

Is Closure Still Possible for the Marcos Human Rights Victims?

More than twenty-five years after the downfall of the Marcos regime, the dark legacies of the martial law era remain unresolved. One of these is the plight of thousands of human rights victims who suffered illegal detention, torture, and even summary executions. Known collectively as the Marcos human rights victims, they still await justice and closure from the Philippine government. Although they won a landmark case against the Marcos Estate in a Hawaii court in 1992 that convicted the former dictator for gross human rights violations and levied on the heirs almost US\$2 billion in damages, its enforcement and resolution is far from over. This paper is an account of the efforts of the Marcos human rights victims to seek justice and reparations, using the concept of modern-day reparations as its conceptual framework. It argues that the end goal of reparations is to bring about closure, and closure can be attained with any, a combination, or all of the following: truth, justice, and redress.

[We] are unable to forgive those whom we cannot punish!

Hannah Arendt, *The Human Condition*

INTRODUCTION

More than twenty-five years after the downfall of the Marcos dictatorship, justice and closure still elude the victims of human rights violations from that era. This is in contrast to other societies that have been able to address crimes against civilians committed during the deposed regime and hold perpetrators accountable, notably in Latin America and Africa. Such decisive measures to amend historical injustices have led to a degree of satisfaction for the victims, which is essential in attaining closure and healing wounds brought about by conflict, thus moving towards social reconciliation and harmony.

Known collectively as the Marcos human rights victims, they filed a class suit for illegal detention, torture, summary executions, and forced disappearances against the former dictator in Hawaii. The class suit would be both a landmark case and a historic one. It was the first human rights litigation on a mass scale against a former head of state. It was the first time a dictator was found guilty of human rights violations and ordered to pay his victims. The case also set a precedent in that dictators could no longer hide behind the veneer of immunity for actions supposedly done on behalf of the state. At the same time, crimes or wrongdoing could no longer escape prosecution by concealing them inside national borders and using the sovereignty of the state as cover. All in all, the victims were awarded almost US\$2 billion in moral and exemplary damages.

But this victory would only be the start of the victims' travails, for the decision would encounter huge challenges and roadblocks. Because compensation for the victims would come from laying claim to the Marcoses' ill-gotten wealth stashed in a number of Swiss banks, it collided with the Philippine government's efforts to recover the same assets through the efforts of the Presidential Commission on Good Government (PCGG). Besides, the Comprehensive Agrarian Reform Law states that all assets recovered from the Marcos Estate¹ shall be used solely for agrarian reform purposes. Two months short of the twenty-fifth anniversary, after the case was first filed, more than seven

thousand victims were finally able to receive compensation amounting to only US\$1,000 from their lead counsel Atty. Robert Swift. It is a small amount compared to the almost US\$2 billion in damages granted to them by the Hawaii District Court.² The money did not come from the Swiss assets but from another Marcos dummy corporation, Arelma Foundation, stashed in a Keppel Bank account in Singapore. This time, the PCGG did not lay claim to the assets—allegedly upon the orders from Malacañang, whose present tenant, after all, is the son of the most famous human rights victim during martial law. There is an adage that spells out the dilemma of the victims: “the longer it takes to pursue a crime, the harder it is to get justice.”

This paper is a discussion of the class suit filed by the Marcos human rights victims against the Marcos Estate in Hawaii. It shall chronicle the events leading to the trial, as well as developments in international human rights law that allowed the trial of a non-American former head of state in US soil. It then examines why the trial failed in effecting closure, before finally providing another track to pursue reparations. As such, this paper would like to posit that reparations could be achieved or attained with truth, justice, and redress, depending on the degree or gravity of the human rights violations and on the options available to the state that pursues an accounting of past crimes.

There must be truth-telling in order to establish or determine what really transpired during the period concerned, to accord the victims or their survivors—and, if possible, their tormentors—the right to know about their ordeal and to inform the general public of what really happened. But more importantly for the victims, truth-telling lays the basis for prosecution and compensation. No matter how limited the number of perpetrators put to court, or even if the punishment for such offenses may be considered light or not proportional to the crime committed, it is important to demonstrate to society the importance of accountability, that human rights violations cannot go unpunished. Redress, which may also be termed as settlement, refers to the measures or amendments the state prescribes or offers to the victims in order to achieve satisfaction. Such measures are manifold and may include the following: financial compensation, apology, official recognition and commemoration, exemption from military service, housing and educational benefits for the children of human rights victims who disappeared or were executed, etc. The end goal of all reparation measures is closure.

Furthermore, this paper would like to posit that reparation measures such as trials and truth telling activities could only be effective if they are acknowledged and supported by the state. Reparation measures may not be effective if it is exclusively a civil society-led initiative. However, if the state is constrained or unable to effect official reparation measures, the viable means of closure for human rights victims lay in the realm of symbolic or moral reparations, i.e. history writing and commemoration.

REPARATIONS: CONTEMPORARY MEANING AND USAGE

The concept of reparations, in its narrowest definition, means nothing more than compensation. Previously, reparations were acts of states alone—i.e., they were either the provider or the recipient. Reparations were imposed by nations as compensation or payment for damages from those who lost a war or conflict. After the Second World War, it was seen as a “victor’s justice,” because the crimes of the losing countries—such as the Nazi’s atrocities against the Jews and Russians, as well as the Japanese massacre of Chinese civilians—were amplified, while the atrocities of the winners—like the atomic bombing of Japan or the fire-bombing of German cities—were overlooked and not examined (Tropey 2003, 63–69).

