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REPUBLIC OF THE PHILIPPINES
SUPREME COURT
MANILA

BAYAN MUNA, as represented by
Rep. Satur C. Ocampo,
Rep. Crispin B. Beltran and
Rep. Liza L. Maza,
Petitioners,

- versus -

G.R. No. _____
For: Certiorari, Mandamus and Prohibition with T.R.O.

ALBERTO ROMULO, in his capacity as Executive Secretary, and BLAS F. OPLE, in his capacity as Secretary of Foreign Affairs,
Respondents.

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PETITION

Petitioner BAYAN MUNA, as represented by Rep. Satur C. Ocampo, Rep. Crispin B. Beltran and Rep. Liza L. Maza, by counsel, respectfully states:

PREFATORY

Ultimately the gist of this Petition can be reduced to this simple question: Should we allow our country to be a State Party to the two (2)-page ***RP-US Non-Surrender Agreement***, which in domestic law would be equivalent to a contract of adhesion, and a hostage to the questionable wisdom of one man, the Secretary of Foreign Affairs, to undermine the *Rome Statute of the International Criminal Court*, legitimize immunity for the most heinous and brutal acts of genocide, crimes against humanity, war crimes and the crime of aggression, and create a two-tiered system of justice, one for

purveyors of American interests of whatever nationality and another for the rest of the world's citizens?

For a sense of context, the establishment of the International Criminal Court in year 2002 represented a profound step forward for international justice. The ICC's infrastructure is currently being developed in The Hague, as States Parties elected its first eighteen (18) judges in February 2003 who were officially sworn into duty on 11 March 2003. The ICC's prosecutor was elected in April 2003 and will commence official duties in June. In short, the ICC is poised to commence its mission of reason and justice. Significantly, after depositing the signed ICC Treaty, the Philippines now sits as an observer in the ICC.

Against this progress, the United States' long-standing opposition to the ICC has intensified since mid-2002. The US Government has engaged in a widespread campaign to undermine and marginalize the ICC to prevent it from becoming an effective instrument of justice. After "unsigning" the *Rome Statute*, the US Government threatened the future of United Nations peacekeeping operations and negotiated a Security Council resolution that provides a limited, one year exemption for citizens of non-State Parties to the *Rome Statute* – this includes US personnel – participating in UN peacekeeping missions or UN authorized operations. Following this abuse of the Security Council, the US Government launched a worldwide campaign to negotiate bilateral immunity agreements, a template for our very own ***RP-US Non-Surrender Agreement***, that would exempt American nationals advocating American interests from ICC jurisdiction.

The bilateral agreements sought by Washington would require States to send any covered national requested by the ICC back to the US instead of surrendering him to the ICC. Importantly, Washington's agreement would

remove the ICC's oversight function, which is the fundamental principle underpinning the *Rome Statute* and is critical to closing the door on impunity.

We are reminded of a statement made by this Court in one case of homicide: *"The real motive that triggered the commission of such hideous crimes appears stashed somewhere in the confused mind of accused-appellant. Indeed, it is not unlikely that fierce jealousy, as he himself hinted, may have unleashed his demonic, infernal frenzy. For, truly, intense love can evoke not only the most noble of sentiments but also even the basest of man's passions. Nonetheless, motive in the instant case is now inconsequential in view of the positive identification of accused-appellant by the prosecution witnesses who saw and clearly demonstrated how he perpetrated the gruesome transgressions of the law."*[1] Then the Court pronounced what it perceived was a judgment of reason and justice.

While this may not be a criminal case for homicide, the circumstances herein could be mistaken for one. And although this Petition deals with a subject bearing an international panorama, its theme is something which could be easily and accurately compared to a homicidal intent – perhaps even more compelling and destructive for the acts that the ***RP-US Non-Surrender Agreement*** ignore implicate wholesale murder of a race or nation such as genocide, crimes against humanity, war crimes and the crime of aggression.

In this Petition, we narrate and bewail how our Government and the US Government unleashed the best means to mangle an instrument of justice, one which had come out in a long while from the law of nations to teach humans to be humane and serve humanity. What these Governments have achieved is to exempt agents of American interests, whether Filipinos or Americans, from prosecution for the crimes of genocide, crimes against

[1] *People of the Philippines v. Rolly Pagador*, G.R. No. 140006-10, 20 April 2001.

humanity, war crimes and the crime of aggression. Deplorably, this was done by our officials upon whom public trust has been reposed, with no rhyme or reason – Respondents capriciously abandoned, waived and relinquished our only legitimate recourse through the ICC to try *"persons"* under the ***RP-US Non-Surrender Agreement***, which literally means any conduit of American interests, who may become liable for genocide, crimes against humanity, war crimes and the crime of aggression.

The impunity brought about by the ***RP-US Non-Surrender Agreement*** worsens the reality that our penal laws are bereft of provisions punishing the evil offenses of genocide, crimes against humanity, war crimes and the crime of aggression; hence internally we cannot prosecute persons responsible therefor. Assuming we have these criminal laws in place, the *Visiting Forces Agreement* which this Court affirmed as valid,[2] exempts under liberal conditions United States personnel from prosecution for offenses committed within the Philippines. The signing of the ***RP-US Non-Surrender Agreement*** even brings forth another absurdity. Under its regime, our country cannot deliver an American criminal to the ICC; but we are obliged after conditions precedent to convey thereto a Filipino national who has nothing to do with American interests. The result is that we treat Government America better than we do our own citizens. Nothing can be more unconstitutional than this.

Indeed, Respondents have cheapened Philippine sovereignty a million times by depriving Filipinos of a legitimate and reasonable means to protect themselves from appalling crimes of large-scale proportions. We may not be aware of the real motive that triggered this unfortunate action of Respondents but, like the case of homicide mentioned above, the intent *"appears stashed somewhere"* in their minds. In any event, motive is irrelevant

[2] *BAYAN v. Zamora*, G.R. No. 138570, 10 October 2000.

in the equation of the Constitution and sovereignty: *"Motive in the instant case is now inconsequential in view of the positive identification"* of Respondents by witnesses *"who saw and clearly demonstrated how"* they *"perpetrated the gruesome transgressions of the law."*

The witnesses are the concerned peoples of the world who in one voice denounce the grisly tactics of a global bully. They will tell us how real the threat to civilization has become America's efforts to secure bilateral immunity agreements, how our Government has been too willing to play the role of principal by conspiracy. We hope that these stories will find legal discourse not in our Petition but also in the resolution of the issues posed herein. This Court, we still believe, remains to be a bastion of our sovereignty and freedom.

PARTIES

Petitioner BAYAN MUNA, as represented in the instant case by Rep. Satur C. Ocampo, Rep. Crispin B. Beltran and Rep. Liza L. Maza, is a duly registered and elected party-list representative. Rep. Ocampo is the President of BAYAN MUNA and is an authorized signatory for the instant Petition under BAYAN MUNA's Constitution and By-Laws. Rep. Beltran and Rep. Maza have been likewise authorized by the National Executive Committee of BAYAN MUNA to join and sign said Petition.[3] As party-list representative, BAYAN MUNA is the instrument by constitutional mandate "to give genuine power to the people, not only by giving more law to those who have less in life, but more so by enabling them to become veritable lawmakers

[3] Article 9, Sec. 3 of the Constitution of Bayan Muna empowers the President to "represent the party and the National Executive Committee." Article 8 empowers the National Executive Committee to authorize the issuances of statements or petitions, including the signatories therein.

themselves."[4]

BAYAN MUNA's constitutional duty is to represent the marginalized and underrepresented in the ideological, power and economic structure. Hence, it behooves upon BAYAN MUNA, if it is to be effective in its constitutional role, to bring attention to and focus on issues that affect its advocacies specifically those that appear in its Constitution and General Program of Action. These include the struggle for a sovereign Philippines free from imperialist dictates, and the fight for human rights and against State impunity.[5] BAYAN MUNA may bring suits or propagate them in any forum, legislative or judicial, otherwise it becomes inutile in its mandate.

This Petition is part and parcel of the constitutional authority which Petitioner BAYAN MUNA derives from its registration and election as party-list representative. This right and obligation, and BAYAN MUNA's interest in discharging it, is one that is not too general to be shared with other groups or the whole citizenry. It pertains to BAYAN MUNA and its constituencies. Of course, we have a responsibility to close ranks whenever our marginalized and underrepresented programs are imperiled, such as when an agreement having the stature and effect of the ***RP-US Non-Surrender Agreement*** is signed by officials of our government. BAYAN MUNA therefore has a present, specific and substantial interest in the resolution of this case; its *locus standi* to initiate this Petition cannot be successfully disputed.

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[4] *Ang Bagong Bayani-OFW Labor Party v. Commission on Elections*, G.R. No. 147589, 26 June 2001.

[5] General Program No. 2 reads: "To assert national sovereignty and independence and protect the national patrimony from foreign domination and control;" No. 4 provides: "To uphold and protect the people's basic human rights and freedoms and ensure justice for all victims of human rights violations;" No. 7 exhorts: "To guarantee the right to self-determination of the Bangsa Moro, Cordillera and other indigenous peoples and ensure their participation in all matters that directly affect them; and No. 10 states: "To foster a just policy of international relations that is independent, peace-oriented and mutually beneficial to our integrity, security and prosperity as a nation." These provisions are also found in the Constitution of Bayan Muna.

In any event, this Petition presents issues of paramount importance and constitutional significance. Hence, the procedural barriers if any should be brushed aside and this Court must hear this Petition. This Court has done so in the early *Emergency Powers Cases*,[6] where it allowed ordinary citizens and taxpayers to question the constitutionality of several executive orders issued by President Elpidio Quirino although they involved only an indirect and general interest shared in common with the public. In the *Emergency Powers Cases*, the Court dismissed the objection that such ordinary citizens and taxpayers were not proper parties, and ruled that transcendental importance to the public of the issues raised therein demanded that they be settled promptly and definitely without regard for technicalities or procedure.

