

# **RETHINKING THE ISSUE OF NON-COMPENSABILITY OF CIVILIAN LOSSES CAUSED BY SECURITY FORCES DURING NON-INTERNATIONAL ARMED CONFLICTS: THE CASE OF THE MARAWI CRISIS IN THE PHILIPPINES**

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## **ABSTRACT**

The terrorism element attendant in an armed conflict does not alter its destructive nature vis-à-vis civilian properties. One example is the Marawi crisis where the Philippine security forces, in response to the threat to national security, territorial integrity, and sovereignty, resorted to aerial bombings and shelling of private buildings, residential houses, and *masajid* infiltrated by local terrorists, resulting in the destruction of these civilian properties. This article addresses the issue of non-compensability of these civilian property losses. Arguments in favour of and against non-compensability are presented against the backdrop of the concept of reparations in both international law and Philippine domestic law. Based on existing legal realities in Philippine domestic law and jurisprudence, this article finds that reparations in the form of compensation in the context of the Marawi crisis may not be imposed upon the Philippine government as a legal obligation. However, Philippine domestic law and jurisprudence likewise provides for sufficient grounds that reparations in the form of compensation has become the moral obligation of the Philippine government, which it must pursue in the name of justice under a regime of rule of law. Yet ironically, while justice especially during the transition is the ultimate objective of reparations both in its moral and legal contexts, it is only in the latter context that reparations may be pursued judicially. In the final analysis, the non-compensability issue, though a legal one, is a question of choice on the part of the Philippine government.

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**Keywords:** reparations, destruction as a military necessity, governmental function of defense of state, *parens patriae*, social justice, sharing of loss

**PENILAIAN SEMULA ISU KETIADAAN PAMPASAN BAGI KERUGIAN ORANG AWAM YANG DISEBABKAN OLEH ANGKATAN KESELAMATAN SEMASA KONFLIK BERSENJATA TEMPATAN: KES KRISIS MARAWI DI FILIPINA**

**ABSTRAK**

Kewujudan elemen keganasan dalam konflik bersenjata tidak menjejaskan sifatnya terhadap kerosakan harta awam. Krisis Marawi merupakan satu contoh di mana konflik bersenjata telah mengakibatkan kemusnahan harta awam apabila angkatan keselamatan Filipina yang bertindak balas terhadap ancaman terhadap keselamatan negara, integriti dan kedaulatan wilayah, telah melancarkan pengeboman udara dan serangan ke atas bangunan persendirian, rumah kediaman, dan masjid-masjid yang disusupi oleh pengganas tempatan. Makalah ini membincangkan isu ketiadaan pampasan terhadap kerugian yang dialami oleh orang awam melalui hujah-hujah yang menyokong dan menentang ketiadaan pampasan dengan berlatarbelakangkan konsep pemampasan dalam undang-undang antarabangsa dan undang-undang domestik Filipina. Berdasarkan realiti di dalam undang-undang domestik dan kaedah perundangan Filipina, adalah didapati bahawa pemampasan dalam bentuk ganti rugi dalam konteks krisis Marawi tidak sepatutnya dikenakan sebagai kewajipan undang-undang ke atas pemerintah Filipina. Walau bagaimanapun, undang-undang domestik dan kaedah perundangan Filipina juga memperuntukkan alasan-alasan yang cukup agar pemampasan dalam bentuk ganti rugi telah menjadi kewajipan moral ke atas kerajaan Filipina, yang mana ianya harus dilakukan atas nama keadilan di bawah rejim kedaulatan undang-undang. Namun ironinya, walaupun keadilan terutamanya semasa peralihan merupakan objektif utama pemampasan di dalam konteks moral dan undang-undang, hanya pemampasan dalam konteks undang-undang dapat dilakukan secara kehakiman. Dalam analisis terakhir, isu ketiadaan pampasan, walaupun berdasarkan undang-undang, sebenarnya adalah satu pilihan di pihak kerajaan Filipina.

**Kata kunci:** pemampasan, kemusnahan akibat keperluan ketenteraan, fungsi kerajaan dalam mempertahankan negara, *parens patriae*, keadilan sosial, perkongsian kerugian

## INTRODUCTION

State entitlement to the use of lethal force to quell acts of terrorism is a norm that is beyond quibble, for every state is entitled to self-defense to protect its national security, territorial integrity, and sovereignty. Terrorism can cause tremendous destruction of lives and properties that States are bound to protect. Governments therefore are expected to counter terrorism simply because, among others, terrorism has the potential to cripple the very fabrics that support the stability of States. For this, the fight against terrorism has not only gained momentum but has become the standing policy of States and pursued even outside one's territorial boundaries as terrorism transcends national borders. In fact, recent development in the global fight against terrorism culminated in the fall of local regimes by the strong hands of powerful foreign governments. A few weeks after the 9/11 terrorist attacks on the United States, former President Bush, upon congressional authorization, directed the United States Armed Forces to invade Afghanistan resulting in the fall of the Taliban regime. The rapid rise of the Islamic State in Iraq and Syria (ISIS) made terrorism or violent extremism a constant subject of discussion and concern from Presidential palaces to common places.

More recently, the global phenomenon of violent extremism placed in the spotlight the only Islamic city in the Philippines, *i.e.*, Marawi City, when a local terrorist group with links to the so-called ISIS seized the city. Imitating foreign governments' responses to acts of terrorism, the Philippine government launched an assault using lethal force against militants who occupied strategic locations in the city. The tragedy in Marawi City that began on May 23, 2017 demonstrates yet again the fundamental reality that crises, whether natural or caused by the vices of man, are ever productive of tremendous loss of lives, destruction of properties, and infliction of human frustrations and sufferings. The right of a State to protect its national security from the threats of terrorism is undisputed. However, the fight against terrorism with the use of lethal

force by the government comes with a heavy price not only upon the enemy combatants. Loss of civilian lives and destruction of private properties are unavoidable consequences as well. The aerial bombings and shelling of the downtown area of Marawi City demonstrate this truism. These military actions caused tremendous destruction of private properties such as residential houses, business establishments, and other private buildings infiltrated by the militants.

When armed conflicts subside, what manifests next is the face of destruction. If left ignored and untreated, the effects of destruction could lead to another problem as severe as the armed conflict itself. Recent experiences at the international level show that the destruction caused by war does not always go untreated. Destruction should not be left as is. From a legal perspective, a remedy must be adopted to mend it. And the legal remedy that can bring the responsive treatment for destruction is by awarding reparations. Beginning with The Hague Convention of 1907, the Geneva Convention of 1949, and the two Additional Protocols of 1977, reparations mechanisms became well-recognized in international law. This stimulates an academic inquiry on whether these mechanisms are likewise recognized, with corresponding implementation, in the Philippines. Vis-à-vis civilian property losses caused by the destructive effects of the armed conflict in Marawi City, this article will explore the mechanisms of reparations if they exist at all in Philippine law. However, an intrinsic difficulty exists in the legal analysis to establish the existence of the right to reparation for civilian property losses during the Marawi crisis considering that the military offensive against the local terrorists presents a clear case of *act jure imperii*, i.e., performance of the governmental function of defense of State, and a *prima facie* case of military necessity for the aerial bombings and shelling. Admittedly, before the writing of this piece, there is an initial temptation to simply adopt without qualifications the rule of non-compensability of civilian losses caused by security forces during internal armed conflicts. However, the availability of scholarship that does not agree totally with this rule, and the academic prerogative to challenge standing rules as to their responsiveness to the realities of the times, provide an avenue to reassess the issue. On second thought, I am convinced to make a reassessment of the rule and fashioned this article as a persuasive piece that presents to the Philippine government the two sides of the proposition concerning the obligation to provide reparations in the form of compensation for civilian property losses caused during the armed conflict in Marawi City.

The issue of compensation, as the gravamen of this article, cannot escape the realm of international law where the concept of reparations gained prominence. Even if denominated as a terrorist attack, the Marawi siege is a non-international armed conflict over which International Humanitarian Law applies. However, this article focuses more on the issue of compensation in the domestic law context, for it is in domestic law that the remedy of compensation must first be sought before its pursuit is elevated to international law.

In the main, this article presents the arguments for and against the non-compensability of civilian property losses during internal armed conflicts. Without necessarily claiming scholarship eminence, the distinctive feature of this article is the assertion of counter-arguments that do not usually appear in international setting *pro*-reparation scholarship. The desired objective is to produce a material reputable enough to persuade the Philippine government to adopt self-imposition of the obligation to provide reparations by way of compensation for the civilian property losses caused by aerial bombings and shelling by the security forces of the Philippines during the armed conflict in Marawi City.

## **NATURE OF THE MARAWI SIEGE AND ITS LEGAL IMPLICATIONS**

The Marawi crisis is a non-international armed conflict between the security forces of the Philippine government and the militants who seized strategic locations in Marawi City. This assertion is based on the definition of ‘armed conflict’ as described in The ABCs of International Humanitarian Law, as follows:

International humanitarian law applies to all armed conflicts. Although none of the relevant conventions contains a definition of armed conflict, it has been described as follows in jurisprudence: “an armed conflict exists whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”

Thus armed conflicts can be international or non-international. To qualify as such a non-international armed conflict must reach a certain intensity and the armed group(s) must be organised to a certain degree. Internal

tensions, internal disturbances such as riots, isolated or sporadic acts of violence and similar events are not covered by international humanitarian law.<sup>1</sup>

Labeling the perpetrators of the Marawi siege as terrorists will most likely earn no academic objection. However, with the proclamation of Martial Law in the whole of Mindanao, these militants were effectively given the status of rebels.<sup>2</sup> Hence, they are deemed to be committing rebellion, which is a political offense. By contemporary thought, the acts of the militants in Marawi City can be categorized as terrorist activities. Meanwhile, by legal definition, the said acts likewise constitute terrorism as defined in Section 3 of the Human Security Act of 2007 of the Philippines (Republic Act No. 9372).<sup>3</sup> Here, terrorism is not a political

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<sup>1</sup> Swiss Federal Department of Foreign Affairs FDFA, *The ABCs of INTERNATIONAL HUMANITARIAN LAW* (Bern: 2014), 9, accessed October 7, 2017, [https://www.fdfa.admin.ch/content/dam/eda/en/documents/publications/GlossarezurAussenpolitik/ABC-Humanitaeren-Voelkerrechts\\_en.pdf](https://www.fdfa.admin.ch/content/dam/eda/en/documents/publications/GlossarezurAussenpolitik/ABC-Humanitaeren-Voelkerrechts_en.pdf).

<sup>2</sup> There are only two grounds for a valid proclamation of martial law under the 1987 Constitution of the Philippines, to wit: (1) invasion, and (2) rebellion. In declaring martial law in Mindanao on the ground of rebellion, the militants in Marawi City were in effect categorized as rebels, or persons committing the crime of rebellion.

