

THE FUNDAMENTAL RIGHT OF THE MARCOS HUMAN RIGHTS VICTIMS TO COMPENSATION

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I. INTRODUCTION

The right to obtain financial compensation for a human rights abuse and to have the perpetrator of such an abuse prosecuted and punished is itself a fundamental human right that cannot be taken from a victim or waived by a government. And the obligation to compensate victims of human rights abuses remains as a continuing responsibility of an enlightened successor government that has replaced a previous oppressive regime. Although it is sometimes tempting to enact a general amnesty in order to heal a nation's wounds, promote harmony, and "let bygones be bygones," such efforts rarely achieve their goals because the wounds fester and the victims need a just resolution to their suffering. The only way to bring true healing to a divided society is to face up to the wrongs that were committed, to prosecute those who violated the fundamental human rights of others, and provide compensation to the victims.

Between 1972 and 1986, Ferdinand E. Marcos ruled the Philippines with an authoritarian regime that brutally suppressed all dissent. Thousands of individuals were tortured and killed during this difficult period. After the "People Power" EDSA Revolution in 1986, Marcos went to Hawai'i, where he lived in exile until his death in 1989. Almost immediately after he arrived in Hawai'i, he was served with a series of complaints brought by the victims of his brutality. After years of difficult and hard-fought litigation, a federal-court jury in Honolulu awarded the class of about 9,500 victims almost two billion U.S. dollars in compensatory and exemplary damages. But no moneys have yet been delivered to the victims, partly because the Philippine government itself has fought against the victims at almost every turn.

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This article is written to explain the duty of the Philippine government under international law to provide compensation for the victims. Both international treaties and customary international law (which develops from the practices of states) requires governments to investigate human rights abuses, prosecute those responsible for the abuses, and provide compensation for the victims of these abuses. This duty continues in time and applies to a new enlightened government even after it has replaced the previous draconian government.

II. THE RIGHT TO BRING A CLAIM IS A FUNDAMENTAL HUMAN RIGHT UNDER INTERNATIONAL LAW

The right to bring a claim for a violation of internationally recognized human rights is well established under international law. The Universal Declaration of Human Rights says that "Everyone has the right to *an effective remedy* by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."¹ Similarly, the International Covenant on Civil and Political Rights, which has been ratified by more than 140 countries, including the Philippines, says that "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have *an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity...."² (Emphasis supplied)

Regional human rights treaties also emphasize the right to redress for human rights violations. The European Convention on Human Rights says that "In the determination of his civil rights..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."³ The European Court of Human Rights ruled in the *Golder Case*⁴ that the right to bring a civil claim to an independent judge "ranks as one of the universally 'recognized' fundamental principles of law." More recently, in *Mentes v. Turkey*,⁵ the European Court of Human Rights ruled that Turkey violated the rights of citizens who were prevented from bringing a claim for the deliberate destruction of their houses and possession, noting that "the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure."

¹ Universal Declaration of Human Rights, art. 8, Dec. 10, 1948, U.N.G.A. Res. 217 (1948).

² International Covenant on Civil and Political Rights, art. 2(3)(a), Dec. 16, 1966, 999 U.N.T.S. 171.

³ European Convention on Human Rights, art. 6(1), Nov. 4, 1950, 312 U.N.T.S. 221.

⁴ Ser.A, no.18 at 17 (Eur. Ct. H.R., May 7, 1974).

⁵ 37 I.L.M. 858, 882 par. 89 (1998).

Similarly, the American Convention on Human Rights says that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.⁶

Decisions in the Inter-American system confirm that the right to an effective remedy is a continuing one that cannot be waived. The seminal case of the Inter-American Court of Human Rights is *The Velasquez Rodriguez Case*,⁷ which holds that the American Convention on Human Rights imposes on each state party a "legal duty to...ensure the victim adequate compensation." The court explained that each country has the duty to protect the human rights listed in the Convention and articulated this responsibility as follows:

This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must *prevent, investigate and punish* any violation of the rights recognized by the Convention....⁸ [Italics supplied.]

Other decisions that confirm this result include *Report No. 36/96, Case No. 10.843*⁹ (ruling that Chile's 1978 Amnesty Decree Law violated Article 25 of the American Convention on Human Rights because "the [human rights] victims and their families were deprived of their right to effective recourse against the violations of their rights"); *Rodriguez v. Uruguay*¹⁰ (stating that "amnesties for gross violations of human rights...are incompatible with the obligations of the State party" under the International Covenant on Civil and Political Rights and that each country has a "responsibility to provide effective remedies to the victims of those abuses" to allow the victims to gain appropriate compensation for their injuries); *Chonfau Orayce and Others v. Chile*¹¹ (stating that Chile's amnesty law violated Articles 1.1, 2, and 25 of the American Convention on Human Rights, that countries have a duty to "investigate the violations committed within its jurisdiction, identify those responsible and impose the pertinent sanctions on them, as well as ensure the adequate reparation of the consequences suffered by the victim").

⁶ American Convention on Human Rights, art. 25(1), Nov. 22, 1969, 9 I.L.M. 673 (1970).

⁷ 4 Inter-Am.Ct. H.R. (Ser.C), par. 174d (1988), *reprinted in* 28 I.L.M. 291 (1989).

⁸ *Id.*, par. 166.

⁹ Inter-American Human Rights Commission, October 15, 1996, paras. 68, 105, 112.

¹⁰ U.N.Doc. CCPR/C/51/D/322/1988, Annex (Human Rights Committee, 1994).

¹¹ Cases 11.505 et al., Inter-American Commission on Human Rights 512, OEA/ser.L/V/II.98, doc. 7 rev. (1997).

The Human Rights Committee in Geneva, established by the International Covenant on Civil and Political Rights, has also gone on record opposing amnesties:

The Committee has noted that some States have granted amnesty in respect of acts of torture. *Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.*¹²

U.S. decisions also support the conclusion that claims cannot be waived or dismissed because of some other foreign policy goals. The case of *Dames & Moore v. Regan*¹³ involved the argument of a U.S. company that its claim for damages against Iran after the 1979 Iranian revolution had been unlawfully extinguished by the 1981 Algiers Accords which freed the U.S. hostages. In response to the argument made by Dames & Moore that its claim had been "taken" in violation of the Fifth Amendment to the U.S. Constitution, Justice Rehnquist's opinion for the Court noted that claimants were not denied the right to pursue their claim, but rather were required to use an alternative forum, the Iran-U.S. Claims Tribunal in The Hague, Netherlands. The Court affirmed the requirement that Dames & Moore utilize this alternative forum, but held in abeyance the taking claim, and indicated a willingness to take another look at it should the alternative tribunal not prove effective.¹⁴

Another relevant case is *Ware v. Hylton*,¹⁵ where Justice Chase rejected the idea that a government can waive private claims without compensation to the claimants:

That Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, I have no doubt; but *the immutable principles of justice*; the public faith of the States, that confiscated and received British debts, pledged to the debtors; and the rights of the debtors violated by the treat; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty for the benefit of the public. *This principle is recognized by the Constitution*, which declares, 'that private property shall not be taken for public use without just compensation'. See Vattel. Lib. 1. c. 20. s. 244.¹⁶ [Italics supplied.]

¹² General Comment No. 20 (on Article 7), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (1994).

¹³ 453 U.S. 654 (1981).

¹⁴ Indeed, the Court's opinion noted that if plaintiffs could later establish "an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." 453 U.S. at 689-99. See also *Coplin v. United States*, 6 Ct.Cl. 115 (1984), *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985) (stating that the *Dames & Moore* opinion "noted that the abrogation of existing rights might constitute a taking").

¹⁵ 3 U.S. 199 (1796).

¹⁶ *Id.* at 245.

Justice Chase thus cited both “the immutable principles of justice” and the Fifth Amendment of the U.S. Constitution to support the conclusion that the U.S. government cannot waive claims, even as part of a peace settlement, without compensating those whose claims have been violated.¹⁷ Justice Iredell wrote in the same case that “these rights [are] fully acquired by private persons during the war, more especially if derived from the laws of war... [and] against the enemy, and in that case the individual might be entitled to compensation.”¹⁸ He added that if Congress had given up the rights of private persons in a peace treaty “as the price of peace,” the private individuals whose “rights were sacrificed” might well “have been entitled to compensation from the public” for their loss.¹⁹ In that case, the Supreme Court ruled decisively that British subjects were entitled to use the judicial system to collect the debts owed to them.

