

**WILLIAM TAN, JOAQUIN TAN LEH AND VICENTE TAN, PETITIONERS,
VS. HERNANI T. BARRIOS, IN HIS CAPACITY AS STATE PROSECUTOR,
DEPARTMENT OF JUSTICE, THE CITY FISCAL OF CAGAYAN DE ORO**

...

G.R. Nos. 85481-82. October 18, 1990

Ponente: GRINO-AQUINO, J.

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GRINO-AQUINO, J.:

On the basis of Proclamation No. 1081 dated September 21, 1972, then President Ferdinand E. Marcos, thru General Order No. 8 dated September 27, 1972, authorized the AFP Chief of Staff to create military tribunals "to try and decide cases of military personnel and such other cases as may be referred to them."

In General Order No. 21 dated September 30, 1972, the military tribunals, "exclusive of the civil courts," were vested with jurisdiction among others, over violations of the law on firearms, and other crimes which were directly related to the quelling of rebellion and the preservation of the safety and security of the Republic.

In General Order No. 12-b dated November 7, 1972, "crimes against persons x x x as defined and penalized in the Revised Penal Code" were added to the jurisdiction of military tribunals/commissions.

Subsequently, General Order No. 49, dated October 11, 1974, redefined the jurisdiction of the Military Tribunals. The enumeration of offenses cognizable by such tribunals excluded crimes against persons as defined and penalized in the Revised Penal Code. However, although civil courts should have exclusive jurisdiction over such offenses not mentioned in Section 1 of G.O. No. 49, Section 2 of the same general order provided that "the President may, in the public interest, refer to a Military Tribunal a case falling under the exclusive jurisdiction of the civil courts" and vice versa.

On April 17, 1975, the three petitioners, with twelve (12) others, were arrested and charged in Criminal Case No. MC-1-67 entitled. "People of the Philippines vs. Luis Tan alias Tata alias Go Bon Hoc, et al." before the Military Commission No. 1, for the crimes of:

(1) murder through the use of an unlicensed or illegally-possessioned firearm, penalized under Article 248 of the Revised Penal Code, in relation to Section 1, par. 6 of General Order No. 49, for the killing on August 25, 1973 of Florentino Lim of the wealthy Lim Ket Kai family of Cagayan de Oro City; and

(2) unlawful possession, control, and custody of a pistol, caliber .45 SN-1283521 with ammunition, in violation of General Orders Nos. 6 and 7 in relation to Presidential Decree No. 9.

The accused were:

1. Luis Tan alias Tata alias Go Bon Hoc
2. Ang Tiat Chuan alias Chuana

3. Mariano Velez, Jr.
4. Antonio Occaciones
5. Leopoldo Nicolas
6. Enrique Labita
7. Oscar Yaun
8. Joaquin Tan Leh alias Go Bon Huat alias Taowie
9. Eusebio Tan alias Go Bon Ping
10. Vicente Tan alias Go Bon Beng alias Donge
11. Alfonso Tan alias Go Bon Tiak
12. Go E Kuan alias Kunga
13. William Tan alias Go Bon Ho
14. Marciano Benemerito alias Marcing alias Dodong
15. Manuel Beleta, and
16. John Doe (Annex A, Petition).

(Names underlined are the petitioners herein.)

Because the case was a "cause celebre" in Cagayan de Oro City, President Marcos, pursuant to the recommendation of Defense Secretary Juan Ponce Enrile, withdrew his earlier order (issued in response to the requests of the defendants' lawyers) to transfer the case to the civil courts. Hence, the case was retained in the military court (Annexes A to C of Supplemental/Amended Petition, pp. 72-88, Rollo). All the accused were detained without bail in the P.C. Stockade in Camp Crame.

Upon arraignment on May 6, 1975, all the accused pleaded "not guilty." Manuel Beleta was discharged to be used as a state witness. He was released from detention on May 5, 1975 (p. 4, Rollo).

