

Raising the White Flag: The Effects of the United Nations Convention against Corruption on Extradition and Mutual Legal Assistance in the Philippines

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I. INTRODUCTION

We are all deeply concerned about the spread of corruption, which is a virus capable of crippling government, discrediting public institutions and private corporations[,] and having a devastating impact on the human rights of populations, and thus undermining society and its development, affecting in particular the poor.

— Global Forum on Fighting Corruption and Safeguarding Integrity II:
Final Declaration¹

A. *Corruption in the Philippines*

In the Philippines, there has been little progress in stemming the misappropriation and waste of resources that has resulted from widespread corruption.² According to the World Bank, in 2008, corruption in the Philippines was among the worst in Southeast Asia, with the Philippines not among the many developing countries making important progress in controlling corruption.³ Decades after the fall of former President Ferdinand E. Marcos, infamous for being the second most corrupt official in the world,⁴ “corruption continues to blight the Philippine economy.”⁵ In fact, a

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1. Global Forum on Fighting Corruption and Safeguarding Integrity II: Final Declaration, available at <http://2001-2009.state.gov/p/inl/rls/rpt/gffc/2001/3380.htm> (last accessed Nov. 15, 2012).
 2. JOHN MALCOLM DOWLING, *FUTURE PERSPECTIVES ON THE ECONOMIC DEVELOPMENT OF ASIA* 295 (2008 ed.).
 3. Doris Dumlao, *WB: Corruption in RP Worst in East Asia*, PHIL. DAILY INQ., June 25, 2008, available at <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080625-144628/WB-Corruption-in-RP-worst-in-East-Asia> (last accessed Nov. 15, 2012).
 4. Charlotte Denny, *Suharto, Marcos and Mobutu Head corruption table with \$50bn scams*, THE GUARDIAN, Mar. 24, 2004, available at <http://www.guardian.co.uk/world/2004/mar/26/indonesia.philippines> (last accessed Nov. 15, 2012).

Pulse Asia survey showed that Filipinos viewed the Arroyo administration as being more corrupt than the Marcos administration.⁶ A 2004 study by the United Nations (U.N.) Development Program shows that the Philippines lost a staggering ₱100 billion of its 2001 national budget to corrupt officials.⁷ Recently, according to the 2010 Transparency International Corruption Perception Index, among the original members of the Association of Southeast Asian Nations, the Philippines is next to Cambodia, Laos, and Myanmar as being perceived to be corrupt.⁸ In the same Study, on the perceived degree of corruption as seen by business executives and analysts, the Philippines ranked 134th out of 180 countries and was grouped with Azerbaijan, Bangladesh, Togo, and Honduras in the extent of corruption.⁹ As a further matter, studies done by American think-tank Heritage Foundation show that the Philippine economy is rated “mostly unfree,” mainly due to corruption and a mismanaged bureaucracy.¹⁰ Worse, because expatriate businessmen in Asia perceive the Philippines as the most corrupt country in the region, the Philippines has been getting the least amount of foreign direct investment and capital compared to its neighbors Indonesia and Thailand.¹¹

B. The United Nations Convention against Corruption

Cognizant of the far-reaching effects of corruption as a barrier to progress and seeing that there is a need for States to combat corruption through mutual cooperation, the U.N. in October of 2003 adopted the U.N. Convention against Corruption (UNCAC), which entered into force on 14

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5. Fr. Ranhilio Callangan Aquino, *Coping With Corruption*, 2 DEMOCRACY AT LARGE 1, 22 (2005).
 6. GMA News Online, Survey: Arroyo most corrupt, Aquino cleanest of 5 prexies, available at <http://www.gmanetwork.com/news/story/72457/news/nation/survey-arroyo-most-corrupt-aquino-cleanest-of-5-prexies> (last accessed Nov. 15, 2012).
 7. Temario C. Rivera, *Political Corruption: An Analytical Framework*, in DISSECTING CORRUPTION: PHILIPPINE PERSPECTIVES 7 (Bobby M. Tuazon ed., 2007).
 8. Transparency International, Corruption Perceptions Index 2010, available at <http://www.transparency.org/cpi2010/results> (last accessed Nov. 15, 2012).
 9. *Id.*
 10. *RP Economy Rated ‘Mostly Unfree’ Because of Corruption, Slow Reforms*, BIZNEWS ASIA, Jan. 16-23, 2006, at 14.
 11. See Carlos Conde, *Philippines Most Corrupt, Survey Says*, N.Y. TIMES, Mar. 13, 2007, available at <http://www.nytimes.com/2007/03/13/business/worldbusiness/13iht-peso.4891792.html> (last accessed Nov. 15, 2012) & *Philippines “Most Corrupt” in Asia*, PHIL. DAILY INQ., Mar. 23, 2008, available at <http://opinion.inquirer.net/inquireropinion/talkofthetown/view/20080323-125924/Philippines-most-corrupt-in-Asia> (last accessed Nov. 15, 2012).

December 2005.¹² The UNCAC addresses the myriad of actions necessary for an effective global approach against corruption. Primarily, the UNCAC aims:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate[,] and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; [and]
- (c) To promote integrity, accountability[,] and proper management of public affairs and public property.¹³

C. International Cooperation: A Means of Combating Corruption

One of the primary obligations of the UNCAC is to strengthen international cooperation in preventing and combating the transfer of criminal offenders and funds of illicit origin, wherein State-Parties to the UNCAC shall cooperate with each other in investigations of and proceedings in criminal matters relating to corruption.¹⁴ There are primarily two kinds of international cooperation under the UNCAC: (1) extradition and (2) mutual legal assistance.¹⁵ Both extradition and mutual legal assistance are processes “of intergovernmental legal cooperation in the investigation, prosecution, and punishment of criminal offenders.”¹⁶

On the one hand, extradition is the removal of the person sought from the Requested State with the purpose of placing him or her at the disposal of the Requesting State, enabling the latter to hold the person sought liable in connection with any criminal investigation or crime penalized by the Requesting State.¹⁷ According to Professor M. Cherif Bassiouni, “perhaps the greatest living authority on international extradition,”¹⁸ extradition has

12. U.N. Convention against Corruption pmbl., *opened for signature* Dec. 9, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC].

13. *Id.* art. 1.

14. *Id.* art. 43 (1).

15. *Id.* arts. 44 & 46.

16. United Nations Asia and Far East Institute (UNAFEI) for the Prevention of Crime and the Treatment of Offenders, Annual Report for 1999 and Resource Material Series No. 57 (Part of the Resource Material Series of the UNAFEI) 177, available at http://www.unafei.or.jp/english/pdf/RS_No57/No57_00All.pdf (last accessed Nov. 15, 2012) [hereinafter UNAFEI].

17. Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country [Philippine Extradition Law], Presidential Decree No. 1069, § 2, ¶ (a) (1977).

18. Jonathan O. Hafen, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 B.Y.U. L. REV. 191, 192 (1992).

been largely a foreign relations instrument, being a “reflection of political relations between [S] http://igitur-archive.library.uu.nl/USBO/2008-0903-201723/2008_accountability_shadow_hierarchy.pdf tates.”¹⁹

On the other hand, mutual legal assistance is the “cooperation or assistance regarding investigation, prosecution[,] and judicial proceedings in relation to crimes[, such as] taking evidence or statements from persons[, and] executing searches.”²⁰

D. The Current Stance of the Philippines

The Philippines ratified the UNCAC on 8 November 2006.²¹ In fact, on 7 November 2008, Memorandum Circular No. 167-A was issued

so as to allow all departments and their attached agencies including government-owned and controlled corporations/government financial institutions and local government units to disburse the necessary funds from their respective budgets to cover their active participation and support to the Commemoration of the International Anti-Corruption and the Launching of the 1st National Summit on UNCAC ... subject to the availability thereof and applicable accounting and auditing rules and regulations.²²

As a State-Party to the UNCAC, the Philippines is tasked with the responsibility of ensuring its laws are compliant with the UNCAC, particularly with the international cooperation aspect of the Agreement.²³

With regard to extradition, upon its ratification of the UNCAC, the Philippines made a reservation, which particularly states that “the Republic of the Philippines declares that dual criminality is required under its extradition law and the Philippines therefore cannot consider the Convention as the legal basis for cooperation on extradition with other States.”²⁴ This reservation, as will be discussed subsequently, is currently

19. *Id.* (citing M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 3 (1974)).

20. UNAFEI, *supra* note 16, at 177.

21. United Nations Office on Drugs and Crime, UNCAC Signature and Ratification Status as of 19 October 2012, *available at* <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last accessed Nov. 15, 2012) [hereinafter Signature and Ratification Status].

22. Office of the Executive Secretary, Memorandum Circular No. 167-A [OES Memo. Circ. No. 167-A], 105 O.G. 8 (Nov. 7, 2008).

23. *See* Renee Dopplick, *Legal Obligations of Signatories and Parties to Treaties*, *available at* <http://www.insidejustice.com/law/index.php/intl/2010/03/15/p238> (last accessed Nov. 15, 2012).

24. United Nations Office on Drugs and Crime, *Declarations and Reservations to the UNCAC*, *available at* <http://www.unodc.org/documents/treaties/UNC>

inconsistent with the obligations set forth in the Treaty as well as with other international obligations.

Furthermore, before the adoption of the UNCAC, the Philippines had adopted Presidential Decree (P.D.) No. 1069 or the Philippine Extradition Law,²⁵ which “guide[s] the executive department and the courts in the proper implementation of the extradition treaties to which the Philippines is a signatory.”²⁶ However, as will be discussed subsequently in Chapter V, this piece of legislation is outdated and fails to reflect the objectives set forth in the UNCAC.

On the one hand, the Philippines has extradition treaties with 13 countries, namely: Australia, Canada, China, Hong Kong, India, Indonesia, Korea, Micronesia, Spain, Switzerland, Thailand, the United States of America (U.S.), and the United Kingdom (U.K.).²⁷

On the other hand, the Philippines currently has no implementing law on mutual legal assistance, but it has entered into treaties on mutual legal assistance on criminal matters with Australia, China, Hong Kong, Korea, Spain, Switzerland, the U.S., and the U.K.²⁸

However, with respect to other countries that the Philippines has no bilateral agreement with, international cooperation remains a far-fetched reality, as no State is obliged to extradite or provide mutual legal assistance unless there is a treaty.²⁹

Recognizing that international cooperation plays a key part in the fight against transnational corruption, the UNCAC includes a broad and comprehensive scheme for extradition and mutual legal assistance in corruption cases.³⁰ Since minimizing corruption is one of the highlights of

AC/ReservationsDeclarations/DeclarationsAndReservations14Aug2008.pdf (last accessed Nov. 15, 2012).

25. Philippine Extradition Law.

26. *Id.* whereas cl.

27. Interview with Mildred Bernadette B. Alvor, Senior State Counsel, Department of Justice, in Ermita, Manila (Mar. 25, 2011).

28. *Id.*

29. JOAQUIN G. BERNAS, S.J., *INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 174 (2009 ed.).

30. Kimberly Prost, *International Cooperation under the United Nations Convention Against Corruption*, in *DENYING SAFE HAVEN TO THE CORRUPT AND THE PROCEEDS OF CORRUPTION: ENHANCING ASIA-PACIFIC COOPERATION ON MUTUAL LEGAL ASSISTANCE, EXTRADITION, AND RETURN OF THE PROCEEDS OF CORRUPTION* 13 (2006).

government accountability and effectiveness,³¹ one which has recently become a global effort, there is clearly a need for additional legislation to operationalize and standardize international cooperation by means of extradition and mutual legal assistance, especially now in this technological age where transnational crime is increasingly becoming endemic.³²

E. Statement of the Problem and Discussion of Legal Issues

Article XI, Section 1 of the 1987 Philippine Constitution defines public office as public trust. It provides that “public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives.”³³ In *Cornejo v. Gabriel and Provincial Board of Rizal*,³⁴ this was emphasized in Justice George A. Malcolm’s words when he said that the officers of the Philippines are “mere agents and not rulers of the people.”³⁵ As in the Philippines and in the rest of the world, it is elementary that public officers must not engage themselves in a scorned activity such as corruption.

However, with increasing technological developments, the international justice system, without the cooperation of nations, could not be effective in successfully prosecuting cases of corruption.³⁶ For this reason, the operationalization and standardization of international cooperation measures is a relevant case study.

International cooperation has two components, which shall be discussed separately in this Note: (1) extradition and (2) mutual legal assistance. In view of this, it may be asked: are the Philippines’ laws and treaties on extradition incompatible with UNCAC and other obligations under international law? Is our reservation to the UNCAC invalid? Is it against the purpose and objectives of the Treaty? Furthermore, is there a need to realign Philippine extradition laws with the UNCAC? With regard to mutual legal assistance, are there current legal measures in the Philippines sufficient to address this international cooperation obligation under international law? Is there a legal obligation to supplement the laws of the country, particularly

31. EDNA E. A. CO, ET AL., PHILIPPINE DEMOCRACY ASSESSMENT: MINIMIZING CORRUPTION 175 (2007 ed.).

32. See CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 BERKELEY J. INT’L L. 53, 86-89 (2000).

33. PHIL. CONST. art XI, § 1.

34. *Cornejo v. Gabriel and Provincial Board of Rizal*, 41 Phil. 188 (1920).

35. *Id.* at 194.

36. See VINAY BHARGAVA & EMIL BOLONGAITA, CHALLENGING CORRUPTION IN ASIA 67 (2004).

with regard to mutual legal assistance, as there is currently a want of implementing measures to implement this aspect of the UNCAC?

II. THE UNCAC

Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid.

— Kofi A. Annan³⁷

A. The Turning Point

The 1976 Lockheed scandal had the “makings of a Hollywood thriller.”³⁸ At that time, an American aircraft corporation, Lockheed Martin Co., had paid the Japanese Prime Minister an estimated \$1.4 million to influence Japanese airlines to purchase its L-1011 aircraft.³⁹ As a result of this, the Japanese Prime Minister Kakuei Tanaka was convicted and sent to jail.⁴⁰ Lockheed, however, found this bribe to be a “profitable investment,” as none of its executives were charged or jailed.⁴¹ Upon investigation by the U.S. authorities, however, it was discovered that Lockheed was not alone in the endeavor.⁴² There were other “questionable payments” passed between foreign officials and American companies.⁴³ In response to this controversy, the U.S. Congress adopted the Foreign Corrupt Practices Act in 1977.⁴⁴

For more than 30 years after this shameful development, however, the U.N. continues to struggle to win the battle against corruption.⁴⁵ Aside from the need for a global response to address the illegal practices in international

37. Kofi A. Annan, Former United Nations Secretary-General, Statement on the Adoption by the General Assembly of the United Nations Convention against Corruption, Address at United Nations Headquarters (Oct. 31, 2003) (transcript available at <http://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html> (last accessed Nov. 15, 2012)).

38. Lori Ann Wanlin, *The Gap Between Promise and Practice in the Global Fight Against Corruption*, 6 ASPER REV. INT'L BUS. & TRADE L. 209, 210 (2006).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Wanlin, *supra* note 38, at 210.

45. UNITED NATIONS OFFICE ON DRUGS AND CRIME, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO xii (2006) [hereinafter UNODC, TRAVAUX PRÉPARATOIRES].

business transactions,⁴⁶ white-collar crime continues to be rampant in many developed countries,⁴⁷ and the economies of developing countries are detrimentally affected by criminal conduct such as bribery and price-fixing.⁴⁸ Because the continuous practice of graft and corruption became a serious and dangerous threat to growth and development, the attention of the U.S. Congress was drawn to bring corruption onto the discussion table.

The first wave of anti-corruption initiatives occurred at the regional level.⁴⁹ The earliest action against international corruption “was when the [U.S.] outlawed transnational bribery in 1977” because of the Lockheed scandal.⁵⁰ Multilateral agreements on corruption then followed with the signing of the Organization of the American States Inter-American Convention against Corruption in 1996.⁵¹ Then came the signing of the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997;⁵² the European Union Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States in 1997;⁵³ the Council of Europe’s Criminal Law Convention on Corruption and Civil Law Convention on Corruption in 1999;⁵⁴ the African Union Convention on Preventing and Combating Corruption in 2003;⁵⁵ and the U.N. Convention against Transnational Organized Crime (UNTOC) in 2003.⁵⁶

B. The Adoption of the UNCAC

The need for a more comprehensive treaty then arose, as the General Assembly of the U.N. on International Cooperation on Criminal Matters

46. See Nikos Passas, *Introduction to THE UNITED NATIONS CONVENTION AGAINST CORRUPTION AS A WAY OF LIFE* 9-10 (Nikos Passas & Dimitri Vlassis eds., 2006).

47. UNODC, TRAVAUX PRÉPARATOIRES, *supra* note 45, at ix & David P. Warner, *Bringing White-Collar Criminals to Justice — Fugitive Apprehension and Return and Obtaining Evidence Abroad*, 11 U.S.-MEX. L. J. 171 (2003).

48. UNODC, TRAVAUX PRÉPARATOIRES, *supra* note 45, at ix.

49. Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT’L L. 345, 698 (2000).

50. Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT’L ECON. L. 191, 192 (2005).

51. *Id.* at 193.

52. *Id.* at 195.

53. *Id.* at 201.

54. *Id.* at 198-99.

55. *Id.* at 202.

56. Webb, *supra* note 50, at 203.

urged States to revise law enforcement cooperation agreements as a fundamental part of the effort to “effectively combat constantly changing methods of individuals and groups engaging in organized transnational crime”⁵⁷ such as corruption. The General Assembly even encouraged Member States to “enact effective [international cooperation] legislation” for its suppression.⁵⁸

In response to this call, the U.N. General Assembly adopted the UNCAC at the U.N. Headquarters in New York on 31 October 2003, through Resolution 58/4, and opened it for signature from 9–11 December 2003 in Merida, Mexico, and thereafter at U.N. Headquarters in New York until 9 December 2005.⁵⁹ Two years after, on 14 December 2005, it entered into force.⁶⁰ The Convention is the first of its kind in combating corruption and it has been held that no international instrument is as comprehensive and elaborate as the UNCAC.⁶¹

In support of this global effort, U.N. Secretary-General Ban Ki-moon, during the celebration of International Anti-Corruption Day on 9 December 2009, pointed out that “the [UNCAC] is the world’s strongest legal instrument to build integrity and fight corruption.”⁶² Aptly, the only legal instrument of a universal nature that could bind all States to the same standard is the UNCAC.⁶³

C. *The Convention*

Emphasizing the transnational character of corruption, the UNCAC is the most modern and the first legally binding international anti-corruption instrument.⁶⁴ Through the UNCAC, international legal action against corruption has progressed as it crystallized from general considerations and

57. G.A. Res. 52/88, § 2, ¶ 6, U.N. GAOR, 52d Sess., U.N. Doc. A/RES/52/88, at 3 (Feb. 4, 1998).

58. *Id.* § 2, ¶ 3, at 2.

59. United Nations Treaty Collection, Status of Treaties, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII14&chapter=18&lang=en (last accessed Nov. 15, 2012).

60. *Id.*

61. Passas, *supra* note 46, at 9.

62. United Nations Office on Drugs and Crime, UNODC’s Action against Corruption and Economic Crime, *available at* <http://www.unodc.org/unodc/en/corruption/index.html> (last accessed Nov. 15, 2012) [hereinafter UNODC’s Action against Corruption and Economic Crime].

63. See Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT’L L.J. 691, 707 (2007) & Webb, *supra* note 50, at 9.

64. UNODC’s Action against Corruption and Economic Crime, *supra* note 62.

declarative statements to legally binding obligations. Its eight Chapters and 71 Articles oblige the State-Parties to implement a wide and detailed range of anti-corruption measures. These measures promote the prevention and criminalization of corruption, the recovery of proceeds of corruption, and the prosecution of offenders through international cooperation.

D. The Conference of State-Parties to the UNCAC

In accordance with Article 63 of the UNCAC, a Conference of the State-Parties (CoSP) to the UNCAC was constituted to facilitate the cooperation between State-Parties in order to achieve the objectives set forth in the Convention, as well as to review and promote its implementation.⁶⁵

The first CoSP took place in Amman, Jordan, on December 2006, where various representatives of State-Parties to the UNCAC established a formal monitoring and reviewing system.⁶⁶

The second CoSP took place in Bali, Indonesia, on 28 January–1 February 2008, where the monitoring and reviewing system took a balanced geographical approach and established clear and specific guidelines for every aspect of the review system.⁶⁷

The third CoSP took place in Doha, Qatar on 9–13 November 2009, where the CoSP concentrated on key issues regarding the review of the implementation of the Convention, asset recovery, and technical assistance.⁶⁸ As established in the third CoSP, “[e]very [State-Party] is now expected to be reviewed over a period of [10] years from (2010–2020), during two successive five-year review cycles.”⁶⁹ In this review mechanism, “each [State-Party] will be peer-reviewed by two other [State-Parties]” to the Convention.⁷⁰

The fourth CoSP was held in Marrakesh, Morocco on October 2011, where participants discussed their progress in implementing the UNCAC provisions.⁷¹

65. UNCAC, *supra* note 12, art. 62.

66. UNCAC Coalition, 4th UNCAC CoSP 2011, *available at* <http://www.uncac-coalition.org/cosp> (last accessed Nov. 15, 2012).

67. *Id.*

68. *Id.*

69. 14th International Anti-Corruption Conference 2010, Workshop: UNCAC Self-Assessments: Going Beyond the Minimum, *available at* <http://14iacc.org/programme/global-challenges/uncac-self-assessments> (last accessed Nov. 15, 2012).

