

# INTERNATIONAL COOPERATION: EXTRADITION AND MUTUAL LEGAL ASSISTANCE

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## I. INTRODUCTION

Our Constitution declares that the Philippines adheres to the policy of cooperation with all nations.<sup>1</sup> This cooperation necessarily includes assistance in other countries' fights against corruption, subject to Philippine domestic laws, treaty obligations and generally accepted principles of international law. Like most countries, the Philippines abhors corruption because of its devastating effect on the social and economic development of nations and their people. As stressed in the *Rationale* of this seminar, "Corruption destroys nations. It undermines democracy and the rule of law, distorts business activities and competition, and hinders sustainable development and prosperity. It is also a threat to the security of societies as it creates environments in which organized crime, terrorism, and other forms of unlawful activity may prosper." The Philippines is committed to do its part in the fight against this common enemy of nations, and has entered into several extradition and mutual legal assistance treaties for that purpose. This paper will tackle the Philippine mechanism and procedures concerning extradition and mutual legal assistance. It is hoped that this simple presentation will give my fellow participants an opportunity to compare their systems and practices with ours in the Philippines.

To be sure, participation in international seminars, such as this, helps us keep abreast of developments in the international arena and provides us with the essential opportunity to learn from our peers and share good practices. I thus look forward to the presentations of my fellow participants in order to have an opportunity to gain broader understanding of their respective systems on extradition and mutual legal assistance which I can bring to my country.

## II. LEGAL AND INSTITUTIONAL FRAMEWORK FOR EXTRADITION AND MUTUAL LEGAL ASSISTANCE

### A. Agencies Involved

Before introducing mechanism and procedures relative to extradition and mutual legal assistance, it may be worth mentioning and describing certain government agencies in the Philippines which have roles in the matters under consideration. These agencies are the Office of the Ombudsman, the Department of Justice, the Department of Foreign Affairs, and the Anti-Money Laundering Council.

#### 1. Office of the Ombudsman

The Office of the Ombudsman is an independent constitutional body mandated to fight and prevent corruption. It is headed by an Ombudsman who has, among others, the power to investigate and prosecute, on his/her own or on complaint by any person, any act or omission

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<sup>1</sup> Article II, Section 2.

of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient.<sup>2</sup> The Office of the Ombudsman may request assistance and information from any government agency in the Philippines.

According to the Philippine Notification relative to the ratification of the United Nations Convention against Corruption (UNCAC), the Office of the Ombudsman, in the absence of a bilateral treaty, serves as the Central Authority for mutual legal assistance. Should there be a bilateral treaty between a state party to the UNCAC and the Philippines, it is the Department of Justice that functions as the Central Authority which shall have the power to receive requests for execution or transmittal to competent authorities.

## 2. Department of Justice

The Department of Justice (DOJ) investigates and prosecutes criminal offenders through the National Bureau of Investigation<sup>3</sup> and the National Prosecution Service, respectively.<sup>4</sup> The Department serves as the Philippine Central Authority for extradition and mutual legal assistance on criminal matters and represents treaty partners before Philippine courts.<sup>5</sup>

## 3. Department of Foreign Affairs

The Department of Foreign Affairs is the prime agency of government responsible for the pursuit and implementation of the Philippine foreign policy. It pursues bilateral, regional and multilateral relations with other states or governments to advance the interests of the Philippines and the Filipinos.

## 4. Anti-Money Laundering Council

The Anti-Money Laundering Council is the Philippines' Financial Intelligence Unit. Among its functions are to: (i) institute civil forfeiture proceedings through the Office of the Solicitor General; (ii) cause the filing of complaints with the Department of Justice or the Ombudsman for the prosecution of money laundering offenses; and (iii) investigate money laundering activities and other violations of the Anti-Money Laundering Act.<sup>6</sup>

# **B. The Philippine Extradition Law<sup>7</sup>**

## 1. Concept of Extradition

Extradition is defined in the law as “the removal of an accused from the Philippines with the object of placing him at the disposal of foreign countries 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.”<sup>8</sup> It has been characterized as the right of a foreign power, created by treaty, to demand the surrender of one accused or convicted of a crime within its territorial jurisdiction, and the correlative duty of the other state to surrender him to the demanding state. It is not a criminal proceeding. Even if the potential extraditee is a criminal, an extradition proceeding is not by its nature criminal, for it is not punishment for a crime, even though such punishment may follow extradition. It is *sui generis*, tracing its existence wholly to

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<sup>2</sup>Republic Act No. 6770 (The Ombudsman Act of 1989).

<sup>3</sup> <http://www.doj.gov.ph/vision-mission-and-mandate.html>.

<sup>4</sup> <http://www.doj.gov.ph/vision-mission-and-mandate.html>.

<sup>5</sup> Id.

<sup>6</sup> <http://www.amlc.gov.ph/amlc.html>.

<sup>7</sup> Presidential Decree No. 1069, entitled “Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country.”