<sup>3</sup> SEC. 3. *Terrorism*.- Any person who commits an act punishable under any of the following provisions of the Revised Penal Code:

- a. Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters);
- b. Article 134 (Rebellion or Insurrection);
- c. Article 134-a (Coup d'Etat), including acts committed by private persons;
- d. Article 248 (Murder);
- e. Article 267 (Kidnapping and Serious Illegal Detention);
- f. Article 324 (Crimes Involving Destruction), or under
  1. Presidential Decree No. 1613 (The Law on Arson);
  2. Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990);
  3. Republic Act No. 5207, (Atomic Energy Regulatory and Liability Act of 1968);
  4. Republic Act No. 6235 (Anti-Hijacking Law);
  5. Presidential Decree No. 532 (Anti-Piracy and Anti-Highway Robbery Law of 1974); and,

offense. However, by considering the militants as rebels, the government is, in effect, conceding that their acts only constitute the crime of rebellion. The crime of rebellion, as a rule, absorbs other crimes (e.g., murder and arson) if the rebels can prove that they committed the said crimes in furtherance of the rebellion. The legal effect of the proclamation of martial law upon the appropriate categorization of the militants in Marawi City caught the attention of Associate Justice Marvic M.V.F. Leonen of the Supreme Court of the Philippines, who, in his Dissenting Opinion in the May 2017 Martial Law consolidated cases,<sup>4</sup> observed that:

The group committing atrocities in Marawi are terrorists. They are not rebels. They are committing acts of terrorism. They are not engaged in political acts of rebellion. They do not have the numbers nor do they have the sophistication to be able to hold ground. Their ideology of a nihilist apocalyptic future inspired by the extremist views of Salafi Jihadism will sway no community especially among Muslims.

... There is no rebellion that justifies martial law. There is terrorism that requires more thoughtful action.<sup>5</sup>

The Marawi siege demonstrates the tangible realities of war. Destruction of civilian properties could be caused by the actions of either parties to the armed conflict. This is the detested side of the phenomenon of armed conflict affecting civilians that ironically lays down the nexus to the favored mechanisms of reparations. After an armed conflict, the

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6. Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives)

thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism and shall suffer the penalty of forty (40) years of imprisonment, without the benefit of parole as provided for under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended.

<sup>4</sup> *Lagman, et al. v. Midealdea, et al., Cullamat, et al. v. President Duterte, et al., and Mohamad, et al. v. Midealdea, et al.*, G.R. Nos. 231658, 231771 and 231774, July 4, 2017, Associate Justice MVM Leonen, *Dissenting Opinion*.

<sup>5</sup> *Id.* at 2-3.

ensuing destruction highlights the dire need for amelioration measures. The Marawi crisis therefore brings to the fore the importance of reparation as a catalyst for rethinking the issue of non-compensability of civilian losses during armed conflicts.

## THE CONCEPT OF REPARATION IN A NUTSHELL

It is stated earlier that the responsive treatment for the effects of destruction is through the legal remedy of reparations, overlooking in the meantime the question of legality of the act that caused the destruction. The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.<sup>6</sup>

The correct diagnosis as to the merits of the arguments for and against non-compensability of civilian losses during armed conflicts requires an understanding of the concept of reparation. While reparation as a concept is not foreign to domestic law, there is a need to begin with an international law premise that befits the introduction in this article of the said concept. The reason is not really to be partial in favor of international law in the long-standing debate on whether international law should prevail over domestic law in case of conflict, but it is in international law that reparation gained prominence as a post-conflict legal remedy. However, this is not to say that in domestic law the concept of reparation does not exist. It does exist, though seeing governments actually provide reparations is rare. “So far,” writes Leisbeth Zegveld, “States have been reluctant to entitle, explicitly and in general, victims of violations of international humanitarian law to claim reparation.”<sup>7</sup>

There are instances where domestic law is able, at the choice of the national authority, to provide reparations. One example is the Victims’ and Land Restitution Law of Colombia passed by its government in 2011. This law “established a comprehensive reparations policy to

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<sup>6</sup> Emanuela-Chiara Gillard, “Reparation for violations of international humanitarian law,” *IRRC* Vol. 85 No. 851 (September 2003): 531, accessed October 1, 2017, [https://www.icrc.org/eng/assets/files/other/irrc\\_851\\_gillard.pdf](https://www.icrc.org/eng/assets/files/other/irrc_851_gillard.pdf).

<sup>7</sup> Leisbeth Zegveld, “Remedies for victims of violations of international humanitarian law,” *IRRC* Vol. 85 No. 851 (September 2003): 497, accessed October 2, 2017, [http://www.ier.ma/IMG/pdf/irrc\\_DIh\\_reparation.pdf](http://www.ier.ma/IMG/pdf/irrc_DIh_reparation.pdf).



address the harms suffered by victims [of] internal armed conflict that has resulted in more than 300,000 murders and enforced disappearances, the displacement of more than 6 million people, and thousands of cases of enforced disappearance, forced recruitment of minors, sexual and gender-based violence, and other serious violations.”<sup>8</sup>

While the full fruition of reparation is rare at the domestic level, the expectation of its realization in state-to-state platform is relatively higher. In his article entitled “A Legal History of International Reparations,” Richard M. Buxbaum writes that:

One principal event, which not only generated most of the reparations activities and discourse of the past half-century but which has also been the subject of much of the litigation and negotiations of the most recent period, is the German payment of reparations arising out of World War II atrocities.

German reparations have also been at the center of the single most critical and controversial evolution of public international law in the past century; namely, the movement from state-centered to societal- and individual-centered rights and obligations. This evolution has its substantive focus in the field of international human rights, and its procedural focus in the increasingly contested primacy of state reparations over direct individual claims for compensation and restitution. Both issues arose in and are illuminated by the history of German reparations and compensation or restitution payments.<sup>9</sup>

The creation of the United Nations Compensation Commission (UNCC) in 1991 likewise indicates the reality of reparations at the international level. The UNCC was a subsidiary organ of the UN Security Council whose “mandate was to process claims and pay compensation

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<sup>8</sup> Cristián Correa, “From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia,” *International Center for Transitional Justice* (October 2015): 1, accessed October 2, 2017, [https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_ColombiaReparationsChallenges\\_2015.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_ColombiaReparationsChallenges_2015.pdf).

<sup>9</sup> Richard M. Buxbaum, “A Legal History of International Reparations,” *Berkeley Journal of International Law* Volume 23 Issue 2 (2005): 314, accessed October 2, 2017, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1291&context=bjil>.

for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait."<sup>10</sup> More elaborate are the observations of *Brilmayer* and *Chepiga*, as follows:

Building on models such as the Iran-United States Claims Tribunal and the United Nations Compensation Commission ("UNCC"), increasing numbers of international adjudicatory bodies have been brought into existence, precisely in order to require violators of international humanitarian law to pay compensation to civilian victims. The Darfur Comprehensive Peace Agreement of 2006 envisioned the establishment of a Compensation Commission that would hear claims brought by individual Darfurians against the Government of Sudan; the two states of Eritrea and Ethiopia are currently arbitrating claims at the Permanent Court of Arbitration for violations of international humanitarian law committed during their 1998–2000 border war; and the International Criminal Court ("ICC") has adopted procedures for awarding reparations to civilians,<sup>11</sup>

and Leisbeth Zegveld who writes that:

[I]t is generally known that human rights treaties provide a remedy, both substantive and procedural, for individuals suffering injury from unlawful conduct by State authorities. For example, Article 13 of the European Convention on Human Rights stipulates that individuals whose rights as set forth in that Convention are violated shall have "an effective remedy before a national authority". And Article 50 of the same Convention mandates the European Court of Human Rights to afford just satisfaction to victims. Human rights treaties also provide for specific provisions on compensation, for example to victims of unlawful arrest or detention. Most recently, the Rome Statute of the International Criminal

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<sup>10</sup> United Nations Human Rights, Office of the High Commissioner, "International Legal Protection of Human Rights in Armed Conflict," *United Nations Publications* Sales No. E.11.XIV.3 (2011): 91, accessed October 2, 2017, [http://www.ohchr.org/Documents/Publications/HR\\_in\\_armed\\_conflict.pdf](http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf).

<sup>11</sup> Lea Brilmayer and Geoffrey Chepiga, "Ownership or Use? Civilian Property Interests in International Humanitarian Law," *Harvard International Law Journal* Vol. 49 No. 2 (Summer 2008): 415-16, accessed October 1, 2017, [http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ\\_49-2\\_Brilmayer-Chepiga.pdf](http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ_49-2_Brilmayer-Chepiga.pdf). [citations omitted]

Court authorizes the Court to determine any damage, loss or injury to victims and order reparations to them.<sup>12</sup>

Reparation, from an international law perspective, is an embodiment of numerous provisions that have found their way into international instruments that States are bound to observe. The existing provisions on reparation were crystallized in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>13</sup> These Basic Principles and Guidelines “assert that victims of such abuses have a right to prompt, adequate and effective reparation.”<sup>14</sup> This right to prompt, adequate and effective reparation, “is held to include, in some combination and as appropriate, restitution, compensation for harm, and rehabilitation in mind, body and status.”<sup>15</sup>

However, it is important to clarify that reparation is not synonymous with compensation, which is the bone of contention of this article. Emphasizing on this point, Christine Evans writes that:

There is a common misconception that reparations are synonymous with monetary compensation. Although compensation is a common component of reparations, the concept of reparations has evolved and now covers a wide range of measures...[R]eparations consist of five key elements, namely: restitution, compensation, rehabilitation, satisfaction (disclosure of the truth) and guarantees of non-repetition.<sup>16</sup>

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<sup>12</sup> Zegveld, “Remedies,” 497.

<sup>13</sup> Francesca Capone, et al., “Education and the Law of Reparations in Insecurity and Armed Conflict: A Summary,” *British Institute of International and Comparative Law*, 8, accessed October 2, 2017, [https://www.biiicl.org/files/6756\\_reparations\\_summary.pdf](https://www.biiicl.org/files/6756_reparations_summary.pdf).

<sup>14</sup> Lisa Magarrell, “Reparations in Theory and Practice,” *International Center for Transitional Justice*, Reparative Justice Series, 1, accessed October 2, 2017, <https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>.

<sup>15</sup> Ibid.

