No. 06-1204

In The Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT MARIANO J. PIMENTEL

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QUESTIONS PRESENTED

Whether the Republic of the Philippines (Republic) and its Presidential Commission on Good Government (PCGG), having been dismissed from the interpleader action based on their successful assertion of sovereign immunity, had the right to appeal the district court's determination that they were not indispensable parties under Federal Rule of Civil Procedure 19(b); and whether the Republic and its PCGG have a right to seek this Court's review of the court of appeal's opinion affirming the district court.

Whether the lower courts acted within their discretion and followed the tests set out in Rule 19(b) of the Federal Rules of Civil Procedure, as applied in *Provident Tradesmens Bank & Trust Co. v. Patterson*, in concluding, in equity and good conscience, that the Republic of the Philippines and its PCGG were not indispensable parties to this interpleader litigation.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

U.S. CONSTITUTION AND FEDERAL STATUTES

TABLE OF AUTHORITIES – Continued

FEDERAL RULES

MISCELLANEOUS

BRIEF FOR RESPONDENT MARIANO J. PIMENTEL

INTRODUCTION

This appeal presents the policy question of whether a foreign sovereign can upset a judgment rendered by a United States court adjudicating entitlement to assets long located in the United States based on the dual claims of immunity and indispensability. The prevailing party is a Class of indigent Filipino Human Rights Victims whose own government seeks to deprive them of compensation for their mistreatment by using its immunity as both a sword and a shield. Tradition and precedent of this Court support resisting manipulation of federal court procedures by the foreign sovereign.

COUNTER-STATEMENT OF THE CASE

The judgment in this statutory interpleader action awarded assets of about $35 million in an account (the "Account") at Merrill Lynch, Pierce, Fenner & Smith, Inc. to the Respondent Class of 9,539 victims of grave human rights abuses suffered during the 1972-86 martial-law regime of Ferdinand E. Marcos in the Philippines. Marcos was sued by the Class in the U.S. District Court for the District of Hawaii after he fled to Honolulu following the February 1986 "People Power" revolution in the Philippines.

In the interpleader, the Class members sought to collect a portion of their judgment of almost $2 billion

rendered in their historic human rights action. *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996). The Class members are individuals (and their heirs) who were victims of "massive *jus cogens* human rights abuses for which Marcos was responsible." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arelma, Inc.,* No. CV00-595-R (D.Hawaii Aug. 14, 2003) [hereinafter "Tr.Ct.Op."], Pet.App. 43a, 53a. They were "subjected to hideous tortures," "summarily executed" or "simply 'disappeared.'" *Id.* at 45a; *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1462-63 (D.Hawaii 1995) (listing specific forms of torture used).

The underlying case for massive human rights abuses was pursued with the explicit approval of the Republic,[1] which filed an *amicus curiae* brief in 1987 urging the U.S. courts to provide a venue for the Victims' claims. This *amicus* brief, discussed in more detail *infra*, stated explicitly that the Republic's "foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts." *Amicus Curiae* Brief Filed in 1987 by the Republic in *Hilao v. Marcos*, No. 15039, RA-1, 11.

The Republic was also litigating actively in the United States during this period, seeking to recover

[1] Reference to the Republic herein also refers to its executive agency, the Petitioner Presidential Commission for Good Government (PCGG).

Marcos assets, and it stated in a complaint it filed in the U.S. District Court for the Southern District of New York in 1986 that after Ferdinand Marcos became "the dictator of the Philippines with personal control over its government and economy," he "participated in a variety of activities constituting a gross denial of human rights, including abduction, murder, torture, summary incarceration and execution." *Republic of the Philippines v. Marcos*, 806 F.2d 344, 348 (2d Cir. 1986) (summarizing language from the Republic's complaint). The trial court explained in the present case that Marcos directly controlled all military and para-military groups in the Philippines and guided the systematic abuses imposed upon thousands of victims. Tr.Ct.Op., Pet.App. 44a-45a.

> The abuse committed against Plaintiff Pimentel by the Philippine military is illustrative of the claims of the class he represents. Pimentel was arrested two weeks after the declaration of martial law. During the next six years he was held in detention centers for four years with no charges against him. On his trip home from his final detention, the military kidnapped him. *They beat him with rifles breaking his teeth, an arm and a leg, and dislocating ribs. They then took him to a remote sugar cane field, buried him up to his neck and left him for dead.*

Id. at 48a (emphasis added).

Merrill Lynch filed this interpleader action in September 2000[2] to determine the entitlement to Merrill Lynch securities account No. 165-07312 (the "Account") established by Ferdinand E. Marcos in 1972 in the name of Arelma Inc. a shell corporation[3] incorporated in Panama for the purpose of hiding actual ownership of these assets. *See* Tr.Ct.Op., Pet.App. 46a-47a. Arelma's incorporation coincided with Marcos's declaration of martial law and the onslaught of massive *jus cogens* human rights violations. *See id.* at 45a, 53a. The Arelma Account was opened with a deposit of $2,000,000 provided by Marcos, which grew to about $35,000,000 when the interpleader was filed in September 2000. *Id*. at 45a-46a; Ex. 9, Joint Appendix (JA) at 34. Merrill Lynch deposited the Account assets, consisting of securities and cash, in the district court at the outset of this statutory interpleader litigation. Tr.Ct.Op., Pet.App. 46a. Merrill Lynch named as defendants those

[2] The Petitioners' assertion, Pet.Br. at 6 n. 5, that the lower court instructed Merrill Lynch to deposit the Arelma assets in the U.S. District Court for the District of Hawaii is contrary to fact and court ruling. A different federal judge in Hawaii, ruling on the Republic's recusal motion, found "the court did not direct, order, or require Merrill Lynch to file the instant action." Merrill Lynch has explained in its *amicus curiae* brief that it filed the interpleader action in the U.S. District Court for the District of Hawaii in September 2000, because of the competing claims that had been presented for the Arelma assets. Merrill Lynch Br. at 8.

[3] Petitioners acknowledge that Arelma was a "shell corporation" at page 2 of their Brief, and the court of appeals so found. Ct.Ap.Op., Pet.App. 10a.

persons or entities that had claimed the Account, including the four Petitioners, the Class of Human Rights Victims, and members of the Marcos family. JA13-15.

The record in this case, developed through four years of protracted and contentious litigation, contains undisputed evidence that the Arelma Account was established at the explicit direction of Marcos with funds he provided. "Arelma was incorporated to receive funds owned by Ferdinand Marcos," Tr.Ct.Op., Pet.App. 48a; "[t]he source of those funds [in the Merrill Lynch Account] was Ferdinand E. Marcos" *id*. at 45a; "[Ferdinand E.] Marcos controlled Arelma during his lifetime." *Id*. at 48a. "The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos." *Id*. at 53a.

The Republic has acknowledged that it knew about the Arelma Account since at least 1986. Pet.Br. at 5; *see also Merrill Lynch, Pierce, Fenner & Smith v. Arelma, Inc.,* No. CV00-595MLR, Findings of Fact & Conclusions of Law re Rule 19(b) Motion (D.Hawaii Aug. 14, 2003) [hereafter cited as "Tr.Ct. FOF/COL"], Pet.App. 56a ("The Republic has been aware of the deposit since 1986 . . . "). In 1987, the Republic sought and obtained the assistance of the U.S. District Court for the Southern District of New York to issue a preliminary injunction freezing the Arelma account. *See* Ex. 23, JA35; Tr.Ct.Op., Pet.App. 47a; Tr.Ct.

FOF/COL, Pet.App. 56a. *See also Republic of the Philippines v. Marcos*, No. 86-2294 (S.D.N.Y. 1986). The Republic, however, never pursued recovery of the Arelma account, and the injunction lapsed.

Beginning in 1986, the Republic filed or was a party in at least a dozen cases in various U.S. courts seeking to recover Marcos assets, *see, e.g., Republic of the Philippines v. Marcos*, 818 F.2d 1473, 1475 (9th Cir. 1987), but never asserted immunity in any of these earlier cases. *See, e.g.,* Tr.Ct.Op., Pet.App. 47a; Tr.Ct. FOF/COL, Pet.App. 58a. Four cases were in the Hawaii federal court. Some of these cases were massive in scope and required federal courts to devote considerable judicial resources. The Republic participated in at least two other interpleader proceedings without asserting immunity or indispensability. *See Sotheby's v. Garcia*, 802 F. Supp. 1058 (S.D.N.Y. 1992) (in which the Republic waived its immunity and participated willingly in an interpleader concerning disputed paintings); *Republic of the Philippines v. Christie's*, No. 98-3871 (S.D.N.Y. 1998) (involving a Picasso painting and including the Class as a claimant).

No evidence produced through discovery or introduced at the present interpleader trial by the Republic or its affiliated parties (Arelma and the Philippine National Bank ("PNB")) supports the Republic's position that the $2 million deposited in the Account was "misappropriated" or "stolen," which is the cornerstone of Petitioners' contentions. *See* Pet.Br. at 1. In fact, both lower courts concluded that

this Account was the property of Ferdinand E. Marcos: "The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos." Tr.Ct.Op., Pet.App. 53a. "Arelma is a shell corporation . . . and the court may look through the corporate form to *Marcos, the owner of its assets*." Ct.Ap.Op., Pet.App. 10a (emphasis added).[4] Although the Republic did not participate directly in the interpleader proceedings after it withdrew from the litigation, it utilized Arelma and PNB as its proxies because (a) after 2000, it controlled Petitioner Arelma, worked with Arelma's counsel, paid for Arelma's prosecution of the litigation, and (b) it controlled the escrow agent Petitioner PNB, owned 16% of PNB's stock, and elected four of its 11 directors. *See* Rogel Zenarosa Dep. at 9-12.

The Republic moved to dismiss itself on sovereign immunity grounds in this litigation only after losing a motion to change venue or recuse the judge assigned to the case. *See* Dkt. No. 56. At no time did the Republic seek to intervene for any purpose before the district court or the court of appeals, even after the district court ruled that it was not an indispensable party. Tr.Ct. FOF/COL, Pet.App. 55a-60a. The court of appeals ruled in 2002, in an earlier appeal,

[4] The assertion made by Petitioners to the contrary in the last sentence of their footnote 10 (Pet.Br. at 25) is seriously misleading.

In re Republic of the Philippines, 309 F.3d 1143 (9th Cir. 2002), Pet.App. 30a-42a [hereafter cited as "2002 Ct.Ap.Op."] that the Republic was entitled to dismissal on sovereign immunity grounds, but it declined to accept the Republic's argument that it was an indispensable party to this litigation pursuant to Rule 19(b). *Id*. at 1153. On remand, in 2003, the district court, acting on the Rule 19(b) motion of Arelma and PNB, made detailed findings and conclusions holding the Republic was not an indispensable party. Tr.Ct. FOF/COL, Pet.App. 58a-60a. This opinion noted that the record was substantially more complete as a result of the completion of discovery and the filing of various motions, including a motion for summary judgment, compared to the record that had been transmitted to the court of appeals two years earlier. *Id*. at 56a. The district court explained that the record did not support the contention that a Philippine court was about to rule on the forfeiture of the Arelma assets. *Id.* at 56a-57a. The court noted that the long-awaited 85-page decision issued by the Philippine Supreme Court on July 15, 2003 did not even mention Arelma. *Id.* at 56a.

The district court noted that because the Republic had known about the Arelma Account since 1986 and had obtained an injunction from a federal court with regard to this Account in 1987, the Republic's claim to the assets would be barred by the applicable New York statutes of limitations, *id*. at 56a-57a, and hence was not "legally protectible." *Id*. at 58a. The district court specifically held that because the

Republic would not be bound by the judgment or findings in the case, its claim would not be impaired:

> Neither res judicata nor collateral estoppel from rulings in this case will apply to the Republic and its PCGG since it is no longer a party.

Id. at 58a. The court of appeals affirmed the lifting of the stay on February 20, 2004, clearing the way for trial. *Merrill Lynch, Pierce, Fenner & Smith v. Arelma, Inc.,* Nos. 03-16742, 03-16743 (9th Cir. Feb. 20, 2004), JA25-27.