Almost daily trials were held for more than thirteen (13) months. The testimonies of 45 prosecution witnesses and 35 defense witnesses filled up twenty-one (21) volumes of transcripts consisting of over 10,000 pages (p. 75, Rollo).

On June 10, 1976, a decision entitled "Findings and Sentence," was promulgated by the Military Commission finding five (5) of the accused namely:

1. Luis Tan
2. Ang Tiat Chuan
3. Mariano Velez, Jr.
4. Antonio Occaciones, and
5. Leopoldo Nicolas

guilty of MURDER. Each of them was sentenced to suffer an indeterminate prison term of from seventeen (17) years, four (4) months, and twenty-one (21) days, to twenty (20) years.

A sixth accused, Marciano Benemerito, was found guilty of both MURDER and ILLEGAL POSSESSION OF FIREARM, and was sentenced to suffer the penalty of death by electrocution (Annex B, Petition).

Eight (8) of the accused, namely:

1. Oscar Yaun
2. Enrique Labita
3. Eusebio Tan
4. Alfonso Tan
5. Go E Kuan
6. William Tan (petitioner herein)
7. Joaquin Tan Leh (petitioner herein) and
8. Vicente Tan (petitioner herein)

were acquitted of the charges, and released on June 11, 1976 (p. 8, Rollo).

On January 17, 1981, Proclamation No. 2045 ended martial rule and abolished the military tribunals and commissions.

On May 22, 1987, this Court promulgated a decision in *Olague vs. Military Commission No. 34. et al.* (150 SCRA 144), vacating the sentence rendered on December 4, 1984 by Military Commission No. 34 against *Olague, et al.* and declaring that military commissions and tribunals have no jurisdiction, even during the period of martial law, over civilians charged with criminal offenses properly cognizable by civil courts, as long as those courts are open and functioning as they did during the period of martial law. This Court declared unconstitutional the creation of the military commissions to try civilians, and annulled all their proceedings as follows:

"Due process of law demands that in all criminal prosecutions (where the accused stands to lose either his life or his liberty), the accused shall be entitled to, among others, a trial. The trial contemplated by the due process clause of the Constitution, in relation to the Charter as a whole, is a trial by judicial process, not by executive or military process. Military commissions or tribunals, by whatever name they are called, are not courts within the Philippine judicial system. x x x.

"xxx xxx xxx.

"Moreover, military tribunals pertain to the Executive Department of the Government and are simply instrumentalities of the executive power, provided by the legislature for the President as Commander-in-Chief to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives. Following the principle of separation of powers underlying the existing constitutional organization of the Government of the Philippines, the power and the duty of interpreting the laws (as when an individual should be considered to have violated the law) is primarily a function of the judiciary. It is not, and it cannot be the function of the Executive Department, through the military authorities. And as long as the civil courts in the land remain open and are regularly functioning, as they do so today and as they did during the period of martial law in the country, military tribunals cannot try and exercise jurisdiction over civilians for offenses committed by them and which are properly cognizable by the civil courts. To have it otherwise would be a violation of the constitutional right to due process of the civilian concerned." (*Olague, et al. vs. Military Commission No. 34*, 150 SCRA 144, 158-160.)

In October 1986, several months after the EDSA revolution, six (6) habeas corpus petitions were filed in this Court by some 217 prisoners* in the national penitentiary, who had been tried for common crimes and convicted by the military commissions during the nine-year span of official martial rule (G.R. Nos. 75983, 79077, 79599-79600, 79862 and 80565 consolidated and entitled *Manuel R. Cruz, et al. vs. Minister Juan Ponce Enrile, et al.*, 160 SCRA 700). The petitioners asked the Court to declare unconstitutional General Order No. 8 creating the military tribunals, annul the proceedings against them before these bodies, and grant them a retrial in the civil courts where their right to due process may be accorded respect.

