Constitutional Considerations and the International Criminal Court

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I. INTRODUCTION

Since its humble origins in 1946, the International Criminal Court (ICC) was envisioned to be an international judicial organ with jurisdiction over the most serious crimes of international concern, some examples of which are crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.[1] On 1 July 2002, this dream became reality with the entry into force of the Rome Statute of the International Criminal Court,[2] having surpassed the minimum 60-ratification required by the Statute.[3] At present, a total of 142 states have signed the Statute and 90 have either ratified, accepted, approved, or acceded to it.

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His past work published by the *Journal* was *The International Criminal Court: An Overview*, 46 ATENEO L.J. 318 (2001).

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1. *See* Franklin M. Ebdalin, *The International Criminal Court: An Overview*, 46 ATENEO L.J. 318 (2001).
2. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter ICC STATUTE].
3. *Id.* art. 126 (6).

For its part, the Philippines signed the ICC Statute on 28 December 2000 at the United Nations Headquarters in New York City, thus becoming the 124th State Signatory. It is significant to note, however, that since the adherence of the Philippines to the ICC Statute, it has not ratified the same to date.

This is a material fact since the ICC Statute is in the nature of a treaty as defined by the 1969 Vienna Convention on the Law of Treaties.[4] A treaty is defined as an "international agreement concluded between States in written form and governed by international law."[5] Although it has been previously held that less formal types of international agreements may be entered into by the Chief Executive and shall be valid even without the concurrence of legislative authority,[6] the prevailing rule is that agreements that are permanent and original should be embodied in a treaty and need State concurrence.[7]

Falling under the classification of being original and permanent, Philippine law mandates that the ICC Statute must concur with the requirements of the Constitution. It must first be ratified by the President, whose own ratification must in turn, be concurred in by the Senate in order for the treaty to be valid and effective.[8]

This ratification requirement substantiates the adherence of the Philippines to the dualist view of the relationship between international and domestic law. This view maintains that international law and domestic law are essentially distinct. Each State determines for itself when and to what extent the former is incorporated into its legal system and its status is always determined by domestic law.[9] When the domestic law provides that the international law applies within the domestic jurisdiction, this is an exercise of the authority of domestic law to adopt or transform the rules of international law.[10] This is to be distinguished from the monist view of the relationship between international and domestic law, which treats both laws

4. Vienna Convention on the Law of Treaties, art. 2, UN Docs. A/CONF.39/11 and Add 1 (1969) [hereinafter VIENNA CONVENTION].
5. *Id.* art. 20.
6. CIR v. Gotamco & Sons, 148 SCRA 36, 39-40 (1987); *see* World Health Organization v. Aquino, 48 SCRA 242 (1972).
7. FR. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 905 (2003 ed.) [hereinafter BERNAS, COMMENTARY].
8. PHIL. CONST. art. VII, § 21.
9. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 205 (1994).
10. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 33 (5d ed. 1998).

as part of the same legal order. International law is thus incorporated into each nation's legal system and is considered supreme over domestic law.[11]

Although committed to the ideals and purposes of the ICC, it is submitted that the Philippine Government must carefully weigh the merits of ratification and preliminarily determine if its obligations under the Rome Statute conform with the Constitution and domestic laws. This is because the treatment of conflicts between international law and domestic law is different from that of the Philippine courts and international courts.[12]

The Philippines, which adheres to the dualist view, regards the Constitution as the fundamental law of the land and is supreme over treaties entered into by the government. Domestic courts are therefore bound to apply the local law and to give a construction which, as much as possible, does not conflict with international law.[13] However, where there is irreconcilable conflict, domestic law prevails. In the case of *Gonzales v. Hechanova*,[14] for example, it has been held that a treaty cannot override an existing law. The Constitution even grants to the Supreme Court the power to declare a treaty unconstitutional in the exercise of judicial review.[15]

In the international arena, on the other hand, it is an established principle that a state may not plead its own law before an international tribunal as an excuse for failure to comply with international law.[16] It is generally held that states have the duty to carry out in good faith treaty obligations and all such other obligations that may arise from the different sources of international law. The provisions of domestic law cannot be invoked as a valid excuse to comply with this duty.[17] This doctrine in international law is stated in the Vienna Convention on the Law of Treaties which provides, "[a] Party may not invoke the provisions of its internal law as justification for its failure to reform a treaty."[18]

From the perspective of the ICC Statute, this difference of treatment might result in implementing the complementarity principles, which underpins the entire ICC structure. Complementarity essentially means the ICC should "complement" and not replace the municipal courts. It is thus not intended to supplant national judicial systems but steps in only when the

11. FR. JOAQUIN G. BERNAS, S.J., AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 55 (2002) [hereinafter BERNAS, PUBLIC INT'L LAW].

