

PROTECTING THE CHILDREN OF THE LOST*

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The International Convention for the Protection of All Persons from Enforced Disappearance¹ is one of the nine core human rights treaties of the United Nations.² It contains an absolute prohibition on enforced disappearance, creates conditions to help prevent its occurrence and establishes the Committee on Enforced Disappearances which monitors the implementation of the Convention through a variety of procedures.³ Article 25 of the Convention specifically addresses the related violation of wrongful removal of children.⁴

This essay critically examines this provision and the extent to which it promotes children's rights. It also considers the domestic situation and how

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¹ International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, art. 24(2) GA Res. 61/177 available at <http://www.unhcr.org/refworld/docid/47fdfaeb0.html> (Date last visited: Mar. 7, 2012). The Convention was opened for signature on Feb. 6, 2007 and entered into force on Dec. 23, 2010. (Hereinafter "Disappearances Convention")

² The others are the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Convention of the Rights of Persons with Disabilities.

³ I have commented on the substantive and remedial provisions of the Disappearances Convention in my thesis *On Locating the Rights of the Lost* available at <http://unsworks.unsw.edu.au/fapi/datastream/unsworks:9845/SOURCE02> (Date last visited: Feb. 8, 2012).

⁴ The Philippines however, is yet to ratify this treaty.

this protection is implemented in the Philippines. It concludes with an assessment of the level of protection that both article 25 and existing Philippine laws provide and suggests that ratification of the Convention and the adoption of appropriate domestic legislation are the way forward.

Enforced Disappearance

The wrongful removal of children is a violation intimately linked to enforced disappearance. The latter is a tool of repression widely regarded as one of the cruelest forms of human rights violations,⁵ where the victims are not just the persons who disappeared, but the family members who are denied the truth about their relatives, as well.

The concept of enforced disappearance is defined, in similar manner, in four different international documents. These documents include the UN Declaration on the Protection of All Persons from Enforced Disappearance,⁶ the Inter-American Convention on Forced Disappearance of Persons,⁷ the Rome Statute⁸ and the International Convention for the Protection of All

⁵ Reed Brody & Felipe González, *Nunca Más: An Analysis of International Instruments on "Disappearances"*, 19 HUM. RTS. Q. 365, 366 (1997).

⁶ Declaration on the Protection of All Persons from Enforced Disappearance, GA Res 47/133 of Dec. 18, 1992, 47th Sess., UN Doc A/RES/47/133, preamble (which provides that "persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law").

⁷ Inter-American Convention on Forced Disappearance of Persons, *adopted* Jun. 9, 1994, O.A.S. Doc. OEA/Ser.P/AG/Doc 3114/94, art. 2 (which provides that "forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees").

⁸ Rome Statute, Jul. 17, 1998, 2187 U.N.T.S. 3, art. 7(2) (which provides that "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those

Persons from Enforced Disappearance.⁹ According to these documents, enforced disappearance has three common elements:

- (1) involvement of government officials;
- (2) deprivation of liberty; and
- (3) refusal by the government to acknowledge the deprivation of liberty.

The perpetrators of enforced disappearances are generally agents of the State. Méndez and Vivanco¹⁰ describe them as mostly forming part of specialized units that make up highly secret bodies within the armed or security forces. These bodies typically have their own chain of command that directs them which ensures that its activities are not interfered with by governmental authorities. They arrest the victims and interrogate and torture them at secret detention centers free from judicial or other intervention. Some victims survive, but most do not. As soon as victims stop providing intelligence, the authorities kill them and dispose of the corpse in a way that ensures continued deniability.¹¹ Cassese¹² observes that enforced disappearances are often associated with “the pursuit of power by terror and elimination of political opposition.” Brody and González¹³ point out that disappeared persons are generally political opponents and members of grass-roots organizations who, as a consequence of the enforced disappearance, become subject to the whim of their captors. Aside from physical torture, psychological and sociological literature is instructive of how an enforced disappearance causes a greater incidence of affective disorders, pathological depressive and non-depressive grief, anxiety and post-traumatic stress disorder and greater degrees of

persons, with the intention of removing them from the protection of the law for a prolonged period”).