Conformably with the ruling in *Olague*, this Court in *Cruz vs. Enrile* (160 SCRA 700), nullified the proceedings leading to the conviction of non-political detainees who should have been brought before the courts of justice as their offenses were totally unrelated to the insurgency sought to be controlled by martial rule. The Court -

(1) granted the petition for habeas corpus and ordered the release of those of some who had fully served their sentences, or had been acquitted, or had been granted amnesty;

(2) dismissed the petitions of those who were military personnel; and

(3) nullified the proceedings against those who were convicted and still serving the sentences meted to them by the military courts, but, without ordering their release, directed the Department of Justice to file the necessary informations against them in the proper civil courts. The dispositive part of the decision reads:

"WHEREFORE, the petition is hereby GRANTED insofar as petitioners Virgilio Alejandrino,* Domingo Reyes, Antonio Pumar, Teodoro Patono, Andres Parado, Daniel Campus,** Reynaldo C. Reyes and Rosalino de los Santos*** are concerned. The Director of the Bureau of Prisons is hereby ordered to effect the immediate release of the above-mentioned petitioners, unless there are other legal causes that may warrant their detention.

"The petition is DISMISSED as to petitioners Elpidio Cacho, William Lorenzana, Benigno Bantolino, Getulio B. Braga, Jr., Tomas C. Amarte, Rogelio L. Caricungan, Ernesto Baradiel, Isabelo Narne, Eric F. Pichay, Pablo Callejo, Russel A. Paulino, Laurel Lamaca, Tirso F. Bala, Calixto Somera, Edulino Lacsina (Draftee), Ronnie A. Celiz, Elpidio Urbano, Sofronio Galo, Aquilino Leyran, Leopoldo Arcadio, Rolando Tudin, Rosendo I. Ramos, Pacifico Batacan, Edilberto Liberato, Jimmy C. Realis, Democrito Lorana who are all military personnel.

"As to the other petitioners, the Department of Justice is hereby DIRECTED TO FILE the necessary informations against them in the courts having jurisdiction over the offenses involved, within one hundred eighty (180) days from notice of this decision, without prejudice to the reproduction of the evidence submitted by the parties and admitted by the Military Commission. If eventually convicted, the period of the petitioners' detention shall be credited in their favor.

The Courts wherein the necessary informations are filed are DIRECTED TO CONDUCT with dispatch the necessary proceedings inclusive of those for the grant of bail which may be initiated by the accused." (*Cruz, et al. vs. Enrile, et al.*, 160 SCRA 700, 711-712.)

On September 15, 1988, Secretary of Justice Sedfrey Ordonez issued Department Order No. 226 designating State Prosecutor Hernani Barrios "to collaborate with the City Fiscal of Cagayan de Oro City in the investigation/reinvestigation of Criminal Case No. MC-1-67 and, if the evidence warrants, to prosecute the case in the court of competent jurisdiction" (Annex C, Petition). On November 15, 1988, State Prosecutor Barrios was designated Acting City Fiscal of Cagayan de Oro City in lieu of the regular fiscal who inhibited himself (p. 66, Rollo).

Without conducting an investigation/reinvestigation, Fiscal Barrios filed on December 9, 1988, in the Regional

Trial Court of Cagayan de Oro City two (2) informations for:

1. Illegal Possession of Firearm docketed as Crim. Case No. 88-824; and
2. Murder docketed as Crim. Case No. 88-825 against all the 15 original defendants in Criminal Case No. MC-1-67 including those who had already died* (Annexes D and E, Petition).

The State Prosecutor incorrectly certified in the informations that:

"this case is filed in accordance with the Supreme Court Order in the case of Cruz, et al. vs. Ponce Enrile in G.R. Nos. 75983, 79077, 79599, 79600, 79862 and 80565 as all accused are detained* except those that are already dead." (p. 7, Rollo.)