State courts in the United States have also recognized the validity of such claims. In *Christian County Court v. Rankin*,²⁰ the court granted private compensation in an action against Confederate soldiers for burning the courthouse in violation of the “laws of nations,” saying that “[f]or every wrong the common law provides an adequate remedy...on international and common law principles.”²¹

The right to pursue claims for compensation exists for wartime atrocities just as it exists for abuses that occur in peacetime.²² Human rights are not suspended during wartime; indeed it would be repugnant to hold that responsibility is sacrificed when the individual is most imperiled.²³ Article III of the 1907 Hague Regulations²⁴ recognizes the duty to compensate for injuries caused during war in the following language: “A belligerent party which violates the provisions of the said

¹⁷ See also 3 U.S. at 229 (“It is admitted, that Virginia could not confiscate private debts without a violation of the modern law of nations...”) and *id.* at 242 (“If the treaty had been silent as to debts, and the law of Virginia had not been made, I have already proved that debts would, on peace, have revived by the law of nations”).

¹⁸ *Id.* at 279.

¹⁹ *Id.*

²⁰ 63 Ky. (2 Duv.) 502 (1866).

²¹ *Id.* at 505-06.

²² See *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 2524 (1996) (allowing torture and rape victims to bring claims for brutal acts carried out “in the course of the Bosnian Civil War”); see also *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992) (allowing a claim to be brought on behalf of a person allegedly tortured and murdered “during the civil war between the Sandanistas and the contras” in Nicaragua).

²³ The Special Rapporteur for the United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities has written:

“The Special Rapporteur reiterates that in order to end impunity for gross violations of international law committed during armed conflict, the legal liability of all responsible parties, including Governments, must be acknowledged, and the victims must be provided with full redress, including legal compensation and the prosecution of the perpetrators.” *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict* at 19, par. 75 (1999).

²⁴ Laws and Customs of War on Land (Hague IV) and Annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631.

Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." The Treaty of Versailles²⁵ implemented this requirement by establishing mixed arbitration tribunals for private claimants to present their damages against Germany, even against the wishes of their own governments. These principles were codified once again in the Geneva Conventions of 1949 which forbid countries from "absolving themselves of liability" for grave breaches.²⁶

It is also settled law that a government can channel such claims, like other claims, toward an alternative forum for resolution,²⁷ or even settle the claims on behalf of the claimants by a lump-sum settlement that might not be fully satisfactory for each claimant, because a settlement always involves accepting an immediate amount in exchange for foregoing the possibility of a larger amount at a later time.²⁸ In cases where the government does channel or settle claims, however, the government's action must be fair to the claimants, and if the settlement or alternative forum is not fair, the claimants will have a claim for a taking of their property.²⁹ Justice Powell said in his concurring opinion in *Dames & Moore* that "the Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of the courts."³⁰

It is clear, therefore, that claims based on violations of law are a form of property that cannot be cavalierly waived by a nation to serve some other foreign policy goal. Claims based on torture, murder, physical abuse, racial persecution, and other violations of basic norms of human decency are particularly important, and both international and U.S. law explicitly protects those claims against government neglect, duplicity, or abuse. Treaties and amnesty agreements purporting to waive claims or exonerate human rights abusers thus have no more validity than the efforts by the Chilean government to immunize its military leaders from claims brought by

²⁵ June 28, 1919, 2 BEVANS 43.

²⁶ Geneva Convention I of 1949, art. 51, 6 U.S.T. 3114, 3148, 75 U.N.T.S. 31 (armed forces in the field); Geneva Convention II of 1949, art. 52, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85 (armed forces at sea); Geneva Convention III of 1949, art. 131, 6 U.S.T. 3316, 3420, 75 U.N.T.S. 135; Geneva Convention IV of 1949, art. 148, 6 U.S.T. 3516, 3618, 75 U.N.T.S. 267 (civilians).

²⁷ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

²⁸ See *Shanghai Power*, 4 Cl.Ct. 237 (1983), *aff'd without opinion*, 765 F.2d 159 (Fed Cir.), *cert. denied*, 474 U.S. 909 (1985).

²⁹ *Ware*, 3 U.S. at 245 (Justice Chase), 279 (Justice Iredell); *Dames & Moore*, 453 U.S. at 689-99.

³⁰ 453 U.S. at 691. See also *Gray v. United States*, 21 Ct. Cl. 340, 392-93 (1886) (ruling that an individual claim survives a settlement by the government, and that a claimant not treated fairly can bring a claim against the claimant's own government: "the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him").

the Chilean citizens who were tortured and murdered.³¹ Although claims can be postponed or transferred to a different venue for resolution, they cannot be extinguished without violating fundamental principles of international and U.S. constitutional law, as well as basic precepts of fairness.

III. THE YEARNING FOR JUSTICE AND A TRUE "RECONCILIATION" THROUGH INVESTIGATION, PROSECUTION, AND COMPENSATION

The drive to investigate human rights abuses, prosecute the perpetrators of these abuses, and provide compensation to the victims has developed a momentum like a rising tide in recent years. Although each fact situation, and each political context, is different, we now see a commitment in all regions of the world to address human rights abuses and to bring justice, compensation, and a sense of closure to the victims. In those places where amnesties have been offered – like Chile and Argentina³² – the yearning for an accounting remains and will not go away. In places where the governing regime wants to put the past behind it and focus on building a better future – like Cambodia – the people and the international community refuse to let the past be forgotten and insist on orderly investigations and prosecutions.³³

The list of current efforts to achieve justice is long, and is worldwide in geographic scope. The goal in each case is to achieve a "reconciliation" to allow the country to go forward together, without always returning to the past for a reexamination resulting from a sense of a people wronged. "Reconciliation" is a powerful word. It is not just a feel-good concept, which can be achieved by a few words of sorrow followed by some handshakes or hugs. It requires making right the wrong that occurred. It requires a full and fair acknowledgment of the wrong, followed by a real settlement, usually requiring the transfer of money and/or property, and the punishment and/or disgrace of those who committed the wrongs.³⁴

³¹ See *Regina v. Bow Street Metro, Stipendary Magistrate, Ex Parte Pinochet*, 2 All E.R. 97, 98 (U.K House of Lords 1999).

³² For a survey of the approaches countries have taken toward human rights abuses committed by authoritarian regimes after they return to democratic rule, see Jon M. Van Dyke and Gerald W. Berkley, *Redressing Human Rights Abuses*, 20 DENVER J. INT'L L. & POL'Y 243 (1992).

³³ Editorial, *Justice for the Khmer Rouge*, N.Y. TIMES, April 13, 2000 at A24.

³⁴ Examples of "reconciliations" that involve substantial financial transfers include Canada's "Statement of Reconciliation" issued January 7, 1998, establishing a \$245 million "healing fund" to provide compensation for the thousands of indigenous children who were taken from their homes and forced to attend boarding schools where they were sometimes physically sexually abused, and Canada's transfer in August 1998 of \$750 million square miles in British Columbia, just south of Alaska, to the 5,000-member Nisga'a Tribe. Anthony DePalma, *Canada Pact Gives a Tribe Self-Rule for the First Time*, N.Y. Times, Aug. 5, 1998, at A1. The basis for the "Statement of Reconciliation" can be found in Benjamin C. Hoffman, *THE SEARCH FOR HEALING, RECONCILIATION, AND THE PROMISE OF PREVENTION* (presented to the Reconciliation Process Implementation Committee in 1995, and documenting physical and sexual abuse at St. Joseph's and St. John's Training Schools for Boys), and Douglas Roche and Ben Hoffman, *THE VISION TO RECONCILE* (1993).

The strategies utilized to bring a sense of closure and reconciliation can be categorized into the following four approaches:

- (1) an apology for the wrong, which can be general or specific;
- (2) an investigation and accounting;
- (3) compensation for the victims, either through a general class approach, or through individual determinations, or both; and
- (4) prosecution of the wrongdoers.