There are two key components of reparations: (1) it singles out the role of states, since states and state agents, as the violators of human rights, have the key responsibility for making reparations; and (2) restorative justice, which involves returning the victims as much as possible to the status quo ante, while acknowledging the impossibility of full compensation (Ignatieff 2001, 17).

Reparations have been accentuated on states undergoing transitions to democracy as a way to heal social wounds and hasten the process of reconciliation. The changed human rights regime have forced states from skirting accountability by hiding behind its veneer of immunity or providing unqualified protection for its agents. Instead, states should assume the following responsibilities to break away from the military-like practices of the past and be more accountable to its citizenry. Among these new tasks for democratic states are: (1) the obligation to do justice, which is to punish the perpetrators if the crimes committed were determined to be criminal in nature; (2) the

obligation to grant victims the right to know, which is to investigate all aspects of a violation that is still shrouded in mystery and to disclose to victims, friends, relatives, and society such aspects; (3) the obligation to grant reparations, which includes both monetary and non-monetary gestures to express recognition of the harm done and an apology in the name of society; and (4) the obligation to see to it that those who have committed the crimes while serving in any capacity in the armed and security forces should not be allowed to continue on the rolls of reconstituted democratic law-enforcement or security-related bodies (Hayner 2001, 12).

But modern day reparations also brought about the tension between the local and the global. It reflected the struggle between local and global resolutions to conflicts at a time when globalization, especially in the field of dispensing justice, increased the interconnectedness of political-decision making. Reparations raised the question of interaction, as well as the dynamics, between the internalization of justice and the sovereignty of the state—up to what point or extent should the response to harm rightly remain under the control of the state where the harm occurred? If conventional norms point to the state, experiences with transitioning societies towards democratic rule point increasingly toward non-state actors (Boraine 2008, 2).

There are three basic streams or sources of demand for reparations. First are those cases arising from acts of injustice perpetrated during the Second World War. These include claims arising from state-sponsored mass killings (the Holocaust being the prime example), forced labor, and sexual exploitation on the part of the Axis powers. In Asia, the most publicized would be the so-called comfort women. It also included wartime incarceration of Japanese immigrants in the US and Canada.

The second set of reparation claims stem from colonialism, both in the classical European sense and in internal colonization, such as slavery, apartheid, forced assimilation imposed on indigenous populations, and occupation or appropriation of ancestral lands. In the former case, there are African nations that plan to seek reparations for economic devastation brought about by European colonialism in the last century. In the latter, reparations are normally undertaken by First World countries vis-a-vis their indigenous populations. For example, Australia apologized for taking young Aborigines away from their parents and forcing them to live in white families to hasten the process of assimilation. Canada likewise apologized to Native Americans or

First Nations as atonement for taking over their lands for commercial purposes.

The third set of reparation claims arose from state terrorism and other authoritarian practices during the transition process to democratic rule by countries in Latin America, Eastern Europe, and South Africa. The victims were generally understood not in racial but in political terms and constitute groups with a shared experience of political repression. Reparations such as monetary compensation in South Africa, Chile, and Argentina came as a result of the findings of the truth commissions. Reparations for the victims were primarily concerned with clarifying the circumstances under which the victims of the regime suffered (Troyer 2001, 335–37).

The following are mechanisms or measures most commonly used to repair historical wrongs committed in order to obtain justice and thereby effect closure:

Prosecution or trials. Punishment for perpetrators of human rights violations through trials may be the most visible and dramatic form of pursuing justice, but they are time-consuming and contentious. In some Latin American countries, such as Argentina and Uruguay, trials for perpetrators of past human rights abuses were postponed because it brought further instability to newly-established democratic regimes that teetered on the verge of collapse. Many transitioning societies often faced the dilemma of choosing only either justice or peace but not both. Of late, trials of former dictators have been raised to the international level, and sometimes even under UN supervision. This is to preserve or to minimize threats to internal social cohesion in post-conflict societies to aid countries that have limited judicial capabilities, or to come up with tribunals that meet international standards (Bassiouni 1996; cf. Reinisch 2005; Mascarenhas 2005).

Financial compensation. Financial compensation may arise as a result from the reports of truth commissions, a decision or order from a court undertaking trials or prosecutions of human rights violators, or a policy of restitution if the state so decides. In the first case, the victims of the apartheid regime in South Africa received substantial amounts of money at the behest of the Truth and Reconciliation Commission. Argentine and Chilean dissidents also received modest financial help from the government after the findings of truth commissions were announced to the public.

Truth commissions. One of the most common demands from victims and their kin in many transitional societies is an official truth-

telling activity. Truth commissions have four important elements: it focuses on the past; does not concentrate on a specific event but paints an overall picture of certain human rights violations over a period of time; it exists for a pre-determined period of time; and it is vested with a certain authority (Hayner 2001, Annex C).

The first country that came up with this mechanism was Argentina. A truth commission was established immediately after the end of the military regime of Gen. Jorge Videla and its “dirty war” on dissidents in 1982. Then President Raul Alfonsin established the National Commission for Disappeared Persons the following year, which came up with a final report entitled *Nunca Mas* (Never Again) four years later. The report was used to prosecute the military, but such attempts were met with successive military revolts and eventually succumbed to them. In spite of the praises being heaped upon truth commissions, they are actually compromises between prosecution and amnesty. Political stability or sometimes reconciliation are sought by offering amnesty to agents or elements of the old regime, but at the same time, it seeks to benefit the victims and society as a whole by letting the public know about what happened through a formalized structure of truth-telling (Skaar 1999, 1119).