He recommended bail of P50,000 for each of the accused in the two cases (p. 8, Rollo). Later, he increased the recommended bail to P140,000 for each accused in the firearm case (Crim. Case No. 88-824). In the murder case (Crim. case No. 88-825), he recommended that the bail be increased to P250,000 for each of the accused, except Luis Tan, Ang Tiat Chuan, and Mariano Velez, Jr., for whom he recommended no bail. Still later, on October 28, 1988, he recommended no bail for all the accused (pp. 8-9, Rollo) because of the presence of two aggravating circumstances: (1) prize or reward; and (2) use of a motor vehicle (p. 65, Rollo).

Criminal Cases Nos. 88-824 and 88-825 of the RTC, Cagayan de Oro City, were assigned by raffle to the sala of RTC Judge Leonardo N. Demecillo. Before issuing warrants for the arrest of the accused, Judge Demecillo issued an order on October 26, 1988, requiring State Prosecutor Barrios to submit certified copies of "the supporting affidavits of the previous cases wherever they are now," and of the Supreme Court order "which is the basis of filing the above-entitled cases, within five (5) days from receipt" of his said order (Annex F, Petition). The State Prosecutor has not complied with that order for, as a matter of fact, there is no Supreme Court order to re-file the criminal cases against the herein petitioners and their twelve (12) co-accused in Crim. Case No. MC-1-67 of the now defunct Military Commission No. 1, because none of them, except Antonio Occaciones, were parties in the Cruz vs. Enrile habeas corpus cases (160 SCRA 700).

On November 7, 1988, William Tan, Joaquin Tan Leh and Vicente Tan filed this petition for certiorari and prohibition praying that the informations in Crim. Cases Nos. 88-824 and 88-825, and the order of respondent Judge dated October 26, 1988 be annulled, and that the public respondents or any other prosecution officer "be permanently enjoined from indicting, prosecuting and trying them anew for the offenses charged therein because they had already been acquitted of the same by Military Commission No. 1 in Crim. Case No. MC-1-67" (p. 23, Rollo).

On November 23, 1988, the First Division of this Court dismissed the petition for being premature as:

"x x x the petitioners have not yet filed a motion to quash the allegedly invalid informations in Criminal Cases Nos. 88-824 and 88-825 (Annexes D and E) whose annulment they seek from this Court (Sec. 3, Rule 117, 1985 Rules on Criminal Procedure). The filing in the lower court of such motion is the plain, speedy and adequate remedy of the petitioners. The existence of that remedy (which they have not yet availed of) bars their recourse to the special civil actions of certiorari and prohibition in this Court (Sec. 1, Rule 65, Rules of Court)." (p. 41, Rollo.)

Upon the petitioners' filing a motion for reconsideration informing this Court that the lower court had issued warrants for their arrest (p. 48, Rollo), we issued a temporary restraining order on January 16, 1989 enjoining the respondents from implementing the orders of arrest and ordering them to comment on the petition (p. 50, Rollo).

The petitioners allege that State Prosecutor Barrios exceeded his jurisdiction and gravely abused his discretion in

reprosecuting them upon the supposed authority of Cruz vs. Enrile for the following reasons:

1. The decision in Cruz vs. Enrile does not in fact direct the filing of informations by the Secretary of Justice against THOSE who, like the petitioners, WERE ACQUITTED after court martial proceedings during the period of martial law.
2. The decision in Cruz vs. Enrile does not apply to the petitioners who were not parties in that case, who were not heard, and over whom the court did not acquire jurisdiction.
3. The reprosecution of the petitioners would violate their right to protection against double jeopardy.
4. The State is estopped from reprosecuting the petitioners after they had been acquitted by the military tribunal which the State itself had clothed with jurisdiction to try and decide the criminal cases against them. The State may not retroactively divest of jurisdiction the military tribunal that tried and acquitted them (pp. 14-15, Petition).
5. The retroactive invalidation of the jurisdiction of the military court that acquitted the petitioners would amount to an ex post facto ruling (p. 81, Rollo, Supplemental Petition).
6. The information against the petitioners in Crim. Case No. 88-825 is null and void because it was filed without a prior preliminary investigation, nor a finding of probable cause, nor the written approval of the Chief State Prosecutor (Secs. 3 and 4, Rule 112, 1985 Rules on Criminal Procedure).

