EN BANC

G.R. No. 231658 *(Representatives Edcel C. Lagman, Tomasito S. Villarin, Gary C. Alejano, et al. vs. Hon. Salvador C. Medialdea, Executive Secretary; Hon. Delfin N. Lorenzana, Secretary of the Department of National Defense and Martial Law Administrator; and Gen. Eduardo Año, Chief of Staff of the Armed Forces of the Philippines and Martial Law Implementor)*

G.R. No. 231771 *(Eufemia Campos Cullamat, Virgilio T. Lincuna, Ateliana U. Hijos, et al. vs. President Rodrigo Duterte, Executive Secretary Salvador Medialdea, Defense Secretary Delfin Lorenzana, et al.)*

G.R. No. 231774 *(Norkaya S. Mohamad, Sittie Nur Dyhanna S. Mohamad, Noraisah S. Sani, and Zahria P. Muti-Mapandi vs. Executive Secretary Salvador C. Medialdea, Department of National Defense [DND] Secretary Delfin N. Lorenzana, Department of the Interior and Local Government [DILG] Secretary [Officer-in-Charge] Catalino S. Cuy, et al.)*

Promulgated:

July 4, 2017

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SEPARATE CONCURRING OPINION

VELASCO, JR., *J.*:

> *[I]f the principle be established that the commander who, under any circumstances whatsoever, assumed to enforce superior military power over the people and territory of his own country does so under* ***ultimate legal responsibility for his acts****, military rule is deprived of its terrors, and the law-abiding citizen sees in it nothing except the firm application for his benefit of the powerful military hand when civil institutions have ceased either wholly or at least effectively to perform their appropriate functions.*[1]
>
> – Brig. Gen. W.E. Birkhimer, former Associate Justice of this Court

On the ground that the President correctly found probable cause of the existence of rebellion and that the public safety requires it, I concur in the *ponencia* sustaining the validity of Proclamation No. 216, entitled "Declaring a State of Martial Law and Suspending the Privilege of the Writ of Habeas Corpus in the Whole of Mindanao."

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[1] Birkhimer, W.E., MILITARY GOVERNMENT AND MARTIAL LAW (3rd ed. revised, 1914), Kansas City, Missouri; emphasis supplied.

Martial Law is the law of necessity in the actual presence of an armed conflict.[2] **The power to declare it is exercised precisely upon the principle of self-preservation in times of extreme emergency**. To an extent, the power to declare Martial Law under Section 18, Article VII of the 1987 Constitution is similar to the citizen's right to **self-defense** under Article 11 of the Revised Penal Code (RPC), as unquestionably a State may use its military power to put down a rebellion too strong to be controlled by the civil authorities[3] to preserve its "sovereignty... and the integrity of [its] national territory."[4]

As it is a necessity—the confluence of the existence of an actual rebellion or invasion and the requirements of public safety—that gives the power to the President to proclaim Martial Law, such necessity must be shown to exist before such proclamation. However, as discussed in the *ponencia*, in deciding upon the existence of this necessity, **the facts as they were presented to the President at the moment he made the proclamation must govern; his decision must be scrutinized based on the information that he possessed at the time he made the proclamation and not the information he acquired later**. Thus, if the facts that were presented to him would excite a reasonable and prudent mind to believe that actual invasion or rebellion existed and the public safety required the imposition of Martial Law, the President is justified in acting on such belief. A subsequent discovery of the falsity of such facts will not render his act invalid at its inception.[5]

To this end, the President is not expected to act on proof beyond reasonable doubt as to the existence of actual invasion or rebellion and requirements of public safety. He must be able to act with urgency to best respond to the exigencies of the circumstances contemplated in Section 18, Article VII—actual invasion or rebellion. It should, therefore, be sufficient that he acts with the reasonableness and prudence of an average man to suitably respond to such events. Thus, **probable cause** is the evidentiary measure for the discretion given to the President's decision to proclaim a Martial Law. As in *Fortun v. Macapagal*,[6] I find the following excerpts from the *Brief of Amicus Curiae* of Fr. Joaquin Bernas, S.J. still instructive in this case:

> From all these it is submitted that the focus on public safety adds a nuance to the meaning of rebellion in the Constitution which is not found in the meaning of the same word in Article 134 of the Penal Code. The concern of the Penal Code, after all, is to punish acts of the past. But the concern of the Constitution is to counter threat to public safety both in the present and in the future arising from present and past acts. **Such nuance, it is submitted, gives to the President a degree of flexibility for determining whether rebellion constitutionally exists as basis for**

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[2] See *U.S. v. Diekelman*, 92 U.S. 520.
[3] See *Luther v. Borden*, 7 How. 1.
[4] CONSTITUTION, Art. II, Sec. 3.
[5] Birkhimer, supra note 1.
[6] 684 Phil. 526, 631 (2012).

