just law, its command is something written in our hearts, long before the lawmaker had supplied its text. *Non ex regula jus sumatur, sed ex jure quod est regula fiat.* "What is right," said Julius Paulus, the Roman juris, "is not derived from the rule but the rule arises from our knowledge of what is right."

As I recently exhorted the officers and members of the IBP, we have installed the new government on this great principle. It is a government formed in the crucible of our people's struggle for freedom and democracy, and dedicated to the restoration of all our public rights and individual liberties. Like Bishop Tutu of South Africa, we too have believed that "there is a fire in our hearts that we have it - freedom - and it will never go out!" It is a great fire, and because it is a great fire, the strongest winds will only fan its flames and cause it to spread, rather than extinguish it. The victory of freedom and justice in our country is a great bonfire burning from the highest mountain top - it is there for everyone to see, and our people and the world are watching it!

LEGAL RECOVERY OF ILLEGALLY ACQUIRED WEALTH[1]

By: Cynthia Roxas-Del Castillo[2]

DEFINITION OF TERMS

The issue of recovering illegally acquired wealth became the topic of discussion following the San Jose Mercury News expose' on the hidden wealth of former President Marcos, the members of his family, other high-ranking government officers and their close associates.

By way of defining terms, "legal recovery", as herein construed, shall refer to recovery and forfeiture proceedings through court and judicial processes, and excluding diplomatic and other processes not involving the courts. This article will not attempt to discuss the sequestration powers and the actions of the Presidential Commission on Good Government (PCGG). Neither will this article pass judgement on whether or not such powers and actions have been exercised within the limits of the law.

On the other hand illegally acquired wealth shall be discussed in the context defined under the Anti-Graft And Corrupt Practices Act (RA 3019 as amended) and the Unexplained Wealth Act (RA 1379). In some of the cases herein,[3] RA 1379 is referred to as the Anti-Graft Act. More appropriately, and to distinguish it from RA 3019, RA 1379 shall be referred to as the Unexplained Wealth Act.

THE ANTI-GRAFT AND CORRUPT PRACTICES ACT AND THE UNEXPLAINED WEALTH ACT

The Anti-Graft and Corrupt Practices Act and the Unexplained wealth Act are legislations which have pre-dated the past regime's rise to power. RA 1379 was approved on June 18, 1955, while RA 3019 was approved on August 17, 1960. These legislations were to be later to be reinforced in the incumbency of President Marcos with the issuance of PDs 46 and 749.

In the Philippines, these two legislations have provided the legal basis for bringing actions to recover illegally acquired wealth of public officers, and to some extent also of private individuals. President Aquino has also issued Executive Orders Nos. 1 and 2 which created the PCGG and authorized it to recover ill-gotten wealth of former President Marcos, his immediate family, relatives and close associates. However, it is submitted that these Executive Orders, would not, by themselves provide the legal bases for recovering ill-gotten wealth of the persons covered therein, on the assumption that the acts leading to the acquisition of the ill gotten wealth, and the procedure employed for recovering the same are considered as criminal or penal in nature, as they would suffer from attacks of being *Ex-Post Facto* laws. Undoubtedly, the acts of the former President and his relatives and friends in acquiring what would be considered ill-gotten wealth

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[2] A.B., LL.B.; Professor, Ateneo de Manila University College of Law; Grantee, Judge Guillermo Guevarra Foundation Professorial Chair.

[3] Almeda v Perez, 5 SCRA 970; Cabal v. Kapunan, 6 SCRA 1059; PNB v. Gancayco, 15 SCRA 91.

under these Executive Orders were committed prior to their issuance. Of course, if already punishable by existing legislations at the time of commission, then such attack would invariably fail. From pronouncements and actions taken by the PCGG, they have more or less relied on these two Republic Acts, in addition of course, to the Executive Orders. It seems however that from similar pronouncements, the PCGG has taken the position that recovery of ill-gotten wealth is a civil remedy, and not criminal in nature.

While RAs 1379 and 3019 provide similar and parallel remedies for recovery and forfeiture of illegally acquired wealth, these two legislations bear basic differences. Briefly and for better understanding of the subject, the differences between these two legislations are as follows :