At trial, the members of the Class of Human Rights Victims prevailed in proving that Arelma was an *alter ego* of Ferdinand Marcos and that their claim as judgment creditors had priority to the interpleaded assets. Tr.Ct.Op., Pet.App. 53a-54a. The claim of PNB, based on its possession of the Arelma stock certificates, was denied based on this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), which confirmed that an individual shareholder does not own a corporation's assets.[5] *Id*. at 52a. The claims of the remaining parties, the Roxas Estate and the Golden Budha Corporation, were denied since (a)

[5] The Republic's argument that the Arelma Account is a "subset" of Marcos' Swiss assets, Pet.Br. at 5, and should "follow the [Arelma] shares," transferred to it by Swiss authorities, Pet.Br. at 40-41, is legally and factually wrong. The Swiss government never had possession or control of the assets in the Merrill Lynch account, and the Republic of the Philippines never owned the Arelma share certificates. Tr.Ct.Op., Pet.App. 46a.

their prior judgments were not against Ferdinand Marcos or his Estate, and (b) they failed to prove the Account assets derived from property stolen from them.[6] *Id*. at 53a-54a.

Four days after entry of the district court's July 12, 2004 judgment, JA90, the Republic filed a motion in a Philippine trial court to reopen long-closed litigation there, asking that court to find that the Arelma assets – which had been in the United States for more than three decades and in the custody of the district court for four years – were the property of the Republic. *See Republic of the Philippines vs. Heirs of Ferdinand E. Marcos et al.*, No. 141 (Sandiganbayan, 1st Div.). This motion, which omitted mention of the U.S. judgment, specifically referred to the Arelma Account and asked the Philippine court to declare "the funds, properties, shares and interests of Arelma, Inc. as forfeited in favor of the Republic." The parties to that proceeding are limited to the Republic and the Marcoses, and the Human Rights Victims have been excluded from participation. Pet.App. 10a, 59a. Now, three-and-a-half years later, the Philippine court still has not ruled on the motion.

In 2006, the court of appeals affirmed the judgment in favor of the Class of Human Rights Victims.[7]

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[6] A Petition for Certiorari, No. 06-1039, by these parties is pending before this Court.

[7] Although the Class twice argued that the Republic as a nonparty lacked power to appeal, *see* JA92-98 and Pimentel's Ninth Circuit Brief at 28, the court of appeals did not address

(Continued on following page)

Merrill Lynch, Pierce, Fenner and Smith, Inc. v ENC Corporation, 464 F.3d 885 (9th Cir. 2006) [hereinafter "Ct.Ap.Op."], in Petitioner's Appendix to its Certiorari Petition [hereinafter "Pet.App."] at 1a-11a. The court of appeals understood that the four factors listed in Rule 19(b) are directly fact-based and examined the "circumstances and practicalities of the Republic's claim" to determine whether the judgment rendered in its absence "'might be prejudicial to [it] or those already parties.'" *Id.* at 4a (quoting Rule 19(b)). It then examined two specific scenarios that could follow if the Republic were deemed indispensable, and concluded that "it is doubtful that the Republic has any likelihood of recovering the Arelma assets" because "[t]he res is in the United States" and [i]t cannot be finally disposed of except by the judgment of a court in the United States." *Id.* at 7a-8a. The court of appeals recognized that any effort by the Republic to pursue the Arelma assets in an action against Merrill Lynch in New York would be barred by New York's six-year statute of limitations. *Id.* at 8a (citing N.Y. C.P.L.R. sec. 213, and also citing *Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102, 115 (1968), for the proposition that the Republic's "failure to secure a judgment affecting these assets is a factor to be taken into account"). *Id.* at 7a. The court of appeals explained that any judgment the Republic might obtain in the Philippines

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the issue, because it ruled for the Class on the Rule 19(b) issue. *See* Ct.Ap.Op., Pet.App. 9a-11a.

would be unenforceable, because the Philippine court would have no jurisdiction over the *res* – the Arelma Account assets – and if a Philippine court were to issue a ruling regarding these assets, "a court of this country would not be bound to give it effect." *Id.* at 8a. *See also Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corporation*, 467 F.3d 1205, 1207 (9th Cir. 2006), Pet.App. 61a, where the court of appeals noted that the Philippine Supreme Court had previously "categorically declared" that its forfeiture proceeding regarding Marcos assets "is *in rem*," citing *Republic of the Philippines v. Sandiganbayan* (Nov. 18, 2003), and also citing *Restatement (Third) of the Foreign Relations Law of the United States* § 482(2)(a) (1987) for the proposition that "any judgment made without proper jurisdiction is unenforceable in the United States." The court of appeals noted explicitly that the Republic is not bound by the present proceeding, "because it is not a party to the action," and that it is not formally prejudiced because it remains free to pursue a claim against Merrill Lynch in the United States (although its odds of success are extremely low because of New York's six-year statute of limitations). Ct.Ap.Op., Pet.App. 8a-9a.

The court of appeals completed the balancing process required by Rule 19(b) by concluding (a) that "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it," *id.* at 9a; (b) that although the Arelma assets are not adequate to satisfy the Human

Rights Victims $2 billion award, nonetheless "the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them," *id.*; (c) that if this interpleader were to have been dismissed on the basis of indispensability, the Human Rights Victims would have no alternative forum open to them in the Philippines, *id.*; and (d) that the Human Rights Victims could be required to sue in New York but such a requirement would impose "a needless repetition that will not benefit the Republic." *Id*. The court of appeals noted that it would be unrealistic to direct the Human Rights Victims to "find redress from their own government" because – despite the passage of 21 years since Marcos was forced out of office – "the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic." *Id.* at 9a-10a. The court of appeals then concluded that "[n]o injustice is done [to the Republic] if it now loses what it can never effectually possess." *Id.* at 9a.

Shortly after the decision of the court of appeals, the district court ordered the first distribution of monies to Class members since the time they had initiated litigation against Marcos in 1986.[8] The

[8] By stipulation, the parties in the instant case, pending appeal, transferred the assets at issue to the *Marcos Human Rights Litigation*, MDL 840, pending in the same court. The distribution order was entered in MDL 840.

district court ruled that each eligible class member will receive, initially, $2,000, upon issuance of the mandate. *In re Estate of Ferdinand E. Marcos Human Rights Litigation,* MDL No. 840, Order of June 26, 2006, JA103-104. The overwhelming number of Class members are impoverished and exist in a cycle of poverty. In a country where the median per capita income is $1,600 per year, this first distribution "will have monetary meaning for the poor among them." Ct.Ap.Op., Pet.App. 9a.

Other collection efforts by the Class have been stymied, not just by the well known fact that Marcos concealed his wealth,[9] but also by the unwillingness of the Philippine courts to allow the Class members to file their judgment in order to pursue collection possibilities in the Philippines. In 2007, the United Nations Human Rights Committee found that this refusal constituted a violation of the Class members' rights under international law. *See Pimentel v. The Philippines*, Communication No. 1320/2004 (Mar. 19, 2007), RA-12-23. The Committee found that the

[9] The 1995 judgment included the following finding:

> Ferdinand and Imelda Marcos engaged in a sophisticated pattern and practice of secreting their assets, periodically laundering those assets in various countries, and redepositing the monies in Swiss bank accounts in the names of the multiple Liechtenstein foundations.

In re Estate of Ferdinand E. Marcos Human Rights Litigation, MDL No. 840, Final Judgment (D. Hawaii Feb. 3, 1995), JA49, 57.

obstructive procedures employed by the Philippine courts (the trial court required the Class members to pay a filing fee of US$8,400,000 and the Philippine Supreme Court took eight years and three months to overturn this ruling) violated the rights of the Class members under Articles 2(3)(a) and 14(1) of the International Covenant on Civil and Political Rights, Dec. 9, 1966, 1999 U.N.T.S. 1711:

> The Committee is of the view that the authors [the Class] are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy. The State party is under an obligation to ensure an adequate remedy to the authors including, compensation and a prompt resolution of their case on the enforcement of the US judgement in the State party. The State party is under an obligation to ensure that similar violations do not occur in the future.

Human Rights Committee, para. 11, RA-23.

The Republic has never compensated the Class members for the abuses they suffered during the Marcos regime, Ct.Ap.Op., Pet.App. 9a-10a, although a decision of the Swiss Federal Court in 1997 specifically held that international law required the Republic to compensate the Victims. *Swiss Federal Office for Police Matters v. Fondation Maler,* 1A.91/1997/odi (Swiss Federal Court (Bundesgericht, Dec. 19, 1997), Ex. 47, JA64, 84 para. 7a.

Following two motions for reconsideration and for *en banc* review in the court of appeals, Petitioners

filed a petition for certiorari with this Honorable Court. This Court granted certiorari on December 3, 2007 adding the additional issue of whether the Republic and PCGG had power to appeal the judgment to the court of appeals and to this Court. PNB and Arelma did not seek certiorari of the court of appeals' ruling that the Class had priority over their claims.

SUMMARY OF ARGUMENT

1. The Republic does not have power to appeal the judgment. It made the strategic determination to withdraw from this interpleader, it chose not to intervene into the trial proceeding even after the trial judge ruled that it was not an indispensable party, and it is not bound in any way by the rulings made by the lower courts during the course of this interpleader procedure. Allowing the Republic to appeal at this point is contrary to the core principle that only parties (or those that intervene) can appeal, will disrupt the orderly conduct of litigation, and will make it more difficult for trial courts to bring about closure.

Arelma and PNB lack standing to raise the issue of the Republic's indispensability on appeal, because they no longer challenge the lower courts' rulings that they are not entitled to the disputed assets and hence have no further direct interest in the outcome of this litigation.

2. The lower courts followed the language of Rule 19(b) and this Honorable Court's guidance in *Provident Tradesmen Bank*, 390 U.S. 102, in determining that the Republic was not an indispensable party to the interpleader. Their decisions, made after weighing all relevant factors under the standard of equity and good conscience, were not an abuse of discretion.

The Republic has participated actively in litigation in U.S. courts regarding purported Marcos assets; it has never previously asserted sovereign immunity in those actions; it has known about the Arelma assets since at least 1986; and it sought and obtained the assistance of a U.S. court to freeze these assets in 1987. Prior to entry of the interpleader judgment, the Republic never made any effort whatsoever to establish its claim to ownership of these assets, in either a Philippine or a U.S. court. The lower courts, based on the factual record developed in this interpleader, both concluded that the assets were owned by Ferdinand Marcos, and determined that the Class of Human Rights Victims were entitled to these assets. The Republic made the strategic decision to withdraw from the interpleader, and it should be bound by the consequences of its decision.

The court of appeals also determined that if this interpleader proceeding is dismissed, the members of the Class "will have no forum within the Philippines open to their claims," and that a proceeding against Merrill Lynch in New York "would merely raise the same question of indispensability." Ct.Ap.Op.,

Pet.App. 10a. The Human Rights Victims have tried to pursue collection efforts in the Philippine courts, but have been stymied in their efforts, and the United Nations Human Rights Committee has ruled explicitly that the failure of the Philippine Courts to permit collection efforts constitutes a violation of the obligations of the Philippines under Article 2(3) of the International Covenant on Civil and Political Rights.

The Republic's effort to dismiss the interpleader at this point is not supported by any evidence or offer of proof substantiating its contention that it is the legitimate owner of these assets. If this Court were to dismiss the interpleader, its ruling would allow any foreign governmental body to block any interpleader or any other proceeding brought by any judgment creditor to collect its judgment merely by asserting a claim to the assets in question without having to present any evidence to substantiate its claim.

3. No significant negative foreign policy consequences will follow if the independent courts of the United States apply logical legal principles to determine ownership of assets long-held in the United States. The *amicus curiae* brief filed by the United States makes no claim that any adverse consequences regarding U.S. foreign relations will follow if this Court affirms the rulings below. Petitioners contend that they will be disadvantaged by such a ruling, because the disputed assets are, they say, "matters of the greatest political sensitivity and importance," Pet.Br. at 48, but they offer no specifics. Nor do Petitioners address the inconsistency between their

present contentions and the position the Republic expressed in the *amicus curiae* brief filed in 1987, which stated "without hesitation or reservation that its foreign relations with the United States will *not* be adversely affected if these human rights claims are heard in U.S. courts." RA-11 (emphasis in original).

Courts must, of course, give careful consideration to foreign policy concerns raised by foreign governments, but the need to defer to such concerns is minimal when the courts possess *in rem* jurisdiction over the assets at issue and the matter concerns procedural issues related to the courts' management of their dockets. Here, no contention is made that the claims of the Class of Human Rights Victims should not have been pursued or that the judgment in favor of the Victims was unwarranted.