⁹ Disappearances Convention, art. 2 (which provides that “the arrest, detention, abduction or other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”).

¹⁰ Juan Méndez & Jose Miguel Vivanco, *Disappearances and the Inter-American Court, Reflections on a Litigation Experience* 13 HAMLINE L. REV. 508, 511 (1990).

¹¹ *Id.*

¹² Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT’L L. 144, 150 (1999).

¹³ Brody & González, *supra* note 5, at 366.

unconscious emotional disturbance over an extended period than extrajudicial killings.¹⁴

There has been a growing recognition of the nature of the enforced disappearance. In Resolution No. 33/173 entitled “Disappeared Persons” adopted on December 20, 1978, the UN General Assembly stated that it was “deeply moved by the anguish and sorrow” of disappeared persons’ relatives and “deeply concerned by reports from various parts of the world” of enforced disappearances.¹⁵ Meanwhile, the UN Declaration on the Protection of All Persons from Enforced Disappearance states “that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity.”¹⁶ It also illustrates the growing recognition of the nature of enforced disappearance. It specifically cites the “extreme seriousness” of the enforced disappearance and explicitly guarantees the right of every person not to be subjected to an enforced disappearance.¹⁷

Wrongful Removal of Children

The wrongful removal of children is a violation that takes place in the specific context of an enforced disappearance. It happens when an enforced disappearance leaves children in the custody of persons other than those to whom custody belongs. Central to this violation is the concealment of the children’s true identity.

¹⁴ See e.g., Luis Fondebrider, *Reflections on the Scientific Documentation of Human Rights Violations* 84 INT’L REV. RED CROSS 885, 885 (2002); Margriet Blaauw & Virpee Lahteenmaki, Denial and Silence or Acknowledgement and Disclosure 84 INT’L REV. RED CROSS 767, 770 (2002); A. Hussain et al., *Complicated grief in families of enforced disappearances* 25 (Supplement 1) (2010); Gregory Quirk & Leonel Casco, Stress Disorders of Families of the Disappeared: A Controlled Study in Honduras 39 SOC. SCI. & MED. 1674 (1994); Pau Pérez-Sales et al., *Long-term psychosocial consequences in first degree relatives of people detained disappeared or executed for political reasons in Chile. A study in Mapuche and Non-Mapuche persons* 12 PSICOTHEMA (SUPPLEMENT 109), 114-15 (2000); Deborah Munczek & Steven Tuber, *Political Repression and Its Psychological Effects on Honduran Children* 47 SOC. SCI. & MED. 1699, 1712 (1998).

¹⁵ General Assembly, 33rd Sess, preamble (Dec. 20, 1978) available at <http://www.un.org/documents/ga/res/33/ares33r173.pdf> (date last visited: Apr. 4, 2012).

¹⁶ Disappearances Convention, preamble.

¹⁷ Disappearances Convention, preamble, art. 1.

In its wake, the phenomenon of the enforced disappearance has spared neither pregnant women nor children.¹⁸ The Argentinian experience is illustrative of this matter. Between 1976 and 1983, Argentine military and police forces caused the disappearance of as many as 30,000 people, perceived as subversive to national security.¹⁹ These victims were kidnapped, tortured, and killed; and ultimately, their fate was hidden from their families and the world by burying their bodies in mass graves or throwing them into the sea.²⁰ Many of these disappeared persons had young children when they were abducted or were pregnant women who gave birth to infants while in captivity.²¹ It is estimated that as many as 450 children of disappeared persons were given or sold to childless military or police families, or otherwise wrongfully adopted by families whose knowledge of their origins ranged from innocence to willful ignorance to guilt.²²

The Philippines has had its own history of enforced disappearance and wrongful removal of children.²³ The case involving the enforced disappearance of University of the Philippines students Karen Empeño and Sherlyn Cadapan is disturbing on a number of levels, not the least of which is Cadapan's reported pregnancy during captivity.²⁴ Apart from what her fate is now, her reported pregnancy raises questions about the possible outcome of her pregnancy and, if allowed to come to full term, the fate of her child.