In his Comment dated February 1, 1985 (should be 1989), Fiscal Barrios disclosed that the information in Criminal Case No. 88-824 for illegal possession of firearm was "already withdrawn by the prosecution at a hearing on January 27, 1988" (should be 1989?) (pp. 66-68, Rollo). The reason for dropping the charge is not stated. It may be because Benemerito, the gunman who was convicted of this felony and sentenced to death by the Military Commission, is already dead - possibly executed. Hence, only the information for murder (Crim. Case No. 88-825) against the petitioners and twelve (12) others, including those already dead, is pending in the lower court (p. 37, Rollo). He defended the reprosecution of the petitioners on the ground that it will not constitute double jeopardy because the nullity of the jurisdiction of the military tribunal that acquitted them prevented the first jeopardy from attaching, thereby nullifying their acquittal. For the same reason, res judicata is not applicable. Neither prescription, because "it had been interrupted by the filing of the earlier charge sheets with the Military Commission" (p. 67, Rollo).

The Solicitor General, in his separate comment, argued that the proceedings involving civilians before a military commission were null and void because we ruled in Olaguer that military tribunals are bereft of jurisdiction over civilians, hence, their decisions, whether of conviction or acquittal, do not bar reprosecution for the same crime before a civil court (p. 102, Rollo).

The petition is meritorious. The public respondents gravely abused their discretion and acted without or in excess of their jurisdiction in misconstruing the third paragraph of the dispositive portion of this Court's decision in Cruz vs. Enrile as their authority to refile in the civil court the criminal actions against petitioners who had been tried and acquitted by Military Commission No. 1 during the period of martial law. It is an unreasonable application of Cruz vs. Enrile, for the decision therein will be searched in vain for such authority to reprosecute every civilian who had ever faced a court martial, much less those who had been acquitted by such bodies more than a decade ago like the petitioners Tan, et al. herein.

The decision in Cruz vs. Enrile would be an instrument of oppression and injustice unless given a limited application only to the parties/petitioners therein who sought the annulment of the court martial proceedings against themselves and prayed for a retrial in the civil courts of the criminal cases against them. They alone are

affected by the judgment in Cruz vs. Enrile, not all and sundry who at one time or another had been tried and sentenced by a court martial during the period of martial law.

Res inter alios judicatae nullum aliis praejudicium faciunt. "Matters adjudged in a cause do not prejudice those who were not parties to it." (54 C.J. 719.) It is a cardinal rule of procedure that a court's judgment or order in a case shall not adversely affect persons who were not parties to the self same case (Icasiano vs. Tan, 84 Phil. 860). Hence, this court's pronouncement in Cruz vs. Enrile nullifying the proceedings in military courts against the civilian petitioners therein and ordering the refiling of informations against them in the proper civil courts, may not affect the rights of persons who were not parties in that case and who, not having submitted to the court's jurisdiction, did not have their day in court (Busacay vs. Buenaventura, 94 Phil. 1033). Their reprosecution, based on the decision in Cruz vs. Enrile in which they took no part and were not heard, would be violative of their right to due process, the same right of the petitioners in Cruz vs. Enrile that this Court endeavored to protect when it nullified the proceedings against them in the military tribunals by applying the Olaguer doctrine that the trial of civilians by military process was not due process*.