1. The Anti-Graft And Corruption Practices Act penalizes specific corrupt practices act, which are defined in Secs. 3-6 of RA 3019. There are no such specific acts defined and penalized in the Unexplained Wealth Act, as the latter Act merely provides for the forfeiture of unlawfully acquired properties. The only act in RA 1379 which carries a pernalty is the act of transferring, conveying or accepting, after effectivity of the aforesaid legislation, unlawfully acquired properties.[4]
2. The specific acts punished under the Anti-Graft And Corrupt Practices Act must necessarily be proven by the person bringing the action who has, theretofore, the burden of proof. The Unexplained Wealth Act, on the other hand, provides for a *prima facie* presumption of unlawful acquisition "whenever any public officer or employee has acquired, during his incubency, an amount of property which is manifestly out of proportion to his salary as such public officer or employee and to his other lawful income and the income from legitimately acquired property."[5] Thus, the burden of proof shifts to the defendant in the action to prove that the property was legitimately acquired.
3. The Anti-Graft And Corrupt Practices Act covers not only corrupt practices of public officers but aiso of private persons. Thus, Sec. 1 of RA 3079, in emphasizing the principle that a public office is a public trust, lays down the policy of the State to repress graft or corrupt practices "of public officers and private persons alike". Sec. 3 of said Act therefore punishes any private person who acted as a co-participant with the public officer in committing any of the defined corrupt practices. Sec. 4 also makes it unlawful for any person having family or close personal relation (which includes friendship, social, fraternal, and professional employment ties) with any public officer, to capitalize, exploit or take advantage of such relationship for any pecuniary advantage from any transaction which such official has to intervene. Likewise, Sec. 5 makes it unlawful for relatives or certain public officers to intervene directly or indirectly, in any contract, transaction or application with the government. On the other hand, private persons have very limited liability under the Unexplained Wealth Act which is, under Sec. 12 thereof, only where a private person knowingly accepts the transfer or conveyance of unlawfully acquired property.
4. Under the Anti-Graft And Corrupt Practices Act, a public officer found to have acquired unexplained wealth, referring to properties in amounts manifestly out of proportion to his lawful income, faces the penalty of dismissal or removal. The Unexplained Wealth Act carries no such penalty but merely provides for forfeiture of the unlawfully acquired wealth in favor of the government.

[4] Sec. 12, RA.1379.

[5] Sec. 2, RA 1379.

NATURE OF PROCEEDINGS UNDER RA 1379 AND 3079 AS AMENDED

An interesting question is the nature of proceedings under the Anti-Graft And Corrupt Practices Act and the Unexplained Wealth Act. A survey of the cases decided by the Supreme Court touching on this matter from the 1962 case of Almeda v. Perez[6] to the 1975 case of Layosa v. Rodriguez [7] should be enlightening.

In *Almeda,* Mariano Almeda, Sr. was the Assistant Director of the National Bureau Of Investigation. He was charged under RA 1379 for having acquired properties manifestly out of proportion to his salary and other lawful income. The case filed was a civil case for forfeiture. The question of whether the proceeding was civil or criminal in nature arose when the Solicitor General filed an amended petition increasing the amount of alleged unlawfully acquired wealth. The defendant objected to the filing of the amended petition, alleging that the proceedings were criminal in nature and the preliminary investigation should not be allowed. Providing for the test as to whether the proceedings were criminal or civil, the court said:

> "xxx forfeiture proceedings may be either civil or criminal in nature, and may be *in rem* or *in personam.* If they are under a statute such that if an indictment is presented the forfeiture can be included in the criminal case, they are criminal in nature, although they may be civil in form; and where it must be gathered from the statute that the action is meant to be criminal in its nature it can not be considered as civil. If however if the proceeding does not involve the conviction of the wrongdower of the offense charged the proceeding is of a civil nature: And under statutes which specifically so provide, where the act or ommission for which the forfeiture is imposed is not also a misdemeanor, such forfeiture may be sued for and recovered in a civil action."[8]

Applying the foregoing test, the court ruled that the proceedings were civil and not criminal in nature, citing the following reasons:

> "In the first place a proceeding under the Act (Rep. Act No. 1379) does not terminate in the imposition of a penalty but merely in the forfeiture of the properties illegaliy acquired in favor of the State (Sec. 6). In the second place the procedure outlined in the law leading to the forfeiture is that provided in a civil action.

[6] *Supra,* see note 3.

[7] 86 SCRA 300.

[8] *Id.,* at 974, citing 37 CJS, Forfeiture, Sec. 5, pp. 15- 6.

Thus there is a petition (Sec. 3), then an answere (Sec. 4), and lastly, a hearing. The preliminary investigations which is required for the filing of the petition, in accordance with Sec. 2 of the Act, is provided expressly to be similar to a preliminary investigation in a criminal case, but the other steps in the proceedings are those for civil proceeding. It stands to reason that the proceeding is not criminal Had it been a criminal proceeding there would have been, after a preliminary investigation, a reading of the information, a plea of guilty or not guilty, and a trial thereafter, with the publication of the judgement in the presence of the defendant. But these proceedings as above set forth, are not provided for in the law.

