.

163. See U.S.-Mexico TSPA, *supra* note 11, art. V (2); U.S.-Canada TSPA, *supra* note 48, art. VI.

164. RP-Spain TSPA, *supra* note 16, art. 11.

165. UN Model Agreement, *supra* note 64, ¶ 13.

International Covenant on Civil and Political Rights such that it has attained the status as a generally accepted principle of international law.<sup>166</sup>

### III. INADEQUATE IMPLEMENTING RULES AND REGULATIONS TO THE RP-SPAIN TSPA

Having discussed and presented the principles underlying prisoner transfer and its basic framework, this Note now progresses into a study of its implementation and execution, with specific reference to the Philippines. Only the RP-Spain TSPA has in fact been implemented because the other treaties ratified and concurred in by the Senate (i.e., with Hong Kong and Thailand) still await some form of enabling legislation or implementing rules and regulations. Congress has not enacted a law to govern the implementation of all transfer treaties; it has only delegated to the DOJ the power to issue IRRs for the RP-Spain TSPA.

In June 2008, the Senate adopted Senate Joint Resolution No. 7 entitled “Authorizing the Department of Justice to Issue the Implementing Rules and Regulations on the Treaty on the Transfer of Sentenced Persons Between the Republic of the Philippines and the Kingdom of Spain and Appropriating Funds for its Implementation.”<sup>167</sup> The Resolution recognized the “need for rules and regulations to be issued for the effective implementation of the Treaty”<sup>168</sup> and enumerated 16 points that needed to be addressed or clarified in the forthcoming rules and regulations. The Senate appropriated ₱5,000,000 for the implementation of the Treaty, taking into account that the transit costs for the sentenced person are to be paid for by the administering State.<sup>169</sup> The House of Representatives acted on this Resolution, which was approved upon its third reading on 10 February 2009 as House Joint Resolution No. 11.<sup>170</sup> It lapsed into law on 4 May 2009 as Joint Resolution No. 3.<sup>171</sup>

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166. International Covenant on Civil and Political Rights art. 14 (7), Mar. 23, 1976, 999 U.N.T.S. 171.

167. S. Jt. Res. No. 7, 14th Cong., 1st Reg. Sess. (2008).

168. *Id.* whereas cl., ¶ 3.

169. *Id.* ¶ 3. See also RP-Spain TSPA, *supra* note 16, art. 16.

170. H. Jt. Res. No. 11, 14th Cong., 1st Reg. Sess. (2009).

171. See Congress of the Philippines, HRJ0011, available at [http://www.congress.gov.ph/legis/search/hist\\_show.php?save=1&journal=&switch=0&bill\\_no=HJR0011&congress=14](http://www.congress.gov.ph/legis/search/hist_show.php?save=1&journal=&switch=0&bill_no=HJR0011&congress=14) (last accessed Feb. 24, 2011).

A Joint Resolution is like a bill and has the force of law once approved by the Senate, the House of Representatives, and the President, and is generally used when dealing with only a single item or issue.<sup>172</sup>

Members of the House of Representatives themselves noted how the TSPAs it had entered into were not self-executory, which is why the 14th Congress introduced House Bill (H.B.) No. 1880 on the transfer of sentenced persons in December 2007. Similar bills were also introduced in the 11th and 12th Congresses. This is cognizant of the fact that the Hong Kong and Thailand transfer treaties, although already concurred in since 2002, could not yet be implemented for lack of legislation.<sup>173</sup> H.B. No. 1880 did not become a law in the 14th Congress; whether a similar bill will be pushed in the 15th Congress remains to be seen. The reality though is that the Thailand and Hong Kong TSPAs, although in existence and concurred in five years before the RP-Spain TSPA, are still awaiting implementation. A Transfer of Sentenced Persons Law should be in order for the 15th Congress — not only to implement existing treaties, but in anticipation of future transfer treaties.

#### *A. Inadequacies of the IRRs to the RP-Spain TSPA*

Legislation or implementing rules and regulations to a transfer treaty are necessary so that a concrete decision-making framework may be utilized by individuals and their counsel when determining whether or not to make a request for prisoner transfer and to stem controversies such as in the case of Larrañaga. The considerations on the provisions and regulations should not be limited to what has already been established, but should extend to questions such as “the degree of shock to the conscience of society that would be experienced” if that prisoner is transferred and the likelihood that the person transferred would return to the Philippines after being released in the country to where he was transferred, or whether he should be allowed to return at all.<sup>174</sup> Implementing legislation is also necessary because once the treaty is entered into and ratified through the Senate’s concurrence, it becomes a source of rights to individuals eligible for transfer. In the absence

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172. See Senate of the Fourteenth Congress of the Philippines, Legislative Process: Types of Legislation, available at <http://www.senate.gov.ph/about/legpro.asp> (last accessed Feb. 24, 2012).

173. House of Representatives of the Fourteenth Congress of the Philippines, Committee News: Joint Committee Approves Bill on Transfer of Sentenced Persons, Dec. 17, 2007, available at [http://www.congress.gov.ph/committees/commnews/commnews\\_det.php?newsid=852](http://www.congress.gov.ph/committees/commnews/commnews_det.php?newsid=852) (last accessed Feb. 24, 2012).

174. See David S. Finkelstein, “Ever Been in a [Foreign] Prison?”: The Implementation of Transfer of Penal Sanctions Treaties by U.S. States, 66 FORDHAM L. REV. 125, 160-61 (1997).

of implementing legislation or rules, they cannot take advantage of these rights.

This Note, however, cautions against future legislation or duly authorized implementing rules and regulations from using the RP-Spain IRRs as a template for the future implementation of TSPAs. There are specific gaps in the implementation of the Treaty that this Note addresses and propounds should be included in future implementation. Certain gaps in these IRRs will be discussed in the next two sections from the point of the view of the Philippines as the sending State and as the receiving State. The gaps identified and discussed in this study do not purport to present a comprehensive, all-encompassing solution to potential problems confronting the implementation of transfer treaties, but it does address those problems readily apparent in light of the Larrañaga transfer, the experience of other jurisdictions such as the U.S., and taking into account principles in conflicts of law that the Philippines adheres to.

#### IV. ISSUES IN IMPLEMENTATION AS THE RECEIVING OR ADMINISTERING STATE

##### *A. The Question of Constitutionality*

A treaty is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>175</sup> In entering into a treaty, a state commits to be bound by it and to perform its obligations therein in good faith, under the principle of *pacta sunt servanda*.<sup>176</sup> Furthermore, a state cannot invoke the provisions of its internal law to justify failure to carry out its obligations under the treaty.<sup>177</sup> Nevertheless, this cannot be construed to mean that a treaty is to be blindly followed; in the Philippines, the Supreme Court has the authority to declare a treaty unconstitutional if it violates rights and principles enshrined in the Constitution.<sup>178</sup>

Thus, treaties are subject to constitutional limitations and cannot contradict the Constitution because it is, after all, the supreme law of the land. The problem posed by transfer treaties is that they destroy the

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175. Vienna Convention on the Law of Treaties art. 2 (a), May 23, 1969, 1155 U.N.T.S. 331.

176. *Id.* art. 26.

177. *Id.* art. 27.

178. PHIL. CONST. art. VIII, § 5 (2) (a). See JOAQUIN G. BERNAS, S.J., AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 64 (2009).

simplicity of constitutional territoriality.<sup>179</sup> For instance, when the first transfers were implemented between the U.S. and Mexico, the constitutionality of the Treaty between them was questioned because of a Provision providing that

[t]he [t]ransferring State shall have *exclusive jurisdiction* over any proceedings, regardless of their form, intended to challenge, modify[,] or set aside sentences handed down by its courts. The [r]eceiving State shall, upon being advised by the [t]ransferring State of action affecting the sentence, take the appropriate action in accordance with such advice.<sup>180</sup>

Consequently, an American challenging the process of his trial in Mexico could only do so in Mexico, and not before the U.S. courts. This was necessary in deference to and in recognition of the sovereignty of the transferring State. Nevertheless, the U.S. Constitution also provides that one cannot be imprisoned in the U.S. without due process of law.<sup>181</sup> Consequently, a number of Americans indirectly challenged their convictions by instituting Writ of *Habeas Corpus* proceedings once they were transferred to a U.S. facility.<sup>182</sup> They claimed that they were denied due process at their trial in Mexico and therefore, they were being detained in violation of the U.S. Constitution which includes notice and fair hearing as essential elements of due process of law. They were trying to transplant their rights under the U.S. Constitution to proceedings they had participated in at Mexico, arguing that they could not be legally detained in the U.S. without being afforded due process of law.<sup>183</sup> This is where the integrity of constitutional territoriality was put to the test.

Considering that the Philippine Constitution contains the same principle that no one shall be deprived of liberty without due process of law,<sup>184</sup> it would be useful to understand how the U.S. Supreme Court resolved this issue and upheld the constitutionality of the treaty.

#### I. Rosado v. Civiletti<sup>185</sup>

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179. Harvard Law Review Association, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 HARV. L. REV. 1500, 1503 (1977).