The wrongful removal of children adds to the serious nature of the denial of the truth that accompanies an enforced disappearance. Such wrongful removal can destroy families systematically and comprehensively. As the drafters of the Disappearances Convention observe, this wrongful removal involves the deprivation of a child's true identity in three situations: a) a child is

¹⁸ Victor Penchaszadeh, *Genetic Identification of Children of the Disappeared in Argentina* 52 JAMWA 10 (1997).

¹⁹ Laura Oren, *Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina* 14 HARV. HUM. RTS. J. 123, 123-24 (2001).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See e.g. *David v. Arroyo*, G.R. No. 171396, May 2, 2006; *Burgos v. Arroyo*, G.R. No. 183711, Jul. 5, 2011; *Secretary of National Defense v. Manalo*, G.R. No. 180906, Oct. 7, 2008; *Boac v. Cadapan*, G.R. No. 184461, May 31, 2011.

²⁴ *What Went Before: Abduction of UP students Karen Empeño and Sherlyn Cadapan*, Dec. 17, 2011 available at <http://newsinfo.inquirer.net/112599/what-went-before-abduction-of-up-students-karen-empeno-and-sherlyn-cadapan> (Date last visited: Mar. 26, 2012). See also *Boac v. Cadapan*, G.R. No. 184461, May 31, 2011.

subjected to an enforced disappearance; b) a child is detained with a parent subjected to an enforced disappearance; and c) a child is born to a disappeared mother during detention. The third situation has three components: (1) the failure to restore the child to the original family; (2) the manufacture of a false identity; and (3) the deprivation of the original family of their rights over the child.²⁵

In the secrecy and lawlessness of an enforced disappearance, the disappeared person is at the complete mercy of the perpetrators, and children become commodities that these perpetrators can easily give away or sell. As McCrory²⁶ states, the wrongful removal of children is “an especially disturbing practice.” Thus, in addition to the personal trauma, there are often highly complex legal matters especially when the child is brought up in another country from that in which he or she was born.²⁷

Disappearances Convention

The Disappearances Convention aims to address enforced disappearance and the range of issues attendant with it, among which is the wrongful removal of children. With regard to the wrongful removal of children, Article 25 of the Convention states:

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

(a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

(b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a) above.

²⁵ Commission on Human Rights, 60th Sess., Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of all Persons from Enforced Disappearance, UN Doc E/CN.4/2004/59, at 24, ¶ 139 (Feb. 23, 2004).

²⁶ Susan McCrory, *The International Convention for the Protection of All Persons from Enforced Disappearance*, 7 HUM. RTS. L. REV. 545, 559 (2007).

²⁷ *Id.*

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) of this article and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.

3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (a) of this article.

4. Given the need to protect the best interests of the children referred to in paragraph 1 (a) of this article and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance.

5. In all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.²⁸

Thus, for there to be wrongful removal of children in accordance with Article 25, two elements must concur:

- (1) Children have been subjected to enforced disappearance; (2) the children's father, mother or legal guardian is subjected to enforced disappearance; or (3) children are born during the captivity of a mother subjected to enforced disappearance.
- (2) The documents attesting to the true identity of these children are falsified, concealed or destroyed.

