

THE DISPUTE OVER EXTRAJUDICIAL KILLINGS: THE NEED TO DEFINE EXTRAJUDICIAL KILLINGS AS STATE- SPONSORED ACTS*

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For several years, the Philippines has faced significant criticism from the international community, human rights groups and local civil society for the deaths of political activists, journalists and others that are the apparent work of elements of the military and the national police. Although the government has publicly denounced such killings, elements of the government have also repeatedly argued that extrajudicial killings should also comprise killings by non-state actors—specifically those by rebel groups. This has led to a dispute over how the State and civil society should define extrajudicial killings. This article argues that efforts against extrajudicial killings should rely on a definition of such killings as acts that are attributable to the State. Such definition would be consistent with principles of state responsibility under international human rights law. Guaranteeing human rights requires that acts of the State be treated distinctly from those of non-State actors. Moreover, treating acts by States distinct from those not by States serves the important practical purpose of facilitating prosecution by allowing for remedies that are tailored for state acts. As an illustration, this article draws on the jurisprudence of the Inter-American Court of Human Rights to propose that victims or their representatives be able to obtain civil redress under an altered burden of proof.

INTRODUCTION

The killing and enforced disappearances of political activists have long been part of modern Philippine life—certainly ever since the administration of President Marcos, during which period the Philippines was repeatedly criticized for the deaths of activists from the political left.¹ More recently during the

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administration of President Arroyo onward, from 2001 to the present, extrajudicial killings and enforced disappearances reemerged in Philippine public consciousness as a drastic rise in their number was reported.² Reports conflict on the number of victims.³ Some suggest that the number cannot be known.⁴ Most estimates, though, count them in the hundreds.⁵

Many credit an increase of killings during the Arroyo administration to its professed goal to eradicate the New People's Army (NPA)—the Communist Party of the Philippines' (CPP) armed wing.⁶ The NPA has been active since the 1970s and has engaged in on-again, off-again peace negotiations with the government since the administration of President Corazon Aquino.⁷ The Arroyo administration's anti-insurgency campaign swept broadly, targeting not only armed insurgents but also representatives from leftist political parties in the House of Representatives and members of civil society organizations that the military and police labeled, largely without substantiation, as insurgent fronts.⁸ In apparent accordance with the administration's determination that the political left was composed of enemies of the State, numerous organizers, activists, low-level elected officials, leaders

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¹ See Edy Kaufman & Patricia Weiss Fagen, *Extrajudicial Executions: An Insight into the Global Dimensions of a Human Rights Violation*, 3 HUM. RTS. Q. 81, 83 (1981) (listing the Philippines as one of the countries in which people have systematically been made to disappear by state actors only to be found dead later).

² See, e.g., Peter Ritter, *The Philippines' Disappearing Dissidents*, TIME, June 9, 2008, available at: <http://www.time.com/time/world/article/0,8599,1813070,00.html>.

³ HUMAN RIGHTS WATCH, SCARED SILENT: IMPUNITY FOR EXTRAJUDICIAL KILLINGS IN THE PHILIPPINES 25 (2007), available at <http://www.hrw.org/en/reports/2007/06/27/scared-silent-0> (observing that different NGOs have reported different numbers of victims).

⁴ AL A. PARREÑO, REPORT ON THE PHILIPPINE EXTRAJUDICIAL KILLINGS (2001-2010) 5 (2010).

⁵ In 2007, estimates ranged from 136, as reported by the Philippine National Police, to 724, as reported by the leftist NGO Karapatan or the Alliance for the Advancement of People's Rights. REPORT OF THE INDEPENDENT COMMISSION TO ADDRESS MEDIA AND ACTIVIST KILLINGS 1 (2007), available at <http://www.pinoyhr.net/reports/meloreport.pdf> [hereinafter "MELO REPORT"].

⁶ HUMAN RIGHTS WATCH, *supra* note 3, at 11.

⁷ *Id.*

⁸ Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report on Mission to Philippines, ¶¶ 13-16, Human Rts. Council, U.N. Doc. A/HRC/8/3/Add.2 (Apr. 16, 2008) (hereinafter "Alston Report").

of indigenous tribes, and even priests have been assassinated.⁹ Regrettably, extrajudicial killings have continued even after the end of the Arroyo administration and the election of “Noynoy” Aquino.¹⁰

Reports have identified members of the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP) as the largest bloc of perpetrators.¹¹ For its part, the government laid the blame largely upon the NPA, arguing that the deaths were the result of internal purges.¹² Both President Arroyo’s 2006 Melo Commission and Philip Alston, the United Nations’ former Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, rejected that theory.¹³ But despite increased international scrutiny, few have been prosecuted, and almost no one has been convicted.¹⁴ Impunity for perpetrators has led international aid groups and civil society organizations to attempt to find ways to improve capacity in government to successfully investigate and prosecute human rights violations.¹⁵

But a persistent obstacle in developing and implementing strategies against extrajudicial killings is disagreement over what constitutes an extrajudicial killing in the first place—one of the principal obstacles being

⁹ See AMNESTY INTERNATIONAL, WITNESSING JUSTICE—BREAK THE CHAIN OF IMPUNITY (2009); HUMAN RIGHTS NOW, REPORT ON EXTRAJUDICIAL KILLINGS AND ENFORCED DISAPPEARANCES IN THE PHILIPPINES: FACT FINDING MISSION OF HUMAN RIGHTS NOW TO PHILIPPINES 10-11 (2008).

¹⁰ AMNESTY INTERNATIONAL, PHILIPPINES: PROGRESS, STAGNATION, REPRESSION? THE STATE OF HUMAN RIGHTS IN THE PHILIPPINES UNDER AQUINO (2011) (“During President Aquino’s first year [in office], dozens of cases of extrajudicial executions have been reported in the Philippines.”); HUMAN RIGHTS WATCH, “NO JUSTICE JUST ADDS TO THE PAIN”: KILLINGS, DISAPPEARANCES, AND IMPUNITY IN THE PHILIPPINES 20-34 (2011) (detailing cases of extrajudicial killing occurring since the start of Aquino administration).

¹¹ See PARREÑO, *supra* note 4, at 12-14; HUMAN RIGHTS NOW, *supra* note 9, at 14.

¹² MELO REPORT, at 8-20.

¹³ MELO REPORT, at 53-54; Alston Report, at ¶¶ 28-29 (military in a “state of denial concerning the numerous extrajudicial executions in which its soldiers are implicated.”).

¹⁴ See AL. A. PARREÑO, KILLINGS AND DISAPPEARANCES IN A “JUST AND HUMANE SOCIETY” PHILIPPINES (2001 – AUGUST 2011) 70 (2011) (as of August 2011, only 5 out of 364 incidents of extrajudicial killings have terminated in convictions). See also PARREÑO, *supra* note 4, at 27.

¹⁵ See, e.g., THE ASIA FOUNDATION, STRENGTHENING HUMAN RIGHTS IN THE PHILIPPINES PROGRAM, QUARTERLY REPORT FROM THE ASIA FOUNDATION TO THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, 1 JANUARY TO 31 MARCH 2009 5-9, available at http://pdf.usaid.gov/pdf_docs/PDACO330.pdf (describing programs funded to address extrajudicial killings).

whether measures against extrajudicial killings, or whatever such killings are called,¹⁶ should be targeted at those by non-State actors such as the CPP-NPA in addition to State-sponsored killings. The military's favored position is that extrajudicial killings should comprise both State and non-State acts.¹⁷ The Supreme Court seems to support the view that including killings by both the State and non-State actors as extra-judicial killings would be "more balanced," and has included private parties and the State as potential respondents to its new writs of amparo and habeas data.¹⁸ But civil society working groups¹⁹ and Congress have not yet acted definitively to define extrajudicial killings. Some may be wary that the military's preference for the inclusion of acts by groups like the NPA would serve only to blunt efforts at investigating military abuses—as prior compromises have done.²⁰

¹⁶ While many civil society groups and journalists have used the term "extrajudicial killings," (see, e.g., TARGET EJK AND ENFORCED DISAPPEARANCES IN THE PHILIPPINES: A CONSENSUS-BUILDING, MEDIA REPORTING & RISK REDUCTION PROJECT, http://www.targetejk.net/index.php?option=com_content&view=article&id=50:working-together-to-define-and-address-extrajudicial-killings&catid=9:blogs&Itemid=16 [project by Institute for War and Peace Reporting to address extrajudicial killings and enforced disappearances]; Dennis Carcamo, *Rights groups: end extra-judicial killings, forced disappearances*, PHILSTAR.COM, June 17, 2010, <http://www.philstar.com/Article.aspx?articleId=585135&publicationSubCategoryId=200>; Nonoy Espina, *Arroyo fails to take steps to end extrajudicial killings*, INQUIRER.NET, July 25, 2006, http://services.inquirer.net/print/print.php?article_id=11686) the Supreme Court and the Executive have preferred to use the term "extralegal killing." See PHIL. SUP. CT., ANNOTATION TO THE WRIT OF AMPARO 1-3, available at http://sc.judiciary.gov.ph/Annotation_amparo.pdf (using the term "extralegal killing" to refer to "killings committed without due process of law, i.e. without legal safeguards or judicial proceedings."); Dep't of Justice, Dep't Ord. No. 848, Special Task Force to Address Extralegal Killings and Enforced Disappearances (2010).

¹⁷ See, e.g., Armed Forces of the Phil., Press Release, Captured Documents confirm Extra Judicial Killings ordered by CPP, Nov. 3, 2010, available at http://www.army.mil.ph/press_release/2010/031110.htm.

¹⁸ Felipe Enrique M. Gozon, Jr. & Theoben Jerdan C. Orosa, *Watching the Watchers: A Look Into the Drafting of The Writ of Amparo*, 82 PHIL. L.J. 8, 19 (2008). Phil. Sup. Ct., A.M. No. 07-9-12-SC (Sept. 25, 2007) (writ of amparo); Phil. Sup. Ct., A.M. No. 08-1-16-SC (Jan. 22, 2008) (writ of habeas data).

¹⁹ E.g., PROTOCOL OF ANDUROG KAN DERECHOS: A MULTI-SECTORAL QUICK REACTION TEAM FOR EXTRA LEGAL KILLINGS (ELK) AND ENFORCED DISAPPEARANCES (ED) IN THE PROVINCE OF ALBAY (2010) (providing for private and public cooperation to respond to killings by both state and non-state actors).

²⁰ See CRISELDA YABES, *THE BOYS FROM THE BARRACKS: THE PHILIPPINE MILITARY AFTER EDSA 64* (2009) (describing President Corazon Aquino's decision that the Commission on Human Rights should investigate both military and NPA abuses as contributing to the Commission's ineffectiveness).

The conflict over what constitutes an extrajudicial killing has meant that, despite the persistence of the problem, no legislation defines what it is. The absence of a uniform and accepted definition of the kinds of political killings occurring has served to create uncertainty among those seeking to end such acts. For instance, even though President Benigno Aquino III's administration ordered the creation of a Department of Justice task force to address killings and enforced disappearances,²¹ no guidelines have been issued that define what an extrajudicial killing is, leaving prosecutors in the dark as to the scope of what kinds of killings should be addressed as such. And uncertainty over the numbers of victims is the result, in part, of various sectors' conflicting definitions over what deaths count.

This article proposes that the government define extrajudicial killings as killings for which the State is responsible instead of defining them as acts committed by either State or non-State actors. Such a definition would be consonant with how international human rights law has come to define the spectrum of State responsibilities towards citizens and serve important practical purposes. Part I of this article provides a brief history of extrajudicial killings in the Philippines from the Marcos administration to the present and discusses responses to extrajudicial killings by the Philippine government. Part I also outlines the Supreme Court's decision in 2007 to include killings by non-State actors as possible extralegal killings under its new writ of amparo. Part II argues that the Supreme Court's interpretation of international human rights law with regard to whether non-State actors could be responsible for extrajudicial killings was erroneous. It does so by providing an overview of the history of the early development in the 1980s of the human rights prohibition against summary or arbitrary executions and describing the emerging consensus during that period on the nature of extrajudicial killings. The reports of the Special Rapporteur on Summary and Arbitrary Executions confirmed human rights organizations' characterization of extrajudicial killings as primarily State-sponsored acts with political motivations.

Part III then explains that although there is no international instrument that expressly defines an extrajudicial killing as a State act, such a definition is in accordance with the international understanding of the nature of extrajudicial killings and with State responsibility for the specific harms imposed upon victims when it kills unlawfully. Finally, Part IV responds to

²¹ Dep't of Justice, Dep't Ord. No. 848, Special Task Force to Address Extralegal Killings and Enforced Disappearances (2010).

arguments that measures on extrajudicial killings should treat killings by State and non-State actors without distinction on the grounds that not doing so would be to suggest that armed rebels are not culpable for human rights violations. Rather, treating acts by the State distinctly does not mean granting impunity to non-State actors because they would remain subject to international humanitarian and criminal law. Moreover, treating State actors distinctly may permit the fashioning of remedies that would be more effective at providing redress.

To that end, Part IV suggests legislative measures that may be taken through which civil compensation for victims of extrajudicial killings and their families may be provided more easily. Relying on the Inter-American Court of Human Rights' approach to extrajudicial killings and enforced disappearances, already accepted and used by the Supreme Court in its jurisprudence on the writ of amparo, this research paper suggests that a new civil cause of action be created or recognized specifically against State extrajudicial killings and enforced disappearances that lowers the burden of proof for plaintiffs when there has been a State practice to which a victim's killing or disappearance can be connected. Should a plaintiff meet that standard, the burden would then be placed upon the government to demonstrate that it is not responsible for the human rights violation. The provision of this remedy would allow speedier access to compensation and vindication for victims by dispensing with the prior requirement of criminal conviction by proof of guilt beyond reasonable doubt against state actor defendants. This remedy could complement criminal proceedings against defendants or provide an alternative when criminal proceedings are unavailing. Most importantly, this proposed remedy would penalize rather than reward the obstruction of the investigation and prosecution of human rights cases.

