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Freedom From Arbitrary Arrest and Detention in the Philippines: A Problem of Enforcement

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FREEDOM FROM ARBITRARY ARREST AND DETENTION IN
THE PHILIPPINES: A PROBLEM OF ENFORCEMENT

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INTRODUCTION

Freedom from arbitrary arrest and detention¹ is recognized by the Constitution of the Republic of the Philippines (the "Constitution"). Article VI, Section 1 of the Constitution provides that, "No person shall be deprived of life, liberty, or property without due process of law."² Nevertheless, since 1971, this basic right has not been recognized³ by either the government or the military.⁴ Moreover

¹For the purpose of this article, the words "arbitrary," "arrest," and "detention" will be given their "primary functional definitions" used by the United Nations Commission on Human Rights, and set forth in its "Study of Right to Be Free From Arbitrary Arrest, Detention and Exile." See Study of Right to Be Free From Arbitrary Arrest, Detention and Exile, 34 U.N. ESCOR Supp. (No. 8) U.N. Doc. E/CN 4/826/Rev. 1 (1964).

"Arrest" is defined as the act of taking a person into custody under the authority of the law, or by compulsion of another kind and includes that period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or release him. Id. at para. 21.

"Detention" is the act of confining a person to a certain place, whether or not in continuation of arrest, and under restraints which prevent him from living with his family or carrying out his normal occupational or social activities. Id.

An arrest or detention is "arbitrary" if its is (a) on the grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person. Id. at para. 27.

The U.N. "Study of Right to Be Free From Arbitrary Arrest, Detention and Exile" was undertaken by a committee of four member States of the United Nations chosen by the Commission on Human Rights. The Philippines was one of the four chosen members. See 22 U.N. ESCOR Supp. (No. 3) para. 82 (1964).

²Phil. Const. art. IV, § 1; see also id. art. IV, §§ 3,5,9,15,16 and 17.

³See U.S. State Dep't, Country Report on Human Rights Practices (1981). The Report admits the "continuing problem" of "military abuses of civilians, including torture and summary executions." Id. at 677. The Report further discusses arbitrary arrests and the ineligibility for bail of detainees arrested under arrest, search and seizure orders; id. at 680; the lack of independence of the judiciary; id. at 681; and the abridgement of freedom of speech, press and assembly. Id. at 685.

⁴The actions of the military are not independent of the government.

Philippine citizens who have been subject to arbitrary arrest and detention have found little relief. For the past eleven years, they have confronted insurmountable barriers in their struggle for the recognition and enforcement of human rights⁵ by their government and the international community.⁶

This article will analyze the problem of human rights enforcement in the Philippines. The Philippine legal process will be examined in order to demonstrate how that process produces results which perpetuate, rather than prevent, human rights violations. The article will first present a brief history of the violations and the events which led to them. Section II will analyze and explore the implications of two landmark cases concerned with martial law and the suspension of the writ of habeas corpus. Section II will also discuss the almost limitless executive power granted to the President under the Constitution, and examine how the Constitution and the President's executive powers thereunder have been amended to ensure that arbitrary arrest and detention continue.

(footnote 4 continued)

The military acts under the authority of the Prime Minister who is the commander-in-chief of all armed forces in the Philippines. See Phil. Const. art. IX, § 12. By virtue of a 1976 amendment to the Constitution, Ferdinand Marcos is both the President and the Prime Minister. See Phil. Const. amend. 3.

⁵In this article, "human rights" refers specifically to freedom from arbitrary arrest and detention.

⁶See generally Maki, General Principles of Human Rights Law Recognized by All Nations: Freedom From Arbitrary Arrest and Detention, 10 Cal. W. Int'l. L.J. 272 (1980).

Section III will discuss the availability of international enforcement as an alternative to the domestic legal process. The Charter of the United Nations⁷ (the "Charter") and its recognition and enforcement of human rights will be examined. The discussion in Section III will also show the ineffectiveness of United Nations procedures when applied to the situation in the Philippines.

The conclusion will present two possible solutions to the problem of human rights enforcement in the Philippines. The first proposal recommends amendments to the Charter which would provide for stricter and more effective enforcement mechanisms than are available at present. The second proposal recommends the ratification of a treaty modelled after the European Convention on Human Rights.⁸

I. HUMAN RIGHTS VIOLATIONS: AN HISTORICAL PERSPECTIVE

During the late 1960's and early 1970's, the political environment in the Philippines was extremely unstable.⁹ Lawlessness abounded as groups of differing political persuasions attempted to overthrow the government which was controlled by President Ferdinand Marcos.¹⁰ The greatest

⁷U.N. Charter.

⁸European Convention on Human Rights, Europ. T.S. No. 5 (1953) [hereinafter cited as Convention]. For text of Convention, see Council on Europe, Collected Texts (1978).