Article 25 also creates a range of obligations on States parties to the Convention. Some of these include the obligation to: (1) Prevent and punish the wrongful removal of children under their criminal law; (2) Search for and identify children wrongfully removed and return them to their families of

²⁸ Disappearances Convention, art. 25.

origin, in accordance with legal procedures and applicable international agreements; (3) Assist other States parties in searching for, identifying and locating wrongfully removed children; (4) Have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance; and (5) Take into account the best interests of the child as a primary consideration, and recognize the right of a child who is capable of forming his or her own views to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

The drafters of the Convention took note of the importance of addressing the issue of the wrongful removal of children. They appreciated the need to deal with situations in which the perpetrators of enforced disappearances appropriate disappeared children or the children of disappeared persons, as well as situations in which children are born while their mothers are the victims of enforced disappearances.²⁹ As observed, these children are subsequently given up for adoption and lose their identity.³⁰ Thus, the drafters sought among others, to incorporate an obligation on State parties to prevent and punish the wrongful removal of children³¹ with concomitant criminal sanctions,³² facilitate the children's return to the family of origin,³³ make provision for international cooperation mechanisms to locate and return children wrongfully removed,³⁴ deal with the question of the civil status of children wrongfully removed and the possibility of reviewing adoptions,³⁵ and consider the primary standard of the best interests of the child.³⁶

²⁹ Commission on Human Rights, 59th Sess., Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of all Persons from Enforced Disappearance, UN Doc E/CN.4/2003/71, at 18, ¶ 89 (Feb. 12, 2003).

³⁰ *Id.*

³¹ *Id.*

³² Commission on Human Rights, 61st Sess., Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of all Persons from Enforced Disappearance, UN Doc E/CN.4/2005/66, at 29, ¶ 116 (Mar. 10, 2005).

³³ *Id.*

³⁴ *Supra* note 29, UN Doc E/CN.4/2003/71 at 19, ¶ 89 (Feb. 12, 2003).

³⁵ *Id.*

³⁶ *Supra* note 32, UN Doc E/CN.4/2005/66, at 29, ¶ 119 (Mar. 10, 2005).

The Committee on Enforced Disappearances, in interpreting the Convention, with its reporting, individual communications, inter-state communications, urgent, inquiry and referral procedures,³⁷ is in a unique position to give further life and meaning to Article 25. Other treaty- and charter-based human rights bodies are also in a position to elaborate on and develop the prohibition of wrongful removal of children even more. For instance, the Committee against Torture published a draft General Comment that aims to explain and clarify the obligations of States parties under Article 14 of the Convention against Torture to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”³⁸ Paragraph 15 of this draft General Comment states:

Satisfaction and the right to truth

15. Satisfaction should include, by way of and in addition to the obligations of investigation and criminal prosecution under articles 12 and 13 of the Convention, any or all of the following remedies: “effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; an official declaration or a judicial decision restoring the dignity, the reputation

³⁷ Disappearances Convention, art. 29-34.

³⁸ The Committee against Torture invited comments on this draft (referred to as a Working Document) *available at* http://www2.ohchr.org/english/bodies/cat/comments_article14.htm (date last visited: Mar. 26, 2012). The Committee against Torture is the principal organ established by the Convention to oversee its implementation. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art 17, 1465 UNTS 85. The Convention entered into force on Jun. 26, 1987 and the Philippines became ratified the Convention in June 1986. The Philippines is a party to this Convention. The Committee against Torture is empowered to issue General Comments as part of its reporting procedure with a view to elucidate the text of the Convention. Accordingly, this power can leave little room for “loopholes and disingenuous interpretations.” *See* Antonio Cassese, *A New Approach to Human Rights: The European Convention for the Prevention of Torture*, 83 AM. J. INT’L L. 121, 129 (1989).

and the rights of the victim and of persons closely connected with the victim; public apology, including acknowledgement of the facts and acceptance of responsibility; judicial and administrative sanctions against persons liable for the violations; commemorations and tributes to the victims; inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

However, while the draft General Comment requires a search for the “identities of the children abducted,” it does not build and add substantively on the prohibition of the wrongful removal of children. It seems that the Committee against Torture has thus far missed out on an important opportunity to make a more substantive contribution to the development of this prohibition in international human rights law.