> **Martial Law even if facts cannot obviously satisfy the requirements of the Penal Code whose concern is about past acts. To require that the President must first convince herself that there can be proof beyond reasonable doubt of the existence of rebellion as defined in the Penal Code and jurisprudence can severely restrict the President's capacity to safeguard public safety for the present and the future and can defeat the purpose of the Constitution.**
>
> What all these point to are that the twin requirements of "actual rebellion or invasion" and the demand of public safety are inseparably entwined. But whether there exists a need to take action in favour of public safety is a factual issue different in nature from trying to determine whether rebellion exists. **The need of public safety is an issue whose existence, unlike the existence of rebellion, is not verifiable through the visual or tactile sense. Its existence can only be determined through the application of prudential estimation of what the consequences might be of existing armed movements. Thus, in deciding whether the President acted rightly or wrongly in finding that public safety called for the imposition of Martial Law, the Court cannot avoid asking whether the President acted wisely and prudently and not in grave abuse of discretion amounting to lack or excess of jurisdiction.** Such decision involves the verification of factors not as easily measurable as the demands of Article 134 of the Penal Code and can lead to a prudential judgment in favour of the necessity of imposing Martial Law to ensure public safety even in the face of uncertainty whether the Penal Code has been violated. This is the reason why courts in earlier jurisprudence were reluctant to override the executive's judgment.
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> In sum, since **the President should not be bound to search for proof beyond reasonable doubt of the existence of rebellion and since deciding whether public safety demands action is a prudential matter, the function of the President is far from different from the function of a judge trying to decide whether to convict a person for rebellion or not**. Put differently, looking for rebellion under the Penal Code is different from looking for rebellion under the Constitution.[7]

Certainly, the urgency of the circumstances envisioned under Section 18, Article VII of the Constitution requires the President to act with promptness and deliberate speed. He cannot be expected to check the accuracy of each and every detail of information relayed to him before he exercises any of the emergency powers granted to him by the Constitution. The window of opportunity to quell an actual rebellion or thwart an invasion is too small to admit delay. An expectation of infallibility on the part of the commander-in-chief may be at the price of our freedom.

As I have pointed out in *Fortun*,[8] "the President cannot be expected to risk being too late before declaring Martial Law or suspending the writ of habeas corpus. **The Constitution, as couched, does not require precision in establishing the fact of rebellion**. The President is called to act as public safety requires."[9] A degree of trust must, therefore, be accorded to the

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[7] Emphasis and underscoring supplied.
[8] Supra note 6.
[9] Emphasis supplied.

discretion exercised by the officer upon whom the exercise of emergency powers has been confided by the Constitution.

Notably, while Section 18, Article VII provides that "[t]he Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ or the extension thereof," it does not specify the "appropriate proceeding" that may be filed by a citizen for the purpose. Hence, in describing the nature of their petitions, petitioners Lagman, et al. and Cullamat, et al. would simply quote the third paragraph of Section 18, Article VII. Only petitioners Mohamad, et al. ventured further and maintained that its recourse is a "special proceeding."

It would be problematic for this Court to pigeonhole a petition praying for an inquiry into the "sufficiency of the factual basis of the proclamation of martial law" under any of the rules issued by this Court. Doing so may put undue procedural constraint on petitioners, defeating the intent underlying the provision. Given the exigencies of the circumstances considered in Section 18, Article VII of the Constitution, I concede that there is wisdom in the position that a petition praying for an inquiry into the "sufficiency of the factual basis of the proclamation of martial law" is *sui generis*.

This Court held in *David v. Macapagal-Arroyo*,[10] however, that the sufficiency of the factual basis for an emergency power must be measured not according to correctness but arbitrariness. The Court held:

> As to how the Court may inquire into the President's exercise of power, Lansang adopted the test that **"judicial inquiry can go no further than to satisfy the Court not that the President's decision is correct," but that "the President did not act arbitrarily." Thus, the standard laid down is not correctness, but arbitrariness.** In *Integrated Bar of the Philippines*, this Court further ruled that "it is incumbent upon the petitioner to show that the President's decision is totally bereft of factual basis" and that if he fails, by way of proof, to support his assertion, then "this Court cannot undertake an independent investigation beyond the pleadings."

In line with this, the yardstick available to this Court in gauging "arbitrariness" is found in Section 1, Article VIII of 1987, which fortifies the expanded certiorari jurisdiction of this Court and, thus, allows it to "review what was before a forbidden territory, to wit, the discretion of the political departments of the government."[11] Section 1, Article VIII of the Constitution provides:

> SECTION 1. 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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[10] 522 Phil. 705, 854 (2006).
[11] Id.

> 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 provision's relation to the "appropriate proceeding" mentioned in Section 18, Article VII was spelled out by former Chief Justice and Constitutional Commissioner Roberto Concepcion in his sponsorship speech. He said:

> 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.
>
> 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 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.
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> 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 question 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
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> x x x x
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> 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.[12]

Thus, where a proclamation of Martial Law is bereft of sufficient factual basis, this Court can strike down the proclamation as having been made with "a grave abuse of discretion amounting to lack or excess of jurisdiction." Otherwise, the President's determination of the degree of power demanded by the circumstances must stand.[13] Resolving a challenge against the exercise of an emergency power, this Court held in *Integrated Bar of the Philippines v. Zamora*:[14]