⁹See generally H.A. Averch, F.H. Denton and J.E. Koehler, A Crisis of Ambiguity: Political and Economic Development in the Philippines (1970); E. Fernando, The Constitution of the Philippines (1974) [hereinafter cited as Fernando].

¹⁰Fernando, *supra* note 9.

threat to Marcos' Administration came from communist factions, which were rebelling in several provinces on the island of Mindinao.¹¹

In August of 1971, Marcos responded to the exigencies of the social and political situation, which he interpreted as threatening national security and public safety, by implementing Proclamation No. 899¹² (the "Proclamation"). The Proclamation suspended the writ of habeas corpus in certain provinces of the Philippines.¹³ The Proclamation applied to persons then detained, as well as to others who might be detained, for the crimes of insurrection and rebellion.¹⁴ The President's Proclamation made reference to an alleged plan by communist factions to terrorize the capital city of Manila,¹⁵ and stated that the Communist Party of the Philippines adhered to the idea of "swift armed uprising" and to "terrorist tactics."¹⁶ In addition, Marcos expressed the fear that the Communist Party had infiltrated major labor organizations and had succeeded in turning major student and youth organizations into communist fronts.¹⁷

In September of 1972, Marcos further responded to the

¹¹Id.

¹²Proclamation No. 899 (1971).

¹³Id.

¹⁴Id.

¹⁵Id.; Fernando, supra note 9, at 304-305.

¹⁶Proclamation No. 899 (1971).

¹⁷Id.

political instability in the Philippines by proclaiming a state of martial law throughout the country.¹⁸ This action was ostensibly taken on the basis of:

carefully evaluated and verified information, which definitely established that lawless elements entered into a conspiracy ... for the prime purpose of ... waging an armed insurrection and rebellion against the government ... in order to forcibly seize political and state power in the country and supplant it with an entirely new one ...¹⁹ based on the Marxist-Leninist-Maoist teachings and beliefs.

The imminent threat of communist aggression was thus the justification for implementing martial law.

Under martial law, many persons were arrested for "insurrection" and "rebellion,"²⁰ as well as for other crimes such as "terrorism," "possession of firearms," and "subversion," which were defined in orders subsequently promulgated by the President.²¹ Martial law also provided Marcos with an independent grant of authority to suspend the

¹⁸Proclamation No. 1081, 1 Vital Legal Documents 7 (1971) [hereinafter cited as Proclamation No. 1081]. Proclamation 1081 provides in pertinent part:

"I, Ferdinand E. Marcos, President of the Philippines, by virtue of the powers vested upon me by Article VII, Section 10, Paragraph (2) of the Constitution, do hereby place the entire Philippines...under martial law...."

"In addition, I do hereby order that all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on occasion thereof, or incident thereto, or in connection therewith,...and for such other crimes as will be enumerated in orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order, or promulgation upon my direction shall be kept under detention unless otherwise ordered released by me...." Id.

¹⁹Id.

²⁰Id.

²¹Id.

writ of habeas corpus in any province or in any individual case.²² Marcos claimed that martial law was a temporary maneuver which would be lifted within a year.²³ In spite of this claim, martial law lasted for eight years, and was lifted only recently in January of 1981.²⁴

During the eight years of martial law (1972-1981), many people were arrested and charged with subversion and insurrection.²⁵ In addition, persons were arrested and detained without ever being charged with a crime.²⁶ Moreover, pursuant to the proclamation implementing martial law, all persons detained remained in detention until President Marcos personally ordered them released.²⁷ Persons arrested and charged with crimes, as well as those not formally charged with crimes, were detained indefinitely at the discretion of the President²⁸ and were thus denied due process of law.²⁹ Prolonged detention, without the opportunity to be

²²Id.

²³See Tasker, The President's New Clothes, Far E. Econ. Rev., Oct. 17 1980, at 25 [hereinafter cited as Tasker].

²⁴President Marcos officially lifted martial law on January 17, 1981. See Gonzaga, Rule by Decree Lives On, Far E. Econ. Rev., Sept. 11, 1981, at 18 [hereinafter cited as Gonzaga].

²⁵Proclamation No. 1081, supra note 18, at 7. See also Phil. Const. art. IV, § 1; and Aquino v. Enrile, L-36142, Sept. 17, 1974.

²⁶Proclamation No. 1081, supra note 18, at 7. See also Phil. Const. art. IX, § 12; and Ocampo, The Advantages of Overkill, Far E. Econ. Rev., Nov. 14, 1980, at 29.

²⁷Proclamation No. 1081, supra note 18, at 7.

²⁸Id.