70. *Id.*

71. UNCAC Coalition, *supra* note 66.

E. *The Objectives of the UNCAC*

The first Article of the UNCAC states its purposes which were previously quoted. In particular, international cooperation measures deserve a second look, as they provide the assurance that punishment of international and transnational crimes “will not be frustrated by the frontiers of territorial sovereignty.”⁷² The duty to extradite and to cooperate with other States has become an instrument of mobilization against transnational crimes such as corruption. With the “global village shrinking at a rapid pace, propelled as it is by technological leaps in transportation and communication,”⁷³ there is a pressing need to strengthen the domestic and international community’s arsenal of weapons against corruption.⁷⁴

F. *State-Parties to the UNCAC*

As of October 2012, the UNCAC has 162 State-Parties.⁷⁵ Members that have signed but have yet to ratify include Barbados, Bhutan, Germany, and Japan, among others.⁷⁶

III. INTERNATIONAL COOPERATION UNDER THE UNCAC

[I]nternational cooperation in combating transnational organised crime, should take place at all levels of cooperation, namely international, regional, bilateral, as well as amongst various role[-]players within national jurisdiction.

...

This is a fight we cannot lose, a fight we will not lose.

— Statement by the Republic of South Africa⁷⁷

A. *International Cooperation in General*

The internationalization of crime has made domestic authorities increasingly dependent on international cooperation.⁷⁸ Chapter IV of the UNCAC,

72. Secretary of Justice v. Lantion, 343 SCRA 377, 384 (2000).

73. *Id.* at 393.

74. See Rishi Hingoraney, *International Extradition of Mexican Narcotics Traffickers: Prospects and Pitfalls for the New Millennium*, 30 GA. J. INT’L & COMP. L. 331, 333 (2002).

75. Signature and Ratification Status, *supra* note 21.

76. *Id.*

77. Statement by the Republic of South Africa on High Level Segment International Cooperation in Combating Transnational Organised Crime 1-4, available at <http://www.uncjin.org/Documents/10thcongress/10cStatements/southafrica14.pdf> (last accessed Nov. 15, 2012).

78. JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 235 (3d ed. 2006).

which contains seven Articles, extensively discusses the international cooperation aspect of transnational anti-corruption efforts. The detailed provisions in this Chapter even “establish a comprehensive system for mutual legal assistance between law enforcement authorities and are potentially some of the most important [provisions] in the Convention.”⁷⁹

It should be borne in mind, however, that other conventions also contain provisions on international cooperation, such as the UNTOC⁸⁰ and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).⁸¹ Aside from the UNCAC, UNTOC, and OECD Convention, there are other international assistance and cooperation clauses in international treaties such as the International Covenant on Economic Social and Cultural Rights (ICESCR),⁸² which must be differentiated from international cooperation in the suppression of crime. As defined earlier in Chapter I, the international cooperation discussed in this Note is in the context of suppression of crime, as distinguished from the international cooperation clause in human rights conventions such as the ICESCR.⁸³ In the latter, the international assistance and cooperation clause mandates each State-Party

to take steps, individually and through *international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁸⁴

This international cooperation clause makes it incumbent upon State-Parties to assist each other in the full and progressive realization of human rights using the maximum of their available resources.⁸⁵ Unlike international cooperation in the suppression of crime, this international assistance and

79. Transparency International, UN Convention against Corruption (UNCAC) — Summary (An Unpublished Summary of the UNCAC), *available at* <http://www.multaqa.org/pdfs/UNCACSummary.pdf> (last accessed Nov. 15, 2012).

80. U.N. Convention against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, 40 I.L.M. 335 [hereinafter UNTOC].

81. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *opened for signature* Dec. 17, 1997, 37 I.L.M. 1.

82. International Covenant on Economic, Social and Cultural Rights art. 2 (1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

83. *Id.*

84. *Id.* (emphasis supplied).

85. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations*, ¶¶ 13–14, U.N. Doc. E/1991.23 (Dec. 14, 1990).

cooperation clause refers to an economic and technical form of assistance.⁸⁶ In its General Comments, the Committee on Economic Social and Cultural Rights opined that international measures that deal with the debt crisis should take full account of these rights through international assistance and cooperation.⁸⁷

In contrast, international cooperation, as surmised from the UNCAC, is a system of coordination wherein State-Parties shall cooperate in criminal matters relating to corruption, and “where appropriate and consistent with their domestic legal system, State[-]Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.”⁸⁸ These may include specific aspects of law enforcement cooperation such as extradition, gathering and transferring of evidence, assisting investigations and prosecutions, and transferring of criminal proceedings.⁸⁹ Specifically, the international cooperation aspect of the Convention can be further divided into the following topics:

- (1) Extradition;⁹⁰
- (2) Transfer of Sentenced Persons;⁹¹
- (3) Mutual Legal Assistance;⁹²
- (4) Transfer of Criminal Proceedings;⁹³
- (5) Law Enforcement Cooperation;⁹⁴
- (6) Joint Investigations;⁹⁵ and
- (7) Special Investigative Techniques.⁹⁶

Article 43 (1) of the UNCAC emphasizes the *mandatory* character of cooperating in criminal matters, which concerns the abovementioned Articles, when it provided that “State[-]Parties *shall* cooperate in criminal

86. *Id.* ¶ 13.

87. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 2: International Technical Measures*, ¶ 9, U.N. Doc. E/1990/23 (Feb. 2, 1990).

88. UNCAC, *supra* note 12, art. 43 (1).

89. *See* Prost, *supra* note 30, at 6.

90. UNCAC, *supra* note 12, art. 44.

91. *Id.* art. 45.

92. *Id.* art. 46.

93. *Id.* art. 47.

94. *Id.* art. 48.

95. *Id.* art. 49.

96. UNCAC, *supra* note 12, art. 50.

matters in accordance with [A]rticles 44-50 of this Convention,”⁹⁷ which are enumerated above. According to the legislative guide implementing the UNCAC, reference to the word “shall” is reference to a mandatory provision.⁹⁸

This Note will particularly focus on the extradition of offenders and mutual legal assistance, as means for concretizing the UNCAC objectives.

B. The Extradition Framework under the UNCAC

1. General Provisions Concerning Extradition

The provisions of the UNCAC concerning extradition are straightforward and are geared towards enhancing the ability of State-Parties to extradite those accused of crimes of corruption. Particularly, State-Parties are obligated to “expedite extradition procedures and to simplify evidentiary requirements for extradition.”⁹⁹ In attaining this objective, the offenses established in the UNCAC are deemed to be included in any existing agreement between State-Parties.¹⁰⁰ In addition to this, State-Parties are also required to incorporate these offenses in any future extradition agreement that they may enter into. These offenses, according to the Convention, include bribery of national public officials¹⁰¹ and foreign public officials and officials of public international organizations;¹⁰² embezzlement, misappropriation, or other diversion of property by a public official;¹⁰³ trading in influence;¹⁰⁴ abuse of functions;¹⁰⁵ illicit enrichment;¹⁰⁶ and bribery in the private sector.¹⁰⁷ Under the UNCAC, these offenses shall not be considered political offenses.¹⁰⁸

On the issue of political offenses, for some publicists, a crime is considered political if it forms part of an “ideologically motivated act, expressing political opposition, directed against the security of the [S]tate ...

97. *Id.* art. 43 (1) (emphasis supplied).

98. UNITED NATIONS OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 4 (2006) [hereinafter UNODC, LEGISLATIVE GUIDE].

99. UNCAC, *supra* note 12, art. 44 (9).

100. *Id.* art. 44 (4).

101. *Id.* art. 15.

102. *Id.* art. 16.

103. *Id.* art. 17.

104. *Id.* art. 18.

105. UNCAC, *supra* note 12, art. 19.

106. *Id.* art. 20.

107. *Id.* art. 21.

108. *Id.* art. 44 (4).

including any act committed to avoid persecution arising from participation in the struggle for national independence or political freedom.”¹⁰⁹ While there is no exhaustive definition of a political offense under international law,¹¹⁰ the political offense exception is a valid excuse from extradition because it protects the right of persons to rebel against any government they find unsatisfactory or oppressive.¹¹¹ It is sanctioned on the principle that the Requested State should remain detached from the internal affairs of the Requesting State,¹¹² especially when it relates to their nationality, ethnicity, or religious views.¹¹³

Under the UNCAC, however, the offenses abovementioned, no matter how slightly connected to political beliefs and acts, are not considered political offenses, and thus may not be excused from extradition on said ground.¹¹⁴

In addition, the Convention recognizes provisional arrest and allows State-Parties to exercise their discretion in matters of provisional arrest.¹¹⁵ Notwithstanding this, the person sought is guaranteed fair treatment in all stages of proceedings.¹¹⁶

2. The UNCAC as a Legal Basis for Extradition

More controversially, one of the key features of the UNCAC is that a State-Party must consider the UNCAC as the legal basis for extradition, if that State-Party requires a treaty for extradition.¹¹⁷ Conversely, if a State-Party does not require a treaty for extradition, then the offenses established in the UNCAC are considered to be extraditable as between State-Parties.¹¹⁸

3. Dual Criminality in Extradition

109. MIRIAM DEFENSOR-SANTIAGO, *POLITICAL OFFENSES IN INTERNATIONAL LAW* 321 (1977).

110. Miriam E. Sapiro, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 655 (1986).

111. Lorenzo L. Lorenzotti, *In Re Extradition of Atta: Tension between the Political Offense Exception and U.S. Counterterrorism Policy*, 1 PACE INT’L L. REV. 163, 166 (1989).

112. *Id.*

113. Jeffrey Bean, *Terrorism, Extradition and International Law*, 9 J. INT’L RELATIONS 18, 21 (2007).

114. UNCAC, *supra* note 12, art. 44 (4).

115. *Id.* art. 44 (10).

116. *Id.* art. 44 (14).

117. *Id.* art. 44 (5).

118. *Id.* art. 44 (7).

More often than not, extradition treaties and agreements condition the extradition of an offender upon the satisfaction of dual criminality, or “if the offense underlying an extradition request is punishable under the domestic law of both the [R]equesting and [R]equested State Parties.”¹¹⁹ However, Article 44 (2) of the UNCAC deviates from this principle of dual criminality by providing that a State-Party, “whose law so permits[,] may grant the extradition of a person for any of the offences covered by the Convention that are not punishable under its own domestic law.”¹²⁰ For this reason, dual criminality is not required if the crime in question is a crime according to the UNCAC.¹²¹

Using a more flexible approach to dual criminality in extradition,¹²² the Convention provides that whenever dual criminality is considered a requirement, it shall be deemed fulfilled regardless of whether the laws of the Requested State-Party “place the offen[s]e within the same category of offen[s]e or denominate the offen[s]e by the same terminology as the [R]equesting State[-]Party, if the conduct underlying the offen[s]e for which assistance is sought is a criminal offen[s]e under the laws of both State[-]Parties.”¹²³ In the UNCAC, this conduct-based approach is enforced, wherein the underlying rule applicable to all forms of cooperation is that, where dual criminality is required, it must be based on the fact that the relevant State-Parties have criminalized the conduct underlying an offense, and not whether the actual offense provisions actually coincide.¹²⁴

4. Extradition of Nationals

Absent any treaty stipulation providing otherwise, it is immaterial that the person sought is a citizen or national of the Requested State.¹²⁵ Nonetheless, the UNCAC contains several provisions that deal with situations wherein countries are barred from extraditing their nationals. Basically, the UNCAC provides that if the Requested State-Party refuses to extradite a person only on the ground that the person sought is a national, the State-Party must submit the case to its own competent officials for prosecution upon the

119. Prost, *supra* note 30, at 7.

120. UNCAC, *supra* note 12, art. 44 (2).

121. Ren Qiujuan, et al., *Review of Chinese Reviews: Selected Articles Recently Published in Chinese (Part 6)*, 5 CHINESE J. INT'L L. 787, 787 (2006).

122. Prost, *supra* note 30, at 7.

123. UNCAC, *supra* note 12, art. 43 (2).

124. Prost, *supra* note 30, at 7.

125. 35 C.J.S. *Extradition and Detainers* § 56 (Westlaw 2012) (citing *In re Neely*, 103 F. 626 (C.C.S.D. N.Y. 1900), *aff'd*, 180 U.S. 126, 21 S. Ct. 308, 45 L. Ed. 457 (1901)).

petition of the Requesting State.¹²⁶ State-Parties are also encouraged to allow the conditional surrender of a national, wherein the person sought will be returned to his or her country of nationality to serve any sentence or penalty that is imposed.¹²⁷

5. Grounds for Refusing Extradition

Before a request for extradition is refused on any ground, “the [R]equested State[-]Party [must] ... consult with the [R]equesting State[-]Party to provide it with [enough] opportunity to present its opinions[, as well as] to provide information relevant to [any] allegation.”¹²⁸ Should it be deemed that extradition is unnecessary, extradition shall be refused on certain grounds.

One instance wherein a request for extradition may be denied is when “the [R]equested State[-]Party has substantial grounds for believing that the request has been made for the purpose of ... punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin[, or] political opinions or that compliance with the request would cause prejudice to that person’s position for any one of these reasons.”¹²⁹

Conversely, certain grounds cannot be used by State-Parties to deny a request for extradition. These may include, as earlier stated, ordinarily denying extradition for political offenses.¹³⁰ The UNCAC further prohibits State-Parties from refusing extradition on the primary reason that the offense is also contended to involve financial or fiscal matters,¹³¹ such as tax and customs cases.¹³²

C. The Mutual Legal Assistance under the UNCAC

While extradition is the oldest and the most common form of international cooperation, there is an increasing need for international cooperation in the form of collection of evidence, tracing of information and proceeds of crime, and enforcement of judicial orders.¹³³ This has resulted in States entering into various bilateral and multilateral mutual assistance treaties, such as the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic

126. UNCAC, *supra* note 12, art. 44 (11).

127. *Id.* art. 44 (12)-(13).

128. *Id.* art. 44 (17).

129. *Id.* art. 44 (15).

130. *Id.* art. 44 (4).

131. *Id.* art. 44 (16).

132. UNODC, LEGISLATIVE GUIDE, *supra* note 98, at 40.

133. DUGARD, *supra* note 78, at 235.

Substances,¹³⁴ Southeast Asian Mutual Legal Assistance Treaty (MLAT) in Criminal Matters,¹³⁵ and U.N. Model Treaty on Mutual Assistance in Criminal Matters.¹³⁶

I. Types of Assistance

It must be noted that some multilateral conventions, such as the U.N. Drug Convention and the UNTOC, have embedded provisions on mutual legal assistance concerning the particular type of crime dealt in the said Conventions.¹³⁷ Unlike these Conventions, however, the UNCAC broadly requires State-Parties to afford each other extensive measures of mutual legal assistance in prosecutions, investigations, and judicial proceedings respecting any of the offenses covered by the Convention.¹³⁸

In addition, State-Parties are asked to conclude, as may be necessary, agreements that will give effect to the mutual legal assistance provisions in the Convention.¹³⁹ In order to facilitate this, the UNCAC also includes a Mini-Mutual Legal Assistance Treaty that can be utilized by State-Parties if they agree to do so.¹⁴⁰ While the Mini-Mutual Legal Assistance Treaty provides for the procedure of requesting and rendering assistance in detail, the UNCAC also provides that the U.N. Model Treaty on Mutual Assistance in Criminal Matters may also be used as a supplement for such agreements.¹⁴¹

The UNCAC, in Article 46 (3), provides for a wide range of assistance afforded to Requesting Parties, including:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures, and freezing;
- (d) Examining objects and sites;
- (e) Providing information, evidentiary items and expert evaluations;

134. U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 28 I.L.M. 493.

135. Southeast Asian Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 29, 2004.

136. Model Treaty on Mutual Assistance in Criminal Matters, G.A. Res. 45/117, U.N. Doc. A/RES/45/117 (Dec. 14, 1990).

137. Prost, *supra* note 30, at 8.

138. UNCAC, *supra* note 12, art. 46 (1).

139. *Id.* art. 46 (30).

140. *Id.* art. 46 (7).

141. Prost, *supra* note 30, at 9.

- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) Facilitating the voluntary appearance of persons in the [R]equesting State Party;
- (i) Any other type of assistance that is not contrary to the domestic law of the [R]equested State Party;
- (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of [C]hapter V of this Convention; [and]
- (k) The recovery of assets, in accordance with the provisions of [C]hapter V of this Convention.¹⁴²

2. Mutual Legal Assistance and Dual Criminality

Dual criminality in mutual legal assistance was “fairly controversial during its negotiation, partly for historical reasons.”¹⁴³ Under the UNTOC, an earlier convention, dual criminality is only discretionary as grounds for denying mutual legal assistance.¹⁴⁴ Under the UNCAC, however, State-Parties “may grant [mutual legal assistance] in the absence of dual criminality when they deem it appropriate to do so.”¹⁴⁵ The UNCAC elaborates on this when it states that a State-Party may deny assistance “only after taking into account the purposes of the Convention,” if dual criminality is not complied with.¹⁴⁶ Furthermore, if the request is for mutual legal assistance that does not involve coercive action, such as arrest, search, or seizure, a State-Party is obliged to render that assistance, as long as it is consistent with its national law.¹⁴⁷ Finally, the UNCAC asks State-Parties to adopt additional measures to allow for a wider application of mutual legal assistance in the absence of dual criminality.¹⁴⁸

3. Central Authority

The UNCAC, without prejudice to domestic law, also requires State-Parties to designate Central Authorities that have the responsibility and competence to receive requests for mutual legal assistance, either by executing them or

142. UNCAC, *supra* note 12, art. 46 (3).

143. Prost, *supra* note 30, at 9.

144. *Id.*

145. *Id.*

146. UNCAC, *supra* note 12, art. 46 (9) (b).

147. *Id.*

148. *Id.* art. 46 (9) (c).

transmitting them to competent authorities for execution.¹⁴⁹ In efforts to expedite the execution and transmission of requests, and “to obtain maximum benefits from the use of [C]entral [A]uthorities, each [State-Party] should ensure that it has one [C]entral [A]uthority for all extradition and [mutual legal assistance] matters.”¹⁵⁰ Regardless of its structure, whether it be an existing office or a person within an office, the Central Authority should be staffed with persons who have considerable and substantive knowledge on extradition and mutual legal assistance.¹⁵¹ More importantly, the Central Authority should have the capability and responsibility to attend to various incoming and outgoing requests.¹⁵²

4. The Form and Content of a Request

The requisite form and content of requests for assistance are also embodied in the Mini-Mutual Legal Assistance Treaty in the UNCAC. Accordingly, requests should be made in writing or by any means capable of producing a written record, in a language acceptable to the Requested State-Party.¹⁵³ In urgent cases and where parties so agree, requests may be made orally, with the written confirmation to follow.¹⁵⁴ Moreover, the Convention conveniently and adequately provides a list of the required information for a request,¹⁵⁵ although a Requested State-Party may ask for more information.¹⁵⁶

5. Execution of a Request

When executing a request under the UNCAC, a State-Party must do so according to the domestic law of the Requested Party.¹⁵⁷ It must also respect any of the procedures specified in the mutual legal assistance request unless it is illegal or unfeasible.¹⁵⁸ Likewise, the Requesting State-Party, unless it secures the consent of the Requested State-Party, is not permitted to use the information received for purposes other than those stated in the request.¹⁵⁹

149. *Id.* art. 46 (13).

150. Prost, *supra* note 30, at 10.

151. *Id.*

152. *Id.*

153. UNCAC, *supra* note 12, art. 46 (14).

154. Prost, *supra* note 30, at 10.

155. *Id.*

156. UNCAC, *supra* note 12, art. 46 (16).

157. *Id.* art. 46 (17)

158. *Id.*

159. *Id.* art. 46 (19).

Moreover, a Requesting State-Party may require the Requested State-Party to keep confidential the information provided in the request, except if it is necessary to execute such request.¹⁶⁰ To expedite the process, the UNCAC requires Requested State-Parties to execute requests without delay,¹⁶¹ as well as to update the Requesting State-Party on the status and progress of the request.¹⁶² As for the costs, the Requested State-Party should pay the cost of executing the request, unless the State-Parties agree otherwise.¹⁶³

6. Grounds for Refusing Mutual Legal Assistance

If it lays out the proper grounds for refusal, a Requested State-Party may deny mutual legal assistance. Such grounds, as delineated in the UNCAC, include: not meeting the requirements for assistance; assistance is prejudicial to the interests of the Requested State-Party; assistance is of a *de minimis* nature; or assistance is available under other provisions of the Convention.¹⁶⁴ Similar to extradition, before the Requested State may deny a request of mutual legal assistance, the State-Parties are required to consult each other and possibly agree to conditional assistance.¹⁶⁵ Further, mutual legal assistance cannot be denied solely because the offense is considered to involve fiscal matters¹⁶⁶ or because it is an issue against bank secrecy.¹⁶⁷

7. Miscellaneous Provisions

Lastly, the UNCAC also provides additional information that goes beyond formal and conventional mutual legal assistance. For instance, the Convention requires State-Parties “to consider entering into agreements for the transfer of sentenced persons”¹⁶⁸ and “transferring or consolidating proceedings in the interest of justice.”¹⁶⁹ On a less ceremonial manner, it requires the law enforcement authorities of State-Parties to “maintain channels of communication and information exchange.”¹⁷⁰ The law

160. *Id.* art. 46 (20).

161. *Id.* art. 46 (24).

162. Prost, *supra* note 30, at 11.

163. UNCAC, *supra* note 12, art. 46 (28).

164. *Id.* arts. 46 (9) (b) & 46 (21).

165. Prost, *supra* note 30, at 11.

166. UNCAC, *supra* note 12, art. 46 (22).

167. *Id.* art. 46 (8).

168. Prost, *supra* note 30, at 13.

169. *Id.*

170. *Id.*

enforcement authorities are also encouraged to conduct joint investigations¹⁷¹ and to use special investigative techniques.¹⁷²

IV. INTERNATIONAL COOPERATION FRAMEWORK OF THE PHILIPPINES

[T]he suppression of crime is the concern not only of the [S]tate where it is committed but also of any other [S]tate to which the criminal may have escaped, because it saps the foundation of social life and is an outrage upon humanity at large, and it is in the interest of civilized communities that crimes should not go unpunished.