> On the other hand, the President as Commander-in-Chief has a vast intelligence network to gather information, some of which may be classified as highly confidential or affecting the security of the state. In the exercise of the power to call, on-the-spot decisions may be imperatively necessary in emergency situations to avert great loss of human lives and mass destruction of property. Indeed, **the decision** to call out the military to prevent or suppress lawless violence **must be done swiftly and decisively if it were to have any effect at all**. Such a scenario is not farfetched when we consider the present situation in Mindanao, where the insurgency problem could spill over the other parts of the country. **The determination of the necessity** for the calling out power **if subjected to unfettered judicial scrutiny could be a veritable prescription for disaster, as such power may be unduly straitjacketed by an injunction or a temporary restraining order every time it is exercised.**
>
> Thus, it is the unclouded intent of the Constitution to vest upon the President, as Commander-in-Chief of the Armed Forces, full discretion to call forth the military when in his judgment it is necessary to do so in order to prevent or suppress lawless violence, invasion or rebellion. **Unless the petitioner can show that the exercise of such discretion was gravely abused, the President's exercise of judgment deserves to be accorded respect from this Court.**[15]

On this score, the President did not commit a grave abuse of discretion in issuing Proclamation No. 216, given the facts he was confronted with, including but not limited to the following:

1. A state of national emergency on account of lawless violence was declared in Mindanao on September 4, 2016;
2. The Maute Group published a video declaring their allegiance to the Islamic State of Iraq and Syria (ISIS);
3. The Maute group attacked a military outpost in Butig, Lanao del Sur in February 2016;

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[12] I Record of the Constitutional Commission 434-436 (1986); cited in *Association of Medical Clinics for Overseas Workers, Inc. v. GCC Approved Medical Centers Association, Inc.*, G.R. Nos. 207132 & 207205, December 6, 2016.

[13] See *Luther v. Borden*, 7 How. 1.

[14] 392 Phil. 618, 675 (2000).

[15] Emphasis supplied.

4. The Maute Group caused a mass jailbreak in Marawi City in August 2016;
5. A hospital was taken over by the Maute Group on May 23, 2017;
6. Several government and private facilities were set ablaze by the Maute terrorist group;
7. Members of the Maute group hoisted the ISIS flag;
8. A city-wide power outage set in as sporadic gunfights ensued in Marawi City;
9. Control over three bridges in Lanao de Sur fell to the Maute Group;
10. Hostages were taken from a church;
11. Young Muslims were forced to augment the Maute group.

I further lend my concurrence to the view sustaining the coverage of Proclamation No. 216 to the entirety of Mindanao. As pointed out by the *ponencia*, Marawi is in the heart of Mindanao and the rebels can easily join forces with the other rebel and terrorist groups and extend the scope of the theater of active conflict to other areas of Mindanao. And based on past events, such is the design of the multiple rebel and terrorist groups now presently in armed conflict with the Armed Forces in Marawi City. In fact, as shown by prior incidents, which include the following, the activities of these numerous rebel and terrorist groups are spread over different parts of the Mindanao:

1. An improvised explosive device (IED) was detonated at a night market in Roxas Avenue, Davao City on September 2, 2016, causing the death of fifteen (15) people and injury to more than sixty (60) others;
2. On November 5, 2016, the Abu Sayyaf Group (ASG) abducted a German national, Juergen Kantner off Tawi-Tawi; the remains of his wife, Sabine Merz, was found in Barangay Darul Akram, Sulu;
3. On December 28, 2016, members of the Bangsamoro Islamic Freedom Fighters (BIFF) lobbed two grenades at the provincial office of Shariff Maguindanao;
4. On January 13, 2017, an IED exploded in Barangay Uno, Basilan thereby killing one civilian and injuring another;
5. On January 19, 2017, the ASG kidnapped three (3) Indonesian crew members near Bakungan Island, Tawi-Tawi;
6. On January 19, 2017, the ASG detonated an IED in Barangay Danapah, Basilan resulting in the death of two (2) children and the wounding of three (3) others;
7. Military personnel were ambushed in Marawi City on February 16, 2017;
8. On February 16, 2017, the ASG beheaded its German kidnap victim, Juergen Kantner, in Sulu;
9. On March 15, 2017, Mrs. Omera Lotao Madid was kidnapped in Saguiaran, Lanao del Sur by suspected Maute Group elements;
10. The ASG beheaded kidnap victim Noel Besconde in Sulu;

11. There were eleven (11) separate instances of IED explosions by the BIFF all over Mindanao from February to May 2017;
12. Military intelligence disclose that the Maute Group had dispatched its members to the cities of Marawi, Iligan and Cagayan de Oro to conduct bombing operations, carnapping and "liquidation" of AFP and PNP personnel in the said areas as early as April 18, 2017.[16]

It can only complicate the situation if the effectivity of Proclamation No. 216 will be limited only to Marawi City or some other provinces. The Armed Forces must be given ample power to suppress or contain the rebellion as soon as possible under a singular rule of operational procedure regardless of territorial lines in Mindanao.

To date, almost two-thirds of Marawi's population have left the city and are now scattered in different parts of Mindanao. Thousands of these displaced citizens—men, women, and children, young and old alike—are cramped in uncomfortable evacuation centers without any means of livelihood and with barely enough food to eat and survive in these crowded, and sometimes unsanitary, spaces. Meanwhile, those who remain trapped in the ruins of the city are in danger of being caught in the line of fire and have scarcely any access to food or water.

Martial Law is not the end in itself, it is a temporary means to achieve the paramount object of restoring peace under civilian authority. With the breakdown of civilian government in Marawi at the hands of the Maute group, which has a reported culpable intention and capability to do the same to the rest of Mindanao, I find it proper that the President exercised his Martial Law powers to suppress the rebellion and temporarily replace the incapacitated civilian authorities with military men in the hopes of ending as soon possible this tragic humanitarian disaster.

