G.R. No. 225973 - **Saturnino C. Ocampo, et al. v. Rear Admiral Ernesto C. Enriquez (in his capacity as the Deputy Chief of Staff for Reservist and Retiree Affairs, Armed Forces of the Philippines), et al.**

G.R. No. 225984 - **Rep. Edcel C. Lagman, et al. v. Executive Secretary Salvador Medialdea, et al.**

G.R. No. 226097 - **Loretta Ann Pargas-Rosales, et al. v. Executive Secretary Salvador Medialdea, et al.**

G.R. No. 226116 - **Heherson T. Alvarez, et al. v. Hon. Salvador C. Medialdea in his capacity as Executive Secretary, et al.**

G.R. No. 226167 - **Zaira Patricia B. Baniaga, et al. v. Secretary of National Defense Delfin N. Lorenzana, et al.**

G.R. No. 226120 - **Algamar A. Latiph, et al. v. Secretary Delfin N. Lorenzana, sued in his capacity as Secretary of National Defense, et al.**

G.R. No. 226294 - **Leila M. De Lima v. Hon. Salvador C. Medialdea, et al.**

Promulgated:

November 8, 2016

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DISSENTING OPINION

SERENO, *CJ:*

The whole thesis of respondents on the substantive issues lies in the absence of an express prohibition against the burial of former President Marcos; hence, they argue that this Court cannot characterize the current President's decision to have him buried at the *Libingan ng mga Bayani* (LMB) as one made in grave abuse of discretion.

Nothing can be more wrong, and no view more diminishing of the Judiciary's mandated role under the 1987 Constitution.

If the absence of an express prohibition were to be the primary or sole determinant of the merits of this case, then even the processing clerk of the administrative office supervising the LMB could decide this matter by simply ticking off the appropriate box in a Yes or No question that asks: "Is

there an express statute that prohibits a President from burying a former bemedalled soldier or president in the *Libingan ng Mga Bayani*? If yes, bury. If no, do not bury."

To the contrary, the case can only be decided by deeply and holistically analyzing the extent and implications of the legal phenomenon called the power to exercise presidential discretion, and how it should be measured in this case.

In light of allegations that the decision to bury the late President will run counter to the Constitution, statutory standards and judicial pronouncements, this Court must take a step back in history to understand what the Constitution that it is defending stands for; whether it is in danger of being violated in spirit or in letter; and whether this danger is of such kind and degree that the exercise of presidential discretion should be restrained. This Court must also compare the statutory standards that have been raised and determine whether the course of action proposed by the President would run counter to those standards. This Court must also examine the doctrines and language employed in many of its decisions if it is to guard against heresy directed at the spirit of the Constitution that could undermine not just one doctrine, but perhaps the moral legitimacy of the Court itself.

This is how consequential any statement coming from the Court on this issue could be.

The Court's bounden duty is not only to preserve the Constitution, but also itself.

It has been posited that the Court should not meddle in a political maneuver that the President is compelled to make. Whether it is a maneuver that is animated by the need to maintain credibility in the eyes of important supporters, or whether it is necessary to advance unity in this country, is not a motivation that the President should be accountable for.

Likewise, it has been proposed that this Court should look beyond the past and shift its focus to today's political reality – that the present decision-maker is the most powerful and the most popular politician in the republic; that for him to undertake the reforms he has promised requires that he be able to deliver on his promises; that the key to unity in this day and age is to forgive the past and give former President Marcos the honors due the office that he held and the bemedalled soldiering he rendered; and that in any event, the state has enacted many measures not only to compensate Martial Law victims but also to advance the cause of human rights.

At the initial stage of any discussion in this Court, these kinds of arguments are usually met with skepticism by its Members under the express

unction of the Constitution as interpreted in the post-Marcos decisions. [1] For the relevant judicial powers provisions of the 1987 Constitution impels the Court to relegate the political question argument, and any semblance of such argument – deference, political wisdom, etc. – to a status of non-importance, especially if it fails to satisfy the threshold test. Simply put, that test is whether indeed the question is one addressed to purely political exercises internal to the workings of the legislature;[2] or whether, on the part of the President, there are no legal standards against which his particular action can be evaluated. [3] Indeed, the Court has, in questions of grave national importance, generally exercised judicial review when the allegations of grave abuse of discretion are sufficiently serious.

For the implications of this case goes to the very fulcrum of the powers of Government: the Court must do what is right by correctly balancing the interests that are present before it and thus preserve the stability of Philippine democracy.

If the Court unduly shies away from addressing the principal question of whether a decision to bury the former President would contradict the anti-Martial Law and human rights underpinnings and direction of the 1987 Constitution, it would, wittingly or unwittingly, weaken itself by diminishing its role as the protector of the constitutional liberties of our people. It would dissipate its own moral strength and progressively be weakened, unable to promptly speak against actions that mimic the authoritarian past, or issue judicial writs to protect the people from the excesses of government.

This Court must, perforce, painstakingly go through the process of examining whether any claim put forth herein by the parties genuinely undermines the intellectual and moral fiber of the Constitution. And, by instinct, the Court must defend the Constitution and itself.

The 1987 Constitution is the embodiment of the Filipino nations' enduring values, which this Court must zealously protect.

Countless times, this Court has said in so many words that the 1987 Constitution embodies the Filipinos' enduring values.[4] The protection of those values has consequently become the duty of the Court. That this is the

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[1] *Saguisag v. Ochoa, Jr.*, G.R. Nos. 212426 & 212444, 12 January 2016; *Francisco, Jr. v. House of Representatives*, 460 Phil. 830 (2003); *Estrada v. Desierto*, 406 Phil. 1 (2001); *Oposa v. Factoran, Jr.*, G.R. No. 101083, 30 July 1993, 224 SCRA 792; *Bondoc v. Pineda*, 278 Phil. 784 (1991); *Marcos v. Manglapus*, 258 Phil. 479 (1989).

[2] *Arroyo v. De Venecia,* 343 Phil. 42 (1997).

[3] *David v. Macapagal-Arroyo*, 522 Phil. 705 (2006); *Integrated Bar of the Philippines v. Zamora*, 392 Phil. 618 (2000); *Llamas v. Orbos*, 279 Phil. 920 (1991).

[4] 1987 Constitution, Preamble. Also see Concurring Opinion of Chief Justice Sereno in *Poe-Llamanzares v. COMELEC*, G.R. Nos. 221697 & 221698-700, 8 March 2016.

legal standard by which to measure whether it has properly comported itself in its constitutional role has been declared in various fashions by the Court itself.

See, for example, how this Court articulated its duty to protect the environment,[5] women,[6] children,[7] labor,[8] the indigenous people,[9] and consistently, those who have been or are in danger of being deprived of their human rights.[10]

Note the power that the Constitution vests in the Court to actively promulgate rules for the protection of human rights, and how the Court in turn described this duty when it promulgated the writs of *kalikasan*, *habeas data*, and *amparo*.[11]

Any conclusion in this case that betrays a lack of enthusiasm on the part of this Court to protect the cherished values of the Constitution would be a judicial calamity. That the Judiciary is designed to be passive relative to the "active" nature of the political departments is a given. But when called upon to discharge its relatively passive role, the post-1986 Supreme Court has shown zealousness in the protection of constitutional rights, a zealousness that has been its hallmark from then up to now. It cannot, in the year 2016, be reticent in asserting this brand of protective activism.

Not everything legally required is written in black and white; the Judges' role is to discern within the penumbra.

As early as 1950, the Civil Code, a creation of the Legislature, has instructed the Judiciary on how to proceed in situations where there is no applicable law or where there is ambiguity in the legislation that seems to apply to the case at hand. The code provides:

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[5] *Resident Marine Mammals of the Protected Seascape Tanon Strait, v. Secretary Angelo Reyes*, G.R. No. 180771, 21 April 2015. *West Tower Condominium Corp. v. First Phil. Industrial Corp.*, G.R. No. 194239, 16 June 2015; *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, 595 Phil. 305 (2008); *Oposa v. Factoran, Jr.*, supra note 1.

[6] *Spouses Imbong v. Ochoa, Jr.*, G.R. Nos. 204819, 204934, 204957, 204988, 205003, 205043, 205138, 205478, 205491, 205720, 206355, 207111, 207172, 207563, 8 April 2014; *Garcia v. Drilon*, 712 Phil. 44 (2013); *Philippine Telegraph and Telephone Co. v. National Labor Relations Commission*, 338 Phil. 1093 (1997).

[7] *Poe-Llamanzares v. Commission on Elections*, G.R. Nos. 221697 & 221698-700, 8 March 2016; *Dela Cruz v. Gracia*, 612 Phil. 167 (2009); *People v. Abadies*, 433 Phil. 814 (2002).

[8] *Seagull and Maritime Corp. v. Dee*, 548 Phil. 660 (2007); *Lopez v. Metropolitan Waterworks and Sewerage System*, 501 Phil. 115 (2005).

[9] *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, 486 Phil. 754 (2004).

[10] *The Diocese of Bacolod v. Commission on Elections*, G.R. No. 205728, 21 January 2015, 747 SCRA 1; *Land Bank of the Philippines v. Heirs of Angel T. Domingo*, G.R. No. 168533, 4 February 2008, 543 SCRA 627; *Guazon v. De Villa*, 260 Phil. 673 (1990).

[11] See *Rules of Procedure for Environmental Cases*, A.M. No. 09-6-8-SC, 13 April 2010; *The Rule on the Writ of Amparo*, A.M. No. 07-9-12-SC, 25 September 2007; *Rule on the Writ of Habeas Data*, A.M. No. 08-1-16-SC, 22 January 2008.

> Article 9. No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws.
>
> Article 10. In case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail.

I do not believe that this Court is bereft of sufficient guides that can aid in the exercise of its role of protecting and advancing constitutional rights. It must with a magnifying lens examine whether clear intent, historical references, and express mandates can be found in the 1987 Constitution and whether these are relevant to this case. We must pick them out and examine them. The ill-gotten wealth statutes, the remedial human rights legislation – all describe the burden of a nation that must recover from the financial and moral plunder inflicted upon this nation by Marcos, his family and his cronies. We must get our bearings from these guideposts and find out if they instruct us on what must be done with respect to his proposed burial beyond the express and implied condemnation of the wrongs he has committed against the country. The pronouncements of this Court and those of the Sandiganbayan, the legal pleadings and administrative propositions submitted by the Philippine government to international and local tribunals from 1987 to the present – a full 29 years – from these we must infer an indication of the treatment that should be given to the proposed action of the Government.

That constitutional and statutory interpretation is the bread and butter of adjudication is beyond cavil. From the oldest cases in the *Philippine Reports* to its latest decision,[12] this Court has been in the business of filling in gaps, interpreting difficult texts, so that "right and justice will prevail." That this is the entire reason for the existence of the Judiciary is self-evident. The end of "judg-ing" is not to do what an administrative clerk can very well do; it is to ensure that "right and justice" will prevail.

Indeed, that judges must interpret statutes as well as declare the existence and protection of individual rights so that "justice and right" might prevail has been the essence of an independent Judiciary. This has been so from the time that the necessity for such independence was first recognized by the 1215 Magna Carta signed by King John; that no man, not even the highest ruler of the land – and King John believed in his divine right to rule – can exercise power in such a way that denies the fundamental liberty of any man.

And the modern Judiciary has progressed considerably from that time. The Philippine Judiciary will thus be measured by the universal standard of

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[12] See, among others, *Vda. de Padilla v. Vda. de Padilla,* 74 Phil. 377 (1943*); Republic v. de los Angeles*, 148-B Phil. 902 (1971); *Floresca v. Philex Mining Corp.*, 220 Phil. 533 (1985); *Salvacion v. Central Bank of the Philippines*, 343 Phil. 539 (1997); Concurring Opinion of Chief Justice Maria Lourdes P.A. Sereno in *Corpuz v People,* 734 Phil. 353 (2014) citing the Report of the Code Commission, p. 78; *Social Weather Stations, Inc. v. COMELEC*, G.R. No. 208062, 7 April 2015; *Carpio-Morales v. Court of Appeals*, G.R. Nos. 217126-27, 10 November 2015; *Poe-Llamanzares v. Commission on Elections*, supra note 7.

whether it has discharged its power of review, so that "right and justice will prevail."

There was a time when this Court hid under the "political question" doctrine and evaded constitutional and moral responsibility for the long period of suppression of the people's basic rights. Rightly so, that same Court, after the repudiation by our people of the Marcos regime in 1986, likewise repudiated the acts of the majority of the Court during Martial Law.

This Court cannot afford to retrogress and make the same mistakes as those made by its predecessor courts during Martial Law. To do so would possibly merit the same kind of condemnation that former President Marcos reaped in the fullness of time.

Is the preference for the protection of human rights encoded in the legal DNA of the Constitution?

There is no question that the importance given to human rights is encoded in the very building blocks of the Philippine Constitution. For the Constitution to make sense, the Supreme Court has to recognize that it is programmed to reject government actions that are contrary to the respect for human rights, and to uphold those that do.

The recognition of the hallowed place given to the protection of human rights has been tirelessly repeated by all the Justices who ever walked the halls of Padre Faura. Not one has said that it was unimportant; or that it should be sacrificed at the altar of something else – not economic progress, not even peace – not even by those who saw when, why, and how Martial Law began and progressed.

Former Chief Justice Reynato Puno has said:

> The sole purpose of government is to promote, protect and preserve these [human] rights. And when government not only defaults in its duty but itself violates the very rights it was established to protect, it forfeits its authority to demand obedience of the governed and could be replaced with one to which the people consent. The Filipino people exercised this highest of rights in the EDSA Revolution of February 1986. [13]

Chief Justice Puno unequivocably repudiated the "ends-justifies-means" mantra of Martial Law when he catapulted the rights that Marcos trampled upon to the highest pinnacle of government priorities, and when as Chief Justice he made as his tenure's flagship the promulgation of the extraordinary and novel human rights writs of *amparo* and *habeas data*.

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[13] Concurring Opinion of Chief Justice Puno in *Republic v. Sandiganbayan*, 454 Phil. 504 (2003).

If it is true that when the Government itself violates the very rights it was established to protect, that violation forfeits its right to govern, then it becomes necessary for this Court to reject any governmental attempt that encourages the degradation of those rights. For this Court guards not only against clear and direct violations of the Constitution, but also against actions that lead this country and its rulers to a slippery slope that threatens to hurl its people to the abyss of helpless unprotectedness.

Contrary to the thesis of my esteemed colleague Justice Diosdado Peralta, the constitutional provisions guaranteeing the protection of human rights are not inert, coming to life only when there is a specific law that would make these rights accessible in specific cases. Each right that is sought to be protected by the Constitution acts as a prohibition against the Government's derogation of those rights. Not all of the rights guaranteed by the Constitution direct the commission of positive acts. Yet these rights can, under the right circumstances, be invoked either singly or collectively to bar public officers from performing certain acts that denigrate those rights.

Summary of the arguments on the substantive issues

Credit must be given to the Solicitor General for immediately agreeing that the Constitution, decisions of this Court, human right statutes and the ill-gotten wealth laws and proceedings – in their totality – condemn the Martial Law regime of the late President Marcos, his family and his cronies.[14] Nevertheless, he posits that all of these are in the past; human rights victims are to be compensated, anyway; and the recovery of ill-gotten wealth would continue, including the pursuit of criminal cases against the Marcos family and their cronies. In other words, while he admits that it would be most difficult to make former President Marcos out as a hero, considering the latter's martial rule and recorded plunder, nevertheless, Marcos was a bemedalled war soldier, and that, in addition, his being a former President who was never dishonorably discharged as a soldier – this fact alone – entitles him to be interred at the LMB. To the Solicitor General, it is *non sequitur* for human rights victims to claim that the burial of Marcos at a cemetery called *Libingan ng mga Bayani* will entomb him as a hero and negate the plethora of legal pronouncements that he is not.

The candid admission made by the Solicitor General has made the job of this Court much easier. For the substantive issue now boils down to whether, in fact and in law, the proposed burial of the late President Marcos at the LMB

(1) will derogate from the state's duty to protect and promote human rights under the Constitution, domestic statutes, and international law;

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[14] Consolidated Comment dated 22 August 2016, p. 62; Oral Arguments Transcript of Stenographic Notes [hereinafter TSN], 7 September 2016, p. 243; Memorandum dated 27 September 2016, pp. 134-136.

(2) will violate Presidential Decree No. 105, and Republic Act Nos. 10066, 10086 and 289;

(3) is an unconstitutional devotion of public property to a private purpose;

(4) is an illegal use of public funds;

(5) cannot be sourced from the residual powers of the President or his powers to reserve lands for public purposes;

(6) cannot find legal mooring in AFP Regulation G 161-375;

(7) is in violation of the clause on faithful execution of the laws

and thus the proposed burial is unconstitutional and illegal, and the presidential discretion sought to be exercised is being committed in grave abuse of discretion.

On the procedural points, this Opinion fully agrees with the *Dissenting Opinion* of Justice Alfredo Benjamin S. Caguioa, Jr., but will nevertheless, attempt to augment what has been so ably discussed by Justice Caguioa on the political question defense.

On the substantive points, I fully agree with Justice Caguioa, whose *Dissenting Opinion* had first been proposed as the main decision. I had prepared this Opinion to elucidate my independent understanding of some of the issues he has covered.

DISCUSSION

I.

THE COURT HAS THE AUTHORITY TO RESOLVE THIS CONTROVERSY UNDER THE EXPANDED CONCEPT OF JUDICIAL REVIEW IN THE 1987 CONSTITUTION.

Respondents contend that the issue in this case is a matter within the discretion of the Executive and must consequently be considered beyond our power of judicial review.

As will be further discussed, this Court cannot refuse to review an issue simply because it is alleged to be a political question. That train has departed a long time ago. Prevailing jurisprudence is a generation apart from the former usefulness of the political question doctrine as a bar to judicial review. The reason for that departure – Philippine Martial Law experience.

A. With the advent of the 1987 Constitution, respondents can no longer utilize the traditional political question doctrine to impede the power of judicial review.