<sup>16</sup> Christine Evans, *The Right to Reparation in International Law for Victims of*

While reparation consists of several components and is thus wider in scope, compensation which is just one of these components is therefore narrower. Compensation is a monetary payment for financially assessable damage arising from the violation.<sup>17</sup> It covers material and moral injury.<sup>18</sup>

### THE ‘GOVERNMENTAL FUNCTION’ ARGUMENT FOR NON-COMPENSABILITY OF CIVILIAN PROPERTY LOSSES DURING THE MARAWI CRISIS

The doctrine of state immunity is one of the primary reasons why reparation rights, as asserted against the state, cannot be had by victims of violations of International Humanitarian Law during an internal armed conflict. Elucidating why the Hague Convention of 1907, the Fourth Geneva Convention of 1949, and the two Additional Protocols of 1977 provisions for ‘financial liability against states whose armed forces intentionally destroy civilian property in war’ have been ‘largely theoretical’ in the past, *Brilmayer* and *Chepiga* observed in 2008 that:

Jurisdiction is among the many reasons why such liability has been largely limited to theory. Belligerent states, the obvious defendants, are generally **immune to jurisdiction without their consent**, (emphasis added) and few states are willing to consent to the establishment of adjudicatory bodies that would hold them liable for what amounts to war crimes.<sup>19</sup>

Constitutional case law and scholarship distinguishes between and classifies the functions of the state into governmental and proprietary roles as a necessary guideline to the correct appreciation of the doctrine of state immunity in the Philippines. Beginning with *United States of America v. Ruiz*, the dichotomy of governmental and proprietary functions of state has assumed centrality in state immunity jurisprudence

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*Armed Conflict*, (New York: Cambridge University Press, 2012), 13, accessed October 2, 2017, <http://www.corteidh.or.cr/tablas/r31595.pdf>.

<sup>17</sup> Gillard, “Reparation for violations of international humanitarian law,” 531.

<sup>18</sup> *Ibid.*

<sup>19</sup> Brilmayer and Chepiga, “Ownership or Use?,” 413-15. [citations omitted, boldfacing and underscoring supplied]

in the Philippines.<sup>20</sup> In *National Power Corporation v. City of Cabanatuan*,<sup>21</sup> the Supreme Court of the Philippines defined governmental and proprietary functions in the following language:

Governmental functions are those pertaining to the administration of government, and as such, are treated as absolute obligation on the part of the state to perform while proprietary functions are those that are undertaken only by way of advancing the general interest of society, and are merely optional on the government.

Based on the above categories, governmental functions would include administration of justice, maintenance of peace and order, and defence of state among others. The underlying importance of these examples provides the first hint and highlights the significance of the distinction between governmental and proprietary functions. Distinguishing between governmental and proprietary functions of State is essential in establishing civilian losses during armed conflict as a non-compensable loss. Writing on this distinction, *Wells* and *Hellerstein* observed that:

The governmental-proprietary distinction is neither a single nor a simple rule. Rather, it is a cluster of rules that courts use in diverse contexts for a variety of purposes. In constitutional cases, courts use the governmental-proprietary distinction to aid in the resolution of two types of problems: **First, whether to deny a state an immunity that it might otherwise enjoy**; and, second, whether to free a state from a constitutional constraint that might otherwise limit its action.<sup>22</sup>

<sup>20</sup> See *U.S.A. v. Ruiz*, G.R. No. L-35645, May 22, 1985; *U.S.A. v. Guinto*, G.R. No. 76607, February 26, 1990; *U.S.A. v. Rodrigo*, G.R. No. 79470, February 26, 1990; *Republic of Indonesia v. Vinzon*, G.R. No. 154705, June 26, 2003; *Air Transportation Office v. Ramos*, G.R. No. 159402, February 23, 2011; *Arigo, et al. v. Swift, et al.*, G.R. No. 206510, September 16, 2014, and other cases.

<sup>21</sup> G.R. No. 149110, April 9, 2003.

<sup>22</sup> Michael L. Wells and Walter Hellerstein, "The Governmental-Proprietary Distinction in Constitutional Law," *University of Georgia Law* Vol. 66:1073 (1980): 1075, accessed October 6, 2017, [http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1377&context=fac\\_artchop](http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1377&context=fac_artchop). [boldfacing and underscoring supplied]

Based on this observation, the distinction between governmental and proprietary functions of state is the first step to determine the applicability of the doctrine of state immunity in each case. Accomplishing this step is necessary because the issue on non-compensability of civilian losses during armed conflict falls to the first type of problem referred to by *Wells* and *Hellerstein*. This issue is therefore inevitably intertwined with the doctrine of state immunity. This doctrine is enshrined in the 1987 Constitution of the Philippines through the provision that the State may not be sued without its consent.<sup>23</sup> However, where the State has not expressly waived its immunity, the State's consent to be sued may be implied depending on the nature of the act it has performed. If the State performs an act *jure imperii*, then it cannot be sued without its consent, for the state is engaged in its governmental function. The rule is different when the State is engaged in an act *jure gestionis*, for by then it is acting in its proprietary, business, or commercial capacity. While engaged in an act *jure gestionis*, the State is deemed to have descended to the level of an individual thereby tacitly divesting itself of its immunity.

In relation to the subject matter of this article, what needs to be done is to determine whether the Philippine government is engaged in its governmental or proprietary function in its actions to flush out the militants that seized Marawi City, even if by doing so the government must use the lethal force of aerial bombings and shelling resulting in the destruction of civilian properties. Combatting terrorism is definitely within the embrace of the defense of a state. If there is a hierarchy of governmental functions, the defense of a state belongs to the highest category. This the Supreme Court of the Philippines confirmed in the case of *United States of America, et al. v. Ruiz*,<sup>24</sup> where defence of state was described as 'indisputably a function of the government of the highest order.' Hence, the aerial bombings and shelling by the security forces of the Philippines against the militants fall within the scope of a 'governmental function' activity of the Philippine government.

However, determining whether the Philippine government is liable would require a judgment in a legal suit declaring the said liability. However, the opportunity to prove the liability of the Philippine

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<sup>23</sup> Section 3, Article XVI, 1987 Constitution of the Philippines: The State may not be sued without its consent.

<sup>24</sup> G.R. No. L-35645, May 22, 1985.

government in a legal suit is almost non-existent, for it has to first waive its state immunity for that suit to even prosper. It would be too good to be true that the Philippines, as a sovereign, will waive its state immunity to allow private claimants to prove that the government is liable for the civilian property losses during the armed conflict in Marawi City. In this context, the Philippine government is not liable for the civilian property losses resulting from the performance of a governmental function during the Marawi siege. This is the reason why the doctrine of state immunity is also referred to as the Royal Prerogative of Dishonesty, *i.e.*, the state can defeat the legitimate claim of a private individual by simply invoking its non-suability.

The *late Justice* Desiderio Jurado, an eminent Filipino scholar in civil law, wrote, “There can be damage without injury to those instances in which loss or harm was not the result of a violation of a legal duty.”<sup>25</sup> While this appears in his comments on the chapter on human relations of the New Civil Code of the Philippines, I find it relevant because the civilian property losses during the armed conflict in Marawi City may be considered as one such instance of damage without injury. “In such cases,” he continued, “the consequences must be borne by the injured person alone; the law affords no remedy for damages resulting from an act which does not amount to a legal injury or wrong.”<sup>26</sup> “These situations,” he concluded, “are often called *damnum absque injuria*.”<sup>27</sup> Considering the foregoing, the civilian property losses caused by the security forces present a clear case of *damnum absque injuria* or damage without injury.

One ramification that is ripe to mention is the notion of abuse that may possibly occur in the State’s performance of its governmental function. Unfortunately, while State officials are susceptible to the commission of a wrong, the State lacks such fallibility. In one case, the Supreme Court of the Philippines said, “The immunity from suit is based on the political truism that the State, as a sovereign, can do no wrong.”<sup>28</sup> Consequently, if at all abuse may be alleged to have attended the

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<sup>25</sup> Desiderio P. Jurado, *Civil Law Reviewer*, Twenty First Edition, Rex Book Store (Manila: 2009), 36.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Air Transportation Office v. Spouses David and Elisea Ramos*, G.R. No. 159402, February 23, 2011.

performance of the governmental function in defence of state, such an accusation is good only as against the government officials involved but unavailing as against the State itself because of the political truism that the State, as a sovereign, cannot be wrong. This does not mean though that under all circumstances, the State is not liable for causing massive destruction upon private properties by simply invoking that it was engaged in a governmental function. While the performance of such prerogative is unquestionable, however, when the State violates International Humanitarian Law, it could be held responsible for reparations under international law for civilian property losses caused thereby. However, state responsibility for violations of IHL also requires determination of factual basis, which is not the thrust of this article.

### **THE ‘MILITARY NECESSITY’ ARGUMENT FOR NON-COMPENSABILITY OF CIVILIAN PROPERTY LOSSES DURING THE MARAWI CRISIS**

In *United States v. Caltex (Philippines)* et al., 73 S.Ct. 200 (1952),<sup>29</sup> the U.S. Supreme Court ruled against Caltex Philippines by rejecting the latter’s claim for compensation for the destruction of its oil terminal facilities by the Americans during the Japanese invasion of the Philippines, which was necessary to prevent the said facilities from falling into the hands of the Japanese military. The U.S. Supreme Court held that the facilities were taken not for use but for destruction due to the ‘fortunes of war’ and so therefore not compensable.

In his analysis of *United States v. Caltex (Philippines)* in Constitutional Law: The Destruction of Private Property During War by Military Forces as a Non-Compensable Loss, Harold M. Frauendorfer noted, “the majority of the court...chose to follow the reasoning of the court in *United States v. Pacific Railroad Co.* [where] the court held that where private property is destroyed through battle, bombardment, or in some other way directly due to war, there was no compensable taking of

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<sup>29</sup> See Harold M. Frauendorfer, “Constitutional Law: “The Destruction of Private Property during War by Military Forces as a Non-Compensable Loss,” *Marquette Law Review* Vol. 37 Issue 1 (Summer 1953): 82, accessed September 30, 2017, <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=3122&context=mulr>.



the property.”<sup>30</sup> Writing in 1942, Philip Marcus observed that under American and other legal systems there is no absolute right of private ownership, of possession, or of control of property as against the government in either peace time or war time.<sup>31</sup> This means that during war time, the State can take private property with the end view of destroying it for military reasons. Elaborating on the right to take property under international law in a wartime context, he continued to say that:

International law permits many instances of forcible taking of property in war time. Capture of property in the heat of battle or at sea is standard practice. And this is true of requisitioning by an invading army." Assessment upon conquered territories has been sanctioned under the name of contribution.

Retorsion and reprisal are doctrines under which property can be expropriated and destroyed." The destruction of private property in the present war by bombing raids may bring these two doctrines into greater favour than they have been.<sup>32</sup>

The destruction of civilian properties during the siege in Marawi City is undeniably the direct, logical, and immediate result of the military actions of the government to suppress the siege. This does not suggest the lack of liability of the militants who infiltrated private properties. However, in terms of magnitude, the aerial bombings and shelling were far greater than the intrusion of the militants to private properties. Nevertheless, the magnitude of the destruction *per se* is not the conclusive parameter to determine whether the military action taken by the government is legally acceptable or not. Even if the magnitude of the destruction is so high, it is not automatic that the military action taken is necessarily legally unjustifiable. In fact, the principle of military necessity could even justify the use of weapons that are far, far deadlier than aerial

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<sup>30</sup> Id. at 83, citing *United States v. Pacific Railroad Co.* [120 U.S. 227, (1887)].