180. U.S.-Mexico TSPA, *supra* note 11, art. VI (emphasis supplied).

181. U.S. CONST. amend. V & VI.

182. See *Velez v. Nelson*, 475 F. Supp. 865 (D. Conn. 1979) (U.S.); *Rosado v. Civiletti*, 621 F.2d 1179 (2d Cir. 1980) (U.S.); and *Mitchell v. United States*, 483 F. Supp. 291, 294 (E.D. Wis. 1980) (U.S.).

183. *Id.*

184. PHIL. CONST. art. III, § 1.

185. *Rosado*, 621 F.2d at 1179.



In *Rosado v. Civiletti*, Efran Caban, Raymond Velez, Pedro Rosado, and Felix Melendez, all U.S. citizens, filed petitions in the District of Connecticut to be released from prison.<sup>186</sup> They were then serving a nine-year imprisonment term imposed by the Mexican courts after they were arrested in Mexico in November 1975 for narcotics offenses.<sup>187</sup> They did not receive the assistance of counsel during the Mexican criminal proceedings against them,<sup>188</sup> nor were they ever accorded an opportunity to appear before the judge who allegedly decided their case.<sup>189</sup> They were not permitted to address the charges against them, or present any evidence at all; no opportunity was given Rosado to confront the witnesses against him, and neither Caban nor Velez was allowed to cross-examine their accusers.<sup>190</sup> They were transferred to U.S. custody pursuant to the U.S.-Mexico TSPA in December 1977.<sup>191</sup> Given the circumstances under which they were convicted, they filed suit for Writ of *Habeas Corpus* proceedings alleging that they were denied due process of law in Mexico and therefore, their continued incarceration in the U.S. was in violation of the U.S. Constitution.<sup>192</sup>

As a condition to their transfer, they were required to give their express consent to the transfer, signifying that they understood they could challenge their convictions before the courts of Mexico only.<sup>193</sup> The U.S. and Mexico were also required to consent to the transfer under the Treaty.<sup>194</sup> The consent given by the offenders, the court held, constituted a waiver on their part of taking advantage of the prisoner transfer such that they were precluded from challenging their Mexican convictions in U.S. courts.<sup>195</sup> Therefore, this crucial element of consent is the factor that underpins the Treaty's constitutionality.

Furthermore, the U.S. Supreme Court emphasized the importance of sovereignty saying that, “[a]lthough the Bill of Rights does apply extraterritorially to protect American citizens against the illegal conduct of [U.S.] agents, it does not and cannot protect our citizens from the acts of a

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186. *Id.* at 1182.

187. *Id.*

188. *Id.* at 1185.

189. *Id.* at 1186.

190. *Id.*

191. *Rosado*, 621 F.2d at 1182.

192. *Id.* at 1182.

193. *Id.* at 1198.

194. U.S.-Mexico TSPA, *supra* note 11, art. IV, ¶¶ 2 & 3 & art. V, ¶ 1.

195. *Rosado*, 621 F.2d at 1198-99.

foreign sovereign committed within its territory,”<sup>196</sup> and added that Mexico as a sovereign nation could in no way be subject to the judgments of the U.S. court.<sup>197</sup>

In addition, the U.S. asserted two other interests in upholding the validity of the Treaty aside from the consent given by the offenders.<sup>198</sup> First is the U.S.’ “substantial interest in promoting good relations with Mexico by honoring its criminal convictions and recognizing the integrity of its criminal justice system.”<sup>199</sup> The second stems from fostering good relations, in that future transfers may be availed of to give Americans an “opportunity for repatriation and, hopefully, better prison conditions and more positive means for rehabilitation” — a benevolent purpose which is a valid exercise of the executive’s treaty-making power conferred by the constitution.<sup>200</sup>

The principles of constitutionality and sovereignty are closely related in the application of transfer treaties. From the *Rosado* case, it is made clear that consent of the offender to the transfer validates whatever proceedings took place in the foreign country, regardless of the offender’s allegations that he was denied his constitutional rights. This is in recognition of the sovereignty states accord each other in the international system, and in furtherance of international cooperation in criminal justice as well as providing the best environment a state can give its convicted nationals for rehabilitation.

The next question this Note tackles at this juncture is how this agreement between states in the field of international relations will translate once applied in the domestic sphere. More importantly, as the receiving State, does consent to the transfer *ipso facto* result in the recognition of the foreign penal judgment such that only the enforcement or execution of the sentence itself is left to be done?

### *B. Enforcing a Foreign Criminal Judgment*

In the study of conflict of laws or private international law, it has been noted that judgments on criminal matters are an exception to the application of foreign law in a local jurisdiction.<sup>201</sup> This principle was extracted from U.S.

196. *Id.* at 1189 (citing *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L. Ed. 2d 1148 (1957); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); *Neely v. Henkel*, 180 U.S. 109, 21 S.Ct. 302, 45 L. Ed. 448 (1901); and *United States v. Lira*, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847, 96 S.Ct. 87, 46 L. Ed. 2d 69 (1975)).

197. *Rosado*, 621 F.2d at 1190.

198. *Id.*

199. *Id.*

200. *Id.* at 1193.

201. See EDGARDO L. PARAS, *PHILIPPINE CONFLICT OF LAWS* 76 (8th ed. 1996) and JOVITO R. SALONGA, *PRIVATE INTERNATIONAL LAW* 102 (1979 ed.).

Chief Justice Marshall's pronouncement in *The Antelope*<sup>202</sup> that, "[n]o society takes concern in any crime but what is hurtful to itself."<sup>203</sup> This stemmed from the fact that criminal punishment was viewed as retribution carried out on behalf of the sovereign and therefore, could have no effect beyond the sovereign's borders.<sup>204</sup> Consequently, courts will not base a conviction for a criminal offense on the breach of a foreign penal law and neither will it enforce foreign judgments given in penal proceedings.<sup>205</sup> As described by former Senator Jovito R. Salonga in his seminal work on private international law, "if a man commits a crime in State 1, is tried and convicted there, and later escapes to State 2, judgment against him in State 1 will be refused enforcement in State 2."<sup>206</sup> This Section examines to what extent this principle has been affected by prisoner transfer agreements and reconciles this with TSPAs.

### 1. The DOJ Opinions

Dr. Plachta, an authority on transfer treaties, has noted that

there are still two basic attitudes towards the conflict between criminal justice and state sovereignty which are also reflected in the prisoner transfer concept: a modern one, favouring the concept of international justice, solidarity and effective cooperation in the war against criminality; and a conservative one, assuming that a judgment of a court constitutes an expression of the sovereignty of a state and that its enforcement in another state is deemed to be an infringement of the latter's sovereignty.<sup>207</sup>

Sovereignty is the "power to affect legal interests either by legislative, executive or judicial action" and "is a property of a State ... giving it the exclusive capacity of self-determination and self-restriction."<sup>208</sup>

It appears that the Philippines has espoused this second, more conservative point of view of the prisoner transfer concept. This is reflected in a series of DOJ Opinions which will be discussed below.

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202. *The Antelope*, 23 U.S. 66, 1825 WL (1825).

203. SALONGA, *supra* note 201, at 102 (citing *The Antelope*, *supra* note 202).

204. Sherman, *supra* note 56, at 506.

205. See SALONGA, *supra* note 201, at 102.

206. *Id.*

207. Sherman, *supra* note 56, at 508 (citing PLACHTA, *supra* note 59, at 149).

208. JOAQUIN G. BERNAS S.J., THE 1987 PHILIPPINE CONSTITUTION: A COMPREHENSIVE REVIEWER 8 (2006).

*a. DOJ Opinion No. 080, s. 1986*<sup>209</sup>

On whether a Filipino convicted of murder by a British court could serve his life sentence in the Philippines, then Minister Neptali A. Gonzales replied that the following actions would need to be taken: (i) the Philippines would have to pass domestic legislation permitting the transfer of Filipinos convicted abroad to serve sentence in the country; and (ii) an agreement would have to be signed between both governments for a transfer to take place, such as the Council of Europe Convention on the Transfer of Sentenced Persons or a bilateral agreement between states.<sup>210</sup> Minister Gonzales then stated that no such law or agreement existed at the time and therefore, there would be no basis for a transfer.<sup>211</sup>

*b. DOJ Opinion No. 118, s. 1987*<sup>212</sup>

Again, the case of the Filipino serving sentence in the United Kingdom was brought before the DOJ under then Secretary Sedfrey A. Ordoñez.<sup>213</sup> In response to the query of whether the Filipino national could serve his sentence in the Philippines as it would be in his best interests, Secretary Ordoñez wrote that the proposed transfer would

in effect require the Philippine Government, not only to recognize, but also to enforce in the Philippines, the judgment of a British court in a criminal case. We are not aware of any provision in Philippine law authorizing the recognition and enforcement of a foreign judgment in criminal proceedings. Under the Revised Rules of Court, only judgments of foreign courts in civil cases, particularly, those involving a person or specific thing may be given effect in the country. (Sec. 50, Rule 39). ... As a rule, criminal laws are territorial in character and have therefore no application beyond the limits of the sovereignty which enacted them.<sup>214</sup>

Thus, the DOJ dispensed with the request for transfer citing that Philippine law neither recognizes nor authorizes the recognition and enforcement of a foreign penal judgment.<sup>215</sup>

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209. DOJ Opinion No. 080, s. 1986.