— Preamble, Philippine Extradition Law¹⁷³

During the two-day conference of the Global Organization of Parliamentarians against Corruption and the regional meeting of the Southeast Asian Parliamentarians against Corruption held last September 2010, Justice Secretary Leila M. de Lima proclaimed that the “Philippines joins the international community in committing to combat corruption and to promote good governance.”¹⁷⁴ In fact, last 7 November 2008, Memorandum Circular No. 167-A was issued to allow departments and their attached agencies, as well as heads of government-owned and controlled corporations or government financial institutions and local government units, to disburse necessary funds to actively participate and give full support to the launching of the UNCAC.¹⁷⁵ As a State-Party to the UNCAC, the Philippines is tasked with the responsibility of ensuring that its existing laws are compliant with the provisions of the UNCAC, particularly with the international cooperation aspect of the said Agreement.¹⁷⁶

However, extradition and mutual legal assistance in the Philippines is “still at the infancy stage. There is little local jurisprudence or writings on the subject.”¹⁷⁷ Nonetheless, this Chapter will discuss the international cooperation framework in the Philippines, by examining both the Philippine Extradition Law and the country’s foreign bilateral agreements with other

171. UNCAC, *supra* note 12, art. 49.

172. *Id.* art. 50.

173. Philippine Extradition Law, pmb1.

174. Philippine Information Agency, Int’l Parliamentarians Gather for Anti-Corruption Conference, *available at* <http://archives.pia.gov.ph/?m=12&fi=100930.htm&no=26> (last accessed Nov. 15, 2012).

175. OES Memo. Circ. No. 167-A.

176. Dopplick, *supra* note 23.

177. Severino H. Gaña, Jr., Extradition and Legal Assistance: The Philippine Experience (A Visiting Expert’s Paper for the 114th International Training Course, as included in Resource Materials Series No. 57) 62, *available at* http://www.unafei.or.jp/english/pdf/PDF_rms/no57/57-06.pdf (last accessed Nov. 15, 2012).

countries, which are also signatories to the UNCAC. Its emerging agreements on mutual legal assistance will also be discussed.

A. The Extradition Framework in the Philippines

In the Philippines, extradition is governed by P.D. No. 1069 and by the applicable extradition treaty in force.¹⁷⁸ After the conclusion of the country's first Extradition Treaty with the Republic of Indonesia, President Marcos enacted P.D. No. 1069.¹⁷⁹ The law was created as a guide for the executive and judicial implementation of extradition treaties.¹⁸⁰ As defined in P.D. No. 1069, extradition is

[t]he removal of an accused from the Philippines with the object of placing him [or her] at the disposal of foreign authorities to enable the [R]equesting [S]tate or government to hold him [or her] in connection with any criminal investigation directed against him [or her] or the execution of a penalty imposed on him [or her] under the penal or criminal law of the [R]equesting [S]tate or government.¹⁸¹

An “accused,” who is not necessarily convicted of a crime in a foreign State, is a person within the territory of the Republic of the Philippines, and whose extradition has been requested by a foreign State.¹⁸² As will be discussed subsequently, the current Philippine Extradition Law inappropriately calls the person sought an “accused” and fails to encompass the procedure for requests made *from* the Philippine government, where the person sought is within the territorial jurisdiction of the foreign State.

1. The Legal Basis for Extradition

Extradition may be granted only pursuant to a convention or treaty,¹⁸³ and any foreign State or government with which the Philippines has entered into an extradition treaty or convention may request for the extradition of the person sought in the Philippines, only when the relevant treaty or convention remains in force.¹⁸⁴ Conversely, extradition cannot be made

178. *Id.* at 51.

179. *Id.*

180. Philippine Extradition Law, whereas cl. & Gaña, Jr., *supra* note 177, at 50.

181. Philippine Extradition Law, § 2 (a).

182. *Id.* § 2 (c).

183. *Id.* § 3 & Department of Justice, DOJ Opinion No. 216, Series of 1988 [DOJ Opinion No. 216, s. 1988] (Nov. 8, 1988). Secretary Sedfrey A. Ordoñez opined that absent a valid extradition with Austria, there is no legal basis for the extradition of an Austrian citizen with pending charges before an Austrian court. DOJ Opinion No. 216, s. 1988.

184. Philippine Extradition Law, § 4 (1).

without a treaty.¹⁸⁵ As such, with respect to countries that the Philippines has no bilateral agreement with, extradition remains an impossibility.¹⁸⁶

For this reason, the Philippines has entered into bilateral treaties with 13 countries, namely Australia, Canada, China, Hong Kong, India, Indonesia, Korea, Micronesia, Spain, Switzerland, Thailand, the U.S., and the U.K.¹⁸⁷ The bilateral treaty with the U.K. was signed in 2009, but currently lacks Senate ratification.¹⁸⁸ In the absence of a bilateral extradition treaty, however, an international convention entered into by the Philippines may serve as the legal basis for extradition if the Philippines did not declare any reservation upon its acceptance.¹⁸⁹ One such multilateral convention is the UNTOC, which the Philippines has taken to be its legal basis for the extradition of offenses such as participation in an organized crime group,¹⁹⁰ laundering of proceeds of crime,¹⁹¹ and to a particular extent, corruption.¹⁹² In the case of the UNCAC, however, although a State-Party to it, the Philippines has declared that it does not accept the Convention as a legal basis for extradition.¹⁹³

The procedure for extradition is normally through diplomatic channels, and the following principles apply:

185. Severino H. Gaña, Jr., International Cooperation in Combating Trafficking in Human Beings and Smuggling of Migrants (A Visiting Expert's Paper for the 122d International Training Course, as included in Resource Materials Series No. 62) 98, available at http://www.unafei.or.jp/english/pdf/PDF_rms/no57/57-06.pdf (last accessed Nov. 15, 2012). In the Philippines, after the Secretary of Foreign Affairs has received the extradition request and has certified its compliance with the law and subject treaties, the Secretary shall transmit the request to the Secretary of the Department of Justice who shall file the necessary extradition petition and application for warrant of arrest in the Regional Trial Court. *Id.*

186. See BERNAS, *supra* note 29, at 174.

187. Interview with Mildred Bernadette B. Alvor, *supra* note 27.

188. *Id.*

189. ASIAN DEVELOPMENT BANK & ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, MUTUAL LEGAL ASSISTANCE, EXTRADITION, AND RECOVERY OF PROCEEDS OF CORRUPTION IN ASIA AND THE PACIFIC 28 (2008).

190. UNTOC, *supra* note 80, art. 5.

191. *Id.* art. 6.

192. *Id.* art. 8.

193. ASIAN DEVELOPMENT BANK ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT ANTI-CORRUPTION INITIATIVE FOR ASIA AND THE PACIFIC, *supra* note 189, at 29.

- (1) “No [S]tate is obliged to extradite unless there is a treaty;”¹⁹⁴
- (2) “Differences in legal systems can be an obstacle to interpretation of what the crime is;”¹⁹⁵ and
- (3) “Religious and political offenses are not extraditable.”¹⁹⁶

2. Dual Criminality in Extradition

Under the dual criminality principle, “an act is not extraditable unless it constitutes a crime under the laws of both the [S]tate requesting extradition and the [S]tate from which extradition is sought.”¹⁹⁷

In interpreting dual criminality, the Philippines adopts both the listing approach, where specific crimes are enumerated, and the conduct approach, where the conduct must be recognized under both the Requesting State and Requested State as a crime.¹⁹⁸ Extradition treaties using the listing approach include those with Hong Kong, Indonesia, and Thailand, while extradition treaties using the conduct approach include those with Australia, Canada, Korea, Micronesia, Switzerland, and the U.S.

To satisfy dual criminality through the conduct approach, it is not essential that the crimes in the two countries be the same or that the scope of the crime’s liability be equivalent.¹⁹⁹ The main justification for this principle is that “it ensures that a person’s liberty is not restricted when his/her conduct is not recognised as criminal in the [S]tate receiving an extradition request.”²⁰⁰ To satisfy dual criminality through the listing approach, the offense must be specifically listed in the extradition agreement between the State-Parties.²⁰¹ The listing approach, which is a more explicit requirement, is the less popular approach because of the hindrance of updating lists of extraditable offenses with new crimes.²⁰²

194. BERNAS, *supra* note 29, at 174.

195. *Id.*

196. *Id.*

197. David Chaikin & Jason Sharman, APG/FATF Anti-Corruption/Anti-Money Laundering/Combating Financing of Terrorism (A Research Paper for the FATF/APG Project Group on Corruption and Money Laundering) 61, available at http://www.apgml.org/issues/docs/17/APG-FATF_Report_on_Anti-Corruption_AML.pdf (last accessed Nov. 15, 2012).

198. Gaña, Jr., *supra* note 177, at 52.

199. *Id.*

200. Chaikin & Sharman, *supra* note 197, at 61.

201. Gaña, Jr., *supra* note 177, at 52.

202. Anna MacCormack, *The United States, China, and Extradition: Ready for the Next Step?*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 445, 453 (2008–2009).

Further, in the Philippines, the Philippine Extradition Law provides for a severity criterion, wherein the offense for which extradition is sought must be punishable in the Requesting State and the Philippines by imprisonment.²⁰³

3. Breakdown of Extradition Requests

Most extradition requests come from the U.S.²⁰⁴ Conversely, most of the Philippine requests are also directed to them. This is mainly due to the number of Filipinos who reside in the U.S.²⁰⁵ The most prominent case in recent time is the Garcia family extradition case, where the Office of the Ombudsman, through the Department of Justice (DOJ) and Department of Foreign Affairs, coordinated with the U.S. government for the extradition of former Armed Forces of the Philippines (AFP) Comptroller Major General Carlos F. Garcia's wife and three sons.²⁰⁶ The former General, along with his family, was accused of amassing a total of ₱303 million in illegally obtained money during his service in the AFP.²⁰⁷ Clarita and Timothy Mark, Garcia's wife and son, respectively, were arrested in the U.S. based on a "provisional arrest warrant" requested by the Philippine authorities.²⁰⁸ The other two sons, Juan Paulo and Ian Carl, who were indicted for bulk cash smuggling and conspiracy to commit bulk cash smuggling, were arrested in Michigan and Las Vegas, respectively.²⁰⁹ The U.S. indictment alleged that the Garcia brothers smuggled U.S. \$100,000.00 from Manila to San Francisco in 2003 and failed to declare them in their luggage.²¹⁰ According to the late Press Secretary Cerge M. Remonde of the Arroyo administration, the extradition of Ian Carl D. Garcia and Juan Paulo D. Garcia will depend on whether they have pending criminal cases in the Philippines.²¹¹ Currently, their extradition

203. Philippine Extradition Law, § 3 (a).

204. Gaña, Jr., *supra* note 177, at 53.

205. *Id.*

206. Reinir Padua, *Ombudsman Working on Extradition of Garcia's Wife, 3 Sons*, PHIL. STAR, Mar. 8, 2009, available at <http://www.philstar.com/article.aspx?articleid=446609> (last accessed Nov. 15, 2012).

207. *Id.*

208. *Id.*

209. *Id.*

210. Jose Rodel Clapano, *Extradition of Garcia's 2 Sons Up to DOJ, DFA — Palace*, PHIL. STAR, Mar. 1, 2009, available at <http://www.philstar.com/article.aspx?articleid=444510> (last accessed Nov. 15, 2012) & Edson C. Tandoc Jr., *RP to Seek Extradition of Garcia's Sons*, PHIL. DAILY INQ., Feb. 27, 2009, available at <http://globalnation.inquirer.net/news/breakingnews/view/20090227-191476/RP-to-see-Extradition-of-Garcias-sons> (last accessed Nov. 15, 2012).

211. Clapano, *supra* note 210.

remains on hold, as Solicitor General Jose Anselmo I. Cadiz discloses the filing of the Motion for Reconsideration of the Sandiganbayan's approval of the plea bargaining agreement.²¹²

The following table shows the number and status of extradition requests made to and from the Philippines from 2004 to 2007.

Table 1.1. Status and Number of Foreign Extradition Requests Received from 2004-2007²¹³

STATUS	NUMBER
Person Sought Extradited	5
Pending with the DOJ	12
Filed / Pending in Court	4
Withdrawn	3
Denied	3
Total	27

Table 1.2. Status and Number of Philippine Extradition Requests from 2004-2007²¹⁴

STATUS	NUMBER
Person Sought Extradited	2
Withdrawn / Pending	8
Total	10

4. Extradition of Nationals

In the extradition of nationals, Philippine law allows its citizens to be extradited, subject to the usual exceptions contained in the relevant treaties.²¹⁵

5. Major Issues Encountered

212. RG Cruz, SolGen to File Appeal vs Garcia Plea Bargain, *available at* <http://www.abs-cbnnews.com/nation/05/11/11/solgen-file-appeal-vs-garcia-plea-bargain> (last accessed Nov. 15, 2012).

213. Email from Mildred Bernadette B. Alvor, Senior State Counsel, Department of Justice (May 30, 2011, 10:19 PHT) (on file with Author).

214. Email from Mildred Bernadette B. Alvor, Senior State Counsel, Department of Justice (June 17, 2011, 18:24 PHT) (on file with Author).

215. Gaña, Jr., *supra* note 177, at 56.

Generally, the objections raised against extradition are constitutional ones.²¹⁶ Such issues involve the period of detention under provisional arrest, bail, and political motivation.²¹⁷ These issues are briefly discussed below.

a. Period of Detention under Provisional Arrest

It has become a standard for most extradition treaties to have a provision on provisional arrest. The main reason is that there is a risk that the fugitive may flee while the Requesting State is in the process of completing the necessary documentation in its request for extradition.²¹⁸ The UNCAC allows for such a measure, when it provides that upon the Requested State's satisfaction of the urgency and the circumstances of the request of the Requesting State, the former may take custody or other measures that will ensure the fugitive's presence at the extradition proceedings.²¹⁹ In the Philippines, our implementing law, P.D. No. 1069, allows for such a provisional request to be sent through diplomatic channels, or by post or telegraph.²²⁰

On the issue of the length of detention, P.D. No. 1069, on the one hand, provides that the length of detention under a provisional arrest while the receipt of the extradition request is pending is 20 days.²²¹ On the other hand, the extradition treaties provide for a detention of 45 to 60 days.²²² The position of the International Affairs Division (IAD) in this issue is that, where there is a conflict, a later treaty prevails over an earlier enacted statute, thus the 45 to 60-day period governs.²²³ The IAD is a division of the DOJ, composed of state counsels and state prosecutors, in charge of handling all requests for extradition and mutual legal assistance in criminal matters.²²⁴

b. Bail

Once the person sought has been provisionally arrested, the question of bail arises. The IAD has always put forward the argument that the constitutional right to bail is not an absolute right, as it is only available in criminal proceedings committed against the State.²²⁵ Since extradition is not a criminal proceeding, bail may only be granted within the court's

216. *Id.* at 54.

217. *Id.*

218. *Id.*

219. UNCAC, *supra* note 12, art. 44 (10).

220. Gaña, Jr., *supra* note 177, at 54.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 50.

225. *Id.* at 55.

discretion.²²⁶ In *Government of Hong Kong Special Administrative Region v. Olalia, Jr.*,²²⁷ however, this issue has been settled when the Court ruled that “[i]f bail can be granted in deportation cases, we see no justification why it should not be also allowed in extradition cases.”²²⁸

c. Political Motivation

The issue of whether or not a crime is politically motivated is relatively important because a crime recognized as politically motivated cannot be the subject of extradition proceedings in the Philippines.²²⁹ The definition of political offenses has been discussed previously in Chapter III.

One of the more controversial issues in the Philippines was the extradition of communist rebel leader Jose Maria Sison, who was charged with rebellion and murder by the Arroyo administration.²³⁰ He was sought to be extradited from the Netherlands, the place where he sought refuge for nearly 19 years.²³¹ Sison claimed that the charges against him were politically motivated and was made in order to make the people stray from focusing on the criminal culpabilities of then President Gloria Macapagal-Arroyo for electoral fraud, corruption, and gross human rights violations.²³² While the Dutch government thrice rejected his political motivation argument, the Dutch cannot completely fulfil the Philippines’ extradition request for Sison because he was protected by the Refugee Convention²³³ as well as the European Convention of Human Rights (EUHR),²³⁴ and thus, he could not be expelled to “anywhere he was in danger of torture and other ill[-]treatment.”²³⁵ Moreover, the fact that the Philippines does not have an

226. Gaña, Jr., *supra* note 177, at 55.

227. *Government of Hong Kong Special Administrative Region v. Olalia, Jr.*, 521 SCRA 470 (2007).

228. *Id.* at 484.

229. *See* Lorenzotti, *supra* note 111, at 166.

230. Delfin T. Mallari, Jr., *Joma on Extradition Bid: You Can’t Touch Me*, PHIL. DAILY INQ., June 30, 2006, at A13.

231. *Id.*

232. Gil C. Cabacungan, Jr., *Gov’t Wants The Hague to Expel Joma Sison*, PHIL. DAILY INQ., June 29, 2006, available at http://business.inquirer.net/money/topstories/view/20060629-7172/Gov%92t_wants_The_Hague_to_expel_Joma_Sison (last accessed Nov. 15, 2012).

233. U.N. Convention Relating to the Status of Refugees, *entered into force* Apr. 22, 1954, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

234. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention of Human Rights].

235. Cabacungan, Jr., *supra* note 232.

extradition treaty with the Netherlands served as a major obstacle for the fulfillment of the request.²³⁶

6. Survey of Existing Philippine Legislation and Bilateral Agreements

Below is a general summary and comparison of the existing legislation and bilateral treaties contracted by the Philippines and their essential features.

Table 2. Philippine Legislation and Agreements with Other Countries:
Extradition

LEGISLATION / MULTILATERAL / BILATERAL AGREEMENTS WITH OTHER COUNTRIES	FEATURES OF THE PHILIPPINES' EXTRADITION AGREEMENTS			
	Extradition of Nationals Allowed	Dual Criminality Approach	UNCAC Party	UNTOCP arty
P.D. No. 1069	✓	Minimum Penalty	—	—
UNCAC	✓	No Need / Conduct	—	—
UNTOC	✓	No Need / Conduct	—	—
Australia	✓	Conduct	✓	✓
China	✓	Conduct	✓	✓
Hong Kong	✓	<i>Listing</i>	✓	✓
Korea	✓	Conduct	✓	Not ratified
Spain*	✓	Conduct	✓	✓
Switzerland	✓	Conduct	✓	✓
U.S.	✓	Conduct	✓	✓
U.K.*	✓	Conduct	✓	✓
Canada	✓	Conduct	✓	✓
India*	✓	Conduct	✓	✓
Indonesia	✓	<i>Listing</i>	✓	✓
Micronesia	✓	Conduct	✗	✓
Thailand	✓	<i>Listing</i>	✓	Not

236. Volt Contreras, et al., *Joma Sison Arrested*, PHIL. DAILY INQ., Aug. 29, 2007, available at <http://www.inquirer.net/specialreports/jomasison/view.php?db=1&article=20070829-85261> (last accessed Nov. 15, 2012).

				ratified
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*No Senate Ratification of the Bilateral Treaty

B. The Mutual Legal Assistance Framework in the Philippines

Unlike extradition, mutual legal assistance in the Philippines is relatively new.²³⁷ While there is no national legislation on mutual legal assistance, the Philippines has recently entered into treaties on mutual legal assistance on criminal matters with Australia, China, Hong Kong, Korea, Spain, Switzerland, and the U.S.²³⁸ A bilateral mutual legal assistance treaty was also entered with the U.K. in 2009 but it is still pending in the Senate.²³⁹ Further, the Philippines has two agreements on Transfer of Sentenced Persons, one with Thailand and another with Hong Kong, but both are still likewise pending in the Senate.²⁴⁰ Additionally, the Philippines has also entered into multilateral agreements through the UNCAC and the UNTOC. In case of the Southeast Asian MLAT, however, the Philippines has signed but has not yet ratified it.²⁴¹

By ratifying the UNCAC, the Philippines has significantly increased the number of countries to which it can provide mutual legal assistance in corruption cases.²⁴² If there is no bilateral treaty entered into by the Philippines on mutual legal assistance, Article 46 of the UNCAC can be used to provide a wide range of assistance. It must be noted, however, that the Philippines is a dualist or pluralist State where international treaties do not automatically become integrated with national law.²⁴³ Dualist States emphasize the difference between international and municipal law and highlight that unless international law is transformed or incorporated into domestic law, it does not become part of domestic law.²⁴⁴ In the Philippines, after ratifying a treaty, the practice is to enact an enabling law, because in general, treaty provisions are not self-executing.²⁴⁵ As such, in order to make full use of the mutual legal assistance provisions in the UNCAC, there exists a need to formulate local implementing legislation.

237. Gaña, Jr., *supra* note 177, at 62.

238. Interview with Mildred Bernadette B. Alvor, *supra* note 27.

239. *Id.*

240. Gaña, Jr., *supra* note 177, at 50.

241. ASIAN DEVELOPMENT BANK ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT ANTI-CORRUPTION INITIATIVE FOR ASIA AND THE PACIFIC, *supra* note 189, at 30.

242. *Id.* at 257.