This principle was reiterated in many other cases such as *Gonzales v. COMELEC*,[7] *Daza v. Singson*,[8] and *Basco v. Philippine Amusement and Gaming Corporation*,[9] where this Court emphatically held –

> Considering however the importance to the public of the case at bar, and in keeping with the Court's duty, under the 1987 Constitution, to determine whether or not the other branches of the government have kept themselves within the limits of the Constitution and the laws and that they have not abused the discretion given to them, the Court has brushed aside technicalities of procedure and has taken cognizance of this petition xxxx

Again, in *Kilosbayan v. Guingona Jr.*,[10] this Court ruled that in cases of

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[6] *Philippine Constitution Association v. Gimenez*, 122 Phil. 894 [1965]; *Iloilo Palay & Corn Planters Association v. Feliciano*, 121 Phil. 258 [1965]; *Araneta v. Dinglasan*, 84 Phil. 368 [1949].
[7] 21 SCRA 774 [1967].
[8] 180 SCRA 496, 502 [1988] cited in *Kilosbayan, Inc. v. Guingona Jr.*, 232 SCRA 110 [1994].
[9] 197 SCRA 52, 60 [1991].
[10] 232 SCRA 110 [1994].

transcendental importance, the Court may relax the standing requirements and allow a suit to prosper even where there is no direct injury to the party claiming the right of judicial review, consistent with the Court's duty to formulate controlling principles, doctrines and precepts.

Petitioner BAYAN MUNA may be served summons and other court processes at the following address –

BAYAN MUNA NATIONAL HEADQUARTERS
No. 28 Magiting Street
Teacher's Village, Diliman
Quezon City 1101, Philippines

Respondents Alberto Romulo, in his capacity as Executive Secretary, and Blas F. Ople, in his capacity as Secretary of Foreign Affairs, caused the execution of the ***RP-US Non-Surrender Agreement***. In the case of Respondent Secretary Ople, he also signed with US Ambassador Francis J. Ricciardone Jr. the ***RP-US Non-Surrender Agreement*** on behalf of their respective Governments.

Respondents Alberto Romulo and Blas F. Ople may be served processes and other court orders at the following addresses –

EXECUTIVE SECRETARY ALBERTO ROMULO
Office of the Executive Secretary
Malacañang, Manila

SECRETARY BLAS F. OPLE
Office of the Secretary
Department of Foreign Affairs
Pasay City

OFFICE OF THE SOLICITOR GENERAL

No. 134 Amorsolo Street, Legaspi Village
Makati City

MATERIAL DATES AND ANNEXES

Petitioner BAYAN MUNA received on 8 September 2003 a certified true copy of the ***RP-US Non-Surrender Agreement*** through *Exchange of Notes No. BFO-028-03 dated 13 May 2003*. Hence, this Petition is filed on time or within sixty (60) days from receipt of the assailed international agreement.

Attached are the certified true copy of the ***RP-US Non-Surrender Agreement*** through *Exchange of Notes No. BFO-028-03 dated 13 May 2003* as ANNEX A; a true copy of the *Rome Statute of the International Criminal Court* as ANNEX B; and a true copy of pertinent pages of BAYAN MUNA's Constitution showing its thrust and advocacies as ANNEX C.

FACTS AND CASE

On 13 May 2003, Blas F. Ople, Secretary of Foreign Affairs, signed the ***RP-US Non-Surrender Agreement*** through *Exchange of Notes No. BFO-028-03 dated 13 May 2003* on behalf of the Philippine Government. The other contracting party was the Government of the United States represented by Ambassador Francis J. Ricciardone Jr. The execution of this international agreement was a hush-hush affair without the fanfare ordinarily associated with an undertaking of momentous significance.

Despite the utmost secrecy characterizing the ***RP-US Non-Surrender Agreement*** (which may be discerned from the marking "CONFIDENTIAL" embossed on the certified true copy of the original, ANNEX A hereof) Petitioner BAYAN MUNA was able to obtain on 8 September 2003 a true copy of the ***RP-US Non-Surrender Agreement***. The agreement reads –

x x x x

> Considering that the Parties have each expressed their intention to, where appropriate, investigate and prosecute war crimes, crimes against humanity, and genocide alleged to have been committed by their respective officials, employees, military personnel, and nationals,
>
> I have the honor to propose the following agreement:
>
> 1. For purposes of this Agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
>
> 2. Persons of one Party present in the territory of the other shall not, absent the express consent of the first Party,
>
> (a) be surrendered or transferred by any means to any international tribunal for any purpose, unless such tribunal has been established by the UN Security Council, or
>
> (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to any international tribunal, unless such tribunal has been established by the UN Security Council.
>
> 3. When the United States extradites, surrenders, or otherwise transfers a person of the Philippines to a third country, the United States will not agree to the surrender

> or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the Republic of the Philippines.
>
> 4. When the Government of the Republic of the Philippines extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of the Republic of the Philippines will not agree to the surrender or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the United States. x x x x

We surfed the web for anything similar to the ***RP-US Non-Surrender Agreement*** and every discussion on this subject. The results of our search revealed a worldwide campaign of the US Government to impose a template completely similar to the ***RP-US Non-Surrender Agreement*** upon other poor and powerless countries. The US Government's goal in this endeavor was to impose a different world order for sources of American interests so that they may have immunity from prosecution for genocide, crimes against humanity, war crimes and aggression. We also found out that enlightened civilizations unanimously rejected similar copies of the *Non-Surrender Agreement* for two reasons: (a) it fosters selfish implications favoring only the US Government; and (b) it violates the *Rome Statute of the International Criminal Court* and the generally accepted principle of international law of good faith to refrain from acts which would defeat the object and purpose of a treaty.

As reported by the *Coalition for the International Criminal Court* –

> The pursuit of bilateral immunity agreements is part of a long history of US efforts to gain immunity for its citizens from the ICC. From 1995 through 2000, the US

government supported the establishment of an ICC, yet one that could be controlled through the Security Council or provided exemption from prosecution of US officials and nationals. In 2001, the Bush Administration discontinued participation in ICC meetings and, on 6 May 2002, officially nullified the Clinton administration's signature of the *Rome Statute*. Purportedly, the Bush Administration believes that the Court could be used as a stage for political prosecutions, despite ample safeguards included in the *Rome Statute* to protect against such an event.

Contrary to assurances from high-level US officials, the US is not respecting the rights of States that have ratified or acceded to the *Rome Statute*. As it did in seeking an exemption for peacekeepers from the jurisdiction of the ICC through the Security Council, the US government is using coercive tactics to obtain immunity from the jurisdiction of the ICC for its nationals. US officials have publicly threatened economic sanctions, such as the termination of military assistance, if countries do not sign the agreement. In several instances, there have been media reports of the US providing large financial packages to countries at the time of their signature of bilateral immunity agreements.

Reports indicate that many countries from around the world, including close allies of the US government, those seeking membership in NATO, and those in the Middle East and South Asia, have been targeted for approach and face extreme pressure to sign. John Bolton, US Undersecretary for Arms Control and International Security, recently stated, "Using Article 98 of the *Rome Statute* as a basis, we are negotiating bilateral, legally-binding agreements with individual States Parties to protect our citizens from being handed over to the Court. Our negotiators have been engaged in bilateral discussions with several EU countries...(and) several countries in the Middle East and South Asia. Our ultimate goal is to conclude Article 98 agreements with every country in the world, regardless of whether they have signed or ratified the ICC, regardless of whether they intend to in the future."

As of 13 June 2003, 39 countries have reportedly signed such agreements: Afghanistan, Albania, Azerbaijan, Bahrain, Bhutan, Bolivia, Bosnia-Herzegovina, Djibouti, the Democratic Republic of Congo, the Dominican Republic, East Timor, Egypt, El

Salvador, Gabon, Gambia, Georgia, Ghana, Honduras, India, Israel, Madagascar, Maldives, the Marshall Islands, Mauritania, Micronesia, Nauru, Nepal, Palau, the Philippines, Romania, Rwanda, Sierra Leone, Sri Lanka, Tajikistan, Thailand, Tonga, Tuvalu, Uganda and Uzbekistan. National law in many of these countries requires that the agreement be ratified by parliament before becoming binding. To date, 5 countries are reported to have ratified these agreements in Parliament: Bosnia-Herzegovina, Georgia, Honduras, Sierra Leone and Uganda. Several countries, including members of the European Union, have conducted legal analyses of these agreements and concluded that the proposed agreements are contrary to international law.

A number of relevant foreign policy directives from Washington have paved the way for the US effort to gain exemption for its citizens from the ICC. On May 6, 2002, Marc Grossman, US Undersecretary of State for Political Affairs, announced that the current administration no longer considered itself bound by the US signature of the *Rome Statute* and did not intend to ratify the treaty. In May 2002, the US first threatened to destabilize UN peacekeeping operations by promising to veto the UN mission in East Timor unless its military personnel were granted immunity from the ICC; the operation was renewed without such a provision. On July 12, 2002, the US obtained a one-year renewable exemption for UN peacekeepers in the context of the Security Council debate on the UN mission in Bosnia-Herzegovina. (The agreement was made retroactively effective to July 1, 2002.) On August 2, 2002, the last day before the US Congressional summer recess, President Bush signed the American Servicemembers' Protection Act, which authorizes the withdrawal of US military assistance from certain non-NATO allies supporting the Court. The Act does, however, also include broad Presidential waivers.

US pressure on countries to support its bilateral immunity agreements intensified in mid-August 2002 when US officials, including Pierre-Richard Prosper, US Ambassador at Large for War Crimes Issues, indicated that the US relationship with NATO would change should his government fail to achieve its goal to secure broad non-surrender agreements. It has furthermore been reported that States seeking entry into NATO may be refused entry on the basis of a failure to sign a bilateral

> immunity agreement, although US officials have publicly denied this claim.[11]

The nexus between the ***RP-US Non-Surrender Agreement*** and the *Rome Statute of the International Criminal Court* is undeniable as it has never been disavowed. Hence, for a better understanding of the invalidity of the ***RP-US Non-Surrender Agreement***, we must first appreciate the concept and operation of the *Rome Statute of the International Criminal Court.*

The International Criminal Court is a permanent judicial body created by the international community of States to prosecute individuals for the gravest crimes under international law, namely Genocide, Crimes against Humanity, War Crimes and Aggression. The ICC entered into force on 1 July 2002 when seventy-five (75) States ratified the *Rome Statute* creating it. One-hundred thirty-nine (139) countries – including the Philippines – have signed the *Rome Statute*. Ninety-two (92) States have so far ratified it as of 5 September 2003.