There is, however, a perceptible lack of consistency in the application of the Olaguer doctrine to Cruz vs. Enrile which needs to be rectified. For, although the Court nullified the proceedings against the civilians-petitioners who were still serving their sentences after conviction by the military courts and commissions, and we directed the Secretary of Justice to file the necessary informations against them in the proper civil courts, we did not nullify the court martial proceedings against the other civilians?petitioners who: (1) had finished serving their sentences; (2) had been granted amnesty; or (3) had been acquitted by the military courts. We did not order their reprosecution, retrial, and resentencing by the proper civil courts. We set them free.

In effect, the Court applied one rule for those civilians who were convicted by the military courts and were still serving their sentences, and another rule for those who were acquitted, or pardoned, or had finished the service of their sentences. The Court applied a rule of retroactive invalidity to the first group (whom the Court ordered to be reprosecuted before the proper civil courts) and another of prospective invalidity for the others (whom the Court ordered to be released from custody).

In the interest of justice and consistency, we hold that Olaguer should, in principle, be applied prospectively only to future cases and cases still ongoing or not yet final when that decision was promulgated. Hence, there should be no retroactive nullification of final judgments, whether of conviction or acquittal, rendered by military courts against civilians before the promulgation of the Olaguer decision. Such final sentences should not be disturbed by the State. Only in particular cases where the convicted person or the State shows that there was serious denial of the Constitutional rights of the accused should the nullity of the sentence be declared and a retrial be ordered based on the violation of the constitutional rights of the accused, and not on the Olaguer doctrine. If a retrial is no longer possible, the accused should be released since the judgment against him is null on account of the violation of his constitutional rights and denial of due process.

It may be recalled that Olaguer was rescued from a court martial which sentenced him to death without receiving evidence in his defense. It would be a cruel distortion of the Olaguer decision to use it as authority for reprosecuting civilians regardless of whether, unlike Olaguer, they had been accorded a fair trial and regardless of whether they have already been acquitted and released, or have accepted the sentences imposed on them and commenced serving the same. Not everybody who was convicted by a military court, much less those who were acquitted and released, desires to undergo the ordeal of a second trial for the same offense, albeit in a civil court. Indeed, why should one who has accepted the justness of the verdict of a military court, who is satisfied that he had a fair hearing, and who is willing to serve his sentence in full, be dragged through the harrow of another hearing in a civil court to risk being convicted second time, perchance to serve a heavier penalty? Even if there is

a chance of being acquitted the second time around, it would be small comfort for the accused if he is held without bail pending the completion of his second trial which may take as long as, if not longer than, the sentence he has been serving or already served.

The trial of thousands of civilians for common crimes before military tribunals and commissions during the ten-year period of martial rule (1971-1901) which were created under general orders issued by President Marcos in the exercise of his legislative powers, is an operative fact that may not be justly ignored. The belated declaration in 1987 of the unconstitutionality and invalidity of those proceedings did not erase the reality of their consequences which occurred long before our decision in *Olague* was promulgated and which now prevent us from carrying *Olague* to the limit of its logic. Thus, did this Court rule in *Municipality of Malabang vs. Benito*, 27 SCRA 533, where the question arose as to whether the declaration of nullity of the creation of a municipality by executive order wiped out all the acts of the local government thus abolished:

"In *Norton vs. Shelby County*, Mr. Justice Field said: 'An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.' Accordingly, he held that bonds issued by a board of commissioners created under an invalid statute were unenforceable.

"Executive Order 386 'created no office.' This is not to say, however, that the acts done by the municipality of Balabagan in the exercise of its corporate powers are a nullity because the executive order 'is, in legal contemplation, as inoperative as though it had never been passed.' For the existence of Executive Order 386 is 'an operative fact which cannot justly be ignored.' As Chief Justice Hughes explained in *Chicot County Drainage District vs. Baxter State Bank*:

"The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton vs. Shelby County*, 118 U.S. 425, 442; *Chicago, I. & L. Ry. Co. vs. Hackett*, 228 U.S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects - with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.'