The 1987 Constitution has expanded the concept of judicial review[15] by expressly providing in Section 1, Article VIII, as follows:

> Section 1. The Judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
>
> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

The above provision delineates judicial power and engraves, for the first time, the so-called *expanded certiorari jurisdiction* of the Supreme Court.[16]

The first part of the provision represents the traditional concept of judicial power involving the settlement of conflicting rights as conferred by law. The second part represents the expansion of judicial power to enable the courts of justice to review what was before forbidden territory; that is, the discretion of the political departments of the government.[17]

As worded, the new provision vests in the judiciary, particularly in the Supreme Court, the power to rule upon even the wisdom of the decisions of the executive and the legislature, as well as to declare their acts invalid for lack or excess of jurisdiction, should they be tainted with grave abuse of discretion.[18]

The deliberations of the 1986 Constitutional Commission provide the nature and rationale of this expansion of judicial power. In his Sponsorship Speech, former Chief Justice and Constitutional Commissioner Roberto R. Concepcion stated:

> The first section starts with a sentence copied from former Constitutions. It says:
>
> > The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

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[15] *Integrated Bar of the Philippines v. Zamora*, supra note 3.
[16] *Francisco, Jr. v. House of Representatives*, 460 Phil. 830 (2003).
[17] *Oposa v. Factoran, Jr.*, supra note 1.
[18] Id.

I suppose nobody can question it.

The next provision is new in our constitutional law. I will read it first and explain.

> Judicial power includes the duty of courts of justice to settle actual controversies involving rights which are legally demandable and enforceable and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part or instrumentality of the government.

Fellow Members of this Commission, **this is actually a product of our experience during martial law.** As a matter of fact, it has some antecedents in the past, but **the role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the solicitor general set up the defense of political questions and got away with it.** As a consequence, certain principles concerning particularly the writ of habeas corpus, that is, the authority of courts to order the release of political detainees, and other matters related to the operation and effect of martial law failed because the government set up the defense of political question. And the Supreme Court said: "Well, since it is political, we have no authority to pass upon it." The Committee on the Judiciary feels that this was not a proper solution of the questions involved. It did not merely request an encroachment upon the rights of the people, but it, in effect, encouraged further violations thereof during the martial law regime. . . .

x x x x

Briefly stated, courts of justice determine the limits of power of the agencies and offices of the government as well as those of its officers. In other words, the judiciary is the final arbiter on the question whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction, or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction or lack of jurisdiction. This is not only a judicial power but a duty to pass judgment on matters of this nature.

This is the background of paragraph 2 of Section 1, which means that the courts cannot hereafter evade the duty to settle matters of this nature, by claiming that such matters constitute a political question.[19] (Emphasis supplied)

The expansion of judicial power resulted in constricting the reach of the political question doctrine.[20] *Marcos v. Manglapus*[21] was the first case that squarely dealt with the issue of the scope of judicial power *vis-a-vis* the political question doctrine under the 1987 Constitution. In that case, the Court explained:

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[19] I RECORD of the 1986 Constitutional Commission 434-436 (1986).
[20] *Estrada v. Desierto*, supra note 1.
[21] *Marcos v. Manglapus*, supra note 1.

> The present Constitution limits resort to the political question doctrine and broadens the scope of judicial inquiry into areas which the Court, under previous constitutions, would have normally left to the political departments to decide.
>
> x x x x
>
> x x x When political questions are involved, the Constitution limits the determination to whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the official whose action is being questioned. If grave abuse is not established, the Court will not substitute its judgment for that of the official concerned and decide a matter which by its nature or by law is for the latter alone to decide.[22]

The prerogative of the Court to review cases in order to determine the existence of grave abuse of discretion was further clarified in *Estrada v. Desierto*:[23]

> To a great degree, the 1987 Constitution has narrowed the reach of the political question doctrine when it expanded the power of judicial review of this court not only to settle actual controversies involving rights which are legally demandable and enforceable but also to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of government. Heretofore, the judiciary has focused on the "thou shalt not's" of the Constitution directed against the exercise of its jurisdiction. **With the new provision, however, courts are given a greater prerogative to determine what it can do to prevent grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of government.** Clearly, the new provision did not just grant the Court power of doing nothing.[24] (Citations omitted and emphasis supplied)

Notably, the present Constitution has not only vested the judiciary with the *right* to exercise judicial power, but made it a *duty* to proceed therewith – a duty that cannot be abandoned "by the mere specter of this creature called the political question doctrine."[25] This duty must be exercised "to correct errors of jurisdiction committed not only by a tribunal, corporation, board or officer exercising judicial, quasi-judicial or ministerial functions but also to set right, undo and restrain any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, even if the latter does not exercise judicial, quasi-judicial or ministerial functions."[26]

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[22] Supra note 20, at 506-507.
[23] *Estrada v. Desierto*, supra note 1.
[24] Id. at 42-43.
[25] *Francisco, Jr. v. House of Representatives*, supra note 16, at 910.
[26] *Araullo v. Aquino III*, G.R. Nos. 209287, 209135, 209136, 209155, 209164, 209260, 209442, 209517, 209569, 1 July 2014, 728 SCRA 1, 74.

Chief Justice Concepcion had emphatically explained to the 1986 Constitutional Commission that the Supreme Court, which he had been a part of, used the political question theory to avoid reviewing acts of the President during Martial Law, and thus enabled the violation of the rights of the people. In his words:

> It [referring to the refusal of the Supreme Court to review] did not merely request an encroachment upon the rights of the people, but it, in effect, encouraged further violations thereof during the martial law regime.[27]

The question I now pose to my colleagues in the Majority: "Are we not, by refusing to pass upon the question of the effects of the Marcos burial at the LMB, encouraging authoritarianism, plunder, and the violation of human rights, by signaling that what Marcos and his Martial Rule represents is not anathema?"

B. In the exercise of its expanded judicial power, the Court has decided issues that were traditionally considered political questions.

Following the effectivity of the present Constitution, only a select number of issues continue to be recognized by the Court as truly political and thus beyond its power of review. These issues include the executive's determination by the executive of sovereign or diplomatic immunity,[28] its espousal of the claims of its nationals against a foreign government,[29] and the electorate's expression of confidence in an incumbent official.[30]

Apart from these matters, all other acts of government have been the subject of the expanded *certiorari* jurisdiction of the Court under Article VIII, Section II of the Constitution. As demonstrated in the following cases, the Court has reviewed the acts of the President, the Senate, the House of Representatives, and even of independent bodies such as the electoral tribunals and the Commission on Elections, even for acts that were traditionally considered political.

Acts of the President

The Court in *Marcos v. Manglapus*[31] ascertained the validity of the President's determination that the return of the Marcoses posed a serious

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[27] Supra note 19.
[28] *Department of Foreign Affairs v. National Labor Relations Commission,* 330 Phil. 573 (1996); *Callado v. International Rice Research Institute,* 314 Phil. 46 (1995); *Lasco v. United Nations Revolving Fund for Natural Resources Exploration,* 311 Phil. 795 (1995); *The Holy See v. Rosario, Jr.,* G.R. No. 101949, 1 December 1994, 238 SCRA 524; *International Catholic Migration Commission v. Calleja,* G.R. No. 85750, 89331, 268 Phil. 134 (1990).
[29] *Vinuya v. Romulo,* 633 Phil. 538 (2010);
[30] *Evardone v. Commission on Elections,* G.R. No. 94010, 95063, 2 December 1991, 204 SCRA 464.
[31] *Marcos v. Manglapus*, supra note 121.

threat to the national interest and welfare, as well as the validity of the prohibition on their return. As previously stated, the political question doctrine was first invoked – and then rejected – by the Court in that case in view of its expanded power of judicial review under the 1987 Constitution.

The Court then reviewed the constitutionality of a presidential veto in *Gonzales v. Macaraig, Jr.*[32] It ruled that "the political question doctrine neither interposes an obstacle to judicial determination of the rival claims. The jurisdiction to delimit constitutional boundaries has been given to this Court."

The expanded power of judicial review was likewise utilized to examine the grant by the President of clemency in administrative cases;[33] and the President's power to call out the armed forces to prevent or suppress lawless violence, invasion or rebellion.[34] The Court even tackled the legitimacy of the Arroyo administration in *Estrada v. Desierto.*[35] Although it resolved the question as a constitutional issue, the Court clarified that it would not defer its resolution based merely on the political question doctrine.

In *David v. Macapagal-Arroyo*,[36] it was the validity of then President Arroyo's declaration of national emergency that was assailed before the Court. Significantly, it reviewed the issue even while it recognized that the matter was solely vested in the wisdom of the executive:

> While the Court considered the President's "calling-out" power as a discretionary power solely vested in his wisdom, it stressed that 'this does not prevent an examination of whether such power was exercised within permissible constitutional limits or whether it was exercised in a manner constituting grave abuse of discretion." This ruling is mainly a result of the Court's reliance on Section 1, Article VIII of 1987 Constitution which fortifies the authority of the courts to determine in an appropriate action the validity of the acts of the political departments. Under the new definition of judicial power, the courts are authorized not only "to settle actual controversies involving rights which are legally demandable and enforceable," but also "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government."[37] (Citations omitted)

In *Biraogo v. Philippine Truth Commission of 2010*,[38] even the President's creation of a Truth Commission was reviewed by the Court. **As will be further explained, the fact that the commission was created to implement a campaign promise did not prevent the Court from examining the issue.**

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[32] *Gonzales v. Macaraig, Jr.*, 269 Phil. 472 (1990).
[33] *Llamas v. Orbos*, 279 Phil. 920 (1991).
[34] *Integrated Bar of the Philippines v. Zamora*, supra note 3.
[35] *Estrada v. Desierto*, supra note 1.
[36] *David v. Macapagal-Arroyo*, 522 Phil. 705 (2006).
[37] Id. at 766.
[38] *Biraogo v. Philippine Truth Commission of 2010*, 651 Phil. 374 (2010).

Acts of the Legislature

The Court has likewise exercised its expanded power of judicial review in relation to actions of Congress and its related bodies. In *Daza v. Singson,*[39] it reviewed the manner or legality of the organization of the Commission on Appointments by the House of Representatives. While the review was premised on the fact that the question involved was legal and not political, the Court nevertheless held that "even if we were to assume that the issue presented before us was political in nature, we would still not be precluded from resolving it under the expanded jurisdiction conferred upon us that now covers, in proper cases, even the political question."

In later cases, the Court rejected the political question doctrine and proceeded to look into the following political acts of the legislature: (a) the decision of the House of Representatives to allow the dominant political party to change its representative in the House Electoral Tribunal; [40] (b) the decision of the Senate Blue Ribbon Committee to require the petitioners to testify and produce evidence at its inquiry;[41] (c) the propriety of permitting logging in the country;[42] (d) the validity of the filing of a second impeachment complaint with the House of Representatives;[43] (d) the validity of an investigation conducted in aid of legislation by certain Senate committees;[44] and (e) the decision of the House of Representatives Committee on Justice to take cognizance of two impeachment complaints.[45]

We also exercised our constitutional duty "to determine whether or not there had been a grave abuse of discretion amounting to lack or excess of jurisdiction"[46] on the part of the Senate when it ratified the WTO Agreement and the three Annexes thereof in *Tañada v. Angara.*[47] The Court firmly emphasized in that case that "it will not shirk, digress from or abandon its sacred duty and authority to uphold the Constitution in matters that involve grave abuse of discretion brought before it in appropriate cases, committed by any officer, agency, instrumentality, or department of the government."[48]

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[39] *Daza v. Singson*, 259 Phil. 980 (1989).
[40] *Bondoc v. Pineda*, 278 Phil. 784 (1991).
[41] *Bengzon Jr. v. Senate Blue Ribbon Committee*, G.R. No. 89914, 20 November 1991.
[42] In *Oposa v. Factoran, Jr.*, supra note 1, the Court declared that "the political question doctrine is no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review."
[43] *Francisco, Jr. v. House of Representatives*, supra note 16.
[44] *Neri v. Senate Committee on Accountability of Public Officers and Investigations,* 573 Phil. 554 (2008).
[45] *Gutierrez v. House of Representatives Committee on Justice*, 658 Phil. 322 (2011). We explained therein that "the Court is not asserting its ascendancy over the Legislature in this instance, but simply upholding the supremacy of the Constitution as the repository of the sovereign will."
[46] *Tañada v. Angara*, 338 Phil. 546 (1997), at 575.
[47] Id.
[48] Id.

Latest Jurisprudence

The most recent jurisprudence in this area remains in line with the notion of expanded *certiorari* jurisdiction. The Court has been consistent in its rejection of the political question doctrine as a bar to its expanded power of review.

In 2013, the constitutionality of the pork barrel system was resolved in *Belgica v. Ochoa.*[49] While the Court clarified that the issue involved legal questions, it nonetheless rejected the invocation of the political question doctrine and upheld the expanded judicial powers of the Court.

In 2014, *Araullo v. Aquino III*[50] delved into the constitutionality of the Disbursement Acceleration Program of the executive department, again emphasizing the Court's expanded power of review.

In 2015, the Court in *The Diocese of Bacolod v. Commission on Elections*[51] rejected the application of the political question doctrine. It ruled that the right of the non-candidate petitioners to post the subject tarpaulin in their private property was an exercise of their right to free expression. In rejecting the COMELEC's political question defense, it held that "the concept of a political question... never precludes judicial review when the act of a constitutional organ infringes upon a fundamental individual or collective right."[52]

A few months after *Diocese of Bacolod*, the policy of the Judicial and Bar Council (JBC) requiring judges of first-level courts to render five years of service before they could qualify as applicants to second-level courts was assailed as unconstitutional in *Villanueva v. Judicial and Bar Council.*[53] The Court resolved the issue by stating "since the formulation of guidelines and criteria, including the policy that the petitioner now assails, is necessary and incidental to the exercise of the JBC's constitutional mandate, a determination must be made on whether the JBC has acted with grave abuse of discretion amounting to lack or excess of jurisdiction in issuing and enforcing the said policy."[54]

Early this year, the Court in *Saguisag v. Ochoa, Jr.,*[55] determined the constitutionality of the Enhanced Defense Cooperation Agreement between the Republic of the Philippines and the United States of America. The Court affirmed therein its expanded jurisdiction:

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[49] *Belgica v. Ochoa*, 721 Phil. 416 (2013).
[50] *Araullo v. Aquino III*, supra note 26.
[51] *The Diocese of Bacolod v. Commission on Elections*, supra note 10.
[52] Id. at 53.
[53] *Villanueva v. Judicial and Bar Council*, G.R. No. 211833, 7 April 2015, 755 SCRA 182.
[54] Id. at 197.
[55] *Saguisag v. Ochoa, Jr.*, G.R. Nos. 212426 & 212444, 12 January 2016.

> The power of judicial review has since been strengthened in the 1987 Constitution. The scope of that power has been extended to the determination of whether in matters traditionally considered to be within the sphere of appreciation of another branch of government, an exercise of discretion has been attended with grave abuse. The expansion of this power has made the political question doctrine "no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review."[56] (Citations omitted)

Notably, while there were instances when the Court deferred from interfering with an issue involving a political question, it did so not because political questions were involved but because of a finding that there was no grave abuse of discretion.[57] Otherwise stated, the Court still exercised its expanded judicial power, but found no reason to annul the questioned acts. It held in *Defensor-Santiago v. Guingona, Jr.,*[58] "the all-embracing and plenary power and duty of the Court 'to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government' is restricted only by the definition and confines of the term 'grave abuse of discretion.'"

It is evident from this long line of cases that the Court can no longer refuse to adjudicate cases on the basis of the "political question doctrine." Whenever issues of a political nature are raised before it, it is the duty of the Court to meet the questions head-on for as long as grave abuse of discretion or constitutionality is seriously involved.

C. The assertion that the burial is intended to implement an election campaign promise does not render the matter non-justiciable.

In view of the above rulings of this Court, it is evident that we must resolve the present controversy, notwithstanding the allegation that the decision of the President to allow the burial is purely political in character. That the order was supposedly founded on an "election campaign promise" does not transform the matter into a political issue that is beyond our power to review.

In fact, in *Biraogo v. Philippine Truth Commission of 2010,*[59] the Court reviewed the validity of the creation of the Truth Commission, despite

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[56] Id.

[57] See *Pimentel, Jr. v. Senate Committee on the Whole,* 660 Phil. 202 (2011); *Spouses dela Paz v. Senate Committee on Foreign Relations,* 598 Phil. 981 (2009); *Garcia v. Executive Secretary,* 602 Phil. 64 (2009); *Sanlakas v. Reyes,* 466 Phil. 482 (2004); *Eastern Assurance & Surety Corp. v. LTFRB,* 459 Phil. 395 (2003); *Lim v. Executive Secretary,* 430 Phil. 555 (2002); *Bagatsing v. Committee on Privatization,* 316 Phil. 404 (1995); *Co v. House of Representatives Electoral Tribunal,* 276 Phil. 758 (1991); *Garcia v. Executive Secretary,* 281 Phil. 572 (1991).

[58] *Defensor-Santiago v. Guingona, Jr.*, 359 Phil. 276 (1998).

[59] Supra note 38.

its recognition that the act was meant to implement a campaign promise made by then President Benigno Aquino III:

> The genesis of the foregoing cases can be traced to the events prior to the historic May 2010 elections, when then Senator Benigno Simeon Aquino III declared his staunch condemnation of graft and corruption with his slogan, *"Kung walang corrupt, walang mahirap."* The Filipino people, convinced of his sincerity and of his ability to carry out this noble objective, catapulted the good senator to the presidency.
>
> To transform his campaign slogan into reality, President Aquino found a need for a special body to investigate reported cases of graft and corruption allegedly committed during the previous administration.
>
> Thus, at the dawn of his administration, the President on July 30, 2010, signed Executive Order No. 1 establishing the *Philippine Truth Commission of 2010 (Truth Commission)*.[60]

Even under those circumstances, however, the Court still decided the controversy and ultimately declared the creation of the Truth Commission unconstitutional. While I maintain my dissenting view because unknowable standards were imposed in that case, I believe that the Court correctly took cognizance of the dispute, notwithstanding the fact that a campaign promise was involved. There is no reason for the Court to deviate from that course in the present case.

Having established the duty of the Court to review the assailed acts, it is now necessary to examine whether the decision of the President to allow the burial of former President Marcos at the LMB is consistent with the Constitution and the laws.

II.

THE PRESIDENT ACTED WITH GRAVE ABUSE OF DISCRETION AND IN VIOLATION OF HIS DUTY TO FAITHFULLY EXECUTE THE LAWS WHEN HE ORDERED THE BURIAL OF MARCOS IN THE *LIBINGAN NG MGA BAYANI*.

The 1987 Constitution mandates the president to ensure that laws are faithfully executed.[61] This duty of faithful execution circumscribes all the actions of the President as the Chief Executive. It also limits every exercise of his discretion. As this Court declared in *Almario v. Executive Secretary*:

> Discretion is not a free-spirited stallion that runs and roams wherever it pleases but is reined in to keep it from straying. In its classic formulation, "discretion is not unconfined and vagrant" but "canalized within banks that keep it from overflowing."

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[60] Id. at 428.
[61] 1987 CONSTITUTION, Article VII, Section 17.