With our nation's dark experience under the 1972 Proclamation No. 1081, however, it is understandable that any Martial Law proclamation will be examined with extreme wariness. In fact, the common thread running through the three consolidated petitions is the implicit distrust of Martial Law. Couched in the consolidated petitions challenging Proclamation No. 216 is the notion that the declaration of Martial Law is equivalent to a desecration of human rights and the automatic negation of Article III of the 1987 Constitution or the Bill of Rights. Even this very Court implied such sentiment. The Court's ruling in *Fortun* stated, thus:

> Two. Since President Arroyo withdrew her proclamation of Martial Law and suspension of the privilege of the writ of *habeas corpus* in just eight days, they have not been meaningfully implemented. The military did not take over the operation and control of local government units in Maguindanao. **The President did not issue any law**

[16] *See* Respondents Memorandum dated June 19, 2017, pp. 10-11.

> **or decree affecting Maguindanao that should ordinarily be enacted by Congress. No indiscriminate mass arrest had been reported. Those who were arrested during the period were either released or promptly charged in court.** Indeed, no petition for *habeas corpus* had been filed with the Court respecting arrests made in those eight days. The point is that the President intended by her action to address an uprising in a relatively small and sparsely populated province. In her judgment, the rebellion was localized and swiftly disintegrated in the face of a determined and amply armed government presence.[17]

Indeed, compared to the calling-out power of the President, the power to declare Martial Law is less benign and "poses the most severe threat to civil liberties."[18] This Court's ruling in *David v. Macapagal-Arroyo*[19] outlines the marked differences between the two emergency powers, thus:

> Under **the calling-out power**, the President may summon the armed forces to aid him in suppressing lawless violence, invasion and rebellion. **This involves ordinary police action** x x x.
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> x x x x
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> **The declaration of Martial Law is a "warn[ing] to citizens that the military power has been called upon by the executive to assist in the maintenance of law and order, and that, while the emergency lasts, they must, upon pain of arrest and punishment, not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law."**
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> In his "Statement before the Senate Committee on Justice" on March 13, 2006, Mr. Justice Vicente V. Mendoza, an authority in constitutional law, said that of the three powers of the President as Commander-in-Chief, **the power to declare Martial Law poses the most severe threat to civil liberties.** It is a strong medicine which should not be resorted to lightly. It cannot be used to stifle or persecute critics of the government. It is placed in the keeping of the President for the purpose of enabling him to secure the people from harm and to restore order so that they can enjoy their individual freedoms. In fact, Section 18, Art. VII, provides:
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> x x x x
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> Justice Mendoza also stated that PP 1017 is not a declaration of Martial Law. It is no more than a call by the President to the armed forces to prevent or suppress lawless violence. As such, it cannot be used to justify acts that only under a valid declaration of Martial Law can be done. Its use for any other purpose is a perversion of its nature and scope, and any act done contrary to its command is ultra vires.[20]

This Court in *David* would later cite Justice Vicente V. Mendoza when he stated that, specifically, the following powers can be exercised by

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[17] Supra note 6. Emphasis supplied.
[18] *David v. Macapagal-Arroyo*, supra note 10.
[19] Id.
[20] Emphasis supplied.

the President as Commander-in-Chief where there is a valid declaration of Martial Law or suspension of the writ of *habeas corpus*: "(a) arrests and seizures without judicial warrants; (b) ban on public assemblies; [and] (c) take-over of news media and agencies and press censorship."[21]

Truly, in the occasion of a rebellion or invasion, **the paramount object of the State is the safety and interest of the public and the swift cessation of all hostilities**; it is neither the adjustment to nor the accommodation of the unbridled exercise of private liberties.[22] As Martial Law is borne out of necessity, interference of private rights may be justified. This concept is not foreign and is recognized by our laws. The prime example is the inherent police power of the state, which can prevail over specific constitutional guarantees.[23] As this Court elucidated, "the guarantees of due process, equal protection of the laws, peaceful assembly, free expression, and the right of association are neither absolute nor illimitable rights; they are always subject to the pervasive and dominant police power of the State and may be lawfully abridged to serve appropriate and important public interests."[24]

Article 11 of the Revised Penal Code (RPC) and Article 432 of the New Civil Code (NCC) likewise flow from this principle. Respectively, they state:

> Article 11, RPC:
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> ARTICLE 11. Justifying Circumstances. — The following do not incur any criminal liability:
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> 1. Anyone who acts in defense of his person or rights, provided that the following circumstances concur:
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> First. Unlawful aggression;
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> Second. Reasonable necessity of the means employed to prevent or repel it;
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> Third. Lack of sufficient provocation on the part of the person defending himself.
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> x x x x
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> 4. Any person who, in order to avoid an evil or injury, does an act which causes damage to another, provided that the following requisites are present:
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> First. That the evil sought to be avoided actually exists;
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> Second. That the injury feared be greater than that done to avoid it;
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> Third. That there be no other practical and less harmful means of preventing it.

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[21] Supra note 10.

[22] Birkhimer, supra note 1.

[23] Nachura, Antonio E.B., OUTLINE REVIEWER IN POLITICAL LAW 47; citing *Philippine Press Institute v. COMELEC*, G.R. No. 119694, May 22, 1995, 244 SCRA 272 and *Quezon City v. Ericta*, No. L-34915, June 24, 1983, 122 SCRA 759.