Sec. 12 of the law provides a penalty to the public officer, but said penalty is against the employee or officer for the transfer or conveyance of any unlawfully acquired properties. The law therefore penalizes an officer for transferring or conveying properties unlawfully acquired, but does not do so for making the unlawful acquisition it merely imposes the penalty of forfeitute of the properties unlawfully acquired.

xxxx the proceeding for forfeiture, as pointed out and as provided for in the law, is not a penal proceeding but a civil one for the forfeiture of the properties illegally acquired, and as the procedure outlined in the law is that which is followed in civil actions, xxxx"[9]

In the subsequent xase of Cabal v. Kapunan[10] then Chief of Staff of the Armed Forces of the Philippines, Manuel F. Cabal, was charged among other acts, of unexplained wealth, in a letter-complaint to the Secretary of National Defense. A special committee was created by the President of the Philippines to investigate the charges. The committee called upon Cabal to take the witness stand and to testify on the charge of unexplained wealth. Cabal refused to take the witness stand, claiming the constitutional right against self-incrimination. The case, a criminal charge for contempt, therefore arose from Cabal's refusal to take the witness stand. The court took cognizance of the undisputed principle that "the accused, in a criminal case, can refuse, not only to answer incriminatory questions, but also, to take the witness stand."[11] Thus, the question was: Were the proceedings before the committee civil or criminal in nature? The court conceded that the purpose of the charge was to apply the provisions of RA 1379 for the forfeiture of the unlawfully acquired wealth. The court took into account that the charge did not seek the removal of Cabal as Chief of Staff, as he no longer held the position at the time the proceedings were being conducted. The court in *Cabal* took pains in citing a series of U.S. cases some of which held proceedings for forfeiture as civil and some as criminal, but in the end held that the forfeiture partakes of the nature of penalty. Quoting *Boyd v. U.S.*, 116 U.S. 616, 29 L. Ed. 746, the court said that forfeiture. "though technically a civil proceeding, is in substance and effect a criminal one." Distinguishing it from the prior case of *Almeda,* the court said:

[9] *Id.*, at 974-975.

[10] *Supra*, see note 3.

[11] *Id.*, at 1063.

"We are not unmindful of the doctrine laid down in Almeda v. Perez, L-18428 (August 30, 1962) in which the theory that after the filing of respondents' answer, a petition, may not be amended as to substance pursuant to our rules of Criminal Procedure, was rejected by this court upon the ground that said forfeiture proceeding was civil in nature. This doctrine refers however to the purely procedural aspect of said proceeding, and has no bearing on the substantial rights of the respondents therein. Particularly their constitutional right against self-incrimination."[12]

Republic v. *Agoncillo,*[13] decided subsequent to *Cabal,* reiterated the rule that proceedings under RA 1379 are deemed criminal, and hence, the exemption of defendants in criminal cases from the obligation to be witnesses are applicable thereto.

PNB v. *Cancayco*[14] dealt with bank deposits of Mr. Ernesto Jimenez, former Administrator of the then ACCA, who was charged with having acquired properties and monies manifestly disproportionate to his salary and lawful income, in accordance with RA 1379. The prosecutors of the department of justice required PNB to produce the records of bank deposit of the public official. In view of RA 1405, the Law on Secrecy of Bank Deposits, PNB filed an aftion fcr declatory relief on whether or not the amount of bank deposits may be disclosed. Insisting on disclosure, the prosecutors pointed to the last sentence of Sec. 8 of RA 3019 which provides that in the enforcement of the Unexplained Wealth Act "bank deposits should be taken into consideration xxx, notwithstanding any provision of law to the contrary." Ordering disclosure, the court said that RA 1405 allows disclosure by way of exception to the confidential nature of bank deposits, cases of bribery or dereliction of duty of public officials, both of which are criminal offenses. What is significant here is that the court likened cases of Unexplained Wealth to the crimes of bribery or dereliction of duty when it said:

"cases of unexplained wealth are similar to bribery or deriliction of duty, and no reason is seen why these two classes of cases be excepted from the rule making deposits confidential. The policy of one can not be different from the policy of the other, This policy expresses the notion that a public office is a public trust xxx "[14a]

The factual background in the case of *In Re Lanuevo*[15] was the Bar Scandal of 1971. The Clerk of the Supreme Court, found to have acquired a house at BF Homes, was charged with Unexplained wealth. Attempting to prove that the

[12] Id., at 1067.

[13] 40 SCRA 579.

[14] *Supra*, see note 3.

[14a] *Id.*, at 96.