<sup>8</sup> Sec. 2(a), PD 1069.

treaty obligations between different nations. It is not a trial to determine the guilt or innocence of the potential extraditee. Nor is it a full-blown civil action, but one that is merely administrative in character. Its object is to prevent the escape of a person accused or convicted of a crime and to secure his return to the state from which he fled, for the purpose of trial or punishment.<sup>9</sup>

## 2. Basis and Purpose

Extradition may be granted only pursuant to a treaty or convention.<sup>10</sup> In the Philippines, for a treaty to be valid and effective, the same must be concurred in, or ratified by, at least 2/3 of all the members of the Senate,<sup>11</sup> that is, at least 16 out of 24 Senators.<sup>12</sup> At present, the Philippines has extradition treaties with 13 countries, namely, Indonesia,<sup>13</sup> Thailand,<sup>14</sup> Australia,<sup>15</sup> Canada,<sup>16</sup> Switzerland,<sup>17</sup> South Korea,<sup>18</sup> Micronesia,<sup>19</sup> the United States of America,<sup>20</sup> Hong Kong,<sup>21</sup> Spain, India, China, and the United Kingdom.<sup>22</sup>

Extradition may be requested for the following purposes: (i) criminal investigation instituted by authorities of the requesting state or government charging the accused with an offense punishable under the laws both of the requesting state and the Republic of the Philippines by imprisonment or other form of deprivation of liberty for a period stipulated in the relevant extradition treaty or convention; or (ii) execution of the prison sentence imposed by a court of the requesting state, with such duration as that stipulated in the relevant extradition treaty or convention, to be served within the territorial jurisdiction of the requesting state.<sup>23</sup>

The general conditions for extradition are set forth in the Extradition Law, while the specific minimum requirements as well as the mandatory and discretionary grounds for refusing a request for extradition are provided for in existing treaties.<sup>24</sup>

Under existing treaties, extradition of a Filipino national is one of the discretionary grounds for refusing a request for extradition, with the exception of the treaties of the Philippines with India, the United Kingdom and the United States of America, which contain

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<sup>9</sup>*Govt. of Hong Kong, represented by the Phil. Dept. of Justice vs. Hon. Felixberto Olalia Jr., et al., G.R. No. 153675, April 9, 2007, jurisprudence cited in the case omitted here.*

<sup>10</sup> Sec. 3, PD 1069.

<sup>11</sup>The Philippine Congress, which is the Legislative Department of the government, is composed of two (2) chambers, the Lower House (House of Representatives) and the Upper House (Senate).

<sup>12</sup>Sec. 21, Art. VII, Philippine Constitution.

<sup>13</sup> Date of Entry into Force: October 25, 1976.

<sup>14</sup> Date of Entry into Force: December 7, 1984.

<sup>15</sup> Date of Entry into Force: January 18, 1991.

<sup>16</sup> Date of Entry into Force: November 12, 1990.

<sup>17</sup> Date of Entry into Force: February 23, 1997.

<sup>18</sup> Date of Entry into Force: November 30, 1996.

<sup>19</sup>Based on the records of the Department of Foreign Affairs of the Philippines, the treaty between the Philippines and Micronesia has not entered into force. No file found (Note Verbale on notification of completion of the requirements) on its entry into force.

<sup>20</sup> Date of Entry into Force: November 22, 1996.

<sup>21</sup> Date of Entry into Force: June 20, 1997.

<sup>22</sup>Philippine treaties with Spain, India and the United Kingdom are pending before the Philippine Senate Committee on Foreign Relations for concurrence.

<sup>23</sup>Sec. 3 (a) (b), PD 1069.

<sup>24</sup>Atty. Rafael G. Hipolito, UNCAC Review Focal Point, Office of the Ombudsman, "Inventory of Philippine Compliance with the United Nations Convention Against Corruption (UNCAC), Chapter IV-International Cooperation, page 5.

an explicit provision that extradition shall not be refused on the ground that the person sought is a citizen of the requested state. To date, the Philippines has not refused a request for extradition on the sole ground that the person sought to be extradited is its own national.<sup>25</sup>

Moreover, the Extradition Law and the existing treaties do not impose as a condition for the extradition of a Filipino national that the service of sentence, in case of conviction, be in the Philippines. There is also no domestic law which would authorize the enforcement in the Philippines of a sentence imposed under the domestic law of a foreign country.<sup>26</sup>

Extradition may be denied on the ground that the request is likely for the purpose of prosecuting and 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 the person's position for any one of these reasons. This mandatory ground for denying a request for extradition is present in all Philippine bilateral extradition treaties, except with India, Indonesia, Thailand and the United States of America.<sup>27</sup>

With regard to UNCAC, the Philippine Notification states that, in view of the requirement of dual criminality under the Philippine Extradition Law, UNCAC cannot be considered as a legal basis for extradition. However, subject to compliance with domestic legal processes, the Philippines is considering the amendment of its declaration, so that it can use the Convention as a basis for extradition provided that the dual criminality requirement is satisfied.<sup>28</sup>

### 3. Requesting Officer; Requirements

Request for extradition may be made by any foreign state or government with which the Philippines has an extradition treaty or convention in force. Such request may be made by the diplomat of the foreign state, addressed to the Secretary of Foreign Affairs of the Philippines. The request shall be accompanied by: (i) the original or an authentic copy of either- (a) the decision or sentence imposed upon the accused by the court of the requesting state, or (b) 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; (ii) a recital of the acts for which extradition is requested, with the fullest particulars as to the name and identity of the accused, his whereabouts in the Philippines, if known, the acts or omissions complained of, and the time and place of the commission of these acts; (iii) the text of the applicable law or statement of the contents of said law, and the designation or description of the offense of the law, sufficient for the evaluation of the request; and (iv) such other documents or information in support of the request.<sup>29</sup>

### 4. Provisional Arrest; Right to Bail

In case of urgency, the requesting state may, pursuant to the treaty or convention in force, request the provisional arrest of the accused pending receipt of the request for extradition. A request for provisional arrest shall be sent to the Director of the National Bureau of Investigation (NBI) of the Philippines, either through the Diplomatic Channels or direct by post or telegraph. The Director of the NBI or any official acting on the Director's behalf shall, upon receipt of the request, immediately secure a warrant for the provisional arrest of the

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<sup>25</sup> Id. at page 7.

<sup>26</sup> Id. at page 8.