243. BERNAS, *supra* note 29, at 60.

244. *Id.*

245. *Id.*

1. Central Authority

Pursuant to Article 46 (13) of the UNCAC, each State-Party must designate a Central Authority that shall have the responsibility, as well as the power, to receive requests for mutual legal assistance, either to execute them or transmit them to competent officials for execution.²⁴⁶ On its signing of the UNCAC, the Philippines has made known that requests for mutual legal assistance pursuant to a treaty are to be handled by the DOJ,²⁴⁷ while requests without a treaty are to be handled by the Ombudsman.²⁴⁸

2. Dual Criminality in Mutual Legal Assistance

Unlike extradition, dual criminality is less commonly required in mutual legal assistance.²⁴⁹ In the Philippines, since there is no local legislation on mutual legal assistance, dual criminality may or may not be expressly required in the bilateral treaties.²⁵⁰ A survey of the Philippine mutual legal assistance treaties would show that dual criminality is discretionary in all its existing treaties, except in the Hong Kong-Philippine Mutual Legal Assistance Bilateral Treaty, where dual criminality is mandatory.²⁵¹

3. Execution of Requests

Similar to extradition, the IAD of the DOJ also handles all matters relating to mutual legal assistance in criminal matters.²⁵² In addition to this function, the IAD also assists in handling requests for the transfer of sentenced persons or prisoners.²⁵³

4. Major Issues Encountered: Bank Secrecy Law

246. UNCAC, *supra* note 12, art. 46 (13).

247. Ma. Mercedes N. Gutierrez, Philippine Experience on the UNCAC (An Unpublished Report Presented During the ADB-OECD 14th Steering Group Meeting and Regional Seminar on Political Economy of Corruption on Sep. 10, 2009) 11, available at <http://www.oecd.org/site/anti-corruptioninitiative/policydialoguemeasuringprogress/44442295.pdf> (last accessed Nov. 15, 2012).

248. *Id.*

249. ASIAN DEVELOPMENT BANK ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT ANTI-CORRUPTION INITIATIVE FOR ASIA AND THE PACIFIC, *supra* note 189, at 42.

250. *Id.*

251. *Id.* at 43.

252. Gaña, Jr., *supra* note 177, at 50.

253. *Id.*

At the moment, most of the requests for legal assistance have to do with examining bank records.²⁵⁴ Legally, there is an obstacle to this because the Philippines has a strict bank secrecy law.²⁵⁵ This was particularly evident in *Salvacion v. Central Bank of the Philippines*,²⁵⁶ which dealt with foreign currency deposits. In the case, the argument was that the treaties superseded the bank secrecy deposit law because the treaties came after the said laws and impliedly repealed it.²⁵⁷ The Central Bank, however, argued that there was no express repeal in the treaties and so there was no repeal or amendment of the bank secrecy law.²⁵⁸ In this case, however, the Court held that a transient or a tourist made the foreign currency deposits, thus, it was not the kind of deposit encouraged and protected by the bank secrecy law.²⁵⁹ This is because such a depositor only stays for a few days in the country and his deposit is here only for a temporary period of time.²⁶⁰ The Court also ruled that the main reason for the protection of the bank accounts was to increase our ties with foreign lenders and to facilitate the entry of desired investments here.²⁶¹ It further ruled that if the funds can be identified by an outside source as not being used for a legitimate purpose, then the bank secrecy laws do not apply.²⁶²

According to Senior Deputy State Prosecutor Severino H. Gaña of the DOJ, “[w]e are cautious in the implementation of [mutual legal assistance treaties,] as we are walking a tight rope because of the absence of any definitive jurisprudence. Slowly, however, we are gathering materials and formulating possible arguments against the bank secrecy laws.”²⁶³

5. Breakdown of Mutual Legal Assistance requests

Similar to extradition, most mutual legal assistance requests come from the U.S.²⁶⁴ Recently, through the mutual legal assistance treaty between the U.S. and the Philippines, the U.S. turned over to the Philippine government a check of U.S. \$132,000.00 or ₱5.7 million, representing the proceeds of the sale of forfeited properties owned by former military comptroller Jacinto

254. *Id.* at 57.

255. *Id.*

256. *Salvacion v. Central Bank of the Philippines*, 278 SCRA 27 (1997).

257. *Id.* at 30-31.

258. *Id.*

259. *Id.* at 45.

260. *Id.*

261. *Id.*

262. *Salvacion*, 278 SCRA at 45-46.

263. Gaña, Jr., *supra* note 177, at 57.

264. *Id.* at 53.

C. Ligot and his wife in Stanton Avenue, Buena Park, California.²⁶⁵ It was the first time a foreign government had turned over to the Philippines proceeds of ill-gotten assets abroad using the mutual legal assistance treaty.²⁶⁶ According to U.S. Ambassador to the Philippines Harry K. Thomas Jr.,

[t]his is to show the benefit of the [mutual legal assistance treaty] we have with the Philippines, the confidence that the [U.S.] government places in the Aquino administration, in particular, [Justice] Secretary De Lima, and that the funds will be returned to the treasury for the benefit of the Filipino People.²⁶⁷

The Ambassador said he is hopeful that the case is just the first of many where the U.S. government would cooperate with the Philippine government through the mutual legal assistance treaty.²⁶⁸

Below is the number and status of mutual legal assistance requests received and initiated by the Philippines from 2004 to 2007.

Table 3.1. Status and Number of Philippine Mutual Legal Assistance Requests from 2004-2007²⁶⁹

STATUS	NUMBER
Completed	11
Denied	0
For Further Documentation	4
Withdrawn	0
Pending	0
Total	15

Table 3.2. Status and Number of Foreign Mutual Legal Assistance Requests Received from 2004-2007²⁷⁰

STATUS	NUMBER
Completed	26

265. Edu Punay, *US Returns \$132,000 Ligot Assets to the Phil*, PHIL. STAR, Apr. 8, 2011, available at <http://www.philstar.com/Article.aspx?articleId=674125&publicationSubCategoryId=> (last accessed Nov. 15, 2012).

266. Leila B. Salaverria, *Gutierrez Should Get Credit for Return of Ligot Funds*, PHIL. DAILY INQ., Apr. 10, 2011, available at <http://newsinfo.inquirer.net/inquirer-headlines/nation/view/20110410-330322/Gutierrez-should-get-credit-for-return-of-Ligot-funds> (last accessed Nov. 15, 2012).

267. Punay, *supra* note 265.

268. *Id.*

269. Email from Mildred Bernadette Alvor, *supra* note 214.

270. *Id.*

Denied	4
For further documentation	4
Withdrawn	3
Pending	4
Total	41

6. Survey of Existing Philippine Mutual Legal Assistance Agreements

Below is a general summary and comparison of the existing legislation and bilateral treaties contracted by the Philippines on mutual legal assistance and their essential features.

Table 4. Philippine Agreements with Other Countries: Extradition

MULTILATERAL / BILATERAL AGREEMENTS WITH OTHER COUNTRIES	FEATURES OF THE PHILIPPINES' MUTUAL LEGAL ASSISTANCE AGREEMENTS	
	Mutual Legal Assistance of Nationals Allowed	Dual Criminality Requirement
UNCAC	✓	No Requirement / Discretionary
UNTOC	✓	Discretionary
Australia	✓	Discretionary
China	✓	Discretionary
Hong Kong	✓	<i>Mandatory</i>
Korea	✓	Discretionary
Spain★	✓	Discretionary
Switzerland	✓	Discretionary
U.S.	✓	Discretionary
U.K.★	✓	Discretionary

V. THE IMPLICATIONS OF THE PHILIPPINES' RATIFICATION OF THE UNCAC

Pursuant to Article 26 of the Vienna Convention on the Law of Treaties (Vienna Convention), the UNCAC is binding upon the Philippines as a State-Party and the latter is bound to perform the obligations set therein in

good faith.²⁷¹ Under this principle of *pacta sunt servanda*, the Philippines' ratification of the UNCAC is not a mere symbolic act of the Philippine government in the fight against transnational corruption, but has in fact real and concrete legal consequences. This Chapter will discuss the legal effects of the Philippines' ratification of the UNCAC, particularly the propriety of its existing reservation to the extradition aspect of the treaty, the inconsistency of its approaches to dual criminality, and its current lack of implementing measures to address mutual legal assistance. Prior to delving into the legal effects of the Philippines' ratification, however, the imperative and advantages of fully complying with the UNCAC will be discussed first.

A. *Why Comply with the UNCAC?*

It is necessary that the Philippines complies fully with the UNCAC primarily because it is its obligation as a State-Party. Further, not only is it an obligation, but it will also help boost our Financial Action Task Force (FATF) standing, deter corrupt offenders from seeking haven in Philippine territory, and send a message to the international community that corruption is not tolerated in Philippine shores.

1. State Obligation as State-Party

By ratifying the UNCAC on 8 November 2006,²⁷² the Philippines officially made itself a State-Party to the UNCAC.²⁷³ As a consequence of its act of ratification, the Philippines expressed its consent to be bound.²⁷⁴ As such, it is obliged to comply with its legal obligations under the UNCAC.²⁷⁵ In fact, the Vienna Convention, which regulates treaties concluded between States,²⁷⁶ imposes that a State-Party to a treaty should perform the obligations set therein in good faith.²⁷⁷ This principle, called the *pacta sunt servanda* principle, is enshrined in Article 26 of the Vienna Convention, which states that — “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”²⁷⁸ The strict observance of

271. Vienna Convention on the Laws of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

272. Signature and Ratification Status, *supra* note 21.

273. See Martin A Rogoff & Barbara E. Gauditz, *The Provisional Application of International Agreements*, 39 ME. L. REV. 29, 34 (1987).

274. IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 611 (7th ed. 2008) & Catherine Logan Piper, *Reservations to Multilateral Treaties: The Goal of Universality*, 71 IOWA L. REV. 295, 296 (1985).

275. MALCOLM D. EVANS, INTERNATIONAL LAW 188 (2d ed. 2006).

276. Vienna Convention, *supra* note 271, art. 1.

277. *Id.* art. 26.

278. *Id.*

good faith and the fundamental value of *pacta sunt servanda* was confirmed by the International Court of Justice (ICJ) in the 1997 *Gabcikovo-Nagymaros* case,²⁷⁹ wherein the ICJ held that the wrongful conduct of both states in litigation did not purport to terminate their obligations under the treaty; rather, it is imperative, under the principle of *pacta sunt servanda*, that they find another solution within the cooperative context of the treaty.²⁸⁰ Good faith therefore obliges State-Parties to complete their obligations in the treaty with a view to further the validity of the treaty and not otherwise.²⁸¹ This is likewise consonant with the Philippine Constitution, which states that the Philippines “adopts the generally accepted principles of international law as part of the law of the land[,] and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.”²⁸²

Because the mandatory character of cooperating in criminal matters was sufficiently emphasized in Article 43 (1) of the UNCAC,²⁸³ the Philippines, as a State-Party, is bound to render its obligations therein in good faith.

In addition, according to the International Law Commission’s Articles of State Responsibility, it is imperative that States take positive measures to comply with their obligations under a treaty because there may be certain consequences for their breach of an international obligation.²⁸⁴ In fact, “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”²⁸⁵

2. Financial Action Task Force Standing

The Paris-based FATF is an inter-governmental body established in 1989 by the G-7 Summit and is mandated to implement and develop anti-corruption standards in order to raise public awareness and help combat corruption,

279. *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. 7, 68 (Sep. 25).

280. *Id.*

281. *Id.*

282. PHIL. CONST. art. II, § 2 & *Bayan Muna v. Romulo*, 641 SCRA 244, 299 (2011).

283. UNCAC, *supra* note 12, art. 43 (1) & UNODC, LEGISLATIVE GUIDE, *supra* note 98, at 4.

284. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 77 (2002).

285. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 12, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

such as money laundering and terrorist financing.²⁸⁶ In order to do so, it formulates policies, both at the national and international level, and works to bring about national legislative and regulatory reforms in order to bring the policies to practice.²⁸⁷ During this process, the FATF ensures compliance with their standards by regularly identifying high-risk jurisdictions, or jurisdictions that pose great risk to the international financial system by not complying with the standards, and by publishing the results and listing the countries that are prime candidates for the laundering of proceeds of criminal activities.²⁸⁸ The publication, called the Non-Cooperative Countries and Territories (NCCT) list or the “Blacklist,” is an important piece of international literature, because it sanctions non-cooperating jurisdictions by making all transactions, especially bank transactions, a tedious task for corporations and individuals within those jurisdictions.²⁸⁹ While the Blacklist process is discretionary, it uses economic forces to induce States to comply with its recommendations.²⁹⁰

In the Philippines, getting sanctions from the FATF is not entirely new.²⁹¹ In fact, when the country was part of the NCCT, international money transfers and remittances of overseas workers and businesses became problematic, because strict measures were imposed by U.S. and European

286. Jackie Johnson, *Little Enthusiasm for Enhanced CDD of the Politically Connected*, 11 J.M.L.C. 291, 297 (2008) & Financial Action Task Force, Corruption (A Reference Guide and Information Note on the Use of the FATF Recommendations to Support the Fight against Corruption) 1, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Corruption%20Reference%20Guide%20and%20Information%20Note%202012.pdf> (last accessed Nov. 15, 2012) [hereinafter Financial Action Task Force, Corruption].

287. See Kathleen A. Lacey & Barbara Crutchfield George, *Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms*, 23 NW. J. INT'L & BUS. 263, 299 (2003); Bruce Zagaris, *A Brave New World: Recent Developments in Anti-Money Laundering and Related Litigation Traps for the Unwary in International Trust Matters*, 32 VAND. J. TRANSNAT'L L. 1023, 1028 (1999); & Financial Action Task Force, *Who We Are*, available at <http://www.fatf-gafi.org/pages/aboutus/> (last accessed Nov. 15, 2012).

288. Financial Action Task Force, *High Risk and Non-Cooperative Jurisdictions*, available at <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/> (last accessed Nov. 15, 2012) & Kenneth S. Blazejewski, *The FATF and its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks*, 22 TEMP. INT'L & COMP. L.J. 1, 19-21 (2008).

289. See Ted P. Torres, *FATF Wants RP to Amend Anti-Money Laundering Law*, PHIL. STAR, Sep. 18, 2010, available at <http://www.philstar.com/Article.aspx?articleId=612822&publicationSubCategoryId=66> (last accessed Nov. 15, 2012).

290. Blazejewski, *supra* note 288, at 18.

291. Torres, *supra* note 289.

regulators on transactions with Philippine banks, causing delays and complications.²⁹²

As one of its measures, the FATF, on its report on the use of FATF Recommendations to support the fight against corruption, stated that it

considered whether the country could demonstrate that it has a solid framework of measures to prevent and combat corruption through respect for transparency, good governance principles, high ethical and professional requirements, and established a reasonably efficient court system to ensure that judicial decisions are properly enforced.

...

By effectively implementing the FATF Recommendations, countries can:

- (a) better safeguard the integrity of the public sector[;]
- (b) protect designated private sector institutions from abuse[;]
- (c) increase transparency of the financial system[; and]
- (d) facilitate the detection, investigation, and prosecution of corruption and the money laundering, and the recovery of stolen assets.²⁹³

Specifically, Recommendations 36 to 39 of the FATF Recommendations deal with extradition and mutual legal assistance. Recommendation 36 particularly states that “[c]ountries should rapidly, constructively[,] and effectively provide the widest possible range of mutual legal assistance in relation to money laundering and terrorist financing investigations, prosecutions, and related proceedings.”²⁹⁴ The Recommendation laid down particular demands similar to the UNCAC, such as requiring countries:

- (a) Not [to] prohibit or place unreasonable ... restrictive conditions on ... mutual legal assistance[;]
- (b) [To ensure] that they have clear and efficient processes for the execution of mutual legal assistance [;]
- (c) Not [to] refuse to execute a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters[; and]

292. *Id.*

293. Financial Action Task Force, Corruption, *supra* note 286, at 2.

294. Financial Action Task Force, FATF 40 Recommendations (An October 2003 Paper Incorporating All Subsequent Amendments Until October 2004) 12, available at <http://www.fatfgafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf> (last accessed Nov. 15, 2012).

- (d) Not [to] refuse to execute a request for mutual legal assistance on the grounds that laws require financial institutions to maintain secrecy or confidentiality.²⁹⁵

Further, on the issue of dual criminality, Recommendation 37 also upholds the conduct test, when it states that —

Countries should, to the greatest extent possible, render mutual legal assistance notwithstanding the absence of dual criminality. Where dual criminality is required for mutual legal assistance or extradition, that requirement should be deemed to be satisfied regardless of whether both countries place the offe[s]e within the same category of offence or denominate the offen[s]e by the same terminology, provided that both countries criminali[z]e the conduct underlying the offen[s]e.²⁹⁶

Recommendation 38 also supports international cooperation, by mandating that countries take expeditious actions when confronted by requests from foreign countries to determine, freeze, seize, and confiscate property laundered or any property of corresponding value in lieu of it.²⁹⁷

Lastly, Recommendation 39 states that —

Countries should recogni[z]e money laundering as an extraditable offen[s]e. Each country should either extradite its own nationals, or where a country does not do so solely on the grounds of nationality, that country should, at the request of the country seeking extradition, submit the case without undue delay to its competent authorities for the purpose of prosecution of the offen[s]es set forth in the request. Those authorities should take their decision and conduct their proceedings in the same manner as in the case of any other offen[s]e of a serious nature under the domestic law of that country. The countries concerned should cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecutions.

Subject to their legal frameworks, countries may consider simplifying extradition by allowing direct transmission of extradition requests between appropriate ministries, extraditing persons based only on warrants of arrests or judgments, and/or introducing a simplified extradition of consenting persons who waive formal extradition proceedings.²⁹⁸

A cursory reading of the abovementioned Recommendations would show that international cooperation is an important aspect of the fight against corruption that must not be overlooked. More importantly, a profound understanding of the recommendations would lead a State-Party to question and understand the consequences of ignoring these recommendations. As

295. *Id.*

296. *Id.* at 12-13.

297. *Id.* at 13.

298. *Id.*

members of the FATF community would know and would proudly proclaim, the FATF's Blacklist or the NCCT is a highly influential piece of publication, as it identifies high-risk jurisdictions that dauntingly repel foreign investors.²⁹⁹ Unless the Philippines should risk getting its name back on the list, the recommendations, particularly on international cooperation matters, must be given a serious second look. This should be done, as "substantial growth in foreign investments in the Philippines is vital to its short-run economic revival and long-run industrialization."³⁰⁰

3. Not a Haven for Corrupt Officials

Another practical advantage for the Philippines' full compliance of the UNCAC would be its capacity to prevent itself from being a safe haven for corrupt criminals.³⁰¹ By strengthening its international cooperation measures, as will be recommended subsequently in this Chapter as well as in the Chapters on Conclusion and Recommendations, the Philippines can actually make a stand by choosing to send accused corrupt criminals to jurisdictions that may properly try and prosecute them for their misdeeds, instead of protecting them and keeping them in a "neutral" Philippine jurisdiction.

4. Non-Tolerance of Transnational Corruption in the Philippines

By indirectly trying and prosecuting corrupt officials that have been accused of crimes under the UNCAC through international cooperation with other State-Parties to the treaty, the Philippines will be showing, by example, that it does not tolerate transnational corruption, no matter how insignificant it might be to Philippine shores, because it admits that these should likewise be criminalized, as established in the UNCAC.

As discussed above, the country's full compliance with the UNCAC is not only recommendatory, it is likewise an obligation. As to what changes and improvements the Philippines need to work on, the next Sections will discuss them thoroughly, with emphasis on the legal effects of the Philippines' ratification, particularly the inconsistency of its approaches to dual criminality, the propriety of its existing reservation to the extradition aspect of the treaty, and its current lack of implementing measures to address mutual legal assistance.

299. Thato Mohasoa, Know About Money Laundering (A Paper by the Public Relations Section Head of the Central Bank of Lesotho) 6, available at <http://www.centralbank.org.ls/news/Know%20about%20Money%20laundering.pdf> (last accessed Nov. 15, 2012).

300. David G. Scalise & Patricia J. De Guzman, *Foreign Investment in the Philippines*, 29 GEO. WASH. J. INT'L L. & ECON. 145, 195 (1995).

301. William J. Olson, *International Organized Crime: The Silent Threat to Sovereignty*, 21 FLETCHER F. WORLD AFF. 65, 79 (1997).

B. Extradition

1. The Proper Approach to Dual Criminality in Bilateral Treaties

One of the legal preconditions that States impose on extradition is the principle of dual criminality or “proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State.”³⁰² Using a more flexible approach to dual criminality, the UNCAC provides that whenever dual criminality is a requirement, it shall be deemed fulfilled irrespective of the terminology of the offense committed, as long as the conduct underlying the offense is a criminal offense under the laws of both State-Parties.³⁰³ For purposes of international cooperation, this is called the conduct approach.³⁰⁴

As discussed earlier, the Philippines adopts two approaches to dual criminality in its bilateral treaties: the listing approach and the conduct approach. There is no legal problem in the bilateral treaties entered into by the Philippines with a precondition of dual criminality using the conduct approach because they comply with the obligations set forth in the UNCAC. These bilateral treaties include the ones entered into by the Philippines with Australia, Canada, China, Hong Kong, India, Indonesia, Korea, Micronesia, Spain, Switzerland, Thailand, the U.K., and the U.S.³⁰⁵ With regard to the treaties entered into using the listing approach, however, this poses a problem because this “list” in effect limits the applicability of the UNCAC to the Philippines, particularly in extradition treaties using the listing approach, such as those entered with Hong Kong, Indonesia, and Thailand, as the extraditable offenses are already set in stone by form of a list. This is likewise inconsistent with the fact that Hong Kong, Indonesia, and Thailand have ratified the UNCAC,³⁰⁶ which otherwise proposes the conduct approach.

a. Problems with the Strict Interpretation of Dual Criminality

While admittedly, dual criminality is not unreasonable, its strict interpretation effectively restricts extradition.³⁰⁷ A few illustrations of this

302. See Chaikin & Sharman, *supra* note 197, at 61 & SATYA D. BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 179 (1968).