These approaches are described below, with examples from recent history:

A. Apology

A formal apology is a crucial element of any reconciliation process. Recent examples include President Clinton's apology for the U.S. support of the military in Guatemala.³⁵ Secretary of State Madeleine Albright apologized for U.S. support for the 1953 coup that restored Shah Mohammed Riza Pahlevi to power in Iran and its backing of Iraq during the war with Iran in the 1980s.³⁶ Pope John Paul II issued a sweeping apology on March 12, 2000 for the errors of the Roman Catholic Church during the previous 2,000 years, acknowledging intolerance and injustice toward Jews, women, indigenous peoples, immigrants, and the poor.³⁷ In 1993, the United States apologized for the participation by its military and diplomats in the illegal overthrow of the Kingdom of Hawai'i in 1893.³⁸ The United States also apologized for the internment of Japanese-Americans during World War II.³⁹

B. Investigation and Accounting

Documentation of the wrongdoing serves the important purpose of recognizing the suffering and acknowledging that the wrongdoing occurred. The two most significant accountings in recent years are those that took place in Chile and South Africa, but others have occurred as well – like what happened in Guatemala quite recently.

³⁵ See *infra* text at note 45.

³⁶ Agence France-Presse, *Iranians Respond to Overture from the U.S. with Mixed Signals*, N.Y. TIMES, Mar. 19, 2000, at A13, col. 1.

³⁷ Alessandra Stanley, *Pope Asks Forgiveness for Errors of the Church Over 2,000 Years*, N.Y. TIMES, Mar. 13, 2000, at A1, col.4 (nat'l ed.).

³⁸ Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai'i, PUB. L. 103-150, 107 Stat. 1510 (1993).

³⁹ Civil Liberties Act of 1988, 50 U.S.C. sec. 1989.

Chile's situation was unique in that General Augusto Pinochet allowed elections to take place in the late 1980s, but retained firm control over the military and kept a watchful eye on the new government. The new President, Patricio Aylwin, was effectively blocked from prosecuting Pinochet and his military associates, but he wanted nonetheless to acknowledge and honor the victims, and so appointed a Commission of Truth and Reconciliation which prepared a comprehensive report documenting 2,000 human rights abuses.⁴⁰

In South Africa, a Truth and Reconciliation Commission met for two and a half years to document as many of the human rights abuses as possible and issued a report blaming both sides for abuses. Persons who came forward with truthful accounts of their participation in violent acts linked to a political objective were pardoned as part of the national healing effort, but others have been prosecuted for their role in these atrocities.⁴¹ As of the end of 1999, 6,037 individuals had applied for political amnesty, with 568 receiving pardons and 815 applications still under consideration.⁴² Of the 568 who were pardoned, 383 were members of the African National Congress, who were seeking to overthrow the apartheid government, 124 were members of the apartheid security forces, 28 were in the Zulu-based Inkatha Freedom Party, and one (Adriaan Vlok -- who had been Minister of Law and Order from 1986 to 1994 and confessed to ordering a bomb attack in 1987) was a member of the governing apartheid National Party.⁴³

In February 1999, an independent United-Nations-sponsored Historical Clarification Commission concluded an 18-month investigation and reported that the Guatemalan military -- with U.S. money and training -- committed "acts of genocide" against the indigenous Mayan community in Guatemala during the country's long civil war and were responsible for 42,000 human rights violations, including 29,000 deaths or disappearances.⁴⁴ The next month, President Clinton apologized for the U.S. participation saying that "support for military forces and

⁴⁰ See Van Dyke and Berkley, *supra* note 32, at 249-51.

⁴¹ *Truth and Reconciliation Commission of South Africa Report* (5 volumes, 1999). A challenge to the legitimacy of granting amnesties was rejected in *Azanian Peoples Organization v. The President of the Republic of South Africa*, 1996(8) BCLR 1015 (Constitutional Court of South Africa, 1996). The court justified its conclusion by explaining that the amnesty was not "a uniform act of compulsory statutory amnesia," but was appropriately linked to promoting "a constructive transition towards a democratic order" and was "available only where there is a full disclosure of all facts" and for acts committed "with a political objective." *Id.*, par. [32].

⁴² Dean E. Murphy, *Ex-Apartheid Minister Offers Lone High-Ranking Voice of Remorse*, L.A. TIMES, Dec. 17, 1999, at A2, col. 4 (nat'l ed.).

⁴³ *Id.*, col. 5.

⁴⁴ Mireya Navarro, *Guatemalan Army Waged 'Genocide,' New Report Finds*, N.Y. TIMES, Feb. 26, 1999, at A1, col. 8 (nat'l ed.).

intelligence units which engaged in violence and widespread repression was wrong, and the United States must not repeat that mistake.”⁴⁵

C. Compensation for the Victims

International law has always been clear that reparations are essential whenever damages result from violations of international law. This principle is securely rooted in the decision of the Permanent Court of International Justice in the *Chorzow Factory Case*,⁴⁶ and it was reaffirmed in 1999 by the International Tribunal for the Law of the Sea in the *M/V Saiga Case*.⁴⁷ Reparations are just as important and just as mandatory in cases of human rights abuses as in any other cases. The requirement of appropriate compensation is being recognized increasingly in a wide variety of contexts.

For instance, in 1992, after more than 2,000 human rights abuses were documented by a Chilean commission, the Chilean Legislature enacted a law providing a wide range of economic benefits for the victims and their families.⁴⁸ In Puerto Rico, Governor Pedro J. Rossello publicly apologized and offered restitution of up to \$6,000 each to thousands of “independentistas” and others who were spied on by a police intelligence unit starting in the late 1940s.⁴⁹

Canada has also provided a reparations package for the First Nation children who were taken from their families and transferred to boarding schools where they were denied access to their culture and frequently physically mistreated.⁵⁰ New Zealand established a process to address the wrongs committed by the British against the Maori people in the late 1800s, and has returned lands and transferred factories, fishing vessels, and fishing rights to the Maori groups to compensate them for their losses.⁵¹

⁴⁵ John M. Broder, *Clinton Offers His Apologies to Guatemala*, N.Y. TIMES, Mar. 11, 1999, at A1, col. 5 (nat'l ed.).

⁴⁶ *Factory at Chorzow*, Merits, Judgment No. 13, P.C.I.J., Series A, No. 17, at 47 (1928).

⁴⁷ *The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea)*, par. 170 (ITLOS July 1, 1999). The text of this opinion can be found at http://www.un.org/Depts/los/ITLOS/Saiga_cases.htm (visited Mar. 22, 2000).

⁴⁸ Law Nr. 19,123 Creating the National Corporation for Reparation and Reconciliation (Chilean National Congress 1992).

⁴⁹ Mireya Navarro, *Freed Puerto Rican Militants Revel in Life on the Outside*, N.Y. Times, Jan. 27, 2000, at A14, col. 3 (nat'l ed.).

⁵⁰ See *supra* note 34.

⁵¹ For an example of the settlement obtained by one Maori group, see *Ngai Tahu - New Zealand Maori Tribe Website*, at <http://www.ngaitahu.iwi.nz/> (last modified July 5, 2002).

In 1994, Florida Governor Lawton Chiles signed into law a bill providing for the payment of \$2.1 million in reparations to the descendants of the black victims of the Rosewood massacre, in which white lynch mobs killed six blacks and drove others from their homes to destroy a prosperous black community.⁵²

The Japanese-Americans interred in World War II have also received \$20,000 each,⁵³ and those persons of Japanese ancestry brought to camps in the United States from Latin America have received \$5,000 each.⁵⁴ The German government has funded various compensation programs to pay victims of the World War II Holocaust, and to make payments directly to the State of Israel as well.⁵⁵ More recently, lawsuits were filed in U.S. courts by the victims of slave- and forced-labor during World War II against the German banks and companies that profited from such abuses,⁵⁶ and on July 17, 2000, an agreement was reached to provide \$5 billion to the 250,000 members of this victimized class.⁵⁷

D. Prosecution of the Wrongdoers

The Trials at Nuremberg and in the Far East after World War II still stand as models for systematic and conscientious prosecutions of those who have violated the laws of war and fundamental human rights principles. But for almost half a century after those trials, no other international trials took place. Then in the early 1990s, the United Nations Security Council established tribunals to prosecute those who violated fundamental norms during the fighting in the former Yugoslavia and Rwanda.⁵⁸ These tribunals were slow in their procedures, but seem now to be proceeding steadily through their caseload. As of February 2000, the Rwandan Tribunal had delivered seven verdicts and was holding 39 people in custody in

⁵² Randall Robinson, *The Debt: What America Owes to Blacks* 225 (2000)(citing House Bill 591).