ARGUMENT

I. The Republic Has No Right To Appeal

A. Only "parties" to a judgment have a right to appeal therefrom.

This Honorable Court has "consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." *Karcher v. May*, 484 U.S. 72, 77 (1987). This rule has been "very well settled" for at least 150 years. *See, e.g., Payne v. Niles*, 61 U.S. (20 How.) 219, 221 (1858) ("[I]t is very well settled in

all common-law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court, unless he was a party to the judgment in the court below. . . ."). This jurisdictional limitation on appellate rights is embodied in Rule 3 of the Federal Rules of Appellate Procedure, which provides for the filing of a notice of appeal by "parties." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (*per curiam*) (citing Fed. R. App. P. 3). It is likewise codified in 28 U.S.C. § 1254(1) – Petitioners' asserted basis for this Court's jurisdiction – which provides for writs of certiorari "granted upon the petition of any party. . . ." 28 U.S.C. § 1254(1). *Cf. Karcher*, 484 U.S. at 81 (dismissing for lack of jurisdiction where the appellants were not "parties" under the previous version of § 1254(2)).

B. The Republic was not a party to the judgment and was not treated as a party to the judgment.

The naming of the Republic in the complaint is not controlling on the question whether it may appeal from the judgment. "The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002). Thus, depending on the procedural development of the case and the strategic choices made, a litigant can lose "party" status. *See Karcher*, 484 U.S. at 81 (holding that intervenor appellants lost "party" status during the appeals). The relevant "context" here is that the

Republic successfully opposed its joinder as a party in the district court, then elected to sit on the sidelines while the remaining parties litigated the Republic's alleged indispensability and their competing claims to the Arelma assets. As a consequence of its strategic decision, the Republic lost any right it might have had to appeal from the judgment.

Contrary to the Petitioners' argument, Pet.Br. at 24, 29, the dismissal of the Republic was not a "technical matter." Having invoked foreign sovereign immunity, the Republic avoided joinder as a party and was neither subject to the district court's jurisdiction nor bound by its judgment. The district court explained that "[n]either res judicata nor collateral estoppel from rulings in this case will apply to the Republic and its PCGG since it is no longer a party," Tr.Ct.Op., Pet.App. 58a, and the court of appeals agreed that "any judgment entered in this action cannot bind the Republic because it is not a party to the action," Ct.Ap.Op., Pet.App. 8a, a conclusion that Petitioners do not contest. The Republic was not, therefore, a "party" to the judgment from which it now seeks to appeal. *See Devlin*, 536 U.S. at 10-11 (permitting an appeal as "petitioner's only means of protecting himself from *being bound by a disposition of his rights*") (emphasis added). *See also id.* at 9 (distinguishing the petitioners in *Marino* on the basis that "the District Court's decision *did not finally dispose of any right or claim* they might have had") (emphasis added). As *amicus* Merrill Lynch notes, the Republic still has what it always claimed to have – a

contingent claim against Merrill Lynch. Merrill Lynch Br. at 27-29.

The Republic's status in the present case is thus similar to its status in *Hilao v. Estate of Marcos*, 393 F.3d 987 (9th Cir. 2004), where the court of appeals ruled that the Republic was a "nonparty" to the district court's actions regarding a settlement agreement and an "Order Directing Compliance" issued to banks holding disputed assets. Because the Republic was not bound by the settlement agreement "its argument for nonparty appellate standing to challenge that same agreement collapses." *Id.* at 993. Similarly, an Order Directing Compliance by financial institutions did not "bind[ ], [n]or was meant to bind, the Republic," and hence the Republic could not challenge it. *Id.* at 994. Notwithstanding the Republic's claim that the Compliance Order "interfered with its efforts . . . to collect all funds," the court of appeals held that "inconvenience to the Republic, however, does not rise to the level of an 'exceptional circumstance' justifying nonparty standing to appeal." *Id.* (citation omitted).

Nor was the Republic "treated as a party" in the district court following its dismissal. The court of appeals ordered its dismissal on sovereign immunity grounds but remanded with directions to stay the litigation because later events could affect the indispensability determination. 2002 Ct.Ap.Op., Pet.App. 30a. Thereafter, the Republic avoided the district court proceedings. *See* Pet.Br. at 9 (stating that the

Republic was "absent from the litigation" after the district court lifted the stay).[10]

More importantly, the Republic made no further effort to press its indispensability arguments in the district court. It was not until Arelma and PNB renewed their Rule 19(b) motion that the district court proceeded to determine the Republic's claimed indispensability. Tr.Ct. FOF/COL, Pet.App. 55a-60a. The Republic neither sought to intervene nor otherwise to be heard at the evidentiary hearing. It took no exception to the district court's findings of fact and conclusions of law denying Arelma's and PNB's motion, including the district court's finding that "[t]he Republic and its PCGG made a strategic decision not to participate in this litigation even though they have participated in over a dozen lawsuits in the United States involving purported Marcos assets," and that "[t]he Republic and PCGG must accept 'the disadvantages as well as the advantages

[10] After the court of appeals remanded for dismissal of the Republic, counsel for the Republic did appear informally at a district court hearing to spread the appellate mandate and rule on Respondent's motion to lift the stay, but expressly reserved the Republic's immunity. Hearing Transcript, 6/20/2003, at 3, 19-20. After the district court lifted the stay, the Republic petitioned for leave to appeal. Pimentel moved to strike the petition on the ground that the Republic, having invoked sovereign immunity and having failed to intervene, was a nonparty with no right to appeal. The court of appeals affirmed without addressing the motion to strike. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Pimentel*, Nos. 03-16742, 03-16743 (9th Cir. Feb. 20, 2004), JA25-27.

that flow from' their 'strategic election.'" Tr.Ct. FOF/COL, Pet.App. 58a-59a (citing *Citibank Int'l v. Collier-Traino, Inc.,* 809 F.2d 1438, 1441 (9th Cir. 1987)).[11]

C. The Republic failed to intervene to assert its indispensability and preserve a right to appeal.

Contrary to Petitioners' argument, Pet.Br. at 20, an appeal from the judgment was not the "only means" for the Republic to protect its interests. *Devlin*, 536 U.S. at 10. As the U.S. *amicus curiae* brief notes, the Republic could have intervened as of right pursuant to Rule 24 after its dismissal, for the limited purpose of asserting its own indispensability, without consenting to jurisdiction generally. *See* U.S. Br. at 15; *see also Marx v. Guam*, 866 F.2d 294, 301 (9th Cir. 1989) (holding that Guam could challenge the district court's jurisdiction to proceed in its absence, without risk of waiving its sovereign immunity). The Republic also could have sought intervention post-judgment for purposes of appeal. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395 (1977). Such intervention would have afforded the Republic with appellate rights. *Karcher*, 484 U.S. at 77. Further, the denial of an intervention motion is

[11] "While we do not fault that strategic election, we must hold that the appellant must accept the disadvantages as well as the advantages that flow from it." *Citibank*, 809 F.2d 1438, 1441 (9th Cir. 1987).

itself immediately appealable. *Marino*, 484 U.S. at 384.

However, the mere opportunity to intervene does not confer appellate rights. "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Martin v. Wilks*, 490 U.S. 755, 765 (1989). The Republic eschewed intervention and adopted a different strategy, one that forced the district court and the remaining parties to litigate the indispensability questions in its absence. This election to sit on the sidelines has consequences. *Id.* at 770 (Stevens, J., dissenting) ("One of the disadvantages of sidelinesitting is that the bystander has no right to appeal from a judgment no matter how harmful it may be."). Because the Republic could have sought intervention but chose not to, the Court should reject its attempted end-run around the rule that only "parties" can appeal. *Marino*, 484 U.S. at 304 ("We think the better practice is for such a nonparty to seek intervention for purposes of appeal").

The intervention requirement is not a meaningless formality. Instead, it prevents litigants from gaming the federal court system by permitting the district court, in the first instance, to resolve the scope of an intervenor's "party" status and participation, preferably *before* an issue is decided and *before* an appeal is taken. *See Devlin*, 536 U.S. at 21 (Scalia, J., dissenting) (noting that intervention permits the

district court "'to perform an important screening function'") (citation omitted). And as the United States argued in *Devlin*, "the Federal Rules permit courts to place conditions on the scope of intervention, and that includes restrictions on discovery." U.S. Br. in *Devlin v. Scardelletti*, 2002 WL 352118 at *26 (2002) (citing *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987)).[12]

Logic requires a rule mandating that a foreign government, asserting immunity, must intervene on a limited basis to assert its indispensability to an interpleader proceeding if it wishes to appeal from the judgment. A foreign government asserting sovereign immunity simply seeks to block its own joinder on jurisdictional grounds. By contrast, an assertion of indispensability invokes equity to preclude the parties and the court from proceeding to judgment[13] – a

[12] In *Devlin*, the United States argued that class member objectors should be required to intervene in order to appeal the approval of a mandatory class settlement that bound them over their objections, because the intervention requirement allows the district court to exercise control over, and place appropriate conditions, on the scope of the objectors' participation. *Id.* Although the Court held that intervention was not required in *Devlin*, that holding is easily distinguishable from the present situation, because the appellants in *Devlin* were bound by the judgment in that case. *Devlin*, 536. U.S. at 7. Here, the Republic is not bound by the interpleader judgment.

[13] The nature of the indispensability inquiry is equitable, not jurisdictional. *See* 7 C. Wright, *et al.*, *Federal Practice & Procedure* § 1611, at 169 (3d ed. Supp. 2007) (citing *Mallow v. Hinde*, 25 U.S. (12 Wheat.) 193, 198 (1827)).

discretionary, fact-bound inquiry that implicates the interests of all the parties and "can only be determined in the context of particular litigation." *Provident Tradesmens Bank*, *supra*. The lack of an intervention requirement would place the district court and the other parties in the untenable situation of attempting to resolve a sovereign's claim of indispensability without the ability to order complete discovery and litigation on that claim.

An intervention requirement thus prevents a foreign government from using its immunity as both a shield and as a sword – precisely what the Republic asks this Court to authorize here. It simultaneously claims the right to appeal from a determination of its indispensability while rejecting any concomitant burden to present evidence on its contention in the first instance. It seeks to preserve its sovereign prerogative to sit on the sidelines, while reserving the right to assert error in the district court's resolution of those issues in its absence. Nothing in either Rule 19 nor the principles governing foreign sovereign immunity requires the federal courts to tolerate such strategic manipulation, especially in light of the ready availability of limited intervention that preserves that government's immunity.

This Court has previously dismissed appeals by states for lack of jurisdiction where the state asserted an interest in the property in suit as a basis for dismissal, but refused to consent to jurisdiction and failed to intervene. In *South Carolina v. Wesley*, 155 U.S. 542 (1895), the plaintiff sued the South Carolina

secretary of state for possession of land occupied by the state. Before trial, the South Carolina attorney general appeared and filed a "suggestion" that the court lacked jurisdiction to proceed because the State owned the property and would not consent to jurisdiction. *Id.* at 543-44. The trial court denied the suggestion, proceeded to trial and awarded possession to the plaintiff. This Court dismissed South Carolina's writ of error, reasoning that "[t]he state was not a party to the record in the trial court, and did not become a party by intervention, *pro interesse suo* or otherwise, but expressly refused to submit its rights to the jurisdiction of the court." *Id.* at 545.

The *Wesley* court cited *Georgia v. Jesup*, 106 U.S. 458 (1882), a receivership action brought against assets of a railroad located in Georgia. Before the final foreclosure decree issued, the Georgia attorney general appeared and petitioned to dismiss or stay the proceedings for lack of jurisdiction, asserting sovereign immunity and claiming that the state had a priority claim to the assets. *Id.* at 459-60. The trial court denied the state's petition and entered the foreclosure decree, and Georgia appealed to this Court. *Id.* at 461. This Court held that because the state refused to submit to jurisdiction and was not bound by the decree, the order denying the state's dismissal petition "is not one which the state can ask this court to review upon its appeal; this, for the reason already indicated, that the order did not conclude the state – it being no party to the suit – as to any right acquired by virtue of the executions for

taxes." *Id.* at 463. Significantly, this Court observed that even if the state had priority under Georgia law, that priority was not affected because there was no adjudication of the state's rights. *Id.* at 463-64.

A foreign government with statutory immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1391, 1441(d), 1602-11, surely has no greater appellate rights than a state that has an organic, constitutional immunity from suit. The Republic of the Philippines is no different in any relevant respect from the sovereign states in *Wesley* and *Jesup*. The Republic was not a party in the district court and, after its dismissal, it neither acted like a party nor was treated like a party. It invoked sovereign immunity nearly from the outset of the proceedings and refused to submit its claims to the jurisdiction of the district court. It is not bound to the judgment. It failed to seek intervention. Therefore it was not a party in the district court and has no right to appeal the denial of indispensable party status and the judgment of the district court.