303. UNCAC, *supra* note 12, art. 43 (2).

304. Qiujuan, *supra* note 121, at 787.

305. Interview with Mildred Bernadette B. Alvor, *supra* note 27.

306. Signature and Ratification Status, *supra* note 21. Hong Kong, Indonesia, and Thailand ratified the UNCAC on Jan. 13, 2006, Sep. 19, 2006, and Mar. 1, 2011, respectively. *Id.*

307. Hafen, *supra* note 18, at 230 & Australian Government: Attorney-General's Department, A New Extradition System (A Review of Australia's Extradition

problem has occurred in the past with the Jakarta GoldQuest case.³⁰⁸ In that case, although not about corruption, dual criminality proved to be an effective bar against extradition efforts.³⁰⁹ The Philippines sought to extradite an accused for the crime of syndicated estafa.³¹⁰ However, syndicated estafa was virtually unknown to Indonesian jurisprudence.³¹¹ Since the RP-Indonesia Extradition Agreement adheres to the listing approach of dual criminality, the Philippines' extradition request was denied.³¹² The case of the accused executives was dismissed as it was held to be a "mere corporate dispute over company profits."³¹³

Another case that would illustrate the problem is the case of the "I love you" virus.³¹⁴ The laws in the Philippines at the time Onel A. de Guzman launched the "I love you" virus did not cover computer damage.³¹⁵ Investigators quickly tracked the attack to de Guzman, a programming student at the AMA Computer University in Manila.³¹⁶ However, when asked by the Federal Bureau of Investigation to arrest de Guzman, courts in the Philippines could offer no help.³¹⁷ Nothing could be done, because the dual criminality condition was not complied with, as he did not break any existing Philippine law.³¹⁸

Law and Practice) 21, available at <http://www.ag.gov.au/Extraditionandmutualassistance/Pages/ExtraditionDiscussionPaper.aspx> (last accessed Nov. 15, 2012).

308. GMA News Online, Jakarta Court Rejects RP Extradition Plea for 4 GoldQuest Executives, available at <http://www.gmanetwork.com/news/story/55729/pinoyabroad/jakarta-court-rejects-rp-extradition-plea-for-4-goldquest-executives> (last accessed Nov. 15, 2012) [hereinafter Jakarta Court Rejects RP Extradition Plea].

309. *Id.*

310. *Id.*

311. *Id.*

312. See Gaña, Jr., *supra* note 177, at 52.

313. Jakarta Court Rejects RP Extradition Plea, *supra* note 308 & Allison Lopez, 3 *Executives, Trader Face Extradition*, PHIL. DAILY INQ., May 9, 2007, available at http://newsinfo.inquirer.net/inquirerheadlines/metro/view/2007050964852/3_executives,_trader_face_extradition (last accessed Nov. 15, 2012).

314. Gilbert C. Sosa, Country Report on Cybercrime: The Philippines (A Visiting Expert's Paper for the 140th International Training Course, as included in Resource Materials Series No. 79) 80, available at http://www.unafei.or.jp/english/pdf/RS_No79/No79_12PA_Sosa.pdf (last accessed Nov. 15, 2012).

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

It is not surprising that the dual criminality principle has been criticized as cumbersome and as an obstacle to an efficient and effective extradition system.³¹⁹ In some instances, “the time delays in processing extradition have resulted in some cases of countries withdrawing their extradition requests and abandoning prosecutions.”³²⁰ Extradition thus becomes a time-consuming, expensive, and inefficient mechanism for international cooperation due to many conditions that have to be satisfied before extradition can actually take place.³²¹ In fact, the FATF “encourages countries to simplify extradition by allowing [such] based only on warrants of arrest or judgments.”³²²

As courts recognized these difficulties, the strict interpretation of the dual criminality gave way to a more liberal interpretation of the dual criminality requirement.³²³ A series of cases in the U.S. Supreme Court has reflected this new standard in *Wright v. Henkel*,³²⁴ *Collins v. Loise*,³²⁵ and *Factor v. Laubenheimer*.³²⁶ The policy behind this change in interpretation is the “desire to rebalance the individual rights of the accused in light of a worldwide effort to suppress international crimes.”³²⁷

b. The Conduct Approach Will Not Violate the Offender’s Human Rights

At the onset, it must be noted that not all offenders who are requested to be extradited are Philippine nationals. Nonetheless, it is necessary that the constitutional rights of the offender, regardless of his citizenship, remain protected. Further, it is important to remember that dual criminality is not a principle of international law, nor does it stem from human rights

319. Hafen, *supra* note 18, at 230 & Australian Government: Attorney-General’s Department, *supra* note 307, at 21.

320. Chaikin & Sharman, *supra* note 197, at 62.

321. Qiujuan, *supra* note 121, at 787.

322. Chaikin & Sharman, *supra* note 197, at 59.

323. Hafen, *supra* note 18, at 230 & Daseul Kim, *Perfectly Properly Triable in the United States: Is Extradition a Real and Significant Threat to Foreign Antitrust Offenders*, 28 NW. J. INT’L L. & BUS. 583, 594 (2008).

324. *Wright v. Henkel*, 190 U.S. 40 (1903). The court noted that as long as the elements of the different versions of the crime were “substantially analogous,” the dual criminality requirement is satisfied. *Id.* at 58.

325. *Collins v. Loisel*, 259 U.S. 309 (1922). “The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.” *Id.* at 312.

326. *Factor v. Laubenheimer*, 290 U.S. 276 (1933).

327. Hafen, *supra* note 18, at 199.

conventions.³²⁸ Its existence merely relies on the treaty or domestic law making it a requirement.³²⁹

Nonetheless, the Author deems it best to discuss the possible human rights issues that may be involved in liberalizing the interpretation of the dual criminality requirement. For instance, the International Covenant on Civil and Political Rights (ICCPR) guarantees that the following rights relevant to this Note remain to be protected: the right to be presumed innocent,³³⁰ the right to due process,³³¹ and the right to liberty.³³² Likewise, dual criminality is also often linked to the legality principle,³³³ which is a human rights requirement under the ICCPR³³⁴ and the EUHR.³³⁵ The Author asserts that a liberal interpretation of the dual criminality condition, through the conduct approach, will not violate these rights and principles. In fact, the Author's proposed legislation, which shall be discussed subsequently in Chapter VII, will further protect the offender's human rights.

i. Right to be Presumed Innocent

It must be noted that an extradition proceeding is not a criminal proceeding. *Secretary of Justice v. Hon. Lantion*³³⁶ has long settled this issue when it ruled that an extradition proceeding is *sui generis*, or is one of its own kind. To illustrate, several differences exist between an extradition proceeding and a criminal proceeding. In terms of procedure, an extradition proceeding is summary in nature while a criminal proceeding requires a full-blown trial.³³⁷ In terms of admission of evidence, the former admits evidence in more flexible standards, unlike the latter, which requires more stringent standards.³³⁸ In terms of quantum of evidence, the former requires only the existence of a *prima facie* case, while the latter requires proof beyond reasonable doubt.³³⁹ Finally, unlike in an extradition proceeding where the

328. *Factor*, 290 U.S. at 287.

329. GUY STESSENS, MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL 292 (2000).

330. International Covenant on Civil and Political Rights art. 14 (2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

331. *Id.* art. 14 (3).

332. *Id.* art. 9 (1).

333. STESSENS, *supra* note 329, at 292.

334. ICCPR, *supra* note 330, art. 15 (1).

335. European Convention of Human Rights, *supra* note 234, art. 7.

336. *Lantion*, 343 SCRA at 386.

337. Philippine Extradition Law, § 9.

338. *Id.*

339. REVISED RULES ON EVIDENCE, rule 133, § 2 & Philippine Extradition Law, § 9.

President may overturn the court's decision to extradite the person sought, a judgment in a criminal proceeding becomes executory after being rendered final.³⁴⁰

More importantly, guilt is not determined in the extradition process and the person sought remains innocent until proven guilty.³⁴¹ As such, the offender's internationally recognized right to be presumed innocent is not violated by the extradition process, more so by the liberalization of the dual criminality requirement.

ii. Right to Due Process

Further, because an extradition proceeding is not a criminal proceeding, the constitutional rights that are only available to an accused cannot be invoked by the extraditee. *Lantion* has ruled that the person sought is not entitled to notice and hearing throughout the evaluation stage of the extradition process because doing so would defeat the purpose of the extradition process.³⁴² Nonetheless, the offender's right to due process remains protected, because after the filing of the petition for extradition in court, the person sought will be furnished copies of the petition and other related documents, and shall be granted ample time to evaluate and comment such documents, as well as the opportunity to be heard.³⁴³

iii. Right to Liberty

The primary reason why dual criminality is imposed as a legal precondition is because the Philippines wants to safeguard the offender's constitutional right to liberty.³⁴⁴ The Philippine Constitution is very clear on this when it states that "no person shall be deprived of life, liberty, or property without due process of law."³⁴⁵ The justification for dual criminality is that "it ensures that a person's liberty is not restricted when his/her conduct is not recognised as criminal in the [S]tate receiving the extradition request."³⁴⁶

340. Republic of the Philippines — United States Extradition Treaty, Phil.-U.S., art. 3, Nov. 13, 1994, 1994 U.S.T. LEXIS 185.

341. Miriam Defensor Santiago, *Procedural Aspects of the Political Offence Doctrine*, 51 PHIL. L. J. 238, 258 (1976); Kathleen F. Elliot, *No Due Process Right to Speedy Extradition*, 18 SUFFOLK TRANSNAT'L L. REV. 347, 353 (1995); & Lis Wiehl, *Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. OF INT'L L. 729, 741 (1998).

342. *Lantion*, 343 SCRA at 392.

343. *Id.* at 393.

344. Chaikin & Sharman, *supra* note 197, at 61 & PHIL. CONST. art. III, § 1.

345. PHIL. CONST. art. III, § 1. *See also* ICCPR, *supra* note 330, art. 9.

346. Chaikin & Sharman, *supra* note 197, at 61.

Further, the social conscience of a State is not embarrassed by the extradition of a person who would not, according to its local standards, be guilty of the acts deserving prosecution.³⁴⁷ Using the conduct approach, however, will not violate this constitutionally safeguarded right. This is because first and foremost, the conduct approach still ensures that the crime for which an offender is to be prosecuted has the same underlying conduct with the act committed by the offender.³⁴⁸

Furthermore, it must be noted that the right to liberty is not an absolute right.³⁴⁹ Jurisprudence provides that detention is justified if it is necessary to prevent the flight of a person awaiting trial.³⁵⁰ Flight-risk is determined by considering the nature of the offense charged and the personal circumstances of the person sought.³⁵¹ In the case of extradition, the person sought is already considered a flight-risk since extradition only became necessary because the offender fled to avoid prosecution.³⁵² Thus, in the case of extradition, as long as the conduct of the offender is similar to the acts in the crime by which he or she is to be prosecuted, his right to liberty may be properly restricted.

iv. Principle of Legality

The principle of legality is a legal principle which requires all criminal laws to be ascertainable, clear, and non-retrospective.³⁵³ This means that an act can only be punished if, at the time of its commission, there was a written criminal law that sufficiently and precisely sanctioned such act.³⁵⁴ In Latin, it

347. Hafen, *supra* note 18, at 194 (citing IVAN A. SHEARER, EXTRADITION IN INTERNATIONAL LAW, 137-38 (1971)).

348. UNCAC, *supra* note 12, art. 43 (2) & Hafen, *supra* note 18, at 296.

349. See ICCPR, *supra* note 330, art. 9 (3) & Letellier v. France, 14 E.H.R.R. 83, 94 (1991).

350. Mukong v. Cameroon, Communication. No. 458/1991, ¶ 9.8, U.N. Doc. CCPR/C/51/D/458/1991 (1994); Yagci and Sargin v. Turkey, 20 E.H.R.R. 505, 526 (1995); Wemhoff v. Germany, 1 E.H.R.R. 55, 55 (1968); W. v. Switzerland, 17 E.H.R.R. 60, 80 (1993); Cesky v. Czech Republic, 33 E.H.R.R. 181, 194 (2000); & Stogmuller v. Austria, 1 E.H.R.R. 155, 194 (1969).

351. U.S. v. Lamp, 606 F. Supp. 193, 201 (1985) (U.S.).

352. Government of the United States of America v. Purganan, 389 SCRA 623, 656 (2002).

353. See MARC RIBEIRO, LIMITING ARBITRARY POWER 10-11 (2004).

354. United Nations Office on Drugs and Crime, Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments (A Technical Assistance Working Paper of the Terrorism Prevention Branch) 9, available at <http://www.unodc.org/pdf/terrorism/TATs/en/3IRoLen.pdf> (last accessed Nov. 15, 2012).

is known as *nullum crimen nulla poena sine lege* (no crime nor punishment without law).³⁵⁵

The conduct approach to dual criminality does not violate this principle, because before anything else, dual criminality does not safeguard the legality principle, but is only intended to avoid conflicts of law.³⁵⁶ Furthermore, dual criminality is not a condition for directly penalizing those who have been accused, but is in the context of carrying out investigatory and provisional measures.³⁵⁷ As earlier mentioned, an extradition proceeding is not a criminal proceeding.³⁵⁸ Lastly, the conduct approach is only an interpretation of dual criminality and still ensures that the crime for which an offender is to be extradited has the same underlying conduct with the act committed by the offender.³⁵⁹

2. The Propriety of the Philippines' Existing Reservation

Article 44, Paragraphs 5 and 6 of the UNCAC states that if a State-Party makes extradition conditional on the existence of a treaty and that State-Party receives a request of extradition from another State-Party with which it has no extradition treaty, it should consider the Convention as the legal basis for extradition with respect to the offenses criminalized by the UNCAC.³⁶⁰ When the Philippines ratified the UNCAC, however, it has declared that it does not take the Convention as the legal basis for extradition with other State-Parties. It particularly stated that “in accordance with Article 44, [P]aragraph 6, the Republic of the Philippines declares that dual criminality is required under its Extradition [L]aw and the Philippines therefore cannot consider the Convention as the legal basis for cooperation on extradition with other States.”³⁶¹

A reservation is a unilateral statement made by a State when it signs, ratifies, accepts, approves, or accedes to a treaty, where it excludes or modifies the legal effect of certain provisions of the treaty with regard to the reserving State.³⁶²

355. *Id.*

356. *Id.* at 38.

357. STESENS, *supra* note 329, at 292.

358. *Lantion*, 343 SCRA at 386.

359. UNCAC, *supra* note 12, art. 43 (2) & Hafén, *supra* note 18, at 296.

360. UNCAC, *supra* note 12, art. 44 (5).

361. Signature and Ratification Status, *supra* note 21.

362. BROWNLIE, *supra* note 274, at 612; Piper, *supra* note 274, at 298; & Richard W. Edwards, Jr., *Reservations to Treaties: The Belilos Case and the Work of the International Law Commission*, 31 U. TOL. L. REV. 195, 199 (2000). See also Marjorie Owen, *Reservations to Multilateral Treaties*, 38 YALE L. J. 1086, 1104

In this case, the Philippines made a reservation based on dual criminality because it was not yet ready to consider all the crimes criminalized by the UNCAC as a species of corruption.³⁶³ This precondition of dual criminality, which the Philippines has cited as its reason for not making the UNCAC a legal basis for extradition cases, could possibly be an issue for State-Parties of the Convention that have not criminalized certain forms of transnational bribery.³⁶⁴

Significantly, other countries regarded the Convention as the legal basis for cooperation on extradition with other State-Parties to the Convention. The following State-Parties have expressly indicated that they consider the Convention as the legal basis for cooperation on extradition, pursuant to Article 44, Paragraph 6 (a): Albania, Azerbaijan, Belarus, Bolivia, Canada, Chile, Costa Rica, Croatia, Estonia, Georgia, Guatemala, Kazakhstan, Latvia, Panama, Paraguay, Poland, and South Africa, among others. The Russian Federation also accepted such use of the Convention on the basis of reciprocity.³⁶⁵

3. Challenging the Reservation

The Author deems it best to challenge the Philippines' reservation to the UNCAC by addressing the prominent issues raised by the DOJ when it made the reservation. First, it fears that the UNCAC will trump the notion of dual criminality; and second, it fears that the offender's human rights will not be amply protected. The following issues shall be discussed subsequently. Notwithstanding this, the Author will also challenge the reservation on the ground that it is violative of the object and purpose of the Treaty.

a. Prominent Issue Raised: Dual Criminality

First and foremost, the reservation raises that one of the reasons why UNCAC was not taken into consideration as a legal basis for extradition is that "dual criminality is required under [the Philippine] [E]xtradition [L]aw."³⁶⁶ This reasoning is rather illogical, because a cursory inspection of the UNCAC would show that the Convention does not ask State-Parties to dispense with the dual criminality condition. In fact, the UNCAC already

(1929) & Daniel N. Hylton, *Default Breakdown: The Vienna Convention of the Law of Treaties: Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419, 422 (1994).

363. Interview with Mildred Bernadette B. Alvor, *supra* note 27.

364. ASIAN DEVELOPMENT BANK & ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 189, at 43.

364. See Chaikin & Sharman, *supra* note 197, at 61.

365. Signature and Ratification Status, *supra* note 21.

366. *Id.*

incorporated this safeguard in its provisions when it provided for measures whenever dual criminality is required.³⁶⁷ Nonetheless, the Author considers that it is important to examine the broad implications of this reasoning.

While it is not the objective of this Note to go into a substantial analysis of the UNCAC crimes addressed or not addressed by the Philippines, the Author deems it best to briefly go through them, in order to justify the need to re-examine the dual criminality aspect of the reservation.

i. The UNCAC Crimes in the Philippine Context

While the anti-corruption framework in the Philippines is increasingly evolving, it is still incomplete.³⁶⁸ Currently, the different forms of corruption are defined and prosecuted through the following legislation: Revised Penal Code,³⁶⁹ Anti-Graft and Corrupt Practices Act as Amended,³⁷⁰ Code of Conduct and Ethical Standards for Public Officials and Employees,³⁷¹ The Plunder Law,³⁷² The Forfeiture Law or the Unexplained Wealth Act,³⁷³

367. UNCAC, *supra* note 12, art. 43 (2).

368. See NOEL G. VILLAROMAN, LAWS AND JURISPRUDENCE ON GRAFT AND CORRUPTION xxxvi (2010).

369. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815 (1932). An examination of Title 7, Book 2 of the Revised Penal Code would show that the following crimes are criminalized: Direct Bribery (Article 210); Indirect Bribery (Article 211); Qualified Bribery (Article 211-A); Corruption of Public Officials (Article 212); Frauds Against the Public Treasury and Similar Offenses (Article 213); Other Frauds and Prohibited Transactions (Article 214-215); Possession of Prohibited Interest by a Public Officer (Article 216); Malversation of Public Funds and Property (Article 217); Failure of Accountable Officer to Render Accounts (Article 218); Failure of a Responsible Public Officer to Render Accounts Before Leaving the Country (Article 219); Illegal Use of Public Funds or Property (Article 220); Failure to Make Delivery of Public Funds or Property (Article 221); Removal; Concealment or Destruction of Documents (Article 226); Officer Breaking Seal (Article 227); and Opening of Closed Documents (Article 228). *Id.*

370. See Anti-Graft and Corrupt Practices Act, Republic Act No. 3019 (1960).

371. See An Act Establishing a Code of Conduct and Ethical Standards for Public Officials and Employees, to Uphold the Time-Honored Principle of Public Office Being a Public Trust, Granting Incentives and Rewards For Exemplary Service, Enumerating Prohibited Acts and Transactions and Providing Penalties for Violations Thereof and for Other Purposes [CODE OF CONDUCT AND ETHICAL STANDARDS FOR PUBLIC OFFICIALS AND EMPLOYEES], Republic Act No. 6713 (1989).

372. See An Act Defining and Penalizing the Crime of Plunder, Republic Act No. 7080 (1991).

Anti-Red Tape Act of 2007,³⁷⁴ The Ombudsman Act of 1989,³⁷⁵ and The Sandiganbayan Decree.³⁷⁶

Our national laws, however, are not completely ignorant of the crimes enunciated in the UNCAC. While the Philippines does not completely cover all crimes criminalized in the UNCAC, such as bribery of foreign public officials and officials of public international organizations,³⁷⁷ all other acts criminalized by the UNCAC are already covered by existing Philippine laws. In fact, it would be fair to say that the Philippines has an adequate collection of anti-corruption laws and regulations.

The following table shows the national anti-corruption laws that correspond to the crimes mentioned in the UNCAC.

Table 5. A Comparative Table of UNCAC Crimes and the Philippine Laws that Address Them

UNCAC CRIMES	PHILIPPINE LAWS
Bribery of national public officials ³⁷⁸	Articles 210-212, Revised Penal Code Section 3, The Anti-Graft and Corrupt Practices Act Section 7, Code of Conduct and Ethical Standards The Anti-Red Tape Act
Bribery of foreign public officials and officials of public international organizations ³⁷⁹	The country “has not enacted a law punishing bribery of a foreign public official. The domestic laws

373. See An Act Declaring Forfeiture in Favor of the State Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceedings Therefore, Republic Act No. 1379 (1955).

374. See An Act to Improve Efficiency in the Delivery of Government Service to the Public by Reducing Bureaucratic Red Tape, Preventing Graft and Corruption, and Providing Penalties Therefore [Anti-Red Tape Act of 2007], Republic Act No. 9485 (2007).

375. See An Act Providing for the Functional and Structural Organization of the Office of the Ombudsman, and for Other Purposes [The Ombudsman Act of 1989], Republic Act No. 6770 (1989).

376. See Creating a Special Court to be Known as “Sandiganbayan” and for Other Purposes, Presidential Decree No. 1486, as Amended (1978).

377. SyCip, Salazar, Hernandez, & Gatmaitan, *Philippines, in Guide to ANTI-CORRUPTION REGULATION IN ASIA 51* (2010-2011).

378. UNCAC, *supra* note 12, art. 15.

379. *Id.* art. 16.

	punishing corruption and bribery only apply to Philippine public officers.” ³⁸⁰ However, international conventions and treaties cover the criminal liability of foreign public officers. ³⁸¹
Embezzlement, misappropriation or other diversion of property by a public official ³⁸²	The Plunder Law Articles 217–220, Revised Penal Code Section 3, Anti-Graft & Corrupt Practices Act
Trading in influence ³⁸³	The Code of Conduct and Ethical Standards for Public Officials and Employees
Abuse of functions ³⁸⁴	The Code of Conduct and Ethical Standards for Public Officials and Employees
Illicit enrichment ³⁸⁵	The Forfeiture Law or the Unexplained Wealth Act
Bribery in the private sector ³⁸⁶	Anti-Graft and Corrupt Practices Act ³⁸⁷
Embezzlement of property in the private sector ³⁸⁸	Anti-Graft and Corrupt Practices Act
Laundering of proceeds of crime ³⁸⁹	Republic Act No. 9160 (Anti-Money Laundering Act of 2001) ³⁹⁰
Concealment ³⁹¹	P.D. No. 1829 (Penalizing

380. SyCip, Salazar, Hernandez, & Gatmaitan, *supra* note 377, at 51.

381. *Id.*

382. UNCAC, *supra* note 12, art. 17.

383. *Id.* art. 18.