12. *Id.* at 60-61.

13. *Id.* at 61.

14. 9 SCRA 230 (1963).

15. PHIL. CONST. art. VIII, § 5 (2) (a).

16. BERNAS, PUBLIC INT'L LAW, *supra* note 11, at 60.

17. *Id.*

18. VIENNA CONVENTION, art. 27.

national authorities are unable or unwilling to act.[19] The lack of proper judicial interpretation on this matter thus leaves the relationship between the ICC Statute and Philippine law in a state of ambiguity.

Concededly, the Philippine Constitution adopts the generally accepted principles of international law as part of the law of the land.[20] However, this incorporation clause refers only to generally accepted principles of customary international law and not to treaty or conventional international law, which need to be transformed into domestic law, if they are to become binding on the Philippines. "Transformation" is undertaken by the aforementioned ratification by the President and concurrence by the Senate.[21]

II. CONSTITUTIONAL ISSUES FOR CONSIDERATION

Even if the Philippines is a signatory to the ICC Statute, certain issues must first be considered before the said treaty may be ratified. Foremost among these are issues regarding the constitutionality of the ICC Statute. The others are the death penalty and irrelevance of official capacity, or absence of immunity from suit. These issues were deliberated upon by the Philippine delegation during the 1998 Rome Diplomatic Conference. It is submitted that these two issues should be carefully contemplated as the Philippines considers the ratification of the ICC Statute.

A. Death Penalty

The imposition of the death penalty inevitably became one of the major issues during the negotiation of the ICC Statute, given the nature of the crimes involved: genocide, crimes against humanity, war crimes, and aggression. The discussion centered on whether the ICC can impose a death sentence on a person found guilty by the Court. The European and North American States were rabidly against such possibility, while the majority of Islamic and Arab States, as well as a number of Caribbean and Asian States, strongly supported its imposition.

The Philippines, for its part, was guided by the Constitution, which provides that:

> Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall the death penalty be imposed unless, for compelling reasons involving heinous crimes, the Congress hereafter

19. Ebdalin, *supra* note 1, at 329.

20. PHIL. CONST. art. II, § 20.

21. PHIL. CONST. art. VII, § 21.

> provides for it. Any death penalty already imposed shall be reduced to *reclusion perpetua.*[22]

This represented an ambiguity in policy. The Constitution provided for the abolition of the death penalty but at the same time opened the way for its re-imposition by Congress with respect to "heinous crimes." In 1993, Congress did just that, by enacting the current Death Penalty Law.[23] The validity of such re-imposition was upheld by the Supreme Court in *People v. Echegaray,* stating thus:

> A reading of Section 19 (1) of Article III will readily show that there is really nothing therein which expressly declares the abolition of the death penalty. The provision merely says that the death penalty shall not be imposed unless for compelling reasons involving heinous crimes, the Congress hereafter provides for it and, if already imposed, shall be reduced to reclusion perpetua. The language, while rather awkward, still plain enough.[24]

On the other hand, the Philippine Delegation also recognized the fact that an array of extradition treaties entered into by the Philippines exclude death penalty from among the penalties available to extraditable offenses.

Noting the precedence of our Constitutional obligations, the Philippine Delegation supported the imposition of the death penalty, stating that there was nothing more consistent with Philippine constitutional principles than the move to stop actions which are considered *hostes humanis generis.* Still, the Philippines categorically stated in the deliberations that it was not pushing for the imposition of the death penalty in the international arena despite the fact that its own laws provided for such penalty.

To address the impasse, the Arab States proposed the inclusion of a provision stating that the Court may impose on a person convicted under this Statute one or more of the penalties provided for by the national law of the State in which the crime was committed. This was rejected by the European and North American States who believed that such a provision would violate the principle of equality, as it would in effect impose different sentences upon persons convicted for the same offense.

The final compromise agreed upon was that the death penalty shall be excluded from the applicable penalties that may be imposed by the ICC, subject to the insertion of a statement in the *travaux préparatoires* that the

22. PHIL. CONST. art. III, § 19 (1).

23. An Act to Impose the Death Penalty on Certain Heinous Crimes, amending for that purpose the Revised Penal Laws, as amended, other Special Penal Laws, and for Other Purposes, Republic Act No. 7659 (1993).

24. People v. Munoz, 170 SCRA 107, 121 (1989), *quoted in* People v. Echegaray, 267 SCRA 682, 700 (1997).

non-inclusion of the death penalty will, in no way, affect the development of customary international law in this area.