Petitioners and the U.S. *amicus* brief cite *Minnesota v. United States*, 305 U.S. 382 (1939), as precedent for finding appellate rights in this case, even though (as the United States concedes) the Court *never considered the issue* of appellate rights in that case. Pet.Br. at 23, U.S. Br. at 16-17. Moreover, unlike in the present case, the court of appeals in *Minnesota* dismissed the entire litigation on the Government's interlocutory appeal and did not remand for further development and consideration of the Government's

indispensability arguments. *United States v. Minnesota*, 95 F.2d 468, 473 (8th Cir. 1938). Thus, at no time in the *Minnesota* litigation did the United States opt to sit on the sidelines as a nonparty and permit a court to resolve indispensability in its absence. Here, however, the Republic made the strategic decision not to pursue further its assertion of indispensabilty in the district court.

The Petitioners' "collateral order" analogy also fails. Pet.Br. at 23-24. The collateral order doctrine permits interlocutory appeals from certain types of orders by persons who were bound by, and thus were "parties" to, those orders, even though they would not be bound by the subsequent judgment in the litigation. *Devlin*, 536 U.S. at 16-17. Here, by contrast, the Republic claims a right to appeal from a *judgment* to which it is *not* bound. *Id.* (distinguishing the right to appeal from a judgment from the right to appeal from a collateral order). Nor was the Republic a party to the district court's order denying Arelma's and PNB's renewed Rule 19(b) motion, Tr.Ct. FOF/COL, Pet.App. 55a, because it was not the Republic's motion and the Republic never intervened to support it. And unlike a collateral order, the district court's order does not purport to require the Republic to do (or not do) anything. *See Devlin*, 536 U.S. at 17 (citing *Hinckley v. Gilman, C. & S.R. Co.*, 94 U.S. 467 (1876)).

Litigation choices have consequences. The decision of the Republic to claim immunity and its failure to intervene on the question of its indispensability

had the consequence of foreclosing it from appealing the judgment.

II. The Court Must Dismiss The Appeal As To Arelma And Philippine National Bank Because They Lack Power To Appeal And No Live Controversy Remains As To Them.

This Court independently scrutinizes whether particular petitioners present a sufficient case or controversy to create Article III standing. *Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 126 S.Ct. 1854, 1859 (2006). The Petitioners and the United States argue that Arelma and PNB have a right to raise the Rule 19(b) issue even if the Republic does not. Pet.Br. at 16; U.S. Br. at 9. But Rule 19(b) appeals are not riderless horses. Since Arelma and PNB suffered no injury from the denial of their Rule 19(b) motion, and they no longer challenge the denial of their claims to the Arelma assets on the merits, there is no live controversy as to them and they therefore lack standing to appeal.

The district court denied the claims of Arelma and PNB on the merits after a trial. Tr.Ct.Op., Pet.App. 52a-54a. The court of appeals affirmed the judgment stating that neither Arelma (a "shell corporation") nor PNB ("as escrow holder") "now have an interest to be protected." Ct.Ap.Op., Pet.App. 10a. Neither Arelma nor PNB sought certiorari of that merits determination in this Court, and any such

challenge is therefore waived. *Cf. Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) ("Only the questions set forth in the petition [for certiorari], or fairly included therein, will be considered by the Court") (quoting Sup. Ct. R. 14.1(a)); *Yee v. City of Escondido*, 503 U.S. 519, 536-37 (1992) (same).

Indeed, Arelma and PNB apparently now support the Republic's claims of ownership of the account. However, a litigant generally lacks standing to advance the rights of others. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972). Rather, standing requires "personal injury fairly traceable to the [opposing party's] unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler*, 126 S.Ct. at 1861 (2006). In *DaimlerChrysler,* this Court found no Article III standing because there was no injury that was "concrete and particularized." *Id.* at 1862. "[T]he injury is not actual or imminent, but instead conjectural or hypothetical." *Id*. Similarly, any "injury" to Arelma and PNB from the decision to proceed in the Republic's absence is conjectural and hypothetical given the unchallenged merits rulings. Since Arelma and PNB have abandoned any claims to the interpleaded assets, they are in no way "aggrieved" by the judgment of the court of appeals, and therefore lack standing to appeal that judgment. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980).

Article III jurisdiction requires that a live controversy must exist at every stage of review. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). "That the dispute

between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires." *Honig v. Doe*, 484 U.S. 305, 307 (1988). This Court has observed that Article III jurisdiction can be destroyed by a party's choices about which rulings to appeal. *Ashcroft v. Mattis*, 431 U.S. 171, 172-73 (1977). Here, Arelma and PNB chose not to seek certiorari to challenge the rulings that their claims failed on the merits.

The failure of Arelma and PNB to preserve their "requisite personal interest" in the subject matter of the litigation means that the Court now lacks jurisdiction over their appeal. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). For example, in *Ashcroft v. Mattis* this Court held that the petitioner's failure to preserve a challenge to a merits-based ruling on an affirmative defense rendered the case moot. 431 U.S. at 171-72. Because there was no longer any dispute over the merits of the liability claim, the petitioner lacked a present interest in controversy and could not appeal. *Id.* at 172-73.

An interpleader case from the First Circuit is instructive. In *Horizon Bank & Trust Co. v. Massachusetts*, 391 F.3d 48 (1st Cir. 2004), Massachusetts successfully asserted immunity but was held not to be an indispensable party. *Id*. at 51. The district court proceeded to judgment in the Commonwealth's absence and awarded the interpleaded assets to a private claimant. *Id.* at 52. The Commonwealth

appealed the indispensability ruling but failed to challenge the priority of the judgment winner's claim. *Id.* The First Circuit dismissed the appeal, holding that the Commonwealth's failure to challenge the ultimate disposition of the interpleaded fund rendered moot the issue of its indispensability. *Id.* at 53. The court noted that its holding could be premised on a loss of standing to appeal. *Id.* at 53 n.1.

Regardless of whether the result is based on mootness principles or a loss of appellate standing,[14] the point is that neither Arelma nor PNB has any present interest to be protected in the litigation as a whole, or in a Rule 19(b) determination.[15] Without a viable claim to the assets, the indispensability of the Republic is a purely abstract proposition as to Arelma and PNB, and their appeal must be dismissed for lack of standing.

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[14] As this Court observed in *Geraghty,* mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Geraghty*, 445 U.S. at 397 (*citations omitted*).

[15] Petitioners argued in a footnote to their petition for a writ of certiorari that "The decision also places PNB, the nominal owner of Arelma, in an untenable position because the bank is a party to escrow agreements, entered into at the direction of the Swiss Federal Supreme Court, requiring it to dispose of the Arelma assets as directed by the appropriate Philippine court." Cert.Pet. at 11 n.5. PNB fails to articulate any detrimental consequence of this position, especially given their failure to continue to pursue the merits of their claims.

Both Petitioners and the United States rely on *Minnesota v. Northern Sec. Co.*, 184 U.S. 199 (1902), for the proposition that appellate courts must act *sua sponte* to protect the rights of absent indispensable parties. Pet.Br. at 18, U.S. Br. at 17. The United States also cites *Hanson v. Denckla*, 357 U.S. 235 (1958), for the proposition that Arelma and PNB have a right to raise the lack of an indispensable party on appeal. U.S. Br. at 10. But both of these propositions assume the presence of a party with the requisite personal stake in the litigation to support standing to appeal.[16] Since Arelma and PNB no longer challenge the district court's conclusions on the merits of their claims, their claims are deemed moot and they have no standing to appeal *at all*.

III. The Republic Is Not An Indispensable Party Under Rule 19(b).

An interpleader action commenced under 28 U.S.C. § 1335 is unlike a conventional lawsuit. It is brought by a plaintiff stakeholder who willingly deposits the *res* with the court and who seeks only the remedy of a discharge order. The defendants are not true defendants. They are claimants who have asserted entitlement to the *res*. They are not required to

[16] "[A]ny defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Hanson*, 357 U.S. at 245 (*citing Chicago v. Atchison, T. & S.F. Ry. Co.,* 357 U.S. 77 (1958)).

present evidence in support of their claims, but they must do so if they expect to prevail in the interpleader proceeding. They do not risk entry of a judgment against them for a money judgment. Properly considered, an interpleader complaint is an invitation to make a claim. Accordingly, many of the policy concerns underlying foreign sovereign immunity are not present in an interpleader, and the factors set forth in Rule 19(b) favor maintenance of an interpleader, not dismissal.

A. The lower courts' Rule 19(b) determination is reviewable under an abuse of discretion standard.

This Court has not squarely considered the standard of review applicable to a district court's Rule 19(b) determination, and neither the Petitioners nor the Solicitor General address the standard of review in their briefs. The courts of appeals have reached a consensus[17] on this issue that, because Rule 19(b)

[17] Only the Sixth Circuit reviews Rule 19(b) determinations *de novo*. *Glancy v. Taubman Centers, Inc.* 373 F.3d 656, 665 (6th Cir. 2004). All other circuits review for abuse of discretion. *See Travellers Indemnity Co. v. Dingwell*, 884 F.2d 629, 635 (1st Cir. 1989); *Universal Reinsurance Co., Ltd. v. St. Paul Fire and Marine Ins. Co.*, 312 F.3d 82, 88 (2d Cir. 2002); *General Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 312 (3d Cir. 2007); *American General Life and Acc. Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005); *Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 393 (5th Cir. 2006); *Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, 361 F.3d 359, 361 (7th Cir. 2004); *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001); *Davis ex rel. Davis v.*

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determinations are fact-intensive and require a balancing of interests based on pragmatic considerations, "*de novo* balancing should not occur on appeal; instead, the district court's application of Rule19(b)'s 'equity and good conscience' test should be reviewed under an 'abuse of discretion' standard." *Cloverleaf Standardbred Owners Ass'n v. Nat'l Bank of Washington*, 699 F.2d 1274, 1276-77 (D.C. Cir. 1983) (R. Ginsburg, J., joined by Scalia, J.) (citing *Walsh v. Centeio*, 692 F.2d 1239, 1241-43 (9th Cir. 1982)).

This Court's decision in *Provident Tradesmens Bank*, *supra*, is not to the contrary. Although the Court balanced the Rule 19(b) factors *de novo*, the Rule 19(b) issues in that case were first raised in the court of appeals so there were no district court findings entitled to deference. 390 U.S. at 109. Here, where the district court took evidence and engaged in fact-finding in the first instance, the district court's determination is entitled to particularly wide latitude consistent with the "equity and good conscience" standard provided in Rule 19(b). *See Cloverleaf*, 699 F.2d at 1277 (stating that the "equity and good conscience" standard "'leaves the district judge with substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go

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United States, 343 F.3d 1282, 1289 (10th Cir. 2003); *United States v. Rigel Ships Agencies, Inc.*, 432 F.3d 1282, 1291 (11th Cir. 2005); *Bonzel v. Pfizer, Inc.*, 439 F.3d 1358, 1362 (Fed. Cir. 2006).

forward in the absence of someone needed for a complete adjudication of the dispute,'" quoting from 7 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1604 at 45-46 (1972)). *See also Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, 361 F.3d 359, 361 (7th Cir. 2004) (reviewing for abuse of discretion "[b]ecause of the looseness of the terms 'equity and good conscience' and because their applicability is to be determined in each case by weighing several factors with no weights indicated").

This Court emphasized in *Provident Tradesmens Bank* that the approach of a reviewing court post-trial is different from the analysis applied by the initial court, because "[a]fter trial, considerations of efficiency" such as "the time and expense" involved in the trial militate in favor of denying a Rule 19(b) motion. *Id*. at 111; *see also id.* at 112 (explaining that [o]n appeal . . . [the] interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations that would be required at an earlier stage" when the "only concern" was which forum to choose).

In the present case, to be sure, the court of appeals also did not address the standard of review, and its decision reflects a *de novo* balancing.[18] However,

[18] The Class preserved the issue of the correct standard of review, having argued their merits brief in the court of appeals for application of the Ninth Circuit's abuse of discretion standard. *See* Pimentel's Merits Brief in *Merrill Lynch v. ENC Corp*., Nos. 04-16503, 04-16538, 04-16503, filed 11/30/2004, at 17.

insofar as the court of appeals affirmed the judgment of the district court, the court of appeals' reasoning should be viewed as supplying alternative grounds and additional reasons for affirming the judgment.