210. *Id.*

211. *Id.*

212. DOJ Opinion No. 118, s. 1987.

213. *Id.*

214. *Id.*

215. *Id.*

*c. DOJ Opinion No. 002, s. 1992*<sup>216</sup>

This case involved Filipino seamen, cleared of drug trafficking charges but convicted for contempt of court in Canada, who had requested to be deported to the Philippines to serve their sentence here instead of in Canada.<sup>217</sup> Then Acting Secretary Silvestre H. Bello merely reiterated the stance taken in the DOJ Opinions above that domestic legislation and an agreement between states would have to be passed to enable such a transfer to take place.<sup>218</sup> It is worth noting that this may have been the impetus for the conclusion of the RP-Canada TSPA which, however, has not yet been concurred in by the Senate of the Philippines.

*d. DOJ Opinion No. 046, s. 1994*<sup>219</sup>

Justice Secretary Franklin M. Drilon in response to a query from the Philippine Embassy in Bangkok for guidelines on exploring a mutual repatriation act of prisoners between the RP and Thailand stated that “any such agreement for mutual repatriation of prisoners would also be legally infirm if it would involve a transfer of service of sentence of convicted Filipino prisoners abroad.”<sup>220</sup> He reiterated that Philippine law did not authorize the recognition or enforcement of a judgment of a foreign court in a Philippine court.<sup>221</sup> Nevertheless, it seems that this may have also sparked the conclusion of the RP-Thailand TSPA on 12 October 2001 and ratified on 7 May 2002.

This brief summary of DOJ Opinions stresses the fact and general belief consistently held by the DOJ that the recognition and enforcement of a foreign penal judgment needed to be authorized by law and was a stepping stone to permitting a transfer of prisoners. This stance conflicts with that of prisoner transfer precisely because receiving a prisoner requires the recognition of a foreign criminal conviction; without recognition, there would be nothing to enforce.

## 2. Treaties as Law in the Philippines

There is no custom under international law and relations regarding the transfer of sentenced persons that has been established yet.<sup>222</sup> Under the Philippine Constitution, a treaty not embodying a generally accepted

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216. Department of Justice, DOJ Opinion No. 002, Series of 1992 (Jan. 7, 1992).

217. *Id.*

218. *Id.*

219. Department of Justice, DOJ Opinion No. 046, Series of 1994 (Apr. 7, 1994).

220. *Id.*

221. *Id.*

222. Sherman, *supra* note 56, at 508 (citing PLACHTA, *supra* note 59, at 148).

principle of international law (e.g., a customary law) is not considered as being part of the law of the land unless it has concurred in by the Senate in accordance with Article VII, Section 21 of the Constitution.<sup>223</sup> This act of concurrence transforms the treaty into binding municipal law. Granting that TSPAs have the force of law in the Philippines once ratified, does it also mean that this is sufficient basis in itself to permit the recognition and enforcement of a foreign criminal conviction? This Note replies in the negative, arguing that a procedure or mechanism must be in place recognizing the foreign penal judgment *before* the transfer and necessary enforcement may be undertaken. The TSPA is not self-executory. The Senate recognized this by delegating the power to implement rules and regulations to the DOJ and appropriating funds for the RP-Spain TSPA,<sup>224</sup> echoing the point of view taken in the DOJ Opinions discussed. This view was also supported by a Director of the Department of Foreign Affairs' (DFA) Legal Affairs Office who stated that the prisoner transfer agreements entered into by the Philippines, as of 2007, could not be implemented due to the absence of domestic legislation on the matter or until Congress gives the DFA express authority to issue implementing rules and regulations and are allocated funds for the purpose.<sup>225</sup> The DOJ failed, however, to institute a procedure for recognizing and enforcing these foreign criminal judgments in the RP-Spain IRRs.

A reading of the RP-Spain TSPA does not yield any provision for the recognition of a foreign judgment or specify under what authority this may be premised on.<sup>226</sup> Although arguably, a treaty premised on the consent of the parties is anchored on and legitimized by that very consent because the party-states *chose* to enter into the treaty and therefore, voluntarily bound themselves to its contents, and in the case of TSPAs, to recognize a foreign criminal judgment so that it may be enforced, nevertheless, its implementation must follow a procedure that conforms with the law of the administering State. Considering that foreign judgments in civil or commercial matters must be proven before a local court before it may be enforced,<sup>227</sup> there should likewise be a process for legitimating the enforcement of criminal judgments in the Philippines.

### 3. Enforcement Governed by Law of the Administering State

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223. PHIL. CONST. art. VII, § 21.

224. S. Jt. Res. No. 7.

225. House of Representatives, Committee Affairs Department, Joint Committee Approves Bill on Transfer of Sentenced Persons, *available at* [http://www.congress.gov.ph/committees/commnews/commnews\\_det.ph?newsid=852](http://www.congress.gov.ph/committees/commnews/commnews_det.ph?newsid=852) (last accessed Feb. 24, 2012).

226. *See* RP-Spain TSPA, *supra* note 16.

227. *See* 1997 RULES OF CIVIL PROCEDURE, rule 39, § 48.

To reiterate, TSPAs provide in their contents that the enforcement of a sentence will be governed by the law of the administering State.<sup>228</sup> This means that the sentence will be enforced according to the laws and regulations of the receiving State on parole, conditional release, good conduct allowances, and the like.<sup>229</sup> Unless and until a procedure for recognition of judgment is in place, this Note posits that the sentence cannot be enforced in the receiving State. Recognition within this context is understood to be the receiving State's official acceptance of the criminal judgment as valid. There can be no *ipso facto* recognition of the foreign criminal conviction upon the ratification of the treaty because the effective enforcement would require recognizing the judgment in order to iron out the details of enforcement. These details may include an adaptation of the penalty involved (e.g., determining where a penalty would fall under the nomenclature used in the RPC), determining where and what type of facility the transferee should be imprisoned in based on the judgment or if necessary, the facts of the case (e.g., a maximum or minimum security facility, the National Penitentiary, or a provincial jail), and to whom the sentenced person must report to if or when eligible for parole or conditional release.

Furthermore, because the law of the receiving State governs the administration of the enforcement, the next logical question to ask is: What is the law of the administering State? This is where the importance of implementing legislation is crucial. Although the IRRs to the RP-Spain TSPA provides in Section 30 that "unless the Treaty provides otherwise, the laws, rules and regulations of the Philippines pertaining to prisoners shall, whenever appropriate, apply to a sentenced person falling under the coverage of the Treaty,"<sup>230</sup> it remains unclear what these laws might be. As much as this general statement should be contained in implementing legislation, there should be specific references to the law as well. In the U.S., for example, federal legislation identifies the U.S. Parole Commission as responsible for determining when a transferred offender is eligible for parole and identified pertinent sections of Title 18 on Crimes and Criminal Procedure that will apply in these cases.<sup>231</sup> Likewise, it would be useful to identify the agencies responsible and laws applicable to prisoners when the Philippines is the receiving State.

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228. See, e.g., RP-Spain TSPA, *supra* note 16, art. 10; European Transfer Convention, *supra* note 38, art. 9 (3); US-Mexico TSPA, *supra* note 11, art. V (2).

229. See, e.g., Code of Federal Regulations, 28 C.F.R. 2.68 (2008); Paula Wolff, The International Prisoner Transfer Program, *available at* <http://www.ilw.com/articles/2007,0515-wolff.shtm> (last accessed Feb. 24, 2012).

230. DOJ Dept. Circ. No. 15-09, § 30.

231. 18 U.S.C.A. § 4106.

*a. RPC*

Articles 97 and 98 of the RPC provide the rules on time allowances for good conduct and loyalty, respectively.<sup>232</sup> Time allowances for good conduct and loyalty are afforded all prisoners because it is beneficial for them and ideally works as an incentive for reformation and rehabilitation. Offenders received by the Philippines should likewise be eligible for these time allowances, which are granted by the Director of Prisons.<sup>233</sup> Depending on where the offender is incarcerated, the good conduct time allowance is determined by the Bureau of Corrections or the Bureau of Jail Management and Penology.

*b. The Indeterminate Sentence Law<sup>234</sup> and the Board of Pardons and Parole*

When a court imposes a sentence, it generally has to comply with the Indeterminate Sentence Law which requires that the sentence imposed must have maximum and minimum terms, instead of a singled fixed term or penalty,<sup>235</sup> unless it falls under the exceptions to its application found in Section 2.<sup>236</sup> Once an offender has served the minimum terms of his or her sentence based on a final judgment of conviction, he or she becomes eligible for parole. Parole is the “conditional release of an offender from a

232. See REVISED PENAL CODE, arts. 97 & 98. Article 97 on allowance for good conduct enumerates deductions a prisoner may be entitled to for good behavior, while Article 98 provides for a one-fifth deduction under the specified circumstances.