I. THE CONFLICT OVER DEFINING EXTRAJUDICIAL KILLINGS IN THE PHILIPPINES

A. History of Extrajudicial Killings in the Philippines

1. Rise of Human Rights Violations during the Marcos Years

Extrajudicial killings and other gross human rights violations in the Philippines emerged as a public phenomenon during the administration of

Ferdinand Marcos, especially during and after his imposition of martial law.²² Marcos declared martial law in 1972, lifting it in 1981.²³ Although he justified martial law as a necessary response to armed Communist rebels, his assumption of emergency powers was also a systemic assault against his political opponents and the press as well as the beginning of an intensified counterinsurgency campaign against various rebel groups.²⁴ Marcos's political opponents were murdered, disappeared, and/or tortured on a vast scale—a practice that would intensify even after martial law was officially lifted.²⁵ Targets included farmers, students, lawyers, journalists, tribal leaders, and academics.²⁶ The practice of “salvaging” became particularly widespread. “Salvaging” refers to the disappearance and summary execution of accused subversives by the military with “their bodies left where they will eventually be found.”²⁷

In addition to the targeting of political opponents and the media, the Marcos years saw an intensified counterinsurgency campaign that led to

²² Human Rights in the Philippines Hearing Before the H. Subcomm. on Human Rts. and Int'l Orgs. of the Comm. on Foreign Affs., 98th Cong., at 55 (1983) [hereinafter “Human Rights in the Philippines Hearing”] (Statement of Robert Youngblood, Assoc. Prof. of Political Sci. and Affiliate with the Cent. of Asian Studs., Arizona State Univ.). See also ALFRED W. MCCOY, *POLICING AMERICA'S EMPIRE: THE UNITED STATES, THE PHILIPPINES, AND THE RISE OF THE SURVEILLANCE STATE* 397-98 (2009) (recounting Marcos' turn from “constitutional authoritarianism” to extrajudicial executions in years after Martial Law). Serious human rights violations actually increased after martial law was lifted. See AMNESTY INT'L, *PHILIPPINES: UNLAWFUL KILLINGS BY MILITARY AND PARAMILITARY FORCES* 7 (1988).

²³ Human Rights in the Philippines Hearing, *supra* note 22, at 55 (Statement of Robert Youngblood, Assoc. Prof. of Political Sci. and Affiliate with the Cent. of Asian Studs., Arizona State Univ.).

²⁴ See *The Philippines: Marcos' Martial Law*, TIME, Oct. 2, 1972, available at <http://www.time.com/time/magazine/article/0,9171,906446-1,00.html>;

²⁵ Human Rights in the Philippines Hearing, *supra* note 22, at 4 (Statement of Hon. Elliot Abrams, Ass't Sec. of State, Bur. of Human Rts. and Humanitarian Aff.). See also *id.* at 55 (Statement of Robert Youngblood, Assoc. Prof. of Pol. Sci. and Affiliate with the Cent. of Asian Studs., Ariz. State Univ.), Marvin E. Frankel, Jack Greenberg & Diane F. Orentlicher, *The Philippines: A Country in Crisis – A Report by the Lawyers Committee for International Human Rights*, 15 COLUM. HUM. RTS. L. REV. 69, 70-84 (1983).

²⁶ Report of the Working Grp. on Enforced or Involuntary Disappearances, Jan. 26, 1981, ¶ 146, U.N. Doc. E/CN.4/1435 (1981); Human Rights in the Philippines Hearing, at 50 (Excerpt from REPORT OF AN AMNESTY INTERNATIONAL MISSION TO THE REPUBLIC OF THE PHILIPPINES, 11-28 NOVEMBER 1981).

²⁷ Human Rights in the Philippines Hearing, at 142 (Statement of William C. Wipfler, Director, Human Rts. Office Nat'l Council of Churches of Christ, U.S.A.).

numerous civilian deaths in areas where the New People's Army operated.²⁸ In addition to those killed by the regular military were those killed by paramilitary forces armed, supported or tolerated by the government.²⁹ These groups engaged in brigandage against civilians and other crimes like smuggling and murder for hire, in addition to being employed to kill the government's political opponents.³⁰ When the government was questioned about its or its adjuncts' killings, its standard responses included claiming that victims had died while attempting to escape from government custody, in armed encounters with the military, or had been assassinated by Communists—claims that were usually rejected.³¹

The rise in human rights violations during the Marcos era has been traced to a number of factors: (1) official orders from Marcos to detain suspects without warrants and in extralegal safe houses; (2) the enculturation of graduates from the Philippine Military Academy in a culture of "torture, corruption and impunity"; (3) Marcos' permissiveness with respect to military commanders' pursuit of Communists combined with competition amongst commanders for his favor; (4) and the transformation of anti-insurgency efforts into underground campaigns "spreading terror through arrests, salvaging and torture."³² Despite this strategy, the Marcos years saw a large increase in the numbers of armed rebel fighters and in their popular support.³³

The New People's Army was hardly innocent of murder either, dispatching "Sparrow" death squads into the cities to engage in assassinations and engaging in a "purge" in the 1980s in which it executed hundreds of its

²⁸ Human Rights in the Philippines Hearing, at 4 (Statement of Hon. Elliot Abrams, Ass't Sec. of State, Bur. of Human Rts. and Humanitarian Aff.).

²⁹ Justus M. van der Kroef, *Private Armies and Extrajudicial Violence in the Philippines*, 13 ASIAN AFF. 1, 2 (1986/1987).

³⁰ *Id.* at 2-9.

³¹ Frankel et al., *supra* note 25, at 85 fns. 62-63; Special Rapporteur on Summary and Arbitrary Executions, ¶ 193, Comm'n on Human Rts., U.N. Doc. E/CN.4/1983/16 (Jan. 13, 1983) (noting that, in some cases, victims who were said to have been killed in armed encounters were actually killed during peaceful gatherings or during protests against the government).

³² MCCOY, *supra* note 22, at 403-05.

³³ David Kowalewski, *Vigilante Counterinsurgency and Human Rights in the Philippines: A Statistical Analysis*, 12 HUM. RTS. Q. 246, 247 (1990).

own members.³⁴ However, even then, the government was seen as responsible for the bulk of human rights violations.³⁵

2. Extrajudicial Killings after Marcos: From Aquino to Arroyo

The fall of the Marcos regime in 1986 ended neither armed rebellions nor the political killings and enforced disappearances that had come to be associated with it. The succeeding administration of Corazon Aquino continued the practice of arming paramilitary groups, this time known as Citizen's Armed Forces Geographical Units or CAFGUs,³⁶ under direct military command, to which many human rights violations, including extrajudicial killings, were attributed.³⁷ Peace talks between the government and the CPP-NPA fell apart when the NPA rejected the Aquino administration's peace overtures, including offers of amnesty and the release of Communist Party leaders, and when it continued its armed campaign against the government.³⁸

In 1987, Aquino declared a "total war" against the NPA, against which the CAFGUs were released.³⁹ CAFGUs distributed "hit lists" of intended targets of violence, warning victims that they would be killed if they did not

³⁴ van der Kroef, *supra* note 29, at 3; Robert Francis Garcia, *Comrade Torturer*, PCIJ.ORG (Apr.-June 2001), <http://www.pcij.org/imag/SpecialReport/comrade.html>. See also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Dec. 23, 1992, ¶ 490, U.N. Doc. E/CN.4/1993/46 (by Bacre Waly Ndiaye) ("Acts of violence, including killings, are said to be perpetrated by liquidation squads of the NPA known as 'sparrow units', military rebel forces and Muslim separatist forces").

³⁵ Report of the Working Grp. on Enforced or Involuntary Disappearances, Jan. 26, 1981, ¶ 146, U.N. Doc. E/CN.4/1435 (1981).

³⁶ CAFGUs refer to cadres of officers and men in the active force and qualified reservists residing in the locality. The CAFGUs upon recommendation of the Secretary of National Defense and approved by the President may be called or mobilized to complement the operations of the regular force of the AFP or to support the regular force formations or units. This is the reserve force development program of the Armed Forces of the Philippines as authorized under Executive Order No. 264, Series of 1987. See PARREÑO, *supra* note 14, at 3.

³⁷ van der Kroef, *supra* note 29, at 1-2; Report of the Special Rapporteur on Summary or Arbitrary Executions, Jan. 23, 1990, ¶¶ 334-43, U.N. Doc. E/CN.4/1990/22 (by S. Amos Wako).

³⁸ van der Kroef, *supra* note 29, at 13-14.

³⁹ MCCOY, *supra* note 22, at 441-42.

cease political activities, and engaged in the actual murders of the victims.⁴⁰ Victims of extrajudicial killings included human rights activists, lawyers, members of the Church, and others.⁴¹ Aside from the CAGFUS, elite intelligence units allegedly engaged in covert assassinations.⁴²

Aquino's successor, President Fidel Ramos improved the Philippines' record on extrajudicial killings and other traditional human rights concerns.⁴³ Nonetheless, they continued, with most cases attributable to the CAGFUs, the military, and the police.⁴⁴ In particular, the Ramos administration's Presidential Anti-Crime Commission, led by then-Vice President Joseph Estrada, became notorious for the summary executions of criminal suspects with official sanction and with impunity.⁴⁵ The government did, however, reach a framework for peace negotiations with the Communist Party or National Democratic Front, decriminalized membership in the Communist Party,⁴⁶ and entered into a Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law ("CARHIHRL") with the CPP-NDF.⁴⁷

However, the CPP-NDF withdrew from peace talks in 2004 as President Gloria Macapagal-Arroyo's administration was roiled by an electoral

⁴⁰ Report of the Special Rapporteur on Summary or Arbitrary Executions, Jan. 23, 1990, ¶¶ 334-43, U.N. Doc. E/CN.4/1990/22.

⁴¹ *Id.*

⁴² MCCOY, *supra* note 22, at 442.

⁴³ Robert Weissman, "Development" And the Denial of Human Rights in Ramos's Philippines, 7 HARV. HUM. RTS. J. 251, 251 (1994). See also MCCOY, *supra* note 22, at 453 (describing Ramos' reforms of the Philippine National Police).

⁴⁴ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Dec. 7, 1993, ¶¶ 501-04, U.N. Doc. E/CN.4/1994/7; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Question of the Violation of Human Rights and Fundamental Freedoms, Dec. 14, 1994, ¶¶ 263-65, U.N. Doc. E/CN.4/1995/61.

⁴⁵ MCCOY, *supra* note 22, at 454-66.

⁴⁶ AMNESTY INTERNATIONAL, PHILIPPINES: POLITICAL KILLINGS, HUMAN RIGHTS AND THE PEACE PROCESS 5-6 (2006) (hereinafter "AMNESTY, PHILIPPINES: POLITICAL KILLINGS").

⁴⁷ Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law Between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, Mar. 16, 1998, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/PH/KAR_PHL_UPR_S1_2_008anx_02.pdf.

scandal that called her government's legitimacy into question.⁴⁸ The Arroyo administration, faced with military and popular discontent responded with a brief assumption of emergency powers directed against the CPP-NPA and discontented military officers.⁴⁹ It then launched what it called an "endgame strategy" against the CPP-NPA.⁵⁰ President Arroyo ordered the NPA's defeat by the end of her second term in 2010.⁵¹ The campaign against the NPA swept broadly. Among others, the government included leftist members of Congress who had been elected to represent leftist political parties as enemies of the State.⁵² Outside Metro Manila, extrajudicial killings dramatically rose in number. According to one estimate, the number of cases of extrajudicial killings in the country, excluding journalists, tripled in 2005 and 2006, rising to 63 and 68 respectively from 22 in 2004.⁵³

Special Rapporteur Philip Alston credited the rise to the government's decision to try to end the insurgency by attacking leftist civil society organizations.⁵⁴ Leftist activists and personalities, practically the sole victims of the killings,⁵⁵ were found to have been listed on military and police lists called "orders of battle."⁵⁶ The manner of killing was generally uniform: victims would be shot by one or two assailants who would sometimes engage in the shooting while on motorcycles.⁵⁷

Alston observed at least two different general typologies for such killings. In one province, the Armed Forces of the Philippines collect

⁴⁸ Paul D. Hutchcroft, *The Arroyo Imbroglio in the Philippines*, 19 J. DEMOCRACY 141, 144-49 (2008); AMNESTY, PHILIPPINES: POLITICAL KILLINGS, 7-8.

⁴⁹ Proc. 1017, Proclamation Declaring a State of National Emergency (Feb. 26, 2006), available at http://www.lawphil.net/executive/proc/proc_1017_2006.html.

⁵⁰ Fe Zamora, *Arroyo war 'end-game vs NPA: 'Oplan Bantay Laya to deliver final blow'*, PHIL. DAILY INQ., June 18, 2006, available at http://services.inquirer.net/print/print.php?article_id=5342.

⁵¹ Joel Guinto, *Arroyo orders 'war of rapid conclusion'*, PHIL. DAILY INQ., Jan. 8, 2009, available at <http://newsinfo.inquirer.net/breakingnews/nation/view/20090108-182241/Arroyo-orders-war-of-rapid-conclusion>.

⁵² See Alston Report, *supra* note 8.

⁵³ PARREÑO, *supra* note 4, at 17.

⁵⁴ Alston Report, *supra* note 8, at ¶ 11.

⁵⁵ MELO REPORT, *supra* note 5, at 5.

⁵⁶ Alston Report, *supra* note 8, at ¶ 17; Extrajudicial Killings in the Philippines: Strategies to End the Violence Hearing Before the S. Subcomm. on East Asian and Pac. Aff. of the Comm. on Foreign Relations, 110th Cong. 18 (2007) (Statement of T. Kumar, Advocacy Director for Asia and the Pac., Amnesty Int'l, USA).

⁵⁷ MELO REPORT, *supra* note 5, at 5; PARREÑO, *supra* note 14, at 49.

information about residents in particular areas to identify rebels or members of civil society organizations: those who cannot be persuaded to “surrender” from their suspected affiliation then become targets for an extrajudicial execution.⁵⁸ In another province, the AFP “systematically hunt[s]” down “leaders of leftist organizations” using torture and interrogation to identify targets who are usually eventually killed.⁵⁹

High-ranking officers, most notably then-General Jovito Palparan, Jr.,⁶⁰ made public statements appearing to condone or approve of human rights violations. Palparan went on record to state, among others, that: “the killing of activists is necessary incident to conflict”; “I encourage people victimized by communist rebels to get even”; and “I cannot order my soldiers to kill, it’s their judgment call, they can do it on their own.”⁶¹ Palparan, a division-level commander, has been implicated as being directly involved in cases of enforced disappearances and extrajudicial killings.⁶² And allegations of at least some official military involvement in extrajudicial killings have been supported with documentation.⁶³ Other high-level administration officials, even Cabinet members, made statements apparently supportive of the scope of the government’s counter-insurgency strategy.⁶⁴ But how high actual responsibility for the planning and ordering of extrajudicial killings goes remains unknown.⁶⁵

⁵⁸ Alston Report, *supra* note 8, at ¶¶ 19-20.

⁵⁹ *Id.* at ¶¶ 22-24.