<sup>31</sup> Philip Marcus, “Taking and Destruction of Property under a Defense and War Program.” *Cornell Law Review* Vol. 27 Issue 3 (1942): 329, accessed September 30, 2017, <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4534&context=clr>.

<sup>32</sup> Id. at 331.

bombings and shelling, *i.e.*, the use of nuclear warheads. Hence, the government may repel claims for reparations on considerations of military necessity.

Before delving further on this ‘military necessity’ argument, it is imperative to establish first the constitutional foundation of the military action taken by the government during the Marawi siege. Under the 1987 Constitution of the Philippines, the President is the Commander-in-Chief of all armed forces of the Philippines.<sup>33</sup> This encapsulates the military powers of the President under the Constitution. Thus, in case of lawless violence, invasion or rebellion, he may call out the armed forces of the Philippines to prevent or suppress these events. In case of invasion or rebellion, the President may suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law as what President Duterte did on the whole of Mindanao. Thus, in cases of threats to national security, the military is called upon to respond to these threats as it is the strongest institution in the government in terms of physical might.

On practical and logical grounds, terrorists who are usually armed with deadly force must be met with lethal forces as well. However, the tangible strength of the military is not the only reason why in cases of lawless violence, invasion, or rebellion, it is the institution called upon by the President to respond. From a constitutional perspective, the Armed Forces is called upon to respond to these critical events since it is the protector of the people and the State. Section 3, Article II of the 1987 Constitution of the Philippines provides that, “Civilian authority is, at all times, supreme over the military. The Armed Forces of the Philippines is the protector of the people and the State. Its goal is to secure the sovereignty of the State and the integrity of the national territory.” Thus, in protecting the people and the State, the armed forces can pursue military actions even if these actions may result in civilian property losses occasioned by destruction out of necessity.

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<sup>33</sup> Section 18. The President shall be the 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, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law. [...] [Section 18, Article VII, 1987 Constitution of the Philippines]

In The ABCs of International Humanitarian Law, the Swiss Federal Department of Foreign Affairs explained the principle of military necessity as follows:

The principle of military necessity is a general principle of the conduct of hostilities. It must at all times be demonstrable that military force is necessary and proportionate (proportionality), and that it distinguishes between civilians and combatants as well as between civilian objects and military objectives. The fundamental concern of international humanitarian law is to ensure that a balance is struck between military necessity and humanitarian considerations.”<sup>34</sup>

Under Section 3 (1) of Republic Act No. 9851, otherwise known as the Philippine Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, military necessity is defined as follows:

"Military necessity" means the necessity of employing measures which are indispensable to achieve a legitimate aim of the conflict and are not otherwise prohibited by International Humanitarian Law.

Aerial bombings and shelling are nothing new in modern warfare. Certainly, the international community is more familiar with the destructive force of nuclear weapons as the world had in the past witnessed the nuclear bombings of Hiroshima and Nagasaki in 1945. These events in history ignited the race to nuclear capabilities. In fact, one of the mechanisms that brought stability during the Cold War era was the assurance of mutual annihilation between the defunct USSR and the United States. What assured the potential mutual annihilation of these two protagonists was their possession of weapons of mass destruction, *i.e.*, nuclear warheads. This notwithstanding, the prohibition of the use of nuclear weapons has not yet attained the binding character of customary international law or *jus cogens*. And we do not see that prohibition coming soon. In fact, the International Court of Justice had the occasion in 1996 to give its opinion on the issue of legality of the use of nuclear weapons in armed conflict.<sup>35</sup> “According to a 1996 advisory opinion of

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<sup>34</sup> FDFA, *The ABCs*, 32.

<sup>35</sup> See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226.

the International Court of Justice (ICJ),” writes the Swiss Federal Department of Foreign Affairs (FDFA), “use of nuclear weapons is usually a violation of international humanitarian law due to the scale of their impact, even though there is no comprehensive ban in customary international law, nor indeed in international treaty law.”<sup>36</sup> “Moreover,” FDFA continued, “it is difficult to envisage how any use of nuclear weapons could be compatible with its rules, in particular the principles of distinction, proportionality and precaution.”<sup>37</sup> Based on the Advisory Opinion of the International Court of Justice, there is no rule in customary international law that either permits or prohibits the use of nuclear weapons. Instead, the use of nuclear weapons is subject to the rules of International Humanitarian Law, *e.g.* principles of necessity and proportionality, notwithstanding the tremendous destructive nature of nuclear weapons.

The ‘military necessity’ argument for aerial bombings and shelling by the security forces of the Philippines draws its strength against the backdrop of the legality of the use of nuclear weapons in armed conflicts, with emphasis on the disparity in the magnitude of destruction caused by conventional and nuclear weapons. If the use of nuclear weapons may be justified on the military necessity argument, with more reason that the use of lesser lethal weapons can be justified by military necessity. It could be argued that the use of aerial bombings and shelling is ‘necessary’ to flush out the militants from the private buildings that they occupied in Marawi City. Of course, military action should not be taken to mean wreaking havoc without any limitations. Military strategies during armed conflicts must be executed in accordance with International Humanitarian Law or the Law of War. International Humanitarian Law (IHL) does not judge on the legality or illegality of an armed conflict like the Marawi siege. What IHL does is to regulate the conduct of hostilities by the warring parties and to protect the victims of armed conflicts. This two-fold purpose is achieved by the parties’ observance of certain principles such as distinction, proportionality, and precaution.

There are military strategies other than aerial bombings and shelling like the use of ground troops or special forces at that. However, the government is at liberty to adopt measures that would entail the least

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<sup>36</sup> FDFA, *The ABCs*, 35.

<sup>37</sup> *Ibid.*

damage to its security forces. During World War II, cities were flattened not by the force of infantry but mostly by the destructive capacity of aerial bombings. The United States of America could have adopted a D-Day type of invasion of Japan to force its surrender during World War II. But instead, the U.S. opted to shorten the agony of protracted ground invasion by dropping atomic bombs from the sky instead. With the atomic bombings of Hiroshima and Nagasaki, Japan was left with no other choice but to raise the white flag without the red sun. The atomic bombings therefore delivered the military victory needed to end the war on the Pacific side. Similarly, to end the Marawi siege, the Philippine government had the option to deploy more troops for ground combat or simply shatter the positions of the militants through aerial bombings and shelling. Either way, the resulting loss could be a consequence of military necessity.

However, the principle of military necessity is neither an impotent hypothesis that facilitates the State's defeat in the fight against terrorism nor a blanket license that allows the use of lethal force without any limitations whatsoever in the name of victory against terrorism. As a norm of International Humanitarian Law, its applicability is not suspended by the terrorism element attendant in an armed conflict. As succinctly put by *Katyal* and *Tribe*:

A time of terror may not be the ideal moment to trifle with the most time-tested postulates of government under law. It is certainly not a good time to dispense lightly with bedrock principles of our constitutional system.<sup>38</sup>

Referring to his reading of *United States v. Caltex (Philippines)* et al., 73 S.Ct. 200 (1952) as discussed above, Harold M. Frauendorfer, though agreeing that, '*the court's holding is both logical and based on the weight of authority,*' nevertheless cautioned that:

This does not say that the military forces are free to go about destroying property at their whim in time of war, but rather it says that when the necessity of the destruction is clear, even by "hind sight," the destruction

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<sup>38</sup> Neal K. Katyal<sup>†</sup> and Laurence H. Tribe,<sup>††</sup> "Waging War, Deciding Guilt: Trying the Military Tribunals," *The Yale Law Journal* Vol. 111 (2002): 1259, accessed September 30, 2017, [https://www.yalelawjournal.org/pdf/251\\_8op3oy2o.pdf](https://www.yalelawjournal.org/pdf/251_8op3oy2o.pdf).

and resulting loss is due to the ravages and fortunes of war, and done at

such a time when, "The safety of the state . . . overrides all considerations of private loss."<sup>39</sup>

Similarly, even if the issue is brought to Philippine law on property, the non-compensability rule for condemnation or seizure of private property for security reasons admits an exception. Compensation can be had if the property owner can prove that the condemnation or seizure is unjustified. This is clear from the provisions of Article 436 of the New Civil Code of the Philippines, which reads:

Art. 436. When any property is condemned or seized by competent authority in the interest of health, safety or security, the owner thereof shall not be entitled to compensation, **unless he can show that such condemnation or seizure is unjustified.**<sup>40</sup>

One may vigorously claim on one hand that the strategy used is justified by necessity although the reality is that, based on the facts, no such necessity exists, while on the other hand a denial of necessity is belied by the existence of factual basis thereof. Unfortunately, this is a determination that involves an inquiry into the attendant facts. This is not the concern of this article, for it deals for the most part with legal issues surrounding the mechanism of reparation as a post-conflict intervention for civilian property losses during the Marawi crisis.

## **ARGUMENTS FOR COMPENSABILITY OF CIVILIAN PROPERTY LOSSES DURING THE MARAWI CRISIS**

Recall that in the introduction, this writer observed that there is an initial temptation to simply adopt, without qualifications, the rule of non-compensability of civilian losses caused by security forces during armed conflict. The reason is obvious. That is the prevailing notion especially in the Philippine domestic setting. For one, Article 436 of the New Civil Code of the Philippines cited above provides for the rule that when any

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<sup>39</sup> Frauendorfer, "Destruction," 84. [*boldfacing supplied*]

<sup>40</sup> [*boldfacing supplied*]

property is condemned or seized by competent authority in the interest of health, safety or security, the owner thereof shall not be entitled to compensation. For another, as an exercise of police power of the state, taking of property for destruction as a necessity requires no compensation. As the late *Justice Cruz* put it, "...destruction from necessity cannot require the conversion of the property taken to public use, nor is there any need for the payment of just compensation."<sup>41</sup> Further, the two arguments presented to support the non-compensability rule referred to in this article are the most formidable arguments for the Philippine government to repel claims for reparation for civilian property losses during the Marawi crisis. This is buttressed by the fact that even in international law scholarship where reparation is vigorously espoused as a right, there is a trace of frustration when it comes to the matter of its implementation. In the Philippine domestic context, reparations for the civilian property losses during the Marawi siege may not even reach a *matter-of-law* level of recognition. Constitutional realities in the domestic ground make it harder for reparations to achieve full fruition. However, as early as 1859 in 'Vattel, *The Law of Nations* (Chitty's Transl. 1859)',<sup>42</sup> there was already a notion that seems to suggest the need to distinguish between two kinds of destruction of private property during armed conflicts vis-à-vis compensation. Frauendorfer gave us a glimpse of which, as follows:

At the common law, it appears that private property could be destroyed where public necessity demanded without any compensation going to the person suffering the loss. This view was recognized as the common law view in early decisions in the United States and followed as such. However, not all of the early writers on the subject were convinced of this precept of non-compensability for the taking of private property, even though done only in instances of public necessity. Vattel, writing in the late eighteenth century, stated in effect that where there is a destruction of private property in time of war, the destruction is of two kinds; the one being destruction wrought by the enemy, which was a non-compensable loss, and the other being a destruction of private property deliberately done by the authorities as a precautionary measure, in which

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<sup>41</sup> Isagani A. Cruz, *Constitutional Law* (Quezon City: Central Lawbook Publishing Co., Inc., 2003), 65.