233. *Id.* art. 99. It provides that, “[w]henever lawfully justified, the Director of Prisons shall grant allowances for good conduct. Such allowances once granted shall not be revoked.” *Id.*

234. An Act to Provide for an Indeterminate Sentence and Parole for All Persons Convicted of Certain Crimes by the Courts of the Philippine Islands; to Create a Board of Indeterminate Sentence and to Provide Funds Therefor and for Other Purposes [Indeterminate Sentence Law], Act. No. 4103, as Amended (1965).

235. See LUIS B. REYES, 1 REVISED PENAL CODE 775 (17th ed. 2008).

236. Indeterminate Sentence Law, § 2. This Section provides for the following exceptions:

to persons convicted of offenses punished with death penalty or life-imprisonment; to those convicted of treason, conspiracy or proposal to commit treason; to those convicted of misprision of treason, rebellion, sedition or espionage; to those convicted of piracy; to those who are habitual delinquents; to those who have escaped from confinement or evaded sentence; to those who having been granted conditional pardon by the Chief Executive shall have violated the terms thereof; to those whose maximum term of imprisonment does not exceed one year, not to those already sentenced by final judgment at the time of approval of this Act, except as provided in Section 5 hereof.

*Id.*



correctional institution after he has served the minimum of his prisoner sentence.”<sup>237</sup> The Board of Pardons and Parole reviews and determines whether an individual is eligible for parole. Arguably, a transferred offender should also be eligible for parole when transferred, just as any other local offender would be, again in recognition of the purposes of imprisonment and the TSPA. Thus, there should be a proviso recognizing the role of the Board of Pardons and Parole as regards a transferred prisoner.

*c. The Probation Law*<sup>238</sup>

Probation is the “disposition under which a defendant, after conviction and sentence, is released subject to conditions imposed by the court and to the supervision of a probation officer.”<sup>239</sup> The offender is released subject to conditions instead of being made to serve sentence in confinement. Probation is a special problem when acting as the receiving State because court intervention is necessary in probation proceedings. Under the Philippines’ Probation Law,<sup>240</sup> the probationer and his probation program are under the control of the court that placed him on probation subject to the actual supervision of a probation officer.<sup>241</sup> A probationer is subject to the jurisdiction of the court that permitted his probation and necessarily so because in case he violates the terms of probation, that same court will have the authority to issue a warrant of his arrest so that he may be detained and ordered to serve his sentence in confinement after due hearing.<sup>242</sup>

Therefore, in cases where a treaty provides that an offender on probation may be eligible for transfer to the Philippines, the DOJ must determine the court that will exercise jurisdiction over the offender and coordinate with the Parole and Probation Administration, which should be jointly held responsible for supervising the offender’s probation according to their respective rules.

*C. Recommendations for Legislation: Philippines as the Receiving State*

Summarizing the problems and issues posed by a TSPA with the Philippines as the receiving State, the following are this Note’s recommendations for

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237. Board of Pardons and Parole, Revised Rules and Regulations of the Board of Pardons and Parole, § 2 (l) (Nov. 26, 2002).

238. Establishing a Probation System, Appropriating Funds Therefor and for Other Purposes [Probation Law of 1976], P.D. No. 968, as amended by P.D. No. 1257, and as Further Amended by B.P. Blg. 76 and P.D. No. 1990 (1976).

239. *Id.* § 3 (a).

240. Probation Law of 1976.

241. *Id.* § 13.

242. *Id.* § 15.

inclusion in future legislation which will act as the law of the administering State.

### 1. Receiving State Must Verify the Offender's Consent to Transfer

In order to forestall an attack on the constitutionality of the transfer on due process grounds, the administering State must also actively take measures to verify the offender's consent, which following the *Rosado* case would amount to a waiver of the right to question in the Philippines his conviction in the foreign country. The RP-Spain TSPA provides in Article 5 (2) that the "sentencing State must make it possible for the administering State, *if it so desires*, to verify and make sure that the sentenced person is aware of the legal consequences involved in the transfer, and his consent is voluntarily given."<sup>243</sup> This permissive language must be made mandatory in legislation such that verifying an offender's consent cannot be optional on the part of the receiving State but a requirement before transfer may be effected. Section 20 of the RP-Spain IRRs does provide a clear process for verifying consent and this should be maintained in implementing legislation.<sup>244</sup> But even if the offender's consent operates as a waiver of the right to question one's conviction before the court of the receiving State, the offender is not precluded from going to court on other grounds, such as to question the manner in which the transfer was carried out.<sup>245</sup>

Neither may the infringement of a state's sovereignty be used a ground to support an attack on a TSPA because of the following principles: (a) the treaty has the force of law; (b) states made the conscious decision and choice to enter into the agreement and therefore, must abide by it in good faith; (c) in cases where a transfer has been made, the states have given their consent to the transfer. All these conscious choices made the by the state amount to safeguards to a state's sovereignty because of the fundamental fact that the states voluntarily agreed to enter into the treaty.

### 2. Procedure for Recognition of the Foreign Penal Judgment

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243. RP-Spain TSPA, *supra* note 16, art. 5 (2).

244. DOJ Dept. Circ. No. 90, § 15. This Section provides:

Section 15. Verification of Consent. — Before giving his or her consent to the transfer, the Secretary of Justice, through the Philippine Embassy or Consular officials in the sentencing State, shall verify the consent of the sentenced Filipino national requesting his or her transfer to ensure that the same is voluntarily given and with full knowledge of the consequences thereof.

*Id.*

245. See Walsh & Zagaris, *supra* note 9, at 419.

When the Philippine receives a request for an individual to be transferred into its jurisdiction, the agency designated by Congress is responsible for determining whether or not it meets the requirements of the treaty and whether to permit the transfer. Since the treaties in force have already identified the DOJ as the Central Authority,<sup>246</sup> for the sake of uniformity and to facilitate the processing of requests, there is no objection to designating the DOJ as the agency responsible for evaluating and acting on a request. Moreover, once an offender has been transferred, agencies attached to the DOJ such as the Bureau of Corrections and the Parole and Probation Administration exercise supervision over the offender such that designating the DOJ would serve to streamline the transfer process.

This Note propounds that once the DOJ assents to receiving a prisoner, such consent should be considered as recognition of the foreign criminal judgment and as upholding the validity of the judgment. This should be clearly stated in the implementing legislation in line with the principle advocated by the DOJ Opinions that a treaty or international agreement *and* legislation are necessary in order to enforce a foreign judgment of conviction in the Philippines.<sup>247</sup>

Recognition of the penal judgment before a court of law is unnecessary for purposes of approving a transfer because the state's consent to transfer through the DOJ after the latter has received all the necessary documentation from the sending State operates as conferring recognition over the judgment and precisely because the implementing law of the administering State will make clear that consent to a specific transfer operates as recognition of the judgment. Consent, after all, is the key element in effecting prisoner transfers.

### 3. Law Governing After Transfer

Once the transfer has been carried out, a TSPA invariably provides that the enforcement of the sentence shall be governed by the law of the administering State.<sup>248</sup> This statement refers to existing laws in place at the state governing parole, time allowances, and other rules and regulations that have an impact on serving sentence. This does not preclude, however, the enactment of a specific law to govern enforcement either. Such a law as the one proposed by this Note could be considered the law of the administering State. Among other provisions, this law will provide that the provisions in the RPC on good conduct allowances shall also apply to a transferred offender as well as the rules and regulations promulgated by the Board of Pardons and Parole, the Bureau of Corrections, the Bureau of Jail

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246. See, e.g., RP-Spain TSPA, *supra* note 16, art. 3.

247. See Chapter IV.B.1 of this Note.

248. UN Model Agreement, *supra* note 64, ¶ 21.

Management and Penology, and the Parole and Probation Administration. The DOJ will also be given sufficient discretion to implement rules and regulations as it sees fit in furtherance of achieving the goals and purposes of transfer treaties.

## V. ISSUES IN IMPLEMENTATION AS THE SENDING OR SENTENCING STATE

### A. *Transfer of Prisoners as Discretionary*

#### 1. Transfer is Not a State's Legal Obligation Under a TSPA

Contrary to a news article with the heading “RP obliged to transfer rapist” and the accompanying statements in the report by [former] President Macapagal-Arroyo’s chief legal counsel, Raul Gonzalez, that “[t]here is an obligation on our [the Philippines’] part to exchange prisoners,”<sup>249</sup> a TSPA does not impose the obligation to transfer. Neither is a TSPA a treaty concerning the exchange of prisoners. Gonzalez went so far as to say that refusing to transfer Larrañaga would make the Philippines a “rogue country” so much so that “[w]e will all look like fools when we sign and ratify a treaty and not recognize it later on.”<sup>250</sup> These statements were made after the family of the rape victims learned of Larrañaga’s impending transfer and was seeking to bar the transfer.<sup>251</sup>

This is not to say that the RP-Spain TSPA or TSPAs in general do not create a binding obligation on the parties to the treaty. The obligation to transfer, however, is not automatic. Precisely because the treaty is premised upon international cooperation based and founded on mutual respect for national sovereignty and jurisdiction,<sup>252</sup> both states must consent to the transfer (the offender must consent as well). A state has the prerogative to refuse transfer.

