

RP-US Extradition Treaty: Impartial or Playing Favorites?

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Calls to re-examine the Philippines' Extradition Treaty with the United States spurred after the Philippine Government failed to obtain the extradition of Rod Lauren Strunk suspected to be the mastermind of the murder of his actress-wife Nida Blanca. Despite the extradition of Manila Congressman Mark Jimenez to face several criminal charges in the United States, the United States failed to reciprocate the same in the case of Strunk who could have been the very first American national to be extradited to the Philippines. While others claim that the RP-US Extradition Treaty is a lopsided agreement, which works only in favor of the United States, many maintain their confidence in the sufficiency of the treaty to have other persons facing charges extradited from the US to the country. This was strengthened by the recent decision of a United States District Court finding no bar to the extradition of former presidential adviser and crony Charlie "Atong" Ang, who is accused of funneling tobacco tax kickbacks and illegal gambling payoffs to then President Joseph Ejercito Estrada now facing prosecution for plunder.

The United States Embassy in Manila on November 19, 2003 in its website,¹ declared that "the US-Philippine Extradition Treaty is working, both countries are implementing it seriously, and both are benefiting from it." From the data released by the Embassy, the United States and the Philippines have filed with each other a total of 39

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¹ www.usembassy.state.gov/posts/rpi/wwwmain.html.

extradition cases, 23 or 59% from the US while 16 or 41 % from the Philippines. Both countries obtained the extradition of several wanted persons under the treaty, five persons were extradited from the US to the Philippines, while the latter has extradited nine to the United States.

The next pages of this article seek to provide answers to issues concerning the most controversial extradition treaty to which the Republic of the Philippines is a signatory, the Philippines' Extradition Treaty with the United States. Incidental to this purpose, this article likewise seeks to provide useful information for the better understanding and appreciation of the concept of extradition as a vital tool in the suppression of crimes and the prosecution of criminals who after committing an offense flee to another country to escape punishment.

EXTRADITION

Extradition is lithe process by which persons charged With or convicted of a crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment. It applies to those who are merely charged with an offense but have not been brought to trial; to those who have been tried and convicted and have subsequently escaped from custody; and those who have been convicted in absentia. It does not apply to persons merely suspected of having committed an offense but against whom no charges have been laid or to a person whose presence is desired as a witness or for obtaining or enforcing a civil judgment. ¹¹²

Under Philippine law, it is defined as lithe removal of an accused from the Philippines with the object of placing him at the disposal of foreign authorities to enable the requesting state or government to hold him in connection with any criminal investigation directed against him or the execution of a penalty imposed on him under the penal or criminal law of the requesting state or government. "3

² Weston, Falk, D'Amato, *International Law and World Order*, 2nd ed., p. 630 (1990) and cited in the dissenting opinion of Justice Puno in *Secretary of Justice vs. Lantion*, 322 SCRA 160, January 18, 2000 .

³ Section 2(a), Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

Extradition proceedings are not criminal in nature but are *sui generis*, a class by itself. An extradition proceeding does not involve the determination of the guilt or innocence of the accused for its ultimate purpose is not to prosecute but only to determine whether the extradition request complies with the Extradition treaty and the law implementing it, and whether the person sought is extraditable.⁴

The legal obligation of one State to surrender a fugitive from justice lies in the presence of an extradition treaty to which it is a party. In *US vs. Rauscher*,⁵ it was held that "it is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties. "

. Extradition treaties are international agreements or conventions entered into between States wherein the contracting parties obligate themselves to surrender a fugitive from justice found within their respective territories to the Requesting State so that he may be prosecuted for any violation of the laws of the said Requesting State. These treaties are entered into mainly for the purpose of suppressing crimes. With the advancement of technology and the development of easier and faster modes of international travel, the opportunity for criminals to evade prosecution is greater hence, to ensure that criminals are meted their deserved punishments and to prevent one State from being a haven of *fugitives*, a great number of States become signatories to bilateral or multilateral extradition treaties.

Extradition was first practiced by the Egyptians, Chinese, Chaldeans and Assyro- Babylonians.⁶ M. Cherif Bassiouni divides the history of extradition into four (4) periods: "(1) ancient times to seventeenth century - a period revealing almost exclusive concern

⁴ See Government of the United States of America vs. Purganan, GR No. 148571, September 24, 2002.

⁵ 119 U.S. 407, 411, 7 S. Ct. 234, 236, 301. ed. 425 (1886).

⁶ The practice of Extradition from Antiquity to Modern France and the United States: A Brief History, 4 B.c. Int'l. & Compo 1. Rev. 39 (1981) and cited in the dissenting opinion of Justice Puno in Secretary of Justice vs. Hon. Ralph C. Lantion and Mark Jimenez, GR No. 139465, January 18, 2000.

for political and religious offenders; (2) the eighteenth century and half of nineteenth century - a period of treaty-making chiefly concerned with military offenders characterizing the condition of Europe during that period; (3) from 1833 to 1948 - a period of collective concern in suppressing common criminality; and (4) post-1948 developments which ushered in a greater concern for protecting the human rights of persons and revealed an awareness of the need to have international due process of law regulate international relations. ⁷