<sup>42</sup> See note 4 of Frauendorfer, "Destruction," 82.

case the owner of the property destroyed should bear no more than his "quota of the loss."<sup>43</sup>

Based on these categories, the subject matter of this article deals with '*destruction of private property deliberately done by the authorities as a precautionary measure.*' This behoves a formulation of counter-arguments which, though standard in domestic law but not typical of international setting *pro*-reparation scholarship, are formidable enough for consideration. These are the principles of *Parens Patriae*, *Social Justice*, and the '*Sharing of Loss*' argument.

### THE '*PARENS PATRIAE*' ARGUMENT FOR COMPENSABILITY OF CIVILIAN PROPERTY LOSSES DURING THE MARAWI CRISIS

The doctrine of *parens patriae* is cogent enough for the Philippine government to seriously consider providing reparations by way of compensation for civilian property losses caused by aerial bombings and shelling. Black's Law Dictionary defines *parens patriae* as follows:

The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves....A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit (*parens patriae* allowed the state to institute proceedings). The state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit.<sup>44</sup>

The State as a sovereign, is the *parens patriae*.<sup>45</sup> This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is vested in a royal person or in the legislature.<sup>46</sup> It is a most beneficent function, and often necessary to be exercised in the

<sup>43</sup> Frauendorfer, "Destruction," 82.

<sup>44</sup> Black's Law Dictionary, Ninth Edition, 2009, 1221.

<sup>45</sup> *The Government of the Philippine Islands v. El Monte de Piedad y Caja de Ahorras de Manila*, G.R. No. L-9959 December 13, 1916, quoting *Fontain vs. Ravenel* (17 Hw., 369, 384).

<sup>46</sup> *Ibid.*, quoting the Supreme Court of the United States in *Mormon Charch v. United States* (136 U. S.,1, 57).



interest of humanity, and for the prevention of injury to those who cannot protect themselves.<sup>47</sup> In his *Separate Opinion* in *Cruz v. Secretary of Environment and Natural Resources*,<sup>48</sup> retired Chief Justice Renato Puno of the Supreme Court of the Philippines explained that:

[T]he principle of *parens patriae* [is] inherent in the supreme power of the State and deeply embedded in Philippine legal tradition. This principle mandates that persons suffering from serious disadvantage or handicap, which places them in a position of actual inequality in their relation or transaction with others, are entitled to the protection of the State.<sup>49</sup>

There is no doubt that the tremendous destruction of the downtown area in Marawi City has placed the *Meranaos*<sup>50</sup> at a very serious disadvantage. The Marawi crisis claimed innocent civilian lives, ruined homes, wiped out local businesses, and displaced hundreds of thousands. Life, as *internally displaced persons* at evacuation centres, is harsh thereby worsening people's health and moral. These are just some of the gruesome effects of the Marawi crisis. The *Meranaos* are suffering. With their condition, it is utter intellectual insensitivity to say that they are not at a very serious disadvantage. This 'placed them in a position of actual inequality in their relation' with the rest of the society. Hence, the only logical conclusion is that they are entitled to the protection of the State. Surely, for the Philippine government to provide reparations in the form of compensation for their property losses is to give them the protection of the state as *parens patriae*.

It is true that the doctrine of *parens patriae* was originally conceived to benefit a specific class of disadvantaged persons. The term originated in English common law when the King acted as guardian to persons with legal disabilities such as infants, idiots, and lunatics.<sup>51</sup> 'In

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<sup>47</sup> See *ibid*.

<sup>48</sup> *Separate Opinion, Puno, J., Isagani Cruz v. Secretary of DENR, et al.*, G.R. No. 135385, December 6, 2000.

<sup>49</sup> [*boldfacing and underscoring supplied*]

<sup>50</sup> The term *Meranao* literally means the people of the lake. These people are natives of the municipalities (including Marawi City) surrounding Lake Lanao.

<sup>51</sup> *Inherent Parens Patriae Authority Empowers Court of General Jurisdiction to Order Sterilization of Incompetents: In re C.D.M.*, 627 P.2d 607 (Alaska

State *ex rel. Hawks v. Lazaro*, 157 W. Va. 417, 202 S.E.2d 109 (1974), the court observed that "one can reasonably believe that the early doctrine of *parens patriae* was conceived in avarice and executed without charity."<sup>52</sup> "The court also noted that "[e]arly reported English law primarily adjudicated disputes among men of property, and the early development of *parens patriae* was more a state fiscal policy than a humanitarian doctrine."<sup>53</sup> However, the present state of law and jurisprudence indicates a higher status for the doctrine of *parens patriae*, which it truly deserves. In the United States, *parens patriae* refers to the state, as a sovereign, in its role as guardian.<sup>54</sup> The state's role as guardian, as jurisprudence shows, justifies the personality of the state to sue for and in representation of the disadvantaged. As early as 1916, the Supreme Court of the Philippines has already adopted the principle of *parens patriae* in the case of *Government of the Philippine Islands v. El Monte de Piedad y Caja de Ahorros de Manila*.<sup>55</sup> Here, it was held that the government, although not the intended beneficiary of money deposited in a bank, has the right to file an action, as *parens patriae*, to recover the said money on behalf of earthquake victims who were the intended beneficiaries.

This right of the government to sue, as *parens patriae*, for and on behalf of those who cannot protect themselves also permeates in American jurisprudence. The following excerpt shows how far the principle of *parens patriae* has gone in the federal courts in the United States, to wit:

The concept of the *parens patriae* suit has been greatly expanded in the United States federal courts beyond that which existed in England.

In *Louisiana v. Texas*, the State of Louisiana brought suit to enjoin officials of the State of Texas from so administering the Texas quarantine regulations as to prevent Louisiana merchants from sending goods into Texas. The US Supreme Court recognized that Louisiana was attempting to sue, not because of any particular injury to a particular business of the

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1981), 60 Wash. U. L. Q. 1177 (1982), at Note 3. Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol60/iss3/8](http://openscholarship.wustl.edu/law_lawreview/vol60/iss3/8)

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> G.R. No. L-9959, December 13, 1916.

State, but as *parens patriae* for all its citizens. While the Court found that *parens patriae* could not properly be invoked in that case, the propriety and utility of *parens patriae* suits were clearly recognized, thus setting a precedent. Thus, in a series of cases after *Louisiana v. Texas* the Supreme Court followed that precedent to allow states to sue as *parens patriae*:

- *Missouri v. Illinois*, 180 U.S. 208 (1901) (holding that Missouri was permitted to sue Illinois and a Chicago sanitation district on behalf of Missouri citizens to enjoin the discharge of sewage into the Mississippi River);
- *Kansas v. Colorado*, 206 U.S. 46 (1907) (holding that Kansas was permitted to sue as *parens patriae* to enjoin the diversion of water from an interstate stream);
- *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (holding that Georgia was entitled to sue to enjoin fumes from a copper plant across the state border from injuring land in five Georgia counties);
- *New York v. New Jersey*, 256 U.S. 296 (1921) (holding that New York could sue to enjoin the discharge of sewage into the New York harbor);
- *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (holding that Pennsylvania might sue to enjoin restraints on the commercial flow of natural gas);
- *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (holding that Minnesota could sue to enjoin changes in drainage which increase the flow of water in an interstate stream).<sup>56</sup>

This does not mean however that the principle of *parens patriae* applies only on the issue of legal standing to sue, which is a matter of procedural law. The principle of *parens patriae* can be pursued by the state outside the context of *parens patriae* court action. It is not all about the right to sue. The doctrine of *parens patriae*, which has ‘beneficent functions’, is ‘deeply embedded in Philippine legal tradition.’ Certainly, the Philippine government can demonstrate its beneficence as *parens patriae* by providing reparations by way of compensation for civilian property losses caused by aerial bombings and shelling.

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<sup>56</sup> *Parens patriae*, accessed October 11, 2017, [http://en.wikipedia.org/wiki/Parens\\_patriae](http://en.wikipedia.org/wiki/Parens_patriae).

## THE ‘SOCIAL JUSTICE’ ARGUMENT FOR COMPENSABILITY OF CIVILIAN PROPERTY LOSSES DURING THE MARAWI CRISIS

It is submitted that ‘the use of property bears a social function’ is a principle recognized by no less than the Constitution of the Philippines.<sup>57</sup> It is in the utility of property that the satisfaction of our social and economic wants is accomplished. To produce crops and other farm products, the farmer cultivates his land. To manufacture goods, the industrialist establishes a factory. To formulate plans and strategies, the company Chief Executive Officer enjoys the luxury of his office. To sell goods, the retail trader displays them at his store. To provide quality education, educational institutions operate within comfortable buildings and other facilities. To render government services, the government establishes capitol buildings and halls. To enjoy the sanctity of family life, families build serene homes. These are just some of the social and economic benefits that man derives from the utility of property. However, these benefits could suddenly disappear during an armed conflict. The destruction in the downtown area of Marawi City is one such event. Sometimes, it is when properties perish that the use-of-property-bears-a-social-function principle becomes crystal clear. For the destruction in Marawi City, social justice as a response can be expressed through reparations in the form of compensation.

Social justice is persuasive enough to convince the Philippine government to seriously consider providing reparations by way of compensation for civilian property losses caused by aerial bombings and shelling. In the celebrated case of *Calalang v. Williams*,<sup>58</sup> the Supreme Court of the Philippines, speaking through the late *Justice* Laurel, defined social justice in the following language:

Social justice is "neither communism, nor despotism, nor atomism, nor anarchy," but the **humanization of laws** and the **equalization of social and economic forces by the State** so that justice in its rational and objectively secular conception may at least be approximated. Social

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<sup>57</sup> Section 6. The use of property bears a social function, and all economic agents shall contribute to the common good. [...] [Section 6, Article XII, 1987 Constitution of the Philippines].