<sup>27</sup> Id. at page 9.

<sup>28</sup> Id. at page 4.

<sup>29</sup> Sec. 4, PD 1069.

accused from the judge of the Regional Trial Court of the province or city having jurisdiction. The NBI Director through the Secretary of Foreign Affairs shall inform the requesting state of the result of its request. If within 20 days after the provisional arrest the Secretary of Foreign Affairs has not received the request for extradition and the required documents, the accused shall be released from custody. Release from provisional arrest shall not prevent re-arrest and extradition of the accused if a request for extradition is received subsequently in accordance with a treaty or convention in force.<sup>30</sup>

Can a prospective extraditee post bail for his/her provisional liberty upon arrest? In a 2002 case, the Philippine Supreme Court held that, "The constitutional provision on bail does not apply to extradition proceedings, as it is available only in criminal proceedings."<sup>31</sup> However, in 2007, the Philippine Supreme Court held that, "Clearly, the right of a prospective extraditee to apply for bail in this jurisdiction must be viewed in the light of the various treaty obligations of the Philippines concerning respect for the promotion and protection of human rights. Under these treaties, the presumption lies in favor of human liberty. Thus, the Philippines should see to it that the right to liberty of every individual is not impaired."<sup>32</sup> The Supreme Court added that, "Obviously, an extradition proceeding, while ostensibly administrative, bears all earmarks of a criminal process. A potential extraditee may be subjected to arrest, to a prolonged restraint of liberty, and forced to transfer to the demanding state following the proceedings."<sup>33</sup>

#### 5. Duty of Secretary of Foreign Affairs; Concurrent Request for Extradition

Unless it appears to the Secretary of Foreign Affairs that the request fails to meet the requirements of the Philippine law and the relevant treaty convention, the Secretary shall forward the request together with the related documents to the Secretary of Justice, who shall immediately designate and authorize an attorney in the Justice Department to take charge of the case. The attorney so designated shall file a written petition, including all related documents, 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. The filing of the petition and the service of the summons to the accused shall be free from payment of docket and sheriff's fees. The court where the petition is filed shall continue to have exclusive jurisdiction to hear and decide the case, regardless of the subsequent whereabouts of the accused, or the change or changes of residence.<sup>34</sup>

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 be promptly forwarded to the attorney having charge of the case, if there be one, through the Department of Justice.<sup>35</sup>

#### 6. Issuance of Summons; Temporary Arrest; Hearing; Service of Notices

Immediately upon receipt of the petition, the judge shall, as soon as practicable, summon the accused to appear and answer the petition on the day and hour fixed in the order. The

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<sup>30</sup> Id. at Sec. 20.

<sup>31</sup> *Government of the United States of America vs. Hon. Guillermo Puruganan, et al.*, G.R. No. 148571, September 24, 2002.

<sup>32</sup> Id.

<sup>33</sup> *Govt. of Hong Kong, represented by the Phil. Dept. of Justice vs. Hon. Felixberto Olalia Jr., et al.*, *supra*.

<sup>34</sup> Sec. 5, PD 1069.

<sup>35</sup> Id. at Sec. 15.

judge may issue a warrant for the immediate arrest of the accused which may be served anywhere within the Philippines if it appears to the judge that the immediate arrest and temporary detention of the accused will best serve the ends of justice. Upon receipt of the answer to the petition, or should the accused after having received the summons fail to answer within the time fixed, the judge shall hear the case or set another date for the hearing. The order and notice as well as a copy of the warrant of arrest, if issued, shall be promptly served each upon the accused and the attorney having charge of the case.<sup>36</sup>

7. Appointment of Counsel de Officio; Hearing in Public; Exception; Legal Representation

If on the date set for the hearing the accused does not have legal counsel, the judge shall appoint any law practitioner residing within the court's territorial jurisdiction as *counsel de officio* to assist the accused in the hearing.<sup>37</sup> The hearing shall be public unless the accused requests, with the approval of the court, that it be conducted in chambers. The attorney having charge of the case may upon request represent the requesting state throughout the proceedings. The requesting state may, however, retain private counsel to represent it for particular extradition cases. Should the accused fail to appear on the date set for hearing, or if the accused is not under detention, the court shall forthwith issue a warrant of arrest which may be served upon the accused anywhere in the Philippines.<sup>38</sup>

8. Nature and Conduct of Proceedings; Decision and Service Thereof.

In the hearing, the provisions of the Rules of Court, insofar as practicable and not inconsistent with the summary nature of the proceeding, shall apply to extradition cases, and the hearing shall be conducted in such a manner to arrive at a fair and speedy disposition of the case. Sworn statements offered in evidence at the hearing of any extradition case shall be received and admitted in evidence if properly and legally authenticated by the principal diplomatic or consular officer of the Philippines residing in the requesting state.<sup>39</sup>

Upon conclusion of the hearing, the court shall render a decision granting extradition, and shall give his reason therefor upon showing of the existence of a prima facie case. Otherwise, it shall dismiss the petition.<sup>40</sup> The decision of the court shall be promptly served on the accused if present at the hearing, and the clerk of court shall immediately forward two copies thereof to the Secretary of Foreign Affairs through the Department of Justice.<sup>41</sup>

9. Appeals by Accused; Stay of Execution

The accused may, within 10 days from receipt of the decision of the court granting the extradition, appeal to the Court of Appeals of the Philippines, whose decision in extradition cases shall be final and immediately executory. The appeal shall stay the execution of the decision.<sup>42</sup> The provision of the Philippine Rules of Court governing appeals in criminal cases in the Court of Appeals shall apply.<sup>43</sup> The accused 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.<sup>44</sup>

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<sup>36</sup> Id. at Sec. 6.