B. The lower courts properly applied Rule 19(b) pursuant to the instructions of this Court in *Provident Tradesmens Bank*.

The lower courts interpreted and applied the language of Rule 19(b) of the Federal Rules of Civil Procedure by following this Honorable Court's decision in *Provident Tradesmens Bank*, 390 U.S. at 109 and 118, which instructed courts to look through the lens of "'equity and good conscience'" and to determine indispensability "'in the context of [this] particular litigation.'" Ct.Ap.Op., Pet.App. 4a-5a. This Court explained that a decision on whether a party is indispensable "must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Tradesmens Bank,* 390 U.S. at 118-19. The four factors listed in Rule 19(b) are directly fact-based, and so it is essential and inevitable that a court examine the practical issues related to a party's participation in a trial.[19] The court

[19] Contrary to Petitioners' contention, Pet.Br. at 34, the court of appeals *did not evaluate the merits of the Republic's asserted claim*, but instead *assumed the validity of the claim* and

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of appeals also followed the guidance provided by this Court in *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), which explained that the "equity" called for in Rule 19(b) requires courts to exercise "flexibility . . . marked by 'mercy and *practicality*.'" Ct.Ap.Op., Pet.App. 6a (emphasis added). This Court has explained that "[a] court of equity will strain hard" to avoid dismissal. *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936).

1. The Class would be prejudiced by a dismissal.

The Class of Human Rights Victims, which prevailed on the merits following years of hard fought and expensive litigation, would be severely prejudiced by a dismissal. The Class members, some of whom were tortured or summarily executed as early as 1972, have waited decades for relief, first to obtain their judgment and then to collect a portion of it. If the present claim were to be dismissed pursuant to the views of the Republic and the U.S. *amicus curiae* brief, the Class would have no alternate forum in which to pursue its claims, because it has no right to intervene in the Republic's forfeiture proceedings, and it would be obliged to sue Merrill Lynch, thus raising the same issues presented in this action.

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determined that even if it were valid the Republic was barred by the statute of limitations from pursuing the claim. Ct.Ap.Op., Pet.App. 8a.

Dismissal of this interpleader would also prejudice the interpleader plaintiff, Merrill Lynch. Merrill Lynch acted responsibly by initiating this interpleader and naming as "defendants-claimants" all individuals who had asserted any entitlement to the Arelma assets. Merrill Lynch Complaint, JA12-13. Merrill Lynch has been discharged from the litigation. Discharge Order, JA22. Dismissal of the entire interpleader after these many years of litigation would ensnare Merrill Lynch, the stakeholder, in costly and protracted future lawsuits.

By contrast, the Republic has no real negative consequences because it is still free to bring a claim against Merrill Lynch and it can pursue Marcos assets from numerous other sources in many other venues. As the court of appeals held after considering all litigation avenues open to the Republic, "[a]s a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets." Ct.Ap.Op., Pet.App. 7a. Merrill Lynch has conclusively demonstrated in its brief *amicus curiae* that any lawsuit that might be brought by the Republic against Merrill Lynch would be barred by a New York statute of limitations. Merrill Lynch Br. at 26-28. The Republic has been aware of the Arelma assets since 1986 but has yet to establish its right to these assets in any court in the world. Ct.Ap.Op., Pet.App. 7a. The court of appeals concluded that "[n]o injustice is done [to the Republic] if it now loses what it can never effectually possess." *Id.* at 9a.

2. The Republic is not bound by the judgment.

The Republic is expressly not bound by the interpleader judgment. *See Provident Tradesmens Bank*, 390 U.S. at 110; Ct.Ap.Op., Pet.App. 8a. No findings of fact or conclusions of law will bind it via *res judicata* or collateral estoppel. Tr.Ct. FOF/COL, Pet.App. 58a. As the court of appeals stated when it denied the Republic's second motion for reconsideration, the Republic's "fears of *res judicata* are baseless." Pet.App. 61a. Therefore, to the extent the shaping of the judgment could lessen the impact on the Republic, the lower courts have done so.

3. The judgment effects finality and gives Plaintiff Merrill Lynch an adequate remedy.

The final two enumerated factors in Rule 19(b) address the effectiveness of a final judgment from the standpoint of the plaintiff and the other litigants. Implicit in the Rule is the understanding that in the absence of a "necessary" or "required" litigant, finality may be imperfect. Therefore, Rule 19 asks whether the finality achievable without the missing litigant is "adequate" and whether dismissal will deprive the plaintiff of an adequate remedy.

Merrill Lynch, the plaintiff, answers unequivocally that the final judgment is adequate, and that it will have no remedy at all if this action is dismissed. Merrill Lynch Br. at 14 and 29. Notwithstanding the

possible future litigation the Republic might threaten, the judgment resolves entitlement to the Account assets as a practical matter. The likelihood that the Republic could prevail against Merrill Lynch in an action to recover the Account assets is so *de minimis* that Merrill Lynch is willing to accept that risk. As this Court stated in *Provident Tradesmens Bank*, there is "no reason . . . to throw away a valid judgment just because it [does] not theoretically settle the whole controversy." 390 U.S. at 116.

International treaty provisions will not undermine the adequacy of the judgment. Never invoked and never mentioned in the litigation until the Solicitor General's Statement of Interest, the application of the treaties is speculative. The Republic never sought the assistance of the United States under the Treaty on Mutual Legal Assistance in Criminal Matters ("MLAT"), Nov. 13, 1994, U.S.-Phil., S. Treaty Doc. No. 18, 104th Cong., 1st Sess. (1995), because it cannot satisfy the conditions precedent to invocation. The Republic must first obtain a judgment in its own courts establishing a right to the assets in which all claimants are heard. It has never undertaken such a procedure, despite extensive stays of the interpleader proceeding. Since the Class of Human Rights Victims, with a clear interest to the assets, are barred from the forfeiture proceeding, *see* Ct.Ap.Op., Pet.App. 10a; 2002 Ct.Ap.Op., Pet.App. 41a; Tr.Ct. FOF/COL, Pet.App. 59a, any forfeiture judgment obtained by the Republic as to the assets would be ineligible for

recognition by a United States court under MLAT. *See* 28 U.S.C. § 2467(C).

Nor has the Republic invoked the United Nations Convention Against Corruption, Oct. 31, 2003, GA Res. 58/4, which the United States ratified in 2006, two years after the judgment in this action. Questions of the Convention's retroactivity aside, the United States complied with its obligations thereunder since the Republic was permitted to participate in "a civil action," *i.e.*, the interpleader action, "to establish title to or ownership of property" allegedly stolen from it. *See* Convention, art. 53(a).

The final judgment is also adequate from the standpoint of the parties to the litigation. Although only one party prevailed – the Class – the interpleader finally resolved the parties' claims *inter se* to the Account assets, and the court of appeals affirmed the judgment on the merits. Though the parties other than the Class are disappointed with the outcome, they had full discovery and a fair opportunity to submit evidence and plead their claims.

4. Other factors support the Rule 19(b) determination.

The Republic's dilatoriness in seeking a judgment as to the Account assets is a factor both lower courts took into account. Both courts noted that the Republic has been aware of the Account assets since 1986 and even obtained a freeze order from a federal court in 1987. The Republic offers no explanation to this

Court why it has vigorously pursued litigation concerning other alleged Marcos assets in this country, but not the Arelma assets. Nor has it explained its unwillingness to participate in the instant interpleader (yet permitting PNB and Arelma to participate) while prosecuting over a dozen other lawsuits in United States courts – and participating in other interpleader actions.

The status of the Class members as adjudicated human rights victims is another factor taken into account by the lower courts. International treaties ratified by the United States require it to provide remedies for compensation to human rights victims. *See* International Covenant on Civil and Political Rights, art. 2(3), *supra*, and the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85. The interpleader serves precisely that purpose. The Republic has never compensated the Class members for the abuses they suffered, and has interfered with the Class members' attempts to enforce its judgment. Ct.Ap.Op., Pet.App. 10a; RA-12. Enabling victims of *jus cogens* violations of fundamental human rights to receive compensation for their suffering and loss, as required by international treaty law, could well be characterized as serving a public good and falling within the "public rights" exception to the indispensable party requirements. *See Conner v. Burford,* 848 F.2d 1441 (9th Cir. 1988) (weighing the claim of indispensability in light of the "public rights" exception and the fact that the

interests of the parties claiming to be indispensable had been protected by other parties in the litigation).

5. The Republic's sovereignty is a factor but not the sole or overriding factor.

Although sovereignty is not an enumerated factor in Rule 19(b), the lower courts appropriately considered it. The court of appeals referred to it as a "powerful consideration," but "not the sole consideration." Ct.Ap.Op., Pet.App. 7a. Before this Court, the Republic contends that foreign sovereigns have the absolute power to block all interpleader actions in United States courts involving assets they claim. Pet.Br. at 27 *et seq*. This contention is not supported by the *amicus curiae* brief filed by the Solicitor General, which recognizes the importance of the balancing approach under Rule 19(b) and agrees that proceedings can continue even if a sovereign claimant is absent. U.S. Br. at 21-22. Nor is support for this contention found in the text of the FSIA or Rule 19(b). Indeed, Petitioners fail to cite even one single case supporting the Rule 19(b) dismissal of an interpleader action based solely on the fact that a foreign sovereign has asserted immunity.[20]

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[20] Numerous cases can be cited where litigation has continued despite assertions of immunity by sovereign parties, including, *e.g., Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 1058 (N.Y. 2003) (ruling that although a tribe protected by sovereign immunity had interests

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The cases involving the immunity of the United States, the 50 states, and Indian tribes cited by the Republic are not analogous to the present situation, because Indian tribes, the 50 states, and the federal government operate within the jurisdiction of the United States and, if a case is dismissed after an assertion of sovereign immunity, other means exist to address and resolve the dispute. For example, in *Dawavendewa v. Salt River Project Agricultural Improvement and Power District,* 276 F.3d 1150, 1162-63 (9th Cir. 2002), which the Republic cites, the court dismissed the claim only after determining that three potential "viable alternative forum[s]" existed – a suit on behalf of the plaintiff brought by the United States, a suit brought on behalf of the plaintiff by the Equal Employment Opportunity Commission, and a suit by the plaintiff in tribal court.

Assertions of sovereignty coupled with indispensability arise in cases involving claims of immunity by the United States, the 50 states, and Indian tribes, and such evaluations are always fact-specific. Some involve claims brought by Native American tribes,

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that would be affected by the litigation, the tribe should not be deemed an indispensable party because that would leave the public with no effective remedy against constitutional violations and other abuses by the executive branch), and *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1118-20 (E.D. Cal. 2002), *aff'd on other grounds*, 353 F.3d 712 (9th Cir. 2003) (ruling that although the immune tribes "can claim a legal interest in this lawsuit," the claim could proceed without them because their interest would be represented by another party).

where the United States Government is the nonjoined party. Courts have often allowed such claims to proceed without the United States, and the courts have been particularly influenced by the potential consequence that the lawsuit could not be pursued and thus that the underlying dispute would continue to fester. In *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 460-61 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952), for instance, the court of appeals noted that "[m]ore than twenty years have elapsed and the United States has failed to bring an action, in behalf of the Nations," and that "[i]f we hold that the United States is an indispensable party, the Nations will be unable to prosecute a suit to establish their title to, and recover the possession and use of, their lands predicated upon an alleged cause of action which arose more than twenty years ago." *Id*. Even though proceeding with the suit might well require the defendants to undertake "the burden and expense of defending two lawsuits" (*i.e.*, a second one brought by the United States), the court ruled that "the equities presented by the situation and the inconveniences that will result . . . weigh heavily in favor of the Nations." *Id.* Similarly, in *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976), the court allowed an action brought by the tribe against the State of Rhode Island and other defendants to proceed even in the absence of the United States, which could not be sued because of its sovereign immunity.