Philippine Laws

Philippine laws have only recently started addressing the matter of the enforced disappearance and the wrongful removal of children. There is, as yet, no domestic law clearly defining and punishing these human rights violations. While an assortment of laws may be brought to bear upon them, these laws still fall short of complete recognition of the rights not to be subjected to the enforced disappearance and to the wrongful removal of children.³⁹

The 1987 Philippine Constitution similarly makes no explicit reference to these violations. However, the protection can be inferred from its prohibition against “secret detention places, solitary, *incommunicado*, or other similar forms of detention.”⁴⁰ Moreover, the right to life and liberty,⁴¹ the right against unreasonable searches and seizures,⁴² the right not to be subjected to torture,⁴³ the right to family solidarity,⁴⁴ and the right of children to special

³⁹ For more information on this matter, see International Convention for the Protection of All Persons from Enforced Disappearance: Prospects and Challenges, a policy paper of the Institute of Human Rights of the University of the Philippines Law Center. I served as the lead writer of the paper.

⁴⁰ CONST. art. III, § 12(2). In carrying out an enforced disappearance and in wrongfully removing children, perpetrators resort to these forms of detention.

⁴¹ CONST. art. III, § 1.

⁴² CONST. art. III, § 2.

⁴³ CONST. art. III, § 12(2).

protection from all forms of neglect, abuse, cruelty, exploitation and other conditions prejudicial to their development⁴⁵ further gives protection against these specific violations.

Meanwhile, criminal statutes fail to completely comprehend the nature and effect of enforced disappearance and wrongful removal of children.⁴⁶ More specifically, the definitions of arbitrary detention, kidnapping and simulation of birth under the Revised Penal Code of the Philippines are inadequate in addressing enforced disappearances and the wrongful removal of children.

With regard to arbitrary detention, it is limited in its scope since it is only confined to a public officer who “without legal grounds, detains a person.”⁴⁷ It does not deal to any extent with the refusal by the government to acknowledge the deprivation of liberty, a central element of the enforced disappearance. Kidnapping is similarly confined in its scope to a person who “detains another.”⁴⁸ It likewise does not deal to any extent with the element of refusal by the government to acknowledge the deprivation of liberty. Besides, the perpetrator of a kidnapping is a “private individual,” unlike the perpetrator of an enforced disappearance who is an agent of the State. Lastly, the definition of simulation of births under Article 347 of the Penal Code does not take into account that the children have been subjected to enforced disappearance; or that their father, mother or legal guardian has been subjected to enforced disappearance; or they have been born during the captivity of a mother subjected to enforced disappearance.

Recent legislative enactments are likewise lacking in their efforts to address the occurrence of enforced disappearances and wrongful removal of children. Without laying down rules specific to these serious forms of harms, the new laws nonetheless provide a measure of protection. The Philippine Anti-Torture Act of 2009⁴⁹ defines and punishes torture,⁵⁰ including torture

⁴⁴ CONST. art. IV, § 1.

⁴⁵ CONST. art. IV, § 3(2).

⁴⁶ See Kirsten Anderson, *How Effective Is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance*, 7 MELB. J. INT'L L. 245, 265 (2006).

⁴⁷ REV. PEN. CODE, art. 124.

⁴⁸ REV. PEN. CODE, art. 267.

⁴⁹ Rep. Act No. 9745 (2009).

⁵⁰ The Committee against Torture considers the enforced disappearance as a form of torture. See Committee against Torture, Conclusions and Recommendations of the

against children⁵¹ and “confinement in solitary cells or secret detention places.”⁵² The Philippine Act on Crimes against International Humanitarian Law, Genocide, and Other Crimes against Humanity,⁵³ defines and punishes the enforced disappearance⁵⁴ as a crime against humanity.⁵⁵