President Joseph Estrada signed the *Rome Statute of the International Criminal Court* on 28 December 2000. The signed treaty was immediately deposited in the United Nations before the 31 December 2000 deadline stated in the *Rome Statute*. Regrettably, President Gloria Macapagal-Arroyo has not done her ministerial duty to transmit the treaty to the Senate, thus preventing the Senate from exercising its constitutional prerogative to concur or not to concur with the ratification of the treaty as provided in Sec. 21, Article VII of the Constitution.

A primer prepared for circulation among Asian countries by Atty.

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[11] See http://www.iccnow.org. The Coalition for the International Criminal Court is a global network of well over 1,000 members working together to support a permanent, fair and independent International Criminal Court. Established in 1995, the Coalition is the leading online provider of information on the ICC.

Neri Javier Colmenares provides significant information –

What is the ICC?

The International Criminal Court (ICC) is a permanent judicial body created by the international community of States to prosecute individuals for the gravest crimes under international law, namely Genocide, Crimes against Humanity, War Crimes and Aggression.

- The ICC entered into force on 1 July 2002 when 75 states ratified the *Rome Statute* establishing the ICC.
- 139 countries – including the Philippines – have signed the *Rome Statute*.
- 81 states have signed and ratified it as of 19 September 2002. Malawi was the last country to do so.[12]
- The ICC is independent from the United Nations.

The Court is composed of the following organs:

a. Presidency
b. Pre-trial Division, Trial Division and Appeals Division
c. Office of the Prosecutor
d. Registry

What are the ICC's characteristics?

- Unlike the International Court of Justice which only deals with disputes between States, the ICC has the power to investigate, prosecute and convict individuals.
- Unlike the ad hoc Tribunals for Rwanda and Yugoslavia which have limited jurisdiction and temporary, the ICC is a permanent body based in The Hague.
- Unlike domestic or national courts, the ICC exercises universal jurisdiction over criminals who commit acts considered as crimes under the *Rome Statute*.

How did the ICC come about?

[12] Georgia became the 92nd State Party to the Rome Statute when it ratified the treaty on 5 September 2003.

- Shortly after the United Nation's founding, the International Law Commission codified the Nuremberg Principles and drafted a statute for the ICC.
- On 17 July 1998, 120 States voted to approve the *Rome Statute* while 21 States abstained and 7 voted against the *Rome Statute* including the US.
- More than a hundred States, including the Philippines and the United States, signed the *Rome Statute* before the deadline of 31 December 2000.
- The *Rome Statute* entered into force on 1 July 2002, after more than 60 States ratified it.

Why is the ICC needed?

a. To help end impunity, by going after human rights violators who managed to escape prosecution.
b. To help promote peace by putting a stop to the cycle of violence through the timely arrest and prosecution of the perpetrators.
c. To serve as a deterrent to future violations of human rights and humanitarian law.
d. To help establish progressive developments in human rights and humanitarian law and legal system reform in the international arena and among member states.

What are the crimes covered by the ICC?

a. Genocide
b. Crimes against humanity
c. War crimes or violations of international humanitarian law
d. Crime of aggression

Genocide

1. Killing members of a group
2. Causing serious bodily harm or mental harm to the members of a group
3. Deliberately inflicting on a group conditions of life

calculated to bring about their physical destruction in whole or in part
4. Imposing measures intended to prevent births within a group
5. Forcibly transferring children of a group to another group

Crimes Against Humanity

1. Murder
2. Extermination
3. Enslavement
4. Forcible transfer of population or deportation
5. Imprisonment or severe deprivation of liberty
6. Torture
7. Rape or other forms of sexual violence
8. Persecution against any identifiable group
9. Enforced disappearance
10. Apartheid
11. Other inhumane acts of similar character

War Crimes or Violations of International Humanitarian Law

1. Grave breaches of the 1949 Geneva Conventions
2. Serious violations of laws and customs applicable in international armed conflict
3. In cases of an armed conflict not of an international character, any of the violations of Article 3 common to the four Geneva Conventions
4. Other serious violations of the laws and customs applicable to armed conflicts not of an international character

The Crime of Aggression

The elements of the crime of aggression were not defined in the *Rome Statute* due to the objection of the US. It will be defined by the Assembly of States Parties in the future.

What is the extent of ICC jurisdiction?

The Court has jurisdiction only with respect to crimes

committed after the entry into force of the Statute on 1 July 2002, as the Statute has no retroactive effect. Theoretically, crimes committed under the Marcos and Suharto regimes, for example, can no longer be punished under the Statute.

How is a case brought to trial?

a. A State Party may refer a complaint called a "situation" to the Prosecutor where it appears that one or more crimes within ICC jurisdiction was committed (Art. 13.a and Art. 14).
b. The UN Security Council may refer a "situation" to the Prosecutor (Art. 13.b).
c. The Prosecutor may initiate investigation *motu proprio* or on his own, on the basis of reliable information received re the commission of crimes (Art. 13.c, Art. 15).

What are the rights of the accused?

All the fundamental guarantees of the right to fair trial under international law are protected –

a. Right against self-incrimination
b. Right to counsel
c. Rights against coercion and duress and double jeopardy

The Statute does not sanction the death penalty.

What are the obligations of States Parties?

a. *Complementarity:* States have the primary responsibility of bringing those responsible for genocide, crimes against humanity and war crimes to justice. Every State has the duty to exercise criminal jurisdiction over those responsible for international crimes.
b. *Full cooperation:* States Parties agree under Article 86 to "cooperate fully with the Court in the investigation and prosecution of crimes within

ICC jurisdiction."

What are the ICC governing principles?

a. *Non-retroactivity:* Only crimes committed after 1 July 2002, when the ICC Statute entered into effect, are covered.
b. *Nullum crimen sine lege:* No person shall be criminally responsible unless the conduct in question constitutes, at the time it takes place, a crime within ICC jurisdiction.
c. *Nulla poena sine lege:* A person convicted by the ICC may be punished only in accordance with the Statute.
d. *Ne bis in idem:* The ICC adheres to the double jeopardy rule, unless otherwise provided.
e. *No to impunity defenses:* Statutes of limitation (prescription), official and state immunity do not relieve responsibility.
f. *Individual criminal responsibility:* The ICC has jurisdiction over natural persons who willfully committed, participated, contributed in the crime.
g. *Due process:* Trials must be fair and observe due process.
h. *Non-imposition of the death penalty:* The highest penalty is 30 years although it may also impose life imprisonment when justified.
i. *Exclusion of persons under eighteen.*
j. *Reparation to victims.*

What would be the impact of the ICC on human rights in Asia?

a. It will serve as a regional human rights mechanism and provide a forum for victims to seek justice and help combat impunity.
b. It will open up legal systems in various countries to accommodate international human rights and humanitarian law and standards.
c. It will serve as a deterrent to future violators of human rights and humanitarian law.
d. By combating the commission of atrocities and impunity, it will contribute in promoting peace

and justice in the region.

Why is the United States against the ICC Statute?

a. Possibility of harassment suits
b. Immunity: The US wants its peace-keeping troops to be beyond ICC jurisdiction.
c. Aggression should not be a crime under the Statute.
d. Non-States Parties should absolutely not be covered by ICC jurisdiction, despite the decision of 120 States to retain jurisdiction.

What is the ICC's present status?

a. President Joseph Estrada signed the *Rome Statute* on 28 December 2000.
b. The signed treaty was immediately deposited in the UN, before the deadline imposed by the Statute on 31 December 2000.
c. But President Arroyo has NOT transmitted the treaty to the Senate, preventing the Senate from exercising its Constitutional prerogative to concur or not to concur with the ratification of the treaty – as provided under Sec. 21, Article VII of the Constitution.

What is the impact of the ICC if the Senate concurs in its ratification?

a. The Philippines becomes part of the civilized international community sworn to put a stop to atrocities committed against humanity.
b. It is now important for the government to fulfill its treaty obligations, especially in prosecuting human rights violators.
c. It will serve as an impetus to pass laws criminalizing human rights violations.
d. Individuals, NGOs and human rights organizations have the legal standing to file a complaint with the ICC prosecutor.

What can we do to support the ICC?

a. Launch information and awareness campaigns.
b. Lobby government institutions to support the ICC and work for its effective implementation.
c. Actively engage the US and other opponents of the Statute in debate to sharpen public awareness on the real issues involved.
d. Push legislative proposals and bills on human rights to facilitate the incorporation of the ICC Statute into the domestic legal system.
e. Network with ICC advocates here and abroad to strengthen support for the ICC.

Because the ***RP-US Non Surrender Agreement*** is constitutionally and legally flawed, we seek relief before this Court under Rule 65 of the *1997 Rules of Civil Procedure* to have it set aside and nullified. We have no other recourse and forum than this Court to obtain justice. In *Ang Bagong Bayani-OFW Labor Party v. Commission on Elections*[13] this Court ruled –

> Respondents contend that the recourse of both petitioners under Rule 65 is improper because there are other plain, speedy and adequate remedies in the ordinary course of law x x x x We disagree x x x x under both the Constitution and the Rules of Court, such challenge may be brought before this Court in a verified petition for certiorari under Rule 65 x x x x In any event, this case presents an exception to the rule that certiorari shall lie only in the absence of any other plain, speedy and adequate remedy. It has been held that certiorari is available, notwithstanding the presence of other remedies, "where the issue raised is one purely of law, where public interest is involved, and in case of urgency" x x x x Moreover, this case raises transcendental constitutional issues on the party-list system, which this Court must urgently resolve, consistent with its duty to "formulate guiding and controlling constitutional principles, precepts, doctrines, or rules." Finally, procedural requirements "may be glossed over to prevent

[13] See note 4.

> a miscarriage of justice, when the issue involves the principle of social justice . . . when the decision sought to be set aside is a nullity, or when the need for relief is extremely urgent and certiorari is the only adequate and speedy remedy available."

By entering into the assailed international agreement effectively guaranteeing impunity to America for various violations of international criminal law within Philippine territory, Filipinos including members of BAYAN MUNA, particularly those in war-torn areas of the country where continuing military exercises allow American military personnel to be present therein, are exposed to the danger of victimization without recourse to the remedies afforded by the ICC Statute. Filipinos therefore stand to suffer damage and injustice which could be characterized as grave and irreparable.