[15] 66 SCRA 245.

amount of P17,000.00, which was used as downpayment for the acquisition of the house on installment was financed partly from his own savings and partly from a loan from a sister who worked in Okinawa, the court found that the savings and loan were not reflected in the statement of assets and liabilities filed by the public official, a requirement found under Sec. 7 of RA 3019. The court ruled that the public official may be prosecuted under the Anti-Graft and Corrupt Practices Act, and may be dismissed from his position, a penalty found in Sec. 8 of RA 3019. The suit brought was an administrative case for disbarment but the court did not find it necessary to discuss the nature of the action. No ruling was made on the forfeiture of the property found to be illegally acquired.

The case of *Layosa* v. *Rodriguez*[16] was not one of unexplained wealth but dealt with commission of a specific corrupt practice under the Anti-Graft and Corrupt Practices Act. In this case, a customs official was found to have accepted 3 cases of beer and softdrinks from a *patron* of a vessel, in consideration of preferential berthing rights. The action brought was a criminal suit under RA 3019. The issue arose out of suspension ordered by the trial court before the defendant was served with a warrant of arrest and subsequently arraigned. The defendant claimed that when suspension was ordered the trial court had not yet acquired jurisdiction over him. The court ruled that the suspension was legal, having been issued after notice and hearing, where counsel for the public official participated. The court said that the participation of counsel amounted to voluntary appearance. What is intriguing is that the decision contains a statement, albeit in parenthesis, that "in civil cases, voluntary appearance through counsel is equivalent to service of summons".[17] It seems that *Layosa* even more confuses the jurisprudence on the nature of the proceedings under RA 4039 and RA 1379.

Be that as it may, the weight of authority still indicates that the proceedings for forfeiture of recovey of illegally acquired wealth are penal in character. The more precise ruling would probably the one held in *Cabal,* which held that "the proceedings are civil with respect to the procedural aspect, but in essence criminal or penal."[18] That the procedure is civil in character is clear in the procedure outlined in RA 1379. In fact, under Sec. 7 of said Act, it is specifically stated in cases of appeal, the provisions of the Rules of Court for appeals in *civil* cases shall be applicable. *Cabal* however, insinuates that if forfeiture is coupled with dismissal under Sec. 8 of RA 3019, even the procedural aspect must be criminal, dismissal from office being a criminal punishment. This would be true for all actions of forfeiture based on any of the specific corrupt practices under RA 3019, which carry criminal penalties of imprisonment aside from forfeiture. However except for procedural aspects, actions for forfeiture or recovery of unexplained wealth must respect the substantial rights of an accused. In criminal proceedings such as the right against self-incrimination, as held in *Cabal* and *Agoncillo.*

[16] Supra, see note 7.

[17] Id., at 303.

[18] *Supra*, at 1066.

Where does this lead us? Among the substantial rights of an accused in a criminal case is the right to be present in all stages of the proceedings. If former public officials who fled the country insist on their right to be present, is our government prepared to allow them back into the country? The position of the government may be clear at this point, and this probably explains the reason why in Executive Order No. 14 forfeiture proceedings under RA 1379 are placed under civil suits, without prejudice however to the right of the PCGG to file criminal proceedings.

THE PHILIPPINE PROPERTIES: CHOICE OF REMEDIES

It is to be noted that forfeiture or recovery proceedings under RA 1379 apply only to unlawfully acquired wealth of public officials. Thus, for cronies, business associates and friends of public officials who have exploited or taken advantage of their close relations with such public officials, the Unexplained Wealth Act may be unavailable. The proper action against them would be the Anti-Graft and Corrupt Practices Act which specifically punishes these acts of private persons.[19] It will be noted however that unlike RA 1379, RA 3019 provides that in addition to forfeiture of illegally acquired wealth, public officials and private persons found guilty of any of the specific corrupt practices are liable for the criminal penalties of imprisonment and perpetual disqualification from public office.[20] Thus, if prosecution is instituted under RA 3019, the proceedings must necessarily be criminal, both in procedure and in substance. Again we are faced here not only by the right of the accused to be present, but the mandatory presence required in arraignment . Thus if criminal prosecutions are instituted, the choice is between allowing the people who fled the country to come back, or giving up the action completely as they can not be arraigned; In the case of public officials, forfeiture or recovery is still possible under RA 1379, where the procedure is civil thus removing the arraignment stage. But again, the right to be present is still debatable, considering the ruling in *Cabal* and *Agoncillo.* But for private persons, the choice is definitely limited to the criminal proceedings under RA 3019. Executive Order No. 14 is probably the solution, as it covers ill-gotten wealth of both public officials and private persons associated with the past regime, and it authorizes the filing of civil and criminal proceedings.