> The President's power must be exercised in accordance with existing laws. Section 17, Article VII of the Constitution prescribes faithful execution of the laws by the President:
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> > Sec. 17. The President shall have control of all the executive departments, bureaus and offices. He shall ensure that the laws be faithfully executed.
>
> The President's discretion in the conferment of the Order of National Artists should be exercised in accordance with the duty to faithfully execute the relevant laws. **The faithful execution clause is best construed as an obligation imposed on the President, not a separate grant of power. It simply underscores the rule of law and, corollarily, the cardinal principle that the President is not above the laws but is obliged to obey and execute them.** This is precisely why the law provides that "[a]dministrative or executive acts, orders and regulations shall be valid only when they are not contrary to the laws or the Constitution."[62] (Citations omitted and emphasis supplied)

In fulfilling this duty, the President is not only obligated to enforce the express terms of the Constitution or the statutes; he is likewise bound to implement any right, duty, or obligation inferable from these primary sources.[63] This rule finds support in *Cunningham v. Neagle,*[64] in which the United States Supreme Court suggested that the **duty of the President to faithfully execute the law is not limited to the enforcement of the express terms of acts of Congress or of treaties, that duty extends to "all rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."**[65]

As a consequence of these principles, any act of the President that contravenes the law, its policies, or any right or duty inferable therefrom must be considered grave abuse of discretion.[66] By the same token, a refusal to execute the laws when necessary must be invalidated in the absence of any statutory justification.[67]

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[62] 714 Phil. 127, 163-164 (2013).
[63] *See* Concurring Opinion of Associate Justice Arturo Brion, *Biraogo v. Philippine Truth Commission of 2010*, 651 Phil. 374 (2010).
[64] 135 U.S. 1, pp. 82–84.
[65] Id. at 64.
[66] In *Carpio-Morales v. Court of Appeals*, supra note 12, the Court defined grave abuse of discretion in this manner:

> It is well-settled that an act of a court or tribunal can only be considered as with grave abuse of discretion when such act is done in a capricious or whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or to a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility. It has also been held that "grave abuse of discretion arises when a lower court or tribunal patently violates the Constitution, the law or existing jurisprudence." [citations omitted]

[67] Supra note 63.

As will be demonstrated, the directive of President Duterte to allow the burial of Marcos at the LMB contravenes the constitution, laws, policies, and jurisprudence. Moreover, the basis for the directive was an invalid regulation issued by the Armed Forces of the Philippines (AFP) in excess of its statutory authority. Considering that the order was made in contravention of law, it cannot be justified by mere reference to the President's residual powers. Such act is tainted with grave abuse of discretion.

A. Statutes and jurisprudence establish a clear policy to condemn the acts of Marcos and what he represents, which effectively prohibits the incumbent President from honoring him through a burial in the **Libingan ng mga Bayani.**

It is the duty of the Court to give effect not only to the letter of the law, but more importantly to the spirit and the policy that animate it. In *Alonzo v. Intermediate Appellate Court,*[68] the Court explained:

> Thus, we interpret and apply the law not independently of but in consonance with justice. Law and justice are inseparable, and we must keep them so. x x x
>
> > *The spirit, rather than the letter of a statute determines its construction, hence, a statute must be read according to its spirit or intent. For what is within the spirit is within the statute although it is not within the letter thereof, and that which is within the letter but not within the spirit is not within the statute. Stated differently, a thing which is within the intent of the lawmaker is as much within the statute as if within the letter; and a thing which is within the letter of the statute is not within the statute unless within the intent of the lawmakers.*[69]

To carry out this duty, the Court must examine not only the subject law itself, but the entire body of related laws including the Constitution, domestic statutes, administrative issuances and jurisprudence. It is only by taking a holistic view of the matter that the Court can ensure that its reading of the law is consistent with the spirit thereof. In *Social Weather Stations, Inc. v. COMELEC,*[70] we explained the importance of taking a holistic view when interpreting the law:

> Third, the assumption that there is, in all cases, a universal plain language is erroneous. In reality, universality and uniformity of meaning is a rarity. A contrary belief wrongly assumes that language is static.

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[68] 234 Phil. 267 (1986).
[69] Id. at 272-273.
[70] G.R. No. 208062, 7 April 2015, 755 SCRA 124.

> The more appropriate and more effective approach is, thus, holistic rather than parochial: to consider context and the interplay of the historical, the contemporary, and even the envisioned. Judicial interpretation entails the convergence of social realities and social ideals. The latter are meant to be effected by the legal apparatus, chief of which is the bedrock of the prevailing legal order: the Constitution. Indeed, the word in the vernacular that describes the Constitution — *saligan* — demonstrates this imperative of constitutional primacy.
>
> Thus, we refuse to read Section 5.2(a) of the Fair Election Act in isolation. Here, we consider not an abstruse provision but a stipulation that is part of the whole, i.e., the statute of which it is a part, that is aimed at realizing the ideal of *fair* elections. We consider not a cloistered provision but a norm that should have a present authoritative effect to achieve the ideals of those who currently read, depend on, and demand fealty from the Constitution.[71]

In this case, we are being asked to decide whether the President may validly order the burial of Former President Marcos in the LMB. The resolution of this question requires more than an examination of the text of AFP Regulations 161-375. More than finding a textual anchor, we are compelled by this issue to scrutinize the implications of the President's order and determine if it conflicts with the text, the policy, and the spirit of the law.

At its core, the present dispute turns on whether the state, through the President and the AFP, may legally honor Former President Marcos and his family. For that is the essence of the proposed burial at the LMB regardless of whether Marcos is to be buried as a hero, as a soldier or as a former president. A clear understanding of our Constitution, laws, jurisprudence, and our international obligations must lead to the conclusion that the grant of any such honors for the late dictator is prohibited.

Setting aside the validity of AFP Regulations 161-375 for the moment, their blind application to the present case would be an egregious mistake. Considering that various laws and jurisprudence reveal the clear policy of the state to denounce both former President Marcos and the Martial Law regime, it would be inappropriate, if not absurd, for the state to honor his memory.

1. Marcos is perpetuated as a plunderer and a perpetrator of human rights violations in our organic and statutory laws.

As soon as the EDSA Revolution succeeded in 1986, the revolutionary government – installed by the direct exercise of the power of

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[71] Id. at 167.

the Filipino people[72] – declared its objective to immediately recover the ill-gotten wealth amassed by Marcos, his family, and his cronies. The importance of this endeavor is evident in the fact that it was specifically identified in the 1986 Provisional Constitution as part of the mandate of the people. Article II, Section 1 of that Constitution states:

> *SECTION 1. Until a legislature is elected and convened under a New Constitution, the President shall continue to exercise legislative power.*
>
> *The President shall give priority to measures to achieve the mandate of the people to:*
>
> *x x x x*
>
> *d) Recover ill-gotten properties amassed by the leaders and supporters of the previous regime and protect the interest of the people through orders of sequestration or freezing of assets of accounts;*

Pursuant to this mandate, then President Corazon Aquino issued three executive orders focused entirely on the recovery of the ill-gotten wealth taken by Marcos and his supporters:

a) Executive Order No. 1[73] created the Presidential Commission on Good Government (PCGG) tasked to, among others, assist the President in the "recovery of all ill-gotten wealth accumulated by former President Marcos, his immediate family, relatives, subordinates and close associates x x x by taking undue advantage of their public office and/or using their powers, authority, influence, connections or relationship."[74]

b) Executive Order No. 2[75] authorized the freezing and sequestration of assets pertaining to Marcos, his relatives, associates, dummies, agents or nominees, which had been "acquired by them directly or indirectly, through or as a result of the improper or illegal use of funds or properties owned by the Government of the Philippines;"[76] or "by taking undue advantage of their office, authority, influence, connections or relationship."[77]

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[72] Provisional Constitution, First Whereas Clause; Also see *In re: Puno*, A.M. No. 90-11-2697-CA (Resolution), 29 June 1992.
[73] EXECUTIVE ORDER NO. 1, *Creating the Presidential Commission on Good Government* (1987).
[74] Id., Section 2(a).
[75] EXECUTIVE ORDER NO. 2, *Regarding the funds, moneys, assets, and properties illegally acquired or misappropriated by former President Ferdinand Marcos, Mrs. Imelda Romualdez Marcos, their close relatives, subordinates, business associates, dummies, agents, or nominees* (1987).
[76] Id. First Whereas Clause.
[77] Id.

c) Executive Order No. 14[78] empowered the PCGG to file and prosecute all cases it had investigated pursuant to Executive Order Nos. 1 and 2.

All three executive orders affirmed that Marcos, his relatives and supporters had acquired assets and properties through the improper or illegal use of government funds or properties by taking undue advantage of their office, authority, influence, or connections. These acts were proclaimed to have caused "grave damage and prejudice to the Filipino people and the Republic of the Philippines."[79]

The gravity of the offenses committed by former President Marcos and his supporters even prompted the Court to describe the mandate of the PCGG as the recovery of "the tremendous wealth plundered from the people by the past regime in the most execrable thievery perpetrated in all history."[80] The importance of this mandate was further underscored by the sovereign Filipino people when they ratified the 1987 Constitution, including the following provision:

> ARTICLE XVIII
> Transitory Provisions
>
> SECTION 26. The authority to issue sequestration or freeze orders under Proclamation No. 3 dated March 25, 1986 in relation to the recovery of ill-gotten wealth shall remain operative for not more than eighteen months after the ratification of this Constitution. However, in the national interest, as certified by the President, the Congress may extend said period.

Apart from being declared a plunderer, Marcos has likewise been pronounced by the legislature as a perpetrator of human rights violations. In Republic Act No. (R.A.) 10368, the state recognized the following facts:

a) Human rights violations were committed during the Martial Law period "from September 21, 1972 to February 25, 1986 by persons acting in an official capacity and/or agents of the State;"[81] and

b) A number of these human rights violations occurred because of decrees, declarations or issuances made by Marcos;[82] and by "acts

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[78] EXECUTIVE ORDER NO. 14, *Defining the jurisdiction over cases involving the ill-gotten wealth of former President Ferdinand E. Marcos, Mrs. Imelda R. Marcos, members of their immediate family, close relatives, subordinates, close and/or business associates, dummies, agents and nominees.*

[79] EXECUTIVE ORDER NO. 2, supra note 75, First Whereas Clause.

[80] *PCGG v. Peña,* 243 Phil. 93 (1998).

[81] Section 3 of RA 10368 defines a "human rights violation" as "any act or omission committed during the period from September 21, 1972 to February 25, 1986 by persons acting in an official capacity and/or agents of the State."

[82] The definition of human rights violations in Section 3 of R.A. 10348 includes: any search, arrest and/or detention without a valid search warrant or warrant of arrest issued by a civilian court of law, including any warrantless arrest or detention carried out pursuant to the declaration of Martial Law by former President

of force, intimidation or deceit"[83] done by him, his spouse, Imelda Marcos, and their immediate relatives by consanguinity or affinity, associates, cronies and subordinates.[84]

Because of the human rights violations perpetrated by Marcos and his associates, the legislature has decreed that victims are entitled to both monetary[85] and non-monetary[86] reparations to be principally sourced from the funds transferred to the Philippine government by virtue of the Order of the Swiss Federal Supreme Court.[87] Those funds were earlier declared part of the ill-gotten wealth of the Marcos family and forfeited in favor of the Philippine government.

The statements in the above laws were clear indictments by both the revolutionary government and the legislature against the massive plunder and the countless abuses committed by Marcos and his cronies during his tenure as President. These laws not only condemn him as a thief; they equally recognize his criminal liability for the atrocities inflicted on innumerable victims while he was in power.

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cont.
Ferdinand E. Marcos as well as any arrest, detention or deprivation of liberty carried out during the covered period on the basis of an "Arrest, Search and Seizure Order (ASSO)," a "Presidential Commitment Order (PCO)" or a "Preventive Detention Action (PDA)" and such other similar executive issuances as defined by decrees of former President Ferdinand E. Marcos, or in any manner that the arrest, detention or deprivation of liberty was effected."

[83] A human rights violation under Section 3(b)(5) of R.A. 10368 includes "[a]ny act of force, intimidation or deceit causing unjust or illegal takeover of a business, confiscation of property, detention of owner/s and or their families, deprivation of livelihood of a person by agents of the State, including those caused by Ferdinand E. Marcos, his spouse Imelda R. Marcos, their immediate relatives by consanguinity or affinity, as well as those persons considered as among their close relatives, associates, cronies and subordinates under Executive Order No. 1, issued on February 28, 1986 by then President Corazon C. Aquino in the exercise of her legislative powers under the Freedom Constitution."

[84] Under Section 3(d) of R.A. 10368, human rights violations may be compensation if they were committed by "Persons Acting in an Official Capacity and/or Agents of the State." This includes former President Ferdinand E. Marcos, spouse Imelda R. Marcos, their immediate relatives by consanguinity or affinity, as well as their close relatives, associates, cronies and subordinates.

[85] R.A. 10368, Section 4 states:

> SECTION 4. Entitlement to Monetary Reparation. — Any [Human Rights Violation Victim] qualified under this Act shall receive reparation from the State, free of tax, as herein prescribed xxx.

[86] R.A. 10368, Section 5 provides:

> SECTION 5. Nonmonetary Reparation. — The Department of Health (DOH), the Department of Social Welfare and Development (DSWD), the Department of Education (DepEd), the Commission on Higher Education (CHED), the Technical Education and Skills Development Authority (TESDA), and such other government agencies shall render the necessary services as nonmonetary reparation for HRVVs and/or their families, as may be determined by the Board pursuant to the provisions of this Act.

[87] R.A. 10368, Section 7 provides:

> SECTION 7. Source of Reparation. — The amount of Ten billion pesos (P10,000,000,000.00) plus accrued interest which form part of the funds transferred to the government of the Republic of the Philippines by virtue of the December 10, 1997 Order of the Swiss Federal Supreme Court, adjudged by the Supreme Court of the Philippines as final and executory in Republic vs. Sandiganbayan on July 15, 2003 (G.R. No. 152154) as Marcos ill-gotten wealth and forfeited in favor of the Republic of the Philippines, shall be the principal source of funds for the implementation of this Act.

2. Decisions of this Court have denounced the abuses committed by Marcos during the Martial Law dictatorship.

Apart from earning the condemnation of the legislature, Marcos and the Martial Law regime have likewise received harsh criticism from this Court. In dozens of decisions, it denounced the abuses he had committed; the pernicious effects of his dictatorship; and the grave damage inflicted upon the nation by his corruption, thievery, and contempt for human rights. Foremost among these denunciations are found in are four cases ordering the forfeiture of the ill-gotten wealth he amassed with the assistance of his relatives and cronies.

In *Republic v. Sandiganbayan*, [88] the Court forfeited a total of USD 658 million in favor of the government. These funds, contained in Swiss deposit accounts in the name of certain foundations, were declared ill-gotten, as they were manifestly out of proportion to the known lawful income of the Marcos family. The Court used the same reasoning in *Marcos, Jr. v. Republic*[89] to justify the forfeiture of the assets of Arelma, S.A., valued at USD 3,369,975 in 1983.

On the other hand, in *Republic v. Estate of Hans Menzi*[90] and in *Yuchengco v. Sandiganbayan*,[91] the Court scrutinized the beneficial ownership of certain shares of Bulletin Publishing Corporation and Philippine Telecommunications Investment Corporation, respectively. The Court concluded in the two cases that the shares, although registered in the names of cronies and nominees of Marcos, were part of the ill-gotten wealth of the dictator and were subject to forfeiture.

It must be emphasized that in the preceding cases, the Court noted the grand schemes employed by Marcos and his supporters to unlawfully amass wealth and to conceal their transgressions. In *Yuchengco,* it declared:

> In *PCGG v. Peña*, this Court, describing the rule of Marcos as a "well-entrenched plundering regime" of twenty years, noted the "magnitude of the past regime's 'organized pillage' and the ingenuity of the plunderers and pillagers with the assistance of the experts and best legal minds available in the market." The evidence presented in this case reveals one more instance of this grand scheme. This Court – guardian of the high standards and noble traditions of the legal profession – has thus before it an opportunity to undo[,] even if only to a certain extent, the damage that has been done.[92] (citations omitted)

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[88] *Republic v. Sandiganbayan*, 453 Phil. 1059 (2003).
[89] 686 Phil. 980 (2012).
[90] 512 Phil. 425 (2005).
[91] 515 Phil. 1 (2006).
[92] Id. at 48-49.

In addition to the plunder of the public coffers, Marcos was harshly condemned by this Court for the human rights abuses committed during the Martial Law period.[93] In *Mijares v Ranada, et al.*,[94] it stated:

> Our martial law experience bore strange unwanted fruits, and we have yet to finish weeding out its bitter crop. While the restoration of freedom and the fundamental structures and processes of democracy have been much lauded, according to a significant number, the changes, however, have not sufficiently healed the colossal damage wrought under the oppressive conditions of the martial law period. **The cries of justice for the tortured, the murdered, and the *desaparecidos* arouse outrage and sympathy in the hearts of the fair-minded,** yet the dispensation of the appropriate relief due them cannot be extended through the same caprice or whim that characterized the ill-wind of martial rule. The damage done was not merely personal but institutional, and the proper rebuke to the iniquitous past has to involve the award of reparations due within the confines of the restored rule of law.
>
> The petitioners in this case are prominent victims of human rights violations who, **deprived of the opportunity to directly confront the man who once held absolute rule over this country, have chosen to do battle instead with the earthly representative, his estate.**[95] (Emphasis supplied)

Marcos himself was severely criticized for abuses he had **personally** committed while in power. For instance, he was found to have unlawfully exercised his authority for personal gain in the following cases: (a) *Tabuena v. Sandiganbayan*,[96] in which he ordered the general manager of the Manila International Airport Authority to directly remit to the Office of the President the amount owed by the agency to the Philippine National Construction Corporation; (b) *Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Desierto*,[97] in which Marcos made a marginal note prohibiting the foreclosure of the mortgaged assets of Mindanao Coconut Oil Mills and waiving the liabilities of the corporation and its owners to the National Investment and Development Corporation; and (c) *Republic v. Tuvera*,[98] in which Marcos himself granted a Timber License Agreement to a company owned by the son of his longtime aide, in violation of the Forestry Reform Code and Forestry Administrative Order No. 11.

Marcos was likewise deemed **personally** responsible for the corruption of the judicial process in *Galman v. Sandiganbayan*.[99] Affirming the findings of a commission created to receive evidence on the case, the Court stated:

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[93] *See Contado v. Tan,* 243 Phil. 546 (1988).
[94] 495 Phil. 372 (2005).
[95] Id. at 372.
[96] 335 Phil. 795 (1997).
[97] 664 Phil. 16 (2011).
[98] 545 Phil. 21 (2007).
[99] 228 Phil. 42 (1986).