²⁹"No person shall be held to answer for a criminal offense without due process of law." Phil. Const. art. IV, § 17.

heard, violated the detainees' rights, guaranteed by the Philippine Constitution, to a speedy disposition of their cases before an independent judicial body.³⁰

II. DOMESTIC ENFORCEMENT OF HUMAN RIGHTS

A. Seeking relief through the courts

Filipino citizens, who were deprived of their rights by virtue of martial law and the suspension of the writ of habeas corpus, have generally sought redress through the Supreme Court of the Philippines.³¹ Most of the cases challenged the constitutional validity of martial law and the suspension of the writ of habeas corpus.³² Since the deprivation of personal liberty has been justified by the imposition of martial law and the suspension of the writ of habeas corpus,³³ the invalidity of martial law and the suspension would necessarily undermine the constitutionality of the imprisonments. The President's³⁴ authority to

³⁰The Constitution provides that "[a]ll persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies." Phil. Const. art. IV, § 16.

³¹*Aguino v. Enrile*, L-36142, Sept. 17, 1974; *Lansang v. Garcia*, L-33964, 42 SCRA 448, Dec. 11, 1971; and *Montenegro v. Castaneda*, 91 Phil. 882 (1952).

³²*Aguino v. Enrile*, L-36142, Sept. 17, 1974; *Lansang v. Garcia*, L-33964, 42 SCRA 448, Dec. 11, 1971; and *Montenegro v. Castaneda*, 91 Phil. 882 (1952).

³³See *Aguino v. Enrile*, L-36142, Sept. 17, 1974, in which the Court stated that the authority to suspend the writ of habeas corpus is implicit in the authority to claim martial law.

³⁴Any powers granted to the Prime Minister or the President under either the Philippines Constitution of 1973 or the Philippines Constitution of 1935 are now enjoyed by one in the same person. See Phil. Const. amend. 3.

implement such measures in certain circumstances, however, remains virtually unquestioned by the Supreme Court of the Philippines.³⁵ For this reason, constitutional challenges by Filipino political prisoners to the deprivation of their human rights have thus far been unsuccessful.³⁶

1. Lansang v. Garcia:³⁷ the suspension of the writ of habeas corpus

In Lansang v. Garcia, petitioners, who had been deprived of their personal liberty, sought to nullify Proclamation No. 899 which had suspended the writ of habeas corpus.³⁸ In determining the constitutional validity of the suspension, the Court first addressed the issue of whether the President had the power to suspend the writ.³⁹ The Court recognized the President's constitutional power to suspend the privilege⁴⁰ but held that power to be neither

³⁵ Aquino v. Enrile, L-36142, Sept. 17, 1974; Lansang v. Garcia, L-33964, 42 SCRA 448, Dec. 11, 1971; and Montenegro v. Castaneda, 91 Phil. 882 (1952). The authority to suspend the privilege of the writ of habeas corpus was granted to the President under the Philippines Constitution of 1935. The 1935 Constitution was in force in 1971 when the writ of habeas corpus was suspended and in 1972 when martial law was implemented. The present Constitution, enacted in 1973, grants the above stated authority to the Prime Minister. Phil. Const. art. IX, § 12. See also supra note 34 and accompanying text.

³⁶ See Aquino v. Enrile, L-36142, Sept. 17, 1974; Lansang v. Garcia, L-33964, 42 SCRA 448, Dec. 11, 1971.

³⁷ Lansang v. Garcia, L-33964, 42 SCRA 448, Dec. 11, 1971.

³⁸ Id.

³⁹ Id.

⁴⁰ The privilege of the writ of habeas corpus was suspended pursuant to the 1935 Constitution which provided: "The president shall be commander in chief of all armed forces of the Philippines, and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, insurrection or rebellion, or imminent danger

absolute nor unqualified.⁴¹ The Bill of Rights⁴² and Article VII of the 1935 Constitution⁴³ expressly limit the suspension to cases of insurrection or rebellion, or the imminent danger thereof, and when the public safety requires it.⁴⁴ The Court's holding is clearly supported by the Constitution.

The more important issue addressed in Lansang was whether the judiciary was bound by the President's determination that insurrection and rebellion existed and that the suspension of the writ was necessary to the public safety. In a previous case, Montenegro v. Castaneda,⁴⁵ in which the same issue arose, the Court held that the question was political and hence non-justiciable.⁴⁶ The Court stated that it was powerless to question the validity of the President's actions and thus could not even inquire into whether or not

(footnote 40 continued)

thereof, when the public safety requires it he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under martial law." Phil. Const. of 1935, art. VII, § 10, para. 2.

⁴¹Lansang v. Garcia, L-33964, 42 SCRA 448, 473-474, Dec. 11, 1971.

⁴²"The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, rebellion or imminent danger thereof, when the public safety requires it." Phil. Const. art. IV, § 15.

⁴³See supra note 40 and accompanying text.

⁴⁴Id.; see also supra note 42 and accompanying text.

⁴⁵Montenegro v. Castaneda, 91 Phil 882 (1952).