<sup>37</sup> Id. at Sec. 7.

<sup>38</sup> Id. at Sec. 8.

<sup>39</sup> Id. at Sec. 9.

<sup>40</sup> Id. at Sec. 10.

<sup>41</sup> Id. at Sec. 11.

<sup>42</sup> Id. at Sec. 12.

<sup>43</sup> Id. at Sec. 13.

<sup>44</sup> Id. at Sec. 14.

#### 10. Surrender of Accused; Seizure and Turn Over of the Accused's Properties

After the decision of the court in the extradition has become final and executory, the accused shall be placed at the disposal of the authorities of the requesting state, at a time and place to be determined by the Secretary of Foreign Affairs, after consultation with the foreign diplomat of the requesting state.<sup>45</sup> If the extradition is granted, articles found in the possession of the accused who has been arrested may be seized upon order of the court at the instance of the requesting state, and such articles shall be delivered to the foreign diplomat of the requesting state who shall issue the corresponding receipt.<sup>46</sup>

#### 11. Costs and Expenses; By Whom Paid

Except when the relevant extradition treaty provides otherwise, all costs and expenses incurred in any extradition proceeding and in apprehending, securing and transmitting an accused shall be paid by the requesting state. The Secretary of Justice shall certify to the Secretary of Foreign Affairs the amount to be paid by the requesting state on account of expenses and cost, and the Secretary of the Foreign Affairs shall cause the amount to be collected and transmitted to the Secretary of Justice for deposit in the National Treasury.<sup>47</sup>

### **C. Mutual Legal Assistance**

#### 1. No Domestic Legislation

The Philippines does not have a domestic law on mutual legal assistance. However, the absence of domestic legislation concerning mutual legal assistance does not prohibit the Philippine government from requesting or granting legal assistance to a foreign country. The Philippines can request or provide legal assistance in criminal matters to other states using as bases, among others, the provisions of existing bilateral and regional mutual legal assistance treaties (MLATs), as well as “mini-MLAs” contained in the various United Nations Conventions to which the Philippines is a state party, such as the United Nations Convention against Corruption (UNCAC). Mutual legal assistance may also be provided pursuant to R.A. 9160, the Philippine Anti-Money Laundering Act of 2001 (AMLA), as amended by R.A. 9194.<sup>48</sup> Moreover, non-treaty-based requests for legal assistance may also be made on the basis of reciprocity.

#### 2. Philippine MLATs With Other Countries

To date, the Philippines has 8 MLATs. These are with Australia,<sup>49</sup> China,<sup>50</sup> Hong Kong,<sup>51</sup> South Korea,<sup>52</sup> Spain,<sup>53</sup> Switzerland,<sup>54</sup> the United Kingdom<sup>55</sup> and the United States of America.<sup>56</sup> The more recent MLATs in the list are with China and the United Kingdom, which were concurred in by the Philippine Senate in May 2012. The Philippines is also a state party to the “Treaty on Mutual Legal Assistance in Criminal Matters,” or the so-called “ASEAN MLAT” entered into by the governments of Brunei Darussalam, Cambodia,

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<sup>45</sup> Id. at Sec. 16.

<sup>46</sup> Id. at Sec. 17.

<sup>47</sup> Id. at Sec. 18.

<sup>48</sup> Inventory of Philippine Compliance with the United Nations Convention Against Corruption (UNCAC), Chapter IV-International Cooperation, *supra*, page 11.

<sup>49</sup> Date of Entry into Force: December 19, 1993.

<sup>50</sup> Date of Entry into Force: October 19, 2012.

<sup>51</sup> Date of Entry into Force: March 24, 2004.

<sup>52</sup> Date of Entry into Force: November 17, 2008.

<sup>53</sup> Date of Entry into Force: December 18, 2008.

<sup>54</sup> Date of Entry into Force: December 1, 2005.

<sup>55</sup> Date of Entry into Force: June 1, 2012.

<sup>56</sup> Date of Entry into Force: November 22, 1996.

Indonesia, Lao People's Democratic Republic, Malaysia, Philippines, Singapore, and the Socialist Republic of Vietnam.

The MLATs entered into by the Philippines contain a lot of common provisions, among them are assistance in: (i) gathering of evidence; (ii) taking the testimonies or statements of persons; (iii) execution of requests for searches and seizures; (iv) facilitating the personal appearance of witnesses; (v) transferring of persons in custody for testimony or other purposes; (vi) obtaining and production of judicial and official records; (vii) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities, including assisting in proceedings related to forfeiture of assets, restitution and collection of fines; and (viii) providing and exchanging information on law, documents and records.<sup>57</sup>

### 3. Grounds for Denial of Requests for Mutual Legal Assistance

The grounds for the denial of a request for assistance may be mandatory or discretionary. The mandatory grounds include those that involve: (i) political offenses; (ii) offenses under military law; (iii) double jeopardy; (iv) offenses barred by prescription; or (v) requests made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of that person's race, sex, religion, nationality, or political belief.<sup>58</sup>

In the ASEAN MLAT, it was stated that the following shall not be considered as political offenses: (i) an offense against the life or person of a Head of State or a member of his/her immediate family; (ii) an offense against the life or person of a Head of a central Government, or of a minister of a central Government; (iii) an offense within the scope of any international convention to which both the Requesting and Requested states or governments are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of commission of that offense; and any attempt, abetment or conspiracy to commit any of the offences referred to above.<sup>59</sup>

The discretionary grounds to deny a request for legal assistance include those: (i) where the requesting party has, in respect of that request, failed to comply with any material terms of the treaty or other relevant arrangements; (ii) the provision of the assistance would, or would be likely to prejudice the safety of any person, whether that person is within or outside the territory of the requested party; or (iii) the provision of the assistance would impose an excessive burden on the resources of the requested party.<sup>60</sup>

Noteworthy, the Philippine MLATs with China, Republic of Korea, Switzerland, Spain and the United States provide as a discretionary ground for refusing a request for assistance the fact that the execution of the request is likely to prejudice its sovereignty, security, public order, or other essential interests. On the other hand, the Philippine MLATs with Australia

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<sup>57</sup> Simeon Marcelo, Former Ombudsman of the Philippines, "Denying Safe Havens through Regional and Worldwide Judicial Cooperation: The Philippine Perspective," Issue Paper (Workshop F), presented to the 5th Anti-Corruption Conference, ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (September 28-30, 2005).