⁶⁰ General Palparan was widely accused of responsibility for a number of extrajudicial killings in areas to which he had been assigned. Lira Dalangin-Fernandez, *Arroyo censures murders, praises Palparan*, PHIL. DAILY INQ., July 24, 2006, available at http://services.inquirer.net/print/print.php?article_id=11516. See also PARREÑO, *supra* note 4, at 18 (observing the high number of extrajudicial executions in places and times where Palparan served as commanding officer of the local infantry division).

⁶¹ MELO REPORT, *supra* note 5, at 17.

⁶² Secretary of Defense v. Manalo, G.R. No. 180906, Oct. 7, 2008 (en banc).

⁶³ See HUMAN RIGHTS WATCH, *supra* note 3, at 30-31 (reproducing a military identification card and secret order authorizing the distribution of a weapon to a soldier involved in an extrajudicial killing); see also HUMAN RIGHTS WATCH, *supra* note 10, *passim* (describing account by a military informant involved in extrajudicial killings of receipt of orders from “senior military commanders” to kill activists or hide their bodies). See also PARREÑO, *supra* note 14, at 86-88.

⁶⁴ Extrajudicial Killings in the Philippines: Strategies to End the Violence Hearing Before the S. Subcomm. on East Asian and Pac. Aff. of the Comm. on Foreign Relations, 110th Cong. 24 (2007) (Prepared Statement of T. Kumar, Advocacy Director for Asia and the Pac., Amnesty Int’l, USA).

⁶⁵ HUMAN RIGHTS WATCH, *supra* note 10, at 39.

President Arroyo and her chief military commanders have never been directly implicated in killings or disappearances.

The Arroyo administration's response to the rise of extrajudicial killings was to publicly censure the killings and to organize task forces and commissions,⁶⁶ though it saw little progress in terms of actual prosecutions and even less in terms of convictions.⁶⁷ Nevertheless, the Arroyo administration did see some positive developments. Extrajudicial killings, excluding killings of journalists, declined in 2007 and after.⁶⁸ The period also saw the finding of the government's independent Melo Commission that the government was responsible for extrajudicial killings and the Supreme Court's effort to address extrajudicial killings through the promulgation of the new writs of amparo and habeas data. In addition, the Arroyo period saw the passage of the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity⁶⁹ and the Anti-Torture Act.⁷⁰ Moreover, during the last few years of the administration, the country's Commission on Human Rights took a more active role in investigation human rights violations.⁷¹ But the 2010 massacre in Maguindanao province of 58 people by gunmen connected to a political family allied with her administration severely damaged Arroyo's reputation on human rights,⁷² as did continuing criticism from the

⁶⁶ The President created Task Force *Usig* (Prosecution) in 2006. In March 2007, the Department of Justice created a Task Force of Prosecutors on Human Rights and Extrajudicial Killings. In July 2007, President Arroyo directed coordination between concerned agencies with regard to the investigation and prosecution of political killings. In November 2007, the President created a Task Force 211 or the Task Force against Political Violence. Human Rts. Comm., Fourth periodic reports of States parties – Philippines, Jan. 20, 2011, ¶ 158, U.N. Doc. CCPR/C/PHL/4.

⁶⁷ PARREÑO, *supra* note 4, at 27-28. See also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Follow-up to Country Recommendations – Philippines, Apr. 29, 2009, ¶ 10, U.N. Doc. A/HRC/11/2/Add.8 (by Philip Alston) (hereinafter “Addendum to Alston Report”).

⁶⁸ PARREÑO, *supra* note 4, at 56-58; PARREÑO, *supra* note 4, at 17 (counting 68 cases of extrajudicial killings in 2006, 35 in 2007, and 15 in 2008).

⁶⁹ Rep. Act No. 9851 (2009).

⁷⁰ Rep. Act No. 9745 (2009).

⁷¹ See Addendum to Alston Report, *supra* note 67, at ¶ 25.

⁷² See generally HUMAN RIGHTS WATCH, “THEY OWN THE PEOPLE”: THE AMPATUANS, STATE-BACKED MILITIAS, AND KILLINGS IN THE SOUTHERN PHILIPPINES (2010). See also Margaret Harris Cheng, *World Report, Health workers detained in the Philippines*, 375 LANCET 628 (2010) (describing the detention of health workers taking part in a disaster relief first-responder capacity training by the military).

Special Rapporteur and human rights groups concerning the effectiveness of the administration's measures.⁷³

i. Melo Commission

The Independent Commission to Address Media and Activist Killings, popularly known as the “Melo Commission” after its chairman, retired Supreme Court Associate Justice Jose Melo, was created and tasked by President Arroyo to investigate extrajudicial killings in the wake of international criticism.⁷⁴ The administration-backed commission was received skeptically by some civil society groups, including Karapatan, a human rights organization that refused to participate in the Commission's proceedings.⁷⁵ Regardless, the Melo Report made several significant, if controversial, findings. The Report concluded that there was no “official or sanctioned policy on the part of the military or its civilian superiors to resort to . . . illegal liquidations” but that “there is certainly evidence pointing the finger of suspicion at some elements and personalities in the armed forces, in particular General Palparan, as responsible for an undetermined number of killings, by allowing, tolerating, and even encouraging the killings.”⁷⁶ The Report also concluded that the military's theory that extrajudicial killings were the work of an NPA purge “cannot be accorded credence.”⁷⁷ The evidence, though, was deemed insufficient to “support a criminal conviction.”⁷⁸

However, the Report speculated that military officers might be responsible for extrajudicial killings under a theory of command responsibility.⁷⁹ Accordingly, the Report also recommended that legislation be

⁷³ Addendum to Alston Report, *supra* note 67, at ¶¶ 9-12; HUMAN RIGHTS WATCH, *supra* note 3, at 2-4.

⁷⁴ President of the Philippines, Admin. Ord. No. 157 Creating an Independent Commission to Address Media and Activist Killings (Aug. 21, 2006), *available at* <http://www.humanrights.gov.ph/docs/AO157.pdf>; Aurea Calica, *GMA to form new commission to probe political killings*, PHIL. STAR, Aug. 18, 2006, *available at* <http://www.philstar.com/Article.aspx?articleId=353525&publicationSubCategoryId=63>.

⁷⁵ Wenna A. Berondo & Edwin Ian Melecio, *Human rights groups say Melo Commission a fraud*, THE FREEMAN, Sept. 03, 2006, *available at* <http://www.philstar.com/Article.aspx?articleId=356206&publicationSubCategoryId=107>; MELO REPORT, *supra* note 5, at 3.

⁷⁶ MELO REPORT, *supra* note 5, at 53.

⁷⁷ *Id.* at 54.

⁷⁸ *Id.* at 61.

⁷⁹ *Id.* at 61-66.

passed to impose “strict chain-of-command responsibility” with a focus solely on “extrajudicial killings and other offenses committed by personnel under their command, control or authority.”⁸⁰ It can be said, therefore, that the Melo Report suggested an approach to extrajudicial killing, in the contemporary context of these acts in the Philippines, that would treat State acts distinctly from non-State acts. But legislation in accordance with this proposal is yet to be passed.⁸¹

ii. The Supreme Court

In 2007, the Supreme Court hosted a summit on extrajudicial executions.⁸² Following this summit, the Court promulgated the writs of *amparo* and *habeas data*, which were intended to serve as protective tools against both extrajudicial executions and enforced disappearances.⁸³ The writ of *amparo* permits persons whose lives, liberty or security have been violated or are in danger of violation to seek protection or information from respondent parties.⁸⁴ The writ of *habeas data*, on the other hand, permits the issuance of writs against violations to rights to privacy, liberty or security.⁸⁵ Most importantly for the purposes of this article, both writs were expressly made available against private as well as public parties. In its annotation to the writ of *amparo*, the Supreme Court defined “extralegal killings”⁸⁶ as “killings committed without due process of law, *i.e.* without legal safeguards or judicial

⁸⁰ *Id.* at 76.

⁸¹ Bills filed on the subject include S.B. 1427, The Command Responsibility Act of 2007 (2007); H.B. 3259, An Act Punishing Military Commanders or Superiors for Crimes or Offenses Committed by Their Subordinates Under The Principle of Command Responsibility (2007); S.B. 2608, An Act Providing a Framework for the Observance of Command Responsibility in Government Service (2010).

⁸² Details about this summit and its material proceedings are available through the Supreme Court’s website under the title National Summit on Extra Judicial Killings, <http://sc.judiciary.gov.ph/publications/summit/>.

⁸³ Phil. Sup. Ct., A.M. No. 07-9-12-SC (Sept. 25, 2007) (Writ of Amparo); Phil Sup. Ct., A.M. No. 08-1-16-SC (Jan. 22, 2008) (Writ of Habeas Data).

⁸⁴ Phil. Sup. Ct., A.M. No. 07-9-12-SC (Sept. 25, 2007).

⁸⁵ Phil. Sup. Ct., A.M. No. 08-1-16-SC (Jan. 22, 2008).

⁸⁶ The Supreme Court adopted the term “extralegal killing” on the ground that this was in accordance with United Nations instruments. Phil. Sup. Ct., Annotation to the Writ of Amparo 3 fn. 10, *available at* http://sc.judiciary.gov.ph/Annotation_amparo.pdf. The United Nations, in fact, also uses the term “extrajudicial executions,” hence the term Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in use since 1992. U.N. Comm’n on Human Rts. Res. 1992/82 (Mar. 5, 1992).

proceedings.”⁸⁷ Such killings comprised killings without due process “regardless of the motive.”⁸⁸ This, the Court said, would be more “protective” of rights to life and liberty than a writ available against the government alone.⁸⁹

The idea that a writ against extrajudicial killings would be more protective of life than a writ tailored to government acts was not the only rationale proposed for the Supreme Court’s definition of extrajudicial killings as comprising both killings by State and non-State actors. Additional rationales, as recounted by two law clerks of then-Chief Justice Reynato Puno, included the interpretation of United Nations documents for the position that extrajudicial killings also comprised killings by non-State actors, and the argument that the extension of extrajudicial killings to non-State actors would be “more balanced” and less “one-sided.”⁹⁰ Indeed, according to them, the Supreme Court Committee on Rules deliberately adopted a definition of extralegal killing to be used in the writ of amparo that would include non-State actors so that the “definition of extrajudicial killings to include only government actors would be dissuaded.”⁹¹

Chief Justice Puno’s law clerks buttressed the argument that “extralegal killings” should include those by non-State actors with citations to two United Nations documents. Importantly however, of the documents cited, one was to a document other than that which it was represented to be—a one page administrative note by the Secretariat of the Commission on Human Rights on social and economic rights rather than a report of the Commission’s Working Group on Enforced or Involuntary Disappearances as was represented,⁹² and the other was a Report of the Secretary-General to the

⁸⁷ Phil. Sup. Ct., Annotation to the Writ of Amparo 3, *available at* http://sc.judiciary.gov.ph/Annotation_amparo.pdf.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Gozon & Orosa, *supra* note 18, at 19.

⁹¹ *Id.*

⁹² Gozon & Orosa cite to what they state is a Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1984/14, at 46 (1983). This document number actually leads to a note by the Secretariat of the Commission on Human Rights stating that the Special Rapporteur on the Prevention of Discrimination and Protection of Minorities would be making a report available on “the new international economic order and the protection of human rights.” Examination of the U.N. Working Group on Enforced or Involuntary Disappearance’s Reports for 1982, 1983 and 1984 to determine if these were the intended references does not show that these were the intended references either. Report of the Working Grp. on Enforced or Involuntary Disappearances,

Economic and Social Council on Extra-legal, Arbitrary and Summary Executions, which does not state that extralegal killings include those by non-State actors—only that they should be punished “wherever” they take place.⁹³ Actual international conceptualizations of extrajudicial, summary and arbitrary executions are discussed *infra* in Part II. An evaluation of the Supreme Court’s jurisprudence on the writ of amparo and a proposal to extend the Court’s evidentiary rulings with respect to the writ to civil actions for damages is provided *infra* in Part IV.

3. *Extrajudicial Killings under Benigno Aquino III*

Extrajudicial killings continue in the Philippines under the administration of Benigno Simeon Aquino III. Six cases of extrajudicial killings were reported in the first month of the new Aquino administration, and others continue to be reported.⁹⁴ By August 2011, there had been twenty-seven (27) incidents of extrajudicial killings committed under the watch of President Aquino.⁹⁵ This is despite Aquino’s campaign promises to protect human rights and to ensure justice for human rights victims.⁹⁶ As a matter of fact, at the time of writing, no person has yet been convicted for an extrajudicial killing committed during the Aquino administration.⁹⁷

II. THE DEVELOPMENT OF HUMAN RIGHTS PROHIBITION AGAINST EXTRAJUDICIAL KILLING

Because extrajudicial killings continue to go undefined in Philippine law and legislative measures specifically directed against extrajudicial killings

Jan. 21, 1983, U.N. Doc. E/CN.4/1983/14; Report of the Working Grp. on Enforced or Involuntary Disappearances, Dec. 9, 1983, U.N. Doc. E/CN.4/1984/21; Report of the Working Grp. on Enforced or Involuntary Disappearances, Jan. 23, 1985, U.N. Doc. E/CN.4/1985/15.

⁹³ The citation refers to the Report of the Secretary General: Extra-legal, Arbitrary and Summary Executions and Measures for Their Prevention and Investigation, U.N. Doc. E/AC.57/1988/5 (1988). Cf. David Weissbrodt & Terri Rosen, *Principles Against Executions*, 13 HAMLINE L. REV. 579, 582 (1991).

⁹⁴ AMNESTY INTERNATIONAL, PHILIPPINES: PROGRESS, STAGNATION, REPRESSION? THE STATE OF HUMAN RIGHTS IN THE PHILIPPINES UNDER AQUINO 3 (2011).

⁹⁵ PARREÑO, *supra* note 14, at 58-63.

⁹⁶ HUMAN RIGHTS WATCH, FALLING FAR SHORT: AQUINO’S FIRST YEAR AND HUMAN RIGHTS (2011).

⁹⁷ *Id.*

have not been passed, this part of the article provides an overview of the historical development and elaboration of the human rights prohibition against extrajudicial killings. This account reveals the development of a consensus that extrajudicial killings by the State were of principal international interest and the development of the view that killings by the State were distinct from killings by non-State actors. The latter development will be further discussed in Part III.

A. Early Stages: Growing International Concern

In 1948, the United Nations' Universal Declaration of Human Rights recognized, among others, the right of all persons to "life, liberty and security of person"⁹⁸ and the right against "arbitrary arrest, detention or exile."⁹⁹ Similar guarantees were embedded in the European Convention on Human Rights (1953),¹⁰⁰ the American Convention on Human Rights (1969),¹⁰¹ the International Covenant on Civil and Political Rights ("ICCPR") (1976),¹⁰² and the African Charter on Human and Peoples' Rights (1981).¹⁰³ Beginning in the 1980s, international concern grew over what had begun to be considered an epidemic of summary or arbitrary executions around the world.¹⁰⁴ Some reported the deaths in countries like Guatemala, Uganda, Chile, and Argentina to be in the tens of thousands.¹⁰⁵ The killings occurred in a variety of contexts

⁹⁸ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 3, U.N. Doc. A810 (Dec. 10, 1948).