The relief demanded herein consists solely in restraining the Respondents from enforcing the assailed international agreement which is void and invalid under both Philippine and international law.

The issuance of a Temporary Restraining Order is necessary to prevent the proceedings in this case from being rendered ineffectual.

ISSUES

I. WHETHER THE PRESIDENT AND THE SECRETARY OF FOREIGN AFFAIRS OF THE REPUBLIC OF THE PHILIPPINES GRAVELY ABUSED THEIR DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION FOR CONCLUDING THE ***RP-US NON-SURRENDER AGREEMENT*** BY MEANS OF *EXCHANGE OF NOTES NO. BFO-028-03 DATED 13 MAY 2003,* WHEN THE

PHILIPPINE GOVERNMENT HAS ALREADY SIGNED THE *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* ALTHOUGH THIS IS PENDING RATIFICATION BY THE PHILIPPINE SENATE.

A. Whether by entering into the ***RP-US Non-Surrender Agreement*** Respondents gravely abused their discretion when they capriciously abandoned, waived and relinquished our only legitimate recourse through the *Rome Statute of the International Criminal Court* to prosecute and try *"persons"* as defined in the ***RP-US Non-Surrender Agreement***, which means "current or former Government officials, employees (including contractors), or military personnel or nationals of the United States," or literally any conduit of American interests, who have committed crimes of genocide, crimes against humanity, war crimes and the crime of aggression, thereby abdicating Philippine Sovereignty.

B. Whether after the signing and pending ratification of the *Rome Statute of the International Criminal Court* the President and the Secretary of Foreign Affairs of the Republic of the Philippines are obliged by the principle of good faith to refrain from doing all acts which would substantially impair the value of the undertaking as signed.

C. Whether the ***RP-US Non-Surrender Agreement*** constitutes an act which defeats the object and purpose of the *Rome Statute of the International Criminal Court* and contravenes the obligation of good faith inherent in the signature of the President affixed on the *Rome Statute of the International Criminal Court*, and if so whether the ***RP-US Non-Surrender Agreement*** is void and unenforceable on this ground.

D. Whether the ***RP-US Non-Surrender Agreement*** is void and unenforceable for grave abuse of discretion amounting to lack or excess of jurisdiction in connection with its execution.

II. WHETHER THE ***RP-US NON-SURRENDER AGREEMENT*** IS VOID *AB INITIO* FOR CONTRACTING OBLIGATIONS THAT ARE EITHER IMMORAL OR OTHERWISE AT VARIANCE WITH UNIVERSALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW.

III. WHETHER THE ***RP-US NON-SURRENDER AGREEMENT*** IS VALID, BINDING AND EFFECTIVE WITHOUT THE CONCURRENCE BY AT LEAST TWO-THIRDS (2/3) OF ALL THE MEMBERS OF THE SENATE, UNDER ART. VII, SEC. 21 OF THE PHILIPPINE CONSTITUTION.

ARGUMENTS

International law is a legitimate source of legal obligations through either incorporation or transformation. Like statutes enacted by Congress, international law is binding within Philippine jurisdiction and constitutes enforceable standards for resolving justiciable controversies.

The execution of the ***RP-US Non-Surrender Agreement*** by means of *Exchange of Notes No. BFO-028-03 dated 13 May 2003* cannot be isolated from the signing of the *Rome Statute of the International Criminal Court*. This is clear from the language of the ***RP-US Non-Surrender Agreement*** which has

no other purpose but to undermine the establishment of the International Criminal Court.

Hence, the measure of validity and enforceability of the ***RP-US Non-Surrender Agreement*** depends in large part upon its effect on the integrity of the *Rome Statute*, i.e., the restriction it causes upon the jurisdiction of the International Criminal Court. The threshold issue is the impact of the signature affixed on the *Rome Statute* pending its submission for ratification to the Philippine Senate. But first, our argument that is closest to our hearts – the detrimental effects of the acts of Respondents upon Philippine sovereignty, or plainly, what the Filipinos will lose from the signing of the ***RP-US Non-Surrender Agreement***.

Respondents gravely abused their discretion when they abdicated Philippine sovereignty by bargaining away jurisdiction of the International Criminal Court over "current or former Government officials, employees (including contractors), or military personnel or nationals of the United States or the Philippines" who have committed crimes of genocide, crimes against humanity, war crimes and the crime of aggression.

Respondents seriously abdicated Philippine sovereignty when they caused the execution of the ***RP-US Non-Surrender Agreement***. In practical terms, they whimsically abandoned, waived and relinquished the Filipino peoples' only legitimate recourse through the *Rome Statute of the International Criminal Court* to prosecute and try *"persons"* as defined in the ***RP-US Non-Surrender Agreement***. As defined, exempted from the jurisdiction of the ICC under the ***RP-US Non-Surrender Agreement*** are *"current or former*

Government officials, employees (including contractors), or military personnel or nationals of the United States" – or literally any conduit of American interests regardless of race or citizenship, who have committed crimes of genocide, crimes against humanity, war crimes and the crime of aggression. *"Sovereignty"* dictates that our Government finds ways and means to penalize malevolent deeds instead of bartering away all avenues to do so.

"Sovereignty" is the *"supreme, absolute and uncontrollable power by which any independent state is governed,"* or the *"self-sufficient source of political power from which all specific political powers are derived."*[14] By losing the opportunity to try and punish the crimes covered in the *Rome Statute of the International Criminal Court*, Respondents irretrievably deserted a great portion of the Philippine's authority to govern effectively.

As things stand, our penal laws are bereft of provisions punishing the evil offenses of genocide, crimes against humanity, war crimes and the crime of aggression; hence, internally, we cannot prosecute persons responsible for such acts. And even if we have these criminal laws in place, the *Visiting Forces Agreement* which this Court affirmed as valid, exempts United States personnel under liberal conditions found in Art. V thereof on *Criminal Jurisdiction*[15] with respect to all offenses committed within the Philippines.

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[14] H.C. Black, Black's Law Dictionary 1396 (1990).

[15] It reads: Article V. Criminal Jurisdiction. – 1. Subject to the provisions of this Article: (a) Philippine authorities shall have jurisdiction over United States personnel with respect to offenses committed within the Philippines and punishable under the law of the Philippines. (b) United States military authorities shall have the right to exercise within the Philippines all criminal and disciplinary jurisdiction conferred on them by the military law of the United States over United States personnel in the Philippines. 2. (a) Philippine authorities exercise exclusive jurisdiction over United States personnel with respect to offenses, including offenses relating to the security of the Philippines, punishable under the laws of the Philippines, but not under the laws of the United States. (b) United States authorities exercise exclusive jurisdiction over United States personnel with respect to offenses, including offenses relating to the security of the United States, punishable under the laws of the United States, but not under the laws of the Philippines. (c) For the purposes of this paragraph and paragraph 3 of this Article, an offense relating to security means: (1) treason; (2) sabotage, espionage or violation of any law relating to national defense. 3. In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply: (a) Philippine authorities shall have the primary right to exercise jurisdiction over all offenses

And now, with no rhyme or reason, Respondents discarded our only legitimate recourse through the *Rome Statute of the International Criminal Court* to try *"persons,"* as understood in the ***RP-US Non-Surrender***

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committed by United States personnel, except in cases provided for in paragraphs 1(b), 2(b), and 3(b) of this Article. (b) United States military authorities shall have the primary right to exercise jurisdiction over United States personnel subject to the military law of the United States in relation to: (1) offenses solely against the property or security of the United States or offenses solely against the property or person of United States personnel; and (2) offenses arising out of any act or omission done in performance of official duty. (c) The authorities of either government may request the authorities of the other government to waive their primary right to exercise jurisdiction in a particular case. (d) Recognizing the responsibility of the United States military authorities to maintain good order and discipline among their forces, Philippine authorities will, upon request by the United States, waive their primary right to exercise jurisdiction except in cases of particular importance to the Philippines. If the Government of the Philippines determines that the case is of particular importance, it shall communicate such determination to the United States authorities within twenty (20) days after the Philippine authorities receive the United States request. (e) When the United States military commander determines that an offense charged by authorities of the Philippines against United states personnel arises out of an act or omission done in the performance of official duty, the commander will issue a certificate setting forth such determination. This certificate will be transmitted to the appropriate authorities of the Philippines and will constitute sufficient proof of performance of official duty for the purposes of paragraph 3(b)(2) of this Article. In those cases where the Government of the Philippines believes the circumstances of the case require a review of the duty certificate, United States military authorities and Philippine authorities shall consult immediately. Philippine authorities at the highest levels may also present any information bearing on its validity. United States military authorities shall take full account of the Philippine position. Where appropriate, United States military authorities will take disciplinary or other action against offenders in official duty cases, and notify the Government of the Philippines of the actions taken. (f) If the government having the primary right does not exercise jurisdiction, it shall notify the authorities of the other government as soon as possible. (g) The authorities of the Philippines and the United States shall notify each other of the disposition of all cases in which both the authorities of the Philippines and the United States have the right to exercise jurisdiction. 4. Within the scope of their legal competence, the authorities of the Philippines and United States shall assist each other in the arrest of United States personnel in the Philippines and in handling them over to authorities who are to exercise jurisdiction in accordance with the provisions of this Article. 5. United States military authorities shall promptly notify Philippine authorities of the arrest or detention of United States personnel who are subject of Philippine primary or exclusive jurisdiction. Philippine authorities shall promptly notify United States military authorities of the arrest or detention of any United States personnel. 6. The custody of any United States personnel over whom the Philippines is to exercise jurisdiction shall immediately reside with United States military authorities, if they so request, from the commission of the offense until completion of all judicial proceedings. United States military authorities shall, upon formal notification by the Philippine authorities and without delay, make such personnel available to those authorities in time for any investigative or judicial proceedings relating to the offense with which the person has been charged in extraordinary cases, the Philippine Government shall present its position to the United States Government regarding custody, which the United States Government shall take into full account. In the event Philippine judicial proceedings are not completed within one year, the United States shall be relieved of any obligations under this paragraph. The one-year period will not include the time necessary to appeal. Also, the one-year period will not include any time during which scheduled trial procedures are delayed because United States authorities, after timely notification by Philippine authorities to arrange for the presence of the accused, fail to do so. 7. Within the scope of their legal authority, United States and Philippine authorities shall assist each other in the carrying out of all necessary investigation into offenses and shall cooperate in providing for the attendance of witnesses and in the collection and production of evidence, including seizure and, in proper cases, the delivery of objects connected with an offense x x x x

Agreement, or any conduit of American interests of whatever nationality who might be liable for the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.