<sup>58</sup> In the Philippines and the United States of America MLAT, it was stipulated that the Requested State may deny assistance if the request relates to a political offense; an offense under military law which would not be an offense under ordinary criminal law; or if the execution of the request would prejudice its security or similar essential interests, or made not in conformity with the Treaty. (Article 3 [1] of the Treaty).

<sup>59</sup> Article 3(3), ASEAN MLAT.

<sup>60</sup> Id., Article 3(2).

and Hong Kong provide such as a mandatory ground for refusal.<sup>61</sup>

#### 4. Dual Criminality

Dual criminality relates to acts that are criminal in both the requesting and requested states. Generally, the requirement of dual criminality is discretionary upon the requested state. However, the Philippines has bilateral agreements wherein it is expressly stated that assistance will be provided without regard to whether the alleged conduct constitutes an offense under the laws of the requested party. As a rule, the Philippines does not decline requests for mutual assistance, be they treaty or non-treaty based, on the ground of absence of dual criminality. Likewise, dual criminality is not a requirement for providing assistance to a foreign state under Section 13 of the AMLA.<sup>62</sup>

#### 5. Central Authority

As previously stated, the Department of Justice serves as the Central Authority for treaty-based requests for legal assistance. It acts on both incoming and outgoing MLA requests. The Department of Justice, through its Office of the State Counsel, conducts the evaluation. If the Justice Department finds that the execution of the request belongs to another government agency, said Department transmits the request to the agency competent to execute the same. If the request involves production of bank records, the request will be referred to the Anti-Money Laundering Council.

In the absence of a treaty, the Office of the Ombudsman, through its Office of the Legal Affairs, serves as the Central Authority for mutual legal assistance. So far, the Office of the Ombudsman has received only one request, and it is pending.

#### 6. Confidentiality

The Justice Department exerts its best efforts to keep MLA requests confidential, including its contents and any action taken thereon. In case the confidentiality is breached, the Department of Justice, or the Office of the Ombudsman in proper cases, will immediately inform the requesting party of such breach to determine if it still wants to pursue the request. However, where the request would involve filing an application in court for its execution, the request and the information provided therein would be considered as public record once the application is filed in court.

#### 7. Limitation of Use

The information or evidence obtained may only be used in the criminal proceeding referred to in the request for assistance. If the requesting state wishes to use the information or evidence in a proceeding not mentioned in the request, it must first secure the consent of the requested state. MLATs are intended solely for mutual assistance between the parties to the treaty. The provisions of an MLAT will not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or impede the execution of the request.

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<sup>61</sup> Inventory of Philippine Compliance with the United Nations Convention Against Corruption (UNCAC), Chapter IV-International Cooperation, *supra.*, page 23.

<sup>62</sup>*Id.* at page 16.

### III. CASE STUDIES

#### **A. Turn-over of US\$132,000, Representing Proceeds of the Forfeiture Sale of Property Registered in the Name of a Former Military Comptroller's Wife**

In 2005, the Office of the Ombudsman filed a forfeiture case before the Sandiganbayan<sup>63</sup> against former military Comptroller and General Jacinto Ligot for amassing wealth grossly disproportionate to his lawful income. Further investigation, in close cooperation with US authorities, resulted in the identification of real property located in Buena Park, California, registered in the name of the General's wife. The property was promptly subjected to forfeiture proceedings and auctioned off for the amount of US\$132,000.

In 2009, a request for the return of the proceeds of the forfeiture sale was made by the Office of the Ombudsman, through the Department of Justice, under the auspices of the US-Philippines Mutual Legal Assistance Treaty. In 2011, the US Government, through Ambassador Harry K. Thomas, Jr. turned over to Secretary of Justice Leila M. de Lima a cheque, in the amount of US\$132,000, representing the proceeds of the forfeiture sale. Ambassador Thomas declared that it was the "first-ever return of funds in an asset-forfeiture case," demonstrating the benefits of the Mutual Legal Assistance Treaty between the two nations.

#### **B. Return of US\$100, 000 Seized from a Military Comptroller's Sons**

In December 2003, the sons of retired Armed Forces of the Philippines Comptroller and General Carlos Garcia attempted to bring into the United States of America the undeclared amount of US\$100,000 (cash) but were caught by San Francisco airport authorities and charged with conspiracy to commit bulk cash smuggling. The sons pleaded guilty and the money was forfeited to the US Government.

In the Philippines, an investigation led to the filing of a Plunder charge and a forfeiture case against General Garcia and his family. In 2010, the Office of the Ombudsman formally informed the US authorities that the seized US\$100,000 was part of the ill-gotten wealth of General Garcia and requested its return, under the auspices of the US-Philippines Mutual Legal Assistance Treaty. In January 2012, the US Government, through Ambassador Harry K. Thomas, Jr., turned over to Ombudsman Conchita Carpio Morales a cheque, in the amount of US\$ 100,000, representing the money seized from the General's sons.