384. *Id.* art. 19.

385. *Id.* art. 20.

386. *Id.* art. 21.

387. SyCip, Salazar, Hernandez, & Gatmaitan, *supra* note 377, at 53.

388. UNCAC, *supra* note 12, art. 22.

389. *Id.* art. 23.

390. An Act Defining the Crime of Money Laundering, Providing Penalties Therefor and for Other Purposes [Anti-Money Laundering Act of 2001], Republic Act No. 9160 (2001).

	Obstruction of, Apprehension and Prosecution of Criminal Offenders) ³⁹²
Obstruction of justice ³⁹³	Penalizing Obstruction of, Apprehension and Prosecution of Criminal Offenders Section 36, The Ombudsman Act of 1989

ii. The Reservation is Inconsistent with Other International Commitments

The primary reason why the Philippines raised its reservation is because it observes the strict adherence to double criminality.³⁹⁴ This double criminality ideology stems from the constitutional right to liberty, in that “it ensures a person’s liberty is not restricted when his/her conduct is not recognised as criminal in the [S]tate receiving an extradition request.”³⁹⁵ Some have argued, however, that double criminality does not protect human rights but only “ensure[s] that foreign [S]tates will not be allowed to punish fugitives for conduct considered contrary to the [R]equested [S]tate’s own-often chauvinistic-notions of criminal justice.”³⁹⁶ Nonetheless, this is certainly an issue for UNCAC crimes not covered in the Philippines, such as bribery of foreign public officials in international business transactions and officials of public international organizations.³⁹⁷ However, it would seem that the Philippines considers this offense as a crime when it ratified the UNTOC, where corruption offenses which are “transnational in nature and involves an organized crime group” are criminalized.³⁹⁸ Needless to say, the

391. UNCAC, *supra* note 12, art. 24.

392. Penalizing Obstruction of, Apprehension and Prosecution of Criminal Offenders, Presidential Decree No. 1829 (1981).

393. UNCAC, *supra* note 12, art. 25.

394. Interview with Mildred Bernadette B. Alvor, *supra* note 27.

395. Chaikin & Sharman, *supra* note 197, at 61.

396. John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT’L. L. 187, 188 (1998). “It would be incorrect to explain [the political offense exception, the rule of double criminality, and the principle of specialty] entirely in human rights terms.” *Id.*

397. ASIAN DEVELOPMENT BANK & ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 189, at 43-44.

397. *See* Chaikin & Sharman, *supra* note 197, at 61.

398. ASIAN DEVELOPMENT BANK & ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 189, at 31.

UNTOC specifically criminalizes bribery involving foreign public officials or international civil servants.³⁹⁹

A closer look at the Philippines' ratification of the UNTOC would show that, unlike the UNCAC, the Philippines accepted the UNTOC as a legal basis for extradition in corruption cases.⁴⁰⁰ This seems inconsistent with the intention of the Philippines not to accept the UNCAC as a legal basis for international cooperation, because the UNCAC, as it would seem, is merely an expansion of the crimes of corruption mentioned in the UNTOC.⁴⁰¹ In fact, the U.S. Bureau of International Narcotics and Law Enforcement Affairs have affirmed that the UNTOC reinforces the UNCAC and is a complimentary convention to it.⁴⁰² Thus, it could be argued that the reason for the reservation is wholly inconsistent with the Philippines' intentions as regards other international instruments.

iii. Dual Criminality is Not an Apt Reason

Even assuming that bribery of foreign public officials is not recognized as a crime in the Philippines, the dual criminality reasoning in the reservation still does not hold water, because the very notion of dual criminality that the Philippines sought to protect was already incorporated in the Treaty in the first place. As held earlier, the reasoning in the reservation is rather absurd and illogical, because a cursory inspection of the UNCAC would show that the Convention does not ask State-Parties to dispense with the dual criminality condition. It must be noted that the mandatory character of cooperating in criminal matters was already emphasized in Article 43 (1) of the UNCAC.⁴⁰³ Notwithstanding this, it has also been internationally understood that States cannot invoke their municipal laws to justify their

399. UNTOC, *supra* note 80, art. 8 (2).

400. *See* UNTOC, *supra* note 80, art. 16 (4).

401. *See* Alexandra V. Orlova & James W. Moore, *Umbrellas or Building Blocks?: Defining International Terrorism and Transnational Organized Crime in International Law*, 27 HOUS. J. INT'L L. 267, 284 (2005). The UNTOC criminalizes membership of organized criminal groups and introduces measures to combat transnational money laundering and transnational corruption, as well as provide for international cooperation measures, such as making the UNTOC a legal basis between State-Parties for extradition matters. *Id.*

402. Elizabeth Verville, Deputy Assistant Secretary, Bureau of International Narcotics and Law Enforcement Affairs, Remarks at a High-level Meeting of the U.N. General Assembly in New York City (June 17, 2010) (transcript available at <http://www.state.gov/j/inl/rls/rm/143406.htm> (last accessed Nov. 15, 2012)).

403. UNCAC, *supra* note 12, art. 43 (1) & UNODC, LEGISLATIVE GUIDE, *supra* note 98, at 4.

non-compliance with treaty obligations.⁴⁰⁴ As such, with respect to the other offenses of corruption which the Philippines recognizes in its local laws, the Philippines should not excuse itself from the UNCAC's objectives of facilitating extradition, by making the UNCAC its legal basis for cooperation. In fact, in an interview with the DOJ, the reservation was partly a pre-emptive measure that the Philippines decided to take to prevent any unseen implications, and they expect that this reservation may be retracted in the future.⁴⁰⁵

a. Prominent Issue Raised: Fear of Human Rights Violations

Furthermore, another fear raised is that the human rights of the offenders may not be amply protected. However, a closer look of the UNCAC would show that extradition is not a mere ministerial duty of sending and receiving transnational offenders. Rather, before actually extraditing someone, certain measures have to be complied with and the UNCAC recognizes that there are many grounds for refusing an extradition request.

One instance where a request for extradition may be denied is when the offense may unduly discriminate the offender.⁴⁰⁶ In the UNCAC, the extradition request may be denied when “the [R]equested State[-]Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin[,] or political opinions[,]”⁴⁰⁷ or if the “compliance with the request would cause prejudice to that person's position for any one of these reasons.”⁴⁰⁸ Thus, in this case, the person sought is not extradited when his right against discrimination is in danger.

Another instance where a request for extradition may be denied is when the person sought would not receive the minimum fair trial guarantees in

404. VCLT, *supra* note 271, art. 27.

405. Interview with Mildred Bernadette B. Alvor, *supra* note 27.

406. United Nations Office on Drugs and Crime, Model Law on Extradition 2004, § 5, available at http://www.unodc.org/pdf/model_law_extradition.pdf (last accessed Nov. 15, 2012) [hereinafter Model Law on Extradition 2004]. See Human Rights Committee, *General Comment No. 18: Non-Discrimination*, ¶ 6, U.N. Doc. A/45/40 (Nov. 10, 1989). Discrimination is any distinction or preference that effectively impairs the equal footing of fundamental rights. *Id.*

See also Convention on the Elimination of All Forms of Discrimination against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 & International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, 660 U.N.T.S. 195.

407. UNCAC, *supra* note 12, art. 44 (15).

408. *Id.*

criminal proceedings in the Requesting State.⁴⁰⁹ The UNCAC incorporated this protection when it said that the person sought shall be “guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State[-]Party in the territory of which that person is present.”⁴¹⁰ Thus, in this case, the person sought is not extradited when his right to fair trial will be trampled upon.

As a further matter, while it is not expressly stated in the UNCAC, the Author deems that the other human rights of the offender should also be protected. Thus, the Author has incorporated other grounds for refusal in her proposed act, explained in Chapter VII of this Note, as they were likewise included in the U.N. Model Law on Extradition of 2004.⁴¹¹ Anchored on a considerable number of international human rights instruments,⁴¹² these grounds include the right of the offender against torture, cruel, inhuman, or degrading treatment or punishment, the right against double jeopardy, and the right not to be subject to death penalty. Thus, for any of these reasons, extradition requests may be properly refused.

The right against torture, cruel, inhuman, or degrading treatment or punishment is embedded in various international human rights instruments⁴¹³ and is considered a *jus cogens* norm.⁴¹⁴ The principle of non-refoulement, which is a principle under the law on refugees that protects refugees from being returned to their countries because they are in danger of persecution,⁴¹⁵ attains similar status under international law, because it is

409. Model Law on Extradition 2004, *supra* note 406, § 7 (1).

410. UNCAC, *supra* note 12, art. 44 (14).

411. Model Law on Extradition 2004, *supra* note 406.

412. *See generally* U.N. Charter; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. ARES/217 (III) (Dec. 10, 1948); ICCPR, *supra* note 330; & ICESCR, *supra* note 82.

413. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85; ICCPR, *supra* note 330; & European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *opened for signature* Nov. 26, 1987, E.T.S. 126.

414. *See* SARAH JOSEPH, ET AL., SEEKING REMEDIES FOR TORTURE VICTIMS: A HANDBOOK ON THE INDIVIDUAL COMPLAINTS PROCEDURE OF THE UN TREATY BODIES 491 (2006).

415. Refugee Convention, *supra* note 233, art. 33 (1). “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion.” *Id.*

inherent in the prohibition of torture and ill treatment.⁴¹⁶ Under international law, *jus cogens* norms have the highest status because they permit no derogation.⁴¹⁷ This means that any treaty obligation or interpretation, which is in any way inconsistent with them, cannot attain validity under international law.⁴¹⁸ One consequence of this is that persons who are in danger of torture or ill treatment, or those who are given status as refugees, may not be extradited to countries where they are threatened or in danger of persecution. In fact, as to refugees, the U.N. has recognized that refugees should not be extradited when there are well-founded reasons to believe that the refugee will be persecuted on account of his race, religion, nationality, or membership in a particular group,⁴¹⁹ which are the same grounds enumerated in the 1951 U.N. Convention Relating to the Status of Refugees.⁴²⁰ Further, the U.N. Model Law on Extradition incorporates the prohibition against torture and inhuman punishment as a ground for refusing extradition.⁴²¹ By incorporating this safeguard as a ground for refusal in the Author's proposed act, the person sought will be ensured of his right against torture, cruel, inhuman, or degrading treatment.

The right against double jeopardy is also recognized in the ICCPR.⁴²² It protects the person from being "liable to be tried or punished again for an offen[s]e for which he [or she] has already been finally convicted or acquitted in accordance with law and penal procedure of each country."⁴²³ As such, the U.N. Model Law on Extradition likewise incorporates the protection of this right in the form of a ground for refusal. The Author's proposed act will likewise incorporate the said protection by making it a ground for refusal of extradition requests.

The right not to be subject to the death penalty, while not expressly prohibited by the ICCPR in Article 6, is prohibited by its Second Optional Protocol to the ICCPR,⁴²⁴ to which the Philippines is a State-Party.⁴²⁵ As

416. JOSEPH, ET AL., *supra* note 414, at 491.

417. VCLT, *supra* note 271, art. 53.

418. *Id.*

419. U.N. High Commissioner for Refugees, *Addendum to the Report of the United Nations High Commissioner for Refugees*, ¶ 48 (2) (c), 31st Session of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, U.N. Doc. A/35/12/Add.1 (Oct. 6-16, 1980).

420. Refugee Convention, *supra* note 233, art. 1 (A) (2).

421. Model Law on Extradition 2004, *supra* note 406, § 8.

422. ICCPR, *supra* note 330, art. 14 (7).

423. *Id.*

424. Second Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 15, 1989, 1642 U.N.T.S. 414.

such, the right not to be subject to the death penalty will likewise be incorporated as a ground for refusal of extradition in the proposed act.

Thus, it is the opinion of the Author, that with respect to the right against discrimination, the right to fair trial, the right against torture, cruel, inhuman, or degrading treatment or punishment, the right against double jeopardy, and the right not to be subject to death penalty, the “fear” of violating the human rights offenders is unwarranted and would fail to materialize. Because of these safeguards, the Philippines will not renege on its positive obligation to ensure that human rights are respected and protected.⁴²⁶

b. The Reservation Violates the Object and Purpose of the Treaty

Aside from the reservation being inconsistent with the Philippines’ commitments in the UNTOC, and the unmerited fear of violating human rights, the reservation may also be challenged under the Vienna Convention.

Prior to the Vienna Convention, it has been understood that a treaty does not allow reservations unless it is expressly provided otherwise.⁴²⁷ Should a reservation be made, the acceptance of all parties is required before attaining legal effect.⁴²⁸ The Vienna Convention changed this, as it expressly permitted reservations to treaties, subject to the “object and purpose” test.⁴²⁹

It is the theory of this Author that aside from the fact that the reservation is wholly inconsistent and redundant, it is likewise void, being contrary to the object and purpose of the treaty. It is worthwhile to challenge this reservation made by the Philippines to the UNCAC because a reading of the UNCAC objectives would show that the UNCAC was primarily made to promote and facilitate international cooperation,⁴³⁰ mainly through the use of the UNCAC as a legal basis for extradition processes.

Article 19 (c) of the Vienna Convention states that a reservation could not be made to a treaty if such reservation is incompatible with the object

425. The Philippines signed and ratified the Second Optional Protocol on Sep. 20, 2006 and Nov. 20, 2007, respectively. *Id.*

426. International Covenant on Civil and Political Rights, *General Comment No. 31*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). States have a positive obligation to ensure that ICCPR rights are respected and protected. *Id.*

427. Nina Anderson, *Reservations and Objections to Multilateral Treaties on Human Rights*, at 9 (2001) (Master’s thesis, Lund University) (*available at* <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1555651&fileId=1563727> (last accessed Nov. 15, 2012)).

428. *Id.*

429. Edwards, Jr., *supra* note 362, at 201.

430. UNCAC, *supra* note 12, art. 1 (b).

and purpose of the treaty.⁴³¹ This is also known as the compatibility test.⁴³² The drafters of the Convention did not specify the criteria for determining the “compatibility.”⁴³³ In fact, the issue of compatibility remains a question of law reviewable by the ICJ upon request.⁴³⁴ However, according to Special Rapporteur Allain Pellet, “[a] reservation shall be incompatible with the object and purpose of the treaty if it has a serious impact on the essential rules, rights[,] or obligations indispensable to the general architecture of the treaty, thereby depriving it of its *raison d’être*.”⁴³⁵ The ICJ has likened the term “object and purpose” with the “intention” of the makers of the treaty.⁴³⁶ It has also been construed to pertain to the central premise of the agreement.⁴³⁷ In this case, it is argued that the reservation is actually invalid, being contrary to the object and purpose of the UNCAC, which expressly states that it is to promote and facilitate international cooperation.⁴³⁸ The object and purpose test is the best protection against reservations that would result in “incoherent treaty rules,”⁴³⁹ such as one that results from the reservation in this case.

International tribunals and commentators have raised the difficulties of determining the precise legal consequences of an incompatible reservation.⁴⁴⁰ However, in *Belilos*⁴⁴¹ and *Loizidou*,⁴⁴² the European Court of Human

431. VCLT, *supra* note 271, art. 19 (c) & David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretative Methods*, 43 VAND. J. TRANSNAT’L L. 565, 571 (2010).

432. BROWNIE, *supra* note 274, at 613.

433. Daniel N. Hylton, *Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT’L L. 419, 430 (1994).

434. See Anderson, *supra* note 427, at 10.

435. Special Rapporteur, *Note on Draft Guideline 3.1.5, “Definition of the Object and Purpose of the Treaty”*, ¶ 8, U.N. Doc. A/CN.4/572 (June 21, 2006) (by Allain Pellet).

436. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (1948) (citing Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT’L L. 281, 302 (1991)).

437. Clark, *supra* note 436, at 303.

438. UNCAC, *supra* note 12, art. 1 (b).

439. Jonas & Saunders, *supra* note 431, at 583.

440. BROWNIE, *supra* note 274, at 615.

441. *Belilos v. Switzerland*, ¶ 55, E.C.H.R., (ser. A) No. 132 (1988). The declaration made by Switzerland when ratifying the European Convention of Human Rights was in fact a reservation of a general character and is therefore unacceptable under the terms of the Article 64 of the Convention. *Id.*

Rights treated the objectionable reservations as severable.⁴⁴³ This is likewise supported by various published reports.⁴⁴⁴ Further, Malcolm D. Evans, a highly qualified publicist, likewise supports this when he stated that the unacceptability of a certain reservation will not vitiate the reserving State's agreement to remain a party to a treaty.⁴⁴⁵ In addition, the absence of a prohibition on reservations does not mean that any reservation is permitted, because all reservations must pass the compatibility test.⁴⁴⁶ There is a strict adherence to this test, as cases have shown that reservations of a general character are likewise considered to be incompatible with the object and purpose of the treaty.⁴⁴⁷ In fact, an incompatible reservation cannot be validated by the acceptance of other States.⁴⁴⁸

Furthermore, according to Ian Brownlie, the application of the criterion of compatibility with object and purpose is a matter of appreciation and this is best left to every individual State's interpretation.⁴⁴⁹ In his words, "each [S]tate decides for itself whether [the] reservations are incompatible and some [S]tates [may] adopt a liberal policy of accepting far-reaching reservations."⁴⁵⁰ In this case, the Philippines' reservation is rather inconsistent not only with the UNCAC, but with its other international obligations as well, such as the UNTOC. As discussed previously, a closer look at the Philippines' ratification of the UNTOC would show that, unlike the UNCAC, the Philippines accepted the UNTOC as a legal basis for extradition in corruption cases.⁴⁵¹ This seems inconsistent with the intention of the Philippines not to accept the UNCAC as a legal basis for international

442. *Loizidou v. Turkey*, ¶ 2, E.C.H.R., (ser. A) No. 310 (1998). Turkey's reservations to the jurisdiction of the Commission and the Court, in relation to activities in Northern Cyprus, were invalid and severable, despite the intention of Turkey to prevent this.

443. Edwards, Jr., *supra* note 362, at 206.

444. Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 531 (2002) & *Kennedy v. Trinidad and Tobago*, ¶ 15, Comm. No. 845/1999, U.N. Doc. CCPR/C/67/D/845/1999 (1999).

445. EVANS, *supra* note 275, at 208.

446. BROWNLIE, *supra* note 274, at 615 (citing Human Rights Committee, *General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add. 6 (Nov. 4, 1994)).

447. *Belilos*, ¶ 55.

448. See Special Rapporteur, *First Report on the Law and Practice Relating to Reservations to Treaties*, ¶ 102, U.N. Doc. A/CN.4/470 (May 30, 1995) (by Allain Pellet).

449. BROWNLIE, *supra* note 274, at 614.

450. *Id.*

451. UNTOC, *supra* note 80, art. 16 (4).

cooperation, because the UNCAC, it would seem, is merely an expansion of the crimes of corruption mentioned in the UNTOC.⁴⁵²

C. Mutual Legal Assistance: Want of Any Implementing Legislation

While mutual legal assistance involving offenses of money laundering is governed by local legislation through the Anti-Money Laundering Act of 2001, there is no applicable legislation for mutual legal assistance involving other offenses of corruption.⁴⁵³ As such, mutual legal assistance in the Philippines is limited only to countries with which it has a bilateral or multilateral agreement. Without a treaty, the Philippines can only go so far as providing mutual legal assistance that does not require judicial intervention, such as taking voluntary witness statements.⁴⁵⁴ Other proceedings, such as search and seizure, compelling a witness to give evidence under oath, and document production, are not readily available.⁴⁵⁵ Pursuant to obligations under the UNCAC to expedite international cooperation procedures and simplify evidentiary requirements,⁴⁵⁶ it is necessary that the Philippines enact local legislation on mutual legal assistance. In fact, according to Senior State Counsel Mildred Bernadette B. Alvor of the DOJ, this should be done to speed up the process and to possibly make arrangements with other countries with which the Philippines does not have a treaty.

Furthermore, the Philippines is a dualist or pluralist State where international treaties have to be transformed into municipal law via ratification in order to be integrated with national law.⁴⁵⁷ This means that, in order for the Philippines to execute the provisions of a treaty, there must be an enforcement mechanism, which may be in the form of a law. As such, in order to make the UNCAC fully effective in the Philippines, there is a need to formulate legislation governing mutual legal assistance. Aside from the legal obligation to expedite international cooperation procedures and simplify evidentiary requirements,⁴⁵⁸ this would also make it easier for the Philippines to collect ill-gotten wealth from countries which do not have a mutual legal assistance treaty with the Philippines.

452. See generally UNTOC, *supra* note 80.

453. ASIAN DEVELOPMENT BANK ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT ANTI-CORRUPTION INITIATIVE FOR ASIA AND THE PACIFIC, *supra* note 189, at 253.

454. *Id.*

455. *Id.*

456. UNCAC, *supra* note 12, arts. 44 (9) & 46 (30).

457. BERNAS, *supra* note 29, at 60 & MALCOLM NATHAN SHAW, INTERNATIONAL LAW 122 (2003).

458. UNCAC, *supra* note 12, arts. 44 (9) & 46 (30).

The importance of this was emphasized in the recent case of the turnover of the Ligot property from the U.S. to the Philippines. In that case, the mutual legal assistance treaty between the Philippines and the U.S. facilitated the return of U.S. \$132,000.00 or ₱5.7 million worth of proceeds from a forfeited California property owned and obtained by the Ligots through corruption.⁴⁵⁹ For other countries without a mutual legal assistance treaty with the Philippines, however, this possibility remains to be inexistent without national legislation or a separate treaty. Since entering into a treaty is a time-consuming and complicated process,⁴⁶⁰ the Philippines should maximize the already ratified UNCAC by formulating legislation that would facilitate mutual legal assistance with other countries.