Davis v. United States, 192 F.3d 951, 960 (10th Cir. 1999), relied upon by Petitioners, Pet.Br. at 32, 38, 43, is not to the contrary. There, the court of appeals remanded on the grounds that despite the absence of the tribe, tribal sovereign immunity did not necessarily make the tribe indispensable, and stated that sovereign immunity does "not abrogate the application of Rule 19(b), whose factors this court has applied to Indian tribes in several cases" (citations omitted). Similarly, in *Imperial Appliance Corp. v. Hamilton Manufacturing Co.*, 263 F. Supp. 1015 (E.D. Wis. 1967), the court allowed the action to proceed after determining that joinder was not feasible because there was no alternative forum in which plaintiffs could maintain the action against all interested parties. *See also Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1384 (10th Cir. 1997) (ruling that the United States was not an indispensable party); *Wyandotte Nation v. City of Kansas City, Kansas,* 200 F. Supp. 2d 1279, 1297-98 (D. Kan. 2002) (same); *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001) (holding that the tribe was not an indispensable party); *Sac and Fox Nation of Missouri v. Norton,* 240 F.3d 1250 (10th Cir. 2001) (same); *U.S. ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249 (8th Cir. 1998) (same); *Dairyland Greyhound Park, Inc. v. McCallum,* 258 Wis.2d 210, 655 N.W.2d 474 (Wis. 2002) (same).

Courts confronted with State assertions of Eleventh Amendment sovereignty coupled with indispensability in interpleader actions have rejected arguments

that actions should be dismissed altogether based on the immunity claim. These decisions emphasize a practical approach to rule 19(b). For example, in *Hudson Savings Bank v. Austin*, 479 F.3d 102 (1st Cir. 2007), the court of appeals addressed the problem raised by a claim of Eleventh Amendment immunity by Massachusetts in an interpleader action where the underlying issue was the relative priority of federal and state tax liens. This appellate court decided that a practical way around the immunity claim could be found by instructing the district court to stay the interpleader with regard to Massachusetts, to adjudicate "the main dispute between the two sovereigns," and then to remand "what was left of the interpleader action to the state court for resolution." *Id.* at 108. Similar outcomes were reached in *GE Capital Mortgage Services, Inc. v. Estate of Lugo*, 319 F. Supp. 2d 127, 134 (D.Mass. 2004) (finding, "after examining the alternatives . . . that 'proceeding to judgment . . . provides the most complete and efficient resolution of the controversy that is possible, with less danger of inconsistency than any other available course of action.'") and *Horizon Bank & Trust Co. v. Flaherty*, 309 F. Supp. 2d 178 (D.Mass. 2004), *appeal dismissed on other grounds*, 391 F.3d 48 (1st Cir. 2004).

When the litigant is a foreign government entitled to sovereign immunity, alternative means to resolve a dispute over assets within the United States do not exist, and a dismissal of the claim would leave the dispute unresolved. The approach urged by the Republic would permit any foreign sovereign to claim an interest in any litigation in the United States

without having to present any evidence whatsoever to support its claim, assert foreign sovereign immunity and indispensability – *again without having to present any evidence to support the claim* – and then completely bar adjudication of the dispute by U.S. courts, *even if the assets in dispute are unquestionably in the United States.* In the present case, the Republic's position would bar the claimants from any forum to pursue their claims *even though a U.S. court has in rem jurisdiction over the disputed assets.*

C. Balancing all factors, the lower courts properly held the Republic was not an indispensable party.

Both of the lower courts followed *Provident Tradesmens Bank* and balanced the pertinent factors separately. In written opinions, each court discussed the factors it considered. Both courts concluded, in equity and good conscience, that the Republic was not an indispensable party.

Petitioners and the United States place complete and undue emphasis on the Republic's foreign government status. Indeed, their analysis exemplifies the "inflexible approach" which the "[r]ule was designed to avoid." *Provident Tradesmens Bank*, 390 U.S. at 107. The fact that it is possible to weigh and balance the factors differently from the way in which the lower courts undertook the task is not a basis to overturn the ruling below. On this record, it cannot be said that the lower courts abused their discretion.

IV. This Case Will Not Adversely Impact United States Foreign Relations.

It is noteworthy that the *amicus curiae* brief filed by the United States makes no broad assertion that the present case will present significant difficulties with regard to any U.S. foreign policy interest or will undermine U.S. relations with the Philippines. The U.S. *amicus* brief focuses on technical issues relating to interpretations of Rule 19 and the application of principles of standing to the present case. Its "Argument" makes only passing reference to the Treaty on Mutual Legal Assistance in Criminal Matters and the UN Convention Against Corruption, which "contemplate cooperation" but have no direct relevance to the present adjudication.

The Republic's claim of a possible adverse impact on its relationship with the United States is overstated.[21] More than a dozen other cases in United

[21] The Republic's argument that distribution of the assets in the Account to poor Filipinos is an "affront [to Philippine] dignity and may affect our relations with [the U.S.]," Pet.Br. at 48, stands in stark contrast to its position regarding hearings conducted by the U.S. Congress on March 14, 2007 investigating hundreds of "extrajudicial" killings in the Philippines, which have been attributed to the Philippine military under the Arroyo administration. *See* http://foreign.senate.gov/hearings/2007/hrg 070314p.html. In an interview on March 11, 2007, the Philippines National Security Adviser, Norberto Gonzales, said "the inquiry was neither an affront to the country's sovereignty nor a breach of courtesy among nations." *See Palace Unfazed by US Hearing on Extrajudicial Killings, Philippine Daily Inquirer,* March 11, 2007, <http://newsinfo.inquirer.net> (and related

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States courts involving both the Republic and the Marcos assets have not adversely affected United States relations with the Philippines. Although Petitioners insinuate a lack of comity on the part of the United States courts, the opposite is true. At the outset of this case, the Republic engaged in forum and judge shopping, asserting its sovereign immunity only after losing its motions to transfer the case or recuse the judge. Although the Republic has known of the existence of the Account at Merrill Lynch since at least 1986, and obtained a federal court freeze order regarding these assets in 1987, *see* Exhibit 23, JA35, the Republic thereafter abandoned its interest in this Account and never pursued any recovery of it in either a Philippine or U.S. court until July 2004 – four days after judgment was rendered for the Class in the lower court. By seeking relief in a Philippine court following entry of the judgment, the Republic hoped to nullify the American judgment.[22] This lethargy does not

articles on March 15 and 16). Surely a country unfazed by U.S. Congressional hearings tying its leadership to mass killings (resulting in a reduction in foreign aid) cannot be overly sensitive to a judicial interpleader proceeding determining entitlement to assets of a former president (deceased while residing in Hawaii) that have been in the United States since 1972.

[22] The July 15, 2003 decision of the Philippine Supreme Court forfeiting the Swiss bank accounts made no mention of the Arelma funds on deposit with the United States court in Hawaii since the Republic never sought any relief as to those funds. *See* Tr.Ct. FOF/COL, Pet.App. 56a. The Republic's motion, pending in a lower Philippine court, seeks to reopen the Philippine Supreme Court decision which the latter Court had expressly declared final and executory.

comport with its grand assertions that the Account is "a matter of the greatest urgency," a "preeminent responsibility of the Philippine government," affecting its "vital national interests," and endangering its ability to "combat official corruption." Pet.Br. at 3 and 49.

The Republic's current position contradicts the official position it presented to the court of appeals in 1987, where it argued that the U.S. courts should "allow Plaintiffs . . . to present their evidence of gross human rights violations against Ferdinand Marcos and to pursue justice in U.S. District Court." *Amicus Curiae* Brief Filed in 1987 by the Republic of the Philippines in *Hilao v. Marcos*, No. 15039, RA-1. It also stated

> without hesitation or reservation that its foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts; and in fact, relations may well be improved if Filipino citizens see that justice is available in U.S. courts. The Philippine Government has previously expressed its deep concern to the U.S. Government about the need for a just solution to the present suits against ex-President Marcos. . . .

Id. at 11 (emphasis in original).

The U.S. courts acted in conformity with that request, and, after contentious adjudication, the

decision below provides the opportunity to provide modest compensation to the Victims who have suffered so much, and their heirs. This distribution will vindicate transcendent values shared by the United States, the Philippines, and indeed the entire world community. *See Sosa v. Alvarez-Machain*, 542 U.S. 694, 731-32 (2004) (indicating approval of the approach and analysis found in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and in *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994)); and *Sosa, supra*, at 728 (recognizing that the Torture Victim Protections Act of 1991, 106 Stat. 73, has provided "authority that 'establish[es] and unambiguous and modern basis for' federal claims of torture and extrajudicial killing").

It is also clear that the international community has reached agreement on the substantive principle that torture and extrajudicial murder by government officials are unlawful and "procedural agreement that universal jurisdiction exists to prosecute" those who commit such acts and that providing "universal tort jurisdiction" "will not significantly threaten the practical harmony that comity principles seek to protect." *Sosa*, 542 U.S. at 762 (Breyer, J., concurring). It would be a cruel irony if our courts, after acknowledging the legitimacy of such claims, adopted a rule on indispensability that effectively forecloses the ability of victims of human rights abuses ever to collect their judgments. In *In re Estate of Ferdinand Marcos Human Rights Litigation,* 94 F.3d 539 (9th

Cir. 1996), the court of appeals quoted from the Republic's 1987 *amicus* brief, noting that "the Republic's own subsequent actions" were interfering with the efforts of the Human Rights Victims to collect their judgment, *id.* at 547, and then explained that the Republic had "stated that [the Class of Victims] should be permitted to seek damages from *whatever assets the Estate [of Marcos] could establish as its own*." *Id.* (emphasis added). Allowing litigants to collect on their judgment against the assets of the tortfeasor is obviously an essential element to the vindication of these principles.

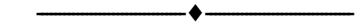
The objections raised by the Swiss Federation in its 2007 diplomatic note, *see* Pet. Reply App. 1a, are contrary to a diplomatic note Switzerland sent to the United States in 1994. In the 1994 note the Federation claimed the primacy of Swiss courts to make the initial adjudication of entitlement to Marcos assets located in Switzerland since its courts possessed *in rem* jurisdiction. Now Switzerland contends United States courts have no power to adjudicate entitlement to Marcos assets even though a United States court possesses *in rem* jurisdiction.[23] Counsel for the

[23] Switzerland also claims that the Account in the United States was subject to Switzerland's jurisdiction because the Swiss had confiscated the two Arelma share certificates and transferred them to the Republic. Switzerland's assertion of jurisdiction over the Arelma assets in the United States is a frontal attack on this Court's decision in *Dole*, 538 U.S. at 468, which held that a shareholder does not own or control the assets of the corporation.

Human Rights Victims requested the Swiss Embassy to explain this contradiction but it failed to do so. *See* RA-24.

The Swiss Federation's position is also undermined by the decisions of its own Supreme Court which permitted the return to the Philippines of Marcos funds located in Switzerland. *See In the Matter of The Swiss Federal Office of Police Matters v. Fondation Maler et al.*, 1A.91/1997/odi, at A16 (Dec. 19, 1997), JA64. Return of the funds was conditioned explicitly on the Republic's compensation of Filipino human rights victims, citing the Class' judgment. *Id*. at 84-86. As the court of appeals pointed out, the human rights victims have never been compensated. *See* Ct.Ap.Op., Pet.App. 9a-10a.

Although the present case involves a foreign government and international issues, it is essentially a case involving judicial procedure.



CONCLUSION

Both the irony and injustice in this case spring from a foreign sovereign's campaign to prevent its most abused and vulnerable citizens from recovering compensation on their judgment, rendered in a United States court, for *jus cogens* violations of human rights perpetrated by a former president of that sovereign. Petitioners advocate for a rule that would totally prevent courts from adjudicating disputes over assets, because they assert the right to block any

such adjudication merely by claiming the disputed assets, without having to present any evidence to substantiate their claim. Once Petitioners' position is understood, it becomes clear that it must be rejected.

For the reasons set forth above, this Court should dismiss the appeal of the nonparty Republic for lack of power to appeal, and dismiss the appeal of Arelma and PNB for mootness or lack of appellate standing. In the alternative, this Court should affirm the decision below that the Republic was not an indispensable party under Rule 19(b).

Respectfully submitted,

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Appendix A

[Filed in the Ninth Circuit in *Hilao v. Ferdinand Marcos et al*, No. 15039 (later MDL 840), 1987]

AMICUS BRIEF OF THE REPUBLIC OF THE PHILIPPINES

I.
INTRODUCTION

The Republic of the Philippines strongly urges this Honorable Court to reverse the July 18, 1986 decision of the U.S. District Court for the District of Hawaii in the cases of *Hilao, et al. v. Marcos, et al.,* Docket No. 86-2449 (hereafter "Hilao"), and *Trajano, et al. v. Marcos, et al.,* Docket No. 86-2448, 86-15039 (hereafter "Trajano"), and to allow the Plaintiffs in those two cases to present their evidence of gross human rights violations against Ferdinand Marcos and to pursue justice in U.S. District Court.