> The Court adopts and approves the Report and its findings and holds on the basis thereof and of the evidence received and appreciated by the Commission and duly supported by the facts of public record and knowledge set forth above and hereinafter, that **the then President (code named Olympus) had stage-managed in and from Malacanang Palace "a scripted and pre-determined manner of handling and disposing of the Aquino-Galman murder case;" and that "the prosecution in the Aquino Galman case and the Justices who tried and decided the same acted under the compulsion of some pressure which proved to be beyond their capacity to resist",** and which not only prevented the prosecution to fully ventilate its position and to offer all the evidences which it could have otherwise presented, but also pre-determined the final outcome of the case" of total absolution of the twenty-six respondents accused of all criminal and civil liability.
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> The record shows suffocatingly that from beginning to end, **the then President used, or more precisely, misused the overwhelming resources of the government and his authoritarian powers to corrupt and make a mockery of the judicial process in the Aquino-Galman murder cases**. xxx
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> Indeed, the secret Malacañang conference at which the authoritarian President called together the Presiding Justice of the Sandiganbayan and Tanodbayan Fernandez and the entire prosecution panel headed by Deputy Tanodbayan Herrera and told them how to handle and rig (moro-moro) the trial and the close monitoring of the entire proceedings to assure the pre-determined ignominious final outcome are without parallel and precedent in our annals and jurisprudence.[100] (Emphasis supplied)

Because of the abuses committed, the Court condemned the Marcos years as a "dark chapter in our history,"[101] a period of "national trauma"[102] dominated by a "well-entrenched plundering regime,"[103] which brought about "colossal damage wrought under the oppressive conditions of the Martial Law period."[104] The attempt by the dictator to return to the country after the EDSA Revolution was even described by the Court as "the case of a dictator forced out of office and into exile after causing twenty years of political, economic and social havoc in the country."[105]

The foregoing pronouncements are considered part of the legal system of the Philippines[106] and must be considered binding, since they are integral parts of final and immutable judgments. It may be presumed that the Court made the above declarations only after a judicious consideration of the evidence and the applicable law. Consequently, those declarations cannot be

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[100] Id. at 71-83.
[101] *See Heirs of Licaros v. Sandiganbayan*, 483 Phil. 510, 524 (2004).
[102] *See Republic v. Tuvera*, supra note 98, p. 61.
[103] See *PCGG v. Peña*, 243 Phil. 93, 115 (1988).
[104] *Mijares v. Ranada*, supra note 94, p. 372.
[105] *Marcos v. Manglapus,* supra note 1, at 492.
[106] CIVIL CODE, Article 8.

questioned, reversed, or disregarded without running afoul of the doctrine of immutability of judgment. This doctrine of finality of judgments applies even to the highest court of the land.[107]

The claim that judgment has not been rendered against Marcos for the plunder and the atrocities committed under his regime is belied by the declarations of this very Court. In his Separate Opinion in *Olaguer v. Military Commission No. 34*,[108] former Chief Justice Claudio Teehankee wrote of our nation's history during the Martial Law regime, and it would be well to recall his words:

> It was a long and horrible nightmare when our people's rights, freedoms and liberties were sacrificed at the altar of "national security" even though it involved nothing more than the President-dictator's perpetuation in office and the security of his relatives and some officials in high positions and their protection from public accountability of their acts of venality and deception in government, many of which were of public knowledge.
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> x x x x
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> The treacherous assassination on August 21, 1983 of the martyred Benigno S. Aquino, Jr., within minutes of his arrival at the Manila International Airport, although ringed with 2,000 soldiers, shocked and outraged the conscience of the nation. After three years of exile following almost eight years of detention since martial law, Aquino, although facing the military commission's predetermined death sentence, *supra*, yet refused proper travel documents, was returning home "to strive for genuine national reconciliation founded on justice." The late Senator Jose W. Diokno who passed away this year was among the first victims of the martial law *coup d'etat* to be locked up with Senator Aquino. In March, 1973, all of their personal effects, including their eyeglasses were ominously returned to their homes. Their wives' visitation privileges were suspended and they lost all contact for over a month. It turned out that Aquino had smuggled out of his cell a written statement critical of the martial law regime. In swift retribution, both of them were flown out blindfolded to the army camp at Fort Laur in Nueva Ecija and kept in solitary confinement in dark boarded cells with hardly any ventilation. When their persons were produced before the Court on *habeas corpus* proceedings, they were a pitiable sight having lost about 30 to 40 lbs. in weight. Senator Diokno was to be released in September, 1974 after almost two years of detention. No charges of any kind were ever filed against him. His only fault was that he was a possible rival for the presidency.
>
> Horacio Morales, Jr., 1977 TOYM awardee for government service and then executive vice-president of the Development Academy of the Philippines, was among the hard-working government functionaries who had been radicalized and gave up their government positions. Morales went underground on the night he was supposed to receive his TOYM award, declaring that "(F)or almost ten years, I have been an official in the reactionary government, serviced the Marcos dictatorship and all that it stands for, serving a ruling system that has brought so much

[107] *Government Service Insurance System v. Group Management Corp.*, 666 Phil. 277 (2011).
[108] 234 Phil. 144 (1987).

suffering and misery to the broad masses of the Filipino people. (I) refuse to take any more part of this. I have had enough of this regime's tyranny and treachery, greed and brutality, exploitation and oppression of the people," and "(I)n rejecting my position and part in the reactionary government, I am glad to be finally free of being a servant of foreign and local vested interest. I am happy to be fighting side by side with the people." He was apprehended in 1982 and was charged with the capital crime of subversion, until he was freed in March, 1986 after President Corazon C. Aquino's assumption of office, together with other political prisoners and detainees and prisoners of conscience in fulfillment of her campaign pledge.

Countless others forfeited their lives and stand as witnesses to the tyranny and repression of the past regime. Driven by their dreams to free our motherland from poverty, oppression, iniquity and injustice, many of our youthful leaders were to make the supreme sacrifice. To mention a few: U.P. Collegian editor Abraham Sarmiento, Jr., worthy son of an illustrious member of the Court pricked the conscience of many as he asked on the front page of the college paper: *Sino ang kikibo kung hindi tayo kikibo? Sino ang kikilos kung hindi tayo kikilos? Kung hindi ngayon, kailan pa?* He was locked up in the military camp and released only when he was near death from a severe attack of asthma, to which he succumbed. Another TOYM awardee, Edgar Jopson, an outstanding honor student at the Ateneo University, instinctively pinpointed the gut issue in 1971 — he pressed for a "non-partisan Constitutional Convention;" and demanded that the then president-soon-to-turn dictator "put down in writing" that he was not going to manipulate the Constitution to remove his disqualification to run for a third term or perpetuate himself in office and was called down as "son of a grocer." When as he feared, martial law was declared, Jopson went underground to continue the struggle and was to be waylaid and killed at the age of 34 by 21 military troops as the reported head of the rebel movement in Mindanao. Another activist honor student leader, Emmanuel Yap, son of another eminent member of the Court, was to disappear on Valentine's Day in 1976 at the young age of 24, reportedly picked up by military agents in front of Channel 7 in Quezon City, and never to be seen again.

One of our most promising young leaders, Evelio B. Javier, 43, unarmed, governor of the province of Antique at 28, a Harvard-trained lawyer, was mercilessly gunned down with impunity in broad daylight at 10 a.m. in front of the provincial capitol building by six mad-dog killers who riddled his body with 24 bullets fired from M-16 armalite rifles (the standard heavy automatic weapon of our military). He was just taking a breather and stretching his legs from the tedious but tense proceedings of the canvassing of the returns of the presidential snap election in the capitol building. This was to be the last straw and the bloodless EDSA revolt was soon to unfold. The Court in *Javier vs. Comelec*, through Mr. Justice Cruz, "said these meager words in tribute to a fallen hero who was struck down in the vigor of his youth because he dared to speak against tyranny. Where many kept a meekly silence for fear of retaliation, and still others feigned and fawned in hopes of safety and even reward, he chose to fight. He was not afraid. Money did not tempt him. Threats did not daunt him. Power did not awe him. His was a singular and all-exacting obsession: the return of freedom to his country. And though he fought not in the barricades of war amid the sound and smoke of shot and shell, he was a soldier nonetheless, fighting valiantly for the liberties of his people against the enemies of his

> race, unfortunately of his race too, who would impose upon the land a perpetual night of dark enslavement. He did not see the breaking of the dawn, sad to say, but in a very real sense Evelio B. Javier made that dawn draw nearer because he was, like Saul and Jonathan, 'swifter than eagles and stronger than lions. "[109] (Citations omitted)

The pronouncements of the Court on this matter must be respected and considered conclusive. Hence, while Marcos may have evaded a criminal proceeding by choosing to go on exile after the EDSA Revolution, the atrocities committed against the Filipino people during his regime must be remembered. Our declarations on this matter cannot be disregarded or forgotten, as Chief Justice Teehankee reminded us in *Olaguer:*

> **The greatest threat to freedom is the shortness of human memory. We must note here the unforgettable and noble sacrifices of the countless brave and patriotic men and women who feel as martyrs and victims during the long dark years of the deposed regime.** In vacating the death sentence imposed on the petitioners who survived the holocaust, we render them simple justice and we redeem and honor the memory of those who selflessly offered their lives for the restoration of truth, decency, justice and freedom in our beloved land.[110] (Emphasis supplied)

> *3. The President may not contradict or render ineffective the denunciations, or the policies and principles enunciated in the foregoing statutes and jurisprudence.*

It is the obligation of the President to give effect to the pronouncements of the Legislature and the Judiciary as part of his duty to faithfully execute the laws. At the very least, the President cannot authorize an act that runs counter to the letter and the spirit of the law.

In this case, the foregoing statutes and jurisprudence condemning Marcos and his regime effectively prohibit the incumbent President from granting him any form of tribute or honor. The President's discretion in this matter is not unfettered. **Contrary to the assertions of respondents, the President cannot arbitrarily and whimsically decide that the acts attributed to Marcos during Martial Law are irrelevant, solely because "he possessed the title to the presidency until his eventual ouster from office."**[111]

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[109] Id. at 173-177.
[110] Id. at 177.
[111] Public Respondents' Memorandum with Prayer to Lift Status Quo Ante Order, (hereinafter Public Respondents' Memorandum), p. 106.

Indeed, it would be the height of absurdity for the Executive branch to insist on paying tribute to an individual who has been condemned by the two other branches of government as a dictator, a plunderer, and a human rights violator. Whether Marcos is to be buried in the LMB as a hero, soldier, or former President is of little difference. The most important fact is that the burial would accord him honor. For the Court to pretend otherwise is to sustain a delusion, as this controversy would not have arisen if not for this reality.

A state of affairs that would allow Marcos to reap any accolade or tribute from the state using public funds and property would obviously contradict the laws and judicial findings described above. Clearly, there is more than sufficient basis to reject the proposed burial.

B. The AFP does not have the power to determine which persons are qualified for interment in the Libingan.

The argument of respondents that the burial is permitted under AFP Regulations 161-375 is unavailing, as the AFP does not have the authority to select which persons are qualified to be buried in the LMB. For this reason, the enumeration contained in AFP Regulations 161-375 must be deemed invalid.

In Proclamation No. 208,[112] then President Marcos reserved a certain parcel of land in Taguig – the proposed site of the LMB – for "national shrine purposes." This parcel of land was placed "under the administration" of the National Shrines Commission (NSC). The NSC was later transferred to the Department of National Defense (from the Department of Education) and then abolished through the Integrated Reorganization Plan. The functions of the former NSC were then transferred to the National Historical Institute (NHI).

On 26 January 1977, Presidential Decree No. (P.D.) 1076[113] created the Philippine Veterans Affairs Office (PVAO) under the Department of National Defense. The PVAO was tasked to, among others, "administer, maintain and develop military memorials and battle monuments proclaimed as national shrines." P.D. 1076 also abolished the NHI and transferred its functions to the PVAO. The transferred functions pertained to military memorials, including the authority to "administer" the LMB.

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[112] PROCLAMATION NO. 208, *Excluding from the operation of Proclamation No. 423, dated July 12, 1957, which established the Fort Bonifacio Military Reservation a certain portion of the land embraced therein situated in the Municipality of Taguig, Province of Rizal, and reserving the same for national shrine purposes*, 28 May 1967.

[113] PRESIDENTIAL DECREE NO. 1076, *Amending Part XII (Education) and Part XIX (National Security) of the Integrated Reorganization Plan*, 26 January 1977.

The authority of the PVAO to administer, maintain and develop the *LMB* pertains purely to the management and care of the cemetery. Its power does not extend to the determination of which persons are entitled to be buried there. **This authority pertains to Congress, because the power to deal with public property, including the right to specify the purposes for which the property may be used, is legislative in character.**[114] Accordingly, the provision in AFP Regulations 161-375 enumerating the persons qualified to be interred in the LMB cannot bind this Court.

At any rate, the AFP Regulations cannot be considered in isolation. As part of the legal system, administrative issuances must be interpreted and implemented in a manner consistent with statutes, jurisprudence, and other rules.[115] In the same manner, the purported discretion of the President to determine the persons who may be interred in the LMB must be considered limited by statutes and judicial decisions.[116]

Since the proposed interment of Marcos in the *LMB* runs counter to law as explained in the preceding section, AFP Regulations 161-375 must be interpreted to mean that Marcos is specifically disqualified from being buried in that cemetery. Only by adhering to this interpretation can the Court ensure that the issuance is in harmony with other existing laws. Consequently, we cannot choose to implement AFP Regulations 161-375 exclusively while disregarding the statutes and jurisprudence referred to above.

C. The burial cannot be justified by mere reference to the President's residual powers; it is not unfettered, and such power can only be exercised in conformity with the entire Constitution.

During the oral arguments, respondents attempted to justify the decision of the President to allow the burial primarily on the basis of his residual power.[117] Citing *Marcos v. Manglapus*[118] *and Sanlakas v Executive Secretary,*[119] they argued that the President is vested with powers other than those enumerated in the Constitution and statutes, and that these powers are implicit in the duty to safeguard and protect the general welfare.[120]

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[114] *Rabuco v. Villegas,* 154 Phil. 615 (1974).
[115] Civil Code, Article 7.
[116] See *Almario v Executive Secretary*, 714 Phil. 127 (2013).
[117] TSN, 7 September 2016, pp. 11-12.
[118] 258 Phil. 479 (2008).
[119] *Sanlakas v. Reyes*, 466 Phil. 482 (2004).
[120] TSN, 7 September 2016, p. 11.

It must be emphasized that the statement in *Marcos v. Manglapus* acknowledging the **"President's residual power to protect the general welfare of the people" was not unconditional.** The Court, in fact, explicitly stated that **only acts "not forbidden" by the Constitution or the laws were permitted** under this concept:

> To the President, the problem is one of balancing the general welfare and the common good against the exercise of rights of certain individuals. **The power involved is the President's residual power to protect the general welfare of the people. It is founded on the duty of the President, as steward of the people. To paraphrase Theodore Roosevelt, it is not only the power of the President but also his duty to do anything not forbidden by the Constitution or the laws that the needs of the nation demand** [See Corwin, supra, at 153]. It is a power borne by the President's duty to preserve and defend the Constitution. It also may be viewed as a power implicit in the President's duty to take care that the laws are faithfully executed [see Hyman,The American President, where the author advances the view that an allowance of discretionary power is unavoidable in any government and is best lodged in the President].[121] (Emphasis supplied)

The Court in that case also reiterated the underlying principles that must guide the exercise of presidential functions and powers, residual or otherwise:

> Admittedly, **service and protection of the people, the maintenance of peace and order, the protection of life, liberty and property, and the promotion of the general welfare** are essentially ideals to guide governmental action. But such does not mean that they are empty words. Thus, in the exercise of presidential functions, in drawing a plan of government, and in directing implementing action for these plans, or from another point of view, in making any decision as President of the Republic, the President has to consider these principles, among other things, and adhere to them.[122] (Emphasis supplied)

Clearly, the residual power of the President cannot be used to justify acts that are contrary to the Constitution and the laws. To allow him to exercise his powers in disregard of the law would be to grant him unbridled authority in the guise of inherent power. Clearly, that could not have been the extent of the residual powers contemplated by the Court in *Marcos v. Manglapus.*

To reiterate, the President is not above the laws but is, in fact, obliged to obey and execute them.[123] This obligation is even more paramount in this case because of historical considerations and the nature of the norms

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[121] Supra note 105, p. 504.
[122] Id. at 503.
[123] Supra note 62.

involved, i.e., peremptory norms of human rights that are enshrined both in domestic and international law.

III.

TO ALLOW MARCOS TO BE BURIED IN THE *LIBINGAN NG MGA BAYANI* WOULD VIOLATE INTERNATIONAL HUMAN RIGHTS LAW AS AN INDEPENDENT SOURCE OF STATE OBLIGATIONS, AND WOULD NEGATE THE REMEDIES PROVIDED BY REPUBLIC ACT NO. 10368.

An examination of the vast body of international human rights law establishes a duty on the part of the state to provide the victims of human rights violations during the Marcos regime a range of effective remedies and reparations. This obligation is founded on the state's duty to ensure respect for, and to protect and fulfill those rights.

Allowing the proposed burial of Marcos in the LMB would be a clear violation of the foregoing international law obligations. Consequently, the planned interment must be enjoined in light of Article II, Section II of the Constitution, the established principle of *pacta sunt servanda,* and the fact that the state has already acknowledged these duties and incorporated them in our domestic laws.

A. Under international law, the Philippines is obligated to provide effective remedies, including holistic reparations, to human rights victims.

The obligation of the Philippines to respect, protect, and fulfill human rights has its legal basis in international agreements and customary international law. As will be discussed, this obligation includes the duty to provide effective remedies, which, in turn, incorporates the grant of holistic reparations to victims of human rights violations.

1. The Philippines is bound to respect, protect, and fulfill human rights under its treaty obligations and customary international law.

As a party to the United Nations (UN) Charter[124] and the International Covenant on Civil and Political Rights (ICCPR),[125] the Philippines is bound

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[124] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI [hereinafter UN Charter].

[125] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171 [hereinafter ICCPR].

to comply in good faith with our obligations therein pursuant to the principle of *pacta sunt servanda.*[126] These treaties form the normative foundation of the duty of the state to provide effective remedies and reparations to victims of human rights violations.