[24] *Imbong v. Ferrer*, 146 Phil. 30, 67 (1970); citing *Gonzales v. Comelec*, No. L-27833, April 18, 1969, 27 SCRA 835, 858; Justice Douglas in *Elfbrandt v. Russel*, 384 U.S. 11, 18-19, 1966.

Article 432, NCC:

> The owner of a thing has no right to prohibit the interference of another with the same, if the interference is necessary to avert an imminent danger and the threatened damage, compared to the damage arising to the owner from the interference, is much greater. The owner may demand from the person benefited indemnity for the damage to him.

But **Martial Law is by no means an arbitrary license** conferred on the President and the armed forces. As it is borne out of necessity, so it is limited by necessity. Justice Teehankee eloquently explained this much:

> ***Necessity* limits both the *extent* of powers that may be exercised under Martial Law, and the *duration* of its exercise**. No life may be taken, no individual arrested or confined, or held for trial, no property destroyed, or appropriated, no rights of the individual may be curtailed or suspended except where necessity justifies such interference with the person or the property. **Any action on the part of the military that is *not* founded on the reasonable demands of necessity is a *gross usurpation of power*, illegal, unjustified, and improper**. The broad mantle of Martial Law cannot cover acts illegal because not justified by necessity, nor proper under the circumstances. This principle is based not only upon the fundamental precepts of *constitutionalism*, but rests on sound reason — that where the action of the matter is not necessary for the public ends of the state they are illegal, and the *mere fact* that Martial Law exists will *not be* a ground for their justification.[25]

Intrusions into the civil rights must be proportional to the requirements of necessity. Only such power as is necessary to achieve the object of quashing the rebellion or thwarting the invasion and restoring peace can be used. "It is an unbending rule of law that the exercise of military power when the rights of the citizen are concerned shall never be pushed beyond what the exigency requires."[26] Anything in excess of what is considered "military necessity"[27] or is markedly removed from what is "needed in order to head the [rebellion or invasion] off"[28] will render liable the officer who committed such *ultra vires* act. Surely, an act against chastity and the desecration of women is unjustified even in times of war. Such and similar acts remain violative of the laws, which continue to be effective even after Martial Law is proclaimed.

The old maxim of *inter arma silent leges* (in times of war, the law falls silent) no longer holds true, especially given this clear expression of the uninterrupted superiority of the Constitution in Section 18, Article VII of the 1987 Constitution:

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[25] J. Teehankee's Dissenting Opinion in *Aquino, Jr. v. Military Commission No. 2*, No. L-37364, 159-A Phil. 163-291 (1975); citing Santos, Martial Law, 2nd ed., pp. 17-78, citing Winthrop, p. 820; Fairman, p. 48; Wiener, p. 14. Emphasis supplied.

[26] *Raymond v. Thomas*, 91 U.S. 712.

[27] "The necessity of employing measures which are indispensable to achieve a legitimate aim of the conflict and are not otherwise prohibited by International Humanitarian Law." Republic Act No. 9851, Sec. 3(1).

[28] *Moyer v. Peabody*, 212 U.S. 78.

> **A state of Martial Law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies**, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ.
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> The suspension of the privilege of the writ shall apply only to persons judicially charged for rebellion or offenses inherent in or directly connected with invasion.
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> During the suspension of the privilege of the writ, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released.[29]

This is in conformity with the observations made in the seminal case of *Ex Parte Milligan*[30] where the United States' Supreme Court, through Justice Davis, held:

> x x x Those great and good men foresaw that troublous times would arise when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be in peril unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. **The Constitution** of the United States **is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances**. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.
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> x x x x
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> This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln, and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew — the history of the world told them — the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued human foresight could not tell, and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this and other equally weighty reasons, **they secured the inheritance they had fought to maintain by incorporating in a written constitution the safeguards which time had proved were essential to its preservation**. Not one of these safeguards can the

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[29] Emphasis and underscoring supplied.
[30] 71 U.S. 2 (4 Wall.) (1866).

> President or Congress or the Judiciary disturb, except the one concerning the writ of habeas corpus.[31]

The continuous operation of the 1987 Constitution, a safeguard embedded in the very provision bestowing upon the President the power to proclaim Martial Law, primarily ensures that no right will unnecessarily be obstructed or impaired during Martial Law and that "civilian authority is, at all times, superior over the military."[32]

Notably, while Section 18, Article VII of the 1987 Constitution provides that in times of public emergency, the privilege of the writ of habeas corpus may be suspended, **there is no express authority allowing the suspension of the other guarantees and civil liberties**. Understandably, the question as to what can or cannot be done during Martial Law has long been discussed and debated over. As early as 1915, Henry Winthrop Ballantine posed the following questions in relation to the proclamation of Martial Law:

> I. What is the effect of a proclamation of martial law, does it suspend the constitution, and the laws of the State...?
>
> II. Does the [President] of a state, by such proclamation, confer on himself, or on his military representatives, a supreme and unlimited power over all his fellow-citizens, within the space described, which suspends the functions of civil courts and magistrates and substitutes in their place the mere will of the military commander?
>
> III. May the military disregard the writ of habeas corpus, or other process of the courts, if issued? Is the writ of habeas corpus in practical effect suspended by such proclamation?
>
> IV. May a military commission, or summary courts, be established as a substitute for the ordinary civil courts, to try civilians for (a) felony, (b) misdemeanours, or (c) disobedience of orders and proclamations?
>
> V. If so, is there any limit to the punishments which may be prescribed and inflicted? May the military confiscate property and levy fines, as well as imprison and put to death at their discretion?
>
> VI. If they take life, or injure person or property, are the military authorities immune from civil suit or criminal prosecution for unreasonable acts done in excess of authority? Are the ordinary courts without jurisdiction to inquire into and review the legality of military measures?
>
> VII. May the military shoot persons caught looting or in the commission of other crimes?
>
> VIII. May the military arrest without warrant, merely on suspicion of complicity in the rioting, or other disturbances? May they

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[31] Emphasis supplied.
[32] CONSTITUTION, Art. II, Sec. 3.

> forcibly enter and search private houses and seize property without a search warrant?
>
> IX. May the military hold and detain persons so arrested on suspicion, for indefinite periods at their discretion, without charge of crime and without turning them over to the civil courts for trial?
>
> X. May the military issue executive orders and proclamations to the citizens generally, having the force of law?
>
> (a) x x x
> (b) May the military exercise a censorship over the press and suppress newspapers at their discretion?
> (c) May the military limit the right or privilege of peaceable public assembly?
> (d) May the military prescribe to employers what classes of laborers they shall or shall not employ?
> (e) May the military establish "dead lines" within which it is forbidden to civilians to go without a military pass, and so restrict the freedom of movement of peaceable citizens?
> (f) May the military confiscate arms, or forbid traffic in arms?
> (g) Will a sentry be justified in firing on a person disobeying his orders to halt, where such person is not attempting to carry out any felonious design?[33]

In answer, it was proposed that the source from which the power to proclaim Martial Law springs must be considered. Hence, **if there is no Constitutional provision or statute expressly allowing an intrusion or limitation of a civil liberty, then it is *not* and will *not* be allowed**.

Public defense can and should be attained without a total abrogation of all individual rights. Otherwise, "it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation."[34] Thus, while this Court recognized in *David* that "arrests and seizures without judicial warrants" can be made during Martial Law, the circumstances justifying such warrantless arrests and seizures under the Rules of Court and jurisprudence must still obtain. Pertinently, Section 5, Rule 113 reads:

> SECTION 5. Arrest Without Warrant; When Lawful. — A peace officer or a private person may, without a warrant, arrest a person:
>
> (a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;
>
> (b) When an offense has just been committed and he has **probable cause** to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it; and

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[33] Ballantine, Henry Winthrop. "Unconstitutional Claims of Military Authority." Journal of the American Institute of Criminal Law and Criminology, vol. 5, no. 5, 1915, pp. 718–743. JSTOR, www.jstor.org/stable/1132541.

[34] *Ex Parte Milligan*, supra note 30.

> (c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or is temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.

As the basis for the declaration of Martial Law—rebellion—is a **continuing crime**,[35] the authorities may resort to warrantless arrests of *persons suspected of rebellion* under the foregoing provision of the Rules of Court.[36] It must, however, be emphasized that the *suspicion of rebellion* upon which a warrantless arrest is made must be based on a **probable cause**, i.e., the ground of suspicion is supported by personal knowledge of facts and circumstances sufficiently strong in themselves to warrant a cautious man's belief that the person sought to be arrested has "committed or is actually committing" the crime of rebellion. Thus, parenthetically, the general arrest orders must be issued by the Armed Forces on the basis of probable cause. Alternatively, it must be shown that the person to be arrested was caught ***in flagrante delicto*** or has committed or is actually committing an overt act of rebellion or any other offense in the presence of the arresting officer.

In sustaining an arrest without a judicial warrant, Justice Holmes, in *Moyer v. Peabody*, ratiocinated that the "public danger warrants the substitution of executive process for judicial process."[37] However, I subscribe to the position that even during Martial Law, **the jurisdiction of and inquiry by the courts are merely postponed, not ousted or superseded**.[38] Hence, the same tests that would be applied by the civil courts in an inquiry into the validity of a government action must be applied by the military during a Martial Law.

In line with this, searches and seizures without judicial warrants can only be had in the following cases: (1) search of moving vehicles; (2) seizure in plain view; (3) customs searches; (4) waiver or consented searches; (5) stop and frisk situations (Terry search); (6) search incidental to a lawful arrest; (7) exigent and emergency circumstance;[39] and (8) search of vessels and aircraft,[40] where, again, probable cause exists that an offense has been committed and the objects sought in connection with the offense are in the place sought to be searched.

In the restriction of the freedom of speech and of the press, the military must still be guided by the **clear and present danger** test—that words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that

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[35] *Umil v. Ramos*, G.R. No. 81567, October 3, 1991, 202 SCRA 251.

[36] *Sanlakas v. Reyes*, 466 Phil. 482, 548 (2004).

[37] 212 U.S. 78 (1909).

[38] Ballantine, Henry Winthrop. "Martial Law." Columbia Law Review, vol. 12, no. 6, 1912, pp. 529–538.