In all cases whether action is instituted under the Anti-Graft and Corrupt Practices Act, the Unexplained Wealth Act, or Executive Order No. 14, jurisdiction to try the cases is lodged in the Sandiganbayan. From then on, the battle for evidence begins. The government is in an advantage if action is filed under the Unexplained Wealth Act, in view of the *prima facie* pesumption under Sec. 2 thereof. The same presumption is carried under Sec. 9 of the rules and regulations promulgated by the PCGG pursuant to Executive Order No. 1. The degree of success for recovering illegally acquired wealth, with respect to properties

[19] Subsequently, the Solicitor General filed with the Sandiganbayan, a case against President Marcos and others, including private persons, pursuant to the Anti-Graft and Corrupt Practices Act.

[20] Sec. 9, RA 3079.

found in the Philippines, would thus largely depend on the evidence presented in the Sandiganbayan.

The characterization of the nature of forfeiture proceedings, as to whether they are criminal or civil, becomes even more important if the judgement obtained in the Philippines will be sought to be enforced in a foreign jurisdiction, for it is a known principle that judgements which are penal in nature cannot be enforced in a foreign jurisdication. Thus, conviction under the Anti-Graft and Corrupt Practices Act may not be enforced in other countries.

ILLEGALLY ACQUIRED WEALTH FOUND IN FOREIGN COUNTRIES

A large extent of what has been alleged as illegally acquied wealth of the past regime are said to be found in the jurisdiction of other countries, notably the United States and Switzerland. The question is, are they within our reach for recovery purposes? Most legal luminaries here and abroad have suggested two options available through judicial proceedings. For properties found outside the Philippines, this article shall discuss mainly the U.S. properties and, to a limited extent, those found in Switzerland.

The two options are: 1) Enforcement of the Philippine court judgement in the foreign jurisdiction and 2) Filing the suit originally in the foreign court.

THE FIRST OPTION

The first option, which is the enforcement in a foreign state of the decision rendered by Philippine courts, must necessarily be limited to those which are not penal in nature. While we may argue that forfeiture cases brought and decided under the Unexplained Wealth Act are not strictly penal, the characterization will depend largely on the appreciation by the foreign court. Assuming that it passes this test, the enforcement of a foreign judgement, are allowable under the principle of comity, which is recognition of the laws and institutions of another. The ruling in the English Case of *Godard v. Gray*[21] very aptly states the limitation of this principle as:

> "Recognition of foreign judgments under the doctrine of comity prevails specially in England, the U.S. and countries in which the common law exist, and has met with less recognition in countries in which the civil law prevails. While it has been said that several of the continental nations do not enforce the judgements of other countries unless there are reciprocal treaties to that effect, yet in those countries which are governed by the common law such judgements are enforced, not by virtue of any treaty or statute, but through a recognition of the legal obligation imposed by a judgement of a court of competent jurisdiction."

[21] LR 6 QB 137.

For common law countries like the US and England, the principle of comity may be used for the purpose of enforcing a decision rendered by a Philippine court. The question however of respecting the rulings of a foreign court depend largely on the judgement of foreign court, and is entirely their business. The Philippine court which rendered the judgement, or the Philippine government authorities for that matter, are completely helpless in case the foreign court should refuse to grant recognition.

The U.S. Constitution has a "full faith and credit" clause but that clause has been interpreted not to require the U.S. courts to give effect to every judgement of a foreign state, as circumstances may be such as to call for denial of full faith and credit.[22] The circumstances are varied and wide, prompting the legal adviser to a U.S. Senator to say in one interview[23] that this legal approach may be "very tricky", considering the temperament of judicial system. We can only rely on the general rule followed in the U.S. that a foreign judgement, to be given full or conclusive effect, must have been rendered upon the merits by a court free from prejudice, and under a system of laws reasonably assuring notice and hearing.[24] Whether or not the decisions of the Philippine courts pass these tests would again be highly subjective on the part of the foreign court. The U.S. has the Uniform Foreign Money Judgements Recognition Act which provides, among others, that recognition will be denied if :

a) The judgement sought to be enforced was rendered under a system which does not provide for impartial tribunals.[25]
b) If the judgement sought to be enforced was rendered under a system which does not provide procedures compatible with due process;[26]
c) The court which rendered the judgement was a "seriously inconvenient forum" in the trial of the action:[27]

While recognition and enforcement of the Philippine court decision in the US would be convenient as there is no need to reprove the case all over again, the U.S. courts, in assessing whether the judgement passes the foregoing test, may scrutinize the basis for Philippine decision. Again the matter of evidence becomes paramount, considering the "shields" employed by those illegally acquiring wealth.

[22] Gaskins v. Gaskins, 13 ALR 2d 970.

[23] 'Legal Optioms Eyed on Hidden Wealth' Business Day, May 26, 1986.

[24] 47 Am Jr. 2nd, 237.

[25] Uniform Foreign Money Judgments Recognition Act, Sec. 4(a) (1).

[26] Id.