⁴⁶Id.

the President had acted "arbitrarily."⁴⁷ Accordingly, the Court held that the authority to decide whether emergencies requiring suspension had arisen belonged to the President and that his decision was final and binding upon the courts.⁴⁸

Nevertheless, in a decision reminiscent of the spirit of Marbury v. Madison,⁴⁹ the Court in Lansang unanimously held that the judiciary was free of any compelling force.⁵⁰ The Court stated:

It is emphatically the province and duty of the judicial department to say what the law is.... If a law be in opposition to the constitution; if both the law and the constitution apply to a particular case ... the court must decide which of these conflicting rules governs the case. This is the very essence of judicial duty.⁵¹

Thus, the Court found that it was under a duty to determine whether the President had acted arbitrarily in suspending the writ of habeas corpus.⁵²

The Court determined that the President's action was not arbitrary, therefore, the Proclamation was constitutionally valid.⁵³ In the eyes of the Court, the President's evaluation of the nature of the social and political situation was a sufficient basis upon which to suspend the writ

⁴⁷Id.

⁴⁸Id.

⁴⁹Marbury v. Madison, 1 Cranch 137 (1803).

⁵⁰Lasang v. Garcia, L-33964, 42 SCRA 448, 473-474, Dec. 11, 1971.

⁵¹Id. at 505-506.

⁵²Id.

⁵³Id. at 486-487.

of habeas corpus.

2. Aquino v. Enrile:⁵⁴ the implementation of martial law

The petitioners in Aquino, who had been arrested and detained under authority of martial law, sought writs of habeas corpus.⁵⁵ Several of the petitioners in Aquino had never been officially charged with an offense.⁵⁶ The Court unanimously dismissed the petitions, although the Justices differed on the grounds for dismissal.

The crucial issue before the Court was the constitutional validity of martial law.⁵⁷ The Court first considered whether the existence and nature of the conditions claimed to justify the implementation of martial law were subject to judicial inquiry.⁵⁸ Five of the ten Justices held the question to be a political one and therefore non-justiciable.⁵⁹ One Justice held that while political questions are not per se beyond the Court's jurisdiction, as a matter of policy implicit in the Constitution, the Court should abstain from interfering with the proclamation of martial law.⁶⁰ The Justice reasoned that the Proclamation concerned

⁵⁴ Aquino v. Enrile, L-36142, Sept. 17, 1974.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id. Martial law was proclaimed pursuant to the 1935 Constitution. Phil. Const. of 1935, art. VII, § 10, para. 2. See also supra note 40 and accompanying text.

⁵⁸ Aquino v. Enrile, L-36142, Sept. 17, 1974.

⁵⁹ Id.

⁶⁰ Id.

matters of national security the responsibility for which is vested by the Constitution in the President alone.⁶¹

Four Justices held that the Court did have the authority to inquire into the constitutionality of the presidential proclamation.⁶² The applicable test was not whether the President's decision was "correct," but whether he had acted arbitrarily.⁶³

The Court again applied the "arbitrariness" test⁶⁴ to the President's evaluation of the social and political circumstances which were similar to those present in the Lansang case, and determined that his action was not arbitrary.⁶⁵ Thus, under the majority's political question doctrine and under the "arbitrariness" test, the state of martial law was held to be constitutionally valid.⁶⁶

The Lansang and Aguino decisions have upheld the President's authority to arrest and detain persons at his discretion. In both cases, the Court failed to consider the conflict between the constitutional right of due process and the imposition of martial law which abrogated that right. The "arbitrariness" test adopted by the Court inquired into the relation between the current state of affairs and the

⁶¹ Id.

⁶² Id.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

President's action. The Court, however, did not state what kind of relationship was required. The test bypasses the issue of whether martial law is constitutionally valid in light of a citizen's competing right to due process under the law.⁶⁷ Even if the President's decision to implement martial law is not arbitrary, it does not necessarily follow that particular arrests made under authority of martial law are not arbitrary.

The Constitution expressly authorizes the implementation of martial law,⁶⁸ and martial law, in turn, authorizes the suspension of the writ of habeas corpus.⁶⁹ The Constitution, however, contains no provision for the deprivation of fundamental human rights under martial law. In theory, therefore, martial law and the suspension of the writ of habeas corpus do not legalize a wrongful⁷⁰ arrest or imprisonment.⁷¹ The suspension only deprives the detained individual of the speedy means of obtaining his or her liberty;⁷² initially, the arrest must be legal.⁷³

This reasoning, like the Supreme Court's "arbitrariness" test, fails to recognize that prolonged, indefinite

⁶⁷See Phil. Const. art. IV, § 1.

⁶⁸See Phil. Const. of 1935, art. VII, § 10, para. 2.

⁶⁹See supra note 33 and accompanying text; see also Proclamation No. 1081; and supra note 14 and accompanying text.