The American armed forces are the primary visiting military forces in Philippine territory. More likely than not, they are the foreign forces prone to commit genocide, crimes against humanity, war crimes and the crime of aggression against the Filipino people. There is no reason to make them immune from the only tribunal – the International Criminal Court – that could try them with objectivity and fairness.

What recourse is available to Filipinos when they become victims of genocide, crimes against humanity, war crimes and the crime of aggression? It is pathetic enough that Respondents would deprive the people of the reasonable, legitimate and credible way of addressing grievances; but it is most horrible that that the dispossession should be done without any explanation for doing so.

Respondents have degraded Philippine sovereignty a million times over by leaving Filipinos without any legitimate and reasonable means to protect themselves from appalling crimes of large-scale proportions. What is worse, the signing of the ***RP-US Non-Surrender Agreement*** brings forth another absurdity. Under the impunity agreement, our country cannot deliver an American criminal to the International Criminal Court; but we are obliged after conditions precedent to convey thereto a Filipino national who has nothing to do with American interests. Must we treat Government America better than we do our own citizens?

Respondents can never waive requirements of sovereignty for purely American interests. This malfeasance is actionable as grave abuse of discretion: a decision of a State functionary to neglect unlawfully the

performance of an act which the law specifically enjoins as a duty, or that is not founded on a valid and just cause, is grave abuse of discretion.[16]

In addition, the Constitution enjoins that *"the State shall pursue an independent foreign policy"* and that *"in its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination."*[17] The signing of the ***RP-US Non-Surrender Agreement*** violates this constitutional edict because of the resulting renunciation of Philippine sovereignty. The effect of this constitutional infirmity is clear: When a government agency, lower court or a quasi-judicial body violates or ignores the Constitution or the law, its action can be struck down by this Court for grave abuse of discretion. The function of all executive, judicial and quasi-judicial instrumentalities is to apply the law as they find it, not to reinvent or second-guess it.[18]

After the signing and pending ratification of the Rome Statute of the International Criminal Court, the President and the Secretary of Foreign Affairs of the Republic of the Philippines are obliged by the principle of good faith to refrain from acts intended substantially to impair the value of the undertaking as signed.

It does not follow from the constitutional provision requiring ratification of treaties and other international agreements[19] that the signed but unratified *Rome Statute* is no treaty at all or that it is of no legal significance. From both the perspectives of *"the generally accepted principles of international law,"* which are deemed incorporated as municipal law by

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[16] *Raposon v. National Labor Relations Commission*, G.R. No. 76936, 17 August 1989.
[17] Constitution, Art. II, Sec. 7.
[18] *Ang Bagong Bayani-OFW Labor* Party *v. Commission on Elections*, supra.
[19] Constitution, Art. VII, Sec. 21.

constitutional fiat,[20] and the country's obligation under the *Vienna Convention on the Law of the Treaties*, which forms part of the law of the land,[21] the *Rome Statute* has both legal and equitable implications that Respondents cannot ignore. In the context of international law, good faith is more than "good form" and clearly, the signature of the President upon the *Rome Statute* is an act of good faith and not an empty gesture.[22]

False and misleading it would be to maintain that the *Rome Statute* is not binding without ratification, or that before such process, no treaty has been concluded but a mere mutual proposal to conclude such treaty has been agreed to. Oppenheim, a leading publicist on the subject, explains that governments act on the view that a treaty, such as the *Rome Statute*, is concluded as soon as their mutual consent is clearly apparent, which takes place when their representatives are authorized to conclude a treaty by their signatures.[23] Verily, the signature on a treaty cannot be regarded as a mere formality. For in signing a treaty, a State exercises an influence upon many of its important procedural clauses, such as those relating to accession, reservations, conditions of entry into force and the like. In addition, signatory States may validly exercise the right of objecting to reservations appended by any other State wishing to become a party to the treaty.

As a rule, there is no legal compulsion to concur with the ratification of a treaty after it has been signed.[24] In practice, concurrence is given or withheld at discretion. We reserve to the Philippine Senate the decision to concur or not to concur with the *Rome Statute*.

But Respondents stand on an altogether different level. With the

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[20] Constitution, Art. II, Sec. 2.
[21] *BAYAN v. Zamora*, supra.
[22] D.P. Connell, International Law 243 (1965).
[23] L. Oppenheim, International Law 909 (Lauterpacht ed. 1967).
[24] Id. at 909.

Philippine Government having signed the *Rome Statute*, they and the rest of the Executive Department are obliged by the principle of good faith (a) to submit a treaty to the Senate's jurisdiction with a view to concurrence or rejection; (b) to refrain prior to legislative decision as to concurrence, from acts intended substantially to impair the value of the undertaking as signed; (c) to enforce a treaty which it has signed and which has received the legislative approval necessary for concurrence.[25]

These obligations of good faith emanate from the generally accepted principle of *pacta sunt servanda* in international law;[26] they are part of domestic law that the President, who is the Respondents' principal, must enforce under the *"faithful execution of the laws"* clause of the Constitution.[27] The obligations of good faith prevent the Philippine Government after signing the *Rome Statute* from subsequently conducting itself as if it had no concern with the signature or as if the signature were a mere act of authentication.[28]

The situation is the same as if a contractor, relying upon good faith, commits itself to a course of action and suffers harm from the failure of its co-contractor to ratify. Thus the injured party may have a claim founded in abuse of right. This view which owes much to French reasoning is widely known as the *doctrine of abuse of rights* and through the years has come increasingly to be acknowledged as a useful instrument in international law for the adjustment of equities between States.[29]

In the *Iloilo Claims* case,[30] an indication was given of the "provisional status" which a signature on a treaty can give the parties. It was said that if a

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[25] Id. at 910.
[26] This principle declares that agreements must be carried out in good faith; *La Chemise Lacoste v. Fernandez*, Nos. L-63796-97, 21 May 1984, 129 SCRA 373; *Agustin v. Edu*, No. L-49112, 2 February 1979, 88 SCRA 195.
[27] Constitution, Art. VII, Sec. 17.
[28] L. Oppenheim, op. cit. note 22 at 910.
[29] Ibid.
[30] *G.B. v. U.S.A.*, VI U.N. Rep. 158.

country agrees to cede territory to another, it may not, in the interval between signature and ratification, surrender the same to a third country; or if it agrees to sell commodities, it may not dispose of them elsewhere. The obligation, in short, is to do nothing to "injure the Treaty by reducing the importance of its provisions." The same expectation applies in the case of the *Rome Statute*.

The generally accepted principle of good faith is also enshrined in the *Vienna Convention on the Law of the Treaties* of which the Philippines is a signatory. As a specific duty for meticulous compliance, it is found in Art. 18 of the *Vienna Convention* which mandates –

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Since the Philippines has not clearly announced its intent not to ratify the *Rome Statute*, it is obliged, according to the *Vienna Convention*, "to refrain from acts which would defeat the object and purpose" of the treaty.

Under Art. 18 of the *Vienna Convention*, the legal effects of a signature in an international agreement are: (a) where the signature is subject to ratification, acceptance or approval, signature does not establish consent to be bound; however, signature qualifies the signatory State to proceed to ratification, acceptance or approval and creates an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty; and (b)

where the treaty is not subject to ratification, acceptance or approval, signature creates the same obligation of good faith and establishes consent to be bound.[31] It has been said that this obligation of good faith is generally accepted[32] and constitutes an international customary law.[33]

The RP-US Non-Surrender Agreement is a wanton violation of the Rome Statute of the International Criminal Court and is therefore void and unenforceable.

We respectfully submit that the ***RP-US Non-Surrender Agreement*** contravenes the generally accepted principle of good faith as well as Art. 18 of the *Vienna Convention on the Law of the Treaties* because it defeats the object and purpose of the *Rome Statute of the International Criminal Court*.

The *Rome Statute* is a multilateral treaty establishing an independent permanent International Criminal Court with jurisdiction over natural persons for the crimes of genocide, crimes against humanity, war crimes and the crime of aggression, as defined therein. It has an international legal personality and its exercise of jurisdiction runs a gamut of explicit preconditions.

In a bid to conceal the invalidity of the ***RP-US Non-Surrender Agreement***, proponents thereof justify its execution through Art. 98, Par. 2 of the *Rome Statute*. The entirety of Article 98 provides –

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[31] I. Brownlie, Principles of Public International Law 611 (1998); M. Shaw, International Law 567 (1986).
[32] Yearbook of the International Law Commission, 1966, II, pp. 202.
[33] Separate Opinion of Associate Justice Reynato Puno in *BAYAN v. Zamora*, G.R. No. 138570, 10 October 2000 citing Knaupp, Classifying International Agreements Under U.S. Law: The Beijing Platform as a Case Study, Brigham Young University Law Review, Vol. 1998 (1), p. 244, citing Carter and Trimble, International Law, p. 110 (1995).

> COOPERATION WITH RESPECT TO WAIVER OF IMMUNITY AND CONSENT TO SURRENDER. – 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a **sending** State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the **sending** State for the giving of consent for the surrender.

But many international law experts have concluded that the *Non-Surrender Agreements* being sought by the US government (of which the ***RP-US Non Surrender Agreement*** is one) are contrary to international law and the *Rome Statute*. For ease and convenience, we quote again the contents of the ***RP-US Non-Surrender Agreement*** –

> x x x x Considering that the Parties have each expressed their intention to, where appropriate, investigate and prosecute war crimes, crimes against humanity, and genocide alleged to have been committed by their respective officials, employees, military personnel, and nationals,
>
> I have the honor to propose the following agreement:
>
> 1. For purposes of this Agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
>
> 2. Persons of one Party present in the territory of the

other shall not, absent the express consent of the first Party,

a. be surrendered or transferred by any means to any international tribunal for any purpose, unless such tribunal has been established by the UN Security Council, or

b. be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to any international tribunal, unless such tribunal has been established by the UN Security Council.