How must this prerogative be exercised? This Note submits that determining eligibility for transfer is not a ministerial function but a discretionary duty of the state under the terms of the treaty. Due to its discretionary nature, implementing a transfer must provide a procedure for evaluating eligibility for transfer based not only on the personal circumstances of the offender but also on its possible impact on society at large, especially upon the families of the victims.

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249. Esguerra & Avendaño, *supra* note 33.

250. *Id.*

251. Jhunnex Napallacan, *Rape victims' kin to fight Larrañaga transfer*, PHIL. DAILY INQ., Sep. 25, 2009, available at <http://newsinfo.inquirer.net/topstories/topstories/view/20090905-223753/Rape-victims-kin-to-fight-Larraaga-transfer> (last accessed Feb. 24, 2012).

252. UN Model Agreement, *supra* note 64, ¶ 2.

*a. Wording of the Treaty*

Although not immediately evident in the wording of the RP-Spain TSPA, both states may in fact exercise their discretion and may accept or decline a transfer. Article 3 (3) provides that the request and *reply* to such request for transfer shall be transmitted through diplomatic channels while Article 3 (4) states that, “[d]ecisions taken by a State with a view to executing this Treaty shall be notified without delay to the other State without any need for stating the grounds therefor.” What can be understood from this ambiguity is that at some level, a State must make a decision in the execution of the Treaty. It is unclear what this decision might be but arguably, it is the decision whether to accept or to refuse a request for transfer. A comparison of the RP-Spain TSPA with other TSPAs entered into by the Philippines and the TSPAs of other countries more clearly demonstrates the discretionary nature of prisoner transfer.

The RP-Thailand TSPA states in Article 4 (g) that the transferring and receiving States and the sentenced person all agree to the transfer and qualifies that the transfer of the sentenced person “does not prejudice either Party’s sovereignty, security, public order[,] or other essential interests.”<sup>253</sup> Thus, when a state determines that its essential interests may be prejudiced by the transfer of the person, it may decline to transfer the offender. The RP-Hong Kong TSPA also requires the consent of the transferring and receiving Parties and the sentenced person. This trilateral consent is a constant feature and requirement of transfer treaties also explicitly expressed in the UN Model Agreement and European Transfer Convention,<sup>254</sup> precursors to numerous TSPAs.

Even if the RP-Spain TSPA did not explicitly state that all parties must consent, this was nevertheless understood as a requirement as can be gleaned from the Senate Journal wherein the minutes of the discussion to the concurrence to the RP-Spain TSPA were published. In her sponsorship speech and interpellation, Senator Miriam Defensor-Santiago clarified that “[the RP-Spain TSPA] does not impose a legal obligation to consent to the request for transfer. This is why the [T]reaty does not list any grounds for requesting a transfer. Neither does the [T]reaty provide sanctions for noncompliance. In short, this treaty is purely consensual.”<sup>255</sup>

Establishing the discretionary nature of a TSPA is necessary in order to avoid falling into the trap that as a treaty, a transfer must be carried out with no exceptions, as Secretary Gonzalez boldly pronounced. Since a state does have the option to refuse, there must be some guidelines for determining

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253. RP-Thailand TSPA, *supra* note 15, art. 4 (h).

254. See UN Model Agreement, *supra* note 64, ¶ 5; European Transfer Convention, *supra* note 38, art. 3.

255. S. JOURNAL Sess. No. 36, at 709-10.

whether or not to refuse, and the authority to do so must be clearly reposed in a specific body.

*b. Guidelines Established in Other Jurisdictions*

In the U.S., it has been noted that only “prisoners with low culpability are likely candidates for transfer, and they are the best candidates for rehabilitation.”<sup>256</sup> The enabling legislation of the state of Ohio required the following to be considered when deciding whether or not to approve a transfer:

(1) the nature of the prisoner's offense; (2) the likelihood that the prisoner would serve a shorter sentence in the receiving [S]tate than he would in Ohio; (3) the likelihood that the prisoner would return or attempt to return to Ohio after being released from imprisonment in the receiving [S]tate; (4) the degree of shock to the conscience of society that would be experienced in Ohio if the prisoner is transferred; and (5) all other factors that are deemed relevant to the determination.<sup>257</sup>

This evaluation is made by the Director of Rehabilitation and Correction.<sup>258</sup> Furthermore, courts are given the authority to review transfer decisions.<sup>259</sup>

The U.S. Department of Justice's International Prisoner Transfer Unit, which processes requests on the federal level, has also published guidelines as regards the evaluation of transfer applications of federal prisoners.<sup>260</sup> These include factors such as: (1) the likelihood of social rehabilitation (this includes accounting for the offender's criminal history, the seriousness of offense, family and other social ties to the sending and receiving countries, and length of time in the U.S., among others); (2) law enforcement concerns (such as public sensibilities, public policy, and possible sentencing disparity due to the law of the administering State); and (3) likelihood of return to the U.S.<sup>261</sup>

In Canada, the International Transfer of Offenders Act<sup>262</sup> provides that the Minister must consider whether in his opinion: (1) the offender will

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256. Antonacci, *supra* note 77, at 62.

257. Finkelstein, *supra* note 174, at 153 (citing OHIO REV. CODE ANN. § 5120.53 (D) (West Supp. 1996) (U.S.)).

258. *Id.*

259. *Id.*

260. U.S. Department of Justice, International Prisoner Transfer Unit, Guidelines for Evaluation of Transfer of Applications of Federal Prisoners, *available at* <http://www.justice.gov/criminal/oeo/iptu/guidelines.html> (last accessed Feb. 24, 2012).

261. *Id.*

262. International Transfer of Offenders Act.

commit a terrorism offense if transferred and (2) whether the offender has already been transferred under the Act or the precursor to it, which was the Transfer of Offenders' Act of 1985.<sup>263</sup>

In Palau, which was formerly a UN Trust Territory being administered by the U.S., the Minister of Justice must take account of the following factors in deciding a request for transfer:

- (1) whether the transfer would adversely affect the rights of the victims of the offense, particularly with respect to any rights to the payment of restitution or compensation by the person;
- (2) whether the transfer would contribute positively to the person's social rehabilitation and lawful reintegration into society;
- (3) the seriousness of the crime;
- (4) the person's previous criminal record;
- (5) the physical and mental health of the person;
- (6) the ties that the person may have to the transferring and receiving countries;
- (7) the capability of the receiving country to enforce the sentence or conditions of release, and the likelihood of enforcement in substantial compliance with the court order;
- (8) considering the economic status and other factors of the transferring country, the ability of that country to enforce the sentence or conditions of release in that country if the person is not transferred;
- (9) the respective prison conditions in the transferring country and the receiving country, if the person has been sentenced to imprisonment, including whether the prison conditions in the receiving country are at least substantially equivalent to the minimum standards for imprisonment in the transferring country;
- (10) whether the transfer will substantially contribute to the development of more effective regional and international cooperation in law enforcement, particularly with respect to penal matters; and
- (11) whether the transfer will advance the principles embodied in the Universal Declaration of Human Rights, adopted on 10 December 1948, and the International Covenant on Civil and Political Rights, adopted on 16 December 1966.<sup>264</sup>

Philippine implementing legislation must likewise provide the DOJ a set of non-exclusive guidelines to facilitate the decision-making process with

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263. *Id.* § 10 (2).

264. Extradition and Transfer Act of 2001, § 43 (e) (2001) (Pal.).

regard to permitting or refusing a transfer. This is necessary also to ensure that if the DOJ is delegated the task of further implementing rules and regulations to streamline the process, such a delegation will not be susceptible to attack for being incomplete or failing to set a standard. Furthermore, Congress should prescribe guidelines and not leave it to the DOJ's discretion because a TSPA is part of the state's foreign policy and the state's conduct in foreign affairs should not be left to the discretion of an administrative body.<sup>265</sup>

If an offender's request for transfer is denied, he or she should be given the opportunity to appeal the DOJ's adverse decision through the appropriate appellate procedure in place at the time of the decision.

An exception to the DOJ's authority in the implementation of transfer treaties would be in case of the transfer of an offender on probation. Due to the nature of probation as suspending the execution of sentence and placing the offender under the supervision of a probation officer under an order of the court, a court process must likewise be undertaken to detain the offender, terminate his probation in the sentencing State, and transfer him. Under the Probation Law, the court orders the final discharge of the probationer upon finding that all terms and conditions of the probation have been fulfilled.<sup>266</sup> In an analogous manner, the court must evaluate his eligibility for transfer using the same guidelines as the DOJ, order the termination of probation, and order the DOJ to facilitate the transfer.