In the Philippines, extradition was first embraced when the Philippine Government concluded its very first extradition treaty with the Republic of Indonesia. Shortly thereafter, then President Ferdinand E. Marcos issued Presidential Decree No. 1069, "The Philippine Extradition Law" on January 13, 1977 to "guide the executive department and the courts in the proper implementation of the extradition treaties to which the Philippines is a signatory."⁸ As the years passed, the Philippines became a signatory to numerous treaties with various countries such as Australia, Canada, the Federated States of Micronesia, Hong Kong, Republic of Korea, Switzerland, the Kingdom of Thailand and the United States of America.⁹

There are two types of extradition treaties: (1) the older or classical type which specifies the offenses for which extradition is provided (listing approach); and (2) the modern type, which contains no list of offenses but provides for extradition in all cases where the offense is punishable in both the demanding and surrendering states (double criminality clause).¹⁰ The older or classical type is reflected by our treaties with Hong Kong, Indonesia, and Thailand while those with Australia, Canada, the Republic of Korea, Micronesia, Switzerland and the United States of America adopt the modern type of extradition treaties containing a double criminality clause.¹¹

⁷ Intentional Extradition, United States Law and Practice, 2nd ed., p.7 (1987).

⁸ Whereas clause, Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

⁹ Extradition and Legal Assistance: The Philippine Experience, Severino H. Gafia, Jr. ¹⁰ Salonga & Yap, Public International Law, 5th ed., p. 122 (2000).

¹¹ Extradition and Legal Assistance: The Philippine Experience, Severino H. Gafia, Jr.

Although as early as 1977, by virtue of PD 1069, the procedure for the extradition of persons who have committed crimes in a foreign country has already been defined, it was only in 1994 when the RPUS Extradition Treaty was executed that the implementing provisions of PD 1069 were ushered into force.¹² Controversies arose when the Philippine Government received from the US government a request seeking the extradition of Mark Jimenez to the United States to face a string of criminal charges.

In line with the resolution of the substantive issues connected with the extradition of Mark Jimenez to the United States, the Supreme Court through Justice Panganiban in the case of *Government of the United States vs. Hon. Guillermo G. Purganan and Mark Jimenez*¹³ enumerated five postulates of extradition calculated to aid the court in ascertaining and carrying out the intent of extradition treaties and their implementing laws. They are quoted herein below as follows:

FIVE POSTULATES OF EXTRADITION

First, extradition is a major instrument for the suppression of crime.

Extradition treaties are entered into for the purpose of suppressing crime by facilitating the arrest and the custodial transfer of a fugitive from one state to the other. xxx In this era of globalization, easier and faster international travel, and an expanding ring of international crimes and criminals, we cannot afford to be an isolationist state. We need to cooperate with other states in order to improve our chances of suppressing crime in our own country.

Second, the Requesting State will accord due process to the accused.

An extradition treaty presupposes that both parties thereto have examined, and that both accept and trust, each other's legal system and judicial process. More pointedly, our duly authorized representative's signature on an extradition treaty signifies our confidence in the capacity and the willingness of the other state to

¹² Secretary of Justice vs. Lantion, 322 SCRA 160, January 18, 2000. ¹³ GR No. 148571, September 24, 2002.

protect the basic rights of the person sought to be extradited. That signature signifies our full faith that the accused will be given, upon extradition to the requesting state, all relevant and basic rights in the criminal proceedings that will take place therein; otherwise, the treaty would not have been signed, or would have been directly attacked for its unconstitutionality.

Third, the proceedings are sui generis.

As pointed out in *Secretary of Justice vs. Lantion*, extradition proceedings are not criminal in nature. :xxx

An extradition proceeding is summary in nature while criminal proceedings involve a full-blown trial. In contradistinction to a criminal proceeding, the rules of evidence in an extradition proceeding allow admission of evidence under less stringent standards. In terms of the quantum of evidence to be satisfied, a criminal case requires proof beyond reasonable doubt for conviction while a fugitive may be ordered extradited upon showing of the existence of a *prima facie* case. Finally, unlike in a criminal case where judgment becomes executory upon being rendered final, in an extradition proceeding, our courts may adjudge an individual extraditable but the President has the final discretion to extradite him. :xxx

Fourth, compliance shall be in good faith.

Our executive branch of government voluntarily entered into the Extradition Treaty, and our legislative branch ratified it. Hence, the Treaty carries the presumption that its implementation will serve the national interest. :xxx

We are bound by *pacta sunt servanda* to comply in good faith with our obligations under the Treaty. This principle requires that we deliver the accused to the requesting country if the conditions precedent to extradition, as set forth in the Treaty, are satisfied. In other words, "the demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender." Accordingly, the Philippines must be ready and in a position to deliver the accused, . should it be found proper.

Fifth, there is an underlying risk of flight.

Persons to be extradited are presumed to be flight risks. This prima facie presumption finds reinforcement in the experience of the executive branch: nothing short of confinement can ensure that the accused will not flee the jurisdiction of the requested state in order to thwart their extradition to the requesting state.