<sup>58</sup> G.R. No. 47800, December 2, 1940.

justice means the promotion of the welfare of all the people, the adoption by the Government of measures calculated to insure economic stability of all the component elements of society, through the maintenance of a proper economic and social equilibrium in the interrelations of the members of the community, constitutionally, through the adoption of measures legally justifiable, or extra-constitutionally, through the exercise of powers underlying the existence of all governments on the time-honored principle of *salus populi est suprema lex*.<sup>59</sup>

Under the principle of social justice, the State ought to equalize the social and economic forces to achieve justice. The government ought to pursue measures that are able to bring economic stability of all component elements of society. Certainly, the economic fabrics of the *Meranao* society are on the brink of total destruction. While the siege occurred in Marawi City only, but its effects spread all throughout the *Meranao* Province of Lanao del Sur. The downtown area of Marawi is the locale of the city's commerce, public market, schools, residential houses, business establishments, *masajid*, *madrasah*, etc. The destruction of these properties certainly brought instability to the *Meranao* society. Therefore, it is high time for the Philippine government to pursue measures of reparations to reinstate the social and economic stability of the *Meranaos* as a gesture of championing the cause of social justice. This exhortation likewise stands on a constitutional policy that the State shall promote social justice in all phases of national development.<sup>60</sup> Thus, promoting public interest is not incompatible with upholding social justice. Though the instability in the social and economic fabrics of the *Meranao* society is local in scope, but its effects can be felt nationwide especially so that the Marawi crisis has national security implications. Therefore, public interest and social justice would be served should the government pursue reparations by way of compensation for the property losses of the *Meranaos* who are now economically underprivileged. It was the late President of the Philippines Ramon Magsaysay who, referring to social justice, said that those who have less in life should have more in law. The *Meranaos* now have less in life with the destruction of their properties that they acquired through years and years

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<sup>59</sup> [*boldfacing supplied*]

<sup>60</sup> Section 10, Art. II, 1987 Constitution of the Philippines: The State shall promote social justice in all phases of national development.

of toil and sacrifice. Social justice would be denied to them if their losses are not compensated.

### **‘SHARING OF LOSS’ ARGUMENT FOR COMPENSABILITY OF CIVILIAN PROPERTY LOSSES DURING THE MARAWI CRISIS**

Writing in 1953, Harold M. Frauendorfer noted, “At the common law, it appears that private property could be destroyed where public necessity demanded without any compensation going to the person suffering the loss.”<sup>61</sup> The present state of law and jurisprudence in the Philippines shows that the same observation applies in the Philippines. However, at the conclusion of his article, Frauendorfer posed a question which I find very interesting to answer in the context of Philippine law, as follows:

Therefore should not some plan be devised in the form of insurance or emergency taxation, or a combination of the two, which would enable the losses due to any direct attack to be borne by all of the people rather than only by those who actually suffer the pecuniary loss?<sup>62</sup>

While the context of this question deals with ‘losses’ due to any direct attack upon the U.S., it is contended that there is no difficulty in applying it to ‘civilian property losses’ occasioned by the quelling of the terrorist attack in Marawi City. Hence, it is also proposed that the civilian property losses of the *Meranaos* be borne by the State through the appropriate measures such as an appropriation law authorizing the release of special funds for compensation. In this way, the *Meranaos* will not shoulder alone their pecuniary losses. True, some of the militants were *Meranaos*. However, the siege must be viewed in the context of terrorism, which, as a worldwide threat, could happen anywhere and anytime irrespective of the national or cultural affiliations of the terrorists. The Filipino nation and the government have benefitted indirectly when Marawi City, instead of any other place in the Philippines, has become the venue in which the government was able to crush the country’s own worst experience of the global threat of violent extremism. Therefore, the losses arising from the destruction of private

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<sup>61</sup> Frauendorfer, “Destruction,” 82.

<sup>62</sup> *Id.* at 84.

properties by aerial bombings and shelling should not be for the *Meranaos* to bear alone. Article 23 of the New Civil Code of the Philippines provides as follows:

Even when an act or event causing damage to another's property was not due to the fault or negligence of the defendant, the latter shall be liable for indemnity if through the act or event he was benefited.

While this provision specifically applies to human relations, there is no peremptory reason why its philosophy cannot be applied by analogy to the proposition that the government ought to provide reparations for the civilian property losses caused by aerial bombings and shelling. As has been observed with accuracy and wisdom:

The experiences of post World War II have clearly indicated that in order to re-establish homes, factories, and other necessities of economic life, which have been ravaged by war, the government and the entire populace must be willing to bear the burden together or economic recovery is severely crippled if not completely blocked.<sup>63</sup>

Even assuming *arguendo* that the government cannot be blamed for it was only performing the governmental function of defence of state, buttressed by the principle of military necessity, the government has nonetheless benefited because it was able to decisively defend and uphold, with the corresponding sacrificial destruction of the downtown area of Marawi City, the State's security, territorial integrity, and sovereignty. This benefit outweighs billions of pesos to be allocated for compensation for the pecuniary losses of the *Meranaos*. Had the siege been permanently successful, the government would lose Marawi City and all the sovereign prerogatives that the government has over the city go with that loss. Such a loss is incapable of pecuniary estimation.

## **REPARATION IN INTERNATIONAL LAW: A LEGAL OBLIGATION?**

Evidently, pro-reparation or reparation-leaning provisions permeate both domestic law and international law. However, whether the right to

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<sup>63</sup> Ibid.

reparation has truly attained the status of a legal obligation in international law outside the context of a treaty or convention, remains a proper subject of inquiry. Some scholars support the view that reparation has already attained the status of a customary law. Christine Evans<sup>64</sup> stressed on this as follows:

Although the implications of reparation provisions in humanitarian law are still being explored and the implementation thereof largely remains lacking, some scholars have stated that provisions on reparations have attained customary law status and, consequently, states cannot absolve themselves or other states for liability with respect to grave breaches. Kalshoven and Zegveld state that: ‘the rule of responsibility, including the liability to pay compensation, has acquired a much broader scope. Although formally written for the Conventions and the Protocol as treaties, it is not too daring to regard it as applicable to the whole of international humanitarian law, whether written or customary.’

Of considerable importance is that the ICRC has specifically affirmed, in its 2005 in-depth study of customary international humanitarian law previously cited, that state responsibility for reparations has become established as a customary norm both in international and non-international armed conflicts. A weak aspect of humanitarian law, however, is its lack of enforcement and monitoring mechanisms. Recent developments in international criminal courts and tribunals...provide avenues for certain victims. Henckaerts notes that the renewed interest in the relationship between humanitarian law and human rights law relates to victims’ on going search for a forum in order to obtain remedies for violations of their rights during armed conflict.<sup>65</sup>

Evans herself believes that the right of the individual to reparation “has acquired a degree of recognition as forming part of customary law”.<sup>66</sup> This she stated against the backdrop of an overview (she discussed in Chapter 2, Part I of her book), “which arguably indicates extensive recognition of the right of the individual to reparation in human rights and humanitarian law, as well as under general international

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<sup>64</sup> Christine Evans is a staff member of the Office of the United Nations High Commissioner for Human Rights. She holds a Ph.D. in international law from the LSE and an LLM from the Raoul Wallenberg Institute of Human Rights and Humanitarian Law.

<sup>65</sup> Evans, *Right to Reparation*, 33. [*citations omitted*]

<sup>66</sup> *Id.* at 39.



law”.<sup>67</sup> In the conclusions of Chapter 2 of her treatise, she made the following observations:

The convergence of norms and legal sources that explore and define the nature of reparations in relation to individuals is demonstrated in jurisprudence from the ICJ, the Articles on State Responsibility of the ILC, humanitarian law and human rights instruments, both legally binding and non-binding, as well as human rights jurisprudence and international criminal law...and the ICRC Customary Law Study. All these elements support the argument that state responsibility for reparations in favour of individuals has acquired certain customary standing.<sup>68</sup>

According to Lisa Magarell, “International law is, by now, fairly clear that a duty exists to provide reparations.”<sup>69</sup> This is the good news that should have taken off from theory and, though shaken by turbulence while airborne, has supposedly landed safely in practice, for it speaks of a duty. “In practice, however,” Magarrell lamented, “the duty lacks precision and questions have been asked about how to give content to that obligation in any given situation where massive harm has been inflicted.”<sup>70</sup> For her part, Emanuela-Chiara Gillard, Legal Advisor at the Legal Division of the International Committee of the Red Cross, observes that:

There is increasing acceptance that individuals do have a right to reparation for violations of international law of which they are victims. This is particularly well established with regard to human rights law. Not only do many of the specialized human rights tribunals have the right to award “just satisfaction” or “fair compensation”, but a number of human rights treaties also expressly require States to establish a remedy for violations before national courts.<sup>71</sup>

It seems to appear that the right to reparations has attained the status of a legal obligation in international law. This does not mean though that said right is always given effect. As Gillard puts it:

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<sup>67</sup> Id. at 39.

<sup>68</sup> Id. at 43.

<sup>69</sup> Magarrell, “Theory and Practice,” 1.

<sup>70</sup> Ibid.

<sup>71</sup> Gillard, “Reparation for violations of international humanitarian law,” 536. [citations omitted]

Progress has been made in recent years via a multitude of different avenues. There appears to be a greater acceptance by States of the idea of individual victims' right to reparation and some willingness to make awards. However, while some victims of violations of international humanitarian law have actually received compensation, the reality remains that the majority remain without redress.<sup>72</sup>

### Conditions to obtain reparations

"In order to obtain one (or a combination) of the forms of reparation," writes Capone, et al., "a victim must have suffered harm. According to the principle of causality, the harm must have resulted from the wrongful act committed. These conditions are necessary requirements to obtain reparation, whether awarded through a judicial or a non-judicial process."<sup>73</sup> The same scholars explained the Concept of Harm as follows:

Harm can be defined as the negative outcome resulting from the comparison of two conditions of a person or object, before and after the wrongful act. There are two broad categories of 'harm' under international law:

- **material damage**, which refers to damage to property or other interests of the State or its nationals and which can be assessed in financial terms; and
- **moral damage**, which includes individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's privacy.<sup>74</sup>

There is however a need to establish the distinction between *casualty* and *harm*. In the discussion below, Capone, *et al.*, elucidated on the distinction with emphasis on educational harm, to wit:

The notion of causality must be distinguished from the notion of harm as it is a separate prerequisite for obtaining reparation. This issue is important in practice as some forms of harm may lead to further consequential forms of harm. For example, the killing of a teacher results not only in a loss of life but also in the loss of educational opportunity for

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<sup>72</sup> Id. at 549.

<sup>73</sup> Capone, et al., "Education and Reparations," 11.

<sup>74</sup> Id. at 11.

the students. The death of the teacher and the loss to the children are separately recognized, which means that they may lead (in principle) to separate recoverable forms of harm. In order to be recoverable, harm must be attributable to the wrongful act, which is the question of causation.

There is no streamlined practice under international law in addressing the question of causation as different breaches of international obligation may entail different causality requirements. With regard to educational harm, establishing causation raises a number of additional concerns. For example, in cases where the educational harm suffered by child soldiers has to be assessed years after missing out on their educational opportunities, establishing causation is problematic. In addition, while it is already difficult to establish a causal link between a violation and educational harm, it is even more difficult to establish this link with regard to the long term and on-going effects of educational harm.