The District Judge ruled that these cases are "non-justiciable under the act of the state doctrine" because they "involve judicial review of the acts of the duly recognized head of a foreign sovereign committed under authority of law." Slip opinions, *Hilao* at 14, *Trajano* at 16. This conclusion characterizes the act of state doctrine in terms that are too broad and applies the doctrine incorrectly to these facts.

II.
THE DISTRICT COURT CHARACTERIZED THE ACT OF STATE DOCTRINE TOO BROADLY AND IGNORED THE RESPONSIBILITY OF COURTS TO DECIDE CASES INVOLVING AGREED PRINCIPLES OF INTERNATIONAL LAW.

The act of state doctrine is "compelled by neither international law nor the [U.S.] Constitution," but it has continued to play a significant role in the courts of the United States and some other countries because of "its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964). It does *not* foreclose judicial scrutiny of *all* acts of foreign governments, but only those on which no "agreed principle" exists or those that involve aspects of international law that "touch much more sharply on national nerves than do others." *Id.* at 428. The District Court apparently misinterpreted this doctrine by phrasing it as a *per se* rule that applies automatically. It should instead have carefully balanced the interests involved to evaluate whether it is appropriate to apply this doctrine to these causes.

If it had undertaken such a balancing approach, the District Court would certainly have concluded that the aspects of international law raised by these cases – whether a former head of state can commit illegal acts of torture and murder – is one on which an "agreed principle" exists. *See*, *e.g.*, *Filartiga v.*

Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) ("There is at present no dissent from the view that the guaranties [of international human rights and fundamental freedoms] include, at a base minimum, the right to be free from torture").

Furthermore, this question of the legitimacy of torture and arbitrary murder of citizens by governmental officials acting under color of law is not one that touches "national nerves" sharply.

The instant case indeed raises the issue of the State responsibility of the Philippine government not to its alien residents but to its very own nationals to protect themselves from peril to their lives and limbs and their property. Surely, American courts should not shield a former head of State of a foreign government from imputations of committing acts of torture against its own nationals under the guise of the act of state doctrine originally enunciated in *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 43 L.Ed. 456 (1897), and reiterated in *Detjen v. Central Leather Co.,* 1248 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918); *Ricaud v. American Metal Co. Ltd.,* 246 U.S. 304; 38 S.Ct. 312, 62 L.Ed. 733 (1918); *Banco Nacional de Cuba v. Sabatino*, *supra*.

In all of the aforecited cases, the Courts had stressed on the political considerations that could have affected the conduct of foreign relations of the government of the United States of America, i.e., offense to the foreign state. In the present case, the Philippine government would not in the very least be

offended if judicial inquiry is made on the participation of its former head of State in the commission of acts herein complained of.

This Honorable Court should not shy away from enforcing the international recognition of the essential rights of man to be free from harm to life and limb against higher authorities of his State.

Indeed, all nations have agreed repeatedly in recent years that torture and arbitrary murder by government officials are violations of international law. The Republic of the Philippines was, for instance, a sponsor of the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture, which states in Article 2:

> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

U.N. General Assembly Res. 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1976). The Republic of the Philippines also supported U.N. General Assembly Resolutions 35/170 and 35/178 on the "Code of Conduct for Law Enforcement Officials" and on "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." The Republic of the Philippines has signed the 1966 International Covenant

on Civil and Political Rights, which states in Article 7 that "No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment." Perhaps most significantly, the 1973 Constitution of the Republic of the Philippines specifically condemns torture in Article IV, Section 20:

> Any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right. *No force, violence, threat intimidation, or any other means which violates the free will shall be used against him.* (Emphasis added.)

The Republic of the Philippines has, therefore, joined forces with the other nations of the world to condemn torture and other arbitrary use of force against individuals. The United States has also been at the forefront of this movement. The U.S. State Department has repeated this commitment forcefully in recent years:

> Human rights is at the core of American foreign policy because it is central to America's conception of itself. This nation did not 'develop.' It was created in order to make real a specific political vision. It follows that 'human rights' is not something added on to our foreign policy, but its ultimate purpose: the preservation and promotion of liberty in the world.

U.S. State Department, *Country Reports on Human Rights Practices for 1983* at 1478 (Report submitted

to the House Foreign Affairs Committee and the Senate Foreign Relations Committee, 89th Cong., 2d Sess., Feb. 1984) (emphasis in original).

Because all nations have condemned torture and murder under color of law and the United States and the Philippines have worked together to establish the prohibition of torture and murder by governments of their citizens as a peremptory norm of international law, no judge need shy away from examining allegations that these clear principles of law have been violated. In these cases, there are disputes about what facts occurred, but there is no dispute about what standard of international law applies. The act of state doctrine exists in the United States to prevent judges from issuing opinions that may interfere with the foreign policy interests of the United States. It does not prevent judges from hearing complaints that allege that clear standards of international law – agreed upon by the United States and all other concerned nations – have been violated. The act of state doctrine should not, therefore, stand in the way of these cases being litigated in U.S. Courts.

III.
EVEN IF THE DISTRICT COURT'S CHARACTERIZATION OF THE ACT OF STATE DOCTRINE WERE CORRECT, THE APPLICATIN [sic] OF THE DOCTRINE TO THE FACTS OF THESE CASES IS INCORRECT BECAUSE THE TORTURE AND MURDER ALLEGED – ALTHOUGH COMMITTED UNDER COLOR OF LAW – WERE ILLEGAL.

As mentioned above, Article IV, Section 20 of the 1973 Philippine Constitution specifically prohibits torture or other use of force by government officials against Philippine citizens. The distinction between lawful and unlawful acts was clearly understood by the drafters of the 1973 Constitution and they took care not to immunize illegal governmental actions. (*See* Article VII, Section 15, of the 1973 Philippine Constitution, which immunizes ex-Presidents from suit only for "official acts" undertaken during their tenure.)

Besides, the immunity from suit invoked by defendant Ferdinand Marcos is not all absolute, but subject to the constitutional provision on accountability of public officers (1973 Constitution, Article XII, Sec. 1, *et seq*.), and other statutes penalizing acts of public officers in abuse of authority (Revised Penal Code, Article 203, *et seq*.) and Anti Graft and Corrupt Practices Act (Rep. Act No. 3019).

During the 1981 debates over amending the Constitution, it was said:

> [T]he government or its officials may not validly claim state immunity for acts they committed against a private party in violation of an existing law. They should be held responsible, for as the state can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful . . . is not the word or deed of the state but is the mere wrong and trespass of those persons who falsely speak and act in its name.

Deliberations at the Batasang Pambansa, Sinco, p. 33 (February 1981).

It is axiomatic in democratic governments that:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the government from the highest to the lowest are creatures of that law and are bound to obey it.

United States v. Lee, 106 U.S. 196, 220 (1982). The District Court thus mischaracterized the acts alleged to have occurred in this case when it concluded that they were committed "under *authority* of law." Slip opinions, *Hilao* at 14, *Trajano* at 16 (emphasis added). The complaints allege that these acts were committed under *color* of law, but no *authority* of law existed to justify the torture or murder of Philippine citizens by any official of the Philippine government.

This distinction was explicitly recognized by the U.S. Court of Appeals for the Fifth Circuit in a case involving the former head of state of Venezuela who

had sought refuge in the United States, but was subsequently accused of having committed financial improprieties while he was in office. *Jimenez v. Artisteguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963), *reh'ng denied,* 374 U.S. 858 (1963). *Jimenez* presented an argument similar to that made by Mr. Marcos, contending that he was charged with

> acts done in the exercise of or in color of his sovereign authority and by virtue of the law of nations as stated in *Underhill v. Hernandez,* 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456, [the] was entitled to be discharged from custody inasmuch as the judicial authorities cannot review the acts done by a sovereign in his own territory to determine illegality.

Id. at 557 (emphasis added). The court rejected this claim, stating that the acts Jimenez was alleged to have committed

> constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an 'Act of State.'

Id. at 558 (emphasis added). Ferdinand Marcos is accused of committing acts of violence similar in severity to the rape analogy used by the U.S. Court of Appeals for the Fifth Circuit. The same legal principles that applied to the deposed dictator Jimenez surely should also apply to ex-President Marcos. For

the same reasons that were persuasive to the court in *Jimenez*, Ferdinand Marcos should not be protected from civil liability by the act of state doctrine for acts like torture and murder.

IV.
CONCLUSION

The Government of the Republic of the Philippines is not directly involved in the *Hilao* and *Trajano* cases now before this Honorable Court. They have been brought by private Philippine citizens who allege that they – or their loved ones – have been physically mistreated by Ferdinand Marcos and his associates during the period Mr. Marcos was President of the Philippines. They brought their action in the U.S. District Court for Hawaii, because that is where Mr. Marcos has taken refuge. Service was perfected upon Mr. Marcos and jurisdiction has been established under the relevant U.S. statute (28 U.S.C. § 1350). Nonetheless, the U.S. District Court has blocked this litigation, concluding that the act of state doctrine prevents a U.S. court from adjudicating this matter.

The Government of the Republic of the Philippines respectfully urges this Honorable Appellate Court to reverse the District Court and allow Plaintiffs to present evidence in support of their claims. Because the international law principles are clear and agreed upon by all nations, this judicial action does not have the capacity of disrupting foreign

relations between the concerned countries. The Government of the Republic of the Philippines can state without hesitation or reservation that its foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts; and, in fact, relations may well be improved if Filipino citizens see that justice is available in U.S. courts. The Philippine Government has previously expressed its deep concern to the U.S. Government about the need for a just solution to the present suits against ex-President Marcos. *See* Opinion No. 34, S. 1986, Ministry of Justice, Republic of the Philippines, dated April 23, 1986, attached hereto as Exhibit A. The Philippine Government now respectfully requests this Honorable Court to allow the present suits to proceed to trial.

Respectfully submitted,

Makati, Metro Manila for Manila, Philippines.

NEPTALI A. GOZALES
Minister of Justice

Appendix B

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-ninth session

concerning

Communication No. 1320/2004**

Submitted by:	Mariano Pimentel et al. (represented by counsel, Mr. Robert Swift)
Alleged victim:	The author
State party	The Philippines
Date of communication:	11 October 2004 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Having concluded its consideration of communication No. 1320/2004, submitted to the Human Rights

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** The Following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke, Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Ms. Ruth Wedgwood.

Committee on behalf of Mariano Pimentel et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Meeting on 19 March 2007

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Mariano Pimentel, Ruben Resus and Hilda Narcisco, all Philippine nationals. The first author resides in Honolulu, Hawaii, and the others in the Philippines. They claim to be victims of violations by the Republic of the Philippines of their rights under article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 14, paragraph 1, of the Covenant. The Covenant and the Optional Protocol entered into force for the State party on 23 January 1987 and 22 November 1989, respectively. The authors are represented by counsel; Mr. Robert Swift of Philadelphia, Pennsylvania.

Factual Background

2.1 The authors claim to be members of a class of 9,539 Philippine nationals who obtained a final judgment in the United States for compensation against the estate of the late Ferdinand E. Marcos ("the Marcos estate") for having been subjected to torture during the regime of President Marcos.[1] Ferdinand E. Marcos was residing in Hawaii at the time.

2.2 In September 1972, the first author was arrested by order of President Marcos two weeks after the declaration of martial law in the Philippines. Over the next six years, he was detained for a total of four years in several detention centres, without ever being charged. Upon return from his final period in detention, he was kidnapped by solders [sic], who

[1] United States District Court in Hawaii, Estate of Ferdinand E. Marcos Human Rights Litigation, MDL No. 840 [The authors' names are not mentioned in the judgment. There is a list of around 137 randomly selected "class claims" and the compensatory damages awarded to them (ranging from US$ 10,000 to US$ 185,000) is specified. Judgment for compensatory damages was also awarded to victims in three of the remaining plaintiff subclasses "of all current citizens of the Republic of the Philippines, their heirs and beneficiaries, who between September 1972 and February 1986 were tortured summarily executed/ disappeared and are presumed dead, while in the custody of the Philippine military or para-military groups, in the aggregate of US$251,819,811.00, US$409,191,760.00 and US$94,910,640.00 to be divided pro-rata. Judgment for US$ 1,197,227,417.90 exemplary damages was also awarded to be divided pro rata among all members of the plaintiff class.]

beat him with rifles, broke his teeth, his arm and leg, and dislocated his ribs. He was buried up to his neck in a remote sugar cane field and abandoned, but was subsequently rescued.