⁷⁰Fernando, supra note 9.

⁷¹Id.

⁷²Id.

⁷³See Phil. Const. art. IV, § 16.

detention violates the right to a speedy disposition of one's case before an independent judicial body.⁷⁴ If one is charged with an offense at the time of arrest, the arrest may be considered "legal." The resulting imprisonment, however, is illegal if it deprives an individual of his or her liberty without due process of law.⁷⁵

B. Executive power after the imposition of marital law

The effect of the Supreme Court decisions in Lansang and Aguino is only one of the reasons for the lack of human rights enforcement in the Philippines. The unfettered constitutional power of the President, in addition to his powers under martial law,⁷⁶ presents a second and more important element of the problem.

Martial law was officially repealed throughout the Philippines in January of 1981.⁷⁷ In theory, the social and political instability of the country, which justified the proclamation of martial law and the 1971 suspension of the writ of habeas corpus, no longer exist. The state of martial law which justified "any" suspension of the writ of

⁷⁴Id.; see also supra note 30 and accompanying text.

⁷⁵Id.; Phil. Const. art. IV, § 16.

⁷⁶See Phil. Const. amend. 6. The Constitution also provides that "[a]ll proclamations, orders, decrees, instructions, and acts promulgated, issued or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding, and effective even after lifting of martial law or the ratification of the Constitution, unless modified, revoked or superceded by subsequent proclamations, orders, decrees, instructions, or other acts of the incumbent President...." Phil. Const. art. XVII, § 3, para. 2.

⁷⁷See Gonzaga, supra note 24.

habeas corpus⁷⁸ no longer exists. Therefore, since neither martial law nor "political instability" justifying martial law exist, human rights should be restored. This reasoning, however, has not affected the realities of the situation.

The Constitution provides that all proclamations, orders, decrees, instructions, and acts promulgated or issued by the incumbent President, are part of the law of the land and remain valid and binding even after the lifting of martial law, unless subsequently modified or superceded by the president.⁷⁹ In addition, the President is authorized by the Constitution to issue any decrees or orders which he deems necessary, whenever, in his judgment, there exists a "grave emergency, threat, or imminence thereof" which requires "immediate action."⁸⁰ In effect, the powers enjoyed by the President under the authority of martial law, remain unchanged by its repeal.⁸¹ The practical consequence of this executive power is that citizens will continue to be subject to arbitrary arrest and detention despite the lift-

⁷⁸ See Proclamation No. 1081, supra note 18; and supra note 33 and accompanying text.

⁷⁹ See supra note 76 and accompanying text.

⁸⁰ Proclamation No. 1595 (1976). A 1976 Amendment to the Constitution states that "[w]henever in the judgment of the President (Prime Minister) there exists a grave emergency or a threat or imminence thereof, or whenever the interim Batasang Pambansa or the regular National Assembly fails or is unable to act adequately, on any matter for any reason that in his judgment requires immediate action, he may in order to meet the exigency, issue the necessary decrees, orders or letters of instruction, which shall form part of the law of the land." Phil. Const. amend. 6.

⁸¹ While the Philippines remained under martial law the President exercised all legislative powers. See Phil. Const. amend. 5. The 1976 Fifth Amendment states that "...the incumbent President shall continue to exercise legislative powers until martial law shall have been lifted."

ing of martial law.⁸²

In view of the Lansang⁸³ and Aquino⁸⁴ decisions, any exercise by the President of his constitutional powers is likely to be upheld by the courts. Future presidential decrees which deprive detainees of due process of law need only meet the "arbitrariness" test. For example, a presidential order may command that a prisoner be detained until the president orders his or her release. To survive judicial scrutiny, the detention order would only have to meet the requirement that the president found the presence of a "grave emergency, threat, or imminence thereof."⁸⁵

The Court in Aquino held that there must be an objective set of facts or circumstances which constitute "insurrection or rebellion" in order to justify a state of martial law.⁸⁶ On the other hand, the Constitution states that a Presidential order of any kind is justified "if in the President's judgment"⁸⁷ there exists a grave emergency requiring immediate action. By basing the legality of an order on the "President's judgment," the Court introduced a

⁸² See Ocampo, Dissidence and Detente, Far E. Econ. Rev., Nov. 6, 1981, at 23; and Blackburn, A Present from the FBI, Far E. Econ. Rev., Mar. 5, 1982, at 13.

⁸³ Lansang v. Garcia, L-33964, 42 SCRA 448, Dec. 11, 1971.

⁸⁴ Aquino v. Enrile, L-36142, Sept. 17, 1974. See also supra note 40 and accompanying text.

⁸⁵ See Aquino v. Enrile, L-36142, Sept. 17, 1974. See also supra note 81 and accompanying text.