Developments in the Nida Blanca murder case prompted appeals to the government to look into the Philippines' extradition treaty with the United States. Senators Manuel Villar and Aquilino Pimentel, Jr., among others, urged the review of the extradition treaty between the two governments claiming that the provisions of the said treaty favor only the US. But is there any truth to this claim and is there any basis to support a conclusion that the RP-US Extradition treaty is a onesided agreement drafted only to favor the United States? Or is this claim a mere excuse to cover up the government's fault in failing to obtain the extradition of Rod Lauren Strunk? A reading of the major provisions of this alleged "one-sided" agreement would provide answers to these questions.

THE RP-US EXTRADITION TREATY

As early as 1981, the Philippines and the United States already signed an extradition treaty, however, it was never ratified.¹⁴ On November 13, 1994, a new RP-US Extradition Treaty was signed in Manila by the Philippine government thru the representation of then Secretary of Justice Franklin M. Drilon¹⁵ and concurred in on November 29, 1995 by the Senate by way of Resolution No. 11.¹⁶

Extraditable Offenses

Under the said treaty, the Philippines and the United States agree to extradite to each other persons whom the authorities in their

¹⁴ Technical Analysis of the RP-US Extradition Treaty prepared by the United States delegation that conducted the negotiations.

¹⁵ Secretary of Justice vs. Lantion, *Supra*.

¹⁶ Government of the United States of America vs. Purganan, *Supra*.

respective jurisdictions have charged with or convicted of an extraditable offense. ¹⁷ What constitutes an extraditable offense is defined under Article 2 thereof.

As previously mentioned, the RP-US Treaty does not list the offenses for which extradition may be granted. Extradition may be permitted for any offense punishable under the laws of both the contracting parties by deprivation of liberty (i.e. imprisonment or other form of detention) for more than one year, or by a more severe penalty such as capital punishment. ¹⁸ Defining extraditable offenses in terms of "dual criminality" rather than attempting to list each extraditable crime obviates the need to renegotiate the Treaty or supplement it if both Contracting Parties pass laws dealing with a new type of criminal activity, or if the list inadvertently fails to cover an important type of criminal activity punishable in both countries. ¹⁹ Whether or not the laws in the Contracting Parties place the offense within the same category of offenses or describe the offense by the same terminology and "whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court," an offense shall still be considered an extraditable offense if the penalty imposed thereto is that covered by the provisions of the treaty. ²⁰

An offense is still an extraditable offense if it consists of an attempt or a conspiracy to commit, aiding or abetting, counseling, causing or procuring the commission of or being an accessory to an offense, even if it is not so punishable under the laws of the Requested State by deprivation of liberty for more than a year or by a severe penalty as long as it is so punishable under the laws of the Requesting State.²¹ The Philippines has no general conspiracy statute similar to

¹⁷ Article 1, RP-US Extradition Treaty, 18

Article 2, RP-US Extradition Treaty.

¹⁹ Technical Analysis of the RP-US Extradition Treaty prepared by the United States delegation that conducted the negotiations.

²⁰ Article 2, par 3, RP-US Extradition Treaty. 21

Article 2, par 2, RP-US Extradition Treaty.

Title 18, United States Code, Section 371.²² Therefore, this paragraph creates an exception to the Dual Criminality Rule of paragraph 1 by expressly making inchoate crimes such as conspiracy extraditable offenses if the inchoate offense is punishable in the Requesting State by deprivation of liberty for a period of more than one year, or by a more severe penalty, and if the object of the inchoate offense is an extraditable offense pursuant to paragraph 1.²³ In the Philippines, only the following conspiracies are considered as felonies and thus punishable under the law: (a) conspiracy to commit treason,²⁴ (b) conspiracy to commit *coup d'etat*, rebellion or insurrection²⁵ and (c) conspiracy to commit sedition.²⁶ Therefore, by this provision, the coverage of offenses for which a person may be extradited is broader in the United States.

Despite the broad coverage of the Dual Criminality Clause, extradition may not be granted for a political offense. The above enumerated conspiracies under Philippine law are political offenses, therefore extradition may not be granted on the basis of any of these three. The political offense prohibition, however, does not cover three categories of offenses that shall not be considered as political offenses and are, therefore, extraditable. They are the following:

First, the crime of murder or other willful crimes against the person of a Head of State of the Contracting Parties, or a member of the Head of State's family. 27

²² Which reads: *Section 371. Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

²³ Technical Analysis of the RP-US Extradition Treaty prepared by the United States delegation that conducted the negotiations.

²⁴ Article 115, Revised Penal Code of the Philippines. 25

Article 136, Revised Penal Code of the Philippines. 26

Article 141, Revised Penal Code of the Philippines. 27

Article 3, par 2(a), RP-US Extradition Treaty.

Second, offenses for which both Contracting Parties have an obligation pursuant to a multilateral international agreement either to extradite the person sought or to submit the case to their competent authorities for prosecution.²⁸

These Offenses include:

- a. aircraft hijacking covered by The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague December 16, 1970, and entered into force October 14, 1971 (22 U.S.T. 1641; T.I.A.S. No. 7192);
- b. aircraft sabotage covered by the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal September 23, 1971, and entered into force January 26, 1973, (24 U.S.T. 564; T.I.A.S. No. 7570);
- c. crimes against internationally protected persons, including diplomats, covered by the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, done at New York December 14, 1973, and entered into force February 20, 1977 (28 U.S.T. 1975; T.I.A.S. No. 8532);
- d. hostage-taking covered by the International Convention against the Taking of Hostages, done at New York December 17, 1979; entered into force June 3, 1983, and for the United States January 6, 1985 (T.I.A.S. No. 11081); and
- e. maritime terrorism covered by the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome March 10, 1988; entered into force March 1, 1992, and for the United States March 6, 1995.²⁹

And third, conspiring or attempting to commit, or aiding or abetting the commission or attempted commission of, any of the foregoing offenses.³⁰

²⁸ Article 3, par 2(b), RP-US Extradition Treaty.