⁹⁹ *Id.* at art. 9.

¹⁰⁰ Convention for the Protection of Human Rights and Fundamental Freedoms arts. 2, 5-6, Nov. 4, 1950, 213 U.N.T.S. 222. More popularly known as the European Convention on Human Rights, this convention provides that, "[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." *Id.* at art. 2(1). It also provides for a right to liberty and security, *id.* at art. 5, and a right to a fair trial. *Id.* at art. 6.

¹⁰¹ American Convention on Human Rights arts. 4, 7, Nov. 22, 1969, 1144 U.N.T.S. 123.

¹⁰² International Covenant on Civil and Political Rights arts. 3, 9, Dec. 16, 1966, 999 U.N.T.S. 171.

¹⁰³ African Charter on Human and Peoples' Rights arts. 4-12, June 27, 1981, 1520 U.N.T.S. 218.

¹⁰⁴ Matthew Lippman, *Government Sponsored Summary and Arbitrary Executions*, 4 FLA. INT'L. L.J. 401, 402-03 (1989). David Kramer & David Weissbrodt, *The 1980 U.N. Commission on Human Rights and the Disappeared*, 3 HUM. RTS. Q. 18, 18 (1981) (explaining that human rights groups began publicizing the issue of disappearances between 1979 and 1980).

¹⁰⁵ Kaufman & Fagen, *supra* note 1, at 81.

and through a variety of practices: from the public execution of dissidents and the display of their bodies in Ethiopia, to on-the-spot executions by military officers in Chile, to claims by the Philippine Constabulary that dead civilians had been killed in combat.¹⁰⁶ While the modern world had certainly seen its share of State killings, before and during the Second World War, the new spate of killings and enforced disappearances was different and unprecedented because of systematic use by States and their agents of murder and disappearances as a means of political survival.¹⁰⁷ Although there were some successes by States in bringing responsible parties to justice,¹⁰⁸ the General Assembly's issuance of resolution after resolution decrying worldwide executions and calling on governments to end arbitrary or summary executions suggests that these victories were few.¹⁰⁹

Growing international attention towards extrajudicial killings and enforced disappearances also unavoidably gave rise to questions concerning what such killings and disappearances actually were, and whether they had common or universal characteristics. Human rights advocates tended to answer in the affirmative, sometimes arguing that an examination of actual cases showed, if anything, a surprising degree of commonality.¹¹⁰ They tended to point to two defining characteristics: (1) the element of State involvement; and (2) the political motivation of the violations.¹¹¹ Amnesty International defined State involvement and political motivation as the "essential difference" between ordinary crimes like kidnappings or disappearances from acts like

¹⁰⁶ *Id.* at 82-88.

¹⁰⁷ *Id.* at 81.

¹⁰⁸ A prominent example is the Argentine judiciary's finding that the country's prior military leaders were responsible for thousands of deaths. Argentina: National Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders, 26 I.L.M. 317 (1987).

¹⁰⁹ *E.g.*, G.A. Res. 35/172, U.N. Doc. A/35/742 (Dec. 15, 1980); G.A. Res. 36/22, U.N. Doc. A/36/645 (Nov. 9, 1981); G.A. Res. 37/182, U.N. Doc. A/37/745 (Dec. 17, 1982); G.A. Res. 38/96, U.N. Doc. A/38/680 (Dec. 16, 1983); G.A. Res. 39/110, U.N. Doc. A/39/700 (Dec. 14, 1984); G.A. Res. 40/143, U.N. Doc. A/40/1007 (Dec. 13, 1985); G.A. Res. 41/144, U.N. Doc. A/41/874/Add.1 (Dec. 4, 1986).

¹¹⁰ *E.g.*, Human Rights and the Phenomenon of Disappearances, Hearings Before the H. Subcomm. on Int'l Orgs. of the Comm. on Foreign Aff., 96th Cong. 3 (1979) (Testimony of Jerome J. Shestack, President, Int'l League for Human Rts. describing the pattern of enforced disappearances "[i]n all countries" as being "remarkably the same").

¹¹¹ *Id.* at 74; Kaufman & Fagen, *supra* note 1, at 81.

enforced disappearances.¹¹² Characterizing the trend in the killing of individuals, Amnesty International employed the same two criteria, defining what it termed “political killings” as “unlawful and deliberate killings of persons by reason of their real or imputed political beliefs or activities, religious, other conscientiously held beliefs, ethnic origin, sex, colour, or language, carried out by order of a government or with its complicity.”¹¹³

With regard to killings by the State, United Nations General Assembly resolutions introduced their own language into the mix. In its first resolution on the subject, the General Assembly expressed its concern at “summary executions as well as arbitrary executions” and also at “the occurrence of executions which are widely regarded as being politically motivated.”¹¹⁴ That and other resolutions therefore seemed to target everything from capital punishment that took place without adequate procedural safeguards to politically motivated executions.¹¹⁵ To some extent, this expansion of terminology was a foreseeable consequence of the various ways in which States could be factually responsible for an illegal death: State agents might be responsible for killing or disappearing persons without acknowledging responsibility, persons might die in custody, or a State might accept responsibility for a death, such as by claiming that persons died after an armed clash or were properly executed for crimes.¹¹⁶ Human rights advocates came to deploy the new terminology as well, using descriptive add-ons like “arbitrary” and “summary” to illustrate distinctions between the amounts of legal process involved in a killing.¹¹⁷

Advocates were clear, though, that political killings or summary or arbitrary executions and enforced disappearances were *essentially crimes committed*

¹¹² Human Rights and the Phenomenon of Disappearances, Hearings Before the H. Subcomm. on Int'l Orgs. of the Comm. on Foreign Aff., 96th Cong. 74 (1979) (Testimony of Jerome J. Shestack, President, Int'l League for Human Rts.)

¹¹³ Political Killings by Governments of Their Citizens, Hearings Before the H. Subcomm. on Human Rts. and Int'l Orgs. of the H. Comm. on Foreign Aff., 98th Cong. 17-18 (1983) (excerpt from AMNESTY INTERNATIONAL, POLITICAL KILLINGS BY GOVERNMENTS (1983)).

¹¹⁴ G.A. Res. 35/172, U.N. Doc. A/35/742 (Dec. 15, 1980).

¹¹⁵ *E.g., id.*; G.A. Res. 36/22, U.N. Doc. A/36/645 (Nov. 9, 1981).

¹¹⁶ Kaufman & Fagen, *supra* note 1, at 88.

¹¹⁷ *E.g.,* Kaufman & Fagen, *supra* note 1, at 82; Political Killings by Governments of Their Citizens, Hearings Before the H. Subcomm. on Human Rts. and Int'l Orgs. of the H. Comm. on Foreign Aff., 98th Cong. 41 (1983) (testimony of Jose Zalaquett, deputy secretary general, Amnesty International).

by the State.¹¹⁸ To some, a definition of summary or arbitrary execution or of enforced disappearances limiting them to State acts was a pragmatic one: their observations had shown that States, not non-State actors, were those overwhelmingly responsible for the violations.¹¹⁹ Amnesty International argued that State-sponsored killings or disappearances were also fundamentally different from non-State sponsored killings, suggesting that illegal killings or disappearances by the State left victims and their families particularly vulnerable or helpless, given the State's assumed role as the enforcer of the law, or the difficulties involved in obtaining redress when it is the State that is responsible for an illegal act.¹²⁰

Human rights organization's focus on State-sponsored acts was probably genuinely driven by the empirical reality of direct State responsibility for human rights violations, but it was also probably driven by a desire to direct the debate on extrajudicial killings and enforced disappearances towards the clear recognition of those acts as human rights violations requiring redress at the international level. For whether international law even made it illegal for a State to participate in the killing or disappearance of its citizens was not necessarily clear.¹²¹

To be sure, genocide was internationally wrongful,¹²² as was the killing of civilians in armed conflicts,¹²³ but it was less certain that the summary

¹¹⁸ Kaufman & Fagen, *supra* note 1, at 84; Political Killings by Governments of Their Citizens, Hearings Before the H. Subcomm. on Human Rts. and Int'l Orgs. of the H. Comm. on Foreign Affs., 98th Cong. 3 (1983) (testimony of Jose Zalaquett, deputy secretary general, Amnesty International).

¹¹⁹ Kaufman & Fagen, *supra* note 1, at 84 ("in most countries in which EJE exists on a large scale, the members of armed opposition movements constitute only a fraction of the victims of government reprisals.").

¹²⁰ Political Killings by Governments of Their Citizens, Hearings Before the H. Subcomm. on Human Rts. and Int'l Orgs. of the H. Comm. on Foreign Aff., 98th Cong. 3 (1983) (testimony of Jose Zalaquett, deputy secretary general, Amnesty International); Human Rights and the Phenomenon of Disappearances, Hearings Before the H. Subcomm. on Int'l Orgs. of the Comm. on Foreign Aff., 96th Cong. 75 (1979) (statement of David Hinkley, Chairman, Amnesty Int'l, Washington Office).

¹²¹ Lippman, *supra* note 102, at 417-18; Special Rapporteur on Summary and Arbitrary Executions, ¶ 47, Comm'n on Human Rts., U.N. Doc. E/CN.4/1983/16 (Jan. 13, 1983) (by S. Amos Wako) (noting the failure of efforts to propagate a code of international crimes).

¹²² Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278.

¹²³ See *infra* notes 143-145.

shooting of a civilian or the failure to investigate a civilian's death was internationally wrongful.¹²⁴ A rift over the scope of the mandate of the proposed Working Group on Enforced and Involuntary Disappearances by the U.N. Commission on Human Rights in 1980 exposed a disagreement among States on the extent of their international responsibility.¹²⁵ The United States and other countries sought to define the Working Group's mandate to focus on individuals who had been *made* to disappear by the State, while a French proposal appeared to include individuals who had voluntarily *hid* themselves from the State or had left a State on their own volition.¹²⁶ This division among members of the Commission on Human Rights on how to define enforced or involuntary disappearances reflected the unwillingness of some States to be subject to strong scrutiny. For instance, Argentina, then under military rule, sought to prevent the creation of a working group on disappearances, arguing that doing so would encroach upon State sovereignty.¹²⁷ An eventual compromise provided no definition of an enforced or involuntary disappearance, but did succeed in allowing the working group to address individual cases of disappearances.¹²⁸ This set the stage for the Working Group to come to terms with what the human rights violation of an enforced disappearance was through an assessment of individual cases.

B. The Special Rapporteur on Summary or Arbitrary Executions and the Working Group on Enforced or Involuntary Disappearances

A lack of guidance from the United Nations on what an extrajudicial killing is led to special rapporteurs playing a role in defining what they were. The Economic and Social Council ("ECOSOC"), charged with making recommendations on promoting human rights and fundamental freedoms,¹²⁹ authorized the appointment of the first special rapporteur on "arbitrary and summary executions" in 1982.¹³⁰ In his first report, Special Rapporteur S.

¹²⁴ See Naomi Roht-Arriaza, Comment, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 452 (1990) (arguing for the recognition of a state obligation to investigate and prosecute human rights violations including enforced disappearances and extrajudicial killings).

¹²⁵ Kramer & Weissbrodt, *supra* note 104, at 22.

¹²⁶ *Id.* at 22.

¹²⁷ *Id.* at 23.

¹²⁸ *Id.* at 30.

¹²⁹ U.N. Charter art. 62, paras. 1, 2.

¹³⁰ E.S.C. Res. 1982/35, U.N. Doc. E/CN.4/RES/1982/35 (May 7, 1982).

Amos Wako observed that the ECOSOC resolution authorizing his appointment provided no definition of “summary” or “arbitrary” or “extralegal” executions despite using all of those terms.¹³¹ Instead, Wako was left to adopt a set of tentative definitions based on his own interpretations of international human rights instruments, taking into consideration the actual diverse contexts in which deaths were taking place.¹³²

Notably, Wako, despite his enumeration of various contexts in which summary or arbitrary executions could take place, adopted a tentative set of guidelines for defining extralegal, arbitrary and summary executions applicable across different contexts. A “summary execution” was the deprivation of life resulting from a procedure lacking in due process and the protections provided by Article 14 of the ICCPR;¹³³ an “arbitrary execution” was one resulting from “the killing of persons carried out by order of government or with its complicity or tolerance or acquiescence without any judicial process”; and an “extralegal execution” “refers to killings committed outside the judicial or legal process, and at the same, illegal under relevant national and international laws.”¹³⁴ Common to all these definitions was the limitation of their application to deaths resulting from government action or inaction¹³⁵—an outcome that Wako attributed both to the kinds of killings about which the United Nations had previously expressed its concerns and to the general responsibility of States under the human rights instruments to protect their citizens’ right to life.¹³⁶

In concluding that United Nations bodies had expressed increasing concern about killings specifically by the State, Wako was clearly correct. Although the United Nations might have, at first, been primarily concerned

¹³¹ Report of the Special Rapporteur on Summary and Arbitrary Executions, ¶ 53, U.N. Doc. E/CN.4/1983/16 (Jan. 13, 1983).

¹³² *Id.* at ¶¶ 55-63.

¹³³ Article 14 of the ICCPR provides for procedural and substantive protections for persons facing criminal charges or other suits at law. These include, among others, the right to be presumed innocent, the right to a fair and public hearing by a competent and independent tribunal, and the right to be tried without undue delay.

¹³⁴ Report of the Special Rapporteur on Summary and Arbitrary Executions, ¶ 66, U.N. Doc. E/CN.4/1983/16 (Jan. 13, 1983). Wako acknowledged that his definitions of arbitrary and extralegal execution could overlap. *Id.* Indeed, they are probably identical given how unlikely it is, outside the genuine context of law enforcement, that a government could take a life without “judicial or legal process” without violating national law.

¹³⁵ *Id.* at ¶ 68.