"There is then no basis for the respondents' apprehension that the invalidation of the executive order creating Balabagan would have the effect of unsettling many an act done in reliance upon the validity of the creation of that municipality." (*Municipality of Malabang vs. Benito*, 27 SCRA 533.)

The doctrine of "operative facts" applies to the proceedings against the petitioners and their co-accused before Military Commission No. 1. The principle of absolute invalidity of the jurisdiction of the military courts over civilians should not be allowed to obliterate the "operative facts" that in the particular case of the petitioners, the proceedings were fair, that there were no serious violations of their constitutional right to due process, and that the jurisdiction of the military commission that heard and decided the charges against them during the period of martial law, had been affirmed by this Court (*Aquino vs. Military Commission No. 2*, 63 SCRA 546) years before

the Olaguer case arose and came before us.

Because of these established operative facts, the refiling of the information against the petitioners would place them in double jeopardy, in hard fact if not in constitutional logic.

The doctrine of double jeopardy protects the accused from harassment by the strong arm of the State:

"The constitutional mandate is (thus) a rule of finality. A single prosecution for any offense is all the law allows. It protects an accused from harassment, enables him to treat what had transpired as a closed chapter in his life, either to exult in his freedom or to be resigned to whatever penalty is imposed, and is a bar to unnecessary litigation, in itself time-consuming and expense-producing for the state as well. It has been referred to as 'res judicata in prison grey.' The ordeal of a criminal prosecution is inflicted only once, not whenever it pleases the state to do so." (Fernando, *The Constitution of the Philippines*, 2nd Ed., pp. 722-723.)

Furthermore, depriving the petitioners of the protection of the judgment of acquittal rendered by the military commission in their particular case by retroactively divesting the military commission of the jurisdiction it had exercised over them would amount to an ex post facto law or ruling, again, in sharp reality if not in strict constitutional theory. "An ex post facto law or rule, is one which -

"1. makes criminal an act done before the passage of the law and which was innocent when done, and punishes such an act;

"2. aggravates a crime, or makes it greater than it was, when committed;

"3. changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed;

"4. alters the legal rules of evidence, and authorizes conviction upon less or different testimony than the law required at the time of the commission of the offense;

"5. assuming to regulate civil rights and remedies only, in effect imposes penalty or deprivation of a right for something which when done was lawful: and

"6. deprives a person accused of a crime of some lawful protection to which he has become entitled, such as the protection of a former conviction or acquittal, or a proclamation of amnesty." (In re: *Kay Villegas Kami, Inc.*, 35 SCRA 428, 431)

Article IV, Section 22 of the 1987 Constitution prohibits the enactment of an ex post facto law or bill of attainder.

We need not discuss the petitioners' final argument that the information against them is invalid because there was no preliminary investigation, no finding of probable cause by the investigating fiscal and no prior approval of the information by the City Fiscal before it was filed.

WHEREFORE, the petition for certiorari and prohibition is granted. Respondent State Prosecutor and the Presiding Judge of the Regional Trial Court, Branch 24, at Cagayan de Oro City, are hereby ordered to discharge the petitioners from the information in Criminal Case No. 88-825. The temporary restraining order which we issued on January 16, 1989 is hereby made permanent. No costs.

SO ORDERED.

Narvasa, Melencio-Herrera, Cruz, Paras, Feliciano, Gancayco, Padilla, Bidin, Sarmiento, Cortes, Medialdea, and Regalado, JJ., concur.

Gutierrez, Jr., J., see separate opinion.

Fernan, C.J., no part.