In the absence of a law specifically dealing with the enforced disappearance and wrongful removal of children, the case involving the enforced disappearance of Sherlyn Cadapan, who was reportedly pregnant at the time of her disappearance, and Karen Empeño, led to the filing of kidnapping charges against M/Gen. Jovito S. Palparan, Jr. (ret), Lt. Col. Felipe G. Anotado, M/Sgt. Rizal C. Hilario and S/Sgt. Edgardo L. Osorio.⁵⁶ Other charges, which included Rape, Serious Physical Injuries, Arbitrary Detention, Maltreatment of Prisoners, Grave Threats, Grave Coercion, Violation of Republic Act No. 7438,⁵⁷ were no longer filed for a variety of reasons including

Committee against Torture: United States of America, UN Doc CAT/C/USA/CO/2, at 4, ¶18 (Jul. 25, 2006). For a similar finding that the enforced disappearance is a violation of the Convention against Torture, *see* Committee against Torture, Concluding Observations of the Committee against Torture: El Salvador, UN Doc CAT/C/SLV/CO/2, (Dec. 9, 2009); Committee against Torture, Concluding Observations of the Committee against Torture: Syrian Arab Republic, UN Doc CAT/C/SYR/CO/1 (May 25, 2010). *See also* Committee against Torture, Summary Record of the First Part (Public) of the 870th Meeting, UN Doc CAT/C/SR.870 (Apr. 29, 2009). For the Concluding Observations on Chad, *see* Committee against Torture, Concluding Observations of the Committee against Torture: Chad, UN Doc CAT/C/TCD/CO/1 (Jun. 4, 2009).

⁵¹ Rep. Act No. 9745, § 14(5) (2009) (which imposes the maximum penalty of *reclusion perpetua* on torture against children).

⁵² § 4(b)(3) of the Philippine Anti-Torture Act of 2009 considers it a form of “Mental/Psychological Torture ...calculated to affect or confuse the mind and/or undermine a person's dignity and morale.”

⁵³ Rep. Act No. 9581 (2009).

⁵⁴ Defined in § 3(g) as “the arrest, detention, or abduction of persons by, or with the authorization support or acquiescence of, a State or a political organization followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing from the protection of the law for a prolonged period of time.”

⁵⁵ To be punishable, it must be proven additionally under § 6 of Rep. Act No. 9581 that the enforced disappearance is “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”

⁵⁶ *Panel of Prosecutors Charges Palparan, et al., for Kidnapping and Illegal Detention of Sherlyn Cadapan and Karen Empeño*, Dec. 16, 2011, available at <http://www.doj.gov.ph/?page=news&newsid=89> (Date last visited: Mar. 31, 2012).

⁵⁷ This is the Act Defining Certain Rights of Persons Arrested, Detained or Under Custodial Investigation (1992)

lack of evidence. No charge relating to Cadapan's reported pregnancy was considered⁵⁸ however, presumably on account of the difficulty of proof.

The Philippine Rule on the Writ of *Amparo*,⁵⁹ and the Rule on the Writ of *Habeas Data*,⁶⁰ are not meant to address the enforced disappearance and the wrongful removal of children in a comprehensive manner. However, they provide additional protection against these violations.⁶¹ The Rule on the Writ of *Amparo* specifically applies to cases of extrajudicial killings and enforced disappearances and makes possible an order requiring a respondent government official to file a return explaining the steps or actions taken to determine the fate of the disappeared and the persons responsible, to recover and preserve evidence which may aid in the prosecution of the persons responsible, to identify witnesses and obtain statements from them, to determine the cause, manner, location and time of disappearance as well as any pattern or practice that may have brought about it, to identify and apprehend the persons involved, and to bring the suspected offenders before a competent court.⁶² It also offers different forms of interim relief such as a temporary protection order, inspection order, production order and witness protection order.⁶³

For its part, the Rule on the Writ of *Habeas Data* makes possible an order requiring a respondent government official to file a return containing these matters:

- (i) A disclosure of the data or information about the petitioner, the nature of such data or information, and the purpose for its collection;

⁵⁸ *Infra* note 66.