⁸⁶ Aquino v. Enrile, L-36142, Sept. 17, 1974.

⁸⁷ See supra note 80 and accompanying text.

subjective element; yet Aquino held that only objective elements could be used to justify martial law. Thus, a presidential order issued pursuant to a constitutional provision would be subject to a lesser standard of review than a declaration of martial law. Even if an order produced the same effect as martial law, the Court would only inquire into whether the order was an exercise of the President's judgment.

The President's judgment would still be subject to the "arbitrariness" test. But considering the ease with which martial law passed constitutional muster in Aquino, it seems likely that any "presidential judgment" would similarly withstand judicial review. The "arbitrariness" test does not, therefore, significantly restrict the President's power to issue orders in accordance with his judgment.

The current state of affairs in the Philippines is a prime example of the abuses of unchecked power. Neither the Supreme Court,⁸⁸ nor the legislative body, the National Assembly, have succeeded in correcting the imbalance of government powers. In light of Lansang and Aquino, there is little chance a detainee will obtain relief through the Supreme Court. The result is the continued violation of fundamental rights with the virtual approval of the Constitution and the Supreme Court.

⁸⁸It should be noted that President Marcos signed the "Judiciary Reform Bill" into law on August 14, 1981, abolishing all courts except the Supreme Court and instituting a new system of courts. See Davies, The Week, Far E. Econ. Rev., Aug. 21, 1981, at 7.

III. INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS AND THE UNITED NATIONS: AN ALTERNATIVE TO THE PHILIPPINE LEGAL PROCESS

In 1945, representatives of the Philippines and fifty other nations met in San Francisco, California and unanimously ratified the Charter of the United Nations.⁸⁹ The signatories to the Charter solemnly agreed to, "reaffirm [their] faith in fundamental human rights."⁹⁰ According to the Charter, the purpose of the United Nations is, inter alia, "to achieve international cooperation ... in promoting and encouraging respect for human rights and fundamental freedoms for all."⁹¹

There are several significant provisions of the Charter which address the subject of human rights and fundamental freedoms. Chapter IX, Article 55 states that the United Nations shall promote "universal" respect for human rights.⁹² In addition, all member nations "pledged themselves to take joint and separate action" [emphasis added] to achieve the goals set forth in Article 55.⁹³

The Philippine government, as a member State of the United Nations, is legally obligated⁹⁴ to uphold the prin-

⁸⁹U.N. Charter.

⁹⁰U.N. Charter preamble.

⁹¹U.N. Charter art. I, para. 3.

⁹²U.N. Charter art. 55.

⁹³U.N. Charter art. 56.

⁹⁴See M. McDougal and G. Bebr, Human Rights in the United Nations, 58 A.J.I.L. 612 (1964); and H. Lauterpacht, International Law and Human Rights (1968). Lauterpacht has recognized that "any construction of the Charter according to which members of the United Nations are in law

ciples of the Charter. More specifically, Article 56 of the Charter imposes an obligation on all members to take "separate action" to achieve universal respect for, and observance of, human rights.⁹⁵ Hence, in addition to its obligation to cooperate with the United Nations in achieving these universal goals, the government of the Philippines is required to recognize and respect the human rights of its own citizens. The Philippine government's failure to fulfill its Charter obligations over the past nine years has been clearly established.⁹⁶

One possible means of enforcing the Philippines' Charter obligations is through the International Court of Justice (the "ICJ"). The ICJ is defined in the Charter as the

(footnote 94 continued)

entitled to disregard - and to violate - human rights and fundamental freedoms is destructive of both the legal and moral authority of the Charter as a whole." See also P.C. Jessup, *A Modern Law of Nations - An Introduction* (1948). Jessup states, "...it is already the law, at least for members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties." Id. at 91 (emphasis added).

⁹⁵U.N. Charter art. 56. Although "human rights" and "fundamental freedoms" are not expressly defined in the Charter, the Universal Declaration of Human Rights, drafted by the United Nations Commission on Human Rights, was subscribed to by more than a majority of the member States, including the Philippines. Article 9 of that document states: "No one shall be subjected to arbitrary arrest, detention or exile." Article 10 states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71-77 (1948). See also Study of Right to Be Free From Arbitrary Arrest, Detention and Exile, supra note 1.

⁹⁶See supra note 3 and accompanying text.

"principal judicial organ of the United Nations."⁹⁷ The duties and functions of the ICJ are set forth in the Statute of the International Court of Justice⁹⁸ (the "Statute") which is an integral part of the Charter.⁹⁹ All United Nations members are "ipso facto parties to the Statute," and each "undertakes to comply with the decision" of the ICJ "in any case to which it is a party."¹⁰⁰

The establishment of the ICJ as a judicial mechanism is an important step toward the goal of universal respect for human rights. The Charter and the Statute, however, do not compel an alleged offender State to come before the ICJ. The Charter and the Statute also do not provide for a method of enforcing an ICJ decision. The ICJ is, therefore, unable to contribute effectively towards achieving the goal of universal respect for human rights.¹⁰¹

The problem of enforcing the Philippines' obligations under the Charter is a procedural one. Under the Statute, only member States may be parties in cases before the ICJ.¹⁰² The practical effect of this rule is that only

⁹⁷U.N. Charter art. 92.