⁵³ Civil Liberties Act of 1988, 50 U.S.C. sec. 1989.

⁵⁴ Settlement Agreement, *Mochizuki v. United States*, No. 97-294C (Fed. Cl. 1997); *WWII Internees Get \$5,000 Dollars, Official Apology*, YOMIURI SHIMBUN, Jan. 11, 1999.

⁵⁵ See Karen Parker and Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L AND COMP. L. REV. 497, 528-32 (1994).

⁵⁶ See, e.g., *Bunger-Fischer v. Degussa AG*, 65 F.Supp.2d 248 (D.N.J. Sept. 13, 1999); see also *Iwanowa v. Ford Motor Company*, 57 F.Supp.2d 41 (D.N.J. 1999).

⁵⁷ See *In re Austrian and German Holocaust Litigation*, 250 F.3d 156 (2d Cir. 2001); Ron Grossman, *Germans OK Paying \$5 Billion to War Slaves; Deal Puts Pressure on U.S. Corporations*, CHICAGO TRIBUNE, Dec. 15, 1999, at A1.

⁵⁸ See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Resolution 827 U.N. S.C.O.R., 3217th Mtg., U.N. Doc. S/RES/827 (1993), and Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. S.C.O.R., 3453d mtg., U.N. Doc. S/RES/955 (1994). The Rwanda Tribunal was established by the Security Council in November 1994 in response to the more than 500,000 minority ethnic Tutsi and Hutu opposition members who were killed during three months of slaughter in 1994 led by the Hutu-dominated government. See generally LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER, and DAVID W. LEEBRON, HUMAN RIGHTS 618-30 (1999).

Arusha, Tanzania.⁵⁹ In December 1999, NATO peacekeepers in Bosnia arrested (using a sealed indictment) retired Maj. Gen. Stanslaw Galic, who had commanded the Bosnian Serb forces that besieged Sarajevo from 1992 to 1994.⁶⁰ The following month, U.S. courts cleared the way for Elizaphan Ntakirutimana to be turned over to the Rwandan tribunal for prosecution. He was a church leader accused of offering refuge to ethnic Tutsi and then turning a Hutu death squad loose on them.⁶¹ In February 2000, three high-ranking Rwandan officers were arrested in Europe on warrants issued by the Rwandan Tribunal.⁶² And in February 2002, the genocide trial of Slobodan Milosovic, former leader of Yugoslavia and its dominant republic Serbia, began in the International Tribunal for the Former Yugoslavia.⁶³

General Augusto Pinochet, the dictator of Chile from 1973 to 1989, was held under house arrest in England for 16 months, fighting his extradition to Spain to be prosecuted for the torture and murder of Chileans, but he was finally returned to Chile in February 2000 after British officials concluded that he was medically unfit to stand trial. Although this protracted episode did not lead to an international trial of Pinochet, the British House of Lords reached a significant decision during the period of house arrest, ruling that Pinochet's status as a former head-of-state did not give him an immunity from prosecution and that prosecution for his egregious "universal" crimes would be appropriate in any country. Although he apparently will now not face trial for his actions, his political power has vanished, and he has been disgraced in the eyes of the world and the people of Chile. Chile's courts are also pursuing cases against military officers who served in the Pinochet government.⁶⁴

In November 1999, Judge Baltasar Garzon, the same Spanish magistrate who has been pursuing General Pinochet, charged 98 former Argentine officers with genocide, terrorism, and torture in connection with the atrocities perpetrated by the military dictatorship that controlled Argentina from 1976 to 1983, when between 9,000 and 30,000 persons died or disappeared.⁶⁵ Previously, Judge Garzon ordered the arrest of Adolfo Scilingo, an Argentine officer who testified in the Spanish court

⁵⁹ Associated Press, *Two Rwandans Held in Europe in 1994 Deaths*, N.Y. TIMES, Feb. 16, 2000, at A6, col. 6 (nat'l ed.).

⁶⁰ Craig R. Whitney, *NATO Arrests Serb Ex-General on War Crimes Charges*, N.Y. TIMES, Dec. 21, 1999, at A10, col. 3 (nat'l ed.).

⁶¹ Barbara Crossette, *Way Clear for U.S. to Deliver Rwanda War Crimes Suspect*, N.Y. TIMES, Jan. 25, 2000, at A3, col. 3 (nat'l ed.).

⁶² Associated Press, *Two Rwandans Held in Europe in 1994 Deaths*, N.Y. TIMES, Feb. 16, 2000, at A6, col. 6 (nat'l ed.). Francois-Xavier Nzuwonemeye was arrested in Montauban, in southwest France; Innocent Sagahutu was arrested in Ringkobing, Denmark, 200 miles west of Copenhagen; and Tharcisse Muvunyi was arrested in Britain.

⁶³ Ian Fisher and Marlise Simons, *Milosevic, 'The Biggest Fish,' on Eve of War Crimes Trial*, N.Y. TIMES, Feb. 12, 2002, at A8, col. 1 (nat'l ed.).

⁶⁴ Clifford Kraus, *Pinochet Case Reviving Voices of the Tortured*, N.Y. TIMES, Jan. 3, 2000, at A1.

⁶⁵ Associated Press, *Menem Rejects Spain's Bid to Try Ex-Leaders*, L.A. TIMES, Nov. 4, 1999, at A6, col.1.

that he had thrown dissidents from planes during the Argentine "dirty war."⁶⁶ Jorge Rafael Videla, the Argentine dictator during this period, was rearrested in June 1998 for his participation in the systematic kidnapping of children, even though he had previously been pardoned (in 1990) after his life sentence (in 1985) for his role in the death squads.⁶⁷ In February 2000, Argentina's newly-inaugurated President, Fernando de la Rúa, ordered a purge from the government payroll of the some 1,500 military personnel and civilians connected with the "dirty war" from the 1976-83 period.⁶⁸

Meanwhile, Brazil is finally addressing the abuses that occurred during the military dictatorship that lasted there from 1964 to 1985. A new investigation is underway to determine what really happened on April 30, 1981, when two military personnel were killed by a bomb in the parking lot outside an arena containing 20,000 supporters of left-wing causes, to determine whether they were *agent provocateurs* trying to disrupt the event. In addition, the nomination of Joao Batista Campelo as the chief of the Federal Police was derailed recently when it was revealed that he had supervised torture in 1970.⁶⁹

In November 1999, the Leipzig appeals court upheld a manslaughter conviction against Egon Krenz, the last Communist leader of East Germany, and two other leading Politburo members, Gunther Kleiber and Gunther Schabowski, for their roles in the shootings of persons trying to escape to the West. These convictions were upheld by the European Court of Human Rights in Strasbourg.⁷⁰

South Korea also prosecuted and imprisoned two of its recent Presidents, Chun Doo Hwan and Roh Tae Woo, for acts of corruption and for human rights abuses in connection with the suppression of a riot.⁷¹

As of this writing, a number of investigations are underway that may lead to prosecutions, and decisions are being made about what type of trial would be appropriate in some of the complex recent political upheavals. The United Nations has been attempting to negotiate with Cambodia to establish a genocide tribunal that

⁶⁶ Associated Press, *Argentine Arrested in Spanish 'Dirty War' Inquiry*, N.Y. TIMES, Oct. 8, 1997, at A4, col. 3 (nat'l ed.).

⁶⁷ Los Angeles Times, *Argentina Arrests Ex-Dictator*, S.F. CHRON., June 10, 1998, at A10, col.1.

⁶⁸ Clifford Krauss, *New Argentine President Orders Purge of Remnants of 'Dirty War'*, N.Y. TIMES, Feb. 16, 2000, at A12, col. 5 (nat'l ed.).