### *B. Dual Citizenship Concerns*

Dual citizenship, as a function of dual heritage or as provided in the Dual Citizenship Law,<sup>267</sup> the latter being a relatively new privilege available to Filipinos, cannot be easily placed in the context of prisoner transfer. On the one hand, TSPAs exist to permit offenders to carry out their sentence in their home country, which is invariably the state of their nationality or citizenship. On the other hand, social rehabilitation and reintegration is more effective when it happens in a state wherein one has genuine ties, which may be the country of residence, regardless of nationality or citizenship.

Dual citizens cannot claim to have equally strong ties to both states of their citizenship. Giving them the option to serve their sentence in either state, regardless of closer ties, might frustrate the ends for which transfer treaties are entered and may also result in the frustration of justice as far as the offended parties may be concerned. The Larrañaga case is useful in understanding this position.

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265. See Finkelstein, *supra* note 174, at 156.

266. Probation Law of 1976, § 16.

267. Citizenship Retention and Re-acquisition Act of 2003.



### I. Larrañaga Revisited

Paco Larrañaga was born to a Filipino mother and a Spanish father. Because both Spain and the Philippines abide by the *jus sanguinis* principle, he was able to petition for transfer to Spain as a Spanish national under the RP-Spain TSPA. Private international law, however, recognizes dual citizenship as a problem that arises only as far as a third state is concerned.<sup>268</sup> Thus, as far as the Philippines is concerned, he is Filipino and as far as Spain is concerned, he is Spanish. Under the TSPA, Spain is required to give proof of citizenship or nationality to the sentencing State.<sup>269</sup> Spain claimed Larrañaga as Spanish; nevertheless, there is no third state involved in this case and in the absence of any renunciation of Filipino citizenship, in the eyes of the Philippines, Larrañaga is still Filipino. Arguably, having resided in the Philippines since birth does not reflect genuine ties to Spain and therefore, it would seem that sending him to Spain would not provide the best environment for his rehabilitation. And yet, the Treaty as it exists provides this loophole which may be tantamount to a failure of justice for permitting a national to leave the jurisdiction of the sentencing State because of the fact that he has another nationality or citizenship. This is an issue that could be addressed by adequate legislation.

This Note argues that the best way to mediate such a situation is to refer to Plachta's genuine ties argument.<sup>270</sup> As the sentencing State which must consent to the transfer, the Philippines should provide guidelines in implementing legislation that rely not only on nationality but also on domicile when determining eligibility for transfer.

Under the U.S.-Mexico TSPA, it has been noted that U.S. domiciliaries and permanent resident aliens are not often transferred outside the U.S. This is because the

domiciliary's social ties are principally with the sentencing country rather than the receiving country. Under these circumstances it is doubted that the rehabilitative objectives of transfer would be achieved because the prisoner will be more isolated after transfer to his country of nationality than he was in the sentencing country.<sup>271</sup>

Thus, domicile may be a deciding factor when dealing with cases wherein both states to the transfer have determined that an offender is a national of their state according to their respective laws.

### C. Right to Be Informed of Transfer Treaty

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268. PARAS, *supra* note 201, at 104.

269. RP-Spain TSPA, *supra* note 16, art. 9.

270. See Chapter II.D.I.a of this Note.

271. Walsh & Zagaris, *supra* note 9, at 399-400.

The RP-Spain TSPA provides that the “competent authorities of each State shall inform those sentenced persons who are nationals of the other State about the possibilities of transfer available under this Treaty and the legal consequences arising therefrom.”<sup>272</sup> This Provision is found in most transfer treaties and in the UN Model Agreement.<sup>273</sup> It has been noted in the U.S. that, “[t]he failure to notify eligible prisoners of the possibility of transfer contravenes the transfer treaties.”<sup>274</sup> Dr. Plachta points out that the failure of implementing legislation to specify an authority that should be responsible for furnishing information for transfer is surprising considering that most treaties provide that transfer may be initiated by the offender.<sup>275</sup> If local legislation has no mechanism for informing the offender, the latter may never have the opportunity to request transfer and may defeat the purposes for which the treaty exists. Thus, it is of particular significance to provide in implementing legislation the measures that should be undertaken to inform the offender of the possibility of his or her transfer.

In implementing legislation promulgated in the state of New York, there is a Provision stating that confinement facilities must have a law library with sufficient information to inform persons who are citizens of a treaty nation of the existence of transfer treaties and how they may initiate a request for return to their country of citizenship.<sup>276</sup> In Canada, the Correctional Service of Canada is obliged to furnish to convicted foreign citizens to whom the European Transfer Convention applies certain documents including standard information on and a copy of the Convention, a copy of the Transfer of Offenders Act of Canada, and an application transfer form.<sup>277</sup> While in Ireland, the implementing legislation provides that a person to whom the provisions “may apply shall be informed, in a language which he or she understands, as soon as may be after the commencement of the sentence, of the substance of this [Transfer of Sentenced Persons Act].”<sup>278</sup>

#### *D. Recommendations for Future Legislation: Philippines as the Sending State*

##### I. Guidelines for Sentencing State’s Consent

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272. RP-Spain TSPA, *supra* note 16, art. 5 (1).

273. UN Model Agreement, *supra* note 64, ¶ 6.

274. Finkelstein, *supra* note 174, at 154.

275. Plachta, *supra* note 27, at 1062.

276. N.Y. CORRECT. § 71, (McKinney) (U.S.).

277. Plachta, *supra* note 27, at 1063.

278. Transfer of Sentenced Persons Act, 1995, Act. No. 16/1995 § 3 (1995), available at <http://www.irishstatutebook.ie/1995/en/act/pub/0016/print.html> (last accessed Feb. 24, 2012) (Ir.).

Factoring in the feedback from the country's first foray into the arena of prisoner transfer in the Larrañaga case, there should be specific guidelines in implementing legislation that the DOJ is obliged to take into consideration when acting on a request for transfer. One primary consideration, to borrow from the Ohio Statute, would be the shock to the conscience of justice and society that the transfer would cause, taking into account the seriousness or deplorability of the crime. It is important to take into consideration the nature of the offense because permitting transfer may depreciate the seriousness of the offense.<sup>279</sup> Hand in hand with this would be a guideline implementing Senator Defensor-Santiago's suggestion that the victim's family be given notice of the request for transfer to avoid any accusation of violating due process of law.<sup>280</sup> This notice should not in any way be construed, however, as requiring the consent of the private offended party. Since transfers are discretionary acts of the Executive, any acts of the victim or victim's family may be taken into consideration only in the discretion of the decision-making body.

Nevertheless, these considerations should also be balanced and weighed against the purposes of prisoner transfer, especially those dealing with the extent to which the offender's reformation and reintegration into society may be promoted. Remembering that transfer is discretionary, guidelines instructing the DOJ to take into account such factors as it deems relevant may be included, provided that such factors are disclosed in the DOJ's decision. The written disclosure of reasons for denying a request for transfer is a feature found in the implementing legislation of Canada;<sup>281</sup> in Ireland, the reasons for not granting an application are given where practicable and where the interests of justice would not preclude such a disclosure;<sup>282</sup> U.S. federal guidelines, however, provide that the reasons for denial are provided only upon request of the inmate.<sup>283</sup>

Since there is no right to be transferred, implementing legislation should also make clear that it is explained to the applicant that the process is discretionary and that his transfer may be refused, and in cases where refused, the offender should be given the reasons for such when practicable.

## 2. Guidelines for Determining Eligibility for Transfer of a Dual Citizen

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279. See ERNESTO A. MIGUEL & LEVI MALLARI ARGOSO, COMPILATION ON PROBATION AND PAROLE SYSTEMS IN THE PHILIPPINES 161 (1st ed. 1998).

280. Bautista & Nubia, *supra* note 44.

281. International Transfer of Offenders Act, § 11 (2).

282. Transfer of Sentenced Persons Act, 1995, § 10 (2).

283. Transfer of Foreign Offenders to or from Foreign Countries Program Statement, P5140.39, 9 (Dep't of Justice, Bureau of Federal Prisons 2009) (U.S.).

Under the Hague Convention on Conflict of Nationality Laws,<sup>284</sup> any question on whether a person is a national of a particular state should be determined in accordance with the law of that state.<sup>285</sup> In its application, the legal content of nationality is not constant and changes with every enactment.<sup>286</sup> In this particular enactment, national or citizen may generally be construed to be that as defined in the current Constitution of the Philippines. In cases of a dual citizen, however, where both states claim the offender as the citizen and the Philippines is the sentencing State, the DOJ should probe into the offender's roots — his family, social and professional ties, the duration of residence in the Philippines *vis-à-vis* the other state, including the offender's knowledge or proficiency in the other state's language. If the offender is not even fluent in the other state's language, chances are that his rehabilitation and reintegration would be hampered due to the language barrier, which would be contrary to the purposes of prisoner transfer.

The DOJ should also take into account the likelihood the offender might return to the Philippines once released in the second state. Again, if most of the offender's ties are found in the Philippines, it would be illogical to transfer him out of the state in the first place. The DOJ may also be assigned the responsibility of determining the necessary documents that would satisfactorily constitute proof of citizenship.