#### **C. Extradition of Charlie Atong Ang, Co-accused in a Plunder Case Against a Former Philippine President**

Charlie Atong Ang, then consultant of the Philippine Amusement and Gaming Corporation, fled to the United States when then Philippine President Joseph Estrada was ousted. Mr. Ang's extradition was sought for prosecution of the crime of Plunder, in violation of Republic Act No. 7080, specifically for conspiring with the President in the conversion of P130 million worth of tobacco excise tax for the latter's personal use and in receiving proceeds from the illegal numbers game *jueteng*. Finding that the evidence established probable cause that Mr. Ang committed Plunder, the US District Court of the District of Nevada granted the request for extradition.

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<sup>63</sup> Special Anti-Graft Court in the Philippines which has jurisdiction over offenses committed by high-ranking public officers of the Philippines, as well as low-ranking employees and private persons who may have conspired with the high-ranking public officers.

#### **IV. CONCLUSION**

Extradition and mutual legal assistance may no longer be in their infancy stages in the Philippines. However, more work should be done. There is no domestic legislation on mutual legal assistance, hence, legislation in that regard should be enacted. Likewise, trainings on extradition and mutual legal assistance for authorities responsible for extradition and mutual assistance may be needed. Further, more treaties on extradition and mutual legal assistance with other willing states should be entered into by the Philippines. To be sure, the more treaties of that kind, the fewer places where corrupt people and other criminals can hide, perpetrate their nefarious activities and evade investigation, prosecution and service of sentences.

# INTERNATIONAL COOPERATION: MUTUAL LEGAL ASSISTANCE AND EXTRADITION

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## I. INTRODUCTION

“With the advent of easier and faster means of international travel, the flight of affluent criminals from one country to another for the purposes of committing crime and evading prosecution has become more frequent. Accordingly, governments are adjusting their methods of dealing with criminals and crime that transcend international boundaries.”<sup>1</sup>

“More and more, crimes are becoming the concern of one world. Laws involving crimes and crime prevention are undergoing universalization. One manifest purpose of this trend towards globalization is to deny easy refuge to a criminal whose activities threaten the peace and progress of civilized countries. It is to the great interest of the Philippines to be part of this irreversible movement in the light of its vulnerability to crimes, especially transnational crimes.”<sup>2</sup>

## II. LEGAL FRAMEWORK

### A. Mutual Legal Assistance (MLA)

The Philippines does not have domestic legislation on mutual legal assistance (MLA). The absence of a domestic law on mutual legal assistance, however, does not mean that we cannot seek or obtain assistance from and to a foreign government. We do so on the basis of our existing bilateral Mutual Legal Assistance Treaties in Criminal Matters, commonly known as MLATs, or on the basis of reciprocity.

In case of a request for assistance that is made on the basis of reciprocity, an undertaking has to be made by the requesting State that it will provide the same type of cooperation to the requested State. The extent of assistance that the Philippines can seek or grant will, therefore, depend on the nature of assistance being requested. A request for assistance requiring compulsory processes or court intervention for its execution may not be made on the basis of reciprocity; requests of this nature can only be made on the basis of a treaty.

The Philippines is party to eight (8) bilateral MLATs with the following countries: Australia, China, Hong Kong, Korea, Spain, Switzerland, the United States of America (USA) and the United Kingdom (UK). It is also a party to the ASEAN MLAT.

Aside from the bilateral agreements earlier mentioned, the Philippines is also a Party to multilateral treaties which contain provisions on extradition and mutual legal assistance. These include the UN Convention Against Corruption (UNCAC), the UN Convention Against Transnational Organized Crime (UNTOC), the UN International Convention for the

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<sup>1</sup> *Government of the United States of America v. Purganan*, 389 SCRA 623, 652.

<sup>2</sup> *Secretary of Justice v. Lantion*, 343 SCRA 377, 393.

Suppression of the Financing of Terrorism, the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and others.

## **B. Extradition**

Presidential Decree No. (P.D.) 1069, “*Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country,*” was issued by then President Ferdinand E. Marcos on January 13, 1977. At present, the Philippines has thirteen (13) extradition treaties with the following countries: Indonesia (1976); Thailand (1981); Australia (1988); Canada (1989); Micronesia (1990); Korea (1993); the USA (1994); the Hong Kong Special Administrative Region (1995); China (2001); Spain (2004); India (2004); the UK (2009). PD No. 1069 expressly states that extradition may be granted only pursuant to a treaty or convention.<sup>3</sup>

## **III. PHILIPPINE CENTRAL AUTHORITY**

The designated Central Authority for the Republic of the Philippines in MLA and Extradition is the Department of Justice (DOJ). Unless the treaty itself expressly states that the request be transmitted through diplomatic channels, all requests for extradition and mutual legal assistance may be directly transmitted to the DOJ.

The Office of the Chief State Counsel (OCSC), which assists the Secretary of Justice in the performance of his/her duties as the Attorney General of the Philippines, performs the role of the DOJ as Central Authority in the processing and/or implementation of requests for extradition and mutual legal assistance. The OCSC also represents our treaty partners before the courts in extradition proceedings and requests for mutual legal assistance in criminal matters.

## **IV. LEGAL PRECONDITIONS**

### **A. Dual Criminality**

For MLAs, the requirement of dual criminality is generally discretionary upon the requested State. However, we have bilateral agreements wherein it is expressly stated that assistance will be provided without regard to whether the alleged conduct constitutes an offense in the requested state. Under our MLATs with Australia, China, Hong Kong, and Korea, a request for legal assistance may be refused if the request relates to acts or omissions which would not constitute an offense under the laws of the Requested State. A similar provision is found in the ASEAN MLAT except that the Requested Party may provide assistance even in the absence of dual criminality if permitted by its domestic laws.