⁹⁸U.N. Charter Statute of the International Court of Justice.

⁹⁹U.N. Charter art. 92.

¹⁰⁰U.N. Charter art. 93, para. 1.

¹⁰¹U.N. Charter art. 94, para. 1.

¹⁰²U.N. Charter Statute of the International Court of Justice, art. 34, para. 1. These two problems are not limited to the area of human rights. The purpose of this article, however, is to examine the problems as they relate specifically to enforcement of human rights. See L.M. Goodrich, *The United Nations* (1966) [hereinafter cited as Goodrich]. Goodrich has recognized that the limited effectiveness of

another member State may bring a claim against the Philippines for human rights violations.¹⁰³ This requirement presents an absolute bar to Philippine citizens seeking an international forum in which to enforce their human rights. Moreover, it is unlikely that a member State, unaffected by the violations, would formally challenge human rights practices in the Philippines.

In addition, the ICJ does not have compulsory jurisdiction over member States.¹⁰⁴ Thus, even if a member State did bring a claim against the Philippines, the ICJ would not have compulsory jurisdiction over the latter.¹⁰⁵ Unless the Philippines voluntarily subjected itself to the ICJ's jurisdiction, the dispute would remain unresolved. Realistically, it seems unlikely that the Philippine government would ever subject itself to the ICJ's jurisdiction in a case concerning the government's human rights practices.

The only method of enforcing an ICJ decision appears in Article 6 of the Charter, which states that: "A member of the United Nations which has persistently violated the

(footnote 102 continued)

the United Nations and the ICJ in enforcing human rights is, to a large extent, an inherent problem which is not likely to be solved. He notes the idealic significance of the purposes and principles of the United Nations, yet states that in actual practice many concessions are made to the requirements of power politics and national interest. *Id.* at 260.

¹⁰³U.N. Charter Statute of the International Court of Justice, art. 34, para. 1.

¹⁰⁴U.N. Charter Statute of the International Court of Justice, art. 36, para. 2.

¹⁰⁵*Id.*

principles contained in the present Charter may be expelled from the organization by the General Assembly upon the recommendation of the Security Council."¹⁰⁶ Expulsion thus requires a Security Council (the "Council") recommendation.¹⁰⁷ Any action or decision of the Council, however, requires a concurring vote of the five permanent Council members.¹⁰⁸ This requirement grants veto power to any permanent member over any action or decision of the Council.¹⁰⁹ The concurring vote requirement thus presents another bar to the recognition of human rights in the Philippines. The United States has openly supported Ferdinand Marcos' government¹¹⁰ and is likely to veto such a recommendation. Thus, the possibility of a Council recommendation to expel the Philippines from the United Nations for human rights violations is remote.

¹⁰⁶U.N. Charter art. 6.

¹⁰⁷Id.

¹⁰⁸Decisions of the Security Council (hereinafter "Council") on all matters other than procedural matters are made by an affirmative vote of seven members, including the concurring votes of the permanent members. U.N. Charter art. 27, para. 3. The permanent members of the Council are the Republic of China, France, the Union of Soviet Socialist Republics, The United Kingdom and Great Britain and Northern Ireland, and the United States of America. Id. at art. 23, para. 1. The composition of the Council is set forth in Article 23 of the Charter. The Council's primary responsibility is the "maintenance of international peace and security." Id. at art. 24.

¹⁰⁹Id.

¹¹⁰See, e.g., U.S. Vice-President George Bush's statement to President Marcos, "We love your adherence to Democratic principles and the Democratic processes." Wash. Post, July 2, 1981, at A-26. See also Anderson, A Gift From Marcos to Us, Wash. Post, Jan 17, 1982, at D-7, col. 1; and Sunday Star-Bull. and Advertiser Honolulu, Dec. 13, 1981, at A-31, col. 3.

IV. CONCLUSION

Philippine citizens have found themselves at an impasse in their struggle for the recognition and protection of their human rights. The Constitution mandates such recognition and respect,¹¹¹ yet at the same time grants the president the power to perpetuate the denial of human rights at will.¹¹² Moreover, the Supreme Court has upheld the constitutional validity of the executive powers,¹¹³ and is unlikely to question Marcos' exercise of those powers. The Philippine legal process has thus served to undermine the human dignity of all Filipinos and the democratic principles to which the government claims adherence.¹¹⁴

The United Nations' goal of promoting the respect and protection of human rights is indeed commendable, but the organization has not provided the effective enforcement mechanisms needed to obtain this goal.¹¹⁵ The lack of both domestic and international enforcement of human rights has resulted in the continued oppression of an entire nation. In view of the incessant and unchecked denial of human rights in the Philippines, one questions whether the "legal

¹¹¹ See Phil. Const. art. IV, §§ 1,3,5,9,15,16 and 17.