Lustration. Contrary to popular perception, lustration—or the systematic vetting of public officials for links to the communist-era security services—was widely adopted in Eastern Europe in the early 1990s not because of its etymological association with the Roman rites of purification, but because politicians and the public heard it being used by bureaucrats during battles for control of Czechoslovak files in preparation for its first democratic elections after the downfall of the communist regime. The term “lustration” has long been used by Slav and Slavophone archivists to refer to the compilation of an inventory or register (Williams et al. 2001, 24–25). “Lustration” and “decommunization” were used interchangeably. While the former is understood as ascertaining whether an occupant of a particular post worked for or collaborated with the communist security services, the latter refers to the wider removal and exclusion of people from office for having been functionaries of the Communist Party or related institutions (Ibid., 35–37). Thus, to lustrate someone meant to check whether his name appeared in a database and bar him from employment in the state bureaucracy, especially in its security apparatuses.

Amnesty. The granting of amnesty stems from many concerns: political stability, reconciliation, and the need for social cohesion.

While new democratic regimes and human rights advocates may be predisposed to punish past offenders, the fear of retribution may convince them that amnesties are preferable to coups. There are other reasons for amnesty. In cases of negotiated transitions, similar to that of South Africa, there is a tendency that the prospect of a handover in the future would depend considerably on whether members of the current regime could face retribution. There is also the very real danger that prosecutions intended to strengthen the rule of law could have the reverse effect, making reformers accept amnesty and other compromises. Furthermore, prosecuting all those responsible for past human rights violations may not be feasible, for there are just too many. This was the dilemma faced by Uruguay and Guatemala in their transitions to democratic rule (Sriram 2004, 10–11). As some of its adherents cynically pointed out, “But is it not democracy or the attainment of democratic rule that is the real reparation? Is it not official silence, or the policy of letting bygones be bygones, the price to pay for a transition to a democratic government? Is it not that non-acknowledgment of past crimes keeps the ‘peace and harmony’ in society?” (Mendez 1997, 13–14; Hesse and Post 1999, 3–6)

Moral reparations. *Restitution.* In its simplest definition, restitution means to return something which was forcibly or improperly taken. It includes personal property (like pieces of art, real estate, or money) or communal property (ancestral domains or “homelands,” and cultural or historical artifacts). Restitution aims to reestablish to the fullest extent possible the situation that existed before the violation took place. Restitution may also mean compensation which relates to an economically assessable damage resulting from violations committed. But it may also mean rehabilitation which may include, but is not limited to, legal, medical, psychological, and other cares (Kritz 1996, 35).

Apologies. Coming from the Greek word *apologos*, which originally meant an oral or written defense against accusations by others, it came to mean as justification, explanation or excuse, and, later on, an account of an offense that was unintended. An apology may be official or personal; it may also be an individual apologizing to a fellow individual, a group to an individual, or a state to an individual or a group. Apology represents the institutionalization of symbolic exchange as one means of precluding or containing socially disruptive conflicts. Apologetic discourse presupposes shared definitions between the two parties of the violation, its severity and implications (Tavuchis 1991, 22–28).

Shortly after assuming office, Prime Minister Rudd apologized to the Aborigines for forcibly taking their young and bringing them to white homes for rearing, a practice common in Australia from the 1920s to the 1970s, to hasten the process of assimilation.

Symbolic or Commemorative. Reparations or redress of past human rights violations may not only be physical or limited to financial compensation, educational or housing benefits, and exemption from military service. If the intention is to inculcate the collective memory of the victims to future generations and remind them of the horrors of authoritarian rule, then symbolic remembrances may very well be the best form of reparations. Aside from erecting markers and memorials or establishing museums, symbolic reparations include commemorations, which is the setting aside of a particular day to remember a particular event or date, to keep alive the memory of the victims and save it from going into oblivion, “forgetting,” or “deremembering” (see Smith 1996).

HUMAN RIGHTS, HUMANITARIAN LAW, AND THE MARCOS TRIAL IN HAWAII

The idea of prosecuting Marcos for human rights violations occurred right after the February 1986 People Power Revolt. But legal remedies were not available in the Philippines, and even if there were, the tense political situation may not be conducive for such an undertaking. Ironically, the US legal system provided the basis for prosecuting Marcos by resurrecting an obscure eighteenth-century law called the Alien Tort Claim Act (ATCA). Also, the case was filed in Hawaii because it was Marcos’s residence and that part of the Marcoses’ ill-gotten wealth was in the US. These were confiscated by US Customs authorities when the Marcos family landed in Hawaii in February 1986 (Orendain 1992). The case would become a watershed in international jurisprudence, because it was the first lawsuit wherein human rights abuses committed by a dictator in another country was tried in the US and convicted.

The Samahan ng mga Ex-detainees Laban sa Detensyon (SELDA; loosely translated, Association of Ex-detainees Against Detention and for Amnesty), a group of former political prisoners and eventually the proponent of the case, sought to seek justice for the thousands of human rights victims and to keep alive their collective memory.

Besides, the SELDA noted, human rights violators in the military have been promoted by the Aquino administration and even occupied key government positions (SELDA 1998, 1).³ SELDA's Executive Board met in March 1986 and appointed Atty. Jose Mari Velez, also a political detainee, to explore and come up with an action plan. Atty. Velez met Atty. Robert Swift from the Kohn, Savett, Klein & Graf Law Office in Philadelphia and told the latter that it was possible to file a class suit in a US court by using the ATCA. In fact, Swift was handling several class suits at the time, foremost of which was the case filed by residents of Bhopal, India, where several hundreds died after inhaling toxic gases that leaked from a Union Carbide plant that manufactured Eveready batteries. Atty. Velez confided to the Board that Swift's law office would shoulder all the litigation expenses until the case is over. Attorneys' fees and reimbursement of fees would only be settled upon recovery of the awarded money (*ibid.*, 4). In turn, Atty. Swift made Atty. Velez his co-counsel in the Philippines, who in turn appointed Atty. Rod Domingo, a junior partner in his law office, to assist him in the preparation of the case.