²⁹ Technical Analysis of the RP-US Extradition Treaty prepared by the United States delegation that conducted the negotiations.

³⁰ Article 3, par 2(c), RP-US Extradition Treaty.

Extradition should likewise be denied if the executive authority of the Requested State determines that the request for extradition is politically motivated³¹ or if the executive authority determines that the request relates to a military offense that is not punishable under non-military penal legislation³² or when the person sought has been tried and convicted or acquitted in the Requested State for the offense for which extradition is requested.³³

If the offense for which extradition is sought is punishable by death in the Requesting State but not in the Requested State, the Requested State may refuse the request for extradition. 34The Requesting State may, however, provide assurances not to impose the death penalty upon the accused if convicted, and if the Requested State considers the same to be sufficient, then it may grant the request. 35

If the offense was committed outside of the territory of the Requesting State, extradition shall be granted in accordance with the provisions of the Treaty if the laws in the Requested State provide for punishment of an offense committed outside of its territory in similar circumstances; or if the executive authority of the Requested State, in its discretion, decides to submit the case to its courts for the purpose of extradition.³⁶ "United States jurisprudence recognizes the jurisdiction of US courts to hear criminal cases involving offenses committed outside the United States if the crime was intended to, or did, have effects in the US, or if the legislative history of the statute shows clear Congressional intent to assert such jurisdiction. "37

In the Philippines, the government's ability to prosecute extraterritorial offenses is much more limited. Article 2 of the Revised Penal Code of the Philippines states that the Code may apply to crimes

31 Article 3, par 3, RP-US Extradition Treaty. 32

Ibid.

33 Article 4, par 1, RP-US Extradition Treaty. 34

Article 5, par 1, RP-US Extradition Treaty. 35

Ibid.

36 Article 2, par 4, RP-US Extradition Treaty.

37 See. 402 of the Third Restatement of the Foreign Relations Law of the United States (1987); Blakesley, "United States Jurisdiction over Extraterritorial Crime," 73 J. Crim. L. & Criminology 1109 (1982).

committed outside the Philippines only if the crime took place aboard a Philippine vessel; involved forgery or passing of forged Philippine coin, currency, or obligations; was committed by a Philippine public officer or employee in the exercise of official duties; or was a crime against national security and the laws of nations as defined in Title I Book II of the Code.³⁸ Hence, United States' requests for the extradition of a fugitive charged or convicted of an extraterritorial offense outside those contemplated under the said article would not prosper.

The extradition of fugitives is an obligation. Each of the Contracting Parties may not refuse to extradite a person sought on the basis that the Requested State's authorities declined to prosecute the person or has instituted but later discontinued proceedings against the person.³⁹ Neither may also refuse to extradite their own nationals for trial or punishment.⁴⁰

The Rule of Specialty

Article 13 of the Treaty embodies the so called "Rule of Specialty." Under this article, a person extradited under the Treaty may only be detained, tried or punished in the Requesting State for the following: 1. the offense for which extradition was granted or a differently denominated offense based on the same facts, provided the offense is extraditable or is a lesser included offense; 2. an offense to which the Requested State consents to the person's detention, trial, or punishment.⁴¹ "Designed to ensure that a fugitive surrendered for one offense is not tried for other crimes, the Rule of Specialty prevents a request for extradition from being used as a subterfuge to obtain custody of a person for trial or execution of a sentence on different charges that are not extraditable or properly documented in the

³⁸ See Article 2 of the Revised Penal Code of the Philippines, es. 39

Article 4, par 2, RP-US Extradition Treaty.

⁴⁰ See Article 6 of the RP-US Extradition Treaty which reads: "Each contracting party may not refuse extradition on the basis that the person sought is a citizen of the Requested State. "

⁴¹ Article 13, RP-US Extradition Treaty.

request."⁴² Aside from limiting the offenses for which a person extradited may be held for trial or punishment, the Requesting State is also prohibited from surrendering the person to a Third State without the consent of the Requested State.⁴³

The Rule of Specialty may be waived. In the United States, the Secretary of State has the authority to consent to a waiver thereof.⁴⁴ Even in the absence of a waiver, a person extradited may be detained, tried or punished for additional offenses or extradited to a Third State if the extradited person leaves the Requesting State after extradition and voluntarily surrenders to it or if he does not leave the Requesting State within 10 days of being free to do so.⁴⁵

Documentary Requirements

Article 7 of the treaty, enumerates the documents required to accompany the request for extradition all of which shall be submitted through diplomatic channels. They are as follows:

- a) documents, statements, or other types of information which describe the identity and probable location of the person sought;
 - b) a statement of the facts of the offense and the procedural history of the case;
 - c) a statement of the provisions of the law describing the essential elements of the offense for which extradition is requested;
 - d) a statement of the provisions of law describing the punishment for the offense;
 - e) a statement of the provisions of the law describing any time limit on the prosecution or the execution of punishment for the offense;
- and

⁴² Technical Analysis of the RP-US Extradition Treaty prepared by the United States delegation that conducted the negotiations.