2.3 In 1974, the second author's son, A.S., was arrested by order of President Marcos and taken into military custody. He was tortured during interrogation and kept in detention, without ever being charged. He disappeared in 1977. In March 1983, the third author was also arrested by order of President Marcos. She was tortured and gang-raped during her interrogation. She was never charged with nor convicted of any offense.

2.4 In April 1986, the authors, together with other class members, brought an action against the Marcos estate. On 3 February 1995, a jury at the United States District Court in Hawaii awarded a total of US$ 1,964,005,859.90 to the 9,539 victims (or their heirs) of torture, summary execution and disappearance. The jurors found a consistent pattern and practice of human rights violations in the Philippines during the regime of President Marcos from 1972-1986. Where individuals were randomly selected, part of the amount of the judgment is divided per claimant. Individuals, who were not randomly selected but are part of the class, including the authors, will receive part of the award which was made to three

subclasses.[2] However, the amounts were not divided per claimant and it is only after collection (in whole or in part) of the judgment amount that the United States District Court of Hawaii will allocate amounts to each claimant. On 17 December 1996, the United States Court of Appeal for the Ninth Circuit affirmed the judgment.[3]

2.5 On 20 May 1997, five class members, including the third author, filed a complaint against the Marcos estate, in the Regional Trial Court of Makati City, Philippines, with a view to obtaining enforcement of the United States judgment. The defendants counter filed a motion to dismiss, claiming that the PHP 400 (US$ 7.20) paid by each plaintiff was insufficient as the filing fee. On 9 September 1998, the Regional Trial Court dismissed the complaint, holding that the complainants had failed to pay the filing fee of PHP 472 million (US$ 8.4 million), calculated on the total amount in dispute (US$ 2.2 billion). On 10 November 1998, the authors filed a motion for reconsideration before the same Court, which was denied on 28 July 1999.

2.6 On 4 August 1999, the five class members filed a motion with the Philippine Supreme Court, on their

[2] The subclasses relate to those victims that had been (1) tortured, (2) summarily executed and (3) disappeared and are presumed dead.

[3] United States Court of Appeals for the Ninth Circuit, Hilao v. Estate of Marcos, 103 F.3d 767.

own behalf and on behalf of the class, seeking a determination that the filing fee was PHP 400 rather than PHP 472 million. By the time of submission of the communication to the Committee (11 October 2004), the Supreme Court had not acted on this motion, despite a motion for early resolution filed by the petitioners on 8 December 2003. (see para. 4 below for an update).

2.7 According to the authors, since the five class members filed their motion with the Philippine Supreme Court, the same Court entered judgement for the State party against the Marcos Estate in a forfeiture action and directed enforcement of that judgement for over US$ 650 million, even though that appeal was filed over two years after the authors' own petition.

The Complaint

3. The authors claim that their proceedings in the Philippines on the enforcement of the US judgement have been unreasonably prolonged and that the exorbitant filing fee amounts to a *de facto* denial of their right to an effective remedy to obtain compensation for their injuries, under article 2 of the Covenant. They argue that they are not required to exhaust domestic remedies, as the proceedings before the Philippine courts have been unreasonably prolonged. The communication also appears to raise issues under article 14, paragraph 1, of the Covenant.

The State party's submission on admissibility and merits

4. On 12 May 2005, the State party submitted that the communication is inadmissible for failure to exhaust domestic remedies. It submits that, on 14 April 2005, the Supreme Court handed down its decision in *Mijares et al. v. Hon. Ranada et al.*, affirming the authors' claim that they should pay a filing fee of PHP 410 rather than PHP 472 million with respect to their complaint to enforce the judgment of the United States District Court in Hawaii. The State party denies that the authors were not afforded an effective remedy.

The authors' comments on the State party's submission

5.1 On 12 January 2006, the authors submit that there has been no satisfactory resolution of their claims. They confirm that, on 14 April 2005, the Supreme Court decided in their favour with respect to the filing fee. However, despite the Supreme Court's view that there be a speedy resolution to their claim by the trial court, this court has not yet decided on the enforceability of the decision of the United States District Court of Hawaii.

5.2 In addition, the authors argue that an appeal in a parallel case, which is one year older than the

appeal in the current case has been pending for over seven years in the Philippine Supreme Court.[4]

Additional comments by the parties

6. On June 1, 2006, the State party submitted that, following the Supreme Court decision on the filing fee, the case was reinstated before the trial court. It adds that the authors of the current case are unrelated to the case referred to in paragraph 5.2.

7.1 On 15 June and 4 July 2006, in response to a request for clarification from the Secretariat regarding the authors' status as "victim[s]" for the purposes of article 1 of the Optional Protocol, the authors stated that a class action in the United States may be brought by any member of the class on behalf of a defined group, in this case, 9,539 victims of torture, summary execution and disappearance. All class members have standing in a class action once it is certified by a court and all have the right to share in a final judgement. A court is free to designate particular class members as "class representatives" for purposes of prosecuting the litigation, but the "class representative" has no more standing on his claim than any other individual class members. Thus, the

[4] This case relates to Imelda M. Manotoc v. Court of Appeals, which involves an interlocutory appeal from the lower court finding there was sufficient service on Imee Marcos-Manotoc, the daughter of Ferdinand E. Marcos, in an action to enforce a United States judgment against her for the torture and murder of a man.

use of different "class representatives" for the same class in lawsuits filed in the US and the Philippines has no bearing on the authors' standing. The Philippine rule on class actions is derived from and based on the United States rule.

7.2 According to the authors, in a class action filed in the United States, it is not common to file a list of all class members. In this case, where the public record could be inspected by the Philippine Ministry, which might act in reprisal against the living torture victims, caution was exercised. The authors, provide evidence to prove that they are members of the U.S. class action: an excerpt from Ms. Narcisco's testimony at the trial on liability in the United States; an excerpt from Mr. Pimentel's deposition in 2002 in the United States, and a United States judgement in which he was certified as a class representative in a subsequent case; and a claim form as required by the court with respect to M. Resus. The authors also confirm that there has been no action taken for the enforcement of the judgement.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or nor [sic] it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the claim relating to the enforcement of the United States District Court of Hawaii's judgement is currently pending before the State party's Regional Trial Court. Since the last hearing on the filing issue relating to this case, on 15 April 2005, in which the Supreme Court found in favour of the authors, the issue of the enforcement of the judgement has been reinstated before the Regional Trial Court. For this reason, and bearing in mind that the complaint relates to a civil claim for compensation, albeit for torture, the Committee cannot conclude that the proceedings have been so unreasonably prolonged that the delay would exempt the authors from exhausting them. Accordingly, the Committee finds that this claim is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.3 The Committee observes that since the authors brought their action before the Regional Trial Court in 1997, the same Court and the Supreme Court considered the issue of the required filing fee arising from the authors claim on three subsequent occasions (9 September 1998, 28 July 1999 and 15 April 2005) and over a period of eight years before reaching a conclusion in favour of the authors. The Committee considers that the length of time taken to resolve this issue raises an admissible issue under article 14, paragraph 1, as well as article 2, paragraph 3, and should be considered on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 As to the length of the proceedings relating to the issue of the filing fee, the Committee recalls that the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principle of fairness.[5] It notes that the Regional Trial Court and Supreme Court spent eight years and three hearings considering this subsidiary issue and that the State party has provided no reasons to explain why it took so long to consider a matter of minor complexity. For this reason, the Committee considers that the length of time taken to resolve this issue was unreasonable, resulting in a violation of the authors' rights under article 14, paragraph 1, read in conjunction with article 2, paragraph 3, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of

[5] *Perterer v. Austria, Communication No.1015/2001,* Views adopted on 20 July 2004, para. 10.7.

article 14, paragraph 1, read in conjunction with article 2, paragraph 3, as it relates to the proceedings on the amount of the filing fee.

11. The Committee is of the view that the authors are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy. The State party is under an obligation to ensure an adequate remedy to the authors including, compensation and a prompt resolution of their case on the enforcement of the US judgement in the State party. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to prove an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views

Appendix C

[Letterhead of Kohn, Swift & Graf, P.C.]

December 11, 2007

Ambassador Urs Ziswiler
Embassy of Switzerland
2900 Cathedral Ave. NW
Washington, DC 20008

Re: Republic of the Philippines v. Mariano J. Pimentel, United States Supreme Court, No. 06-1204

Dear Ambassador Ziswiler:

I wish to bring to your attention a matter of some urgency on behalf of the 9,539 Filipino human rights victims I represent in the above matter. On April 5, 2007 the Embassy of Switzerland submitted a diplomatic note to the United States Department of State intended for submission to the United States Supreme Court in the above matter.[1] Since the Embassy may participate as *amicus* in the merits briefing, I wish to bring to your attention inconsistencies in the position taken by the Embassy.

In the 1990's the victims sought to enjoin transfer of Marcos assets located in two Swiss banks,

[1] Regrettably, the submission of the note to the Court occurred well after the submission of the human rights victims' Opposition Brief, thus precluding any response by counsel for the victims. This appears to be a practice of the Embassy since it has recurred several times in different courts as the Embassy has regularly opposed the victims.

Swiss Bank Corporation and Credit Suisse, which had branches in the United States. The accounts at issue, however, were located at the banks' branches in Switzerland. Your Embassy sent a diplomatic note dated June 7, 1994 to the State Department asserting that "[u]nder international law, therefore, the United States courts lack jurisdiction to assert control over this property held in Switzerland." Your Embassy claimed that, initially, only Swiss courts could adjudicate ownership of these assets. Ultimately the injunction entered by the United States courts was not applied to the banks' branches outside the United States.

The above appeal involves a securities trading account at Merrill Lynch in New York which was established for Ferdinand E. Marcos in 1972 by a Swiss banker, Jean Louis Sunier, using a Panamanian corporation named "Arelma." The assets in this account have been in the United States for 35 years. In September 2000, at my request, Merrill Lynch deposited the assets from the Merrill Lynch account with the United States court in Hawaii and filed an interpleader action naming various parties with potential claims to the assets as defendants, including the Republic of the Philippines. The Republic voluntarily chose not to participate and was dismissed therefrom. The United States court found, after a full trial on the merits, that the victims were entitled to the assets in partial satisfaction of their 1995 judgment against the Estate of Ferdinand E. Marcos. Evidence adduced at the trial included the

testimony of Mr. Sunier and opinions of the Swiss Supreme Court finding that Arelma was a Marcos *alter ego*.

In your diplomatic note of April 5, 2007, you assert that United States courts do not have authority to determine legal entitlement to the assets. Yet this is directly contrary to the position the Embassy asserted in 1994 when it claimed the primacy of Swiss courts to make the initial adjudication of entitlement to Marcos assets located in Switzerland.

Switzerland's only other connection to this appeal is that Mr. Sunier retained the two "blank" Arelma stock certificates until these were confiscated from him in 1997. Switzerland gave these stock certificates to the Republic of the Philippines even though there was absolutely no evidence that Arelma had ever been owned by the Republic or was a Republic asset. Rather, it appears the transfer of the stock certificates was intended to permit the Republic to transfer the assets at Merrill Lynch outside the United States. Neither the human rights victims nor the United States courts interfered in any way in the questionable transfer of the certificates.

Your diplomatic note of April 5, 2007 fails to mention other pertinent matters such as:

- The duty of the United States under international treaties, to which Switzerland and the Republic are also signatories, to provide a forum for claims by human rights victims.

- The refusal of Swiss courts to honor letters rogatory requests of the United States court for documents that the human rights victims needed to prosecute their case against the Marcos Estate.
- Switzerland's failure to act on the decade-old ruling of its Supreme Court that compensation should be paid by the Republic to the victims.

Accordingly, I would appreciate you explaining in a letter to me the seeming inconsistent positions taken by your Embassy. In particular, please explain why Swiss courts have the right to adjudicate entitlement to assets located in Switzerland but United States courts do not have the similar right for assets located in the United States. While I have no desire to embarrass the Embassy before the United States Supreme Court, the Embassy's voluntary advocacy in opposing human rights victims may necessitate doing so, including placing this letter and your Embassy's 1994 diplomatic note into the record.

Respectfully yours,

Robert A. Swift

RAS:yr
Cc: US State Dept., Office of the Legal Advisor US Dept. of Justice, Office of the Solicitor General