Despite the difficulties in assessing and quantifying harm and establishing a causal link between the wrongful act and the harm, those are necessary requirements for obtaining reparation.<sup>75</sup>

### **Reparation in domestic law: a legal obligation?**

In general, states are responsible for ensuring the enjoyment of human rights by all the citizens within their borders, as well as for ensuring that justice will be delivered equally to all when abuses occur.<sup>76</sup> Responsibility for reparations is no exception.<sup>77</sup> *Evans* notes that certain scholars consider the right to reparation already well-grounded in customary law, while others identify it as an emerging rule.<sup>78</sup> This is very significant in determining whether in Philippine law the right to reparation of victims of IHL violations has attained the status of a legal obligation that the Philippine government ought to perform. If the right has attained the status of a customary international law, then it has become automatically part of Philippine law under the Doctrine of Incorporation articulated in Section 2, Article II of the 1987 Constitution of the Philippines, which reads:

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<sup>75</sup> *Id.* at 11-12.

<sup>76</sup> Magarrell, "Theory and Practice," 10.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Evans*, Right to Reparation, 39.

Section 2. The Philippines renounces war as an instrument of national policy, **adopts the generally accepted principles of international law as part of the law of the land** and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.<sup>79</sup>

If the right to reparation has not yet attained the status of a generally accepted principle of international law, then it must be transformed into domestic law through a constitutional mechanism, *e.g.* local legislation, for it to become effective and thus enforceable in the Philippines. This gives context to the following observation of *Zegveld*, to wit:

Neither humanitarian law as a whole nor any specific article imposes an obligation on States to give direct effect in their national legal systems to the provisions of IHL, in that IHL norms could be invoked by individuals before national courts in the same way as national norms. Where a State does choose to do so, the precise article may be invoked directly before national courts. For other States there is the possibility of integrating the substance, if not the actual articles, of IHL into domestic law. But where neither course is adopted, victims are left empty-handed. This seems to be the more common situation worldwide.<sup>80</sup>

Thus, if the right of reparation under International Humanitarian Law has attained the status of a customary law, then it can be invoked by the *Meranaos* before the Philippine courts ‘in the same way as national norms’. Though the right to reparations is well-established and recognized in international law, yet there are three reasons cited by Gillard why most of the claims by victims of IHL violations have failed. These are: (1) the fact that individual claims were precluded by a peace settlement; (2) sovereign immunity; or (3) the non-self-executing nature of the right to reparations under international law.<sup>81</sup> In other words, Meranao claims for compensation can be rejected by the Philippine government because of the doctrine of state immunity as explained above and the non-self-executing nature of the right of reparations under international law. While there is an ‘increasing acceptance’ of the right to reparation of victims of violations of international law, yet the

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<sup>79</sup> [boldfacing supplied]

<sup>80</sup> *Zegveld*, “Remedies,” 507.

<sup>81</sup> See Gillard, “Reparation for violations of international humanitarian law,” 537.

‘position of individual victims of violations of international humanitarian law is more problematic’ according to Gillard. Laying the context of this problem, she said:

While there is general consensus that there is no reason for limiting the right to compensation referred to in the Hague Convention and Additional Protocol I to States and that individual victims should also benefit, problems have arisen when such persons have attempted to enforce this right to reparations — usually compensation — directly before national courts.<sup>82</sup>

For instance, she cites that:

[C]ertain States, most notably Japan and the US, have rejected claims brought against States, either on the ground that sovereign immunity protected the respondent State from scrutiny by national courts or that the relevant provisions of international humanitarian law instruments did not give individuals the necessary standing to pursue their claims directly before domestic courts — i.e. were not self-executing.<sup>83</sup>

### **Reparation under the Philippine IHL statute (R.A. 9851)**

The right to reparation of victims of IHL violations discussed above should be understood in the context of an assertion of a right against the State itself, and not against individuals. This is because “*traditionally it was only States that made reparation.*”<sup>84</sup> This context is important because the Philippine government has enacted Republic Act No. 9851, otherwise known as the "Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity," a law that likewise provides for reparations to victims. Section 14 of R.A. 9851 provides in part as follows:

Section 14. Reparations to Victims. - In addition to existing provisions in Philippine law and procedural rules for reparations to victims, the following measures shall be undertaken:

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<sup>82</sup> Id. at 536.

<sup>83</sup> Id. at 537.

<sup>84</sup> Id. at 545.

- (a) The court shall follow the principles relating to the reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision, the court may, wither upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and state the principles on which it is acting;
- (b) The court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation; ...

This behoves a clarification, for the reader might be misled to believe that the right to reparation (asserted against the State), irrespective of its customary law status or not, has been transformed into Philippine law because of the enactment of R.A. 9851. It is to be remembered that R.A. 9851 is a Philippine criminal law defining and penalizing crimes against international humanitarian law, genocide and other crimes against humanity, organizing jurisdiction, and designating special courts. It is not a law in which the Philippine government itself assumes legal obligation to provide reparations in case the government itself commits IHL violations during an internal armed conflict, like the Marawi siege. As a penal law, the ones to be prosecuted for a violation of R.A. 9851 are natural persons. In other words, reparation under this law is a legal consequence of criminal liability of a person convicted for a violation of R.A. 9851. Therefore, reparation in the context of R.A. 9851 is a liability of the convicted offender, not the Philippine government itself. Under Article 100 of the Revised Penal Code of the Philippines, which applies as a supplement,<sup>85</sup> every person who is criminally liable for a felony is also civilly liable.<sup>86</sup> Civil liability, as a consequence of conviction for a felony under the Revised Penal Code, includes restitution, reparation of

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<sup>85</sup> Section 16. Suppletory Application of the Revised Penal Code and Other General or Special Laws. - The provisions of the Revised Penal Code and other general or special laws shall have a suppletory application to the provisions of this Act. [Section 16, R.A. 9851]

<sup>86</sup> Article 100. Civil liability of a person guilty of felony. – Every person criminally liable for a felony is also civilly liable. [Article 100, Revised Penal Code]

the damage caused, and indemnification for consequential damages.<sup>87</sup>

It is to be noted though that the enactment of R.A. 9851 by the Philippines came at a time where there is a growing trend to make individual violators provide reparation. Although, “[n]one of the international humanitarian law instruments specifically address the question of individuals’ responsibility to make reparation to their victims,” observes Gillard, “[t]his obligation can, however, be inferred from the provisions on individual responsibility for violations of international humanitarian law more generally.”<sup>88</sup> She explained this further:

The four Geneva Conventions and Additional Protocol I establish a system of individual *criminal* responsibility for persons suspected of war crimes (GC I, Article 50; GC II, Article 51; GC III, Article 130; GC IV, Article 147; and PI, Article 85). The focus is on persecution by national courts. States are required to criminalize, under national law, certain violations of international humanitarian law and to prosecute or extradite persons suspected of these crimes. Although the treaties are silent about the possibility of requiring violators to make reparation to their victims, in the context of these national prosecutions there is nothing to prevent the ordinary national law procedures and rights – such as the concept of *partie civile*... – from applying. While ordinarily an obligation to make reparation would require a finding of criminal responsibility, there may be other mechanisms at national law under which victims may obtain redress from violators, such as, for example, the US Alien Tort Claims Act, which is a civil remedy...[A]t the international level the Statute of the International Criminal Court expressly foresees the possibility of violators being ordered to pay compensation.<sup>89</sup>

### **Reparation in the context of the Marawi crisis: a moral obligation?**

“The idea that the consequences of a wrongful act should be adequately

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<sup>87</sup> Article 104. What is included in civil liability. – The civil liability established in Articles 100, 101, 102, and 103 of this Code includes:

1. Restitution;
2. Reparation of the damage caused;
3. Indemnification for consequential damages. [Revised Penal Code]

<sup>88</sup> Gillard, “Reparation for violations of international humanitarian law,” 545.

<sup>89</sup> See *ibid*, note 39 at 545.

and promptly redressed,” writes Capone, et al., of the British Institute of International and Comparative Law (BIICL), “is a well-established principle of justice.”<sup>90</sup> Perhaps, this encapsulates the most important foundation of the obligation to provide reparations for the victims of violations. “It is a general principle of public international law that any wrongful act — i.e. any violation of an obligation under international law — gives rise to an obligation to make reparation.”<sup>91</sup>

However, the legal obligation to provide reparations arises only because of violations. This paper is not an inquiry as to factual questions surrounding the Marawi crisis. It is not designed to conclude, based on established facts, that the Philippine government committed violations of the Law of War in its fight against terrorism during the Marawi crisis. Admittedly, there is difficulty in establishing that the Philippine government has the legal obligation to provide reparations for civilian property losses during the crisis. Be that as it may, while the arguments that have been presented in favor of reparations may not be sufficient to establish a legal obligation, yet it is submitted that they are sufficient to establish the moral obligation of the government to provide reparations. The state as *parens patriae* ought to impose upon itself a moral obligation to provide reparations for civilian property losses caused by aerial bombings and shelling. In this way, the government can give protection to the *Meranaos*, who are now vulnerable more than ever. In doing so, the government will be able to show that it champions the cause of social justice that the *Meranaos* miserably need in these most trying times. With the state providing reparations, the *Meranaos* are not left suffering alone their pecuniary losses. Their loss is *shared* by all in the name of national unity.

The case of *United States v. Caltex (Philippines)* et al., 73 S.Ct. 200 (1952) as cited earlier, shows that the U.S. Supreme Court rejected the claim of Caltex Philippines for compensation for the destruction of its oil terminal facilities by the Americans to prevent them from falling into the hands of the Japanese soldiers during the Japanese invasion of the Philippines. The U.S. Supreme Court held that the facilities were taken not for use but for destruction due to the ‘fortunes of war’ and so therefore not compensable. “The correctness of the instant decision on

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<sup>90</sup> Capone, et al., “Education and Reparations,” 4.

<sup>91</sup> Gillard, “Reparation for violations of international humanitarian law,” 530-31.



legal grounds,” according to Harold Frauendorfer, “is not questioned.”<sup>92</sup> However, “The political wisdom of such a policy in the future is doubtful,”<sup>93</sup> he succinctly said. Arguing along this line, while the option of the Philippine government not to provide reparations for civilian property losses during the Marawi crisis may be correct on legal grounds, however, its wisdom may no longer be tenable on considerations of social justice, *parens patriae*, and sharing of loss in the name of national unity. As of this writing, rehabilitation plans are being finalized thereby signaling the start of the transition. In this transition, justice must be observed as an indispensable component thereof. And reparation is a ‘key element to justice in transition.’<sup>94</sup>

There is a propensity to assert ‘*el que es causa de la causa es causa del mal causado*,’ i.e., he who is the cause of the cause is the cause of the evil caused. The argument is clear enough. The security forces of the Philippines would not have conducted aerial bombings and shelling had the terrorists spared Marawi City by not carrying out the siege therein. The government was simply performing the sovereign right to defend the State’s security, territorial integrity, and sovereignty. However, International Humanitarian Law imposes that war prerogatives cannot be abused as parties to the war ought to conduct their hostilities in accordance with certain limitations. Though the principle of abuse of right is one of civil law, it finds relevance if only to highlight the humanitarian regime that should characterize war in the way IHL sees it. “The principle of abuse of rights is based upon the famous maxim *sumus jus summa injuria* (the abuse of a right is the greatest possible wrong).”<sup>95</sup>

### Leading the Way For Reparation

Reparations consist of five key elements, namely: restitution, compensation, rehabilitation, satisfaction (disclosure of the truth) and guarantees of non-repetition.<sup>96</sup> These remedies can be applied either singly or in combination in response to a particular violation.<sup>97</sup> Of these

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<sup>92</sup> Frauendorfer, “Destruction,” 84.