The SELDA decided that the members of the class suit would be those who suffered human rights abuses from the Philippine military, police, and paramilitary forces from September 1972 to February 1986. Because there was an urgency in filing the case, Marie Hilao-Enriquez, another SELDA member, asked her parents Maximo and Celsa Hilao, to file charges and to be the lead plaintiffs on behalf of her sister Liliosa Hilao, who died while undergoing tactical interrogation inside a detention cell in Camp Crame on April 6, 1973 (*ibid.*, 2).

After the SELDA took the depositions in Manila, Atty. Swift filed the case at the Hawaii Federal District Court under Judge Fong in April 1986. The court, however, dismissed the case for lack of merit, citing the "acts of state doctrine" which gives immunity to an incumbent president or head of state (*ibid.*, 3). Atty. Swift then appealed the case to the next higher court, the Ninth Circuit of the US Court of Appeals in Southern California. The case would be in hibernation over the next four years, until 1990. Luckily for the victims, the trial would proceed and would be in their favor. Subsequently, the class suit would be revived due to the following factors: (1) the legal jurisprudence in the US has changed because of the passage of the Torture Victim Protection Act (TVPA) which complemented the ATCA; (2) a human rights case filed against Imee Marcos-Manotoc by Archimedes Trajano that debunked the "acts of state doctrine" and

paved the way for the class suit to proceed; and (3) Judge Fong was replaced by a more sympathetic adjudicator, Judge Manuel Real.

Enacted in 1789 by the newly created state of America, the ATCA provides that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations (customary law) or a treaty entered into by the United States.” In reality, the ATCA was originally meant to deter piracy and the harming of envoys or ambassadors. The ATCA empowered federal courts with subject matter jurisdiction if three basic requirements are met: (1) the plaintiff is an alien; (2) the defendant is responsible for a tort (violation); and (3) the tort violates the law of nations or a treaty to which the US is a party (Ratner and Abrams 1997, 205).

The ATCA remained an obscure basis for US federal court jurisdiction until the 1980 landmark case *Filártiga vs. Peña-Irala* (or the Filártiga case). The case stemmed from a civil action suit filed by the family of Paraguayan activist Joelito Filártiga, then only 17 years old, who was tortured and later died while in captivity. The accused, Gen. Americo Peña-Irala, then the chief of police of Asuncion, Paraguay, was in the US and was caught for overstaying his visitor’s visa in early 1979. The Center for Constitutional Rights, an advocacy or public interest law group which helped the PCGG in its early years to recover the Marcoses’ assets in the US, and Amnesty International informed Joelito’s sister Dolly, who was also living in the US at the time, about Peña-Irala. She called the Immigration and Naturalization Service, which apprehended Peña-Irala for the violation. He was later charged for the death of Joelito in a Brooklyn courthouse. The defense argued that the ATCA could not be used because “the law of nations,” as it was conceived in the 1780s, was far different than it was in the 1980s. However, Judge Eugene Nickerson dismissed the case, saying that wrongdoing committed by a government against its own people could not count or constitute as violation of the law of nations. When the case was appealed, the Second Circuit invited the State Department to submit an amicus brief. Under the Carter administration’s guiding principle of using human rights as a foreign policy objective, both the State and Justice departments jointly submitted a brief urging a reversal and to permit the suit to proceed (Saguisag 1992).

As a result, Chief Judge Irving Kaufman ruled that the law of nations being referred to was not as it was in 1789, but, rather, as to how it had evolved and existed among the nations of the world today. The court further ruled that acts falling under the edict should be

“universal, definable, and obligatory international norms.” And that torture, by virtue of its universal condemnation both in the domestic laws of all nations and in numerous international declarations and treaties, did violate the law of nations, especially if it was committed against its own people. The decision also brought to the fore the “transitory” nature of torts—i.e., the right to sue follows a wrongdoer across national boundaries. Peña-Irala was eventually deported but the case proceeded without him. In 1994, the Brooklyn court issued a US\$10.4 million default judgment in favor of the Filártiga family, but nothing was collected. They, however, received satisfaction from having established a precedent case for other torture victims (Ratner and Abrams 1997, 205–6). By the late 1980s, the ATCA was used in several Filártiga-style cases against dictators and senior security officers.

The other human rights instrument that bolstered the prosecution against Marcos in the US was the passage of the TVPA in 1992. The law authorized civil suits against individuals of any nationality who used torture or summary executions on another person. The law required four basic elements to take effect: (1) the defendant must have committed torture or an extrajudicial killing; (2) the defendant must have acted under actual or apparent authority, or authorized by any law, of a foreign nation; (3) the plaintiff must be a victim, their legal representative, or a person who may be a claimant in a wrongful death action; and (4) the plaintiff must have exhausted remedies in the country where the conduct giving rise to the claim occurred. The TVPA bolstered the ATCA by extending the right to sue US citizens but, unlike the ATCA, the TVPA covers claims against torture and summary executions only. Thus, while the ATCA provided the Hawaii court the jurisdiction for prosecuting Marcos, the TVPA provided the basis for compensating the victims. The TVPA also became the basis for dividing the victims into three categories: those tortured, those summarily executed, and those who disappeared (presumably summarily executed). However, one limitation of both ATCA and TVPA cases is that they authorize claims against individuals only and not states. Moreover, the TVPA limits prosecution to those crimes committed ten years prescription period—i.e., a case must be filed within ten years after the crime has been committed. Although civil suits do not lead to the same degree of accountability as a criminal process, they do, however, offer a way of seeking justice and represent one form of authoritative arbitration of legal issues relating to human rights violations (*ibid.*, 207–8).