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- * Among whom were 157 civilians and 26 were confirmed to be military personnel.
 - * He had been granted presidential amnesty but was then still under detention (160 SCRA 706).
 - ** Reyes, Pumar, Patono, Parado and Campus had been acquitted but continued to be detained (160 SCRA 706).
 - *** Reynaldo C. Reyes and Rosalino de los Santos had fully served the sentences imposed by the military commissions (160 SCRA 706-707) but had not been released.
 - * Of the fifteen (15) persons charged in the two informations, five (5) have died, namely, Eusebio Tan, Alfonso Tan, and Go E Kuan (who had been acquitted by the military court), and Lepoldo Nicolas and Marciano Benemerito who had been convicted. Informations were filed against them by the State Prosecutor because allegedly, no evidence of their deaths could be found by him in the records of the military court nor has any so far been submitted (p. 65, Rollo). The causes of their deaths do not appear in the records before us, but it is possible that Benemerito, who was sentenced to death by the military commission, may have been executed already.
 - * In truth, only four (4) of the six (6) defendants who had been convicted are still detained. They are Luis Tan, Ang Tiat Chuan, Mariano Velez, Jr. and Antonio Occasionen. Two (2) of those convicted – Leopoldo Nicolas and Marciano Benemerito - died in detention. Those who were acquitted were released from custody upon the promulgation of the decision of the military court. Only Antonio Occasionen, among the six defendants who were convicted by the military court in Crim. Case No. MC-1-67, joined the 217 petitioners in "Cruz, et al. vs. Enrile," 160 SCRA 700 (p. 6, Rollo). The others did not.
 - * "The trial contemplated by the due process clause of the Constitution, in relation to the Charter as a whole, is a trial by judicial process, not by executive or military process." (Olaguer vs. Military Commission No. 34, 150 SCRA 144, 158.)
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SEPARATE OPINION

GUTIERREZ, JR., J.:

I am glad that the Court has adopted my dissenting opinion in Cruz, et al. v. Enrile (160 SCRA 700 [1988]) where I urged that the ruling in Olaquer, et al. v. Military Commission No. 34, et al. (150 SCRA 144 [1987]) should not be given any retroactive effect.

When a new Administration takes over the reins of Government, it may be so angry with perceived misdeeds of the past and so flushed with its power and popularity that it lashes out indiscriminately at everything it dislikes, ignoring many undesirable consequences that correctly raise constitutional questions. The 217 civilians charged with common crimes in Cruz v. Enrile should never have been tried by military tribunals while civil courts were open and fully functioning. However, we cannot ignore the fact that they were actually tried and convicted by military tribunals. Evidence was presented and on the basis of that evidence, the accused were convicted. There are things that took place in the past which in legal contemplation are null and void. But they have already taken

place and no amount of declaring them unconstitutional can wipe their effects clean from the slate as if the acts had never been done.

We now rule in this petition that Olaquer should be applied prospectively. What happens to the 90 convictions for murder, 21 for kidnapping, 5 for kidnapping with murder, 23 for robbery with homicide, 10 for frustrated or attempted murder or homicide, 20 for robbery, 4 for rape, 22 for illegal possession of firearms and one for abortion which the Court nullified in *Cruz v. Enrile*? Most of those convicted and serving sentence have been released and the filing of new prosecutions have been ordered. Shall the new prosecutions now stop and all the 217 petitioners be ordered recommitted to jail? If the new prosecutions will continue because that is the law of that case why should William Tan, Joaquin Tan Leh and Vicente Tan be treated differently? Why should the judgments of military tribunals involving civilians be valid for one group while invalid for another? Prospective for some and retroactive for others?

I am disturbed whenever I find myself and others in this Court inadvertently caught by inconsistencies. Consistency has an important purpose -- to maintain the record of this Court for stability and continuity especially in a period of transition.

Whenever venerable institutions are subjected to senseless and destructive assaults, when executive officers sweep away policies and personnel of former administrators, including those of their immediate predecessors under the very same, administration, and when so much disarray and indecision is evident, the Court's image of judiciousness and rationality becomes a stabilizing factor.

I concur in the Court's adoption of my dissent in *Cruz, et al. v. Enrile* but am disturbed by the new problems that it poses because of what we ordered in that decision.

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