⁴³ Article 13, par 2, RP-US Extradition Treaty.

⁴⁴ *Berenguer vs. Vance*, 473 F. Supp. 1195, 1199 CD.D.C. 1979) cited in the Technical Analysis of the RP-US Extradition Treaty prepared by the United States delegation that conducted the negotiations.

⁴⁵ Article 13, par 3, RP-US Extradition Treaty.

- f) the documents, statements, or other types of information specified in paragraph 3 or paragraph 4 of Article 7.

In addition to these documents, a request for extradition of a person who is sought for prosecution should be accompanied by such evidence as, according to the law of the Requested State, would provide probable cause for his arrest and committal for trial if the offense had been committed in such state, as well as a copy of the warrant or order of arrest issued by a judge or other competent authority together with a copy of the charging document.⁴⁶

If the request relates to a person who has been convicted by the Requesting State of the offense for which extradition is sought, the request should also be supported by:

- a) a copy of the judgment of conviction, or, if such copy is not available, a statement by a judicial authority that the person has been convicted;
- b) information establishing that the person sought is the person to whom the conviction refers;
- c) a copy of the sentence imposed, if the person sought has been sentenced, and a statement establishing to what extent the sentence has been carried out; and
- d) in the case of a person who has been convicted in absentia, the documents required in paragraph 3.⁴⁷

Before these documents shall be received and admitted as evidence in extradition proceedings, they must be certified by the principal diplomatic or consular officer of the Requested State resident in the Requesting State or certified or authenticated in any other manner accepted by the law of the Requested State.⁴⁸

Surrender of Fugitives

The Requested State shall promptly notify the Requesting State through diplomatic channels of its decision on the request for

⁴⁶ Article 7, par 3, RP-US Extradition Treaty. ⁴⁷

Article 7, par 4, RP-US Extradition Treaty. ⁴⁸

Article 7, par 5, RP-US Extradition Treaty.

extradition.⁴⁹ If the request is denied in whole or in part, the Requested State shall provide information as to the reasons for the denial. ⁵⁰ The Requested State shall provide copies of pertinent judicial decisions upon request. If the request for extradition is granted, the authorities of the Contracting Parties shall agree on the time and place for the surrender of the person sought. ⁵¹ If the person sought is not removed from the territory of the Requested State within the time prescribed by the law of that State, that person may be discharged from custody, and the Requested State may subsequently refuse extradition for the same offense. ⁵²

If the extradition request is granted in the case of a person who is being prosecuted or is serving a sentence in the territory of the Requested State, the Requested State may temporarily surrender the person sought to the Requesting State for the purpose of prosecution. ⁵³ The person so surrendered shall be kept in custody in the Requesting State and shall be returned to the Requested State after the conclusion of the proceedings against that person, in accordance with conditions to be determined by agreement between the Contracting Parties. ⁵⁴

Rule of Retroactivity

The Treaty applies not only to offenses committed after the Treaty enters into force, but applies as well to extraditable offenses committed prior thereto. ⁵⁵ This retroactive application does not violate the prohibition against *ex post facto* laws since the prohibition applies only to enactments making criminal certain acts that were not so punishable at the time when committed, and not to the extradition of persons for acts already considered criminal at the time when committed but for which no extradition agreement existed during such time.

⁴⁹ Article 10, par 1, RP-US Extradition Treaty. ⁵⁰

Ibid.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Article 11, RP-US Extradition Treaty. ⁵⁴

Ibid.

⁵⁵ Article 19, RP-US Extradition Treaty.

The implementation of the provisions of the treaty varies from one jurisdiction to another depending upon the municipal laws of each of the contracting parties. In the Philippines, the procedure for the extradition of criminals is defined under Presidential Decree No. 1069 otherwise known as the Philippine Extradition Law issued by then President Marcos in the year 1977. In the United States, Title 18 Chapter 209 of the United States Code contains provisions on the extradition of fugitives from one of its states to another, and from the US to a foreign State. Differences in the respective procedures adopted by the two countries exist.

PROCEDURE FOR EXTRADITING FUGITIVES FROM THE PHILIPPINES TO THE UNITED STATES

The procedure for the extradition of persons is governed generally by the municipal law of the Requested State; hence, requests for extradition of persons found in the Philippines shall be governed by the provisions of Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

Under the said decree, the US Government, through its Foreign Diplomat, may request for the extradition of an individual addressing the same to the Secretary of Foreign Affairs. In case of urgency, the Requesting State may request for the provisional arrest of the accused pending receipt of the request for extradition. ⁵⁶ Request for provisional arrest shall be sent to the Director of the National Bureau of Investigation who, upon receipt, shall immediately secure a warrant for the provisional arrest of the accused. If within 20 days after the provisional arrest the Secretary of Foreign Affairs has not received the request for extradition and the accompanying documents, the accused shall be released from custody. ⁵⁷ The release however, shall not prejudice the re-arrest and extradition of the accused if the request for extradition is subsequently received by the Secretary.