⁶⁹ Larry Rohter, *Past Military Rule's Abuse Is Haunting Brazil Today*, N.Y. TIMES, July 11, 1999, at A11, col. 1 (nat'l ed.).

⁷⁰ BBC News, *Krenz Loses Berlin Wall Appeal*, at http://news.bbc.co.uk/1/hi/english/world/europe/newsid_1235000/1235073.stm (Mar. 22, 2001).

⁷¹ They were both released from prison by Kim Dae Jung shortly after his election as President in 1997 as a gesture of national reconciliation. *A New Kind of Leader for South Korea, and for the Rest of Asia Too*, N.Y. Times, Feb. 23, 1998, at A5, col. 3 (nat'l ed.).

would be jointly run by the United Nations and the Cambodian government. Under this approach, trials would be held for all the top Khmer Rouge leaders, who were responsible for the deaths of some 1.7 million Cambodians who were executed or died of starvation or disease during the 1975-79 regime.⁷²

The United Nations has been examining the possible indictments of military officers responsible for the systematic slaughter of civilians throughout East Timor in September 1999. Militias drove an estimated 750 of East Timor's 880,000 people from their homes, forcing many to flee across the border to West Timor.⁷³ As this paper is being prepared for publication, it appears that tribunals will be established to prosecute those responsible for these atrocities.

These many situations illustrate the complexity of these issues. No one approach works for every historical event. Just as prosecutors exercise discretion to refrain from prosecuting in certain situations, and to accept plea agreements for reduced charges in many other situations, some historical episodes seem to justify a merciful approach, with reduced penalties or simply a full description of what actually happened. In some situations, pardons appear to be justified after part of the sentence has been served to foster reconciliation. But in each situation, a full investigation and disclosure of what occurred seems essential to ensure that the culprits' deeds are known by all and to prevent them from ever exercising power again. And for a true "reconciliation," the transfer of property from those who have benefited to those who have suffered seems essential to bring the matter to a just resolution.

IV. THE MARCOS HUMAN RIGHTS ABUSES

Ferdinand E. Marcos served as President of the Republic of the Philippines from 1965 to 1972, when he declared martial law and proceeded thereafter to rule by decree, effectively suppressing all dissent. According to records kept by human rights groups in the Philippines during that period, more than 90,000 persons were arrested pursuant to presidential decree, more than 3,000 were summarily executed, more than 850 "disappeared," and more than 4,800 were tortured.⁷⁴

⁷² Associated Press, *Cambodia May Put All Khmer Rouge Leaders on Trial*, HONOLULU STAR-BULL., Nov. 4, 1999, at A10, col. 3; Cambodia News Reports, *UN Makes Last Attempt on Genocide Trial*, at <http://www.cambodia-hr.org/NewsReports/March-2000/NR16032000.htm> (Mar. 16, 2000).

⁷³ Seth Mydans, *Liberated East Timor Lacks Law, Order and Much More*, N.Y. TIMES, Feb. 16, 2000, at A8, col. 1 (nat'l ed.); see also Associated Press, *Indonesian Issues Denials on East Timor*, N.Y. TIMES, Dec. 25, 1999, at A9, col. 1.

⁷⁴ See *Hilao v. Estate of Ferdinand Marcos ("Estate III")*, 103 F.3d 767, 783 (9th Cir. 1996).

Ferdinand Marcos declared martial law on September 21, 1972⁷⁵ and proceeded to arrest (without judicial warrants) leading opposition figures as well as a wide variety of other dissidents. U.S. District Judge Manuel Real later explained that “Marcos gradually increased his own power to such an extent that there were no limits to his orders of the human rights violations suffered by plaintiffs in this action.”⁷⁶ Marcos ruled the country during that period by autocratic decree, issuing almost daily lists of individuals who were to be rounded up. Many of those detained were subject to “tactical interrogation,” the code phrase used to refer to the various torture techniques, which Judge Real listed as follows:

1. Beatings while blindfolded by punching, kicking and hitting with the butts of rifles;
2. The “telephone” where a detainee’s ears were clapped simultaneously, producing a ringing sound in the head;
3. Insertion of bullets between the fingers of a detainee and squeezing the hand;
4. The “wet submarine”, where a detainee’s head was submerged in a toilet bowl full of excrement;
5. The “water cure”, where a cloth was placed over the detainee’s mouth and nose, and water poured over it producing a drowning sensation;
6. The “dry submarine”, where a plastic bag was placed over the detainee’s head producing suffocation;
7. Use of a detainee’s hands for putting out lighted cigarettes;
8. Use of flat-irons on the soles of a detainee’s feet;
9. Forcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice;
10. Injection of a clear substance into the body a detainee believed to be truth serum;

⁷⁵ Marcos signed Proclamation No. 1081 on September 21, 1972, placing the entire Philippines under martial law, and then issued General Order No. 1 proclaiming that “he shall govern the nation and direct the operation of the entire government” and General Orders 2 and 2-A, instructing the military to arrest without judicial warrant a long list of opposition leaders including Benigno Aquino, Jr., Jose Diokno, Chino Roces, Teodoro Locsin Sr., Soc Rodrigo, and Ramon Mitra. *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F.Supp. 1460 (D.Haw. 1995); Joker P. Arroyo, *Do Pinoys Remember Martial Law?* PHIL. DAILY INQUIRER, Sept. 21, 2000, reprinted in KILOBAYAN MAGAZINE, Oct. 2000, at 20.

⁷⁶ *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F.Supp. 1460 (D.Haw. 1995).

11. Stripping, sexually molesting and raping female detainees; one male plaintiff testified he was threatened with rape;

12. Electric shock where one electrode is attached to the genitals of males or the breast of females and another electrode to some other part of the body, usually a finger, and electrical energy produced from a military field telephone is sent through the body;

13. Russian roulette; and

14. Solitary confinement while hand-cuffed or tied to a bed.⁷⁷

Ferdinand Marcos fled the Philippines in March 1986, after a series of "People Power" demonstrations filled the streets of Manila to protest a rigged election, and he went into exile in Honolulu, Hawai'i. Almost immediately thereafter, complaints were filed against him in U.S. courts under the U.S. Alien Tort Claims Act,⁷⁸ by victims of human rights abuses. Some have wondered whether it was appropriate for this litigation to be brought in a U.S. court, rather than a court in the Philippines, where the atrocities occurred and where most of the victims resided. In fact, Hawai'i was the only venue where this civil action could have been brought, because Hawai'i was where Marcos lived after 1986. Hawai'i was thus the only place where personal jurisdiction could be obtained over Marcos, and thus the only location where a civil trial would satisfy international requirements of due process and fairness.

This litigation was vigorously contested by Marcos's attorneys, and has involved almost a dozen appeals to the U.S. Court of Appeals for the Ninth Circuit based in San Francisco. It took a decade to reach a final judgment, and efforts are continuing (as of this publication) to collect the judgment for the human rights victims. The lawsuits against Marcos were initially dismissed in 1986 by the U.S. District Court based on the act of state doctrine,⁷⁹ but this ruling was overturned in

⁷⁷ *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F.Supp. 1460, 1462-63 (D.Haw. 1995).

⁷⁸ The Alien Tort Act, 28 U.S.C. sec. 1350, enacted as part of the First Judiciary Act of 1789, provides:

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

See generally *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁷⁹ The act of state doctrine is a prudential court-created doctrine used by U.S. courts to keep the judiciary out of controversial foreign policy issues. The doctrine prevents U.S. courts from questioning the legitimacy of official acts of foreign governments taken within their borders, but exceptions exist if the actions violate uncontroverted or treaty-based principles of international law. See, e.g., *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). The Ninth Circuit ruled that the doctrine should not block the claims of the human rights victims because Marcos's acts of torture and murder were not "official acts," but were instead acts undertaken for his personal benefit, to maintain his hold on power and facilitate his efforts to steal assets from the Republic of the Philippines. *In re Estate of Ferdinand Marcos Human Rights Litigation (Estate II)*, 25 F.3d 1467, 1471 (9th Cir. 1994); see generally JORDAN J. PAUST, JOAN M. FITZPATRICK, AND JON M. VAN DYKE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 707-12 (2000).