3. When the United States extradites, surrenders, or otherwise transfers a person of the Philippines to a third country, the United States will not agree to the surrender or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the Republic of the Philippines.

4. When the Government of the Republic of the Philippines extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of the Republic of the Philippines will not agree to the surrender or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the United States.

The ***RP-US Non-Surrender Agreement*** subverts the *Rome Statute of the International Criminal Court* in this manner[34] –

1. The *Non-Surrender Agreements* are constituted solely for the purpose of providing individuals or groups of individuals with immunity

[34] Coalition for the International Criminal Court, "The US-proposed 'Article 98' agreements are contrary to the language and intent of Article 98 and are therefore prohibited under the Rome Statute," http://www.iccnow.org.

from the International Criminal Court. As such, these agreements are contrary to the purpose of Art. 98 (2) and do not legitimately fall within its scope.

This is clear from the language of Art. 98(2) and from its negotiating history, as recalled by key delegates to the negotiations, including the coordinator of the working group that oversaw negotiations on Art. 98. Because such agreements do not legitimately fall within the scope of Art. 98 (2) and because their effect is to prevent States Parties from meeting their obligations under the *Rome Statute*, they constitute a breach of Articles 27, 86, 87, 89 and 90 of the *Rome Statute*. They also constitute a breach of Art. 18 of the *Vienna Convention on the Law of Treaties*, which applies to States Parties and signatories alike of the *Rome Statute*.

2. The negotiating history of Art. 98, as recalled by key delegates, reflects that the delegates clearly never intended to allow for the conclusion of *Non-Surrender Agreements* such as those presently involved. Further, the delegates negotiating Art. 98 never intended to allow the conclusion of *new* agreements based on Art. 98. Rather, the delegates sought to address potential conflicts between the *Rome Statute* and *existing* international obligations or new international obligations based on existing precedent, as in the case of new *Status of Forces Agreements (SOFA)* following the expansion of NATO.[35]

3. It should be noted that the US did not even primarily drive negotiations on Art. 98. The provision was developed because a number of countries, including strong supporters of the International Criminal Court,

[35] The term "existing international obligations" is utilized twice and the term "existing fundamental obligations at international law" once in a key commentary on Art. 98, co-written by a delegate from Canada. Kimberly Prost/Angelika Schlunck, "Article 98: Cooperation with respect to waiver of immunity and consent to surrender," in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article By Article 1131, 1131 (Triffterer ed., 1999).

had concerns about the potential for conflict between the *Rome Statute* and existing fundamental obligations in international law.[36] These existing fundamental obligations which were of concern to States were primarily obligations to respect diplomatic or state immunity, as framed in the *Vienna Convention on Diplomatic Relations*.[37] Of secondary concern were obligations arising from agreements such as *Status of Forces Agreements (SOFAs)*. Some NATO States in particular expressed a desire to see the standard provisions of *SOFA* agreements and similar agreements recognized in Art. 98.

Recognition of new or renewed *SOFAs*, according to key delegates, would not contravene the *Rome Statute* or the *Vienna Convention on the Law of Treaties*, because the standard provisions of such agreements were clearly contemplated within the scope of Art. 98 and do not fundamentally change from one agreement to another. In other words, these fundamental existing obligations do not substantially change for States that choose to become parties to the *Rome Statute* and for whom such obligations must be taken into account.

4. Application of the negotiating history of the treaty is relevant where a particular interpretation of a treaty would *"[lead] to a result which is manifestly absurd or unreasonable."*[38] Clearly, agreements concluded in line with the US interpretation of Art. 98 (2) would lead to such an absurd or unreasonable result, by allowing non-States Parties to subvert the fundamental principle of the *Rome Statute* that anyone—regardless of nationality—committing genocide, crimes against humanity, or war crimes on the territory of a State Party is subject to the jurisdiction of the International Criminal Court.[39]

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[36] Id. at 1131, 1132.
[37] U.N. Doc. A/CONF.20/13 (16 Apr. 1961).
[38] Vienna Convention on the Law of Treaties, Art. 32.
[39] A key component of the object and purpose of the Statute is incorporated in Art. 27 in the fundamental principle that no one is immune from crimes under international law such as

The overall object and purpose of the *Rome Statute* is to ensure that those responsible for the worst possible crimes are brought to justice in all cases, primarily by States, but as a last resort, by the International Criminal Court. Thus, any agreement that precludes the International Criminal Court from exercising its complementary function of acting when a State is unable or unwilling to do so, defeats the object and purpose of the Statute. The *Vienna Convention on the Law of Treaties* reinforces the conclusion that the US approach to Art. 98 is unreasonable, noting that *"a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and* ***in the light of its object and purpose****."*[40]

5. In addition, the language of Art. 98 (2) clearly does not allow for the kind of agreements the US is lobbying for around the world. The US-proposed "Art. 98" or *Non-Surrender Agreements* seek to prevent any surrender to the International Criminal Court rather than seeking the return of persons to the US. In fact, the US-proposed agreements seek to amend the terms of the treaty by effectively deleting the concept of the *"sending State"* from Art. 98 (2). The term *"sending State"* is a critical element of Art. 98 (2). According to a government delegate who has consulted military experts, the term *"sending State,"* as utilized in Art. 98 (2), is a term used almost exclusively in *SOFA* agreements and *Status of Mission Agreements (SOMAs)*. This indicates that the language of Art. 98 (2) is intended to cover only *SOFAs*, *SOMAs* and similar agreements.

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genocide, crimes against humanity or war crimes. Article 27 (1) provides that the Rome Statute "shall apply equally to all persons without any distinction based on official capacity," and Article 27 (2) states that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." That jurisdiction, apart from a referral of a situation pursuant to Chapter VII of the United Nations Charter, extends under Art. 12 of the Rome Statute to crimes committed by any person over the age of 18, regardless of nationality, in the territory of a State Party or state making a special declaration and to crimes committed by a national of one of these states.

[40] Article 31(1), Vienna Convention on the Law of Treaties.

6. But, unfortunately, the concept of *"sending State"* is rendered completely irrelevant in the *Non-Surrender Agreements*. The definition of *"person/s"* used in the agreements is so broad it would include a number of categories of persons that are not covered by the types of agreements under the purview of Art. 98 (2). *SOFA* agreements, for example, restrict their coverage to *current* serving military and related civilian personnel who are sent to a country for a specific purpose. The agreements the US seeks would cover *former* government officials, employees and military personnel. In particular, it should be noted that these agreements could also include non-American defense contractors manufacturing anything for the US armed forces. In this case, governments could find themselves in the unimaginable situation of being unable to surrender their own nationals to the ICC.

In addition, any non-American nationals serving as members of the US armed forces would receive immunity under these agreements. The US armed forces have members from many different countries, so this is a wider concern than it might otherwise seem. These agreements would essentially include any such persons, regardless of their reason for being on the territory of the State concerned (government, military or personal business or holidays). No possible interpretation of the term *"sending State"* can justify such a definition. In accordance with the language of Art. 98 (2) and the intent of the delegates who negotiated the language, the individual must be someone who was sent to another country under some form of international agreement, be it a *SOFA*, a *SOMA* or an extradition treaty.

States approached to enter into these agreements will have to carefully consider the ramifications if they receive a request from the International Criminal Court for surrender involving a "person" as defined in the *Non-Surrender Agreements* in question, who has not been sent to their State pursuant to an international agreement. It is unlikely that the

International Criminal Court will be satisfied that such cases fall under Art. 98 (2).

7. The language of Art. 90 of the *Rome Statute* must be taken closely into account. Article 90 addresses competing requests for the surrender of a person. A State Party that receives competing requests from the International Criminal Court and from another State must always give priority to the Court's request, where the Court can show that the relevant case is admissible—that no State is willing or able to undertake the investigation and prosecution of that person.[41]

Even where the State issuing the competing request is a non-State Party and where the State contemplating surrender of that person has an international obligation to the non-State Party to extradite the person concerned, surrender to the non-State Party can still only happen after a series of factors are taken into consideration.[42]

This balancing of interests can only occur where there is a formal request for extradition from the non-State Party for purposes of investigation and possible prosecution for the same crimes for which the Court seeks the person's surrender. The US-backed *Non-Surrender Agreements* do not fit within the purview of Art. 90 because they do not seek return of the individual for purposes of ensuring accountability, through official extradition mechanisms, but only to ensure impunity.

8. Along these lines, it is clear from the *Non-Surrender Agreements* that the US is not concerned with undertaking the investigation or prosecution of

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[41] Rome Statute of the International Criminal Court, Arts. 90 (2), (3) and (4).
[42] These factors touch in particular upon the interests of the non-State Party (whether the crime was committed in its territory and the nationality of the victims and of the person sought) and the possibility of subsequent surrender to the Court; Rome Statute of the International Criminal Court, Art. 90 (6).

potential international crimes. In Preambular Paragraph C of these agreements, i.e., *"Considering that the Parties have each expressed their intention to, where appropriate, investigate and prosecute war crimes, crimes against humanity, and genocide alleged to have been committed by their respective officials, employees, military personnel, and nationals,"* the US suggests its intention, broadly stated, to investigate and prosecute *where appropriate* its own personnel. Plainly, the agreement itself makes no provision for return of individuals to the US for this purpose. This *"where appropriate"* language, coupled with the rest of the *Non-Surrender Agreements*, is a fundamental subversion of the *complementarity principle* of the *Rome Statute*.

Part 2 of the *Rome Statute* recognizes the primary responsibility of national jurisdictions to investigate and, where necessary, prosecute international crimes. Where those jurisdictions fail or are unable to take up their responsibilities, the *Rome Statute* provides the International Criminal Court with the necessary jurisdiction to address these crimes. The *Non-Surrender Agreements* would deny the International Criminal Court its jurisdiction.