D. Examining the Current Legal Framework on International Cooperation in the Philippines and Comparing it with the International Cooperation Legislation of Selected Jurisdictions

Aside from treaties and conventions, the only international cooperation legislation in the Philippines is found in the existing Philippine Extradition Law, which has remained unrevised. Although many pending bills have been passed that sought to amend or supplement this law,⁴⁶¹ none has been completely successful. It must be noted, however, that while the results of this Note may be made applicable to a wide variety of crimes in general, the Note is limited to international cooperation in the suppression of crimes of corruption.

Extradition is two-sided in character. It may cover extradition of persons who committed crimes in the Philippines who fled elsewhere and those who committed crimes in a foreign country and fled to the Philippines. The Philippine Extradition Law is thus lacking in content, as it does not cover the extradition of persons where the Philippines is the Requesting State. Unlike the extradition laws of other States such as Indonesia, People's Republic of China, Palau, and Thailand, among others, it does not make a distinction between extradition *from* a foreign country and extradition *to* a foreign country.

In addition, it continues to call the person sought to be extradited as the "accused," which gives the false impression that an extradition case is to be likened to a criminal case. As discussed in *Lantion*,⁴⁶² an extradition proceeding is *sui generis*. It cannot be likened to a criminal proceeding and it does not determine the guilt or innocence of the person sought. As such,

459. Salaverria, *supra* note 266.

460. Interview with Mildred Bernadette B. Alvor, *supra* note 27.

461. *See, e.g.*, S.B. No. 1113, 13th Congress, 1st Reg. Sess. (2004) & S.B. No. 793, 14th Congress, 1st Reg. Sess. (2007).

462. *Lantion*, 343 SCRA at 386.

constitutional rights that are only available to an accused cannot be invoked by the extraditee. In this particular case, the person sought is not entitled to notice and hearing throughout the evaluation stage of the extradition process.

Further, while the law provides for a severity criterion based on minimum imprisonment, it does not provide for the dual criminality condition, nor does it define it based on the conduct test approach, or any other approach, like it does with its treaties.

More importantly, it does not provide for the grounds of refusal or substantive preconditions which must exist before extradition can take place, which is provided in the U.N. Model Law on Extradition,⁴⁶³ such as the political offense exception, discrimination clause, torture clause, or fair trial standards clause. These provisions are important to ensure that the person to be extradited remains protected of his or her human rights.

Structurally, the 21 sections of the Philippine Extradition Law clumped together pale in comparison to the 43 sections of the U.N. Model Law on Extradition which is divided into five parts, as well as other more recent extradition legislation, which at least have subparts or subchapters.⁴⁶⁴ As such, it becomes more imperative to amend the law not only in terms of content, but also in terms of structure and organization.

International cooperation with regard to mutual legal assistance also deserves particular attention, as there is no existing legislation covering this matter. Currently, mutual legal assistance in the Philippines is governed by bilateral treaties with other countries. With respect to countries without a treaty, however, informal measures are taken such as letters rogatory.⁴⁶⁵ With respect to the latter, the general principles of international law apply, such as reciprocity, comity, and rules of due process generally recognized between and among the sovereign States.⁴⁶⁶ The basic problem with letters rogatory is that, unlike a request under the treaty, a Requested State has no obligation to assist.⁴⁶⁷ Moreover, they are slow and relatively inefficient because the requests have to go through many bureaucratic steps, including courts in both countries, foreign and justice ministries, and even

463. Model Law on Extradition 2004, *supra* note 406, §§ 4-15.

464. Hu Qian & Chen Qiang, *China's Extradition Law of 2000*, 2 CHINESE J. INT'L L. 647, 651 (2002).

465. ASIAN DEVELOPMENT BANK & ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 189, at 33.

466. *Id.* at 33-34.

467. *Id.* at 34.

embassies.⁴⁶⁸ The procedure has often been classified as time-consuming and cumbersome.⁴⁶⁹

To illustrate the abovementioned observations, the following table shall compare the Philippine Extradition Law and Mutual Legal Assistance System with selected countries in a summarized manner. As illustrated below, the outdated Philippine Extradition Law erroneously calls the person sought an “accused” and is a rather short compilation of 22 sections, compared to the extradition laws of its neighboring countries. Moreover, the local law does not provide for provisions where the Philippines is the Requesting State. More controversial is the fact that unlike its counterparts, the Philippine Extradition Law does not provide ample protection of the various human rights of the person sought to be extradited. As for mutual legal assistance, the Philippines has no legislation and relies on its existing bilateral treaties for mutual legal assistance.

Table 6.1. Selected Extradition Laws

	LAW OF THE REPUBLIC OF INDONESIA ON EXTRADITION	EXTRADITION LAW OF THE PEOPLE'S REPUBLIC OF CHINA	PALAU EXTRADITION AND TRANSFER ACT	EXTRADITION ACT OF THAILAND, B.E. 2551	PHILIPPINE EXTRADITION LAW
Year Enacted	1979	2000	2001	2008	1977
How the Person Sought to be Extradited is Called	Person Claimed	Person Sought	Person Sought, Criminal Offender	Person whom Extradi- tion is Requested /Person Sought	Accused
Number of Parts / Chapters / Sections	12 Chapters; 48 Articles	4 Chapters; 55 Articles	7 Sub- chapters; 63 Sections	5 Chapters; 34 Sections	21 Sections
Provides for Provisions Where the Country is both the Requesting and	Yes	Yes	Yes	Yes	No

468. Bruce Zagaris & Jessica Resnick, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 ARIZ. J. INT'L & COMP. L. 1, 6 (1997).

469. See Patricia L. Bellia, *Chasing Bits Across Borders*, 2001 U. CHI. LEGAL F. 35, 50 (2001).

Requested State					
Provides for a Conduct Based Approach on Dual Criminality	Yes	Yes	Yes	Yes	No
Provides for a Severity Criterion (Minimum Penalty)	List	Yes	Yes	Yes	Yes
Provides for Extradition Without a Treaty	Yes	Yes	Yes	Yes	No
Exempts their Nationals from Extradition	Discretionary	Yes	Discretionary	No	No
Evidentiary Test	Prima Facie Case	None	Probable Cause	Prima Facie Case	Prima Facie Case

PROVIDES FOR THE FOLLOWING GROUNDS FOR REFUSAL

Essential and Public Interests	Yes	No	Yes	Yes	No
Political Offenses	Yes	Yes	Yes	Yes	No
Double Jeopardy	Yes	Yes	Yes	Yes	No
Death Penalty	Yes	No	Yes	No	No
Torture, Cruelty	No	Yes	Yes	No	No

Provides for Human Rights Provisions where Extradition can be Refused	Yes	Yes	Yes	Yes	No
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Table 6.2. Selected Legislation on Mutual Legal Assistance

	ACT ON INTERNATIONAL ASSISTANCE IN INVESTIGATION AND OTHER RELATED MATTERS (JAPAN)	MUTUAL ASSISTANCE IN CRIMINAL MATTERS, B.E. 2535 (THAILAND)	LAW ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (INDONESIA)	PHILIPPINES
Year Enacted	1980	1992	2006	—
Provides for Mutual Legal Assistance Without a Treaty	Yes	Yes	Yes	The Philippines has no legislation and relies on its existing bilateral treaties for Mutual Legal Assistance.
Provides for a Dual Criminality Requirement	Mandatory	Mandatory	Discretionary	
Provides for the Requisite of Reciprocity	Mandatory	Mandatory	Mandatory	
PROVIDES FOR THE FOLLOWING GROUNDS FOR REFUSAL				
Political Offenses	Yes	Discretionary	Yes	
Double Jeopardy	No	No	Yes	
Death Penalty	No	No	Yes	

VI. CONCLUSION

If crime crosses borders, so must law enforcement.

— Kofi A. Annan⁴⁷⁰

People from all over the world have become increasingly aware of the injustice and deprivation that corruption brings. Developing and developed countries alike would nod their heads in agreement with the fact that corruption is pervasive and has become increasingly entrenched in this seemingly small world. It is frustrating, to say the least, and even defeating, to find out that vast fortunes stolen by those corrupt cannot be recovered because they have been illicitly concealed and transferred abroad. Worse, no trace of the perpetrator can be found. Amidst all this, the UNCAC takes on a positive attitude and challenges everyone to take a bold leap of faith. The Convention is a remarkable achievement by the U.N., as it offers a comprehensive set of standards aimed at preventing and controlling transnational corruption. However, these aspirations, albeit enormously significant, cannot be achieved without the State-Parties' commitment and cooperation. Not surprisingly, the Philippines, as a State-Party, is not spared from this worthy obligation.

This Note aimed to examine the effects of the UNCAC on extradition and mutual legal assistance in the Philippines. In order to achieve this, this Note initially set the theme and discussed the history and transnational character of corruption in Chapter I. It particularly emphasized that with the increasing technological and modern developments, the international justice system, without the cooperation of nations, could not be effective in prosecuting and giving justice to transnational criminal offenders. In other words, curbing corruption now requires a sincere, and serious, global effort.

Chapter II addressed this concern by fixing the stage lights on the UNCAC as the most recent and comprehensive international agreement combating corruption. This Chapter provided a more in-depth understanding of the UNCAC and its objectives, laying particular emphasis on international cooperation as a means of preventing and combating the transfer of criminal offenders and funds of illicit origin.

Chapter III delved specifically into the international cooperation aspect of the UNCAC and recognized that extradition and mutual legal assistance play a key part in the fight against transnational corruption. This Chapter

470. Kofi A. Annan, Former United Nations Secretary-General, Statement on the Occasion of the United Nations Convention against Corruption Being Opened for Signing in Palermo City (Dec. 9, 2003) (transcript available at http://www.unafei.or.jp/english/pdf/RS_No77/No77_06VE_Kwok-chung2.pdf (last accessed Nov. 15, 2012)).

discussed the extradition and mutual legal assistance framework under the UNCAC.

In identifying whether the Philippines has sufficiently complied with its State obligations in the said treaty, particularly with regard to extradition and mutual legal assistance, Chapter IV discussed the international cooperation framework in the Philippines, by examining the Philippine Extradition Law and the country's foreign bilateral agreements with other States, as well as its procedures and agreements on mutual legal assistance. In this process, this Note analyzed the progress of international cooperation in the Philippines and found that there are several inconsistencies in the Philippines' international cooperation framework that need to be straightened out.

In Chapter V, it was established that the Philippines' ratification of the UNCAC is not a mere symbolic act of the Philippine government in the fight against transnational corruption, but has in fact real and concrete legal consequences. Sure enough, Philippine compliance with the UNCAC is not only imperative, but also advantageous, because aside from the fact that it is an obligation under the rule of *pacta sunt servanda*, it will also boost the Philippines' FATF standing, as well as deter corrupt offenders from seeking haven in Philippine territory.

Chapter V discussed the legal effects of the Philippines' ratification of the UNCAC, particularly the inconsistency of its approaches to dual criminality, the propriety of its existing reservation to the extradition aspect of the Treaty, and its current lack of implementing measures to address mutual legal assistance.

Particularly, with regard to the inconsistency of its approaches to dual criminality, the Philippines still adopts the listing approach in its interpretation of the dual criminality condition in its bilateral extradition treaties with Thailand, Indonesia, and Hong Kong. The UNCAC has stressed, however, that when it comes to dual criminality, the conduct approach must be used. In other words, it is not essential that the crimes in the two countries be the same or that the scope of the crime's liability be equivalent. This Note has held the view that the listing approach, which requires that the offense must be specifically listed in extradition treaties, is an outdated policy in view of recent international jurisprudence. As an extensive measure, the implications of this approach was discussed and it is concluded that the conduct approach will not endanger the offender's human rights, such as the right to be presumed innocent, the right to due process, the right to liberty, and the principle of legality. As such, seeing that the Philippines is not compliant to the UNCAC in this aspect, and to avoid inconsistency, there is a need to re-examine the said extradition treaties with Thailand, Indonesia, and Hong Kong.

Also, with regard to extradition, the Philippines raised a reservation during the Treaty's signing, signifying that the Philippines does not take the

UNCAC as a legal basis for extradition because of its adherence to dual criminality. However, as discussed in the previous Chapter, this reasoning is rather illogical, because a cursory inspection of the UNCAC will show that the Convention does not ask State-Parties to dispense with the dual criminality condition. Furthermore, an examination of its current laws and treaties show that the reservation is very well inconsistent with its other international commitments. Aside from this, the fear of the DOJ that the human rights of persons sought to be extradited will not be protected will not materialize, because the UNCAC provides for many grounds for refusal, which incorporates the right against discrimination, the right against torture, cruel, inhuman, or degrading punishment, the right against double jeopardy, and the right against death penalty.

More importantly, the reservation is against the very object and purpose of the Treaty, because it has a serious impact on the essential and explicit purpose of the Convention, which is to promote and facilitate international cooperation. As such, pursuant to jurisprudence, it should be construed as invalid and severable. The Philippines should therefore take the UNCAC as its legal basis for extradition on corruption cases.

With regard to mutual legal assistance, this Note discussed that aside from money laundering, there is no applicable legislation for mutual legal assistance involving other offenses of corruption. Thus, pursuant to obligations under the UNCAC to expedite international cooperation procedures and simplify evidentiary requirements, it is necessary that the Philippines enact local legislation on mutual legal assistance. In fact, according to Senior State Counsel Alvor of the DOJ, this should be done to speed up the process and to possibly make arrangements with other countries where the Philippines does not have a treaty with. Further, the implementation of the UNCAC through national legislation would ensure the placement of mechanisms to detect, trace, seize, confiscate, forfeit, and dispose, in favor of the Philippines, unlawfully acquired wealth by its corrupt officials.

VII. RECOMMENDATIONS

A. Extradition

As a recommendation, the reservations to the UNCAC should be struck down as invalid, because it is against the objective and purpose of the Treaty. Thus, the UNCAC should be considered as the Philippines' legal basis for cooperation on extradition matters. Also, pursuant to a more liberal interpretation of the dual criminality, the existing inconsistent extradition treaties with Thailand, Indonesia, and Hong Kong must be revisited to eliminate the listing approach and adopt the conduct approach. To clear any existing ambiguity, as well as to promote the interest of best practices for

international cooperation, the following changes need to be made to P.D. No. 1069:

- (1) The term “accused” must be changed into “person sought,” to clarify that an extradition proceeding is not a criminal proceeding.
- (2) A distinction must be made between extradition *from* a foreign country and extradition *to* a foreign country. The amended law should also encompass the procedure for requests for extradition by the Philippine government.
- (3) In addition to the severity criterion, the dual criminality condition must be expressly required and it must be defined based on the conduct test approach.
- (4) Lastly, provisions on other grounds for refusal, based on other human rights, such as the political offense exception, discrimination clause, torture clause, or fair trial standards clause must be included to ensure that the person to be extradited remains protected of his human rights.

Further, the Philippines has not created offenses of bribery of foreign public officials nor does it impose criminal liability against legal persons for corruption. An ample amount of consideration should be given to ensure that dual criminality does not prevent the Philippines from cooperating in these cases. As such, the Philippines may either make a law criminalizing these acts or accept the treaty as a legal basis for cooperation.

B. Mutual Legal Assistance

A law with detailed provisions on the procedures and requirements for mutual legal assistance would be essential to providing cooperation in the absence of a treaty and in giving life to the mutual legal assistance provisions of the UNCAC.

Furthermore, the Philippines’ ability to seek and provide international cooperation in corruption cases can be strengthened and be more effective through the expansion of its network of extradition and mutual legal assistance treaties, especially for State-Parties that have yet to ratify or sign the UNCAC. Ratifying the Southeast Asian MLAT would also be one way of expanding this network.

C. Proposing an International Cooperation Framework for Corruption

This Note also aimed to compare and contrast the essential features of extradition laws of other countries with Philippine extradition laws as well as benchmark effective systems for mutual legal assistance and extradition. Based on this comparison and the U.N. Model Laws on Extradition and

Mutual Legal Assistance as discussed previously in Chapter V, this Section shall introduce a recommended legal framework that is aligned with the international cooperation aspect of the UNCAC as well as one that is aligned with the benchmark previously mentioned.

D. Basic Contents of the Proposed Legislation

The proposed international cooperation legislation will basically amend the Philippine Extradition Law by revising it in terms of structure and content. It will be divided into two parts: extradition and mutual legal assistance. The proposed legislation on extradition shall substitute the term “accused” with “person sought,” in order to emphasize that an extradition proceeding is not a criminal proceeding. Further, the new law shall make a distinction between extradition and mutual legal assistance *from* a foreign country, and extradition and mutual legal assistance *to* a foreign country. The amended law shall also lay down the procedure for requests for extradition and mutual legal assistance by the Philippine government. In addition to the severity criterion of extradition, the dual criminality condition will be expressly required, and it will be defined based on the conduct test approach. Lastly, provisions on other grounds for refusal, based on human rights, such as the political offense exception, discrimination clause, torture clause, or fair trial standards clause must be included, in order to ensure that the person to be extradited remains ensured of his human rights. Procedural aspects of the legislation shall remain as it is since this Note is particularly limited to the substantial aspect of international cooperation. Moreover, it must be noted that the proposed international cooperation framework is limited in application to different species of transnational corruption.

E. The Proposed Act

AN ACT REVISING THE PHILIPPINE EXTRADITION LAW
(P.D. No. 1069) AND PRESCRIBING THE PROCEDURE FOR THE
IMPLEMENTATION OF EXTRADITION AND MUTUAL LEGAL
ASSISTANCE TREATIES BETWEEN THE PHILIPPINES AND A
FOREIGN COUNTRY, AND APPROPRIATING FUNDS
THEREFORE

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

PART I: GENERAL PROVISIONS

Section 1. *Title.* — This law shall be known as “The Philippine Extradition and Mutual Legal Assistance Law.”

Section 2. *Declaration of State Policy.* — It is hereby declared to be the policy of the State to uphold the principles of justice, cooperation, and amity

with all nations, as well as to establish effective practices aimed at the suppression of crime, both locally and internationally.

The State adopts the generally accepted principles of international law, the United Nations Convention Against Corruption, the United Nations Convention Against Transnational Organized Crime, and International Human Rights law, as part of the law of the land.

The suppression of crime is the concern not only of the State where it is committed but also of any other State to which the criminal may have escaped, because it saps the foundation of social life, and is an outrage upon humanity at large, and it is in the interest of civilized communities that crimes should not go unpunished.

The State values the dignity of every human person and guarantees full respect for human rights. It is the policy of the State to balance the rights and protect the person or property subject of international cooperation from undue interference, especially where they may be the proper subject of refusal of international cooperation requests.

Consistent with its foreign policy, and bearing in mind that the prevention and eradication of crimes is a responsibility of all States, and that they must cooperate with one another, the State hereby enacts this law for the purpose of guiding the executive and judicial department in the proper implementation of extradition and mutual legal assistance treaties to which the Philippines is a State-Party, strengthening international cooperation in the combating of crimes, particularly, corruption.

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

- (1) “Extradition” — the surrender of any person sought by the Requesting State for criminal prosecution, for an extraditable offense or for the enforcement of a sentence in respect of such an offense.
- (2) “Mutual Legal Assistance” — the assistance rendered by the Requested State to a Requesting State in relation to the investigation, prosecution, and examination before the court in accordance with domestic laws and regulations of the Requested State. Mutual Legal Assistance as referred to in this subsection may be in the following forms:
 - (a) Identifying and locating persons;
 - (b) Obtaining statements or other forms thereof;
 - (c) Providing documents or other forms thereof;

- (d) Making arrangements for persons to provide statement or to assist in the investigation;
 - (e) Delivering letters;
 - (f) Executing the inquiry of search warrant and seizure;
 - (g) Forfeiture of proceeds of crime;
 - (h) Recovery of pecuniary penalties in respect to the crime;
 - (i) Restraining of dealings in property, the freezing of property that may be recovered or confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect to the crime;
 - (j) Locating property that may be recovered, or may be needed to satisfy pecuniary penalties imposed, in respect to the crime; and
 - (k) Other assistance in accordance with the present law.
- (3) “Requesting State” — a State which requests the extradition of a person or mutual legal assistance in relation to crimes.
 - (4) “Requested State” — a State requested by the Requesting State to cooperate through extradition and mutual legal assistance.
 - (5) “Treaty” — a bilateral or multilateral agreement concluded between the Republic of the Philippines and one or more foreign States or governments.
 - (6) “Person Sought” — a person whose extradition or mutual legal assistance is requested by means of submitting a relevant request to the competent authorities.
 - (7) “Central Authority” — the authority designated in Section 45 of this Act.
 - (8) “Foreign Diplomat” — any authorized diplomatic representative of the Requesting State or government and recognized as such by the Secretary of Foreign Affairs of the Requested State.
 - (9) “Secretary of Foreign Affairs” — the head of the Department of Foreign Affairs of the Republic of the Philippines, or in his absence, any official or deputy acting on his behalf or temporarily occupying and discharging the duties of that position.
 - (10) “Secretary of Justice” — the head of the Department of Justice of the Republic of the Philippines.
 - (11) “Depositions” — testimonies given by a witness, expert, or a person sought, which are put into written forms, or are

electronically recorded, such as records, cassettes, videos, or other similar forms regarding anything known, seen, heard, or personally experienced.