1989 by the U.S. Court of Appeals for the Ninth Circuit, confirming that U.S. courts have a duty under international law to provide a forum for the claims of human rights victims.⁸⁰ In a related case involving torture in Argentina, this appellate court has written that "[t]he crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being."⁸¹ Such activities now also clearly violate fundamental principles of international law. When the Marcos class action finally went to trial, the federal jury concluded that Ferdinand E. Marcos was personally responsible for the human rights abuses and awarded the class of 9,531 plaintiffs \$1.2 billion in exemplary damages and \$766 million in compensatory damages.⁸²

After the judgment against the Marcos Estate became final, the human rights victims sought to obtain moneys deposited by the Marcoses in Swiss Banks by bringing actions against the branches of these banks in the United States. These efforts were unsuccessful, because the U.S. Court of Appeals for the Ninth Circuit ruled that the applicable California statute did not permit collection from a branch other than where the deposit was made⁸³ and that actions of the Swiss courts freezing these accounts pending final resolution of claims by the Philippine government were official acts that implicated the act of state doctrine.⁸⁴ The Ninth Circuit also ruled that the district court's injunction blocking any transfer of Marcos funds could not be judicially enforced against the Philippine Government because of its sovereign immunity.⁸⁵

While these efforts were underway, the Swiss Federal Supreme Court ruled that deposits in Marcos accounts of about \$570 million in Swiss Banks should be transferred to the Philippines.⁸⁶ But this transfer was conditional, and the Swiss

⁸⁰ *Hilao v. Marcos*, 878 F.2d 1438 (9th Cir.1989)(table decision).

⁸¹ *Sideman de Blake v. Republic of Argentina*, 965 F.2d 699 — (9th Cir. 1992).

⁸² See *Trajan v. Marcos (In re: Estate of Ferdinand E. Marcos Litigation)*, 978 F.2d 493 (9th Cir. 1992) ("Estate I"), cert. denied, 508 U.S. 972 (1993); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1462-63 (D. Haw. 1995); *In re Estate of Ferdinand Marcos, Human Rights Litigation - Hilao v. Estate of Ferdinand Marcos ("Estate II")*, 25 F.3d 1467 (9th Cir. 1994); *Hilao v. Estate of Ferdinand Marcos ("Estate III")*, 103 F.3d 767 (9th Cir. 1996). In May 1997, the human rights victims filed a complaint in the Makati regional trial court to make the U.S. judgment enforceable in the Philippines. Mike Frialde, *Rights Victims Go After Marcos Estate*, PHIL. STAR, May 21, 1997.

⁸³ *Hilao v. Estate of Marcos*, 95 F.3d 848 (9th Cir. 1996).

⁸⁴ *Credit Suisse v. U.S. District Court for the Central District of California*, 130 F.3d 1342 (9th Cir. 1997).

⁸⁵ *In re Estate of Ferdinand Marcos Human Rights Litigation (Hilao v. Estate of Marcos)*, 94 F.3d 539 (9th Cir. 1996).

⁸⁶ *Federal Office for Police Matters v. District Attorney's Office IV for the Canton of Zurich*, 1A.87/1994/err (Swiss Federal Supreme Court, Dec. 10, 1997); see also Associated Press, *Swiss Court Approves Return of Marcos Funds*, N.Y. TIMES, June 16, 1998, at A12.

Court stated explicitly in its ruling that the Philippine Government had a responsibility to ensure that the human rights victims receive adequate compensation for their injuries, that the Philippine government had a duty to keep the Swiss Government informed about the steps it took to provide compensation to the human rights victims, and that the Swiss Government should monitor the situation to ensure that such compensation was forthcoming.⁸⁷ This ruling is particularly significant, because it was made in spite of the acknowledgment by the Swiss Court that the moneys in question had "illegal origins."⁸⁸ The Court explained that both the Philippines and Switzerland had duties under international law to "safeguard human rights" and that this duty is "incumbent upon...the courts as executors of the international law regime."⁸⁹ The Court recognized that all parties to the International Covenant of Civil and Political Rights⁹⁰ and the Torture Convention⁹¹ have a duty to ensure that victims of human rights abuse have a right to establish their right to compensation through competent judicial tribunals.⁹²

The Swiss Court also recognized that the Philippine judiciary has "shortcomings" and that it is "reputed to be ponderous and susceptible to corruption and political influence."⁹³ For this reason, the Swiss Court included as a condition of transferring the money to the Philippines the requirement that the Philippine government "regularly update" the Swiss authorities on the procedures established "to compensate the victims of human rights violations under the Marcos regime."⁹⁴ These conditions remain unfulfilled, and, as of this writing, the transferred moneys remain in an escrow account, unavailable at present to either the victims or the Philippine Government.

In order to enable the moneys to be distributed, the human rights victims, the Marcos family, and the Philippine Government entered into a settlement of this litigation in 1999 for \$150 million, to be paid from the \$570 million transferred from Switzerland to the Philippines.⁹⁵ The victims did not view the \$150 million as adequate, of course, but nonetheless accepted this amount in order to bring some payments to those who had suffered, in light of the passage of time, the age of the older victims, and the protracted litigation that lay ahead if no settlement were reached. The Sandiganbayan (Anti-Graft) Court in the Philippines blocked this

⁸⁷ *Id.*

⁸⁸ *Id.*, par. 5(b).

⁸⁹ *Id.*, par. 7(c).

⁹⁰ International Covenant on Civil and Political Rights, art. 2(3)(a), Dec. 16, 1966, 999 U.N.T.S. 171.

⁹¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

⁹² *Federal Office for Police Matters v. District Attorney's Office IV for the Canton of Zurich*, 1A.87/1994/err (Swiss Federal Supreme Court, Dec. 10, 1997), par. 7(c)(aa) and (cc).

⁹³ *Id.*, par. 7(c)(ee).

⁹⁴ *Id.*, par. 7(c)(hh).

⁹⁵ Henry Weinstein, *Ferdinand Marcos' Victims Settle Case for \$150 Million*, L.A. TIMES, Feb. 25, 1999, at A8.

settlement, however, ruling in an opinion written by Presiding Justice Francis Garchitorena that it had not been established that the \$570 million legitimately belonged to the Marcoses (rather than being "ill-gotten wealth") and that the \$150 million was too low a settlement, in light of the jury's judgment of \$1.996 billion.⁹⁶

Was the \$150 million settlement adequate in light of other settlements and in light of the difficulty of collecting human rights judgments generally? No amount of money would be adequate to compensate victims for the suffering they received, but a settlement of \$150 million would have given each victim about \$15,000, which is in the range of other human rights settlements. The Japanese-Americans who were wrongfully interred during World War II for several years received, for instance, an apology from the U.S. Congress and \$20,000. Later, on September 19, 2000, the Sandiganbayan ordered this account (which had grown to \$627 million) forfeited to the government,⁹⁷ but still later reversed itself and this money remains in an escrow account as this article is being prepared for publication.

More recently, a Merrill Lynch securities account valued at about \$35,000,000 has been identified, and the human rights victims are seeking access to those funds.⁹⁸ The money has been deposited with the U.S. District Court for the District of Hawai'i, which has initiated an interpleader action, through which all claimants can present the basis for their claims. But the Republic of the Philippines has been vigorously contesting this effort, arguing both that they have sovereign immunity from the jurisdiction of the U.S. court, and that they are an indispensable party essential to the interpleader action. U.S. District Court Judge Manuel Real granted the Philippine Government's motion to be dismissed from the interpleader, but as this article is prepared for publication, the Republic of the Philippines is

⁹⁶ Republic of the Philippines v. Marcos, Civil Case No. 0141 (Sandiganbayan, July 27, 1999). Judge Garchitorena's decision was joined by Associate Justices Catalino R. Castaneda, Jr., and Gregory S. Ong, who each wrote separate concurring opinions. See Frederico D. Pascual, *Marcoses Buying Back Respectability for \$150-M*, PHIL. STAR, Feb. 24, 2000, reprinted in KILOBAYAN MAGAZINE, Mar. 2000, at 41.