Furthermore, a non-prejudice provision was added, to wit: "Nothing in this Part of the Statute affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide the penalties prescribed in this Part."[25] This solution allows states that impose the death penalty, such as the Philippines, to continue imposing it. They would likewise not need to enact amendatory legislation upon expressing their consent to be bound to the Rome Statute.

B. *Irrelevance of Official Capacity*

A second contentious issue was the irrelevance of official capacity or the removal of immunity from suits. The ICC Statute provides that:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for the reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[26]

Article 27 removes the traditional immunity of Heads of State or Governments and other officials from prosecution. Thus, their commission of a crime within the jurisdiction of the ICC will render them open to prosecution. This is a radical concept, considering that most constitutions expressly provide for and vigorously protect such immunity. Admittedly then, the introduction of such was cause for concern among many of the delegations to the Rome Conference.

However, an examination of the 1987 Constitution will show that there is no specific provision that accords the President immunity from suit during his or her tenure. This is in contrast with the 1973 Constitution, which expressly provided that "[t]he President shall be immune from suit during his tenure. Thereafter, no suit whatsoever shall lie for official acts done by him or others pursuant to his specific orders during his tenure."[27]

As to the President's immunity from suit during his tenure, deliberations of the Constitutional Commission paved the way for the "residual privilege"

25. ICC STATUTE, art. 79.

26. *Id.* art. 27.

27. 1973 PHIL. CONST. art. VII, § 17 (superseded 1987).

of immunity from suit.[28] The Supreme Court subsequently justified this immunity, the rationale being "to assure the exercise of Presidential duties and functions free from any hindrance or distraction, considering that being the Chief Executive of the Government is a job that, aside from requiring all of the office holder's time, also demands undivided attention."[29]

The Philippine Delegation interpreted this immunity to refer to "official acts" alone, and hence concluded that Article 27 was a necessary and reasonable derogation from presidential sovereignty. In addition, they cited the constitutional provisions on *public office as a public trust* and noted that "public officials must at all times be accountable to the people."[30]

Members of the Senate and the House of Representatives are likewise not immune from suit. The Constitution merely provides that they shall be immune from arrest for all offenses punishable by not more than six years imprisonment while the Congress is in session.[31] Again, the purpose of this is to protect him from harassment by baseless suits while he is in the performance of his legislative duties.

The Rome Statute may still be subject to questions of constitutionality in view of this absence of official immunity. Some States, such as France, have decided to amend their Constitution in order to ensure conformity with their obligations under the Rome Statute. However, such an approach is only recommended where the process of amendment is relatively simple and free of politics. France, in this instance, has a Constitutional Council that oversees amendments to its constitution. On the other hand, the process of amending the Philippine Constitution is beset by political interests as well as legal impediments.

In this regard, it is interesting to note the approach adopted by the Constitutional Court of Ukraine. It held that Article 27 of the Rome Statute was not contrary to the immunities granted by the Constitution since the crimes subject to the jurisdiction of the ICC were crimes under international law recognized by customary international law or by other international treaties binding on Ukraine. The immunities granted by the Constitution were only applicable before national jurisdictions and did not constitute obstacles to the jurisdiction of the ICC.[32] The Philippines may well adopt

28. *See* BERNAS, COMMENTARY, *supra* note 7, at 738.

29. Soliven v. Makasiar, 167 SCRA 393, 399 (1988).

30. PHIL. CONST. art. XI, § 1.

31 PHIL. CONST. art. VI, § 11.

32. Opinion of the Constitutional Court on the Conformity of the Rome Statute with the Constitution of Ukraine, Case N 1-35/2001 (July 11, 2001), *cited in* Advisory Service on International Humanitarian Law, Comite International de la Croix-Rouge, *Issues Raised with Regard to the 1998 Rome Statute of the International Criminal Court by National Constitutional Courts and Councils of State* (2001).

this interpretation, in order to harmonize the Rome Statute with constitutional obligations.

III. CONCLUSION

As the Philippine Government weighs the constitutional and legal ramifications of becoming a Party to the Rome Statute, it may be well for it to remember "to keep in mind the values that the ICC seeks to uphold, namely, justice and an end to impunity for those who wield their power destructively and wantonly."[33] With this approach, which constitutions all over the world undeniably cherish as values, the Philippines is certain to find common ground and harmony between our Constitution and the Rome Statute.

33. INTERNATIONAL CENTRE FOR HUMAN RIGHTS AND DEVELOPMENT & THE INTERNATIONAL CENTRE FOR CRIMINAL LAW REFORM AND CRIMINAL JUSTICE POLICY, MANUAL FOR THE RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE 55 (2000).