For extradition to be granted, dual or double criminality is required. In determining whether an offense is an offense punishable under the laws of both parties, it shall not matter whether the laws of both States place the act or omission within the same category of offense or denominate the offense by the same terminology (China).

### **B. Use Limitation/Rules of Specialty**

The use of the limitation principle is standard in all of our MLATs. Under this principle, the information or evidence obtained may only be used in the criminal proceeding referred to in the request for assistance. If the Requesting State wishes to use the information or evidence

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<sup>3</sup> Sec. 3.

in a proceeding not mentioned in the request, it must first secure the consent of the Requested State.

In our MLAT with Switzerland, prior consent is not necessary if (a) the facts which are the basis of the request constitute another offense for which mutual legal assistance would be granted; or (b) the foreign criminal proceedings are directed against other persons having participated in committing the offense.

The rule of specialty, while not provided in our Extradition Law, is found in all our bilateral treaties. Under this principle, an extraditee will only be tried or punished by the Requesting State for offenses in respect of which extradition has been granted unless the Requested State consents thereto. Before giving its consent, the Requested State may require the submission of documents/statements under the Treaty. Our treaties expressly excluded application of this rule (a) for conduct committed by an extraditee after his/her extradition; and (b) for lesser offenses, provided such lesser offense is an extraditable offense. In our bilateral extradition treaties with UK and USA, the rule of specialty is extended to the extradition of a person to a third State.

### **C. Evidentiary Test**

In requests for mutual legal assistance, the laws of the Requested State shall be observed in their implementation or execution. This requirement is essential to prevent “fishing expeditions.” However, like dual criminality, evidentiary requirements are more relaxed for MLA rather than for extradition, particularly for less intrusive measures such as the production of documents or taking of statements of witnesses.

For extradition cases, the evidence submitted to the requested State should at least meet the standard of probable cause. However, some jurisdictions, while agreeing on this standard, may, under their respective domestic laws, differ in meeting this standard.

Under PD No. 1069, the Department of Justice, as petitioner, must establish a *prima facie* case. While the other treaties are silent as to the standard of evidence to be used in extradition proceedings, our extradition treaties with Canada, Hong Kong, India, and the US expressly provide that the conduct of extradition proceedings shall be in accordance with the laws of the Requested State.

## **V. SCOPE OF OFFENSES**

Affording the widest range of assistance possible under our MLATs, and subject to each parties’ domestic laws, mutual legal assistance is rendered in the investigation and prosecution of offenses or to proceedings relating to criminal matters. Criminal matters include matters connected with offenses against a law related to taxation, customs duties, foreign exchange control or other revenue matters. Still other treaties include criminal matters relating to forfeiture or confiscation of property in respect of an offense, imposition or recovery of a pecuniary penalty and/or the freezing of assets that may be forfeited, confiscated or used to satisfy a pecuniary penalty imposed in respect of an offense.

P.D. 1069 provides that the person who is the subject of the request for extradition be charged with an “offense punishable under the laws of both the requesting state or government and the Republic of the Philippines by imprisonment or other form of deprivation of liberty for a period stipulated in the relevant extradition treaty or convention.”

(Section 3) Except for our bilateral treaties with Hong Kong, Indonesia and Thailand, which follow the list-approach, our treaties require that the offense must be penalized by imprisonment for a period of at least one year, or by a more severe penalty. This may include the attempt, conspiracy to commit, aid, abet, counsel, cause or procure the commission of or being an accessory before or after the fact to, an offense to which the extradition relates (US, Thailand).

## **VI. GROUNDS FOR REFUSAL**

All extradition treaties and MLATs specify the grounds on which cooperation may be denied. The ground for denying an extradition request or a request for mutual legal assistance may be a mandatory or discretionary ground.

Mandatory grounds of refusal include requests that involve (a) political offenses; (b) offenses under military law; (c) double jeopardy; (d) prosecution is already barred by prescription; or (e) requests made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of that person's race, sex, religion, nationality, or political belief.

In MLATs, discretionary grounds include requests where the Requesting Party cannot comply with the conditions imposed by the Requested State relating to the confidentiality or limitations as to the use of the evidence. A request for assistance may also be refused if its implementation would prejudice an investigation or proceeding in the Requesting State, or endanger the safety of any person or impose an excessive burden on the resources of the Requested State or prejudice national interest.

Discretionary grounds for refusal of extradition include requests when the person sought to be extradited is a national of the Requested State or if the extradition would be unjust or incompatible with humanitarian considerations, taking into account the nature of the offense, the interests of the Requested State, and the age or health of the person sought. The extradition treaties with the United States and India contain a provision to the effect that extradition shall not be refused on the ground that the person sought is a citizen of the Requested State.

## **VII. INTERNAL PROCEDURE**

### **A. Transmission**

Extradition requests are generally transmitted through diplomatic channels. Requests for mutual legal assistance, on the other hand, are generally transmitted directly between the Central Authorities of the two States.

### **B. Evaluation**

In *Sec. of Justice vs. Lantion*<sup>4</sup>, the Supreme Court held that the executive authority given the task of evaluating the sufficiency of the request and the supporting documents is the Department of Foreign Affairs (DFA).

The DFA must also see to it that the accompanying request had been certified by the principal diplomatic or consular officer of the Requested State resident in the Requesting

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<sup>4</sup> 322 SCRA 160 (Jan. 18, 2000).

State. It shall also determine if the request is politically motivated, or if the offense is a military offense which is not punishable under non-military penal legislation.