The promotion, protection and fulfilment of human rights norms are obligations woven throughout the entire UN Charter, beginning with the Preamble which "reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[127] In line with this statement, the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"[128] was identified as one of the basic purposes of the United Nations.[129] These principles became part of a concrete obligation via Article 56 of the Charter, as states were mandated to take joint and separate action in cooperation with the UN for the achievement of its purposes.[130]

On the other hand, the ICCPR obligates states parties to respect and ensure the human rights of all individuals within its territory. Article 2(1) of this covenant provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Interpreting this provision, the United Nations Human Rights Committee[131] (UNHRC) issued General Comment No. 31[132] declaring that the obligation in Article 2(1) is owed not just to individuals as the rights holders under the ICCPR, but to every state party therein.[133] The duty to respect basic human rights is likewise considered an *erga omnes* obligation

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[126] In *Government of the United States of America v. Purganan*, G.R. No. 148571, 17 December 2002, the Court explained the principle of *pacta sunt servanda* as follows:

> Article 2, Section 2, of the 1987 Philippine Constitution provides for an adherence to general principles of international law as part of the law of the land. One of these principles is the basic rule of pacta sunt servanda or the performance in good faith of a state's treaty obligations. Pacta sunt servanda is the foundation of all conventional international law, for without it, the superstructure of treaties, both bilateral and multilateral, which comprise a great part of international law, could well be inconsequential.

[127] UN CHARTER, supra note 124, Preamble.
[128] Id., Art. 55.
[129] Id.
[130] Id., Art. 56.
[131] Pursuant to Article 40 of the ICCPR, the UN HRC is described as the official body that monitors compliance with the ICCPR.
[132] UN Human Rights Committee (HRC), *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 [hereinafter UNHRC General Comment No. 31].
[133] Id., par. 2.

in view of the importance of the rights involved.[134] In other words, it is an obligation towards the international community as a whole.[135]

Further establishing the obligation to respect human rights is the Universal Declaration of Human Rights (UDHR) which defines and codifies human rights norms provided for in the UN Charter. Considered the most important human rights document in the world,[136] the UDHR enumerates the human rights that states are bound to respect, including the right to life, liberty, and security of persons;[137] the prohibition against torture and arbitrary arrest or detention;[138] and the right to freedom from interference with one's privacy, family, home, or correspondence.[139] While not a legally binding treaty, the UDHR is generally considered a codification of the customary international law on human rights.[140] Hence, it binds all nations including the Philippines.

The foregoing instruments clearly create rights that every state is obliged to recognize and respect. To give effect to these entitlements, a violation of protected rights brings about the obligation on the part of the offending state to provide a corresponding remedy.

2. The duty to respect, protect, and fulfill human rights includes the obligation to provide an effective remedy.

The international guarantee of a remedy for human rights violations is well established[141] as one of the bedrock principles of contemporary international human rights law.[142] *Ubi ius ibi remedium* – "where there is a right, there is a remedy."[143] It is settled that gross human rights violations give rise to a right to remedy for victims, which in turn implies a duty on the part of states to provide the same.[144] This obligation is based on the principle that failure to provide an adequate remedy for violations renders the duty to respect the rights involved meaningless and illusory.[145]

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[134] *Case concerning the Barcelona Traction Light and Power Company, Ltd.* (Second Phase, Belgium v. Spain), I.C.J. Reports 1970, p. 32 [hereinafter Barcelona Traction Case].
[135] Id.
[136] Hurst Hannum, *The Universal Declaration of Human Rights*, *in* THE ESSENTIALS OF HUMAN RIGHTS 351 (Rhona K.M. Smith and Christian van den Anker eds., 2005).
[137] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 3 [hereinafter UDHR].
[138] Id., Arts. 4, 5, 9.
[139] Id., Art. 12.
[140] Hannum, supra note 136.
[141] DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 37 (1999 ed.).
[142] Sonja B. Starr, *Rethinking "Effective Remedies:" Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 698 (2008), p. 693.
[143] Id.; Black's Law Dictionary 6th edn. (1990), 1120.
[144] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: REPARATIONS PROGRAMMES, at 7, U.N. Sales No. E.08.XIV.3 (2008); SHELTON, supra note 141, at 15.
[145] DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 61 (2015 ed.).

Under Treaties

International human rights law instruments, both global and regional, impose upon states the duty not merely to offer a remedy, but also to ensure that the remedy provided is "effective." This rule is clearly demonstrated in the provisions discussed below.

It is an accepted principle that "[e]veryone 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."[146] This rule is further developed in Article 2 of the ICCPR, which provides:

> 3. 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;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.[147]

Explaining the nature of the obligations imposed by this provision, the UNHRC stated that the grant of reparations to individual victims is a central component of this legal obligation.[148]

A similar guarantee of effective remedies is included in the Convention on the Elimination of Racial Discrimination (CERD),[149] while the Convention against Torture and other Cruel, Inhuman or Degrading

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[146] UDHR, supra note 137, art. 8.

[147] ICCPR, supra note 125, Art. 2.

[148] In General Comment No. 31, supra note 132, the UNHRC explains:

> Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged.

[149] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, Vol. 660, p. 195 [hereinafter CERD]. Article 6 of this treaty provides:

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Treatment or Punishment (Convention Against Torture)[150] refers to an equivalent right in the form of redress and compensation.[151] This right to redress was clarified in General Comment No. 3[152] of the UN Committee Against Torture (UNCAT) as a comprehensive reparative concept, which embraces both "effective remedy" and "reparation." Redress "entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention."[153] The committee also emphasized that reparative measures must take into account the particular needs of the victims and the gravity of the violations committed against them.[154]

Even regional instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms,[155] the American Convention on Human Rights,[156] and the Protocol to the African Charter,[157] provide for effective remedies for human rights violations.

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[150] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, Vol. 1465, p. 85 [hereinafter CAT].

[151] Article 14 of the CAT states:

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

[152] UN Committee Against Torture (CAT), *General Comment No. 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties*, 13 December 2012 [hereinafter General Comment No. 3].

[153] Id., par. 2.

[154] General Comment No. 3, par. 6 states:

> Reparation must be adequate, effective and comprehensive. States parties are reminded that in the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate in relation to gravity of the violations committed against them. The Committee emphasi[z]es that the provision of reparation has an inherent preventive and deterrent effect in relation to future violations.

[155] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 [hereinafter ECPHR]. Article 13 of the Convention provides:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[156] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose," Costa Rica*, 22 November 1969 [hereinafter ACHR]. Article 63 of the treaty talks about remedies and compensation, as follows:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

[157] African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003. Article 27 of the Protocol states:

> If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

Under Customary International Law

At the same time, customary international law, as discerned from the law of state responsibility and the progressive development of human rights treaty law, is further solidifying the legal basis of the right to remedy of victims of human rights violations.[158]

The Articles on the Responsibility of States for Internationally Wrongful Acts codified by the International Law Commission (ILC Articles) provides that state responsibility arising from an internationally wrongful act[159] gives rise to the duty to make reparations. Under the ILC Articles, a state held liable for the breach of an obligation may be required to perform the following acts: (1) cessation of the violation,[160] (2) guarantee of non-repetition,[161] and (3) full reparation for the injury caused.[162]

Because of the emergence of human rights in international law, [163] the duty to remedy a breach under the ILC Articles is deemed owed not only to the injured state as traditionally imagined, but also to individuals whose human rights have been impaired by the breach under a state's jurisdiction.[164] The right to effective remedies and just reparations for individual victims may be culled from the obligations of the state to cease violations, guarantee non-repetition and make full reparation.[165] This right is further affirmed by Article 33 of the ILC Articles, which declares that the obligation of the state to provide reparations is "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."[166]

To further substantiate the existence of a rule of customary international law on this matter, two declarations approved by the UNHRC and the UN General Assembly, respectively, may be cited.

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[158] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, supra note 144, at 5-6.
[159] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), Chp.IV.E.1 , Art. 1 [hereinafter ILC Articles].
[160] ILC Articles, Art. 30(a).
[161] Id., Art. 30(b).
[162] Id., Art. 31(a).
[163] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, supra note 144, at 6.
[164] UN Sub-Commission on the Promotion and Protection of Human Rights, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report / submitted by Theo van Boven, Special Rapporteur.*, 2 July 1993, E/CN.4/Sub.2/1993/8, paragraphs 43-46 [hereinafter Van Boven Report]; See also Antoine Buyse, *Lost and regained? Restitution as a remedy for human rights violations in the context of international law,* 68 HEIDELBERG J. OF I. L. 129, 134-135 (2008), wherein the author posits as follows: "The ICJ in its Advisory Opinion *Reparation for Injuries Suffered in the Service of the United Nations* recognized that a nonstate entity – the international organization of the United Nations – had the right to claim reparation at the international level from a state. Extending this, one could argue that if other new subjects of international law arise, they too can claim. Individuals have been recognized as being such subjects of international law. To the extent that they are accorded rights under international law, they should therefore have the possibility to claim."
[165] Van Boven Report, supra note 164, par. 45.
[166] ILC Articles, supra note 159, art. 33(2).

The Declaration on the Protection of All Persons from Enforced Disappearance[167] issued by the UNHRC is a body of principles concerning enforced disappearances, including a provision for the right of victims of acts of enforced disappearance to adequate compensation and complete rehabilitation.[168]

On the other hand, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[169] offers guidelines in relation to abuse of economic and political power. Through this declaration, the UN General Assembly recognized that millions of people suffer harm as a result of crime and abuse of power, and that these victims are entitled to prompt redress and access to the mechanisms of justice.[170]

These instruments and customary norms of international human rights law clearly provide for the duty to grant effective remedies to a victim of violations. More than being an essential component of other substantive norms, they create a distinct obligation; hence, the failure to provide effective remedies is an additional and independent violation of internationally recognized human rights.[171]

Defining Effective Remedies

Because an exact definition of an *effective* remedy is not provided by the foregoing international instruments, it is necessary to examine the interpretations of authorized bodies, as well as the theory and practice of international courts, in order to determine the exact scope of the obligation.[172]

As the succeeding discussion will show, the duty to provide an "effective remedy" does not embrace a singular concept. Rather, that duty embodies a variety of measures more aptly referred to as holistic "reparations."

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[167] UN Commission on Human Rights, *Declaration on the Protection of All Persons from Enforced Disappearance.*, 28 February 1992, E/CN.4/RES/1992/29.

[168] Article 19 of the Declaration provides:

> The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation.

[169] UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: resolution / adopted by the General Assembly*, 29 November 1985, A/RES/40/34.

[170] The *Declaration of Basic Principles of Justice for Victims of Crime* (par. 4) states:

> Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

[171] SHELTON, supra note 141, at 37.

[172] Id.

3. The obligation of the state to provide an effective remedy incorporates the duty to offer holistic reparations.

The right to effective remedy is comprised of two dimensions: procedural and substantive.[173] As explained by the UNCAT in General Comment No. 3:

> The obligations of States parties to provide redress under Article 14 are two-fold: procedural and substantive. To satisfy their **procedural obligations,** States parties shall **enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies**, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the **substantive level**, States parties shall ensure that victims of torture or ill-treatment obtain **full and effective redress and reparation**, including **compensation** and the means for as **full rehabilitation** as possible.[174] (Emphasis supplied)

In other words, the procedural dimension refers to the legal means by which alleged human rights violations are addressed by an impartial authority; the substantive dimension involves prompt and effective reparation for the harm suffered.[175]

The right to reparations is therefore but one side of an effective remedy, and is a crucial element in delivering justice to victims.[176] As such, the duty to provide reparations is as binding as the duty to provide effective remedies. This principle is clearly enunciated in international instruments, to the extent that it has achieved a non-derogable status.[177] As the International Criminal Court (ICC) in *Prosecutor v. Thomas Lubanga Dyilo* (Lubanga Case)[178] ratiocinated:

> The Chamber accepts that the **right to reparations is a well-established and basic human right, that is enshrined in universal and regional**

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[173] Diana Contreras-Garduño, *Defining Beneficiaries of Collective Reparations: the Experience of the IACtHR*, 4 AMSTERDAM LAW FORUM, 43 (2012).
[174] General Comment No. 3, supra note 152, par. 5.
[175] Contreras-Garduño, supra note 173, at 43.
[176] Id.
[177] UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, par. 14 [hereinafter General Comment No. 29] which states: "Article 2, paragraph 3, of the Covenant (ICCPR) requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective."
[178] *The Prosecutor v. Thomas Lubanga Dyilo,* ICC-01/04-01/06-803-tEN, 14 May 2007.

> **human rights treaties, and in other international instruments,** including the UN Basic Principles; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime; the Nairobi Declaration; the Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa; and the Paris Principles. These international instruments, as well as certain significant human rights reports, have provided guidance to the Chamber in establishing the present principles.[179] (Emphasis supplied)

Understanding Reparations

The term *reparation* is derived from the word *repair*. Thus, it is often perceived as making of amends by providing recompense to persons who suffered loss or harm due to gross human rights violations.[180] Within the context of State responsibility, it pertains to a series of actions expressing the State's acknowledgment and acceptance of its responsibility in consequence of the gross violations. Reparation therefore denotes all types of redress for victims of human rights violations,[181] all seeking to make them whole again to the fullest extent possible. The *Chorzow Factory* case[182] decided by the Permanent Court of International Justice (PCIJ) in 1928 provides the leading definition of the concept:

> Reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[183]

Reparation, as a means to provide redress for past violations, goes to the very heart of human protection. It has been recognized as a "vital process in the acknowledgment of the wrong done to the victim, and a key component in addressing the complex needs of victims in the aftermath of violations of international human rights and humanitarian law."[184] As explained by the Inter-American Commission of Human Rights (IACtHR) in its Report on the Implementation of the Justice and Peace Law:[185]

> The [Inter-American Court of Human Rights] considers that, beyond the established legal system, the State has a key role and a primary

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[179] Id., par. 185.
[180] Jeremy Sarkin, *Providing reparations in Uganda: Substantive recommendations for implementing reparations in the aftermath of the conflicts that occurred over the last few decades*, 14 AHRLJ 526, 534-535 (2014).
[181] Van Boven Report, supra note 164, at 7.
[182] *Factory At Chorzów, Germany v Poland,* Judgment, Claim for Indemnity, Merits, Judgment No 13, (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928), 13 September 1928.
[183] Id., par. 124.
[184] Sarkin, supra note 180, at 528.
[185] Organization of American States (OAS) Inter-American Commission on Human Rights, *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*, OEA/Ser.L/V/II, Doc. 3, 2 October 2007 [hereinafter Report on the Implementation of the Justice and Peace Law].

> responsibility to guarantee that victims of crimes against international law will have effective access under conditions of equality to measures of reparation, consistent with the standards of international law governing human rights. Access to reparations for victims of crimes against humanity must never be subject exclusively to determination of the criminal liability of the perpetrators, or the prior disposal of their personal goods, licit or illicit.[186]
>
> x x x x
>
> The State must play a primary, rather than a secondary, role in guaranteeing victims' access to reparations in accordance with the standards of international law.[187]

UN Reparations Principles

The most important text dealing with the concept of reparations is the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Reparations Principles).[188] This text is regarded as the international standard for the provision of reparations around the world.[189]

The UN Reparations Principles was the product of the work of Theodoor Van Boven, who was appointed in 1989 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, to examine the possibility of developing basic principles and guidelines on remedies for gross violations.[190] Van Boven's work resulted in a landmark final report in 1993, also known as the Van Boven Principles, which declared that human rights violations give rise to a right of reparation for victims.[191] These principles attribute the State's duty to make such reparations to its obligation to afford remedies and ensure respect for human rights and fundamental freedoms.[192]

After 15 years of consideration, the UN General Assembly adopted the UN Reparations Principles on 16 December 2005[193] without a vote. While these principles are argued to be soft law, they are considered binding on states because they elucidate the basic standards applicable to reparations

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[186] Id., par. 98.
[187] Id., par. 110 (6).
[188] UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147 [hereinafter UN Reparations Principles].
[189] Sarkin, supra note 180, at 536.
[190] United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1989/13 of 31 August 1989.
[191] Van Boven Report, supra note 164, at par. 137, General Principle No.1.
[192] Id., par. 137, General Principle No. 2.
[193] UN General Assembly Resolution 60/147, 16 December 2005.

internationally and domestically.[194] The number of states in the UN General Assembly that accepted the resolution by consensus likewise indicates the authoritative weight of the principles, and signifies the status of these rules as part of emerging customary international law.[195]

It must be emphasized that the UN Reparations Principles is not a source of new commitments but rather a statement of existing obligations, as it expresses the content of international law on reparations to ensure that this is respected. This view was explicitly set out in the prefatory statement of the principles:

> *Emphasizing* that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms xxx.[196]

Therefore, the state obligation to provide reparations to victims of human right violations – as established in this text – takes its normative character from existing legal obligations under international human rights law. As declared in the Preamble[197] and Parts I[198] and II[199] of the UN

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[194] Sarkin, supra note 180, at 546.
[195] Buyse, supra note 164, at 140.
[196] UN Reparations Principles, supra note 188, at 3.
[197] The Preamble of the UN Reparations Principles states in relevant part:

> *Recalling* the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, xxx
>
> *Recalling* the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, xxx
>
> *Recognizing* that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law[.]

[198] The UN Reparations Principles, supra note 188, Part I, states:

> I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law
>
> 1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:
> (a) Treaties to which a State is a party;
> (b) Customary international law;
> (c) The domestic law of each State.
>
> 2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:
> (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
> (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

Reparations Principles, the underlying framework of this document is grounded on the right to effective remedies enshrined in international human rights law.

"Adequate, effective and prompt reparation for harm suffered" is, in fact, a component of the remedies required to be accorded to victims of gross violations of international human rights law, and serious violations of international humanitarian law.[200] Elaborating on the purpose and scope of reparation, the UN Reparations Principles provides:

> IX. Reparation for harm suffered
>
> 15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.
>
> x x x x
>
> 18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

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cont.

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;
(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

[199] The UN Reparations Principles, supra note 188, Part II, provides:

II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:
(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
(d) Provide effective remedies to victims, including reparation, as described below.

[200] UN Reparations Principles, supra note 188, Part VII.