One month after fleeing the Philippines, there were at least three lawsuits that were filed against Ferdinand Marcos, his daughter Imee and General Fabian Ver in three judicial districts in the US for human rights abuses committed between 1972 and 1986. These were the following:

The “Group of 21” case. They were student activists who were detained and tortured by the military during the early part of the martial law period, but who left for the US for further studies or to migrate.⁴ They were represented in the Marcos trial in Hawaii by Atty. Melvin Belli from San Francisco. This case was originally filed in Hawaii, but was later incorporated in the Maximo Hilao et.al. class suit.

The “Group of Three” or the Piopongco case.⁵ This case involves Jaime Piopongco, Francisco Sison, and Jose Maria Sison. Francisco Sison, however, died during the martial law years and his father represented him during the trial. Jaime Piopongco was an activist and radio station owner. His radio station was closed and his house searched by security agents immediately after the declaration of martial law. When he was arrested, he was brought to Malacañang palace, interrogated, subjected to mock executions, and held *incommunicado*. When released, he made his way to the America and became a US citizen. Included in this case was the former Chair of the Communist Party of the Philippines, Jose Ma. Sison, who was personally interrogated by Marcos and then spent five years in solitary confinement and another three years in near-solitary confinement. Both Sison and Piopongco filed cases against Marcos in 1986, but these were dismissed. When the dismissals were reversed due to the Trajano case, the two pursued their cases separately. Sison’s case was included in the class suit, while Piopongco sued the Marcoses alone and was awarded damages worth US\$75,000.

The Maximo Hilao et al. case.⁶ The case was filed by Maximo Hilao on behalf of her daughter Liliosa in 1986.⁷ By having the biggest number of plaintiffs—9,539—it became the flagship case in which the other cases were incorporated. Spearheaded by the SELDA and supported by human rights groups in the Philippines, such as the Task Force Detainees of the Philippines, Atty. Jose Mari Velez was its counsel until his death in 1991 and was replaced by Atty. Romeo Capulong.

When the cases were filed, the American judges were caught in a bind as these acts were committed outside of the sovereignty of the US and therefore deemed non-justiciable. Eventually, all the lawsuits were dismissed on the grounds that the violations were done in the

pursuit of official duties or what may be called “acts of state.” The Philippine government, courtesy of officials sympathetic to the plight of the human rights victims, filed an *amicus curiae* brief urging the US courts to exercise jurisdiction over the said cases. The Philippine government disputed the arguments made by the defendants that they knew nothing or were not aware of the human rights abuses, even providing documents to show that Marcos was given a regular update of the torture sessions and executions of political detainees.⁸ But the clincher would be the Archimedes Trajano case.⁹

Archimedes Trajano was a Manila-based student who attended a forum where Imee Marcos-Manotoc spoke. Trajano had the audacity to question the appointment of Marcos-Manotoc as head of the Kabataang Barangay. After the forum he was kidnapped, interrogated, and tortured to death. His mother Agapita sued Imee Marcos-Manotoc for false imprisonment, kidnapping, wrongful death, and deprivation of rights. Marcos-Manotoc’s defense was that she could not be sued because she was acting in an official capacity as a government agent and had control over security personnel. In short, she claimed immunity under the Foreign Service Immunities Act that exempted foreign states and their agents from prosecution. The court struck down her argument for two reasons. One, the crime was committed outside of the scope of her official duties and beyond her authority. And two, she acted on her own authority and not upon the authority of the Philippine government.

When the case was appealed, the judge ruled that Article III of the US Constitution granted federal courts jurisdiction over civil actions brought by foreign plaintiffs against foreign nationals or sovereigns. It further pointed out that actions against foreign nationals in US courts raised sensitive issues over US foreign relations, thereby making it a federal concern falling within the purview of federal courts.¹⁰

With this ruling, the human rights victims filed for the reopening of the original case by way of a motion for reconsideration at the US Court of Appeals’ Ninth Circuit in San Francisco, California. The Estate¹¹ quickly filed a manifestation against the appeal by the human rights victims, attacking the claims as being barred by the statute on limitations, or the prescribed period in filing a case—a mere technicality. But the court deemed the appeal as meritorious. The court had a choice of applying Hawaii’s two-year statute of limitations on tort claims, or the Philippines’ one-year period for bringing actions for personal injury caused by a public officer arising from martial law,

or the TVPA, which allowed for an equitable tolling of the statute on limitations, which means the case being filed should have been committed within the last 10 years. The court opted for the third and deemed the appeal timely filed, paving the way for the legal action to be filed in March 1986.

Finally, on the merits of the case, the Estate was found liable. Though Marcos did not directly order, conspire, or aid the military in the torture, he knew of such conduct and failed to use his power to prevent such abuses. The court upheld the concept of command responsibility in international law. As a result, the Ninth Circuit Court reversed the earlier decisions dismissing the cases against the Marcos Estate and remanded the cases for trial to the District of Hawaii under Judge Manuel Real. The Judicial Panel on Multi-District Litigation consolidated all the cases and certified it as a class action suit on 8 April 1991 (Ramirez 2001, 115–16). The US District Judge Manuel Real from Los Angeles was appointed to the Hawaii District Court in 1988, and replaced the former judge Harry Fong. Judge Manuel Real, in his concern and kind consideration for the human rights victims, proved to be the opposite of the previous judge.