- (12) “Documents” — evidence in the form of data, recordings, or information that can be seen, read, or heard, with or without the assistance of an instrumentality on paper or any physical material other than paper, or electronically, including and not limited to:
 - (a) writings, voice, or images;
 - (b) maps, designs, photographs, or the like; and
 - (c) letters, signs, numbers, symbols, or perforations which have meaning or are understandable by those able to read or understand them.
- (13) “Letters” — all official documents issued by competent officials in the Philippines or foreign States.
- (14) “Forfeiture” — coercive attempt to expropriate the properties or profits that have been obtained by a person from his or her crime committed, based on a judgment in the Philippines or a foreign State.
- (15) “Freezing” — temporary freezing of properties for the purpose of investigation, prosecution, or examination before the court with the purpose to prevent transfer or assignment and to prevent certain persons or all persons from dealing with the properties that have been obtained or may have been derived by a person from his or her crime.
- (16) “Proceeds of crime” — any property derived directly or indirectly from a crime, including property into which any property derived or realized directly from the crime was later successfully converted, transformed or intermingled, including income, capital or other economic gains derived from such property at any time since the crime.

Section 4. *Legal Bases of Extradition and Mutual Legal Assistance.* —

- (1) A person may be extradited in accordance with the present law and a relevant extradition treaty, on the request of a Requesting State for the purpose of prosecution or imposition or enforcement of a sentence in respect of an extraditable offense.
- (2) Mutual legal assistance may be granted pursuant to the present law and a relevant mutual legal assistance treaty, on the request of a Requesting State for the purpose of gathering and transferring evidence and information relating to crimes.

- (3) Extradition and mutual legal assistance pursuant to a treaty shall be governed by extradition or MLA Treaties in force between the Requested State and the Requesting State.
- (4) Extradition and mutual legal assistance may be granted by virtue of comity and reciprocity, where on the basis of assurances by the Requesting State that the State would comply with a comparable request by the Philippines, or where it would be deemed in the interest of justice to do so.

PART II: EXTRADITION FROM THE PHILIPPINES

ARTICLE I

Extraditable Offenses: Substantive Conditions for Extradition

Section 5. *Dual Criminality Condition using the Conduct Test.* — In determining whether an offense is an offense punishable under the laws of the Philippines and the Requesting State, it shall not matter whether:

- (1) The laws of both the Philippines and the Requesting State place the acts or omissions constituting the offense by the same terminology or define it in the same way;
- (2) The constituent elements of the offense may be different under the laws of both the Philippines and the Requesting State, it being understood that the totality of the conduct, as presented by the Requesting State, shall be taken into account.

Section 6. *Severability Condition.* — Without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or where such treaty refers to the requirements of the domestic legislation of the Philippines, extradition shall be granted to the Requesting State, provided the offense would, if committed in the Philippines, constitute an offense, which, however described, is punishable under the law of the Philippines by imprisonment, or other deprivation of liberty, or by a more severe penalty.

ARTICLE II

Grounds for Refusal of an Extradition Request

Section 7. *Political Offenses.* —

- (1) Extradition shall not be granted if the offense for which it is requested is an offense of a political nature.
- (2) Subsection 1 shall not apply to offenses in respect of which the Philippines has assumed an obligation, pursuant to any multilateral convention or bilateral treaty, not to consider them as offenses of a political nature for the purpose of extradition.

Section 8. *Discrimination Clause.* — Extradition shall not be granted if, in the view of the Secretary of Foreign Affairs of the Philippines, there are

substantial grounds to believe that the request for extradition has been made for the purpose of prosecuting or punishing the person sought on account of his race, religion, nationality, membership in a particular group, or his position may be prejudiced for any of these reasons.

Section 9. *Torture, Cruel, Inhuman, or Degrading Treatment or Punishment.* — Extradition shall not be granted if, in the view of the Secretary of Foreign Affairs of the Philippines, the person sought would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment or punishment.

Section 10. *Refugees.* — Extradition shall not be granted if the person sought is granted the status of a refugee.

Section 11. *Fair Trial Standards.* — Extradition shall not be granted if, in the view of the Secretary of Foreign Affairs of the Philippines, the person sought would not receive the minimum fair trial guarantees in criminal proceedings in the Requesting State.

Section 12. *Double Jeopardy.* — Extradition shall not be granted if there has been a final judgment rendered and enforced against the person sought in the Philippines in respect of the offense for which extradition is requested.

Section 13. *Death Penalty.* —

- (1) Extradition shall not be granted if the offense for which extradition is requested carries the death penalty under the law of the Requesting State.
- (2) Notwithstanding subsection 1, extradition may be granted if the competent authorities of the Requesting State give assurances that the death penalty will not be carried out.

Section 14. *Nationality.* —

- (1) Extradition shall not be refused on the ground that the person sought is a Filipino.

ARTICLE III

Procedural Requirements of Extradition Proceedings

Section 15. *Incoming Requests.* —

- (1) Any foreign State or government with which the Republic of the Philippines has entered into an extradition treaty may request for the extradition of the person sought who is or suspected of being in the territorial jurisdiction of the Philippines.
- (2) The request shall be made by the Foreign Diplomat of the Requesting State or government, addressed to the Secretary of Foreign Affairs, and shall be accompanied by:

- (a) The original or an authentic copy of either:
 1. the decision or sentence imposed upon the person sought by the court of the Requesting State or government;
 2. the criminal charge and the warrant of arrest issued by the authority of the Requesting State or government having jurisdiction of the matter or some other instruments having the equivalent legal force.
- (b) A recital of the acts for which extradition is requested, with the fullest particulars as to the name and identity of the person sought, his whereabouts in the Philippines, if known, the acts or omissions complained of, and the place and time of the commission of these acts;
- (c) The text of the applicable law or a statement of the contents of said law, and the designation or description of the offense by the law, sufficient for evaluation of the request; and
- (d) Such other documents or information in support of the request.

Section 16. *Duty of Secretary of Foreign Affairs.* —

- (1) Unless it appears to the Secretary of Foreign Affairs that the request fails to meet the requirements of this law and the relevant treaty or convention, he or she shall forward the request together with the related documents to the Secretary of Justice, who shall immediately designate and authorize an attorney in his office to take charge of this case.
- (2) The attorney so designated shall file a written petition with the proper Regional Trial Court of the province or city having jurisdiction of the place, with a prayer that the court take the request under consideration and shall attach to the petition all related documents. The filing of the petition and the service of the summons to the person sought shall be free from the payment of docket and sheriff's fees.
- (3) The Regional Trial Court with which the petition shall have been filed shall have and continue to have the exclusive power to hear and decide the case, regardless of the subsequent whereabouts of the person sought, or the change or changes of his place of residence.

Section 17. *Issuance of Summons, Temporary Arrest, Hearing, Service of Notices.*

- (1) Immediately upon receipt of the petition, the presiding judge of the court shall, as soon as practicable, summon the person sought to

appear and to answer the petition on the day and hour fixed in the order. The judge may issue a warrant for the immediate arrest of the person sought which may be served anywhere within the Philippines if it appears to the presiding judge that the immediate arrest and temporary detention of the person sought will best serve the ends of justice. Upon receipt of the answer, or should the person sought after having received the summons fail to answer within the time fixed, the presiding judge shall hear the case or set another date for the hearing thereof.

- (2) The order and notice as well as a copy of the warrant of arrest, if issued, shall be promptly served each upon the person sought and the attorney having charge of the case.

Section 18. *Appointment of Counsel de Officio.* — If on the date set for the hearing, the person sought does not have a legal counsel, the presiding judge shall appoint any law practitioner residing within his territorial jurisdiction as *counsel de officio* for the person sought to assist him or her in the hearing.

Section 19. *Hearing in Public; Exception; Legal Representation.* —

- (1) The hearing shall be public unless the person sought requests, with leave of court, that it be conducted in chamber.
- (2) The attorney having charge of the case may upon request represent the Requesting State or government throughout the proceeding. The Requesting State or government may, however, retain private counsel to represent it for particular extradition case.
- (3) Should the person sought fail to appear on the date set for hearing, or if he or she is not under detention, the court shall forthwith issue a warrant for this arrest which may be served upon the person sought anywhere in the Philippines.

Section 20. *Nature and Conduct of Proceedings.* —

- (1) In the hearing, the provisions of the Rules of Court insofar as practicable and not inconsistent with the summary nature of the proceedings, shall apply to extradition cases, and the hearing shall be conducted in such a manner as to arrive at a fair and speedy disposition of the case.
- (2) Sworn statements offered in evidence at the hearing of any extradition case shall be received and admitted as evidence if such statements are properly and legally authenticated by the principal diplomatic or consular officer of the Republic of the Philippines residing in the Requesting State.

Section 21. *Decision.* — Upon conclusion of the hearing, the court shall render a decision granting the extradition, and give his reasons therefore

upon showing of the existence of a *prima facie* case. Otherwise, it shall dismiss the petition.

Section 22. *Service of Decision.* — The decision of the court shall be promptly served on the person sought if he or she was not present at the reading thereof, and the clerk of court shall immediately forward two copies thereof to the Secretary of Foreign Affairs through the Department of Justice.

Section 23. *Appeals by Accused; Stay of Execution.* —

- (1) The person sought may, within 10 days from receipt of the decision of the Regional Trial Court granting extradition, appeal to the Court of Appeals, whose decision in extradition cases shall be final and immediately executory.
- (2) The appeal shall stay the execution of the decision of the Regional Trial Court.

Section 24. *Application of Rules of Court.* — The provisions of the Rules of Court governing appeal in criminal cases in the Court of Appeals shall apply on appeal in extradition cases, except that the parties may file typewritten or mimeograph copies of their brief within 15 days from receipt of notice to file such briefs.

Section 25. *Service of Decision of Court of Appeals.* — The person sought and the Secretary of Foreign Affairs, through the Department of Justice, shall each be promptly served with copies of the decision of the Court of Appeals.

Section 26. *Concurrent Request for Extradition.* — In case extradition of the same person has been requested by two or more States, the Secretary of Foreign Affairs, after consultation with the Secretary of Justice, shall decide which of the several requests shall be first considered, and copies of the former's decision thereon shall promptly be forwarded to the attorney having charge of the case, if there be one, through the Department of Justice.

Section 27. *Surrender of Accused.* — After the decision of the court in an extradition case has become final and executory, the person sought shall be placed at the disposal of the authorities of the Requesting State or government, at a time and place to be determined by the Secretary of Foreign Affairs, after consultation with the foreign diplomat of the Requesting State or government.

Section 28. *Seizure and Turn Over of Accused Properties.* — If extradition is granted, articles found in the possession of the person sought who has been arrested may be seized upon order of the court at the instance of the Requesting State or government, and such articles shall be delivered to the foreign diplomat of the Requesting State or government who shall issue the corresponding receipt therefore.

Section 29. *Costs and Expenses; By Whom Paid.* — Except when the relevant extradition treaty provides otherwise, all costs or expenses incurred in any extradition proceeding and in apprehending, securing and transmitting a person sought shall be paid by the Requesting State or government. The Secretary of Justice shall certify to the Secretary of Foreign Affairs the amounts to be paid by the Requesting State or government on account of expenses and costs, and the Secretary of Foreign Affairs shall cause the amounts to be collected and transmitted to the Secretary of Justice for deposit in the National Treasury of the Philippines.

Section 30. *Service of Court Processes.* — All processes emanating from the court in connection with extradition cases shall be served or executed by the sheriff of the province or city concerned or of any member of any law enforcement agency;

- (1) Provisional Arrest. — If within the period of 20 days, or the period defined in the Treaty, whichever is later, the Secretary of Foreign Affairs has not received the request for extradition and the documents mentioned in Section 15 of this Act, the person sought shall be released from custody.
- (2) Release from provisional arrest shall not prejudice re-arrest and extradition of the person sought if a request for extradition is received subsequently in accordance with the relevant treaty of convention.

PART III: EXTRADITION TO THE PHILIPPINES

Section 31. *Outgoing Requests.* —

- (1) The Secretary of Foreign Affairs of the Philippines may make a request to a foreign State for the extradition of a person for the purpose of criminal prosecution or the imposition or enforcement of a sentence in respect of an offense over which the Philippines has jurisdiction.
- (2) The Secretary of Foreign Affairs of the Philippines may also make a request to a foreign State for the provisional arrest of a person pending the presentation of the extradition request.

Section 32. *Treatment of Surrendered Persons.* — A person who has been extradited from a foreign State to the Philippines shall not be proceeded against, sentenced, detained, subjected to any other restriction of personal liberty in the territory of the Philippines or re-extradited to a third State for any offense committed prior to his surrender other than that for which he or she was extradited, unless:

- (1) the foreign diplomat or competent executive authority of the foreign State has expressly given its consent

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

Section 33. *Persons surrendered temporarily* —

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

Section 34. *Persons surrendered temporarily* —

- (1) In case of urgency, the Requesting State may, pursuant to the relevant treaty, and while the same remains in force, request for the provisional arrest of the person sought pending receipt of the request for extradition, in accordance with Section 15 of this Act.
- (2) A request for provisional arrest shall be sent to the Director of the National Bureau of Investigation, Manila, either through the diplomatic channels or directly by post or telegraph.
- (3) The Director of the National Bureau of Investigation or any official acting on his behalf shall, upon receipt of the request, immediately secure a warrant for the provisional arrest of the person sought from the presiding judge of the Regional Trial Court of the province or city having jurisdiction of the place, who shall then issue the warrant for the provisional arrest of the person sought. The Director of the National Bureau of Investigation through the Secretary of Foreign Affairs shall inform the Requesting State of the result of its request.
- (4) The enforcement of a sentence imposed on the person who has been temporarily surrendered and convicted in the Philippines shall not commence until his final extradition to the Philippines.

PART IV: MUTUAL LEGAL ASSISTANCE FROM THE PHILIPPINES

ARTICLE I

Substantive Conditions for Mutual Legal Assistance

Section 35. *Dual Criminality*. — Mutual legal assistance may not be granted if the request for mutual legal assistance relates to the investigation, prosecution and examination before the court of a person for a crime, which, if committed in the Philippines, cannot be prosecuted as a crime.

ARTICLE II

Grounds for Refusal of a Request for Mutual Legal Assistance

Section 36. *Political Offenses.* — Mutual legal assistance shall not be granted if the request for mutual legal assistance relates to the investigation, prosecution, or examination before the court, or punishment of a person for a crime that is of political nature.

Section 37. *Discrimination.* — Mutual legal assistance shall not be granted if the request for mutual legal assistance is conveyed for prosecuting or bringing a person into justice based on a person's race, gender, religion, nationality, or political belief.

Section 38. *Death Penalty.* — Mutual legal assistance shall not be granted if the request for mutual legal assistance relates to the investigation, prosecution and examination before the court or punishment of a person for a crime that is subject to capital punishment.

Section 39. *Essential Interest of the State.* — Mutual legal assistance shall not be granted if an approval for providing mutual legal assistance upon its request will be harmful to the sovereignty, security, interests, and national law of the Philippines.

Section 40. *Double Jeopardy.* — Mutual legal assistance shall not be granted if the request for mutual legal assistance relates to the investigation, prosecution and examination before the court of a person for a crime the perpetrator of which has been acquitted, awarded with clemency, or has completed serving the criminal sanction.

Section 41. *Specialty.* — Mutual legal assistance shall not be granted if the foreign State may not assure that the items requested for will not be used for matters other than the criminal matter in respect to which the request was made.

Section 42. *Return of Requested documents.* — Mutual legal assistance shall not be granted if the foreign State may not assure to return, upon the Philippines' request, any item obtained pursuant to the request.

Section 43. *Bank Secrecy.* Mutual legal assistance shall not be refused on the ground of bank secrecy.

ARTICLE III

Procedural Requirements of Mutual Legal Assistance Proceedings

Section 44. *Saving Clause.* — Nothing in this Act shall limit the power of a competent authority of the Republic of the Philippines to make or receive requests for information or to cooperate with a foreign State through other channels or in another manner.

Section 45. *Central Authority.* —

- (1) Any Foreign State may convey the request for mutual legal assistance to the Government of the Republic of the Philippines through the Central Authority. For purposes of this Act, a Central Authority is tasked:
 - (a) to make and receive requests for assistance and to execute and/or arrange for the execution of such requests;
 - (b) where necessary, to certify or authenticate, or arrange for the certification and authentication of, any documents or other material supplied in response to a request for assistance;
 - (c) to take practical measures to facilitate the orderly and rapid disposition of requests for assistance;
 - (d) to negotiate and agree on conditions related to requests for assistance, as well as to ensure compliance with those conditions;
 - (e) to make any arrangements deemed necessary in order to transmit the evidentiary material gathered in response to a request for assistance to the competent authority of the Requesting State or to authorize any other authority to do so; and
 - (f) to carry out such other tasks as provided for by this Act or which may be necessary for effective assistance to be provided or received.
- (2) The Central Authority referred to in this section shall be the Secretary of Justice, where the requests are pursuant to a treaty, and the Office of the Ombudsman, where the requests are made without a treaty.
- (3) Requests transmitted to other agencies or authorities of the Philippines shall be referred as soon as possible to the Central Authority. The fact that the Central Authority of the Philippines did not receive the request directly from the foreign State shall not affect the validity of the request.

Section 46. *Incoming MLA Requests.* —

- (1) The request for Assistance must contain the following:
 - (a) Purpose of such request and a description of requested assistance;
 - (b) Name of agency and official conducting the investigation, prosecution or examination before the court related to said request;

- (c) Description of the crime, case settlement phase, statutory provisions, content of articles, and sanctions imposed;
 - (d) Description of the act or condition being alleged as criminal, except in case of the request for assistance for conducting service of process;
 - (e) Relevant judgment and information that such judgment has permanent legal force in the event of the request for Assistance to execute a judgment;
 - (f) Details of specific procedures or requirements desired to be complied with, including information concerning whether or not legal means of proof required are to be made under oath or pledge;
 - (g) Requirement, if any, concerning confidentiality and the reason therefore; and
 - (h) Desired time limit for carrying out said request.
- (2) The request for mutual legal assistance, to the extent that it is necessary and possible, must also contain the following:
- (a) Identity, citizenship, and domicile of the person deemed able to provide statement or depositions related with the investigation, prosecution and examination before the court;
 - (b) Description concerning the requested statement or deposition;
 - (c) Description concerning required documents or other legal means of proof articles to be submitted, including a description concerning the person deemed able to provide such evidence;
 - (d) Information concerning expenses and accommodations required from the person requested to be present in said Foreign State; and
 - (e) Other additional information the Secretary of Foreign Affairs may ask, if the information contained in the request for Assistance is not sufficient to approve such request for Assistance.

Section 47. *Refusal.* — In the event that the request for mutual legal assistance from the Requesting State is refused, the Secretary of Justice must inform said refusal to the competent official of the Requesting State together with the reasons for said refusal.

Section 48. *Search Warrants.* — The Regional Trial Court may issue search and seizure warrants with respect to the object if it is believed that in or at a certain place there are goods, articles or assets that are:

- (1) Allegedly obtained from the proceeds of crime under the law of the Requesting State that have been or allegedly have been committed;
- (2) Used to commit or prepare such crime;
- (3) Particularly designed or allocated to commit such crime;
- (4) Related to such crime;
- (5) Believed to be evidence in such crime; or
- (6) Used to hamper the investigation, prosecution and examination before the court of such crime.

Section 49. *Search Warrant; Elements.* — Search and seizure warrants as referred to in preceding article shall contain the following elements:

- (1) Alleged crime that is related to the issuance of the warrant;
- (2) Searchable place based on the relevant warrant;
- (3) Description on goods, objects or assets approved to be seized;
- (4) Time limit of a warrant; and
- (5) Other terms and conditions related to the goods, objects or assets.

PART V: MUTUAL LEGAL ASSISTANCE TO THE PHILIPPINES

Section 50. *Outgoing MLA Requests.* — The request for mutual legal assistance by the Philippines must contain the following:

- (1) Identity of the requesting authority;
- (2) Description of subject matter and importance of the investigation, prosecution or examination before the court pursuant to said request, as well as the name and functions of a competent authority conducting investigation, prosecution and judicial process;
- (3) Summary of relevant facts except for the request for MLA related with judicial documents;
- (4) Provisions of relevant laws, contents of articles, and criminal sanctions;
- (5) Description of the MLA requested and details of certain procedures applied for, including confidentiality;
- (6) Purpose of the request for Assistance; and
- (7) Other requirements determined by the Requested State.

PART VI: FINAL PROVISIONS

Section 51. *Costs of Extradition Proceedings.* — Except when the relevant extradition or mutual legal assistance treaty provides otherwise, all costs or expenses incurred in any extradition or mutual legal assistance proceeding, and in apprehending, securing, and transmitting evidence of the person sought shall be paid by the Requesting State or government. The Secretary of Justice shall certify to the Secretary of Foreign Affairs the amounts to be paid by the Requesting State or government on account of expenses and costs, and the Secretary of Foreign Affairs shall cause the amounts to be collected and transmitted to the Secretary of Justice for deposit in the National Treasury of the Philippines.

Section 52. *Regulations.* — The Secretary of Foreign Affairs of the Philippines may promulgate such rules and regulations as may be necessary to give effect to the provisions of the present law.

Section 53. *Repealing Clause.* — All laws, particularly P.D. No. 1069, decrees, orders, issuances, or parts thereof, which are inconsistent with the provisions of this Act are hereby modified or amended, accordingly.

Section 54. *Effectivity Clause.* — This Act shall take effect after fifteen (15) days following its publication in two (2) national papers of general circulation.

VIII. EPILOGUE

It must be noted that like reaping what one sows, efforts at curbing corruption will definitely take a long time to exhibit results. Globalization has made the market economy at its most efficient, but it also masked the distortions created by corruption. It is admitted that while extradition and mutual legal assistance are only some of the measures that can help minimize this endemic social ailment, they are a crucial first step. That is why international cooperation measures deserve a second look, as they provide the assurance that the punishment of international and transnational crimes will not be frustrated by the barricades of territorial sovereignty.

Liberalizing our international cooperation laws, especially when it concerns corruption, should not be an issue, provided the offender's rights remain adequately protected. It must be recognized that giving up a part of our sovereignty in order to let international instruments standardize our systems does not mean our national laws will have to be compromised. In the case of extradition and mutual legal assistance, for that matter, it is high time to raise the white flag.