THE SECOND OPTION

The second judicial option is to institute the suit originally with U.S. Courts. Invariably, the right of aliens to sue in U.S. courts have been predicated under 28 U.S.C. Sec, 1350, This statute however imposes a very stringent two-tier subject matter jurisdictional prerequisite for assumption of jurisdiction by U.S. courts. Thus, an alien seeking relief against another alien must prove:

1. That the actionalbe conduct constitutes a tort involving an alien; and
2. That the act violates a State's right under International Law. These requirements have been so stringent that the Cornell International Law Journal[28] reports that Shepard's list only 37 federal decisions citing Sec 1350 and its predecessors, from enactment in 1789 up to 1980. And of such 37 federal decisions, there are only 2 cases where subject matter jurisdiction was upheld :The first in the case of *Bolchos* v. *Darrel*[29] a 1795 decision, and the second,the case of *Abdul-Rahman Oman Adra* v. *Cliff,*[30] a 1961 decision. Of course, this list does not include lower court decisions not appealable but which may have allowed assumption of jurisdiction. The case of *Bolchos* was decided almost two centuries ago and, for this reason does not merit discussion. Besides, the subject matter in *Bolchos* dealt with captured slaves which is no longer material under the present free world. A third one, *Fillartiga* v. *Pena*[31] was, at the time of listing, on appeal.

The rule was stated in *IIT* v. *Vencap*[32] as:

> "violation of the law of the nations arises only when there has been a violation by one or more individuals of those standards, rules or customs a) affecting the relationship between states or between an individual and a foreign state and b) used by those states for their common good and/or in dealings inter se."

A limited survey of relevant cases under Sec. 1350 show that the U.S. courts have declined to assume jurisdiction in *Dreyfus* v. *Von Finch,*[33] which dealt with seizure of property, on the ground that seizure of property is not a tort that violated international law; *ITT* v. *Vencap;* which ruled that stealing is not part of the law of nations and *Abiodon* v. *Martin Oil Service Inc.,*[35] which held that fraud is not violative of International Law.

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[28] Vol. 30 351, 1980, 'The Exhaustion of Local Remedies Rule and Forum Non-Conveniens in International Litigation in US Courts." Note 8.

[29] 3 F. Cas. 810.

[30] 195 F. Supp. 857.

[31] No. 79-6070 (E.D.N.Y.) May 18, 1979. Because of limited materials, it was not known, at the time of writing, whether or not the case has been decided on appeal.

[32] 519 F. 2nd., 1015

[33] 534 F. 2d.,30.

[34] Supra, see note 32.

[35] 475 F. 2d., 145.

In the light of the foregoing rulings, will a Philippine government action for recovery of illegally acquired wealth stand a chance? It seems that the prospect looks bleak, and the double jurisdictional barrier appears to be insurmountable. The Iranian effort to recover the wealth of the Shah does not provide us with a favorable precedent as the efforts were, from available reports, unsuccessful- in part because the U.S. courts ruled that the suits should be tried elsewhere-despite the "Declaration Of Algeria" wherein the U.S. committed itself to assist Iran in locating and recovering assets which belong to the former Shah of Iran.[36] Of course, we all do know the factual background of the Algeria Declaration, and the known fact that U.S. considers Ayatollah Khomeini as hostile. With President Aquino, the story is different, considering her immense popularity in the U.S., we can only hope that this ace factor can influence the U.S. courts decision.

The nearest that can probably come to cases of ill-gotten wealth was *ITT* v. *Vencap,*[37] which involved stealing. The court, in that case, said:

> "The mere fact that every nation's municipal law may prohibit theft does not incorporate the eight commandment, "thou shall not steal" into the law of nations. It is only where the nations of the world would have demonstrated that the wrong is of mutual and not merely of several concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."

In *Abdul-Rahman,* the case stemmed out of custody of a child. Plaintiff's wife moved their daughter to the U.S. to prevent him from having custody of the child under Moslem Law. It was alleged that the wife concealed the child's name and Lebanese nationality by including the child in his wife's Iraqi passport. The court assumed jurisdiction, pointing to the wife's refusal to deliver the child as the tort committed, and that such action violated International Law by denying Lebanon the right to control the issuance of passports to its nationals.

In *Fillartiga,* the tort alleged was wrongful death by torture, an action which appears to have more chances of the U.S. court's acquiring jurisdiction than cases of ill-gotten wealth, judging from the court's statement in *ITT* that "for the purpose of civil liability, the torturer becomes, like the pirate and the slave driver before him- *'hostic humane generis'*, an enemy of all mankind.

In *Dreyfus,* court said that alien individuals can not sue his own state under Section 1350, relying on the principle that if individuals cannot sue in International law except through their own States, *a fortiori,* individuals have no rights to sue their own States. However, this pronouncement should not be a problem for our government's suing under this section since we have the reverse situation of a foreign state suing its own nationals.