¹³⁶ *Id.* at ¶¶ 64-65.

with State killings in the context of capital punishment,¹³⁷ killings committed by the State outside the bounds of legality had emerged as a concurrent and pressing concern.¹³⁸ In 1980, the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by a vote of 74 States in favor and 7 abstaining, approved a resolution condemning “extra-legal executions.”¹³⁹ The resolution specifically addressed itself to “murder committed or tolerated by Governments,” and condemned the “practice of killing and executing political opponents or suspected offenders carried out by armed forces, law enforcement or other governmental agencies or by paramilitary or political groups acting with the tacit or other support of such forces or agencies.”¹⁴⁰ The General Assembly later endorsed the resolution.¹⁴¹

The limitation of these definitions on the basis of pragmatism or on the basis of particular limitations imposed by United Nations bodies pointed to a lack of a strong international legal foundation to hold States accountable for systematic politically-motivated killings.¹⁴² International humanitarian law did provide for the protection of civilians from attacks during non-international and international armed conflicts. Common Article 3 of the Geneva Conventions provides that in armed conflicts, persons who take no active part in hostilities shall not be subject to violence to life and person including murder, execution without judgment by a regularly constituted court, and to outrages upon personal dignity.¹⁴³ Additional Protocol II extended those

¹³⁷ Nigel S. Rodley, *United Nations Action Procedures Against “Disappearances,” Summary or Arbitrary Executions, and Torture*, 8 HUM. RTS. Q. 700, 715-16 (1986).

¹³⁸ *Id.* at 716.

¹³⁹ Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Res. 5, Rep. of the Sixth U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.87/14/Rev.1, at 8-9, 78-79 ¶ 214 (Aug. 25, 1980 – Sept. 5, 1980). The Philippines, along with Argentina, Chile, Egypt, Ethiopia, Indonesia and Uruguay, abstained from voting on the resolution. *Id.*

¹⁴⁰ *Id.* at 8-9.

¹⁴¹ G.A. Res. 35/171, U.N. Doc. A/RES/35/171 (Dec. 15, 1980).

¹⁴² See U.N. MANUAL ON THE EFFECTIVE PREVENTION AND INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS, pt. I.A.1., U.N. Doc. E/ST/CSDHA.12 (1991) (“a gap existed in international protection against arbitrary or summary executions”).

¹⁴³ Convention (IV) relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 288; Convention (III) relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 136; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 86; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 32.

protections to non-international armed conflicts.¹⁴⁴ But these protections expressly do *not* apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”¹⁴⁵ This left a clear gap in international legal protection for civilians from violence from their governments.¹⁴⁶

1.1 *Developing Consensus*

Within that gap, the Working Group on Enforced and Involuntary Disappearances and the Special Rapporteur on Summary and Arbitrary Executions played a significant practical and theoretical role. The Working Group interpreted its mandate broadly to include seeking information from States with regard to individual cases of disappearances.¹⁴⁷ The Special Rapporteur received an express mandate to seek and receive information regarding individual cases of killings and exercised that authority, receiving information from various groups about individuals who had been killed and inquiring about incidents with the implicated States.¹⁴⁸ According to one early commentator, this system created a kind of international *habeas corpus*—a mechanism for dealing with individual complaints of violations.¹⁴⁹ Problems such as the inability of special rapporteurs or working groups to visit countries without its permission and the tendency of States to ignore them, however, meant that enforced disappearances and extrajudicial killings continued long after the 1980s.¹⁵⁰ Nonetheless, the rapporteurs and Working Group still made a significant contribution to the development of a conception and taxonomy of extrajudicial killing.

The reports of Special Rapporteur Wako confirmed the political nature of most extrajudicial killings, validating the reports from groups like

¹⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) arts. 4, 13, June 8, 1977, 1125 U.N.T.S. 610.

¹⁴⁵ *Id.* at art. 1(2).

¹⁴⁶ Report of the Special Rapporteur on Summary and Arbitrary Executions, ¶ 39, U.N. Doc. E/CN.4/1983/16 (Jan. 13, 1983).

¹⁴⁷ See generally Rodley, *supra* note 137.

¹⁴⁸ H.S.C. Res. 1982/35, U.N. Doc. E/CN.4/RES/1982/35 (May 7, 1982). See e.g., Special Rapporteur on Summary and Arbitrary Executions, Comm’n on Human Rts., U.N. Doc. E/CN.4/1983/16 (Jan. 13, 1983).

¹⁴⁹ Rodley, *supra* note 137, at 700.

¹⁵⁰ Wasana Punyasena, *The Façade of Accountability: Disappearances in Sri Lanka*, 23 B.C. THIRD WORLD L.J. 115, 124-26 (2003).

Amnesty International that stated that extrajudicial killings were political.¹⁵¹ Wako likewise concluded that the targets of summary or arbitrary executions were those “in opposition to the government or at least suspected or perceived to be so by the government.”¹⁵² This characteristic—the targeting of political opponents—pervaded all the various forms of summary or arbitrary execution that were taking place around the world.¹⁵³ In consequence, summary and arbitrary executions were particularly prevalent in countries going through internal disturbances, political upheavals, the suppression of opposition groups and where the abuse of power by law enforcement was prevalent.¹⁵⁴ Such killings also tended to be accompanied by a number of other defining characteristics. *First*, states where arbitrary or summary executions took place often provided impunity to military or police agents implicated in such killings.¹⁵⁵ *Second*, the commission of summary and arbitrary killings had consequences beyond the deaths of particular individuals or groups, but also a negative impact upon a State’s institutions. The requirement of impunity for offenders undermined independent judiciaries,¹⁵⁶ promoted the abuse of power by security forces,¹⁵⁷ and ran concurrently with the increasing use of summary and arbitrary executions as a curb on ordinary crimes.¹⁵⁸

The reports of the Working Group on Enforced or Involuntary Disappearances similarly determined that government actors were largely responsible for enforced and involuntary disappearances.¹⁵⁹ They also

¹⁵¹ Political Killings by Governments of Their Citizens, Hearings Before the H. Subcomm. on Human Rts. and Int’l Orgs. of the H. Comm. on Foreign Aff., 98th Cong. 17-18 (1983) (excerpt from POLITICAL KILLINGS BY GOVERNMENTS, a publication of Amnesty International).

¹⁵² Report of the Special Rapporteur on Summary and Arbitrary Executions, ¶ 104, U.N. Doc. E/CN.4/1983/16 (Jan. 13, 1983).

¹⁵³ *Id.* at ¶ 218.

¹⁵⁴ *Id.* at ¶ 219. Report of the Special Rapporteur on Summary and Arbitrary Executions, ¶ 72, U.N. Doc. E/CN.4/1984/29 (Feb. 21, 1984) (by S. Amos Wako).

¹⁵⁵ Report of the Special Rapporteur on Summary and Arbitrary Executions, ¶ 224, U.N. Doc. E/CN.4/1983/16 (“Governments have been extremely reluctant to investigate cases and where found guilty to punish those law enforcement officers or civilians who have acted with their authority, complicity or acquiescence who are guilty of summarily or arbitrarily executing persons.”).

¹⁵⁶ Report of the Special Rapporteur on Summary and Arbitrary Executions, ¶ 98, U.N. Doc. E/CN.4/1984/29 (Feb. 21, 1984) (by S. Amos Wako).

¹⁵⁷ *Id.* at ¶ 112.

¹⁵⁸ *Id.* at ¶ 147.

¹⁵⁹ Report of the Working Grp. on Enforced or Involuntary Disappearances, Jan. 26, 1981, ¶¶ 3, 9, U.N. Doc. E/CN.4/1435 (1981) (“Working Grp. Enforced Disappearances

determined that the scope of the rights affected by the disappearances of persons extended outwards to encompass the family members of the disappeared themselves. Not only were there frequently obstacles placed on the investigation and prosecution by victims' families of disappearances,¹⁶⁰ but the rights of family members to a family life and to their economic, social and cultural rights were affected. For example, the family's standard of living, health care and education may all be adversely affected by the absence of a parent.¹⁶¹ In addition, in its first report, the Working Group suggested that one of the rights of family members that might be affected by enforced disappearances was also "a right of relatives to be informed of the whereabouts and fate of missing or disappeared family members."¹⁶² Simultaneously, then, the Special Rapporteur and the Working Group confirmed the characterization of extrajudicial killings and enforced disappearances as largely *State-sponsored crimes* motivated by political ends and largely resulting in impunity for perpetrators. In addition, the Rapporteur and the Working Group had begun to identify the array of human rights, not directly pertaining to the victim, that were violated by the killings and disappearances. Although whether there were distinctions between terms like 'extralegal' or 'extrajudicial' killing continued to cause some confusion, the early 1980s was seeing the development of a consensus about what the *character* of these violations was.¹⁶³

1981 Report") (stating that the "vast majority" of cases confronted by the Working Group concerned "persons who had been arrested, detained or abducted by personnel belonging to a body which was either established as or believed to be, an organ of Government; or controlled by Government; or operating with the overt or latent complicity of Government; and the Government concerned in these cases neither accepted responsibility for the arrest, detention or abduction, nor accounted for these actions.").

¹⁶⁰ *Id.* at ¶ 45.

¹⁶¹ *Id.* at ¶ 187. See also Report of the Working Grp. on Enforced or Involuntary Disappearances, Dec. 9, 1983, ¶ 155, U.N. Doc. E/CN.4/1492 (1983).

¹⁶² Working Grp. Enforced Disappearances 1981 Report, ¶ 187.

¹⁶³ See Political Killings by Governments of Their Citizens, Hearings Before the H. Subcomm. on Human Rts. and Int'l Orgs. of the H. Comm. on Foreign Aff., 98th Cong. 41-42 (1983) (testimony of Jose Zalaquett, deputy secretary general, Amnesty International) (testimony of Zalaquett that "significant agreement does exist already" regarding the nature of political or extrajudicial killings).

III. THE WIDENED SCOPE OF STATE OBLIGATIONS AND THE SPECIAL RESPONSIBILITY OF THE STATE

A. The *Velásquez Rodríguez* Case and the Expansion of State Responsibility

The Special Rapporteur's acknowledgment that summary and arbitrary executions impacted the rights of others and of the community as well as the Working Group's suggestion of the existence of a right to know or of a right to the truth were both relatively novel for their time. During this period, human rights instruments were generally not seen as conferring rights upon victims' families that imposed other positive duties on the State besides that of prosecuting violators.¹⁶⁴ Nonetheless, most international human rights instruments did have provisions requiring State parties to "take care" to ensure guaranteed rights and to provide "effective remedies" in cases where rights have been violated.¹⁶⁵ As victims and their families began to appeal to human rights tribunals associated with the conventions, the tribunals began interpreting convention provisions to impose duties upon States to *investigate*

¹⁶⁴ See Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1412-14 (2002). In the Working Group's 1981 Report suggesting that there was a right to know, the Working Group's primary authority was Additional Protocol I of the Geneva Convention. Working Grp. Enforced Disappearances 1981 Report, ¶ 187. Additional Protocol I only requires that, in international armed conflicts, parties search for persons who have been reported missing by an adverse party. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 33, Aug 6, 1977, 1125 U.N.T.S. 4. Notably, Additional Protocol I does not apply to situations where a citizen of a State seeks information from his or her own State concerning a missing person.

¹⁶⁵ E.g., International Covenant on Civil and Political Rights art. 2 (take care clause and the right to a remedy); Convention for the Protection of Human Rights and Fundamental Freedoms arts. 1 (State obligation to respect human rights), 5 (enforceable right to compensation for violations of the right to liberty and security), 13 (right to an effective remedy); American Convention on Human Rights arts. 1 (obligation to respect rights and freedoms), 25 (right to judicial protection in case of violations of fundamental rights). See also International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 6, 660 U.N.T.S. 195 (Mar. 7, 1966); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 39, 1465 U.N.T.S. 85 (Dec. 10, 1984). For a fuller list of conventions and declarations see M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUMAN RTS. L. REV. 203, 213-18 (2006).

and *prosecute* the underlying violations.¹⁶⁶ Although there exist cases¹⁶⁷ following the paradigm preceding the 1988 decision of the American Court of Human Rights in *Velásquez Rodríguez*, the *Velásquez Rodríguez*¹⁶⁸ case is generally regarded as the landmark case that established that States do have an obligation to investigate and bring to justice those responsible for serious human rights violations.¹⁶⁹

In *Velásquez Rodríguez*, the Inter-American Court of Human Rights, an international tribunal empowered to decide contentious cases on the interpretation of the American Convention on Human Rights,¹⁷⁰ confronted a claim presented by the Inter-American Commission on Human Rights that Velásquez Rodríguez had been tortured, detained, and then disappeared at the hands of the Honduran military in violation of several articles of the American Convention on Human Rights, including the rights to life, humane treatment, and personal liberty.¹⁷¹ The Court found Honduras responsible for Velásquez Rodríguez's disappearance and ordered Honduras to compensate his next of kin.¹⁷²

In reaching this judgment, the Court made several important and innovative doctrinal conclusions. *First*, the Court rejected Honduras' claim that the dispute was not admissible because the remedy of habeas corpus was still available.¹⁷³ The Court noted that habeas corpus was not a remedy to find

¹⁶⁶ Aldana-Pindell, *supra* note 164, at 1414.

¹⁶⁷ E.g., Delia Saldías de López v. Uruguay, Human Rts. Comm., Commc'n No. 52/1979, ¶ 11.3 U.N. Doc. CCPR/C/OP/1 (July 29, 1981) (finding that Uruguay had duty to investigate allegations of torture).

¹⁶⁸ Velásquez Rodríguez v. Uruguay, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) (hereinafter "*Velásquez Rodríguez*").

¹⁶⁹ Bassiouni, *supra* note 165, at 226 (referring to *Velásquez Rodríguez* as the "groundbreaking case" in which a duty to investigate and prosecute for human rights violations was determined); Linda Drucker, *Governmental Liability for "Disappearances": A Landmark Ruling by the Inter-American Court of Human Rights*, 25 STAN. J. INT'L L. 289, 319 (1988) (*Velásquez Rodríguez* was a "landmark decision that sets a precedent for future cases against other Latin American regimes."). The case's significance may also derive from the media publicity that accompanied it and the assassinations of two witnesses. *Id.* at 289-90. In addition, the case was the first in which a Latin American nation was found by the Inter-American Court of Human Rights to have violated the American Declaration on Human Rights. *Id.* at 289.

¹⁷⁰ American Convention on Human Rights, art. 62.

¹⁷¹ *Velásquez Rodríguez*, *supra* note 168, at ¶¶ 2-3.

¹⁷² *Id.* at ¶ 194.