Holistic Approach to Reparations

Although the PCIJ in the *Chorzow Factory* case[201] declared that the ultimate goal of reparation is *restitutio in integrum,*[202] or the return of the victims to a situation prior to the unlawful conduct, it is acknowledged that human rights violations are impossible to rectify. As aptly stated by Special Rapporteur Van Boven in his final report:

> It is obvious that gross violations of human rights and fundamental freedoms, particularly when they have been committed on a massive scale, are by their nature **irreparable**. In such instances **any remedy or redress stands in no proportional relationship to the grave injury inflicted upon the victims.** It is nevertheless an imperative norm of justice that the responsibility of the perpetrators be clearly established and that the rights of the victims be sustained to the fullest possible extent.[203] (Emphasis supplied)

This view was seconded by Judge A.A. Cançado Trindade of the IACtHR in his Separate Opinion in *Bulacio v. Argentina.*[204] He opined "the harm cannot be erased. Instead, reparations for human rights violations only provide the victims the means to attenuate their suffering, making it less unbearable, perhaps bearable."[205]

These statements reflect the underlying idea that the reparations in the UN Reparations Principles are envisioned to extend beyond the pecuniary or material dimension. Rather, holistic reparation is the key. This conclusion is supported by Principles 19 to 23 of the UN Reparations Principles pertaining to the five forms of full and effective reparation:

> 19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
>
> 20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
>
> (a) Physical or mental harm;
>
> (b) Lost opportunities, including employment, education and social benefits;

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[201] Supra note 182.
[202] Contreras-Garduño, supra note 173, at 43.
[203] Van Boven Report, supra note 164, par. 131.
[204] I/A Court H.R., *Case of Bulacio v. Argentina.* Merits, Reparations and Costs. Judgment of 18 September 2003. Series C No. 100.
[205] Id., Judge A.A.Cançado Trindade (Separate Opinion), Sec. 25.

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Moral damage;

(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:

(a) Ensuring effective civilian control of military and security forces;

(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

(c) Strengthening the independence of the judiciary;

(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

> (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
>
> (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
>
> (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

Clearly, aside from addressing the injuries suffered by victims through financial compensation, reparation also addresses a broader set of issues, through the prevention of future human rights violations. It addresses "democracy, good governance, and building an inclusive political community. Reparations includes recognition, acknowledgment of violations and state responsibility. It can contribute to structural transformation"[206] while also seeking to promote peace and reconciliation.[207] This holistic approach to reparation is followed in other human rights institutions like the UNCAT, the UNHRC, the ICC, the IACtHR and the European Court of Human Rights (ECHR).

General Comment No. 3 of the UNCAT emphasizes that "monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment. The Committee affirms that the provision of only monetary compensation is inadequate for a State party to comply with its obligations under article 14."[208] General Comment No. 31 of the UNHRC likewise notes that "where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."[209]

The holistic approach was likewise applied by the ICC to the Lubanga Case,[210] in which it held that victims of war crimes, crimes against humanity, and genocide have a fundamental right to receive reparations. The trial chamber observed that reparations "go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims."[211] It then explained that reparations must be applied in a broad and flexible manner, so as to allow it to approve the widest possible remedies for violations of the rights of the victims.[212]

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[206] Sarkin, supra note 180, at 542.
[207] Contreras-Garduño, supra note 173, at 41.
[208] General Comment No. 3, supra note 152, par. 9.
[209] UNHRC General Comment No. 31, supra note 132, par. 16.
[210] *The Prosecutor v. Thomas Lubanga Dyilo*, supra note 178.
[211] Id., par. 177.
[212] Id., par. 180.

In *Blazek v. Czech Republic,* the UNHRC declared that a remedy is only effective if it results in adequate measures of reparation granted to victims. It further provided that the approach must be holistic so as to put the needs and interests of the victim at the center of the process with the aim of restoring the latter's dignity.[213]

For its part, the IACtHR made it clear that as a principle of international law, every violation of an international obligation that results in harm creates a duty to make adequate reparation. In this respect, the Court ruled that reparation

> consists in full restitution (*restitutio in integrum*), which includes the re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to guarantee the rights that have been violated and to redress the consequences of the violations. Therefore, the Court has found it necessary to award different measures of reparation in order to redress the damage fully, so that, in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition, have special relevance to the harm caused.[214]

It is noteworthy that the IACtHR has constantly addressed human rights violations of a widespread nature, which can be attributed to the authoritarian regimes and violent conflicts in Latin America during the 1970s and early 1980s.[215] Consequently, IACtHR rulings are particularly relevant to our discussion of the authoritarian Marcos regime.

Lastly, while the ECHR has awarded "just satisfaction" partaking of a pecuniary nature in most of its cases,[216] the intention to provide a holistic approach in providing effective satisfaction can be discerned in its *Vagrancy Cases* against the Belgian Government:

> [I]f the victim, after exhausting in vain the domestic remedies before complaining at Strasbourg of a violation of his rights, were obliged to do so a second time before being able to obtain from the Court just satisfaction, the total length of the procedure instituted by the Convention would scarcely be in keeping with the idea of the effective protection of human rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention.[217]

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[213] UN Human Rights Committee, *Blazek et al. v. The Czech Republic*, Communication No. 847/1999, CCPR/C/72/D/857/1999, 12 July 2001, par. 7.

[214] I/A Court H. R., Case of *Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 01, 2015. Series C No. 298.; *Cf. Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Cruz Sánchez et al. v. Peru,* para. 452.

[215] Contreras-Garduño, supra note 173, at 45, citing C. Medina-Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System*, 1988, p. 369.

[216] Van Boven Report, supra note 164, par. 81 citing the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 50.

[217] Van Boven Report, supra note 164, par. 82, citing European Court of Human Rights, *De Wilde, Ooms and Versijp Cases ("Vagrancy" Cases)*, Judgment of 10 March 1972 (article 50), Series A, vol. 14, par. 16.

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> Nevertheless, the provisions of Article 50 which recognise the Court's competence to grant to the injured party a just satisfaction also cover the case where the impossibility of *restitutio in integrum* follows from the very nature of the injury; indeed common sense suggests that this must be so *a fortiori*.[218]

B. The burial would contravene the duty of the Philippines to provide reparations to victims of human rights violations during the Marcos regime.

It is evident from the foregoing discussion that the Philippines is obligated to provide holistic reparations to victims of human rights violations during Martial Law. In fact, as discussed in the previous section, R.A. 10368 acknowledged the "moral and legal obligation [of the State] to recognize and/or provide reparation to said victims and/or their families for the deaths, injuries, sufferings, deprivations and damages they suffered under the Marcos regime."[219] As stated in the Explanatory Note of House Bill No. 54 – one of the progenitors of R.A. 10368 – this recognition was one of the main features of the law:

> Among the important features of this bill are:
>
> One, Congress recognition that those who have filed a case against the Marcoses before the US Federal District Court in Hawaii and are given favorable judgment are considered human rights violations victims. This is called legislative cognizance.
>
> Two, any person who has secured or can secure a favorable judgment from any court in the country arising from a human rights violation is given a so-called conclusive presumption that he or she is a human rights violation victim.
>
> Three, some ten billion pesos of funds seized from bank accounts and discovered investments of the Marcos family shall be used to compensate the victims; and
>
> Four, an independent Human Rights Victims Compensation Board is created attached to, but not necessarily under the direct supervision f the CHR to ensure the proper disposition of the funds guided by this Act.
>
> No amount of money can really be enough to compensate our living heroes and those survived by their kinds for the democracy that our people are now enjoying. The least we can do though is pass this bill to honor, in our small way, the sacrifices, that they have made for our country.[220]

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[218] Id., par. 20.
[219] RA 10368, Section 2.
[220] Explanatory Note of House Bill 54, introduced by Rep. Lorenzo R. Tanada, III, 15th Congress, First Regular Session.

The law also recognized the binding nature of the Decision of the US Federal District Court of Honolulu, Hawaii,[221] by creating a *conclusive presumption* that the claimants in the case against the Estate of Ferdinand Marcos were human rights violations victims.[222] In that case, compensatory and exemplary damages were awarded to (a) the class plaintiffs who were declared to have been tortured; or (b) the heirs and beneficiaries of those who were summarily executed, or who disappeared while in the custody of Philippine military or paramilitary groups.[223] Several petitioners in the present case were claimants therein and are thus conclusively considered victims of human rights during the Marcos regime.

Both monetary[224] and non-monetary[225] forms of reparations were provided for in R.A. 10368. These measures notwithstanding, the members of the Bicameral Conference Committee emphasized the symbolic value of recognition in acknowledgment of the fact that material forms of reparation are not sufficient to atone for the suffering of the victims of atrocities:

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[221] MDL No. 840, CA No. 86-0390, Human Rights Litigation Against the Estate of Ferdinand E. Marcos.

[222] RA 10368, Section 17.

[223] The Final Judgment in Human Rights Litigation Against the Estate of Ferdinand E. Marcos states in relevant part:

> 1) The Court incorporates herein its Judgment on Liability entered October 20, 1992 and its Order entered December 17, 1992 denying defendant's posttrial motions re liability.
> 2) Judgment for compensatory damages is entered for the below named randomly selected class claims as follows:
> Torture Subclass
> Summary Execution Subclass
> Disappearance Subclass
> 3) Judgment for compensatory damages is entered for the remaining members of the Plaintiff class as follows:
> a) for the remaining Plaintiff subclass of all current citizens of the Republic of the Philippines, their heirs and beneficiaries, who between September 1972 and February 1986 were tortured while in the custody of the Philippine military or para-military groups in the aggregate of $251,819,811.00, to be divided pro rata.
> b) for the remaining Plaintiff Subclass of all current citizens of the Republic of the Philippines, their heirs and beneficiaries, who between September 1972 and February 1986 were summarily executed while in the custody of the Philippine military or para-military groups in the aggregate of $409,191,760.00 to be divided pro rata.
> c) for the remaining Plaintiff Subclass of all current citizens of the Republic of the Philippines, their heirs and beneficiaries, who between September 1972 and February 1986 disappeared (and are presumed dead) while in the custody of the Philippine military or para-military groups in the aggregate of $94,910,640.00 to be divided pro rata.
> 4) Judgment for exemplary damages, to make an example for the public good, is entered in the aggregate of $1,197,227,417.90 to be divided pro rata among all members of the Plaintiff class.

[224] R.A. 10368, Section 4 states:

> SECTION 4. Entitlement to Monetary Reparation. — Any HRVV qualified under this Act shall receive reparation from the State, free of tax, as herein prescribed xxx.

[225] R.A. 10368, Section 5 provides:

> SECTION 5. Nonmonetary Reparation. — The Department of Health (DOH), the Department of Social Welfare and Development (DSWD), the Department of Education (DepEd), the Commission on Higher Education (CHED), the Technical Education and Skills Development Authority (TESDA), and such other government agencies shall render the necessary services as nonmonetary reparation for HRVVs and/or their families, as may be determined by the Board pursuant to the provisions of this Act.

> Sen. Guingona: Page 5, letter (d) "Monetary Compensation refers to financial consideration equivalent to." Then, we changed "economically assessable damage" just to – We just make it "refers to financial consideration extended to human rights violation victims."
>
> Ang rationale dito kasi this one implies – **The present definition implies that the damage – When you're human rights victim, it can be equivalent to a material damage when actually there is no adequate compensation when your human rights are violated. So we just make it just "financial consideration extended to human rights violation victims as defined in this Act."** Ganoon.
>
> Rep. Lagman: Baka instead of financial consideration, maski iyong consideration, ano, eh – **Ah, financial reparation**.
>
> Sen. Guingona: Okay.
>
> Rep. Lagman: Reparation.
>
> Sen. Guingona: Reparation. **Instead of "economically assessable" parang sinasabi mo you[r] right has been violated but that's equivalent to this amount.**[226]
>
> x x x x
>
> Sen. Arroyo: xxx Here, we seemed to be concerned about the physical aspects of human rights, meaning torture and all that. But take for instance, those who were economically depressed, harassed. You mean to say the family of Chino Roces, who lost his entire Manila Times and his family, is not really living in poverty xxx.
>
> **Now they will not ask for compensation but they would want recognition. This is the purpose of recognition. That is why to us that roll of honor is very important. Because to others, they just want to be recognized.**[227] (Emphasis supplied)

Considering the foregoing, the intent is that not only must material reparation be provided by the state to human rights victims, the prohibition against public acts and symbolisms that degrade the recognition of the injury inflicted – although not expressly mentioned in the statute – are likewise included in the obligation of the state. Therefore, while the passage of legislative measures and the provision of government mechanisms in an effort to comply with this obligation are lauded, the State's duty does not end there.

Contrary to the implications of the *ponencia,* the statutes, issuances, and rules enacted by the different branches of government to promote human rights cannot suffice for the purpose of fulfilling the state's obligation to the human rights victims of former President Marcos. These enactments cannot erase the violations committed against these victims, or the failure of the

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[226] Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill 3334 and House Bill No. 5990 (Human Rights Victims Reparation and Compensation Act), 16 January 2013, I-2, pp. 6-7.
[227] Id. at IV-6, p. 7 and I-7, p. 1.

state to give them justice; more important, these enactments cannot negate the further violation of their rights through the proposed burial.

It must be emphasized that the obligation owed by the Philippine government to the victims of human rights violations during Martial Law is distinct from the general obligation to avoid further violations of human rights. As distinct species of obligations, the general duty to prevent further human rights violations cannot offset the right of past victims to full and holistic reparations. Their rights under international law have already been violated; they have already disappeared, been tortured or summarily executed.[228] The government cannot choose to disregard their specific claims and assert that it has fulfilled its obligation to them merely by enacting laws that apply in general to future violations of human rights.

As will be further discussed, victims of human rights violations during the Martial Law regime have a distinct right to holistic reparations, including the grant thereof in symbolic form.

1. Symbolic reparation is an indispensable facet of an adequate reparations regime.

Symbolic forms of reparation are mandated by international law and are considered hallmarks of any reparations regime.[229] Within the framework of the UN Reparations Principles, satisfaction and guarantees of non-repetition are described as *symbolic,* because they involve a greater intangible element.[230] On the other hand, restitution, compensation, and rehabilitation are typically financial or material in character. As earlier explained, a comprehensive and holistic program of reparations is expected to contain aspects of both.[231]

Symbols as sources of meaning

The collective dimension of symbolic reparations is the source of their value.[232] Symbolic reparations extend beyond the victim and their families, and represent a demand for recognition, respect, dignity, and hope for a safe

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[228] *See In re Estate of Ferdinand Marcos, Human Rights Litigation. Hilao v. Estate of Ferdinand Marcos,* 25 F. 3d 1467.

[229] Frederic Megret, *Of Shines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice,* 13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403929 (last accessed 20 September 2016) [Megret].; Frederic Megret, *The International Criminal Court and the Failure to Mention Symbolic Reparations*, 12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275087 [last accessed 20 September 2016] [Megret II].

[230] Megret II, supra note 229, at 3.

[231] Sarkin, supra note 180, at 547.

[232] Megret II, supra note 229, at 6.

future.[233] They assist communities as a whole in dealing with the process of remembering and commemorating the past.[234] In other words, symbolic measures provide moral reparation,[235] which is considered by victims to be of equal or higher importance than material or physical reparation.

The United Nations, in its guidelines for reparation programs for post-conflict states, describes the significance of symbolic reparations in this manner:

> As many recent reparations programmes have been proposed by truth commissions (which have broader mandates and goals than typical judicial instances), they are becoming less like mere compensation mechanisms and are increasingly proposing more complex reparations measures, including **symbolic ones.** Individualized letters of apology signed by the highest authority in Government, sending each victim a copy of the truth commission's report and supporting families to give a proper burial to their loved ones are some of the individual symbolic measures that have been tried with some success in different contexts. Some of the collective symbolic measures that have been tried are renaming public spaces, building museums and memorials, rededicating places of detention and torture, turning them into sites of memory, establishing days of commemoration and engaging in public acts of atonement. Like other reparations measures, symbolic benefits are, at least in part, geared towards fostering recognition. **However, in contrast to other benefits, symbolic measures derive their great potential from the fact that they are carriers of meaning, and therefore can help victims in particular and society in general to make sense of the painful events of the past. Symbolic measures usually turn out to be so significant because, by making the memory of the victims a public matter, they disburden their families from their sense of obligation to keep the memory alive and allow them to move on. This is essential if reparations are to provide recognition to victims not only as victims but also as citizens and as rights holders more generally.**[236] (Emphasis supplied)

Restitution, compensation, and rehabilitation under the UN Reparations Principles, while necessary, are lacking in this symbolic dimension. Monetary forms of reparation can indeed provide funds for certain necessities and improve the future of victims, but without more, it is unlikely that they would lead to the justice sought.

Moreover, it has been observed that human rights victims want an apology, above all else.[237] They also place a premium on obtaining

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[233] Gina Doñoso, *Inter-American Court of Human Rights' reparation judgments: Strengths and challenges for a comprehensive approach*, 49 Revista IIDH 29, 58 (2009); Megret II, supra note 229, at 6.
[234] Sarkin, supra note 180, 548 citing the Report of Truth and Reconciliation Commission of South Africa.
[235] UN Sub-Commission on the Promotion and Protection of Human Rights, *Question of the impunity of perpetrators of human rights violations (civil and political)*, 26 June 1997, E/CN.4/Sub.2/1997/20, par. 40 [hereinafter Joinet Report]; Contreras-Garduño, supra note 173, at 42.
[236] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, supra note 144, at 23.
[237] Thomas Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice,* 47 Stan. J. Int'l. Law, 279, 284 (2011).

recognition of the harm done to them.[238] In contrast, financial reparations or damages are considered less important than emotional or symbolic reparations, because the former fail to squarely address a person's need for "dignity, emotional relief, participation in the social polity, or institutional reordering."[239] If given in isolation, monetary reparation may even have a trivializing effect on suffering in certain cultural, social, and political contexts.[240]

Forms of Symbolic Reparation

Because of its peculiar nature, symbolic reparation takes various forms. An examination of the UN Reparations Principles, as well as the decisions of international and regional courts, reveals that different measures have been utilized to satisfy this requirement.

The following have been identified as examples of measures intended to offer *satisfaction* to victims of atrocities: (a) "verification of the facts and full and public disclosure of the truth";[241] (b) "an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim";[242] (c) "public apology";[243] and (d) "commemorations and tributes to the victims."[244] These methods deal with the emotional, psychological, and symbolic aspects of the suffering of the victims,[245] and are primarily concerned with the restoration of their dignity through an acknowledgment by the state of the harm done.

Guarantees of non-repetition, on the other hand, focus on reform and restructuring initiatives pursuant to the state's commitment to never again engage in the practices that led to human rights violations.[246] The actual steps taken by state institutions represent the guarantees of non-repetition. These steps include "promoting mechanisms for preventing and monitoring social conflicts and their resolution"[247] and "reviewing and reforming laws contributing to or allowing gross violations of international human rights law."[248]

Meanwhile, the ICC in the Lubanga Case considered the conviction and the sentence issued by the Court itself as forms of reparation on account of their significance to the victims and the communities.[249] In turn, the

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[238] Megret, supra note 229, at 13.
[239] Thomas Antkowiak, supra note 237.
[240] Id.
[241] UN Reparations Principles, supra note 188, Principle 22 (b).
[242] Id., Principle 22 (d).
[243] Id., Principle 22 (e)
[244] Id., Par. 22 (g)
[245] Megret, supra note 229, at 26.
[246] Megret II, supra note 229, at 5.
[247] UN Reparations Principles, supra note 188, Principle 23 (g)
[248] Id., Principle 23 (h)
[249] *The Prosecutor v. Thomas Lubanga Dyilo*, supra note 178, par. 237.