The class suit, now docketed as Multi-District Litigation 840, was bifurcated. The first phase was divided into two stages: the “liability stage” where the court, through the jury, determined whether the Marcos Estate was liable for violations of international law; and if the Marcos Estate was guilty of the crimes committed. After which the case proceeded to the “damage stage” in order to determine the amount of compensation due to the class or the whole set of victims. The second phase was intended for the court to determine the amount of compensation due to each of the category of victims. A Special Master, usually a retired US appellate judge appointed by the Hawaii District Court, would hear and receive evidence or individual claims to determine the specific damages sustained by each member of the class suit.

Atty. Swift had thirty-five witnesses to testify in court. Because only half could travel to Hawaii the rest used videotape presentations. Judge Manuel Real then classified and clustered the following as subclasses: (1) arrested and tortured by military and paramilitary groups while in their custody; (2) summarily executed by military and paramilitary groups; and (3) seized and caused to disappear by military and paramilitary groups, and presumed dead. The main trial by jury in Hawaii started at exactly nine o'clock in the morning of 9 September

1992, at Court Room 5 on the second floor of the federal courthouse. It was estimated to last for about a month, but the clarity and impact of the testimonies needed only ten working days to determine Marcos's culpability. The defense presented no witnesses. The first part of the trial ended on 22 September 1992.

It was not only Filipinos who took the witness stand. Two former US ambassadors, William Sullivan and Stephen Bosworth, also testified in court in favor of the human rights victims. Mr. Bosworth, ambassador from 1984 to 1987 and the last witness to be presented by the plaintiffs, told the court that although Marcos repeatedly promised to do something about human rights abuses on several occasions, he did nothing. Said Ambassador Bosworth, "He would always tell me 'I'll fix this and that' but all he did was wrist slapping, never any serious prosecution." Bosworth also said that from 1972 to 1986, Marcos's control over the military was absolute. Marcos, he observed, was in charge on a very "micro" level and that he ran everything. Asked why the US government did not act more incisively and forcefully, as it did against Manuel Noriega of Panama, Bosworth replied, "We could have just cut off our aid to the Philippines but that might have resulted in our being thrown out of our bases by Marcos. It was very difficult to do anything incisive" (Kaser 1992b). In hindsight, the testimonies of the two former envoys, though helpful for the victims, unwittingly confirmed what everyone suspected all along: that human rights were subsumed under security considerations. Indeed, Marcos knew how to play the American card and exploited it to the hilt.

The jury found the Marcos Estate guilty for the acts of torture, summary executions, and disappearances when it handed its verdict on 22 September 1992. On 23 February 1994, the court awarded the victims US\$1.2 billion as compensatory damages for all the plaintiffs. Then on 20 January 1995, the court again awarded the victims US\$776 million for exemplary damages for the class suit members. The Hawaii District Court was also able to determine that the individual plaintiffs be awarded money ranging from US\$150,000 to US\$700,000.

The three-phased trial officially culminated on 27 January 1995, when the Hawaii District Court released its Final Order. First, it found the investigation report of the Special Masters it sent to the Philippines to validate the 135 randomly selected the previous year to be authentic, and individually awarded them financial remuneration ranging from US\$20,000 to US\$185,000, depending on their personal ordeal or circumstances. The court also rewarded the remaining subclass

that suffered torture the aggregate amount of US\$251,819,811.00 to be divided pro rata; the remaining subclass that suffered summary executions US\$409,191,760.00 to be divided pro rata; and the remaining subclass that suffered involuntary disappearance (and are presumed dead) the aggregate amount of US\$94,910,640.00 to be divided pro rata.¹²

In addition to awarding US\$776 million in compensatory damages, the court also awarded the human rights victims US\$1,197,227,417.90 in exemplary damages to be divided pro rata, to make an example for the common good. Furthermore, the court added prejudgment interest of ten per cent per annum from 7 April 1986, when the case was first filed, to January 1995, when the case or class suit finally ended. Judge Real reasoned out that this award was due to the diminution of the victims' awards for the long time it took from the time when the injuries were committed up until an entry of judgment was made. The award also took into consideration the value of the money that were compounded by inflation and the depreciation of the Philippine peso to the US dollar which is in accord with laws of the state of Hawaii. The judge, now imbued with the language of the new international human rights regime, noted that this was done in "manifestation of the objectives of international law which is to make human rights victims whole for their injuries."¹³

In spite of the many obstacles and challenges, the class suit was able to achieve many objectives based on what the victims had set out to do when it was first filed in 1986. First, the case was able to give the victims a sense of justice even if the case was tried abroad. In fact, there was a lot of sympathy and goodwill towards the human rights victims and the case in general, even from ranking government positions who were themselves victims of imprisonment or torture.

Second, the class suit was able to expose the violations of the Marcos Estate. It provided the Filipinos and the international community a glimpse of the heinous crimes the Marcos family committed. Third, the class suit proved that Marcos, and dictators in general, were not beyond the reach of the law. The suit was able to deny them safe haven in the US. Fourth, the landmark case was a contribution to international jurisprudence on human rights and henceforth to the strengthening of a human rights regime in the world. It was the first class action human rights suit in history using the ATCA. It was also the first time that plaintiffs were awarded compensation from the person authorizing the crime. Until this class suit, never before has a former head of state

been found guilty of human rights abuses in a regular court. Finally, the award given by the Hawaii District Court for exemplary damages represents the largest personal injury award in history.