Should the DFA find that the request complies with the requirements of the law and applicable treaty, the request and supporting documents are forwarded to the DOJ. The Secretary of Justice shall then designate a panel of State Counsels to handle the extradition case. The designated State Counsels shall then file a written petition with the proper regional trial court (RTC).

There are, however, instances when the person sought may waive the extradition proceedings either before or after the filing of the petition for extradition. This process is called simplified extradition. In such a case, the person will be returned to the requesting State as expeditiously as possible without further proceedings.

In case of requests for MLA, the DFA will only have the opportunity to evaluate the request if the same is made on the basis of reciprocity. For MLA requests made on the basis of a treaty, the DOJ conducts the evaluation. If the execution of the request belongs to another agency, the DOJ will transmit the request to the agency competent to execute the same. For example, if the request involves production of bank records and the offense involved is money laundering, the same will be referred to the Anti-Money Laundering Council (AMLC). Where the request for mutual legal assistance involves a corruption case, it shall be forwarded to the Office of the Ombudsman for implementation.

### **C. Extradition Hearing**

PD No. 1069 does not specifically indicate whether the extradition proceeding is criminal, civil or a special proceeding. Par. 1 of Sec. 9 thereof provides, however, that in the hearing of the extradition petition, the provisions of the Rules of Court, insofar as practicable and not inconsistent with the summary nature of the proceedings, shall apply (Section 9, Paragraph 1). Thus, the extradition court shall, immediately upon receipt of the petition for extradition and as soon as practicable, summon the accused to appear and answer the petition.

If in the court's opinion, the immediate arrest and temporary detention of the person sought will best serve the ends of justice, the extradition court may issue a warrant of arrest. It has been our practice to request the arrest of the person sought upon the filing of the petition for extradition.

Upon conclusion of the hearing, the court shall render a decision granting the extradition and giving the reasons therefore upon a showing of the existence of a prima facie case, or dismiss the petition.<sup>5</sup> Said decision is appealable to the Court of Appeals (CA), whose decision shall be final and immediately executory.<sup>6</sup> The provisions of the Rules of Court governing appeals in criminal cases in the CA shall apply in the aforementioned appeal, except for the required 15-day period to a file brief.<sup>7</sup>

The person sought to be extradited may also be provisionally arrested pending receipt of the formal request for extradition as long as it can be proven that there is urgency in the provisional arrest such as when the subject person is a flight risk.

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<sup>5</sup> Sec. 10, PD No. 1069.

<sup>6</sup> *Ibid.* at Sec. 12.

<sup>7</sup> *Ibid.* at Sec. 13.

In this case, the DOJ, upon evaluation of the request for provisional arrest, indorses the request to the INTERPOL Division of the National Bureau of Investigation, which shall then file the application for provisional arrest with the RTC. Upon receipt and evaluation of the formal request for extradition, the State Counsels assigned to the case shall thereafter file the corresponding petition for extradition before the RTC.

Application with the RTC for the implementation of MLA requests will only be filed if the request involves coercive measures such as search and seizure, freezing, confiscation or forfeiture of assets, or where the witness refuses to have his or her statement taken, etc.

#### **D. Surrender of Fugitive/Implementation of MLA Request**

After the decision of the extradition court granting the petition for extradition has become final and executory, the person sought will be placed at the disposal of the authorities of the Requesting State, at a time and place to be determined by the Secretary of Foreign Affairs, after consultation with the foreign diplomat of the Requesting State. Where the Philippines is the Requesting State, at least two (2) INTERPOL agents of the NBI will escort the fugitive back to the country. Where the Philippines is the Requested State, the extraditee is normally turned over to the authorities of the Requesting State, the US Marshalls in case the Requesting State is the US, at the NAIA. Documents or evidence produced pursuant to an MLAT request are transmitted through the fastest possible means.

### **VIII. CHALLENGES**

Extradition and mutual legal assistance, while already customarily used in international law, are fairly new concepts in our jurisdiction. Expectedly, difficulties and challenges abound in its implementation. Listed below are some of the common problems we encounter.

#### **1. No organic law on MLA/outdated law on extradition.**

While we have dutifully complied with our obligations under our MLATs, our ability to provide the widest range of assistance to non-treaty partners is considerably hampered. Without a domestic law on mutual legal assistance, we cannot grant requests for assistance that require coercive measures for its execution, i.e. executing searches and seizures or effecting service of judicial documents.

Our Extradition Law, on the other hand, was enacted thirty-five years ago before criminals intensified their trans-border criminal activities. Understandably, there are already some gaps in the law that have been legally attacked in court – rights afforded to an extraditee, admissibility of evidence presented, among others – all of which has contributed to delays in the proceeding. While we have, so far, successfully defended such issues, it has lengthened the process contrary to the summary nature of an extradition hearing.

#### **2. Lack of familiarity/awareness among law enforcers and prosecutors**

#### **3. Difficulty in gaining direct access to contact/focal points.**

#### **4. Differences on the evidentiary requirement rules.**

## **IX. MEASURES TO ADDRESS THE GAPS**

As the primary implementing agency, the DOJ has taken steps to address the difficulties in implementing or executing requests for mutual legal assistance or extradition. Among them –

1. Drafting of/amendments to domestic legislation.
2. Conducting trainings among stakeholders, i.e. law enforcers and prosecutors, to familiarize them with the use of MLATs and Extradition as a tool in investigation, evidence gathering, and case build-up.
3. Regular dialogue/meetings with Central Authorities to thresh out common issues faced and to facilitate coordination.

## **X. CONCLUSION**

“Indeed, 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 country.”<sup>8</sup>

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<sup>8</sup> *Government of the United States of America v. Purganan, supra.* p. 653.