⁵⁶ Section 20, Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

⁵⁷ Section 20 (d), Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

After receiving the request and the required documents, the Secretary of Foreign Affairs shall, thereafter, determine whether the request complies with the requirements of the law and of the treaty.⁵⁸ During the evaluation stage, the prospective extraditee is not entitled to the right of notice and hearing. Through the ponencia of Justice Puno, the Supreme Court, acting on the motion for reconsideration filed by the Secretary of Justice, ruled that pending evaluation of the extradition request filed by the US Government, the prospective extraditee is not entitled to be furnished copies of the extradition request and all documents and papers submitted by the US Government nor be given the opportunity to be heard.⁵⁹

Once all the requirements have been complied with, the Secretary of Foreign Affairs 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 the case.⁶⁰ The International Affairs Division (IAD) of the Department of Justice is the principal office handling all requests for extradition of individuals who have fled to the Philippines and is likewise responsible for international extradition submitted by local authorities.⁶¹ The Secretary of Justice designates a panel of attorneys from the IAD to handle the case who shall file the written petition with the proper Regional Trial Court.⁶² "In practice, the role of the Department of Justice (DOJ) is not limited to filing and handling the case in court. If it deems necessary, the DOJ may also request the foreign state to submit additional supporting documents particular to Philippine procedure."⁶³

⁵⁸ See Article 7 of the RP-US Extradition Treaty and Section 4(2), Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

⁵⁹ Secretary of Justice vs. Lantion, 343 SCRA 377, October 17, 2000.

⁶⁰ Section 5, Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

⁶¹ Extradition and Legal Assistance: The Philippine Experience by Severino H. Gana, Jr. ⁶² Section 5, Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

⁶³ Extradition and Legal Assistance: The Philippine Experience, *Supra*.

After the appropriate petition has been filed in court, the presiding judge shall summon the accused to appear and to answer the petition.⁶⁴ A warrant of arrest may be issued for the immediate arrest of the accused if it appears that the immediate arrest and temporary detention of the accused shall best serve the ends of justice.⁶⁵ The prospective extraditee is not entitled to notice and hearing before a warrant for his arrest is issued.⁶⁶ The Supreme Court in the case of *Government of the United States of America vs. Purganan*,⁶⁷ restated the proper procedure thus: "Upon receipt of a petition for extradition and its supporting documents, the judge must study them and make, as soon as possible, a prima facie finding whether (a) they are sufficient in form and substance, (b) they show compliance with the Extradition Treaty and Law, and (c) the person sought is extraditable. At his discretion, the judge may require the submission 'of further documentation or may personally examine the affiants and witnesses of the petitioner. If, in spite of this study and examination, no prima facie finding is possible, the petition may be dismissed at the discretion of the judge. On the other hand, if the presence of a prima facie case is determined, then the magistrate must immediately issue a warrant for the arrest of the extraditee, who is at the same time summoned to answer the petition and to appear at scheduled summary hearings. Prior to the issuance of the warrant, the judge must not inform or notify the potential extraditee of the pendency of the petition, lest the latter be given the opportunity to escape and frustrate the proceedings."⁶⁸

After a potential extraditee has been arrested or placed under the custody of the law, he is not entitled to the right of bail as a rule. Bail is not a matter of right in extradition cases according to Philippine jurisprudence.⁶⁹ However, bail may be applied for and granted as an

⁶⁴ Section 6, Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

⁶⁵ *Ibid.*

⁶⁶ *Government of the United States of America vs. Purganan, Supra.* ⁶⁷

Ibid.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

exception, only upon a clear and convincing showing (1) that, once granted bail, the applicant will not be a flight risk or a danger to the community; and (2) that there exist special, humanitarian and compelling circumstances including, as a matter of reciprocity, those cited by the highest court in the requesting state when it grants provisional liberty in extradition cases therein. 70 The applicant bears the burden of proving the above two-tiered requirement with clarity, precision and emphatic forcefulness. 71

After receipt of the answer or should the accused after having received the summons fail to answer within the time fixed, the presiding judge shall hear the case or set another date for hearing. 72 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. 73 The trial court during the hearing determines whether or not the offense mentioned in the petition is extraditable based on the application of the Dual Criminality rule and other conditions mentioned in the applicable treaty. 74 It also determines whether or not the offense for which extradition is requested is a political one.

Upon conclusion of the hearing, the court shall render a decision either granting the extradition or dismissing the petition. 75 The law only requires a finding of the existence of a *prima facie case*. 76 Should the court grant the extradition, the accused may file an appeal with the Court of Appeals within 10 days from receipt of the decision of the Regional Trial Court otherwise, the decision shall become final and executory. 77 After the decision has become final and executory,

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Section 8, Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

⁷⁴ Secretary of Justice vs. Lantion, 322 SCRA 160, *Supra*.

⁷⁵ Section 10, Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

⁷⁶ *Ibid.*

⁷⁷ Section 12(a), Presidential Decree No. 1069, "Prescribing the Procedure for the

the accused shall be placed at the disposal of the authorities of the US government. 78

PROCEDURE FOR EXTRADITING FUGITIVES FROM THE UNITED STATES TO THE PHILIPPINES

Douglas C. McNabb, a US International Extradition Criminal Defense Lawyer outlined the procedure governing the extradition of criminals from the United States to other foreign countries. The Philippine Supreme Court, in the case of *Secretary of Justice vs. Hon. Ralph C. Lantion and Mark Jimenez*,⁷⁹ further incorporated the summary of US Extradition procedures and principles prepared by the Criminal Division of the U.S. Department of Justice making specific reference to the RP-US Extradition Treaty. Information was culled from these two sources to illustrate the United States' extradition procedure.