Assuming that the U.S. courts will assume jurisdiction, there are several defenses, recognized under international law, which may be raised:

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[36] Declaration of the Government of Algeria, January 19, 1981, par. 5, reprinted in 20 Int'l. Legal Materials 230 (1981).

[37] Supra, see note 32.

1. The rule on *'forum non-conveniens'*:

This refers to the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be appropriately tried elsewhere. This was raised in *Filartiga*, and in the Iranian efforts to recover the wealth of the former Shah.

For guide, the case of *Gulf Oil Corporation* v. *Gilbert*[38] summarizes the factors which U.S. courts use when deciding whether to dismiss a case on *forum non conveniens:*

(1) The private interest of the litigant;
(2) Relative ease to access to sources of proof;
(3) Availability and cost of witnesses;
(4) Enforceability of judgement
(5) Procedural barriers to a fair trial;
(6) Administrative convenience for the court; and
(7) Possible difficulties in applying law foreign to the forum.[39]

Again our chances of obtaining dismissal for an action for recovery of illegally acquired wealth would largely on the subjective judgement of the U.S. courts.

2. Exhaustion of Local Remedies rule:

Under this rule, the state in which an international action is brought for injuries suffered by aliens hs the right to resist such action if the person alleged to have been injured have not first exhausted all remedies available to them under the local law.

Traditionally, U.S. courts will waive the local remedies rule if the plaintiff proves lack of effective remedies under the local law, as in the case of undue delay;[40] bias in local courts;[41] where no domestic remedy for the alleged wrong exist, as when the alleged act violates international but not local law;[42] or unfavorable prior determination by the highest court of the state on substantially identical claims.[43]

[38] 330 U.S. 501.

[39] Id., at 508-509.

[40] El Oro Mining & Ry. Co. Ltd. (Great Britain v. Mexico) 5 R. Int'l. ARb. Awards, 191, 198.

[41] Brown, (United States v. Great Britain), 6 Int'l. Arb. Awards, 120, 129.

[42] Fawcett, 'The Exhaustion of Local Remedies :Substance or Procedure?' Brit. Y.B. Int'l. L. 452.

[43] Restatement (Second) of Foreign Relations Law of the U.S., Sec. 208 (b).

In our quest for recovering illegally acquired wealth via the U.S. courts, it is incumbent upon our government to avail of all local remedies first, whether judical or otherwise, in order to avoid dismissal under this rule. The foregoing cases where the local remedies rule was waived do not, apparently apply to our case.

3. The Foreign Sovereign Immunity Act:

This Act grants immunity to U.S. courts processes for foreign sovereigns. The exceptions to this Act are largely based on the foreign sovereign's commercial activities,[44] or waiver by the foreign sovereign. Thus, most U.S. cases have granted immunity to foreign sovereigns on "claims upon the exercise or performance or the failure to exercise or to perform a discretionary function",[45] regardless of whether the discretion be abused. In the landmark case of *Letelier* v. *Chile*[46] the court, citing other cases, said that "there can be no discretion to commit an illegal act" as in homicide. Cases of torture and human rights violations of dictatorial rule have uniformly been held as exceptions to this Act.

Cases for recovery of illegally acquired wealth of foreign sovereigns may be covered by the rule in *Letelier*, that acquisition of assets in the U.S. precedent from an illegal act. A ray of hope can be gleaned from a precedent in the Declaration of Algeria which provides that the U.S. courts are to disallow the defenses of sovereign immunity and the act of state doctrine, and are to enforce any Iranian decrees or judgements concerning the former Shah's assets.[47] The Philippines may ask for the same concession, and this can be done on a government-to-government understanding, without initially involving the judicial processes. Suffice it to say however. the Declaration of Algeria indicates, as suggested in some U.S. cases, that the defense of sovereign immunity may still be raised even after the end of the rule of the foreign sovereign.

It is to be noted, however, that despite the heralded independence of the U.S. courts from the executive branch, in matters concerning sovereign immunity and those under the act of state of doctrine U.S. courts will invariably refer to the executive branch's assessment and suggestion, as they may affect the country's foreign relations.

As to whether immunity applies to heads of state sued in their personal capacity, the most appropriate illustration can be seen from two cases involving no less than the former President Ferdinand Marcos and his wife Imelda Marcos. The two cases are: *Estate* of *Silme C. Domingo* v. *Ferdinand Marcos*,[48] an action for damages and injunctive relief filed in the U.S.

[44] Foreign Sovereign Immunity Act, 28, U.S.C., Sec. 4(b) (2).

[45] Id., Sec. 1605.

[46] 488 F. Supp. 665.