¹¹² See supra note 76 and accompanying text; see also supra note 80 and accompanying text.

¹¹³ Aquino v. Enrile, L-36142, Sept. 17, 1974; Lansang v. Garcia, L-33964, 42 SCRA 448, Dec. 11, 1971.

¹¹⁴ To quote the words of Ferdinand Marcos: "Without freedom, the whole concept of democracy falls apart." F. Marcos, *Today's Revolution: Democracy* (1971), at 29.

¹¹⁵ See Goodrich, supra note 102.

obligation"¹¹⁶ of respect for human rights, imposed by the Charter, has any substance.

There are two possible solutions¹¹⁷ to the problem of human rights enforcement in the Philippines. First, the United Nations should amend the Charter to provide for the effective enforcement of human rights. This could be achieved by subjecting all members to the compulsory jurisdiction of the ICJ. There is, of course, the possibility that a country would refuse to comply with a decision of the ICJ. This problem could be solved by expanding the application of Chapter VII, Article 41 of the Charter.¹¹⁸ This article presently provides for such measures as the complete or partial interruption of economic relations with those countries which "threaten international peace." Expanding the application of Article 41 to countries which violate human rights may be considered a harsh and unjustified international intervention into the domestic affairs of a sovereign nation.¹¹⁹ Nevertheless, human rights have been internationally recognized and are, therefore, of worldwide

¹¹⁶ See supra note 94 and accompanying text.

¹¹⁷ A domestic resolution to the problem of human rights enforcement is not recommended. A domestic solution would involve, inter alia, a restructuring of the Constitution and the present Administration. Such a discussion is beyond the scope of this article.

¹¹⁸ U.N. Charter art. 41. This provision presently applies to situations involving threats to international peace. As Goodrich points out, a situation involving human rights violations is not likely to be one that can convincingly be found to constitute a threat to international security. See Goodrich, supra note 102, at 260.

¹¹⁹ See M.S. McDougal, Studies in World Public Order (1960), at 157-159.

concern.¹²⁰

In addition, the five permanent member concurring vote requirement of Article 27 of the Charter¹²¹ should be amended. The amendment should provide that a decision of the Security Council "shall be made by votes including the concurrence of four-fifths of the permanent members of the Council." This would make it more difficult to veto an action by or a decision of the Council. In addition, while a dissenting vote by one member may be based on political or economic grounds, a two-member dissent is more likely to be based on the merits of the action or decision.

A second proposal is that the member States of the United Nations negotiate and ratify a treaty concerning the recognition and enforcement of human rights. Such a treaty could be modelled after the European Convention on Human Rights,¹²² which grants to citizens of an alleged offender nation the right to bring a claim for human rights violations before an independent tribunal.¹²³ The European

¹²⁰ Id.; see also Goodrich, supra note 102; and supra note 94 and accompanying text.

¹²¹ U.N. Charter art. 27, para. 3.

¹²² Convention, supra note 8. The Convention is a multilateral, regional treaty for the protection of civil and political rights, drafted under the auspices of the Council of Europe. The Council of Europe was established in 1948 to achieve "the maintenance and further realization of human rights and fundamental freedoms." Statute of the Council of Eur., 1 Eur. Y.B. 275 (1955), at art. 1. The Statute requires "respect for human rights" as a condition of membership in the Council of Europe. Id. at art. 3.

¹²³ Id. at arts. 24-25. The right of individual petition, however, can be exercised only in respect to states which have specifically accepted the competence of the tribunal to hear such complaints. This

Convention has proven to be effective, to the extent realistically possible, in ensuring the enforcement of human rights.¹²⁴

Moreover, all parties to the new treaty should be subject to the compulsory jurisdiction of the tribunal in all legal disputes arising under the treaty.¹²⁵ Technical problems such as the definition of human rights, violations, enforcement mechanisms, and conflict of law problems could be resolved during the drafting of the treaty.

Realistically, such a treaty is unlikely to be ratified. There is a high probability that nations, especially those with repressive forms of government similar to the Philippines, will refuse to sign such a treaty. Ideally, a United Nations treaty of this nature would indeed help to remove the barriers which now confront Philippine citizens in their struggle for recognition of their human rights.

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(footnote 123 continued)

has been accomplished by fourteen of the twenty-one parties to the Convention.

¹²⁴ See F.G. Jacobs, *The European Convention on Human Rights* (1975).

¹²⁵ Infra at p. 93.