All requests for extradition are transmitted through diplomatic channels. In urgent cases, requests for the provisional arrest of an individual may be made directly by the Philippine Department of Justice to the US Department of Justice, and vice versa. In the event of a provisional arrest, a formal request for extradition is transmitted subsequently through diplomatic channels.

The United States Department of State forwards the incoming Philippine extradition request to the US Department of Justice. Before doing so, the Department of State prepares a declaration confirming that a formal request has been made, that the treaty is in full force and effect, that under Article 17 of the RP-US Extradition Treaty the parties provide reciprocal legal representation in extradition proceedings, that the offenses are covered as extraditable offenses under Article 2 thereof, and that the documents have been authenticated in accordance with the federal statute that ensures admissibility' at any subsequent extradition hearing.

Extradition of Persons Who Have Committed Crimes in a Foreign Country."

⁷⁸ Section 16, Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country."

⁷⁹322 SCRA 160, GR No. 139465, January 18, 2000.

Title 18, United States Code, Section 3184⁸⁰ generally authorizes any state judge, federal judge or magistrate to issue a warrant of apprehension for the arrest of the prospective extraditee. Said judge or magistrate is authorized to hold a hearing to consider the evidence offered in support of the extradition request. At the hearing, the court must determine whether the person arrested is extraditable to the foreign country. The court must likewise determine that (a) it has jurisdiction over the defendant and jurisdiction to conduct the hearing; (b) the defendant is being sought for offenses for which the applicable treaty permits extradition; and (c) there is probable cause to believe that the defendant is the person sought and that he committed the offenses charged. The requesting country is thereby required to provide sufficient evidence to establish probable cause to believe the individual sought for extradition committed the offense for which he or she is accused and that the individual who has been apprehended is in fact the person identified by that evidence.

If the court decides that the elements necessary for extradition are present, three obligations exist for the judicial officer. First, the judge, justice, or magistrate must certify his or her findings to the Secretary of State. Second, the evidence and a copy of testimony taken

⁸⁰ "Section 3184. *Fugitives from foreign country to United States.*

Whenever there is a treaty or convention for extradition between the United States and any foreign government, xxx any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, xxx issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, xxx he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

during the hearing must be certified to the Secretary of State. And finally, there must be an issuance of a warrant for the commitment of the individual sought for extradition to the proper detention facility where he or she will remain until surrendered to the requesting country.

The ultimate decision whether to surrender an individual rests with the Secretary of State. The Secretary is not mandated to surrender an individual upon a showing of extraditability.⁸¹ Absent treaty language at least insinuating that a convicted individual serve his sentence in the requesting country, it appears the Secretary of State can only authorize the individual be surrendered for trial. In addition, the Secretary of State may only order the surrender pursuant to the offense of which the individual was charged.

While individuals apprehended for extradition have no statutory right to bail, the U.S. Supreme Court has been unwilling to hold that Circuit Courts possess no power to grant bail. It is recognized that where the individual detained for extradition is able to demonstrate the existence of "special circumstances," lower courts have the inherent power to grant bail.

There is a two-calendar-month period⁸² within which an individual, detained and awaiting extradition, is to be removed from the United States. If such removal does not timely occur, the extraditee may, upon application to any court, request discharge from custody. If reasonable notice of the extraditee's intent to make such an application is given to the Secretary of State and such notice is proven up in the court, the judge has discretion to release the extraditee unless the government can show sufficient cause why the extraditee should

⁸¹ See Title 18, United States Code, Section 3186 which reads: "*Section 3186. Secretary of State to surrender fugitive.*

The Secretary of State may order the person committed under sections 3184 and 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense."

⁸² See Title 18, United States Code, Section 3188 which reads: "Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required ..

not be released. The decision to release the extraditee does not bar extradition proceedings from commencing once again.

No extradition treaty exists which expressly authorizes release on bail after an individual sought for extradition has been certified as extraditable and committed to jail for that purpose. In addition, no statutory provision exists authorizing bail after commitment. However, courts maintain the inherent authority to grant bail even after an individual is committed for extradition. In many instances bail may be granted or continued if originally granted prior to the extradition hearing.

Generally, neither party to an extradition proceeding may appeal the determination of the judge or magistrate. If commitment results, limited review is available through a writ of *habeas corpus* proceeding in the United States district court. To be effective, the application for writ of *habeas corpus* should be filed prior to the Secretary of State taking final action on the extradition.

As with any application for writ of *habeas corpus*, a denial of such may be appealed to the appropriate court of appeals. If further denied, review may be sought by writ of certiorari to the U.S. Supreme Court. Because the evidentiary hearing does not determine guilt or innocence, the doctrine of double jeopardy fails to attach. Seemingly, the United States government could continue to pursue (in good faith) extradition until a sufficient showing of probable cause is made.