¹⁷³ *Id.* at ¶ 80.

a disappeared person if it would require identifying that person's place of detention and the authority that had ordered the detention, "since in such cases there is only hearsay evidence of the detention and the whereabouts of the victim is unknown."¹⁷⁴ Importantly, the Court interpreted the testimony that habeas corpus was not effective in practice during that relevant time as further evidence that the case should be deemed admissible.¹⁷⁵ *Secondly*, the Court decided that the claim against Honduras could succeed on the merits so long as the Commission could show "an official practice of disappearances . . . carried out by the Government or at least tolerated by it" to which the disappearance of Velásquez Rodríguez could be linked.¹⁷⁶ The Court thereby provided a relatively low evidentiary standard for holding States liable. *Third*, the Court used the American Convention on Human Rights' provision—that State parties are to undertake to respect the rights recognized therein and assure the free and full exercise of those rights—to hold Honduras responsible for human rights violations even if those violations were "initially not directly imputable to a State." This is under the theory that responsibility arose from a "lack of due diligence to prevent the violation or to respond to it as required."¹⁷⁷ As a consequence, human rights violations required the State to respond with a "serious" investigation of the violations to continue so long as there is "uncertainty about the fate of the person who has disappeared."¹⁷⁸ In establishing a lower evidentiary standard, imposing liability for failing to investigate a disappearance, and requiring remedies to be actually effective, the Court made the pursuit of human rights violations claims easier to pursue.¹⁷⁹

Velásquez Rodríguez is also important because, in addition to being a practical response to the challenges involved in holding States accountable for human rights violations against their citizens, it was a judicial confirmation of the characterization of enforced disappearances made by United Nations bodies like the Working Group on Enforced or Involuntary Disappearances.¹⁸⁰ The Court acknowledged the new political character of enforced

¹⁷⁴ *Id.* at ¶ 65.

¹⁷⁵ *Id.* at ¶ 76.

¹⁷⁶ *Id.* at ¶ 126.

¹⁷⁷ *Id.* at ¶ 172.

¹⁷⁸ *Id.* at ¶¶ 177-181.

¹⁷⁹ Drucker, *supra* note 169, at 290-91. The case's holdings were followed in subsequent jurisprudence. Bassiouni, *supra* note 165, at 227.

¹⁸⁰ The Court's judgment references the work of the Working Group and the special rapporteurs as showing "concern that the practice of disappearances be stopped, the victims reappear and that those responsible be punished." *Velásquez Rodríguez*, *supra* note 168, at ¶ 151.

disappearances that targeted not only the disappeared individual, but also the community at large. Disappearances, explained the Court, were now being used systematically “not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear.”¹⁸¹ This was certainly a characteristic shared by extrajudicial killings, which Amnesty International described as occurring often “as part of an overall policy of ruling by intimidating and breaking down independent social movements and political opposition by the most extreme means.”¹⁸²

Subsequent decisions of the Inter-American Court likewise acknowledged that enforced disappearances and extrajudicial killings were crimes committed by the State with those characteristics.¹⁸³ And both the 1992 United Nations General Assembly Declaration on the Protection of all Persons from Enforced Disappearance and the 1994 Inter-American Convention on Forced Disappearance of Persons restricted their definitions of enforced disappearance to refer *only to acts committed by the State*, reflecting the development of an international human rights prohibition targeted at State conduct.¹⁸⁴ In the case of enforced disappearances, this would be further

¹⁸¹ *Velásquez Rodríguez*, *supra* note 168, at ¶ 149.

¹⁸² Political Killings by Governments of Their Citizens, Hearings Before the H. Subcomm. on Human Rts. and Int’l Orgs. of the H. Comm. on Foreign Aff., 98th Cong. 11 (1983) (testimony of Jose Zalaquett, deputy secretary general, Amnesty International).

¹⁸³ *Eg.*, *Godínez Cruz v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 154 (Jan. 20, 1989) (observing that strike activities of the victim were “of the type that were especially subjected to official repression”); *Blake v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 48 (Jan. 24, 1998) (death of victim in accordance with Guatemalan practice of killing persons suspected of being subversives).

¹⁸⁴ Inter-American Convention on Forced Disappearance of Persons, art. II, June 9, 1994, 33 I.L.M. 1529, 1530 (1994). An enforced disappearance under this Convention is defined as follows: “[f]or the purposes of this Convention, 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.”

The Declaration on the Protection of all Persons from Enforced Disappearance defines an enforced disappearance as follows: “enforced disappearances occur, in the sense 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 of individuals acting on behalf of, or with support, direct or indirect, consent or

ratified through the definition of enforced disappearance in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly in 2006, which was substantially the same as that in the Inter-American Convention and in the 1992 General Assembly Declaration, i.e., a restricted definition of enforced disappearances to acts by States.¹⁸⁵

B. Is There a Uniform International Definition of Extrajudicial Killings?

Unlike in the case of enforced disappearances, there is no uniform definition of “extrajudicial executions” as acts by States in international law. It may therefore be argued that extrajudicial killings may properly comprise killings by non-State actors within the same general human rights prohibition, or that the United Nations has left space for an evolution of the prohibition to include such killings.¹⁸⁶ Certainly, *Velásquez Rodríguez* showed that States could be responsible for the acts of even non-State actors for failing to prevent, stop, and investigate killings by them.¹⁸⁷ And of course, international concern has also been shown for killings by non-State actors. Killings by non-State actors such as rebel groups have also been recorded by the United Nations’

acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.” G.A. Res. 47/133, preamble, U.N. Doc. A/RES/47/133 (Dec. 18, 1992).

¹⁸⁵ International Convention for the Protection of All Persons from Enforced Disappearance art. 2, U.N. Doc. A/61/488 (Dec. 20, 2006). Under Article 2, an “enforced disappearance” is “considered to be the arrest, detention, abduction or any other form of deprivation of liberty 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 person outside the protection of the law.”

¹⁸⁶ Weissbrodt & Rosen, *supra* note 93, at 590 (suggesting that the terms “extra-legal,” “arbitrary,” and “summary” execution “may be developing an international customary definition” but that “[a]s international law evolves, so may the concepts of extra-legal, arbitrary and summary deprivations of life.”). A meditation on non-State actors and human rights obligations was contained in Special Rapporteur Philip Alston’s 2004 report. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶¶ 65-72, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004). In the 2004 Report, Alston

¹⁸⁷ Katja Luopajarvi, Research Report No. 10, Inst. of Human Rights at Åbo Akademi Univ., *Extrajudicial, Summary or Arbitrary Executions – The Scope of the Mandate of the Special Rapporteur* 4-7 (2010), <https://www.abo.fi/media/24259/report10.pdf>.

rapporteurs.¹⁸⁸ But this should not lead to the conclusion that killings by non-State actors must be treated as *equivalent* to those of State actors in terms of what these acts are and their particular effects. Rather, international human rights law has now come to recognize that killings by the State are distinct from those by non-State actors in their character and in their impact upon victims and victims' human rights.

1. *The Distinct Character of Killings by the State*

The reports of the Working Groups and the rapporteurs as well as jurisprudential developments indicate that killings by the government are distinct from others. As described *supra* in Part I, human rights advocates in the 1980s attempted to focus attention on State-sponsored extrajudicial executions by arguing either that the vast majority of executions were committed by the State, or by arguing that killings by the State were just fundamentally different from acts committed by non-State actors. In 1983, Jose Zalaquett, Amnesty International's Deputy Secretary General testified before the United States Congress that, "[w]hen life is taken by the very state apparatus charged with protecting it, there is a situation of particular defenselessness of the individual before the state."¹⁸⁹ Additionally, he argued, State killings "victimize . . . families and the entire community," "poison social and political processes," and "send to the whole society the pernicious message that arbitrary killing of individuals is a possible course of action in certain situations."¹⁹⁰

Much of these arguments were substantiated. In States where extrajudicial killings were prevalent, independent judiciaries were corrupted¹⁹¹

¹⁸⁸ See, e.g., Report of the Special Rapporteur on Summary or Arbitrary Executions, ¶ 165, U.N. Doc. E/CN.4/1986/21 (Feb. 7, 1986) (observing that, in situations of internal armed conflict, "[a]s many killings are done by non-governmental groups as by government agencies.").

¹⁸⁹ Political Killings by Governments of Their Citizens, Hearings Before the H. Subcomm. on Human Rts. and Int'l Orgs. of the H. Comm. on Foreign Aff., 98th Cong. 3 (1983) (testimony of Jose Zalaquett, deputy secretary general, Amnesty International).

¹⁹⁰ *Id.* See also Human Rights and the Phenomenon of Disappearances, Hearings Before the H. Subcomm. on Int'l Orgs. of the Comm. on Foreign Aff., 96th Cong. 75 (1979) (testimony of David Hinley, Chairman, Amnesty Int'l, Washington Office) (arguing that government killings are distinct as government violations of human rights can only be addressed by "the international climate of public opinion").

¹⁹¹ Report of the Special Rapporteur on Summary and Arbitrary Executions, ¶ 98, U.N. Doc. E/CN.4/1984/29.

and security forces abused their power.¹⁹² Governments largely failed to investigate abuses by their own agents,¹⁹³ and victims and their families either refused to speak out or saw their advocates threatened or themselves turned into victims.¹⁹⁴ The substantiation of the distinct nature of killings by the government appears to have more than justified the practice of their distinct treatment under international law. Examples of this distinct treatment include Resolution 5 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,¹⁹⁵ General Comment 6 of the Human Rights Committee on the right to life under the ICCPR, which states that, “[t]he deprivation of life by the authorities of the State is a matter of the utmost gravity,”¹⁹⁶ and even the most recent report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, which states that, “[t]he primary purpose of the recognition of the right to life is to protect people from being killed by the State, the entity that claims and, to a large extent, exercises monopoly on the use of force.”¹⁹⁷

2. The Special Impact upon Victims of State Killings

Yet more than the recognition and confirmation of the special character of killings by the State, the evolution of international law, through cases like *Velásquez Rodríguez*, came to recognize a more complete spectrum of victims’ human rights affected by extrajudicial killings as well as the concomitant and special responsibility of States to assure those rights. These developments strengthen the conclusion that extrajudicial killings by States must be treated as distinct from killings by non-State actors.

Velásquez Rodríguez helped inaugurate a new era in the expansion of the concept of “victims’ rights” in the international sphere.¹⁹⁸ Before *Velásquez*

¹⁹² *Id.* at ¶ 112.

¹⁹³ Report of the Working Grp. on Enforced or Involuntary Disappearances, Jan. 26, 1981, ¶ 45, U.N. Doc. E/CN.4/1435 (1981).

¹⁹⁴ *Id.* at ¶ 45.

¹⁹⁵ Res. 5, Rep. of the Sixth U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.87/14/Rev.1, at 8-9 (Aug. 25, 1980 – Sept. 5, 1980).

¹⁹⁶ Human Rts. Comm., Gen. Cmt. No. 06: The right to life (art. 6) ¶ 3, U.N. Doc. HRI/GEN/1/Rev.6 at 127 (Apr. 30, 1982) (“The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The

¹⁹⁷ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, May 23, 2011, ¶ 43, U.N. Doc. A/HRC/17/28 (2011) (by Christof Heins).

¹⁹⁸ Bassiouni, *supra* note 165, at 210-11, 226.

Rodríguez, the Special Rapporteur on Summary and Arbitrary Executions and the Working Group on Enforced and Involuntary Disappearances had begun to lay a theoretical groundwork for examining the spectrum of human rights affected by extrajudicial killings and enforced disappearances beyond the right to life of the direct victim of the killing or disappearance. That right had, understandably, been considered the primary right considered affected by such violations,¹⁹⁹ albeit closely connected with other rights such as those against arbitrary arrest, detention and torture.²⁰⁰ The Working Group on Enforced Disappearances began the process of examining whether other human rights might be affected by covered violations by suggesting that enforced disappearances might also impact such rights as that to a family life as well as a “right of relatives to be informed of the whereabouts and fate of missing or disappeared family members.”²⁰¹ The *Velásquez Rodríguez* ruling then later recognized the affirmative duty of a State to seriously investigate a human rights obligation.²⁰²

Although *Velásquez Rodríguez*’s finding that there was a duty to investigate was innovative in 1988,²⁰³ it has since become well established that States have an affirmative obligation to prevent and investigate human rights violations.²⁰⁴ That duty to investigate was counterpart to a larger number of now-established rights attributed to the victims of violations, including the right to access to justice, to compensation and reparations, and to the truth

¹⁹⁹ See, e.g., Report of the Special Rapporteur on Summary and Arbitrary Executions, ¶ 35, U.N. Doc. E/CN.4/1984/29 (Feb. 21, 1984).

²⁰⁰ *Id.* at ¶ 79.

²⁰¹ Report of the Working Grp. on Enforced or Involuntary Disappearances, Jan. 26, 1981, ¶ 187, U.N. Doc. E/CN.4/1435 (1981). See also Report of the Working Grp. on Enforced or Involuntary Disappearances, Dec. 9, 1983, ¶¶ 155-61, U.N. Doc. E/CN.4/21 (1983) (discussing resulting violations of the human rights of the families of victims of enforced disappearances especially children and mothers).

²⁰² *Velásquez Rodríguez*, *supra* note 168, at ¶ 177.

²⁰³ Roht-Arriaza, *supra* note 124, at 470.

²⁰⁴ See *McCann & Others v. United Kingdom*, 21 Eur. Ct. H.R. 324 at ¶ 161 (1995) (obligation to protect right to life in conjunction with duty to secure guaranteed rights “requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.”); Human Rts. Comm., Gen. Cmt. No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (States may violate ICCPR rights by “permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”).

about the fate of their loved ones.²⁰⁵ The Inter-American Court of Human Rights has also recognized a right against the violation of relatives' physical and mental integrity resulting from the loss of their family members and the State's failure to investigate their deaths.²⁰⁶ In *Blake v. Guatemala*, the Inter-American Court observed that the family members of the deceased had suffered considerably in light of the State's failure to assist them in their search for the truth.²⁰⁷ The ruling is consistent with the understanding that the victims of State violations of human rights comprise more than the specific individual or individuals who have disappeared or have been killed.²⁰⁸ It is also consistent with the jurisprudence of the European Court of Human Rights.²⁰⁹

The concept of victims' rights and the expansion of State responsibility to investigate as comprising the responsibility to investigate violations whether or not the violation was immediately imputable to the State itself,²¹⁰ have reconfigured and expanded States' obligations to their citizens.

²⁰⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005); International Convention for the Protection of All Persons from Enforced Disappearances art. 24(2) ("Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person."); *Barrios Altos v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 45-49 (Mar. 14, 2001) (Right to the truth of relatives of victims of extrajudicial execution violated). See also Bassiouni, *supra* note 165, at 275-76.

²⁰⁶ *Blake v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶¶ 110-16 (Jan. 24, 1998). See also *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 160-66 (Nov. 25, 2000); *Juan Humberto Sánchez v. Honduras*, Prelim. Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶¶ 101-03 (June 7, 2003) (awarding damages for the suffering incurred by the next of kin of victims of extra-judicial executions and recognizing additional suffering of next of kin because of State responsibility for the executions).