<sup>93</sup> Ibid.

<sup>94</sup> Magarrell, “Theory and Practice,” 2.

<sup>95</sup> Jurado, Civil Law Reviewer, 33.

<sup>96</sup> See Evans, Right to Reparation, 13.

<sup>97</sup> Gillard, “Reparation for violations of international humanitarian law,” 531.

key elements of reparations, compensation seems to be practical and most responsive to the property losses of the *Meranaos* during the Marawi crisis. ‘War damage compensation’ is reparation of losses sustained in a country at war (or in a neutral country which was subjected to such losses inadvertently by the belligerents) by acts of war, enemy occupation, or their consequences.<sup>98</sup> Writing against the backdrop of World War II damage, Nehemiah Robinson divided countries into five groups on the basis of the differences in their legislation on war damage compensation. He wrote:

The legislation on war damage compensation in foreign countries differs from nation to nation. In broad terms, the foreign countries could, with regard to this legislation, be divided into five groups: (a) those in which a registration of such losses has been made but no action taken to assess, let alone compensate, the damage; (b) those where the principle of war damage compensation is recognized but no legislation has yet been enacted to provide for actual compensation payments; (c) those which carry on their statute books partial measures of compensation; (d) those which, in addition to insurance schemes, have certain regulations for common war damage compensation; and (e) those which have enacted and implemented comprehensive legislation to this effect.<sup>99</sup>

This categorization could serve as a guide on what track shall the Philippine government pursue in providing reparations particularly for the property losses of the *Meranaos* of Marawi City. While the context of Robinson’s ‘war damage compensation’ was state-to-state armed conflict, yet its import does not preclude compensation for damage arising from a non-international armed conflict like the Marawi crisis. To recall, International Humanitarian Law does not distinguish between international armed conflict and non-international armed conflict. “International humanitarian law,” writes Brilmayer and Chepiga, “has protected civilian property for almost as long—and for much the same reasons—as it has protected the civilian person. The 1907 Hague Conventions, the Fourth Geneva Convention of 1949, and the 1977

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<sup>98</sup> Nehemiah Robinson, “War Damage Compensation and Restitution in Foreign Countries,” 347, accessed September 30, 2017, [scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2490&context=lcp](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2490&context=lcp).

<sup>99</sup> Id. at 348.

Additional Protocol I were designed to protect civilians against scorched-earth tactics by forbidding the intentional destruction of items essential for their survival, such as foodstuffs, water, and livestock.”<sup>100</sup>

The experience of Colombia and Peru provides some relevant insights on reparations. Colombia struggled with its 50-year internal armed conflict, while Peru had its own internal armed conflict that lasted for 20 years. These two countries passed legislations embodying their reparations efforts following their respective internal armed conflicts. In the case of Colombia, its comprehensive reparations package is contained in Law 1448. Correa observes that:

In concrete terms, the law offers the payment of compensation to victims of the most serious human rights violations, as well as to displaced families; the creation of a program on Comprehensive Psychosocial and Health Care; a program on house restitution through subsidies (for selected victims); debt alleviation, access to educational training, and access to employment (for selected victims); and exemption from the mandatory military services for male youth. ese programs do not have universal coverage, and health care is further limited in terms of the types and number of services provided.<sup>101</sup>

For Peru, the creation of the Truth and Reconciliation Commission (*Comisión de la Verdad y Reconciliación*, or CVR) encapsulates its reparations efforts for it is this CVR that recommended the adoption of the Comprehensive Reparations Plan (*Plan Integral de Reparaciones*, or PIR) and other policies.<sup>102</sup> In the pursuit of these plans, several laws with reparative content were enacted by the Peruvian government.<sup>103</sup>

While each of the two countries abovementioned adopted a ‘comprehensive reparations plan,’ the main proposition of this article is simpler, in that it is limited to reparations in the form of compensation for civilian property losses during the Marawi crisis. This is not to suggest

<sup>100</sup> Brilmayer and Chepiga, “Ownership or Use?,” 418.

<sup>101</sup> Correa, “Principles to Practice,” 7.

<sup>102</sup> See Cristián Correa, “Reparations in Peru: From Recommendations to Implementation,” *International Center for Transitional Justice* (June 2013): 3-6, accessed October 2, 2017 [https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_Peru\\_Reparations\\_2013.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf).

<sup>103</sup> See *ibid.*

that the Philippine government is discouraged to adopt a ‘comprehensive reparation plan’ for the victims of the Marawi crisis. This limited approach is not motivated by a scholarship of narrow mindedness. Colombia’s and Peru’s internal armed conflicts lasted for 50 years and 20 years respectively. The Marawi crisis lasted only for months. In fact as of this writing, there is already a declaration from President Duterte of the Philippines that Marawi City is liberated from ‘terrorist influence.’<sup>104</sup> Though it cannot be categorically declared as of yet whether there were violations of IHL, the tangible highlight of the armed conflict in Marawi City is the utter destruction of civilian properties caused by aerial bombings and shelling by the security forces of the Philippine government. This destruction of civilian properties constitutes the property losses of the *Meranaos* for which compensation is exhorted.

Taking lessons from experiences abroad, the initial step in providing reparations may consist of registration of these civilian property losses. The Philippine government should promptly recognize the need to provide compensation without necessarily binding itself to pass legislation immediately to provide actual compensation payments. This timely recognition has psychological reparative content. In the meantime, existing statutory provisions with reparative content should be activated. But the most desirable is the enactment of a compensation legislation to provide actual payments of compensation for civilian property losses caused by aerial bombings and shelling during the Marawi crisis. The implementation of this legislation may be assigned to a compensation commission to be created thereunder.

The enactment of this compensation legislation does not mean that the Philippine government is conceding liability or recognizing state responsibility for violations of IHL. The Colombia experience on Law 1448 is suggestive of that assurance. Correa clarifies that:

Law 1448 is not based on the recognition of state responsibility for the violations suffered by victims; instead, it understands the state’s role as providing reparations and assistance as a subsidiary effort, given the difficulties that most victims might experience in claiming their rights

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<sup>104</sup> “Duterte declares liberation of Marawi,” CNN Philippines, last updated 21:03 PM PHT Tue, October 17, 2017, <http://cnnphilippines.com/news/2017/10/17/Marawi-liberation-Duterte.html>, accessed October 20, 2017.

against those responsible. There is no recognition of the state's responsibility for failing to guarantee the rights of victims (omission) or for tolerating or supporting the creation and operation of paramilitaries, or even of direct participation of state agents in some violations. On the contrary, several provisions of the law make it clear that the recognition of victim status does not entail the acknowledgment of any responsibility on behalf of the state in the violations established.<sup>105</sup>

The end of the armed conflict in Marawi City marks the beginning of the transition, which by itself requires transitional justice. Reconstruction and rehabilitation efforts should not be limited to infrastructure resurrection. It must likewise involve building people who suffered because of the armed conflict. For their property losses, what the *Meranaos* need is compensation if transition were to have a meaningful impact on them. As Magarrell puts it:

Reparations, like other dimensions of transitional justice, should not be understood or crafted in isolation from other reconstruction efforts. Conceptually as well as in practice, reparations should be understood to be one part of a much larger agenda. A post-conflict agenda necessarily includes an array of peacebuilding, reconstruction, relief, and nation-building efforts. While the objectives and nature of reparations are distinct and require specific and explicit attention, unless they are part of a broader agenda, other important basic rights will go unfulfilled – for victims as well as for the broader population. The fact that attending to basic socio-economic rights, such as housing, water, and education, are not reparations but separately existing rights does not make them less important to victims, or for the society as a whole. In post-conflict contexts, it is often necessary to construct the possibility of enjoying social and economic rights as well as civil and political rights from the ground up. Institutions must be reformed – and some altogether new ones created - to oversee and enforce these rights. Balancing this broader rights agenda with a thoroughgoing commitment to reparations is an important task for government. Neither one should eclipse the other. Crucially, victims should not be expected to sacrifice one set of rights to the other.<sup>106</sup>

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<sup>105</sup> Correa, "Principles to Practice," 25.

<sup>106</sup> Magarrell, "Theory and Practice," 3.

## CONCLUSION

There is an inherent bias of the present state of Philippine law and jurisprudence in favour of non-compensability of the civilian property losses dealt with in this article. This is due to formidable legal realities prevailing in the domestic law of the Philippines, which cannot be brushed aside for they are deeply embedded in Philippine legal tradition. The performance of the governmental function of defence of state, which is of the highest order among governmental functions, overshadows considerations of private losses during an internal armed conflict. The doctrine of state immunity shields the state from such liability arising from the performance of a governmental function. In the context of the Marawi crisis, the military actions taken by the government are tainted with *prima facie* validity under the principle of military necessity, for these military actions were carried out to defend and protect the national security, territorial integrity, and sovereignty of the Philippines from actual terrorism. Perhaps, providing compensation for civilian property losses during the Marawi crisis has not yet attained the status of a legal obligation that the government ought to pursue at its level. Vis-à-vis this issue, the option remains with the government.

Though the concept of reparation is well-recognized in international law particularly IHL and IHRL, yet it is difficult to impose the same upon the Philippine government especially so that there is still an ongoing debate as to whether the right to reparation has attained the status of a customary law. Besides, experience in the international context focused mainly on state-to-state reparations. State responsibility to provide reparations for civilian losses arising from internal armed conflict still needs to transform from gaseous state to solid state. However, the limitations imposed by IHL in the conduct of hostilities during armed conflicts, whether international or non-international, tighten the grasp of *pro-reparation* arguments. Military strategies cannot be pursued in violation of the Law of War. This reasoning though is bound to inquire into factual questions, which is not the thrust of this article. This is because the obligations arising from violations of IHL presuppose the existence of prior violations established by facts.

Notwithstanding the foregoing, the State is at liberty to impose upon itself the obligation to provide reparations in the form of compensation for civilian property losses during an armed conflict. This self-imposition of obligation is the objective that the arguments for compensability of civilian property losses hope to achieve. The principles of *parens patriae*

and social justice, and the 'sharing of loss' argument are proffered in this article for the Philippine government to select that option of imposing upon itself the obligation to provide reparations in the form of compensation. Though this article is indecisive whether it is the legal obligation of the Philippine government to give compensation for the property losses of the affected *Meranaos*, yet what surfaced with accuracy is its moral obligation to do so. Such a policy requires political will and budgetary commitment translated into legislation. There is no problem with the substance of the legislation, for there is an abundance of scholarship and experience on reparations both in domestic and international levels. At the end of the day, what will be served in the fulfilment of the obligation to provide reparations, either in its moral or legal context, is the cause of justice.