[39] *People v. Rom*, 727 Phil. 587, 607 (2014); citing *Dimacuha v. People*, 545 Phil. 406 (2007); *People v. Martinez*, G.R. No. 191366, December 13, 2010, 637 SCRA 791; *Caballes y Taiño v. Court of Appeals*, 424 Phil. 263, 290 (2002).

[40] *Valeroso v. Court of Appeals*, 614 Phil. 236, 255 (2009).

the military has a right to prevent.[41] Thus, the military can prohibit the dissemination of vital information that can be used by the enemy, e.g., they can ban posts on social media if there is a clear and present danger that such posts will disclose their location. The same test, the presence of clear and present danger, governs the power of the military to disperse peaceable assemblies during Martial Law. As this Court held, tolerance is the rule and limitation is the exception.[42] Otherwise stated, in the absence of clear and present danger, the military is bound by the rules of maximum tolerance[43] under Batas Pambansa Blg. (BP) 880, otherwise known as the "The Public Assembly Act of 1985."

As to the "take-over of news media" mentioned in *David*, Section 17, Article XII of the 1987 Constitution states that: "In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest." Prescinding therefrom, this Court, in *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*,[44] held that ***police power*** justifies a temporary "take over [of] the operation of any business affected with public interest" by the State in times of national emergency:

> *Temporary takeover of business affected with public interest in times of national emergency*
>
> Section 17, Article XII of the 1987 Constitution grants the State in times of national emergency the right to temporarily take over the operation of any business affected with public interest. This right is an exercise of police power which is one of the inherent powers of the State.
>
> Police power has been defined as the "state authority to enact legislation that may interfere with personal liberty or property in order to promote the general welfare." It consists of two essential elements. First, it is an imposition of restraint upon liberty or property. Second, the power is exercised for the benefit of the common good. Its definition in elastic terms underscores its all-encompassing and comprehensive embrace. It is and still is the "most essential, insistent, and illimitable" of the State's powers. It is familiar knowledge that unlike the power of eminent domain, police power is exercised without provision for just compensation for its paramount consideration is public welfare.
>
> **It is also settled that public interest on the occasion of a national emergency is the primary consideration when the government decides to temporarily take over or direct the operation of a public utility or a business affected with public interest**. The nature and extent of the emergency is the measure of the duration of the takeover as well as the terms thereof. **It is the State that prescribes such reasonable terms which will guide the implementation of the temporary takeover as dictated by the exigencies of the time**. As we

[41] *Eastern Broadcasting Corp. v. Dans, Jr.*, 222 Phil. 151, 169 (1985).
[42] *David*, supra note 10.
[43] BP 880, Sec. 3(c). "Maximum tolerance" means the highest degree of restraint that the military, police and other peace keeping authorities shall observe during a public assembly or in the dispersal of the same.
[44] 465 Phil. 545, 586 (2004).

> ruled in our Decision, this power of the State cannot be negated by any party nor should its exercise be a source of obligation for the State.[45]

This Court, however, has held that it is the legislature, not the executive, which is the constitutional repository of police power,[46] the existence of a national emergency, such as a rebellion or invasion, notwithstanding. Accordingly, **the power to temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest can only be done whenever there is a law passed by Congress authorizing the same**. This Court, in *David*, explained as much:

> But the exercise of emergency powers, such as the taking over of privately owned public utility or business affected with public interest, is a different matter. This requires a delegation from Congress.
>
> Courts have often said that constitutional provisions *in pari materia* are to be construed together. Otherwise stated, different clauses, sections, and provisions of a constitution which relate to the same subject matter will be construed together and considered in the light of each other. Considering that Section 17 of Article XII and Section 23 of Article VI, previously quoted, relate to national emergencies, they must be read together to determine the limitation of the exercise of emergency powers.
>
> Generally, Congress is the repository of emergency powers. This is evident in the tenor of Section 23 (2), Article VI authorizing it to delegate such powers to the President. Certainly, a body cannot delegate a power not reposed upon it. However, knowing that during grave emergencies, it may not be possible or practicable for Congress to meet and exercise its powers, the Framers of our Constitution deemed it wise to allow Congress to grant emergency powers to the President, subject to certain conditions, thus:
>
> (1) There must be a war or other emergency.
>
> (2) The delegation must be for a limited period only.
>
> (3) The delegation must be subject to such restrictions as the Congress may prescribe.
>
> (4) The emergency powers must be exercised to carry out a national policy declared by Congress.
>
> **Section 17, Article XII must be understood as an aspect of the emergency powers clause**. The taking over of private business affected with public interest is just another facet of the emergency powers generally reposed upon Congress. **Thus, when Section 17 states that the "the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately owned public utility or business affected with public interest," it refers to Congress, not the President**. Now, whether or not the President may exercise such power is dependent on whether Congress may delegate it to him pursuant to a law prescribing the reasonable terms thereof. *Youngstown Sheet & Tube Co. et al. v. Sawyer*, held:

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[45] Emphasis supplied.

[46] *Southern Luzon Drug Corp. v. Department of Social Welfare and Development*, G.R. No. 199669, April 25, 2017; citing *Ichong, etc., et al. v. Hernandez, etc., and Sarmiento*, 101 Phil. 1155 (1957).

x x x x

The order cannot properly be sustained as an exercise of the President's military power as Commander-in-Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States. . ."

x x x x

It may be argued that when there is national emergency, Congress may not be able to convene and, therefore, unable to delegate to the President the power to take over privately-owned public utility or business affected with public interest.