Furthermore, it should be noted that a request from the International Criminal Court for surrender, which *Non-Surrender Agreements* with the US would demand that a State deny, can only be issued when the Court has clearly demonstrated that the case is admissible — that no State is willing or able to undertake investigation and prosecution of the crime concerned. This assessment by the Court would include an evaluation of US capacities and intentions, suggesting that fulfillment of obligations under a *Non-Surrender Agreement* would only have the effect of returning a person to a jurisdiction that has no intention of holding them accountable for their actions. States that uphold this type of agreements will contravene their obligations under Part 2 and Part 9 of the *Rome Statute* (in particular Arts. 86, 87, 89 and 90), as

well as under Art. 27 of the *Rome Statute*, which disallows any immunity from the Court and serves as a fundamental counterpoint to Art. 98.

Lastly, States that uphold such agreements could also be in contravention of their obligations under the Geneva and Genocide Conventions, which enshrine the legal principle of *aut dedere aut judicare* — the responsibility of States either to prosecute such individuals or to extradite them to a jurisdiction that will.

9. By contrast, it should be noted that the standard provisions of *SOFA* agreements and similar agreements included under Art. 98 (2) emphasize the retention by sending States of primary jurisdiction but do not deny other legitimate sources of jurisdiction. Rather, they establish sending States as the priority jurisdiction.

Often, in the case of extradition agreements and in the case of newer *SOFA* agreements, there are even provisions that allow receiving States to keep jurisdiction in cases of overriding national interest or of widespread public concern. In this regard, *SOFAs* and similar agreements fit into the framework of the *Rome Statute*, which centers on the *principle of complementarity* and the *primary responsibility of national jurisdictions* for investigations and prosecutions that they are willing and able to carry out.

It is also likely that future *SOFAs* and similar agreements, when negotiated, will be drafted so as to take into consideration the obligations of States Parties under the *Rome Statute*, to respect the complementarity regime of the International Criminal Court and to ensure that their national judicial processes do not shield any persons from accountability. The compromise in Art. 98, to address the modest conflict between these existing legal obligations and those under the *Rome Statute*, does not undermine the

Court's methods of work or its relationship with national jurisdictions.

10. With the ill-effects of the *Non-Surrender Agreements*, the US is without doubt only concerned with preventing the International Criminal Court from fulfilling its mandate. That the US should seek to aggressively undermine the Court is not a surprise. The US nullified its signature of the *Rome Statute*, to attempt to free itself legally to attack the Court.

States Parties however have explicit obligations to the Court under the *Rome Statute*, and States Parties and even signatories have an obligation under the *Vienna Convention on the Law of Treaties* not to defeat the object and purpose of the treaty. Ostensibly, the accumulation of *Non-Surrender Agreements* would have a detrimental effect on the global ratification process, as States begin to perceive the International Criminal Court as meting out justice only for some nationals and not others. The impact of this perception on its capacity to fulfill its mandate should not be disregarded.

As enumerated above, the execution of the ***RP-US Non-Surrender Agreement*** defeats the object and purpose of the *Rome Statute of the International Criminal Court*. Hence, in signing the ***RP-US Non-Surrender Agreement***, the President and the Secretary of Foreign Affairs of the Philippines violated the generally accepted principle of good faith as well as Art. 18 of the *Vienna Convention on the Law of Treaties* to refrain from acts intended substantially to impair the value of the *Rome Statute* as signed prior to legislative decision as to concurrence.

The consequence of Respondents' indiscretion is to render the ***RP-US Non-Surrender Agreement*** void and unenforceable. As Oppenheim explicates –

> Treaties, whether general or particular, lay down rules of conduct binding upon States. As such they form part of International Law. They are, in the first instance, binding upon the contracting parties, who must refrain from acts inconsistent with their treaty obligations. This implies the duty not to conclude treaties inconsistent with the obligations of former treaties. The conclusion of such treaties is an illegal act which cannot produce legal results beneficial to the law-breaker x x x x The so-called doctrine of non-recognition of treaties and situations inconsistent with previous treaties must be regarded as based on the principle as stated above x x x x It may be said that, to the extent of their inconsistency with the [treaty], all such agreements are, for all practical purposes, void and unenforceable.[43]

Under domestic law, the effect of the foregoing infirmity is clear: When a government agency, lower court or a quasi-judicial body violates or ignores the Constitution or the law, its action can be struck down by this Court on the ground of grave abuse of discretion. Indeed, the function of all executive, judicial and quasi-judicial instrumentalities is to apply the law as they find it, not to reinvent or second-guess it.[44]

Respondents gravely abused their discretion in executing the RP-US Non-Surrender Agreement; this agreement is therefore void and unenforceable.

There is no doubt in our mind that the ***RP-US Non-Surrender Agreement*** was entered into between the Philippines and the United States with intent to impair our sovereignty. The result of Respondents' actions now questioned has been to exempt capriciously and whimsically agents of American interests of whatever nationality from prosecution and trial for the crimes of genocide, crimes against humanity, war crimes and the crime of

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[43] L. Oppenheim, op. cit. note 22 at 894, 895.
[44] *Ang Bagong Bayani-OFW Labor Party v. Commission on Elections*, supra.

aggression. When these crimes are perpetrated against our people, to whom shall they turn for succor and relief?

By means of the ***RP-US Non-Surrender Agreement***, Respondents circumvent the validly signed *Rome Statute of the International Criminal Court*. This dubious objective is obvious from the standardized form or template for the *Non-Surrender Agreement* which consists of an off-the-shelf document that the Philippines shares with other poor and dispossessed countries –

> [The American Government's] insistence on placing all Americans above international law risks undermining the ICC in its earliest and most fragile years. Currently, the State Department is pushing individual countries to conclude bilateral agreements with the US, exempting all Americans (and even some non-nationals) from accountability for genocide, crimes against humanity, and war crimes. These proposed agreements, in the form requested by the US government, are illegal under the *Rome Statute* and are not required by US law.[45]

This negative assessment of the *Non-Surrender Agreement* is shared by the world at large. As observed by the *Coalition for the International Criminal Court* –

> The pursuit of bilateral immunity agreements is part of a long history of US efforts to gain immunity for its citizens from the ICC. From 1995 through 2000, the US government supported the establishment of an ICC, yet one that could be controlled through the Security Council or provided exemption from prosecution of US officials and nationals. In 2001, the Bush Administration discontinued participation in ICC meetings and, on 6 May 2002, officially nullified the Clinton administration's signature of the *Rome Statute*. Purportedly, the Bush Administration believes that the Court could be used as a

[45] US Impunity Agreements: A Summary, in http://www.wfa.org/issues/wicc/aspafinal/aspahome/.html.

stage for political prosecutions, despite ample safeguards included in the *Rome Statute* to protect against such an event.

Contrary to assurances from high-level US officials, the US is not respecting the rights of States that have ratified or acceded to the *Rome Statute*. As it did in seeking an exemption for peacekeepers from the jurisdiction of the ICC through the Security Council, the US government is using coercive tactics to obtain immunity from the jurisdiction of the ICC for its nationals. US officials have publicly threatened economic sanctions, such as the termination of military assistance, if countries do not sign the agreement. In several instances, there have been media reports of the US providing large financial packages to countries at the time of their signature of bilateral immunity agreements.

Reports indicate that many countries from around the world, including close allies of the US government, those seeking membership in NATO, and those in the Middle East and South Asia, have been targeted for approach and face extreme pressure to sign. John Bolton, US Undersecretary for Arms Control and International Security, recently stated, "Using Article 98 of the *Rome Statute* as a basis, we are negotiating bilateral, legally-binding agreements with individual States Parties to protect our citizens from being handed over to the Court. Our negotiators have been engaged in bilateral discussions with several EU countries….(and) several countries in the Middle East and South Asia. Our ultimate goal is to conclude Article 98 agreements with every country in the world, regardless of whether they have signed or ratified the ICC, regardless of whether they intend to in the future."

As of 13 June 2003, 39 countries have reportedly signed such agreements: Afghanistan, Albania, Azerbaijan, Bahrain, Bhutan, Bolivia, Bosnia-Herzegovina, Djibouti, the Democratic Republic of Congo, the Dominican Republic, East Timor, Egypt, El Salvador, Gabon, Gambia, Georgia, Ghana, Honduras, India, Israel, Madagascar, Maldives, the Marshall Islands, Mauritania, Micronesia, Nauru, Nepal, Palau, the Philippines, Romania, Rwanda, Sierra Leone, Sri Lanka, Tajikistan, Thailand, Tonga, Tuvalu, Uganda and Uzbekistan. National law in many of these countries requires that the agreement be ratified by parliament

> before becoming binding. To date, 5 countries are reported to have ratified these agreements in Parliament: Bosnia-Herzegovina, Georgia, Honduras, Sierra Leone, and Uganda. Several countries, including members of the European Union, have conducted legal analyses of these agreements and concluded that the proposed agreements are contrary to international law.
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> A number of relevant foreign policy directives from Washington have paved the way for the US effort to gain exemption for its citizens from the ICC. On May 6, 2002, Marc Grossman, US Under Secretary of State for Political Affairs, announced that the current administration no longer considered itself bound by the US signature of the *Rome Statute* and did not intend to ratify the treaty. In May 2002, the US first threatened to destabilize UN peacekeeping operations by promising to veto the UN mission in East Timor unless its military personnel were granted immunity from the ICC; the operation was renewed without such a provision. On July 12, 2002, the US obtained a one-year renewable exemption for UN peacekeepers in the context of the Security Council debate on the UN mission in Bosnia-Herzegovina. (The agreement was made retroactively effective to July 1, 2002.) On August 2, 2002, the last day before US Congressional summer recess, President Bush signed the American Servicemembers' Protection Act, which authorizes the withdrawal of US military assistance from certain non-NATO allies supporting the Court. The Act does, however, also include broad Presidential waivers.
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> US pressure on countries to support its bilateral immunity agreements intensified in mid-August 2002 when US officials, including Pierre-Richard Prosper, US Ambassador at Large for War Crimes Issues, indicated that the US relationship with NATO would change should his government fail to achieve its goal to secure broad non- surrender agreements. It has furthermore been reported that States seeking entry into NATO may be refused entry on the basis of a failure to sign a bilateral immunity agreement, although US officials have publicly denied this claim.[46]

The European Union has concluded that, "Entering into US agreements – as presently drafted – would be inconsistent with ICC States

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[46] See http://www.iccnow.org.

Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements."[47] Enlightened international response has consistently seen through the disingenuous American design. Canada, Germany, the Netherlands, France, Norway, Mexico and Switzerland have emphatically denied the US request. In April 2003, the Joint Parliamentary Assembly of the European Union and the African, Caribbean, and Pacific Group of States denounced the US agreements as contrary to the *Rome Statute*.[48]

Given the explicitly destructive effect of the ***RP-US Non-Surrender Agreement*** upon the *Rome Statute* and our sovereignty, the execution of the ***RP-US Non-Surrender Agreement*** is truly whimsical and capricious to undertake. There is unmistakable disregard of the law and arbitrary omission to weigh pertinent considerations; it is a manifest case of grave abuse of discretion.[49]

Indeed, the ***RP-US Non-Surrender Agreement*** constitutes a tortuous conduct equivalent to *interferences with contractual relations*. This cause of action, whose elements are (a) the existence of a valid contract and (b) knowledge on the part of the third person (in this case, the US Government and Respondents) of the existence of the contract and (c) interference by the third person, is without legal justification or excuse.[50] As far as the third requisite is concerned, malice in some form is generally implied from the act of interference with contractual relations.[51] The wrongful act of meddling entitles the aggrieved parties to actual, moral and exemplary damages.[52]

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[47] See note 33.
[48] US Impunity Agreements: A Summary, http://www.wfa.org/issues/wicc/aspafinal/spahome/.html.
[49] *Aratuc v. Commission on Elections*, Nos. L-49705-09, 8 February 1979.
[50] H. de Leon, Comments and Jurisprudence on Obligations and Contracts 388 (1993).
[51] Ibid.
[52] Civil Code, Art. 1314.

It is not impertinent to state that the circumstances surrounding the signing of the ***RP-US Non-Surrender Agreement*** manifest a conspiracy to evade a reasonable obligation under the *Vienna Convention on the Law of Treaties* and the *Rome Statute* as well as to disintegrate Philippine sovereignty. The deliberateness by which the US approaches each destitute country to impose its own view of its preferred world order, to compel impoverished States to enter into *Non-Surrender Agreements*, reeks of bad faith. The same is true with the acts of Respondents who acted as principals by conspiracy. The relationship between the US and the Philippines (or any other poor country for that matter) is one that involves, on one hand, the immoral use of might and power to draw on its resources and bribe countries bereft of resources; and on the other, it entails allowing oneself to be corrupted. Certainly, a decision of a State functionary that unlawfully neglects the performance of an act which the law specifically enjoins as a duty, or a determination that is not founded on a valid and just cause as in this case, is grave abuse of discretion.[53]

The RP-US Non-Surrender Agreement is void ab initio for contracting obligations that are either immoral or otherwise at variance with universally recognized principles of international law.

It is a customarily recognized rule of international law that immoral obligations cannot be the object of an international treaty.[54] Thus, an alliance for the purpose of attacking a third State without provocation is from the beginning not binding.[55] So would a treaty like the ***RP-US Non-Surrender Agreement*** that leaves criminals immune from responsibility for

[53] *Raposon v. National Labor Relations Commission*, supra.
[54] L. Oppenheim, op. cit. note 22 at 896.
[55] Ibid.

unimaginable atrocities that deeply shock the conscience of humanity. Considering further that non-compliance with the *Vienna Convention on the Law of Treaties* is in exchange for America's support, the signing of the ***RP-US Non-Surrender Agreement*** stems from an illegitimate consideration that renders this agreement void *ab initio*.

The ***RP-US Non-Surrender Agreement*** is patently immoral because it precludes our country from delivering an American criminal to the International Criminal Court but obliges us after conditions precedent to convey to the ICC a Filipino national who has nothing to do with American interests. Thus, we would treat Government America better than we do our citizens. This is patently immoral.

Furthermore, obligations at variance with universally recognized principles of international law cannot be the object of an international agreement.[56] If, for instance, a State entered into a convention with another State not to interfere in case the latter should command its vessels to commit piratical acts on the open sea, such treaty would be null and void.[57] It is also a principle of international law that it is the duty of every State to forbid its vessels to commit piracy on the high seas.[58]

There is no reason not to apply these rules as to the crimes of genocide, crimes against humanity, war crimes and the crime of aggression, as defined in the *Rome Statute*. The ***RP-US Non-Surrender Agreement*** is called an ***impunity agreement*** precisely because it effectively excludes perpetrators of such grave crimes from prosecution and punishment. By disallowing trial and judgment upon these classes of offenders, the ***RP-US Non-Surrender Agreement*** virtually encourages the perpetration of the criminal acts sought to be curbed under the *Rome Statute*.

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[56] Id. at 897.
[57] Ibid.
[58] Ibid.

The effect of the foregoing infirmity is clear: When a government agency, lower court or a quasi-judicial body violates or ignores the Constitution or the law, its action can be struck down by this Court on the ground of grave abuse of discretion. Indeed, the function of all executive, judicial and quasi-judicial instrumentalities is to apply the law as they find it, not to reinvent or second-guess it.[59]

The RP-US Non-Surrender Agreement is not valid, binding and effective without the concurrence therein by at least two-thirds (2/3) of all the Members of the Senate under Art. VII, Sec. 21 of the Constitution.

The obligations imposed in the ***RP-US Non-Surrender Agreement*** are not proper for mere executive agreements. It involves obligations that must be incorporated in a treaty that requires Senate ratification under Sec. 21, Art. VII of the Constitution. As has been said compellingly, the decisive factor in ascertaining the legal nature of an instrument, whether a treaty or an executive agreement, is not its description which varies considerably, but whether it is intended to create legal rights and obligations between the parties.[60] If the international agreement does, then it is a treaty.

By reference to this test, a "declaration" may or may not be a treaty. In some cases, the absence of an intention to undertake a legal obligation appears clearly from the statements made by governments prior to the adoption of the text of the instrument.[61] In other cases, the clauses of the instrument indicate with sufficient clarity that they are intended as

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[59] *Ang Bagong Bayani-OFW Labor Party v. Commission on Elections*, supra.
[60] Id. at 899.
[61] Ibid.

formulating general statements of principle and policy rather than legal obligations.[62] Truly, there is no good reason for questioning the character of "exchange of notes" as treaties.[63] At least one-third (1/3) of the treaties registered with the United Nations are in the form of "exchange of notes."[64]

Another criterion is whether the international agreement involves political issues or changes of national policy or partakes of permanent character. An affirmative response necessitates a treaty.[65] But an international agreement embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.[66]

As summarized by Prof. Bernas: "x x x x executive agreements covering trademarks, postal regulations, tariffs and most favored nation treatment in customs and related matters were undertaken by the executive *pursuant to an act of Congress*. For that reason there was no need for subsequent congressional ratification. Or x x x x executive agreements and other international agreements which are in the nature of original agreements of a permanent nature or which establish national policy require concurrence. Such agreements, whatever the name given to them, are in fact treaties. But executive agreements which are merely implementation of treaties or of statutes or of well-established policy or are of a transitory effectivity do not require concurrence."[67]

In the case of the ***RP-US Non-Surrender Agreement***, legal obligations

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[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] *Commissioner of Customs v. Eastern Sea Trading*, No. L-14279, 31 October 1961.
[66] Ibid.
[67] J.G. Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary 905 (2003).

are imposed upon each of the States Parties. Correspondingly, legal rights are bestowed upon them. At the same time, this international agreement involves political issues, changes of national policy and arrangements of a permanent character. It is akin to a *reverse* of an extradition *treaty* where persons as defined therein are not to be surrendered to an international body unless created by the UN Security Council. Surely, the provisions of the ***RP-US Non-Surrender Agreement*** bring forth political consequences or outcomes because authority and power, jurisdiction and immunity from laws are entailed.

The ***RP-US Non-Surrender Agreement*** cannot be validly classified as concerning only adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature. Undeniably, we are still awaiting Senate concurrence on the *Rome Statute of the International Criminal Court* yet Respondents have put in place an invalid exception thereto. Similarly, setting aside and reversing the generally accepted principle of good faith and Art. 18 of the *Vienna Convention on the Law of the Treaties* are not adjustments of detail of a temporary nature. There is no law which the ***RP-US Non-Surrender Agreement*** is implementing as nothing is certainly being fine-tuned by it; on the contrary, the agreement attempts to destroy everything that advocates of international humanitarian law have worked for.

The effect of the foregoing constitutional infirmity is clear: When a government agency, lower court or a quasi-judicial body violates or ignores the Constitution or the law, its action can be struck down by this Court on the ground of grave abuse of discretion. Indeed, the function of all executive, judicial and quasi-judicial instrumentalities is to apply the law as they find it,

not to reinvent or second-guess it.[68]

EPILOGUE

T.S. Eliot said, *"What we call the beginning is often the end and to make an end is to make a beginning; the end is where we start from."* So let us return to our premise in the Prefatory that the ***RP-US Non-Surrender Agreement*** is actually a one-sided agreement, all favorable to purveyors of US interests. In truth, this agreement brings us back to our colonial years when we were too hospitable to our colonial masters. After the costly centennial of our independence, we apparently have yet to learn about sovereignty and national dignity. Patterns do not change, only the details vary. It is up to this Court to break this cycle of beginnings and endings joined together like a long rope around our people's necks.

PRAYER

WHEREFORE, it is respectfully prayed that a temporary restraining order be issued against Respondents from implementing the ***RP-US NON-SURRENDER AGREEMENT*** by means of *EXCHANGE OF NOTES NO. BFO-028-03 DATED 13 MAY 2003* considering that its implementation during the litigation would work injustice to the Petitioner and the Filipino people and that the Respondents are doing, threatening or attempting to implement the subject agreement and, after due hearing, the same be DECLARED INVALID and UNENFORCEABLE *AB INITIO* and that Respondents ALBERTO ROMULO, in his capacity as Executive Secretary, and BLAS F. OPLE, in his capacity as Secretary of Foreign Affairs, be ENJOINED PERMANENTLY from implementing the Agreement. Other reliefs are appealed from this Court.

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[68] *Ang Bagong Bayani-OFW Labor Party v. Commission on Elections*, G.R. No. 147589, 26 June 2001.

Respectfully submitted.

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