### 3. Right to Know of Transfer Treaty

In order to achieve the purposes for which a transfer treaty is entered, the offender has the right to know of the existence of these treaties and the procedure for availing of transfer. The RP-Spain TSPA IRRs did not provide for the automatic advisement to an offender (covered by the respective treaties) of the treaty. Implementing legislation must include that the DOJ or its agencies are responsible for taking positive steps to ensuring that foreign offenders with whose home states the Philippines has a transfer agreement with know that transfer is a possibility. Similar to the Canadian statute, Philippine implementing legislation should mandate that an information packet be given to the foreign offenders concerned containing a copy of the transfer agreement, implementing legislation and rules, and an application form.

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284. Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 2, Apr. 12, 1930, 179 L.N.T.S. 89.

285. *Id.*

286. Siegfried Wiessner, *Blessed Be the Ties that Bind: The Nexus Between Nationality and Territory*, 56 MISS. L.J. 447, 450 (1986).

## V. CONCLUSION AND RECOMMENDATION

This Note has examined in detail the TSPA — beginning with its history and purposes, continuing into its salient contents and the purposes for such conditions, followed by a critique of the RP-Spain TSPA IRRs and a warning that these IRRs should not be used indiscriminately as the basis for the implementation of other transfer of sentenced person agreements. Turning its attention into the inadequacies of the IRRs from the viewpoint of the Philippines as the receiving State and as the sending State, this work filled the gaps in these inadequacies with recommendations that should be embodied in implementing legislation that will cover all transfer treaties entered into by the Philippines. As a Conclusion and Recommendation, this Note presents the proposed legislation, the Transfer of Sentenced Persons Act of 2010, taking into account all concerns exhaustively reviewed and discussed throughout the study.

As a concluding remark, this Note observes that as much as adequate safeguards are necessary when carrying out a TSPA, a myopic view of TSPAs is discouraged. That is, if the purposes of a TSPA are to be truly brought to fruition by providing an alternative framework by which offenders may be socially rehabilitated and reintegrated into society, requests for transfer should be viewed with liberality and positivism. Even if they are criminals, it does not mean that they do not deserve a second chance once they are in their home state. Furthermore, in line with the humanitarian purposes that TSPAs seek to address, the Philippines should request states wherein many Filipinos are incarcerated, such as in the Middle East,<sup>287</sup> to enter into prisoner transfer agreements to give the offenders the option of serving sentence in their home country. Not only must the plight of imprisoned OFWs be a cause for concern, but in this age of rising transnational crime and the need to foster international criminal cooperation to address this, the Philippines' participation in such international agreements may encourage reciprocity in other fields of international relations as well, from which the state may positively benefit.

Finally, this Note presents its recommendations in the form of a proposed law — The Transfer of Sentenced Persons Act of 2010 — to serve as a guide for the enabling legislation for all transfer treaties that the Philippines has entered or will enter into in the future.

### AN ACT AUTHORIZING AND PRESCRIBING THE PROCEDURE FOR THE IMPLEMENTATION OF TRANSFER OF SENTENCED

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287. There is a Working Draft between the Philippines and the Kingdom of Saudi Arabia on an Agreement on the Transfer of Sentenced Persons. See Overview of RP-KSA Relations, Agreements Under Negotiation, *available at* <http://www.ops.gov.ph/feb-visits2009/background.htm> (last accessed Feb. 24, 2012).

PERSONS AGREEMENTS ENTERED INTO BY THE PHILIPPINE  
GOVERNMENT AND A FOREIGN GOVERNMENT, AND  
APPROPRIATING FUNDS THEREFOR<sup>288</sup>

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

Section 1. Short Title. This Act shall be known as the “Transfer of Sentenced Persons Act of 2010.”

Section 2. Declaration of Policy.<sup>289</sup> It is hereby declared the policy of the State:

- (1) To further develop international cooperation in the field of criminal law recognizing that such cooperation should further the administration of justice and the social resettlement of sentenced persons;
- (2) That offender rehabilitation and reformation is a primary objective of Philippine penal policy;
- (3) To afford protection to its citizens particularly when they are outside its territorial jurisdiction and to bear in mind that full respect for human rights as laid down in universally recognized principles should be ensured;
- (4) That an offender may be redeemed for economic usefulness and for other social ends through providing him or her the opportunity to serve sentence in his or her home state when convicted outside the country since rehabilitation and reformation are encouraged when the offender is in a familiar and friendly environment;

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288. This draft bill contains the Author’s recommendations as embodied in this Note as well as provisions culled from 18 U.S.C.A. §§ 4100-4113; N.Y. CORRECT. § 71; OHIO REV. CODE ANN. § 5120.53; CAL. PENAL CODE § 2912; DOJ Dept. Circ. 15-09; Extradition and Transfer Act of 2001; and a draft bill presented by Shirley T.M. Monsalud, Proposed Law Providing for the Transfer of Convicted Persons to and from Foreign Countries and its Implication (1998) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

The contents of certain provisions in the proposed law have been omitted in this publication but the full text is found in the Thesis from which this Note is taken and may be accessed at the Professional Schools Library, Ateneo de Manila University. Provisions pertinent to the discussion in this Note are reproduced in full.

289. The policies enunciated are a combination of those discussed in Chapter II.B of this Note, taking into account the positivist streak in Philippine criminal law on the importance of redeeming the individual.

- (5) To enter into transfer of sentenced persons agreements with other states to facilitate the attainment of the abovementioned policies and to uniformly implement these transfer treaties in harmony with the laws of the State while protecting the State's sovereignty and respecting its sense of justice.

#### I. General Provisions<sup>290</sup>

##### Section 3. Definition of Terms.

Section 4. Who May Be Transferred. Only an offender who is a Filipino national or citizen may be transferred to the Philippines. A foreign offender sentenced in the Philippines may be eligible for transfer to a country of which he or she is a citizen or national, as provided under the terms of the pertinent treaty in force and by this Act.

##### Section 5. Duty of the Department of Justice.<sup>291</sup>

Section 6. Applicability of Philippine Laws.<sup>292</sup> The provisions of this Act shall apply as either the law of the administering State or the law of the sentencing State, depending on whether the transfer is to or from the Philippines, subject to the supplementary application, whenever appropriate, of all laws, rules and regulations of the Philippines pertaining to prisoners, parolees, and probationers, unless the treaty or this Act provides otherwise.

Section 7. Conditions for Transfer To or From the Philippines.<sup>293</sup> Any request for transfer under a treaty shall be subject to the following conditions:

- (1) Nationality or Citizenship Requirement — the sentenced person is a national or a citizen of the administering State, as determined by the latter;

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290. These provisions apply to situations in which the Philippines is either the sentencing State or the administering State.

291. The DOJ is delegated the power to implement rules and regulations and is recognized as the Central Authority as far as implementing transfer treaties is concerned. A similar delegation is found in 18 U.S.C.A. § 4102. The full text of this Provision is available in the Author's J.D. Thesis (on file with the Professional Schools Library, Ateneo de Manila University).

292. The supplementary application of relevant laws echoes the provision found in the REVISED PENAL CODE, § 10. This Section also provides the caveat that the terms of the treaty itself, as negotiated, may provide terms inconsistent with existing laws but which should nevertheless be upheld. See Chapter IV.A of this Note.

293. These conditions are those expounded upon and discussed in Chapter II.D.1 of this Note.

- (2) Final Judgment — judgment in respect of the acts or omissions which gave rise to the sentence imposed is final and no other legal proceedings are pending against the sentenced person in the sentencing State;
- (3) Minimum Period of Sentence to Serve — the part of the sentence still to be served at the time of the receipt of the request for transfer by the administering State is at least one year, unless the terms of a treaty provide otherwise or in exceptional circumstances as determined by both the sentencing and administering States;
- (4) Dual Criminality — the acts or omissions giving rise to a conviction in the sentencing State is punishable by deprivation of liberty in the administering State, although the definition thereof is not identical;
- (5) Consent — the transfer is consented to by the sentencing State, the administering State and the sentenced person or, in the event of incapacity, by his or her legal representative;
- (6) The sentenced person has satisfied payment of fines, court costs, civil indemnities and/or pecuniary sanctions of all kinds for which he or she is liable under the terms of the sentence, or has provided sufficient security to ensure payment thereof to the satisfaction of the sentencing State, unless the sentenced person has been declared insolvent.

Section 8. Requests for Transfer.

## II. The Philippines as the Administering or Receiving State

Section 9. Receipt of Request and Determination.

Section 10. Verification of Consent of Sentenced Person.<sup>294</sup> Before giving his or her consent to the transfer, the Secretary, through the Philippine Embassy or Consular officials in the sentencing State, shall take steps to verify the consent of the sentenced Filipino national to ensure that his or her consent is voluntarily given and with full knowledge of the consequences thereof.