In *Araneta v. Dinglasan*, this Court emphasized **that legislative power, through which extraordinary measures are exercised, remains in Congress even in times of crisis.**

x x x x

Let it be emphasized that while the President alone can declare a state of national emergency, however, without legislation, he has no power to take over privately-owned public utility or business affected with public interest. The President cannot decide whether exceptional circumstances exist warranting the take over of privately-owned public utility or business affected with public interest. Nor can he determine when such exceptional circumstances have ceased. Likewise, without legislation, the President has no power to point out the types of businesses affected with public interest that should be taken over. In short, the President has no absolute authority to exercise all the powers of the State under Section 17, Article VII in the absence of an emergency powers act passed by Congress.

Indeed, **the military must still be guided by *law* and *jurisprudence* and motivated by *good faith* in the exercise of the supreme force of the State even during a Martial law.** Thus, in its endeavor to restore peace and preserve the state, the military must still make proper adjustments to the safeguards of constitutional liberty under the following legislations intended to protect human rights:[47]

[47] *Ocampo v. Enriquez*, G.R. Nos. 225973, etc., November 8, 2016.

1. Republic Act No. 7438 *(An Act Defining Certain Rights of Person Arrested, Detained or Under Custodial Investigation as well as the Duties of the Arresting, Detaining and Investigating Officers and Providing Penalties for Violations Thereof)*
2. Republic Act No. 8371 *(The Indigenous Peoples' Rights Act of 1997)*
3. Republic Act No. 9201 *(National Human Rights Consciousness Week Act of 2002)*
4. Republic Act No. 9208 *(Anti-Trafficking in Persons Act of 2003)*
5. Republic Act No. 9262 *(Anti-Violence Against Women and Their Children Act of 2004)*
6. Republic Act No. 9344 *(Juvenile Justice and Welfare Act of 2006)*
7. Republic Act No. 9372 *(Human Security Act of 2007)*
8. Republic Act No. 9710 *(The Magna Carta of Women)*
9. Republic Act No. 9745 *(Anti-Torture Act of 2009)*
10. Republic Act No. 9851 *(Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity)*
11. Republic Act No. 10121 *(Philippine Disaster Risk Reduction and Management Act of 2010)*
12. Republic Act No. 10168 *(The Terrorism Financing Prevention and Suppression Act of 2012)*
13. Republic Act No. 10353 *(Anti-Enforced or Involuntary Disappearance Act of 2012)*
14. Republic Act No. 10364 *(Expanded Anti-Trafficking in Persons Act of 2012)*
15. Republic Act No. 10368 *(Human Rights Victims Reparation and Recognition Act of 2013)*
16. Republic Act No. 10530 *(The Red Cross and Other Emblems Act of 2013)*

The continuous effectivity of the 1987 Constitution further provides a blueprint by which the military shall act with respect to the civilians and how it shall conduct its operations and actions during the effectivity of Martial Law.

Under Section 2, Article II of the 1987 Constitution, the "generally accepted principles of international law [remains to be] part of the law of the land." Hence, conventions and treatises applicable to non-international

armed conflicts including the Geneva Conventions and its Additional Protocols continue to impose the limits on the power and discretion of the armed forces.

Notably, Common Article 3 of the Geneva Conventions enumerates acts that remain prohibited despite the hostilities. It states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. **To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:**
>
> **(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;**
>
> **(b) taking of hostages;**
>
> **(c) outrages upon personal dignity, in particular humiliating and degrading treatment;**
>
> **(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.**
>
> (2) The wounded and sick shall be collected and cared for.[48]

Furthermore, the Fundamental Guarantees under Article 4 of the "Protocol Additional to the Geneva Conventions x x x relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)" remain binding:

> 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
>
> 2. Without prejudice to the generality of the foregoing, **the following acts** against the persons referred to in paragraph 1 are and **shall remain prohibited at any time and in any place whatsoever:**
>
> (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

[48] Emphasis supplied.

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.[49]

These international commitments are incorporated into our laws not only by virtue of Section 2, Article II of the 1987 Constitution, but also by the domestic legislations previously enumerated.

Without a doubt, state agents—the members of the armed forces—who abuse their power and discretion under the proclaimed Martial Law and thereby violate their duty as the "protector of the people and the State"[50] are criminally and civilly liable. And here lies the ultimate safeguard against the possible abuses of this emergency power—the **ultimate responsibility** of the officers for acts done in the implementation of Martial Law. To whom much is given, much will be required.

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[49] Emphasis supplied.

[50] CONSTITUTION, Art. II, Sec. 3.

Our history justifies a heightened vigilance against the abuse of power, whether masked by Martial Law or otherwise. However, our fears should not hold us back from employing a power necessary to fight for our sovereignty and the integrity of our national territory under the auspices of democracy and civil authority. **As we recognize the superiority of the 1987 Constitution even during Martial Law, so should we recognize and place our trust in the safeguards written and intertwined in the grant of the power to declare Martial Law**. Let us concede that the framers of our Constitution, informed by lessons of history, guarded the "foundations of civil liberty against the abuses of unlimited power."[51]

WHEREFORE, I vote to **DISMISS** the petitions.

PRESBITERO J. VELASCO, JR.
Associate Justice

[51] *Ex Parte Milligan*, supra note 30.