CONCLUSION

The Philippines' Extradition Treaty with the United States is a bilateral agreement intended to facilitate the prosecution of criminals who violate the laws of the two contracting countries. It is a tool of criminal enforcement that extends the application of the criminal laws

to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered."

of the two states to reach even those outside their respective territorial jurisdictions by making possible the return of wanted criminals to the requesting state to face criminal prosecution or punishment. Being signatories to this international agreement, both parties are expected to perform their contracted obligations with utmost good faith. Both must assure the effective implementation of the provisions of this treaty.

A reading of the provisions of the Treaty would show no basis for the assertion that the same is drafted to favor the US Government. The provisions of the Treaty are applied equally in favor of both the contracting parties, the US and the Philippines. Aside from Article 2 par 3 (b),⁸³ no other provision can be found specifically making reference only to the United States. Instances when the provisions thereof are adjusted to suit the US state of affairs, such as Article 2 paragraph 2⁸⁴ thereof, are insignificant and insufficient to support the claim of one-sidedness and bias in favor of the US Government.

Despite the impartiality of the Treaty however, comparing the two procedures adopted by the two countries, there appears to be substantial disparities in their manner of carrying out the provisions of the RP-US Extradition Treaty, or any extradition treaty for that matter to which either of them may be a signatory.

Under Philippine procedure, after the petition for the extradition of a person has been filed in court, the immediate apprehension or arrest of a prospective extraditee, when justice so requires, would call

⁸³ Which reads: Article 2. Extraditable Offenses. **==**

3. For the purposes of this Article, an offense shall be an extraditable offense: :xxx (b) whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court.

⁸⁴ Which reads: Article 2. Extraditable Offenses. **==**

2. An offense shall also be an extraditable offense notwithstanding paragraph 1 of this Article if it consists of an attempt or a conspiracy to commit, aiding or abetting, counseling, causing or procuring the commission of or being an accessory before or after the fact to, any offense that is an extraditable offense pursuant to paragraph 1 and if it is punishable under the laws of the Requesting State by deprivation of liberty for a period of more than one year, or by a more severe penalty .

for the court's issuance of a warrant of arrest without giving the person sought the right to notice and hearing. The judge is restrained from informing or notifying the potential extraditee of the pendency of the petition on the belief that to do so would give the latter an opportunity to escape and frustrate the proceedings. A prospective extraditee is considered as a flight risk and for such reason, courts are also not prepared to grant him bail after being detained during the pendency of the determination of his extraditability. The burden of proving his entitlement to such right rests upon him.

US procedure, on the other hand, is more lenient to the prospective extraditee. US courts grant bail to a person arrested for extradition pending determination of his extraditability and even after determination that he is extraditable and already awaiting surrender to the Requesting State. Furthermore, while Philippine law is silent as to the maximum period within which an extraditee may be detained awaiting his surrender to the Requesting State, Title 18, United States Code, Section 3188 expressly requires an individual, detained and awaiting extradition, to be removed from the United States within two "calendar" months otherwise, the extraditee may be discharged upon application to any court.

Philippine extradition proceedings are limited to the determination of whether the extradition request complies with the requirements imposed by the treaty and the law, whether the person sought is extraditable to the Requesting State, and whether the offense for which the extradition of the prospective extraditee is sought is an extraditable offense. A mere prima facie finding suffices for the extradition of the individual. US extradition proceedings, on the other hand, require a determination that the person arrested is extraditable to the foreign country, that the prospective extraditee is being sought for an offense for which the applicable treaty permits extradition, and that there is probable cause to believe that the prospective extraditee is the person sought and that he committed the offenses charged. The requesting country is required to provide sufficient evidence to establish probable cause to believe that the individual sought for extradition committed the offense for which he is accused and that the individual who has been apprehended is in fact the person identified by that evidence. In this sense, therefore, the extradition of fugitives from the Philippines to the United States is easier than from the US to the Philippines.

Therefore, although the Philippines' Extradition Treaty with the United States is not a lopsided agreement favoring the United States Government, the disparities in the procedure of extraditing fugitives under Philippine and United States law places the two countries on unequal footing. The more complex procedure and the greater degree of proof required by the United States' causes the extradition of an individual from the United States more difficult to obtain as compared to the extradition of an individual from the Philippines. This demonstrates the two countries' unequal opportunity for extraditing fugitives under one and the same extradition treaty.

An extradition proceeding is said not to involve the determination of the guilt or innocence of the accused for its ultimate purpose is not to prosecute but only to determine whether the extradition request complies with the Extradition treaty and the law implementing it, and whether the person sought is extraditable. The prosecution of the person sought for extradition is a function not of the extradition court but of the courts of the Requesting State under its own legal system. If the determination of the guilt or innocence of the person sought for extradition is said to be a function left to the courts of the Requesting State, then there should be no need to show that the person sought to be extradited is the person who committed the offense for to do so would be a usurpation of judicial functions of the courts of the Requesting State. It would undermine the legal system and judicial processes of the requesting state which the Requested State, by signing the extradition treaty, signified to have accepted and trusted.

There is no need to change the provisions of the present RP-US Extradition Treaty for it works without preference to any of the two countries, however, a more identical implementation of the Treaty as well as a less demanding procedure for the extradition of individuals from the United States to the Philippines would be ideal.