⁵⁹ A.M. No. 07-9-12-SC (hereinafter "RULE ON THE WRIT OF AMPARO") (2007).

⁶⁰ A.M. No. 08-1-16-SC (hereinafter "RULE ON THE WRIT OF HABEAS DATA") (2008).

⁶¹ But the Free Legal Assistance Group (FLAG) observes wide variances in the relief granted on account of a "lack of a common understanding of international human rights law, substantial evidence, the shifting of the burden of proof, extraordinary diligence, and the archival/dismissal of *Amparo* cases." FLAG points out the need to orient properly the Bench on *Amparo* and to strengthen the *Amparo* Rule by setting appropriate standards, prescribing clear procedures, using companion rules or guidelines, and establishing an effective enforcement and monitoring system. See Letter of the Free Legal Assistance Group (FLAG) urging the Supreme Court to revisit and enhance the Rule on the Writ of *Amparo* signed by Maria Socorro Diokno and dated Mar. 23, 2009.

⁶² RULE ON THE WRIT OF AMPARO, § 9(b), 9(d)(vi).

⁶³ § 14.

- (ii) The steps or actions taken by the respondent to ensure the security and confidentiality of the data or information; and
- (iii) The currency and accuracy of the data or information held.⁶⁴

If the allegations in the Petition for a Writ of *Habeas Data* are proven by substantial evidence, a court may order the deletion, destruction, or rectification of the erroneous data or information and grant other relevant reliefs as may be just and equitable.⁶⁵

In *Boac v. Cadapan*,⁶⁶ the court gave due course to an *Amparo* Petition involving Sherlyn Cadapan and Karen Empeño. While it ordered the release of the purported victims from detention, the failure of the respondent government officials to comply with the order of release made the victory of the victims' families in the case an empty one. The decision also failed to address Cadapan's alleged pregnancy. Furthermore, it demonstrated the limitation on the nature and scope of the relief provided by the Rule on the Writ of *Amparo* on account of its failure to surface the disappeared persons concerned and to sanction those responsible.

Conclusion

Article 25 of the Disappearances Convention is an advance in the law. It defines the wrongful removal of children and creates obligations on States parties to prevent and punish it as well as to take the appropriate measures to correct it. This provision is an important initial step that the Committee on Enforced Disappearances and other human rights bodies can further develop. As the drafters of the Disappearances Convention appreciated, a provision on the protection of children is an essential part of the Convention.⁶⁷ During the drafting sessions, the Mexican delegation, speaking also on behalf of the Group of Latin American and Caribbean States (GRULAC), went further by welcoming the manner by which the Convention tackled the problem of child victims of enforced disappearance as a significant achievement.⁶⁸

⁶⁴ RULE ON THE WRIT OF *HABEAS DATA*, § 10(3)(b).

⁶⁵ § 16.

⁶⁶ G.R. No. 184461, May 31, 2011.

⁶⁷ *Supra* note 29, UN Doc E/CN.4/2003/71, at 7 (Feb. 12, 2003).

⁶⁸ Commission on Human Rights, 62nd Sess., Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the

In contrast, Philippine laws dealing with the enforced disappearance and the wrongful removal of children are considerably less developed. The relevant domestic laws are not sufficiently particularized to address these violations. The absence of a statute defining and punishing them highlights the limitations of the law. While there is a growing recognition that these violations impinge on a range of rights guaranteed under Philippine laws, there remains less than full recognition of the rights not to be subjected to the enforced disappearance and to the wrongful removal of children.

The Disappearances Convention, with its express prohibition of the enforced disappearance and wrongful removal of children, represents a promising response to these violations. In providing for the manner by which these violations should be addressed from a legal perspective, it sets standards by which government officials should inform their responsibilities. There is potential for the development of Philippine laws, in accordance with the provisions of this Convention. Beyond a fundamental review of the relevant domestic laws, the way forward for the Philippines would include ratification of the Convention and adoption of legislation enforcing the rights guaranteed by it.

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