²⁰⁷ *Blake v. Guatemala*, ¶¶ 110-16.

²⁰⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ¶ 8 (victims of gross human rights violations include "the immediate family of dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."); International Convention for the Protection of All Persons from Enforced Disappearances art. 24(1) (defining a "victim" as the "disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.").

²⁰⁹ *Kurt v. Turkey*, 1998-III Eur. Ct. H.R., ¶¶ 130-34 (1998).

²¹⁰ *Velásquez Rodríguez*, *supra* note 168, at ¶ 172. See also *Yaşa v. Turkey*, 1998-VI Eur. Ct. H.R., ¶¶ 114-15.

States are responsible for ensuring that extrajudicial killings and enforced disappearances are investigated and perpetrators prosecuted, and States are particularly responsible for the unique effects of State-sponsored human rights violations upon the persons that are harmed by them. Acts of violence committed by the State as well as the impunity afforded to their perpetrators are different from other crimes: not only may victims' loved ones suffer harassment from the State, but they also experience powerlessness and a profound sense of injustice that compounds and prolongs their grief.²¹¹ In light of the need to address the specific effects of State-sponsored violence, it only makes sense to treat killings by the State distinctly from non-State killings.

As importantly, acknowledging how victims of extrajudicial killings are particularly affected when those killings are perpetrated by the State mandates that appropriate remedies be available. If complying with human rights obligations with regard to victims of political killings requires remedies and compensation commensurate with the suffering entailed by State killings, then extrajudicial killings by the State must be treated distinctly from killings by non-State actors.

IV. ADVANTAGES OF TREATING STATE EXTRAJUDICIAL KILLINGS DIFFERENTLY

Historical and conceptual points aside, a fundamental question regarding whether they should or should not be defined by the Philippine government as acts by State actors only is whether doing so would actually serve the purpose of protecting and vindicating the human rights of Filipinos more than doing otherwise. If not, attempting to define extrajudicial killings as acts by State actors alone would have little practical use. Under such a scenario, the Supreme Court's approach, as reflected in the writs of amparo and habeas data, of covering acts by either kind of actor would indeed be more protective than an approach focusing on acts by one or the other. This final part of this article argues that defining extrajudicial killings, for government purposes, as acts by the State would serve important practical purposes and could be a means of proving speedier and more efficacious remedies to victims of extrajudicial killings and their families.

²¹¹ Juan Humberto Sánchez, *supra* note 206, at ¶¶ 44, 58, 102 (acceptance by Inter-American Court of the view that, "A death in and of itself is difficult to overcome, but even more so when it is violent and, furthermore, at the hands of the State.").

This part begins by explaining that defining extrajudicial killings as State acts would not immunize criminal acts for which armed rebel groups are primarily responsible under international legal norms. Illegal killings by groups like New People's Army could still be in violation of international humanitarian law, otherwise known as the law of armed conflict, and international criminal law. In fact, the new Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity provides a remedy against illegal killings by such organized political groups. This part next explains that defining extrajudicial killings as State acts would not eliminate the Philippine government's responsibility, under international human rights law, to investigate illegal killings committed by non-State groups.

Next, this part will outline the current barriers that impede the criminal prosecution of extrajudicial killings cases, such as the lack of government prosecution, lack of government cooperation, fear on the part of witnesses, and the need to demonstrate guilt by proof beyond reasonable doubt. This section will explain that a distinction between State and non-State killings may allow for the development of alternative mechanisms tailored to State violence that can provide speedier redress for victims. Using the approach of the Inter-American Court of Human Rights, as already reflected and applied by the Supreme Court in its jurisprudence on the writ of amparo, as a guide, this section proposes the creation of a *civil remedy* that could be a way to vindicate victims' rights under a lower evidentiary standard than is required in criminal proceedings. Such a remedy could complement criminal prosecutions or provide an alternative means of redress when criminal liability cannot be secured.

A. International Humanitarian or Criminal Law Still Applies to Violence by Non-State Actors

A strong argument against the creation of remedies specifically applicable to extrajudicial killings by the State is that non-State actors such as the New People's Army, Moro Islamic Liberation Front or Abu Sayyaf have also and may continue to engage in illegal killings. This is undeniable.²¹² The NPA has continued to execute civilians it considers allied with the government

²¹² See, e.g., *supra* notes 34-35. See also Steven Rogers, *Beyond the Abu Sayyaf: The Lessons of Failure in the Philippines*, 83 FOREIGN AFF. 15 (2004).

or who refuse to participate in its “people’s courts.”²¹³ However, it is important to remember that murder or disappearances by organized rebel groups are not actually immune from liability under international humanitarian law and international criminal law.

Additional Protocol II to the Geneva Conventions, which applies to conflicts between a State and “dissident armed forces or other organized armed groups,”²¹⁴ prohibits violence to the lives and health of or outrages upon persons not taking part in hostilities.²¹⁵ The Protocol also protects civilian populations from being the objects of attack and from violence or threats “the primary purpose of which is to spread terror among the civilian population.”²¹⁶ In addition, Common Article 3 of the Geneva Conventions, applicable to armed conflicts not of an international character, prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “outrages upon personal dignity.”²¹⁷ Even outside the context of an armed conflict, liability attaches to non-State actors that engage in widespread or systematic murder.²¹⁸

Significantly, Philippine law already provides criminal remedies for violations of international humanitarian and criminal law. The Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity (“International Humanitarian Law Act”), passed in 2009, expressly adopts the Geneva Conventions “as part of the law of our nation,”²¹⁹ and provides criminal penalties for violations of Common Article 3 of the Geneva Convention and crimes against humanity.²²⁰ This includes violence to life and person such as willful killings and torture, outrages upon personal dignity, and the “passing of sentences and the carrying out of executions without previous judgment” of a regularly constituted court with

²¹³ HUMAN RIGHTS WATCH, *supra* note 10, at 12; Alston Report, *supra* note 8, at ¶¶ 31-33.

²¹⁴ Additional Protocol II, art. 1(1).

²¹⁵ *Id.* at art. 4(2).

²¹⁶ *Id.* at art. 13(1)-(2).

²¹⁷ See Convention (IV) relative to the Protection of Civilian Persons in Time of War art. 3(1).

²¹⁸ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 3.

²¹⁹ Rep. Act No. 9851, Sec. 2(d). The Philippine Constitution, in fact, states that “generally accepted principles of international law” are “part of the law of the land.” PHIL. CONST. art. II sec. 2 (1987).

²²⁰ §§ 4, 6.

due process.²²¹ Liability extends to superiors and accomplices.²²² Although the Act, as in the Geneva Conventions themselves, are not applicable to “internal disturbances or tensions such as riots,” the Act is most likely applicable to illegal killings committed by the NPA as “an organized armed group”²²³—a category that the NPA with its thousands of fighters, sophisticated organization, geographically widespread activity, and continuing armed violence would easily fit in.²²⁴ With respect to the NPA, the revival of CARHIHRL may also provide a hypothetical remedy.²²⁵

B. State Responsibility Would Also Be Engaged by Killings by Non-State Actors

The distinct treatment of extrajudicial killings by the State would not lead to an absence of State responsibility to investigate killings even if they cannot be linked to the State. A State’s obligation to investigate extrajudicial killings is already well established.²²⁶ In recent years, the U.N. Human Rights Committee has more than once found the Philippines to have failed to comply with that duty.²²⁷ In addition, States are liable for their failure to

²²¹ § 4(b).

²²² § 8, 10.

²²³ § 3(c).

²²⁴ Alston Report, *supra* note 8, at ¶ 7. On NPA violence *see, e.g.*, Maricar P. Cinco, *11 soldiers killed in Mindoro battle with NPA*, PHIL. DAILY INQ., Mar. 7, 2010, available at <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100307-257087/11-soldiers-killed-in-Mindoro-battle-with-NPA>; Mario J. Mallari, *AFP denounces NPA’s continuous use of landmines against military*, DAILY TRIBUNE, Mar. 21, 2011, available at <http://www.tribuneonline.org/nation/20110321nat2.html>; Mario J. Mallari, *NPA’s attack police station, kill cop, wound 2 others*, DAILY TRIBUNE, Mar. 21, 2011, available at <http://www.tribuneonline.org/nation/20110321nat1.html>.

²²⁵ *See supra* note 46. On the current status of the complaint mechanism under CARHIHRL, *see* HUMAN RIGHTS WATCH, *supra* note 10, at 69-70.

²²⁶ *E.g.*, *Velásquez Rodríguez*, *supra* note 168, at ¶¶ 177, 181; *Yaşa v. Turkey*, 1998-VI Eur. Ct. H.R. ¶ 113. *See also* PACIFICO A. AGABIN ET AL., *HELPBOOK ON HUMAN RIGHTS ISSUES: EXTRALEGAL KILLINGS & ENFORCED DISAPPEARANCES* 153-60 (Yvonne T. Chua, ed.) (2011).

²²⁷ *Pestaño v. Philippines*, Human Rts. Comm., Commc’n No. 1619/2007, ¶ 7.5, U.N. Doc. CCPR/C/98/D/1619/2007 (May 11, 2010); *Marcellana v. Philippines*, Human Rts. Comm., Commc’n No. 1560/2007, ¶¶ 7.3-7.4, U.N. Doc. CCPR/C/94/D1560/2007 (Nov. 17, 2008).

exercise due diligence to prevent or mitigate illegal killings by non-State actors.²²⁸

C. Treating Killings by the State Distinctly May Permit Distinct and More Effective Remedies

1. *Challenges to the Investigation and Prosecution of Extrajudicial Killings*

One of the unique characteristics of extrajudicial killings by the State is the difficulty involved in seeking to hold one's own State accountable for a violation of human rights. Not only will governments likely be uncooperative in such matters like fact-finding,²²⁹ but victims, their relatives, and their advocates might find themselves in danger should they seek to challenge their States' security apparatus. This has generally proven true in the Philippines as well. Despite the large number of reported extrajudicial killings and enforced disappearances in the Philippines during the Arroyo administration, there have been few convictions. Of 245 reported extrajudicial killings from 2000 to 2008, only 2 led to convictions.²³⁰ Only about 32% of reported incidents reached the trial stage.²³¹ When there are convictions, the time it takes to reach conviction is long—averaging more than 5 years.²³²

A number of problems plague the prosecution of extrajudicial killings. Possible collaboration between law enforcement and the perpetrators of killings leads to failures to engage in the basic elements of an investigation such as the examination of victim's bodies, questioning of witnesses and collecting material evidence.²³³ Fear of collaboration between the police and perpetrators in turn leads to fear on the part of witnesses or family members to cooperate with investigations.²³⁴ Ironically, police may be too afraid to investigate the

²²⁸ See Human Rts. Comm., Gen. Cmt. No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

²²⁹ E.g., *Hernandez v. Philippines*, U.N. Human Rts. Comm., Comm'n No. 1559/2007 ¶ 5.2, U.N. Doc. CCPR/C/99/D/1559/2007 (July 26, 2007).

²³⁰ PARREÑO, *supra* note 4, at 27. See also PARREÑO, *supra* note 14, at 70-73.

²³¹ *Id.*

²³² *Id.* at 29.

²³³ HUMAN RIGHTS WATCH, YOU CAN DIE AT ANY TIME: DEATH SQUAD KILLINGS IN MINDANAO 61-64 (2009).

²³⁴ *Id.* at 65-66. HUMAN RIGHTS WATCH, *supra* note 3, at 62.

military anyway.²³⁵ This is compounded by the weakness of the country's witness protection program, which is either dilatory in providing protection or fails to provide protection at all.²³⁶ The unavailability of witnesses or their refusal to testify is a significant obstacle in prosecutions.²³⁷ Other significant problems include the refusal of the police to investigate killings when military involvement in the act is suspected, and the military's own refusal to investigate its own for human rights violations.²³⁸ Technical weaknesses include limited forensic capacity, responsible for causing an overreliance on witness' testimony in the first place,²³⁹ and the tendency on the part of courts and prosecutors to fail to identify extrajudicial or political killings at an early stage, thereby leading to a case of extrajudicial killing being treated as an ordinary murder.²⁴⁰

The Supreme Court has attempted to help address extrajudicial killings through the designation of special rules for the trial of extrajudicial killing cases and the promulgation of the writs of amparo and habeas data. The Supreme Court designated 99 courts to try cases of "political killings" in continuous trials to be terminated in 60 days from the start of the trial and then to issue decisions within 30 days of the submission of the decision.²⁴¹ The Court's order also required the special courts to report monthly on the status of cases of political killings.²⁴² The order's requirements, however, have not been followed.²⁴³ Even the writ of amparo has proven to be an ineffective means of securing the release of individuals, given the judicial system's delays with regard to their issuance and the apparent inability to enforce the writs.²⁴⁴

²³⁵ HUMAN RIGHTS WATCH, *supra* note 10, at 54-55.

²³⁶ HUMAN RIGHTS WATCH, *supra* note 3, at 63. Alston Report, *supra* note 8, at ¶¶ 52-54 (declaring, "Implementation of the statute establishing the witness protection program is deeply flawed.").

²³⁷ PARREÑO, *supra* note 4, at 31.

²³⁸ HUMAN RIGHTS WATCH, *supra* note 3, at 4.

²³⁹ Alston Report, *supra* note 8, at ¶ 55.

²⁴⁰ Al A. Parreño, Presentation on Extralegal Killings, Basic Death Investigation Course for Pathologists, Univ. of the Philippines College of Medicine (July 18, 2011).

²⁴¹ Phil. Sup. Ct., Admin. Ord. 25-07, Re: Designation of Special Courts to Hear, Try and Decide Cases Involving Killings of Political Activists and Members of Media (Mar. 1, 2007), *available at* http://humanwrongs.org/?page_id=781.

²⁴² *Id.*

²⁴³ HUMAN RIGHTS WATCH, *supra* note 10, at 63.

²⁴⁴ HUMAN RIGHTS WATCH, *supra* note 10, at 63-64. Addendum to Alston Report, *supra* note 8, at ¶ 39 (writ of amparo underutilized, not understood "in some courts," and lacks a "clear enforcement procedure").