The Sandiganbayan's opinion concludes that the Swiss Federal Supreme Court's opinion does not require that the human rights victims receive compensation from the funds held in escrow, but its conclusion on this matter is clearly incorrect in its reading and understanding of the Swiss opinion. The Swiss opinion recognizes at several points the responsibility of the Philippine government "to compensate the victims of human rights violations under the Marcos regime" and the duty of the Philippine government to inform the Swiss government regarding its activities in that regard. Para. 8.

Robert Swift, lead counsel in the Hawai'i human rights lawsuit, met with the Swiss Ambassador to the Philippines in June 2001, and the Ambassador reported that the Swiss had told the Philippine government on three occasions during the previous eight months that the claims of the Marcos human rights victims had to be paid. Email letter from Robert A. Swift to the author, Oct. 22, 2001.

⁹⁷ Martin P. Marfil, *Sandigan Awards \$627-M Loot to Gov't*, PHIL. DAILY INQUIRER, Sept. 20, 2000. This decision was based on the court's conclusion that the money had far exceeded the combined salaries of Ferdinand and Imelda Marcos and that the Marcoses had made admissions that they did not have interest or ownership in the Swiss deposits. See Jovito R. Salonga, *Some Aspects of the Sandiganbayan Decision Ordering the Forfeiture of \$627-M Marcos Swiss Deposits*, KILOBAYAN MAGAZINE, Oct. 2000, at 6.

⁹⁸ *Merrill Lynch, Pierce, Fenner & Smith Incorporated v. Ardena, Inc.*, Civil No. CV00-595MLR (D. Hawai'i 2002).

pursuing an appeal to the U.S. Court of Appeals for the Ninth Circuit, arguing that the interpleader must be stopped and the ownership of the Merrill Lynch account determined by a Filipino court.⁹⁹

The position of the Philippine Government opposing the efforts of the human rights victims to collect their hard-earned judgment is hard to understand or accept, as is the decision of the Sandiganbayan regarding the settlement agreement concerning the money in escrow returned by the Swiss. After the end of the Marcos era in 1986, the Philippine Government established the Presidential Commission on Good Government (PCGG) to pursue assets plundered by the Marcoses,¹⁰⁰ but it has taken no affirmative steps whatsoever to compensate the victims of human rights abuses during the Marcos Regime, even though, as discussed above, international law has recognized the unambiguous duty of the government to do so.¹⁰¹ In the *Velasquez Rodriguez Case*, for instance, the Inter-American Court of Human Rights explained that the duty to investigate human rights abuses and compensate the victims of these abuses continues despite “changes of government” even if the “the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred.”¹⁰² It is, therefore, irrelevant whether the money from Switzerland in the escrow account is “ill-gotten wealth,” because the Philippine Government has a continuing duty to compensate the human rights victims, and this money provides as good a source for such compensation as any other.

The Philippine Government has occasionally recognized its obligation to the human rights victims, but for most of the time since 1986, it has ignored its international-law responsibilities to investigate these abuses and compensate those who have suffered. In the years right after Marcos’s exile to Hawai‘i, the Philippine government (under President Corazon Aquino) had actively supported the class action lawsuit being pursued in Hawai‘i by the human rights victims. In those early years, Philippine Minister of Justice Neptali A. Gonzales prepared a letter to the Deputy Minister of Foreign Affairs, Leticia R. Shahani, explaining that Marcos was not protected by any form of immunity: “Marcos may be held liable for acts done as President during his incumbency, when such acts, like torture, inhuman treatment of

⁹⁹ *Merrill Lynch, Pierce, Fenner & Smith Incorporated v. Aetna, Inc.*, No.02-70143 (9th Cir. 2002).

¹⁰⁰ President Corazon Aquino created the Presidential Commission on Good Government (PCGG) on February 28, 1986 by virtue of Executive Order No. 1, instructing this body to document and recover the moneys stolen by Ferdinand Marcos, his family, and his associates. See generally JOVITO R. SALONGA, PRESIDENTIAL PLUNDER: THE QUEST FOR THE MARCOS ILL-GOTTEN WEALTH (2000) (Senator Salonga was the first Chair of the PCGG).

¹⁰¹ In 1988, the Philippine Legislature enacted the Comprehensive Agrarian Reform Act of 1988, Republic Act No. 6657, sec. 63(b), which says that “[a]ll receipts from assets recovered and from sales of ill-gotten wealth recovered through the Presidential Commission on Good Government” should be deposited in the Agrarian Reform Fund to be used for agrarian reform.

¹⁰² *Velasquez Rodriguez Case* (1988), par. 184, 28 I.L.M. 291, 327-28 (1989).

detainees, etc. are clearly in violation of existing law...the government or its officials may not validly claim state immunity for acts committed against a private party in violation of existing law.”¹⁰³ Even more significantly, the Republic of the Philippines filed an *amicus curiae* brief in the U.S. Court of Appeals for the Ninth Circuit in 1987, after the class action case had been dismissed by the District Court on act of state grounds, urging the Ninth Circuit to reverse the ruling of the District Court. The Republic stated that “foreign relations with the United States will not be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts.”¹⁰⁴

When Corazon Aquino was succeeded as President by Fidel Ramos, the attitude of the Philippine Government changed, and it provided little or no support to the human rights victims during the Ramos period. Occasional efforts by Philippine legislators to assist the victims were unavailing. Some nominal support came in February 1998, when the then-Chair of the PCGG Magtanggol Gunigundo said that the money being held in escrow from the Swiss Marcos deposits would not be released or distributed until the conditions set by the Swiss court (described above) were met, including the condition that the human rights victims would receive compensation for their ordeals.¹⁰⁵

During President Estrada’s administration, occasional efforts were made and statements were issued recognizing the rights of the human rights victims to compensation. In October 1998, for instance, Executive Secretary Ronaldo Zamora explained that the human rights victims were entitled to get “first crack” at the Swiss deposits held in escrow and that the government and the Marcos family should receive their shares only after the human rights victims received “their due.”¹⁰⁶ President Estrada himself denounced the Sandiganbayan’s July 1999 decision blocking the \$150 million settlement as “too technical,” adding that because of this decision “[a]ll the human rights victims will be dead before they see the money.”¹⁰⁷ The PCGG added that it continued to support the \$150 million settlement, and suggested amending the Comprehensive Agrarian Reform Program Law to allow the human rights victims to have access to the Swiss funds held in escrow.¹⁰⁸

¹⁰³ *Estate II*, 25 F.3d at 79.

¹⁰⁴ *Id.*

¹⁰⁵ *Gunigundo Assures Martial-Law Victims*, TODAY, Feb. 4, 1998, reprinted in KILOBAYAN MAGAZINE, Feb. 1998, at 16.

¹⁰⁶ Juliet Labog-Javellana and Christine Herrera, *Gov’t-Marcoses Money Talk Begins Next Week*, PHIL. DAILY INQUIRER, Oct. 9, 1998.

¹⁰⁷ Christine Herrera, *I Won’t Betray Cory/Rights Victims – Erap*, PHIL. DAILY INQUIRER, Feb. 15, 2000, reprinted in KILOBAYAN MAGAZINE, Mar. 2000, at 26.

¹⁰⁸ Press Release of the PCGG, April 17, 2000.