Yet the class suit had many limitations. First, if the trial would be the equivalent of a truth-telling activity, it was a failure. The trial did not produce the catharsis necessary for victims to tell their ordeal and confront their tormentors. Of the more than nine thousand victims listed in the complaint, only 137 individual cases were selected at random by a computer to represent the whole class. Fewer still were able to testify in court during the trial period. There was no way of somehow comprehending the scale and magnitude of human rights violations during martial law. The US court's jurisdiction did not extend to the military who were directly involved. More importantly, the testimonies at the trial were not disseminated to the Filipino public in order to come up with a better understanding of the Marcos regime. Second, if the class suit would be the equivalent of a prosecution trial for Marcos and his Estate, it was grossly insufficient as the case was civil and not criminal. Though Marcos was told to pay for his crimes, he escaped going to prison for it.

The government could have done more to satisfy the victims' longing for justice. First, whoever sits as president has the duty or responsibility to at least offer regrets, if not apologies, to the victims, mainly because it is from their sufferings that the present democratic dispensation rests. As commander-in-chief and head of the security apparatus, a new president assumes or takes into his or her fold the security apparatus that was once responsible for such acts. Second, the government's claim to the Marcoses' assets need not be diametrically opposed to the claims of the human rights victims. There was much sympathy for the human rights victims, yet this did not translate to concrete gains, such as crafting new laws on human rights or modifying the limitations set by the Comprehensive Agrarian Reform Law to include other social justice programs.

Third, the financial award granted by the Hawaii District Court was truly phenomenal. As a consequence, it became the benchmark by which to measure proposed compromise agreements. Up to a considerable degree, the proposed settlements with the Marcos Estate were deemed too small when compared to the total amount awarded by the court. In the end, the astronomical amount became an illusion. The landmark decision became impossible to enforce due to the objections of the Philippine government. And while the Swiss government

recognized the need to include compensation for the human rights victims from stashed Marcos assets in Switzerland, these assets should be recovered first by the Philippine government who after all first laid claim to these ill-gotten wealth in 1986.

AGAINST RESTITUTION AND FAILED LEGISLATION

The overwhelming victory obtained in Hawaii however would not lead to the enforcement of the decision of and would not provide satisfaction for the victims. To the contrary, it would be the start of victims' travails. Because the money to be used in compensating the victims would come from the Marcoses themselves, the Hawaii District Court set its sight on the fabled assets stashed in Switzerland. By doing so, it went on a head-on collision with the Philippine government, whose policy was to recover the Marcoses' ill-gotten wealth and bring it back to the national treasury. In fact, Executive Order No. 1, Cory Aquino's first directive upon assuming power, was to create the PCGG, whose sole task was to run after the Marcos wealth abroad. As early as April 1986, the PCGG was in contact with Swiss authorities on how to recover these assets. In short, the efforts of the Hawaii District Court at reparations collided with the restitution policy of the Aquino administration. And in a landmark ruling in 1995, the Swiss Federal Supreme Court ruled that the Marcoses' Swiss assets belonged to the Philippine government and placed them in an escrow account until after a favorable ruling from a local court is obtained. This is recognition by the Swiss courts that the Philippine government's claim over the Marcos assets was superior to that of the human rights victims.

To satisfy the victims' legitimate quest for financial compensation, both the Ramos and Estrada administrations came up with proposed negotiated settlements. It was a compromise between insisting on the full recovery of the amount, which was unrealistic, and receiving a minute portion of the Marcos wealth. But it contained many preconditions, among them absolving the dictator and his family of wrongdoing. Unfortunately, this option, plus ideological factors, led the permanent divide between two victims' groups and their supporters. In the end, whatever settlement the executive branch was devising was struck down by the judiciary, both by the Sandiganbayan, the Philippines' anti-graft court, and the Supreme Court.

In hindsight, the Philippine experience at reparations and closure was greatly different from those of other countries. Some of the other countries did not suffer from “kleptocracy” and could thus focus their efforts on addressing past human rights violations. In the Philippines, the human rights issue was muddled by efforts at reclaiming the Marcoses’ ill-gotten wealth to the point where the claimants and the Philippine government collided despite the shared objective of closure of the martial law era.

The proposed compromise agreement was caught in the middle of the struggle for control of the contested assets between the Philippine government and the Marcos Estate. As the extent and value of these assets were undetermined, they became something of an imaginary treasure chest that the Ramos and Estrada administrations salivated over. Thus, the claim of the human rights victims for compensation ran smack against the efforts of both presidents to rehabilitate the Marcos family. In a way, the victims’ claims were, so to speak, a pestering fly in the Marcos pie.

Cognizant of the limitations of the law with regard to reparations and of the failed quest for a compromise agreement, the human rights victims opened another track: to lobby for the passage of a new law that obliges the state to recognize their sufferings and compel it to provide them compensation. This avenue became feasible as more and more progressives were elected in congress and the senate beginning in 1998. In the senate, human rights victims and those sympathetic to the issue were elected, among them Aquilino Pimentel, Joker Arroyo, John Osmena, Sergio Osmena III, and the late Raul Roco. Perhaps feeling guilty about the matter or maybe fearing public ridicule, senators on the opposite side of the fence, like Juan Ponce Enrile and Gregorio Honasan, did not raise any form of opposition to the bill at all. Likewise, in the House of Representatives, a number of congress persons sympathetic to the case were elected, such as Edcel Lagman, whose brother Hermon was a victim of forced disappearance, Wigberto Tanada, Lorenzo Tanada III, Mujiv Hataman, and many others. More importantly, human rights victims themselves were elected to office by way of the party-list system. Etta Rosales was elected as representative of the Akbayan party, while Satur Ocampo represented Bayan Muna. The bill was almost signed into law towards the end of the Thirteenth Congress, were it not for pressing concerns in the House of Representatives, chief among them the initiative to impeach then-president Gloria Macapagal Arroyo. At the moment,

the passage of this law is being stalled by efforts to make the former president and her allies accountable.