IACtHR – the most progressive court in terms of granting reparations to victims of human rights violations – has ordered the following measures as part of "other forms of reparation": (a) the construction of monuments to commemorate the suffering of victims,[250] (b) the naming of a school after them,[251] (c) the designation of a day of remembrance for them,[252] (d) the conduct by the state of public ceremonies offering apologies in honor of the fallen;[253] (e) the establishment of memorial scholarships;[254] and (f) human rights courses.[255]

Memorials as Symbolic Reparation

In a report on memorialization processes utilized by states transitioning from conflicts or periods of repression, Farida Shaheed, the UN Special Rapporteur in the field of cultural rights, identified *memorials* as "physical representation[s] or commemorative activities, located in public spaces, that concern specific events regardless of the period of occurrence (wars and conflicts, mass or grave human rights violations), or the persons involved (soldiers, combatants, victims, political leaders or activists for example)."[256]

In recent times, memorials have become principally focused on honoring the victims of human rights atrocities. As Special Rapporteur Shaheed explained, memorials were utilized as a means of "ensuring recognition for the victims, as reparation for mass or grave violations of human rights and as a guarantee of non-recurrence,"[257] as well as a way to combat injustice and promote reconciliation.[258] This trend was followed in post-conflict states, where memorials commemorating victims of human rights violations were regularly established. The Report states:

> An exhaustive list of all truth and reconciliation commissions that have advocated the construction of memorials is beyond the scope of this document. Nevertheless, one should mention the recommendations of the truth and reconciliation commissions in El Salvador, Germany, Guatemala, Peru, Morocco and South Africa and the commission of inquiry in Chad, even though not all their recommendations were implemented.

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[250] I/A Court H.R., *Case of the Moiwana Community v. Suriname.* Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, par. 218.
[251] I/A Court H.R., *Case of Trujillo Oroza v. Bolivia.* Reparations and Costs. Judgment of February 27, 2002. Series C No. 92, par. 122.
[252] I/A Court H.R., *Serrano-Cruz Sisters v. El Salvador,* Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (Feb. 3, 2010).
[253] *Case of the Moiwana Community v. Suriname*, supra note 250, par. 191.
[254] I/A Court H. R., *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile.* Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279, par. 432.
[255] I/A Court H.R., *Case of Espinoza Gonzáles v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2014. Series C No. 289, par. 327.
[256] UN Human Rights Council, *Report of the Special Rapporteur in the field of cultural rights, Memorialization processes*, 23 January 2014, par. 5 [hereinafter Shaheed Report].
[257] Id., Summary.
[258] Id., par. 12.

> The Commission on the Truth for El Salvador clearly called in its report for the construction of a national monument in El Salvador bearing the names of all victims of the conflict, recognition of their good name and the serious crimes of which they were the victims and the institution of a national holiday in memory of the victims of conflict as a symbol of reconciliation.
>
> Similarly, the Commission for Historical Clarification in Guatemala recommended, among other things, that monuments and parks be constructed and the names of victims assigned to public buildings and highways in memory of the victims. The Commission stated that "the historical memory, both individual and collective, forms the basis of national identity."[259]

The reason behind the creation of memorials intended to commemorate victims of atrocities was explained by Special Rapporteur Shaheed in relation to the duty to provide symbolic reparations:

> With the passage of time, memorials have shifted from honouring soldiers dying in the line of duty to a victims' perspective and new visions of reconciliation. Starting in the 1980s, the creation of memorials has become linked to the idea that ensuring public recognition of past crimes is indispensable to the victims, essential for preventing further violence and necessary for redefining national unity. Memorialization is often a demand of victims and society at large and the path to national reconciliation is seen to pass through not only legal reparations, but also symbolic reparations such as memorials.[260]

2. The proposed burial would be the antithesis of an act of symbolic reparation.

In the present case, the dispute also involves the creation of a memorial in the form of a burial plot located at the LMB. Instead of commemorating victims, however, the memorial proposes to honor Marcos, the recognized perpetrator of countless human rights violations during the Martial Law regime. The establishment of this memorial would accomplish the exact opposite of what is intended by symbolic reparation, and would consequently violate the obligations of the Philippines under international human rights law.

For reasons previously discussed, the burial of Marcos would be more than a simple matter of the interment of his remains, because it would involve his victims' right to symbolic reparations. Undoubtedly, to honor the very perpetrator of human rights atrocities would be the direct opposite of the duty of the state to respect, promote, and fulfil human rights.

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[259] Id., par. 39-41.
[260] Id., par. 9.

These conclusions are supported by the opinion of UN Special Rapporteur Pablo De Greiff in the analogous case of another dictator, General Francisco Franco of Spain, and his burial place – the *Valle de los Caídos* (Valley of the Fallen).[261] The site, located in Madrid, serves as a monument and a memorial, as it is also the burial ground of almost 34,000 other individuals. The structure, however, is still considered by many as "an exaltation of Francoism"[262] and a reminder of the forced labor of thousands of political prisoners who were compelled to build the structure.[263]

In his *Report on the promotion of truth, justice, reparation and guarantees of non-recurrence*,[264] Special Rapporteur De Greiff studied the fate of symbols of Francoism in relation to the then newly enacted 2007 Law of Historical Memory.[265] This law dealt with the recognition of victims of human rights violations during the Spanish Civil War and the 40-year regime of General Franco.

Special Rapporteur De Greiff reviewed, in particular, the effects of a provision in the Law of Historical Memory requiring the removal of all memorials related to Franco and the latter's dictatorship. In his report, he welcomed the measures introduced to combat the exaltation of the *coup d'état,* the Civil War, and the repression by the Franco dictatorship, particularly through the removal of symbols and monuments.[266] He further noted "majority of inventoried symbols and monuments had been removed, and that the remaining symbols and monuments either required a lengthy administrative procedure or considerable expense, or were subject to protection rules for their historic or artistic value."[267]

As part of the implementation of the Law of Historical Memory, the removal of *Valle de los Caídos* was proposed because of its ties to General Franco and Francoism. However, because the structure could not be removed without disturbing the burial grounds of other individuals,[268] De Greiff made the following recommendation with respect to the site:

> The site can be put to good use and "reinterpreted", with suitable techniques and pedagogy, in favour of the promotion of truth and memory, and given an educational and preventive purpose. **It can hardly be construed as a place devoted to peace and reconciliation, so long as silence is maintained about the facts relevant to the context and origin**

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[261] UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mission to Spain*, 22 July 2014, par. 5 [hereinafter de Greiff Report].
[262] Id., par. 29-30
[263] Id., par. 32.
[264] Supra note 261.
[265] *Ley de Memoria Histórica* or *La Ley por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la Guerra Civil y la Dictadura*, Ley 52/2007 de 26 de Diciembre.
[266] De Greiff Report, supra note 261, par. 27.
[267] Id.
[268] Id., par. 30.

> **of the site, and especially while the flower-covered tomb of the dictator remains in the centre of the monument.**[269] [Emphasis supplied]

The necessity for the reinterpretation and "recontextualization" of the *Valle de los Caídos* highlights the fact that far from being an ordinary burial plot, the final resting place of a dictator and perpetrator of human rights violations is a symbol and a source of meaning. The meaning it conveys, particularly to the victims of atrocities, cannot be underestimated. Special Rapporteur Shaheed, in her report on memorialization processes, also expressed concerns about the monuments and sites intended to honor past oppressive regimes:

> The question is how to manage an architectural legacy with strong symbolic connotations when oppressive regimes collapse. Should a new democratic Government destroy, conserve or transform these legacies? Answers vary from situation to situation, frequently giving rise to intense controversy, including amongst victims. Striking examples include debates in Spain over the memorial in *Valle de los caidos* (the Valley of the Fallen) where Franco is buried, in Bulgaria over the mausoleum of former communist leader Georgy Dimitrov, which was finally destroyed, and in Germany over Hitler's bunker, now located beneath a parking lot in the centre of Berlin, marked only by a small sign.[270]

Shaheed therefore concludes **"the choice to conserve, transform or destroy always carries meaning and so needs to be discussed, framed and interpreted."**[271] **In this undertaking, the concerns and views of victims are given primary consideration and for good reason – they are, after all, the persons most affected by any decision on the matter.**

In this case, **the victims of human rights violations have expressed their objection to the proposed burial of Marcos in the LMB. They assert that the burial would constitute a state-sanctioned narrative that would confer honor upon him.**[272] **This, in turn, would subject his human rights victims to the same indignity, hurt, and damage that they have already experienced under his regime.**[273]

These opinions must be given paramount consideration by the state in compliance with its duty to provide symbolic reparations to victims of human rights atrocities. For the President to allow the burial in disregard of these views would constitute a clear contravention of international human rights law and would amount to grave abuse of discretion.

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[269] Id., par. 33.
[270] Id., par. 62.
[271] Id., par. 63.
[272] Rosales Petition, p. 61.
[273] Id. at 17.

C. The burial would run counter to the duty of the state to combat impunity.

As part of their obligation to protect and ensure human rights under international law,[274] states have the duty to combat impunity and hold perpetrators of human rights violations accountable. In fact, the clear nexus between the impunity of perpetrators of gross violations of human rights, and the failure to provide adequate reparation to the victims[275] indicate that the two obligations must go hand in hand.

In his report, Special Rapporteur Theodoor Van Boven concluded that "in many situations where impunity has been sanctioned by the law or where *de facto* impunity prevails with regard to persons responsible for gross violations of human rights, the victims are effectively barred from seeking and receiving redress and reparation."[276] His conclusion is unsurprising, given the significant role of reparations in ensuring that the perpetrators are held responsible for their actions.

Certainly, states cannot claim to look after the interest of the victims and at the same time endorse a social and political climate where impunity prevails. This incongruity would be tantamount to a violation of the victims' right to effective remedy and reparations. In Van Boven's words, "it is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards the gross misconduct of perpetrators."[277]

The UN Impunity Principles

The primary instrument providing for the duty to combat impunity is the UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (UN Impunity Principles).[278] Like the UN Reparations Principles, this document does not impose new obligations, but only frames and emphasizes the existing state obligations under international human rights law. This rule is apparent in the Preamble of the Principles, which cites the UN Charter and the UDHR as the bases for the statement that "the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity."[279]

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[274] Anja Seibert-Fohr, *Reconstruction Through Accountability* in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 559 (A. Von Bogdandy and R. Wolfrum, eds., 2005) citing U.N. GAOR, Hum. Rts. Comm., 52d Sess., 1365th mtg. at 12, para. 54, U.N. Doc. CCPR/C/SR.1365 (1994); U.N. GAOR, Hum. Rts. Comm., 57th Sess. at 5, para. 32, U.N. Doc. CCPR/C/79/Add.65 (1996).

[275] Van Boven Report, supra note 164, par. 126.

[276] Id., par. 127.

[277] Id., par. 130.

[278] UN Human Rights Committee, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, 8 February 2005 [hereinafter UN Impunity Principles].

[279] Id., Preamble.

In these Principles, the UN Human Rights Committee enumerates the acts from which impunity may arise. Principle 1 states:

> Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.[280]

A reading of the UN Principles on Impunity reveals the close relationship between impunity and the concepts of reparations and the preservation of memory.

Impunity and the Right to Reparation

The provision of effective remedies and reparations for victims has been recognized as one of the means to combat impunity. Principles 31 and 34 provide:

> PRINCIPLE 31. RIGHTS AND DUTIES ARISING OUT OF THE OBLIGATION TO MAKE REPARATION
>
> Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.
>
> x x x x
>
> PRINCIPLE 34. SCOPE OF THE RIGHT TO REPARATION
>
> The right to reparation shall cover all injuries suffered by victims; it shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law.

In particular, symbolic reparations are considered significant. In his Report[281] on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political),[282] Special Rapporteur Louis Joinet concluded:

> On a collective basis, symbolic measures intended to provide moral reparation, such as formal public recognition by the State of its

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[280] Id., Principle 1.

[281] This report was accomplished pursuant to the request of the UNCHR Sub-Commission on Prevention of Discrimination and Protection of Minorities for Joinet to undertake a study on the impunity of perpetrators of human rights violations.

[282] Joinet Report, supra note 235.

> responsibility, or official declarations aimed at restoring victims' dignity, commemorative ceremonies, naming of public thoroughfares or the erection of monuments, help to discharge the duty of remembrance. In France, for example, it took more than 50 years for the Head of State formally to acknowledge, in 1996, the responsibility of the French State for the crimes against human rights committed by the Vichy regime between 1940 and 1944. Mention can be made of similar statements by President Cardoso concerning violations committed under the military dictatorship in Brazil, and more especially of the initiative of the Spanish Government, which recently conferred the status of ex-servicemen on the anti-Fascists and International Brigade members who fought on the Republican side during the Spanish civil war.[283]

The Duty to Preserve Memory

Another facet of the fight against impunity involves the duty of a state to preserve the memory of its people. In this regard, the UN Impunity Principles requires states to combat any measure that tends to encourage people to forget or downplay past human rights violations. Principle 3 provides:

> PRINCIPLE 3. THE DUTY TO PRESERVE MEMORY
>
> A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in 61fulfillment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

While the UN Impunity Principles sees reconciliation and justice as the primary goals, it is firm in asserting that these goals may not be achieved by disregarding human rights atrocities that occurred in the past. In fact, the principles emphasize that before true reconciliation can be achieved, the human rights violators must be held accountable. This dictum is reflected in the Preamble of the instrument:

> *Aware* that there can be no just and lasting reconciliation unless the need for justice is effectively satisfied,
>
> *Equally aware* that forgiveness, which may be an important element of reconciliation, implies, insofar as it is a private act, that the victim or the victim's beneficiaries know the perpetrator of the violations and that the latter has acknowledged his or her deeds,
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> x x x x

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[283] Id., par. 42.

> *Convinced*, therefore, that national and international measures must be taken for that purpose with a view to securing jointly, in the interests of the victims of violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity.[284]

Consistent with the foregoing, the UN Impunity Principles imposes restrictions on certain rules of law like limiting the entitlement of perpetrators to amnesties and other measures of clemency. In Principle 24, the restrictions are imposed even when clemency measures are "intended to establish conditions conducive to a peace agreement or to foster national reconciliation."[285] Joinet, in his report, emphasizes the importance of accountability in the context of reconciliation:

> [T]here can be no just and lasting reconciliation without an effective response to the need for justice; as a factor of reconciliation, forgiveness, insofar as it is a private act, implies that the victim must know the perpetrator of the violations and that the latter has been in a position to show repentance. For forgiveness to be granted, it must first have been sought.[286]

In this case, **the burial of Marcos in the LMB would be tantamount to a disregard of the human rights violations perpetrated by his regime. To allow it to proceed would sanction an egregious act of impunity and allow the government to bestow an honor that is clearly not due upon a perpetrator of human rights violations. To allow it would be a rampant violation of the rights of victims under international law.**

In the process of mapping through the vast body of international human rights law, each turn leads to the conclusion that the burial of Marcos in the LMB would be incompatible with the international obligations of the Philippines. For the Court to permit the burial would be to sanction these violations and allow the state to disregard the latter's duty to provide effective remedies to victims of human rights violations, particularly its duty to provide symbolic reparations and to combat impunity.

Incorporation of international law principles in Philippine law

The foregoing principles of international law have been incorporated in Philippine law as part of two domestic statutes intended for the protection of human rights.

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[284] UN Impunity Principles, supra note 278, Preamble.
[285] Id., Principle 24.
[286] Joinet Report, supra note 235, par. 26.

As discussed above, R.A. 10368 was enacted pursuant to generally accepted principles of international law, as well as the specific obligations of the Philippines under international human rights laws and conventions.[287] In accordance with these principles, the statute recognized the "heroism and sacrifices of all Filipinos who were victims of summary execution, torture, enforced or involuntary disappearance and other gross human rights violations" and vowed to "restore the victims' honor and dignity" through the grant of reparations to victims and/or their families.[288]

The same principles were likewise incorporated in R.A. 9851,[289] a statute penalizing crimes against international humanitarian law, genocide, and other crimes against humanity. In providing remedies for offenses under this law, courts were specifically mandated to follow international principles relating to reparations for victims, including restitution, compensation, and rehabilitation.[290] The statute also enumerated the sources of international law

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[287] SECTION 2. Declaration of Policy. — Section 11 of Article II of the 1987 Constitution of the Republic of the Philippines declares that the State values the dignity of every human person and guarantees full respect for human rights. Pursuant to this declared policy, Section 12 of Article III of the Constitution prohibits the use of torture, force, violence, threat, intimidation, or any other means which vitiate the free will and mandates the compensation and rehabilitation of victims of torture or similar practices and their families.

By virtue of Section 2 of Article II of the Constitution adopting generally accepted principles of international law as part of the law of the land, the Philippines adheres to international human rights laws and conventions, the Universal Declaration of Human Rights, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) and Other Cruel, Inhuman or Degrading Treatment or Punishment which imposes on each State party the obligation to enact domestic legislation to give effect to the rights recognized therein and to ensure that any person whose rights or freedoms have been violated shall have an effective remedy, even if the violation is committed by persons acting in an official capacity. In fact, the right to a remedy is itself guaranteed under existing human rights treaties and/or customary international law, being peremptory in character (*jus cogens*) and as such has been recognized as non-derogable.

Consistent with the foregoing, it is hereby declared the policy of the State to recognize the heroism and sacrifices of all Filipinos who were victims of summary execution, torture, enforced or involuntary disappearance and other gross human rights violations committed during the regime of former President Ferdinand E. Marcos covering the period from September 21, 1972 to February 25, 1986 and restore the victims' honor and dignity. The State hereby acknowledges its moral and legal obligation to recognize and/or provide reparation to said victims and/or their families for the deaths, injuries, sufferings, deprivations and damages they suffered under the Marcos regime.

Similarly, it is the obligation of the State to acknowledge the sufferings and damages inflicted upon persons whose properties or businesses were forcibly taken over, sequestered or used, or those whose professions were damaged and/or impaired, or those whose freedom of movement was restricted, and/or such other victims of the violations of the Bill of Rights.

[288] Id.

[289] Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, Republic Act No. 9851, 11 December 2009.