During the verification of consent, the sentenced person must be informed of the pertinent provisions in the relevant treaty regarding

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294. Although verification of consent is a feature of the RP-Spain IRRs, it lacks guidelines for what this verification should contain. Thus, it was recommended in Chapter IV.C.1 that the inquiry be more specific. The verification contained here is patterned after that found in 18 U.S.C.A. §§ 4107-4108. Section 17 of this Transfer of Sentenced Persons Act of 2010 contains an almost identical provision.



retention of jurisdiction of the sentencing State and the bars to review of judgment in the administering State. To this end, the verifying officer shall inquire whether the offender understands and agrees that:

- (1) only the appropriate courts in the sentencing State may modify or set aside the conviction or sentence, and any proceedings seeking such action may only be brought in such courts;
- (2) the sentence shall be carried out according to the laws of the Philippines and that those laws are subject to change.

Section 11. Effect of Consent to Transfer.<sup>295</sup> The Department's decision to transfer and receive the Filipino offender operates as the recognition of the foreign judgment of conviction in the Philippines such that it may be enforced in accordance with the laws of the Philippines.

Section 12. Application of Time Allowances; Parole.<sup>296</sup> The offender shall be entitled to good conduct and other time allowance or any credit toward the service of sentence given by the sentencing State for time served as of the time of the transfer. Subsequent to the transfer, the offender shall be entitled to the credits for good conduct and loyalty provided in the Revised Penal Code and in other rules and regulations in force.

An offender transferred to the Philippines to serve a sentence of imprisonment may, in the proper cases, be released on parole at such time as the Board of Pardons and Parole may determine.

Section 13. Receiving an Offender on Probation.

Section 14. Receiving an Offender on Parole.

### III. The Philippines as the Sentencing or Sending State

Section 15. Right to Know of Transfer Agreement.<sup>297</sup> The Secretary shall devise a method of notifying each foreign offender that he or she may be eligible to serve his or her sentence in his or her state of nationality or citizenship as provided in the relevant treaty, if such is in existence. The

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295. This acts as an automatic recognition provision, resolving the problem posed in Chapters IV.B.1 and IV.C.2 on recognizing a foreign judgment of conviction. This does not preclude recourse to the courts when necessary.

296. The clear inclusion of time allowances and provisions for parole addresses the ambiguity in determining what laws may apply and what an offender may expect once transferred. See Chapters IV.B.3 and IV.C.3 of this Note.

297. The right to be informed of the existence of a transfer treaty is not an obligation to transfer. See Antonacci, *supra* note 77, at 62. Providing the offender with an information packet feature of Canadian correctional law, which the Author recommends for adoption in the Philippines. See Chapters V.C and V.D.3 of this Note.

offender shall be provided an information packet which shall contain a copy of the relevant treaty, this Act, the pertinent rules and regulations, and an application form.

Section 16. Application; By Whom Made; Requirements.

Section 17. Verification of Consent of Sentenced Person. Before giving his or her consent to the transfer, the Secretary shall take steps to verify the consent of the sentenced person to ensure that his or her consent is voluntarily given and with full knowledge of the consequences thereof.

During the verification of consent, the sentenced person must be informed of the pertinent provisions in the relevant treaty regarding retention of jurisdiction of the sentencing State and the bars to review of judgment in the administering State. To this end, the verifying officer shall inquire whether the offender understands and agrees that:

- (1) only the appropriate courts in the Philippines may modify or set aside the conviction or sentence, and any proceedings seeking such action may only be brought in such courts;
- (2) the sentence shall be carried out according to the laws of the receiving State and that those laws are subject to change.

The receiving State shall also be permitted to verify the consent of the sentenced person.

Section 18. Notice to Victim or Victim's Kin.<sup>298</sup> Upon receipt of an application for transfer, the Department shall notify the victim/s or the victim's kin who shall have two (2) weeks from notice within which to show cause why the application should not be approved.

Section 19. Offenders on Probation or Parole; Recommendation of the Authority. An application for transfer by an offender on probation must be reviewed by the court exercising jurisdiction over the offender on probation and such court may also make a recommendation to the Department taking into account the factors provided in Section 20 of this Act and other circumstances as may be deemed relevant to the court. The court's recommendation shall be forwarded to the Secretary.

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298. The provision for notice is in response to the reactions to Larrañaga's transfer and is not found in the implementing legislation of other jurisdictions, making it unique to the Philippine setting. This Section stems from the suggestion of Sen. Defensor-Santiago to give notice to the victim's kin to avoid any violation of due process of law, but should not be construed as requiring the consent of the private offended party. See Chapter V.D.1 of this Note. Under Section 20 of this Act, the Secretary must take into consideration the opposition of the victim or the latter's kin when making his or her determination.

An application for transfer of an offender on parole shall be reviewed by the Board of Pardons and Parole, subject to the guidelines provided in the next succeeding section. The Board's recommendation shall be forwarded to the Secretary.

Section 20. Consent of the Sentencing State.<sup>299</sup> The Secretary shall review the application and determine whether or not to consent to the transfer taking into consideration the following:

- (1) Statement from the victim or the victim's next of kin as provided in Section 18;
- (2) Recommendation of the relevant court or Board of Pardons and Parole, as provided in Section 19;
- (3) The nature of the offense;
- (4) The shock to the conscience of society and sense of justice that the transfer might cause;
- (5) The likelihood that the offender's rehabilitation would be encouraged if transferred;
- (6) The likelihood that the offender will return to the Philippines once released in the receiving State;
- (7) The physical and mental health of the person;
- (8) The ties that the person may have to the transferring and receiving countries.

The Secretary may also consider other relevant factors in making his or her determination.

Section 21. Dual Citizens.<sup>300</sup> In cases wherein the sentenced person is a Filipino citizen or national but is also claiming the citizenship or nationality of another state, the Secretary shall review the application and personal information of the offender to determine whether the offender's chances for rehabilitation and reformation would be better served in the Philippines or in the administering State. The Secretary shall inquire into the genuine ties of the offender to both states, taking into account his or her family, social, and professional relationships, as well as the likelihood that the offender will

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299. The Secretary's discretion is tempered with the guidelines in this provision, patterned after OHIO REV. CODE ANN. § 5120.53 (D) and Extradition and Transfer Act of 2001, § 43 (e). See Chapters V.A. and V.D.1 of this Note.

300. This Section recognizes the special problem of dual citizenship and is a safeguard arising out of the Larrañaga experience to ensure that an application will not be used to circumvent the purposes of the treaty where the applicant has no substantial relationships in the potential receiving State. See Chapters V.B and V.D.2 of this Note.

return to the Philippines once released in the receiving State, the duration of residence in both States, and other pertinent factors that will facilitate the decision-making process in line with the policies of the State.

Section 22. Decision on Request for Transfer. The Secretary shall issue a decision on whether or not to consent to the transfer within thirty (30) days from receipt of the statement in Section 18 or if none is sent, then from the lapse of the two weeks in Section 18. The decision shall state the reasons for granting or denying the transfer.

Section 23. Appeal of Decision.

#### IV. Concerns of Transfer

Section 24. Continued Enforcement. The State adopts the policy of continued enforcement, and not conversion of sentence, unless otherwise provided in the relevant treaty. Once the transfer has been carried out, the administering State shall continue to enforce the sentence as follows:

- (1) the enforcement of the sentence shall be governed by the law of the administering State.
- (2) the administering State:
  - (a) shall bound by the duration of the sentence or measure of deprivation of liberty;
  - (b) shall be bound by the findings of facts indicated in the judgment; and
  - (c) shall not convert the sentence or deprivation of liberty into pecuniary sanction.

Section 25. Transfer Arrangements; Costs of Transfer.

Section 26. Pardon, Amnesty or Commutation.

Section 27. Retention of Jurisdiction. The sentencing State shall have exclusive jurisdiction in respect of proceedings of any kind the purpose of which is to review the judgment of conviction.

Section 28. Termination of Enforcement. The administering State shall terminate enforcement of the sentence as soon as it is informed by the sentencing State of any decision or measure as a result of which the sentence ceases to be enforceable.

Section 29. Information on Enforcement.

Section 30. *Ne Bis In Idem*.<sup>301</sup>

Section 31. Principle of Specialty.<sup>302</sup>

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301. See Chapters II.D of this Note.

## V. Miscellaneous Provisions

Section 32. Consular Information.

Section 33. Consultation.

Section 34. Settlement of Disputes.

Section 35. Separability Clause.

Section 36. Repealing Clause.<sup>303</sup> Department of Justice Circular No. 15-09, s. 2009, implementing the transfer of sentenced persons agreement between the Republic of the Philippines and the Kingdom of Spain is hereby repealed. All laws, executive orders, rules and regulations or any part thereof inconsistent with the provisions of this Act are hereby repealed or modified or amended accordingly.

Section 37. Applicability Clause.

Section 38. Appropriations.

Section 39. Effectivity.

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302. See Chapters II.C of this Note.

303. Given the repeated emphasis on the inadequacies of the RP-Spain IRRs articulated in this Note, this Act explicitly repeals the IRRs to stress that the Transfer of Sentenced Persons Act of 2010 shall govern future transfers under the RP-Spain TSPA.