CONCLUSION

While it is extremely necessary to make the Philippine government recognize the victims and provide a modicum of compensation, there are other ways to compensate the human rights victims. In fact, it need not necessarily be financial alone. While waiting for the passage of a law that would finally prompt the state to recognize the plight of the human rights victims and its obligation to provide reparation, moral reparations that address the suffering of the victims remain an option, such as proper memorialization of courageous victims and, better still, a rewriting of contemporary Philippine history. Keeping alive the memory of martial law need not be demonizing Marcos, but more so in stigmatizing this dark past and its legacies. Going back to the original purpose of the case, many of those who pushed for the class suit had never intended to collect money from the Marcoses. Rather, their goal was to bring to trial the Marcos family for their misdeeds and to teach future generations about the horrors of this period. In a sense, the focus on recovering the Marcoses' assets veered away from the moral imperative of educating the public about the martial law period. In the final analysis, this could have brought about a substantive degree of closure not just for the victims but the nation as a whole, including future generations of Filipinos.

NOTES

- 1 Ferdinand Marcos died on 28 September 1989, and all the cases filed against him and the Marcos family were collated and unified under the heading "Marcos Estate," and thereafter represented by Imelda Marcos and her son Ferdinand (Bongbong) Marcos, Jr.
- 2 The Hawaii District Court set the amount of compensation depending on the gravity of the crimes committed on the victims. For example, a victim of illegal detention could be granted as much as US\$45,000, while those who suffered wrongful deaths could amount to more than a hundred thousand dollars.
- 3 The following documents related to the class suit, otherwise known as the MDL 840, are contained in the SELDA papers located at the Special Collection of the University of the Philippines Main Library.
- 4 For the record, the plaintiffs in this case are Gerry Soco, Fluellen Ortigas, Vicente Clemente, Jerrold Garcia, Ester Albano Garcia, Ramon Veluz, Jose Asuncion, Rex Brown, Alfonso King, Cris Aranda, Ramon Castaneda, Emmanuel Umali, Ramon Mappala, Renato Torres, George Gaddi, Susan Araneta, Manuel Buncio, Marcelino de Leon, Don Fabi, Ramon Jalipa, and Apolinario Madayag.

- 5 This case is officially docketed as US Court of Appeals, Maximo Hilao, plaintiffs-appellee, vs. Estate of Ferdinand Marcos, defendant-appellant, 987 F.2d 493 and 25 F.3d 1467 (9th Circuit, 1986 and 1993) as is the main class suit against the Marcos Estate. However there are two other cases filed against Marcos, namely: Jose Ma. Sison and Jaime Piopongco, plaintiffs-appellees v. Estate of Ferdinand Marcos, defendant-appellant, 978 F.2d 493 (9th Circuit, 1992) or otherwise known as the Group of Three, and the Group of 21 wherein twenty one students and Fil-Ams filed a case in the US against Marcos for human rights violations. While Sison's case was tried separately, the Group of 21 case was incorporated into the Maximo Hilao case.
- 6 Maximo Hilao, plaintiff-appellee, v. Estate of Ferdinand Marcos, defendant-appellant, 987 F.2d 493 and 25 F.3d 1467 (9th Circuit, 1986 and 1993).
- 7 The original plaintiffs in the class suit were Maximo Hilao (on behalf of her daughter Lilirosa Hilao), Danilo Mallari de la Fuente, Gerry P. de Guzman, Renato Manguera Pineda, Trinidad Herrera-Repuno, Adora Faye Rivera, Hilda Narciso, Danilo Vizmanos, Guillermo Ponce de Leon, Jose Duran, Josefina Hilao Forcadilla, Domiciano Amparo, Rodolfo Banosa, Arturo Revilla, Agapita Trajano, and Paula Romero.
- 8 It was Executive Secretary Joker Arroyo and Senior Adviser Rene Saguisag who provided documents left behind by the Marcoses in Malacañang to the prosecution lawyers. (See *Hawaii Star Bulletin* 1992 and Kaser 1992a.)
- 9 Re: Estate of Ferdinand E. Marcos Human Rights Litigation: Agapita Trajano and Archimedes Trajano, plaintiffs-appellees, v. Ferdinand E. Marcos, defendant, and Imee Marcos-Manotoc, defendant-appellant, 978 F.2d. 493 (9th Circuit, 1992).
- 10 Ibid. p.3
- 11 Ferdinand E. Marcos died on September 1989 and thereafter all cases filed against him was renamed The Marcos Estate. Imelda Marcos and their son Ferdinand Jr. stood as defendants in lieu of the former dictator.
- 12 US District Court, District of Hawaii, "Final Judgment," MDL 840 and C.A. No. 86-390 (Celsa Hilao et.al., plaintiffs, v. Estate of Ferdinand E. Marcos, defendants), 27 January 1995, par.3.
- 13 Ibid., par.5.

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MEYNARDO MENDOZA, Ph.D. is an Assistant Professor at the Department of History, School of Social Sciences, Loyola Schools, Ateneo de Manila University. His research interests include social movements, human rights in Southeast Asia, and the Marcos period. <mpmendoza@ateneo.edu>