[290] Sections 14 and 15 of RA 9851 state:

> SECTION 14. Reparations to Victims. — In addition to existing provisions in Philippine law and procedural rules for reparations to victims, the following measures shall be undertaken:
>
> (a) The court shall follow principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision, the court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and state the principles on which it is acting;
>
> (b) The court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation; and

that may guide the courts in the application and interpretation of the statute. These sources include international instruments, decisions of international courts and tribunals, as well as writings of most highly qualified publicists and authoritative commentaries.

The obligation of the state to provide holistic reparations for victims of human rights violations is, therefore, enshrined in both international and domestic laws. This obligation includes the responsibility to provide victims with reparations – both financial and symbolic – in recognition of their suffering and heroism. The grant of reparations should likewise go hand in hand with the duty of the state to combat impunity by holding perpetrators of human rights violations accountable.

As previously discussed, the proposed burial of former President Marcos in the LMB contravenes these principles, because it would honor the identified perpetrator of human rights violations. As such, it would accomplish the exact opposite of what is intended to be accomplished by international and domestic principles on reparations, i.e., to recognize and honor the sufferings of victims; and to make amends for the physical, emotional and psychological harm they have sustained. The burial would also perpetuate a climate of impunity, as it would effectively disregard the human rights violations perpetrated by Marcos and permit the state to honor him despite his transgressions.

Clearly, the President cannot sanction the burial without going against domestic and international principles, as well as his solemn oath to faithfully execute the law.

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cont.

(c) Before making an order under this section, the court may invite and shall take account of representations from or on behalf of the convicted person, victims or other interested persons.

Nothing in this section shall be interpreted as prejudicing the rights of victims under national or international law.

SECTION 15. *Applicability of International Law.* — In the application and interpretation of this Act, Philippine courts shall be guided by the following sources:

(a) The 1948 Genocide Convention;
(b) The 1949 Geneva Conventions I-IV, their 1977 Additional Protocols I and II and their 2005 Additional Protocol III;
(c) The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, its First Protocol and its 1999 Second Protocol;
(d) The 1989 Convention on the Rights of the Child and its 2000 Optional Protocol on the Involvement of Children in Armed Conflict;
(e) The rules and principles of customary international law;
(f) The judicial decisions of international courts and tribunals;
(g) Relevant and applicable international human rights instruments;
(h) Other relevant international treaties and conventions ratified or acceded to by the Republic of the Philippines; and
(i) Teachings of the most highly qualified publicists and authoritative commentaries on the foregoing sources as subsidiary means for the determination of rules of international law.

IV.

PUBLIC FUNDS AND PROPERTY CANNOT BE USED FOR THE BURIAL AS IT SERVES NO LEGITIMATE PUBLIC PURPOSE.

On a final note, I must point out that the discretion of the President in this case is not unlimited, as argued by respondents. Because their proposal involves public funds and property, certain rules must be complied with.

Respondents propose the use of a portion of the LMB, a national cemetery owned by the government, for the interment of Marcos. They likewise intend to use money from the government coffers for the preparation and maintenance of the gravesite, as well as for military honors to be accorded to the deceased by the AFP.

Considering that public resources would be used for the interment, it is necessary for this Court to determine if the planned expenditures are for a legitimate public purpose. The reason is simple – public property, including public funds, belongs to the people.[291] Hence, it is the duty of the government to ensure the prudent use of these resources at all times to prevent dissipation and waste.[292] As a necessary corollary to these principles, it is settled that public property and funds may only be used for public purposes.[293]

This Court has explained the nature and the meaning of the term "public purpose" in the context of public expenditures in several cases. It has declared that the term includes not only activities that will benefit the community as a body and are related to the traditional functions of government,[294] but also those designed to promote social justice, general welfare and the common good.[295] This broad understanding of the public purpose requirement, however, does not authorize the use of public funds and property for unmistakably personal and political motives.[296]

Ultimately, the validity of a public expenditure depends on the essential character of its direct object. In *Albon v. Fernando,*[297] the Court explained:

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[291] *Dimapilis-Baldoz v. Commission on Audit*, 714 Phil. 171 (2013).
[292] Id.
[293] PRESIDENTIAL DECREE 1445 (1978), Section 4(2); REPUBLIC ACT 7160 (1991), Section 305(b); See *Strategic Alliance Development Corp. v. Radstock Securities Ltd.*, 622 Phil. 431 (2009).
[294] *Yap v. Commission on Audit,* 633 Phil. 174 (2010).
[295] *Binay v. Domingo,* 278 Phil. 515 (1991).
[296] *See Petitioner-Organizations v. Executive Secretary,* 685 Phil. 295 (2012).
[297] 526 Phil. 630 (2006).

> In *Pascual v. Secretary of Public Works*, the Court laid down the test of validity of a public expenditure: **it is the essential character of the direct object of the expenditure which must determine its validity and not the magnitude of the interests to be affected nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.** Incidental advantage to the public or to the State resulting from the promotion of private interests and the prosperity of private enterprises or business does not justify their aid by the use of public money.[298] (Citations omitted and emphasis supplied)

Based on the foregoing standard, the validity of public expenditures must be determined based on the nature of the particular expense involved, and the public purpose sought to be accomplished.

As will be explained in further detail, **the proposed burial would promote only the private interest of the Marcos family**. Significantly, respondents have failed to prove that any sort of public purpose would be served by the planned interment; in fact, the event would contravene the public purposes of the LMB. Consequently, the intended public expenditure cannot be allowed.

A. The burial would contravene the public purpose of the Libingan ng mga Bayani.

The government in this case proposes to shoulder the expenses for the burial of Marcos in the LMB, a military cemetery maintained on public property and a declared national shrine. The expenses contemplated are comprised of the cost of a plot inside a military cemetery, the maintenance expenses for the gravesite, and the cost of military honors and ceremonies.[299]

Generally, burial expenses are not borne by the government because interments are customarily private affairs. However, as exceptions to the foregoing rule, public expenditure is allowed in the case of cemeteries that serve certain public purposes, for instance: (a) burial grounds set aside for the indigent in the name of social justice;[300] and (b) cemeteries reserved for individuals deemed worthy of honor and reverence, i.e., the nation's war dead, soldiers or dignitaries, of the government.[301] The LMB belongs to this second exception.

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[298] Id. at 638.
[299] TSN, 7 September 2016, pp. 220-226.
[300] *See* REPUBLIC ACT NO. 7160, Section 17.
[301] *See* PROCLAMATION NO. 425, *Balantang Memorial Cemetery National Shrine in Jaro, Iloilo City*, 13 July 1994.

Formerly known as the Republic Memorial Cemetery, the LMB was designated by former President Ramon M. Magsaysay as the national cemetery for the nation's war dead in 1954. Through Executive Order No. 77,[302] he ordered that the remains of the war dead interred at the Bataan Memorial Cemetery and other places be transferred to the LMB to accord honor to dead war heroes; improve the accessibility of the burial grounds to relatives of the deceased; and consolidate the expenses of maintenance and upkeep of military cemeteries. He thereafter issued Proclamation No. 86,[303] which renamed the cemetery to "*Libingan ng mga Bayani,*" because the former name was "not symbolic of the cause for which our soldiers have died, and does not truly express the nation's esteem and reverence for her war dead."

It is therefore evident that the LMB is no ordinary cemetery, but a burial ground established on public property to honor the nation's war dead and fallen soldiers. Further, the designation of the cemetery as a national shrine confirms its sacred character and main purpose, that is, to serve as a symbol for the community and to encourage remembrance of the honor and valor of great Filipinos.[304] Respondents themselves acknowledged this fact when they argued that the LMB implements a public purpose because it is a military shrine and a military memorial.[305]

To allow the LMB to fulfill the foregoing purposes, it has been and continues to be the recipient of public funds and property. Not only was the cemetery established on land owned by the government, public funds are also being utilized for the cost of maintenance and other expenses. The use of these resources is justified because of the public purpose of the site. As a necessary consequence of this principle, an expenditure that does not further this public purpose is invalid.

Applying the foregoing standards, the proposed expenditures for the burial of Marcos in the LMB must be considered invalid. **As earlier discussed, Marcos was an ousted dictator and disgraced president. Consequently, he is clearly not worthy of commendation from the state and no public purpose would be served by his interment therein. In fact, his burial in the LMB would result in a contravention of the public purpose of the site as it would no longer be a sacred symbol of honor and valor.**

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[302] EXECUTIVE ORDER NO. 77, *Transferring the remains of war dead interred at Bataan Memorial Cemetery, Bataan Province and at other places in the Philippines to the Republic Memorial Cemetery at Fort WM Mckinley, Rizal Province*, 23 October 1954.

[303] PROCLAMATION NO. 86, *Changing the "Republic Memorial Cemetery" at Fort WM McKinley, Rizal Province, to "Libingan ng mga Bayani,"* 27 October 1954.

[304] PRESIDENTIAL DECREE NO. 105, *Declaring National Shrines as Sacred (Hallowed) Places and Prohibiting Desecration Thereof,* (1973).

[305] Consolidated Comment dated 22 August 2016, pp. 43-44.

B. Respondents have not explained how the burial would serve the avowed policy of national unity and healing.

Considering that the public purpose of the LMB would not be served by the interment, we must now examine the other public purpose supposedly fulfilled by the proposal. According to respondents, that purpose pertains to national unity and healing. In their Comment, they contend:

> Undeniably, no cadaver has polarized this nation for the longest time other than that of the former President Marcos. Thus, President Duterte deems that it is but high time to put an end to this issue by burying the mortal remains of a former President, Commander-in-Chief, and soldier.
>
> President Duterte's decision to accord respect to the remains of former President Marcos is not simply a matter of political accommodation, or even whims. Viewed from a wider perspective, this decision should be dovetailed to his war against corruption and dangerous drugs, and his recent dealings with the CPP/NPA/NDF. All these are geared towards changing the national psyche and beginning the painful healing of this country.[306]
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> x x x x
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> It should likewise be emphasized that President Duterte's order to allow former President Marcos' interment at the Libingan is based on his determination that it shall promote national healing and forgiveness, and redound to the benefit of the Filipino people. Surely, this is an exercise of his executive prerogative beyond the ambit of judicial review.[307]

It is significant to note, however, that respondents fail to explain how the burial would lead to national unity and healing. Consequently, their statements remain meaningless assertions. To emphasize, mere reference to an avowed public purpose cannot automatically justify the use of public funds and property. This Court must still review the validity of the declared purpose of public expenditure, as well as the reasonable connection between the objective and the proposed means for its attainment. Our duty to safeguard public funds and property demands no less. To reiterate, "[p]ublic funds are the property of the people and must be used prudently at all times with a view to prevent dissipation and waste."[308]

Furthermore, as previously discussed, it is the essential character of the direct object of public expenditure that determines its validity,[309] and not the incidental advantage derived from it by the community. Hence, assuming for the sake of argument that the burial would bear an incidental benefit of

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[306] Id. at 5.
[307] Id. at 26.
[308] *Yap v. Commission on Audit*, supra note 294, at 188.
[309] See *Albon v. Fernando*, supra note 297.

promoting unity and healing, this supposed benefit would not erase the reality that the interment would principally be for the promotion of the personal interest of former President Marcos and his family.

C. The burial would promote only the private interest of the Marcos family.

It is clear from the foregoing discussion that the burial would ultimately benefit only the Marcos family. No general advantage is derived by the public from the interment; as it stands, divisiveness instead of unity has resulted from the plan.

The circumstances surrounding the order of the President to allow the burial likewise reveal the political color behind the decision. In their Comment, respondents admit that the President ordered the burial to fulfill a promise made during his presidential campaign.[310] It must be pointed out, however, that the President made that pledge not at any random location, but while campaigning in Ilocos Norte,[311] a known stronghold of the Marcos family. During the oral arguments held in this case, it was also revealed that the preparations for the burial were prompted by a letter sent by the Marcos heirs to Secretary Lorenzana, urging him to issue the orders required for the interment at the earliest opportunity.[312]

Needless to state, the private interest of the Marcos family and the personal objective of the President to fulfill a pledge to his political allies will not justify the proposed public expenditure for the burial.

Indeed, it is completely unseemly for the Marcos family to expect the Filipino people to bear the financial and emotional cost of burying the condemned former President even while this country has yet to recover all the ill-gotten wealth that he, his family, and unrepentant cronies continue to deny them.[313] It is wrong for this Government and the Marcos family to refer human rights victims to the financial reparation provided by Republic Act 10386 as recompense, which moneys will come, not from the private wealth of the Marcos family, but from the money they illegally acquired while in office, and on which the Philippine state spent fortunes to recover. Every Filipino continues to suffer because of the billions of unwarranted public debt incurred by the country under the Marcos leadership;[314] and every Filipino will

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[310] Consolidated Comment dated 22 August 2016, p. 16.
[311] Id., footnote 51.
[312] TSN, 7 September 2016, p. 165, 234.
[313] *See Chavez v. Presidential Commission on Good Government*, 360 Phil. 133 (1998).
[314] In *Presidential Commission on Good Government v. Peña*, supra note 103, at 107, the Court stated:
> The rationale of the exclusivity of such jurisdiction is readily understood. Given the magnitude of the past regime's "organized pillage" and the ingenuity of the plunderers and pillagers with the assistance of the experts and best legal minds available in the market, it is a matter of sheer necessity to restrict access to the lower courts, which would

incur more expenses, no matter how modest, for the proposed burial. No situation can be more ironic indeed.

EPILOGUE

Stripped to its core, this case involves an order by the President to bury a dictator – one declared to have perpetrated human rights violations and plundered the wealth of the nation – with all the trappings of a hero's burial. It may not be an express declaration, as respondents themselves concede that the President does not have the power to declare any individual a hero, but it is a pronouncement of heroism nevertheless. It is far from being an empty statement bereft of significance. As respondents themselves recognize, the nature of the office held by the President provides him the opportunity to "profoundly influence the public discourse x x x by the mere expediency of taking a stand on the issues of the day."[315] Clearly, the order of the President to allow the burial is, at the very least, a declaration that Marcos is worthy of a grave at a cemetery reserved for war heroes, despite the objections of countless victims of human rights violations during the Martial Law regime. It is an executive pronouncement that his memory may be preserved and maintained using public funds.

Justice Isagani Cruz once stated: "liberty is not a gift of the government but the rights of the governed."[316] Throughout his regime, Marcos trampled upon this statement by his own acts and those of his subordinates, in a stampede wrought by the fervor to supposedly protect the nation from lawless elements. It pitted Filipino against Filipino, masking each face in shades of black or white and sowing fear and terror whilst reaping a harvest of public treasure. The nation was silenced. But people like petitioners persevered, keeping in their hearts the essence of Justice Cruz's words. They fought, and the people ultimately rose and won back the freedom we all now enjoy. The statement continues:

> Every person is free, save only for the fetters of the law that limit but do not bind him unless he affronts the rights of others or offends the public welfare. Liberty is not derived from the sufferance of the government or its magnanimity or even from the Constitution itself, which merely affirms but does not grant it. Liberty is a right that inheres in every one of us as a member of the human family.[317]

To forget that Marcos took this right away from the citizens of the Philippines would be the peak of intellectual and moral complacency. As a

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> have tied into knots and made impossible the Commission's gigantic task of recovering the plundered wealth of the nation, whom the past regime in the process had saddled and laid prostrate with a huge $27 billion foreign debt that has since ballooned to $28.5 billion.

[315] Public Respondents' Memorandum, p. 60.
[316] *Ordoñez v. Director of Prisons*, G.R. No. 115576, 4 August 1994, 235 SCRA 152.
[317] Id.

nation of laws, we cannot tolerate anything less than the full remembrance of a dark past from which we derive lessons that we imbue into the legal firmament. We cannot tolerate another instance in which our rights would be run to the ground, in which we would lose sight of the values held in our own Constitution, the symbols we hold dear, the aspirations we cherish. The LMB is revered because of the symbolism it carries. One treatise on geography and public memory explains:

> Cemeteries, as one type of memorial space, create a symbolic encounter between the living and the dead in the form of individual gravesites and the ritual activities taking place in the burial space. In contrast to communal cemeteries, national cemeteries are state shrines that belong to the national narrative of the people. The heroes buried there – most prominently national leaders and fallen soldiers – are privileged members of the national pantheon.[318]

A grave in the LMB is a testament to the honor and valor of the person buried therein. The Marcos family has long sought a burial for the dictator at this site for this exact reason.

The Court cannot order that a particular event be remembered in a particular way, but it can negate an act that whimsically ignores legal truths. It can invalidate the arbitrary distillation of the nation's collective memory into politically convenient snippets and moments of alleged glory. The Court is empowered to do justice, and justice in this case means preventing a whitewash of the sins of Marcos against the Filipino people.

The burial of Marcos in the earth from whence he came is his right, despite all that he did. However, his burial in the grave of heroes on the impulse of one man would continue the desecration of other citizens' rights, a chilling legacy of the Marcos regime that curiously survives to this very day, long after the death of the dictator.

Respondents may deny the implications of their actions today,[319] but the symbolism of the burial will outlive even their most emphatic refutations. Long after the clarifications made by this administration have been forgotten, the gravesite at the LMB will remain. That is the peculiar

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[318] Foote, Kenneth E. and Maoz Azaryahu, *Toward a Geography of Memory: Geographical Dimensions of Public Memory,* Journal of Political and Military Sociology, 2007, Vol. 35, No. 1 (Summer), pp. 125-144.

[319] In Public Respondents' Memorandum (p. 99), it was declared:

> Besides, the chapter of Philippine history on Martial Law is not written in ordinary ink. Rather, its every word is written in the blood and tears of recognized and unsung heroes; its every page is a Shroud that has their bloodied but valiant faces on it; and each turn of these pages echoes their cried for freedom.
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> The point here is simple: the interment of the remains of former President Marcos at the Libingan is not tantamount to a consecretion of his mortal remains or his image for that matter. No amount of heartfelt eulogy, gun salutes, holy anointment, and elaborate procession and rituals can transmogrify the dark pages of history during Martial Law. As it is written now, Philippine history is on the side of petitioners and everybody who fought and died for democracy.

power of symbols in the public landscape – they are not only carriers of meaning, but are repositories of public memory and ultimately, history.

For the Court to pretend that the present dispute is a simple question of the entitlement of a soldier to a military burial is to take a regrettably myopic view of the controversy. It would be to disregard historical truths and legal principles that persist after death. As important, it would be to degrade the state's duty to recognize the pain of countless victims of Marcos and Martial Law. Regardless of the promised national unity that the proposed burial will bring, I cannot, in good conscience, support such an expedient and shortsighted view of Philippine history.

WHEREFORE, I vote to **GRANT** the Petitions.

MARIA LOURDES P. A. SERENO
Chief Justice