On October 19, 2001, the PCGG, under the leadership of its new chairperson, Haydee B. Yorac, delivered a draft bill to Loretta Ann Rosales, Chairperson of the House of Representatives Committee on Civil, Political and Human Rights that would authorize the PCGG and the Commission on Human Rights authority to implement a compensation program for the Marcos human rights victims, conclusively recognize the victims identified in the Hawai'i litigation as eligible for compensation, authorize the PCGG to enter into a settlement agreement with representative plaintiffs of the Hawai'i class of victims, and set aside \$200 million of the escrow account from the Swiss Marcos accounts for the human rights victims.¹⁰⁹ This draft bill is significant because it contains language explicitly recognizing the duty of the Philippine government to compensate the Marcos human rights victims: "The State hereby acknowledges its moral and legal obligation to compensate said victims and/or their families for the deaths and injuries they suffered under the Marcos regime."¹¹⁰ The draft bill recognizes that this obligation is based on the Universal Declaration of Human Rights,¹¹¹ and the December 10, 1997 decision of the Swiss Federal Court returning the Marcos deposits¹¹² "which decision recommends that the Philippines take steps to compensate the victims of human rights violations under the Marcos regime."¹¹³

This draft bill thus has some positive features, but it has not been clear whether the current Philippine Government is truly serious about trying to bring this sad chapter in Philippine history to an appropriate closure that would recognize the legitimacy of the Hawai'i judgment and the rights of the class of victims who brought that claim. This proposed bill may have been drafted solely as a device to obtain the Swiss Bank escrow funds at a time when the Philippine Government thought it would be able to obtain a summary judgment verdict from the Sandiganbayan regarding these funds. In order to satisfy the Swiss Federal Court, the Philippine Government needs a decision in its favor on the escrow funds and it needs to utilize some program that will provide compensation to the Marcos human rights victims. But it is not clear under the draft bill that the Philippine Government has any actual intention of ever distributing the money to them. It is possible that

¹⁰⁹ An Act Providing for Compensation to the Victims of Human Rights Violations During the Regime of Former President Ferdinand Marcos, Documentation of Said Violations, Appropriating Funds Therefore, and for Other Purposes, transmitted by PCGG Chairperson Haydee B. Yorac to Hon. Loretta Ann Rosales, Chairperson, Committee on Civil, Political, and Human Rights, House of Representatives, Philippines, Oct. 19, 2001.

¹¹⁰ *Id.*, sec. 2, par. 2. The proposed bill's "Explanatory Note" explains that the bill "acknowledges that compensation for victims of human rights is an obligation of the State. After all, it is the State that guarantees the civil and political rights of its citizens."

¹¹¹ Universal Declaration of Human Rights, art. 8, Dec. 10, 1948, U.N.G.A. Res. 217 (1948), quoted in the text *supra* at note 1.

¹¹² The Swiss decision is discussed in the text *supra* at notes 71, 76-77, 80, 82-83 and 85.

¹¹³ PCGG Draft Bill, *supra* note 109, sec. 2, par. 2. This proposed bill would also require the documentation of all the human rights abuses during the Marcos period.

the Government would encourage someone to try to challenge the constitutionality of the bill under the Sandiganbayan's 1999 decision.¹¹⁴

The primary reason to be suspicious of the motives of the current Philippine Government is its continued willingness to spend vast amounts of money in legal fees to U.S. lawyers to fight the efforts of the human rights victims to obtain the \$35 million in the Merrill Lynch account described above.¹¹⁵ Two other reasons for being distrustful about this draft bill and the Government's motives are that the implementing mechanism that would be established under this bill remains unclear and that the funding (\$200 million) is altogether inadequate to provide appropriate compensation for the large number of victims who would be included within its coverage.¹¹⁶ The victims are also worried that if the payments were to be distributed by an agency of the Philippine government, the program might be subject to constant challenge in the Philippine courts and also subject to possible political pressure and corruption, and therefore that many or most of the victims would never actually receive any compensation. Distribution under the supervision by the U.S. federal court in Hawai'i, utilizing the carefully-assembled and well-documented list of class members who were victims or are heirs of those tortured, murdered, or "disappeared," would appear to be a much better approach to bring closure to this process at this late date.

Although the language in this draft bill accepting responsibility, recognizing the legitimacy of the Hawai'i judgment, and acknowledging the rights of the members of the Hawai'i class to compensation is an important positive step forward, the bill would need substantial reworking, and a substantial increase in funding to establish a system that would bring appropriate closure to the atrocities perpetuated during the Marcos martial law period. It is particularly confusing to understand why the current Philippine Government opposes the efforts of the human rights victims to obtain the \$35 million Merrill Lynch account now subject to an interpleader action in Hawai'i¹¹⁷ even while it acknowledges its duty to assist these victims in their quest for justice and appropriate compensation.

As explained in the earlier sections of this article, the current Philippine Government has a duty under international law to provide compensation for the

¹¹⁴ *Republic of the Philippines v. Marcos*, Civil Case No. 0141 (Sandiganbayan, July 27, 1999).

¹¹⁵ Robert Swift, lead attorney for the human rights victims, explained to President Arroyo in July 2001 that the \$35 million in the Merrill Lynch account would be distributed to the human rights victims.

¹¹⁶ The bill would access \$200 million from the Swiss Marcos deposits, but this figure would not be sufficient to provide an adequate settlement, because the bill would recognize a much larger class of victims than those included in the Hawai'i litigation. The Hawai'i class contained only the victims of torture, murder, and disappearances. The proposed PCGG bill would also include persons who had been arrested and detained (another 80-90,000 individuals), those forced into exile, and those who had their property and businesses confiscated. PCGG Draft Bill, *supra* note 109, sec. 3(a).

¹¹⁷ The dispute over the Merrill Lynch account is discussed in the text *supra* at notes 98, 99.

victims of human rights during the Marcos Regime, and it is in violation of these duties by its failure to provide a process to facilitate such compensation. The obvious and most appropriate mechanism is to utilize the judgment reached by the U.S. District Court for Hawai'i, which reached its result after years of careful and hotly-contested litigation, complete with full and fair appeals. It is bizarre and altogether inappropriate for the Philippine Government to oppose the efforts of the human rights victims to obtain compensation for their sufferings.

V. CONCLUSION

How can a society build a future if it is still poisoned by the past? If someone has killed your spouse or your child, is it possible to forgive and forget, or is the innate need for justice — including punishment, compensation, and a final accounting — too strong to set aside?

Some argue that countries returning to democracy after a period of authoritarian rule should forego investigations and prosecutions of human rights abusers in order to promote the healing and nation-building process. They argue that protracted trials will exacerbate the wounds that have divided the country, and that the transition to democracy can be promoted by encouraging the members of the previous regime to participate in the new government. They also argue that if the fear of legal retribution is removed, the authoritarian leaders will be more willing to relinquish power and permit the new democracy to function.

These arguments frequently have a short-term appeal, but in the long run it will always be better to conduct full investigations, prosecute the abusers, and enable the victims to receive appropriate compensation. In any orderly civilized society, prosecution of criminals is an essential responsibility, and disclosure of historical events is an important responsibility of any government. Each victim has a right to know what happened and a right to compensation for their injuries and suffering. The orderly administration of justice "dissipates the call for revenge."¹¹⁸ Even though prosecutions may be disruptive in the short run, they are necessary to serve to deter future human rights abuses. Although pardons and plea agreements may be appropriate in some situations, it is never legitimate to ignore atrocities.

If the national courts of the country where the abuses occurred are functioning properly and can conduct the prosecutions and determine the claims for compensation, these national courts should be given the responsibility to do so. But in some situations, because the judiciary is not independent or because the country is still in turmoil, its courts cannot be expected to provide a fair forum for the accused

¹¹⁸ Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV 1, [3-6] (1998).

and the victims. In those situations, an international tribunal can play an important role to ensure accountability and orderly prosecutions, or the impartial courts of another country could be used.

In the Marcos situation, the U.S. District Court for the District of Hawai'i was the obvious and only appropriate venue, because Marcos himself was in Hawai'i. He could not have been served and sued in any other location. The U.S. District Court carefully managed this complex case, and the jury reached an appropriate judgment after full deliberation. It is time for this judgment to be paid and for the victims to receive compensation. The Philippine Government originally supported the litigation in the United States, but has recently taken the opposition position. To meet its obligations under international law, the Philippine Government must reassess its position and must support the victims in their efforts to collect the judgment rendered on their behalf by the U.S. court.

Abstract:

**CONTRACTS TO MAKE BABIES: AN EXAMINATION OF
ARTIFICIAL REPRODUCTIVE TECHNOLOGY FROM A
PHILIPPINE CONTRACT LAW PERSPECTIVE**

The authors examine Artificial Reproductive Technology (ART) contracts in the light of Philippine civil law, specifically, contract law. The paper outlines the different ART methods most familiar to Filipino couples seeking fertility treatments: artificial insemination, in vitro fertilization and surrogacy. It also describes what an ART contract is in general, as well as the specific contracts that are executed for each ART procedure.

The article analyzes ART contracts using as framework the essential requisites of a contract and the probable liabilities for breach of the contract. It concludes with an assessment of the applicability of existing contract law to an ART contract.