[47] Declaration of Algeria, Supra., par.14.

[48] Civil Action No. C82 1055 V.

District Court of Western District of Washington, and *Psinakis* v. *Marcos,*[49] a libel action brought in the North District Court of California. Both cases were filed during the incumbency of President Marcos, and were both dismissed on the claim of sovereign immunity, at the suggestion of the executive branch.

The substantive portions of the suggestion of immunity submitted by the U.S. Western District Of Washington, at the direction of the Attorney General of the U.S., dated December 6, 1982 in the case of *Silme,* provides as follows:

"1. The United States Of America has an interest and concern in the subject matter and outcome of this action in so far as it involves the question of immunity from the court's jurisdiction of representatives of a friendly foreign state (emphasis ours). That issue arises in connection with a determination reached by the executive branch of the government of the United States in the implementation of its foreign policy and in the conducr of its international relations, which determination must be given effect by the court.

2. The Attorney General has been informed by the acting Legal Adviser of the United States Department of State that the government of the Republic of the Philippines has formally asked the government of the United States to suggest the immunity of the President and Mrs. Marcos from this suit. The Attorney General has been further informed by the Legal Adviser that

(t)he Department of State recognizes the immunity of President Marcos as head of state of the Republic of the Philippines; and Mrs. Marcos as a member of the immediate family of President Marcos and therefore, partakes of his immunity. In addition, she has been notified to and accepted by the United States Government since March 6, 1979, as Special Envoy Extraordinary and Minister Plenipotentiary of the Republic of the Philippines. By virtue of this diplomatic accreditation, Mrs. Marcos is entitled to immunity in accordance with Art. 31 of the 1961 Vienna Convention on Diplomatic Relations, 23, U.S.T. 3227, T.I.A.S.. 7502."[50]

On record, it appears that on December 23, 1982, barely 17 days after the suggestion the District Judge dismissed the action in *Silme* against the Marcos defendants, pursuant to the "conclusive determination" of the executive branch.[51]

[49] No. C-75-1725

[50] Dept. of State File No. p. 83 0013-0925, quoted in the American Journal of Int'l. Law. Vol. 77, (1983) at 305-306.

[51] The plaintiffs have, since then, moved for reconsideration of the question of the immunity of President and Mrs. Marcos. Subsequent newspaper accounts, as of time of writing, indicated that following the ouster of President Marcos, sovereign immunity was denied to the deposed President.

Since sovereign immunity rests largely on the recognition by the executive branch, cases brought today would not probably be decided in the same light as *Silme* and *Psinakis,* considering the U.S. Executive Branch's reaffirmation that they no longer recognize President Marcos as the head of the government.

4. Act Of State Doctrine:

This doctrine states that foreign sovereigns cannot be made responsible for an act done in his sovereign character in his own country. *Duke of Brunswick* v. *King of Hanover,*[52] illustrates the rule when it said that "the courts of this country cannot sit in judgement upon an act of sovereign done in the exercise of his authority vested in him as sovereign."

The cases on this doctrine have been more or less in agreement that the doctrine does not shield all actions of foreign sovereign from judicial scrutiny. The case of *Banco Nacional de Cuba* v. *Sabatino* suggest that the docrine be applied with flexibility, but laid the rule that "the act of state doctrine is a judicial doctrine for the guidance of the courts, and that the primacy of the executive branch in foreign relations is but one of the basis of the doctrine." However, many decisions have relied on the *Bernstein* approach. In a *Bernstein* letter, which is the nature of a "suggestion" as in sovereign immunity, the executive informs the judiciary that it need not apply the act of State doctrine in a particular case. In the form of a waiver, it rebuts the doctrines presumption that judicial inquiry into the act of a foregin sovereign will interfere with the executive's conduct of foreign policy.

It has however been uniformly held that the doctrine applies only when officials having sovereign authority act in official capacity. In *Jimenez* v. *Hizon*[54] the court held, and this may sound encouraging for our cause, that: "A dictator's illegal acts and receipt of money and securities with knowledge of their unlawful origin were for private financial gain and exceeded his official authority."

The recent case of *Clayco Petroleum Corporation* v. *Occidental Petroleum Corporation,*[55] however, applied the act of state doctrine in an Anti Trust claim on allegations that the defendant made bribe payments to the Petroleum Minister. The reason: granting of oil concessions is an act of state, although receiving bribe is not. The doctrine was applied because there was no proof that the bribe was the cause of granting the concession.

Thus again, the importance of evidence must be underscored, a connection between the illegal act and the official act must be drawn, otherwise, the doctrine may be used as a defense.

[52] JL Cas. 1

[53] 376 U.S. 398.

[54] 373 U.S. 914.

[55] 712 F. 2d 404.