2. *Responses to Challenges to the Investigation and Prosecution of Killings*

Treating States differently from non-State actors permits deterrent and remedial remedies that are tailored to State violations of human rights violations. This could occur in two ways: *first*, prosecutors and courts might use the element of imputed or alleged State responsibility in order to classify extrajudicial killings as a special type of case that requires special or expedited consideration during the investigatory and judicial phases of a case; and *second*, new measures could be designed that would better address human rights violations by the State by recognizing that suits against the State involve unique challenges to be overcome. In particular, remedial mechanisms, as *Velásquez Rodríguez* illustrated, could take into consideration whether there has been a pattern or practice of similar State conduct, whether information regarding human rights violations could reasonably be expected to be difficult to obtain given that the State would likely refuse to disclose relevant information, and the State's willingness to cooperate with a court or other body. In *Velásquez Rodríguez*, this approach permitted a form of civil compensation to be awarded to victims even under a lower evidentiary standard. Such an approach might not be feasible in order to facilitate criminal responsibility given due process requirements,²⁴⁵ but may still be a means of providing better and safer redress for the victims of human rights violations.

i. *Classifying extrajudicial killings as State acts for the purposes of prosecution*

Efforts to address extrajudicial killings and enforced disappearances have often concentrated on promoting and facilitating the criminal prosecution of perpetrators.²⁴⁶ And much foreign aid has been directed towards that

²⁴⁵ *Yaşa v. Turkey*, 1998-VI Eur. Ct. H.R. No. 88 ¶ 113; *Ergi v. Turkey*, 1998-VI Eur. Ct. H.R. No. 81 ¶¶ 77-78.

²⁴⁶ It is sometimes suggested that no new legislation need be passed to address extrajudicial killings, only that there be further facilitation of prosecution. *E.g.*, Teodoro L. Locsin Jr., Rep., 'Just do it,' Paper Presented to the Supreme Court's National Summit on Extra Judicial Killings (2007), *available at* <http://sc.judiciary.gov.ph/publications/summit/Summit%20Papers/Locsin%20-%20Just%20do%20it.pdf> (declaring that "Congress can have no fruitful role to play" in addressing extrajudicial killings and requesting "the judiciary to be quicker and more aggressive in addressing human rights cases even under existing rules").

goal.²⁴⁷ But extrajudicial killings are often punished under the same criminal provisions in the Revised Criminal Code as homicides that lack political purposes, are not committed by the State or its agents, not committed during the course of military operations, or arise from deaths in custody and the like.²⁴⁸ Deaths arising from extrajudicial killings may also fall under existing special laws if they involve torture²⁴⁹ or fall under the International Humanitarian Law Act. A determination is required then as to whether a specific case should be considered a probable extrajudicial killing or a crime that falls under special laws like the International Humanitarian Law Act or the Anti-Torture Act.

In order to address that question, some means must be available to decide what cases merit special consideration. Under a victims-rights based approach, it is necessary that killings by the State be treated distinctly from those not by the State. Extrajudicial killings could therefore comprise the killings of journalists by State officials or authorities and deaths in detention. This approach is supported by the United Nation's model protocol for the investigation of extrajudicial killings as to cases where success through the use ordinary criminal processes seems less likely.

(a) *A practical and victims' rights based approach
to defining the scope of extrajudicial killings*

In addition to the paradigmatic case of extrajudicial killings through assassination by members of the military, the Philippines has also experienced other kinds of summary, extralegal and arbitrary executions. The Maguindanao massacre in 2010, which claimed many journalists among its victims, identified the Philippines as one of the most dangerous countries in the world for journalists.²⁵⁰ In 2011, a gruesome video was leaked from a Manila police station showing police officers torturing a detainee, raising questions as to

²⁴⁷ See United States Mission to the Philippines, Country Assistance Strategy – Philippines: 2009-2013 9 (2009), available at http://pdf.usaid.gov/pdf_docs/PDACN452.pdf.

²⁴⁸ See Parreño, *supra* note 240. Such acts are treated as murders under either Article 248 or 249 of the Revised Penal Code.

²⁴⁹ The Anti-Torture Act of 2009 penalizes torture and creates a separate and independent crime when torture results in death. Rep. Act No. 9745 § 14(a)(1).

²⁵⁰ Comm. to Protect Journalists, *Special Reports, Getting Away With Murder*, June 1, 2011, <http://www.cpj.org/reports/2011/06/2011-impunity-index-getting-away-murder.php> (ranking the Philippines as the third worst country where “journalists are murdered on a recurring basis and governments are unable or unwilling to prosecute the killers”).

whether deaths arising from an excessive use of police force can also be considered an extrajudicial killing.²⁵¹

Defining what is or what is not an extrajudicial killing under a victims' rights-based approach would consider whether victims' rights are affected by an illegal killing in the same way as the paradigmatic case of killings by members of the military firing guns from their motorcycles. Under this approach, other killings such as the killings of journalists by State authorities should probably also be considered extrajudicial killings. This is because as such acts would similarly be violations of victims' rights to the truth and to their physical and mental integrity. Indicia that a victim has been killed as *a result of government violence* should therefore provide a theoretically sound basis for treating a case of homicide as an extrajudicial killing as far as investigation and other such processes are concerned.

Alternative approaches would be to consider the motives behind the killing or the identity or profession of the victim. While these are certainly pertinent criteria, and criteria that should be relied upon to identify extrajudicial killings,²⁵² the use of the victim's profession or the motive behind the attack as primary criteria would be practically over-inclusive. The reason that special procedures are necessary with respect to extrajudicial killings is that perpetrators have enjoyed impunity. And impunity is traceable to government involvement in that particular crime. This is recognized by the Minnesota Protocol as incorporated in the *U.N. Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*.²⁵³ The Minnesota Protocol, the alternative name for the Manual's *Model Protocol for a Legal Investigation of Legal, Arbitrary and Summary Executions* applies in instances where "criminal proceedings are less likely to be brought to a successful outcome"

²⁵¹ Cecile Suerte Felipe & Non Alquitran, *Cop tagged in torture video dismissed from service*, PHIL. STAR, Jan. 14, 2011, available at <http://www.philstar.com/Article.aspx?articleId=647968&publicationSubCategoryId=63>; Edu Punay, *Tondo precinct cops face torture raps*, PHIL. STAR, Aug. 24, 2010, available at <http://www.philstar.com/Article.aspx?articleId=605635&publicationSubCategoryId=63>.

²⁵² This is partly the approach of Supreme Court Administrative Order 25-07, *supra* note 241, which provides: "[i]n determining whether the crime is a 'political killing', the following factors, among others, shall be considered: (1) political affiliation of the victim; (2) method of attack; and (3) reports that state agents are involved in the commission of the crime or have acquiesced in them."

²⁵³ U.N. MANUAL ON THE EFFECTIVE PREVENTION AND INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS, pt. III, U.N. Doc. E/ST/CSDHA.12 (1991).

because of factors like the investigating agency's possible lack of impartiality. A special investigation should be commenced where there are "[f]actors that support a belief that the Government was involved in the execution."²⁵⁴ To put it bluntly, it is because the government appears to have been involved that special procedures and distinct treatment are necessary.

Consequently, the Minnesota Protocol suggests the existence of one or more of the following factors as requiring special procedures:

- (i) where the victim was last seen alive in police custody or detention;
- (ii) where the modus operandi is recognizably attributable to government-sponsored death squads;
- (iii) where persons in the Government or associated with the Government have attempted to obstruct or delay the investigation of the execution;
- (iv) where the physical or testimonial evidence essential to the investigation becomes unavailable.²⁵⁵

This recognition of a practical basis for distinguishing extrajudicial killings on a pragmatic basis and in combination with a victims' rights based approach allows for a principled and practical way to address extrajudicial killings. Of course, further elaboration would be required, in the Philippine context, to identify and monitor applicable modus operandi. Work is also needed to provide guidelines to prosecutors and to the courts on when an identified extrajudicial killing should be criminally prosecuted under a special statute, such as the Anti-Torture Act or the International Humanitarian Law Act, as opposed to an expedited process for extrajudicial killing.

ii. Velásquez Rodríguez *applied: creating a unique remedy for a unique harm*

Confining extrajudicial killings to acts attributable to the State has another benefit: by treating acts attributable to the State distinctly from those that are not, unique remedies may be created that are specially tailored to the unique harm of State violence. This final section of this research paper illustrates one way in which distinguishing State from non-State violence permits the creation of a tailored remedy. Using *Velásquez Rodríguez* as a

²⁵⁴ *Id.* at pt. 3.D.1.

²⁵⁵ *Id.* at pt. 3.D.1(a).

model, this section proposes a *new civil remedy* for victims of extrajudicial killing and enforced disappearances that employs a lower burden of proof for claimants, thereby providing an easier avenue for vindication and civil compensation. This hypothetical remedy could be a complement to criminal prosecution where the evidence is insufficient to demonstrate guilt beyond a reasonable doubt. This remedy could allow speedier compensation and vindication for claimants while acting as an incentive for government to better respond to extrajudicial killings committed by it or its agents because of the threat of actually paying for violations. Moreover, this remedy would already have jurisprudential support in the Supreme Court's decisions on the writ of amparo, which have already incorporated *Velásquez Rodríguez* into its analysis of evidentiary burdens in human rights cases.

Although the criminal prosecution of human rights violators has often been the focal point of victims' rights advocates' efforts,²⁵⁶ civil remedies also have a place in schemes to redress human rights violations.²⁵⁷ Civil liability, like criminal liability, deters abuses, rehabilitates and helps restore the dignity of victims, reinforces social norms against human rights violations, and empowers victims.²⁵⁸ Among the most significant successes for Philippine victims of human rights, the suit against the estate of Ferdinand Marcos, was obtained through civil rather than criminal processes.²⁵⁹ More importantly, plaintiffs in civil suits deal with a lower burden of proof than is necessary to win a criminal case.²⁶⁰ And, in civil suits, legislatures and courts may apply alternative schemes with respect to plaintiffs' and respondents' burdens of proof.²⁶¹ Consequently, civil suits could potentially be an effective means of obtaining redress for human rights victims.

²⁵⁶ *E.g.*, Roht-Arriaza, *supra* note 124, at 481-82 (monetary compensation alone would be insufficient to be an adequate remedy for State-sanctioned violence).

²⁵⁷ *Id.* at 482-83 ("monetary compensation may constitute an important form of post-adjudicatory redress."); Diane F. Orentlicher, Note, *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation*, 26 *STUD. TRANSNAT'L LEGAL POL'Y* 425, 427-28 (1994).

²⁵⁸ *Id.*

²⁵⁹ *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

²⁶⁰ *See* *Razon v. Tagitis*, G.R. No. 182498, 606 SCRA 598, Dec. 3, 2009 (*en banc* Decision).

²⁶¹ *E.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

(a) *Weaknesses of existing civil remedies*

Philippine law does already provide for civil remedies under various articles of the Civil Code.²⁶² These include: Article 32, which creates a cause of action for violations or impairments of constitutional rights or liberties; Articles 19, 20, and 21, which concern good faith and intentional or negligent injury or loss; Article 27, which provides a cause of action for material loss arising from a public servant or employees refusal to or neglect in performing official duties; Article 33, which permits suits arising from physical injuries separate and distinct from related criminal actions; and Article 2176, which obliges the payment of damages to another for quasi-delicts.

The pursuit of these existing civil remedies, though, is problematic for a few principal reasons. *First*, under existing Rules of Court, plaintiffs must pay what can become prohibitive filing and other litigation fees.²⁶³ This initial barrier acts as a disincentive for plaintiffs to file suits for substantial damages. *Second*, even under the lower preponderance of the evidence standard for a civil action, plaintiffs may be unable to prevail. This arises as a result of the unique challenges involved in suing the government—lack of government cooperation, inability to adequately identify specific individual perpetrators of violations, lack of witnesses, and weak forensic evidence.²⁶⁴

(b) *The Supreme Court's response to evidentiary problems in its writ of amparo jurisprudence*

The Supreme Court, in its landmark decision, *Razon v. Tagitis*, has already recognized and responded to many of the difficulties involved in prevailing in an action against the government.²⁶⁵ *Razon*, a writ of amparo case involving an enforced disappearance, listed the evidentiary difficulties involved in meeting the burden of proof for the writ, difficulties that the Court explained exist, “because the State itself—the party whose involvement is alleged—investigates enforced disappearances.”²⁶⁶ Difficulties included deliberate concealment of perpetrators’ identities, scared or intimidated witnesses, and the “State’s virtual monopoly of access to pertinent

²⁶² See generally JOSE MANUEL I. DIOKNO, CIVIL AND ADMINISTRATIVE REMEDIES AS INSTRUMENTS OF ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS (2011).

²⁶³ RULES OF COURT, Rule 141.

²⁶⁴ See *supra* notes 233-40.

²⁶⁵ *Razon*, *supra* note 260.

²⁶⁶ *Id.*

evidence.”²⁶⁷ Because of these problems, the Court declared that it was compelled “to adopt standards appropriate and responsive to the circumstances, without transgressing due process requirements.”²⁶⁸

In an innovative application of *Velasquez Rodríguez* outside the context of a proceeding before an international human rights tribunal, the Court relied on *Velasquez Rodríguez* to modify the standard of proof generally applicable in civil cases involving human rights: all evidence was to be considered “in their totality,” employing “the most basic test of reason.”²⁶⁹ In its decision rejecting the government’s motion for reconsideration, the Court further clarified that it was adopting a “lowered or relaxed” burden of proof.²⁷⁰ This, the Court explained, was because, the requirement of direct evidence “would render it extremely difficult, if not impossible, to prove that an individual has been made to disappear.”²⁷¹

The extent to which the Court’s jurisprudence on the writ of amparo could serve to facilitate civil remedies for violations of human rights is unclear. The Court has emphasized that the writ of amparo is a remedial or procedural measure unlike civil or even administrative processes.²⁷² In doing so, the Court has left open the possibility that shifts in the burden of proof in particular civil cases could deny due process. In addition, the Court, even under what it terms a flexible or lowered standard, has rejected petitions for the writ of amparo that appeared meritorious. In *In re: Melissa C. Roxas*, the petitioner alluded to circumstances of her disappearance that included her forcible abduction in broad daylight with the use of vehicles without license plates, “interrogations to elicit communist inclinations,” her perception of “sounds of construction, gun-fire and airplanes” at her place of detention, and the consistency of these indicia with prior enforced disappearances in support of her writ.²⁷³ Yet the Court demanded direct evidence of government involvement in order to issue what was, in essence, a protective order against the government from an

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Razon v. Tagitis*, G.R. No. 182498, 612 SCRA 685, Feb. 16, 2010 (*en banc* Resolution).

²⁷¹ *Id.*

²⁷² *See, e.g., Boac v. Cadapan*, G.R. No. 184461, May 31, 2011 (*en banc* Decision); *Rubrico v. Macapagal-Arroyo*, G.R. No. 183871, 613 SCRA 233, Feb. 18, 2010 (*en banc* Decision).

²⁷³ *Roxas v. Macapagal-Arroyo*, G.R. No. 189155, 630 SCRA 211, Sept. 7, 2010 (*en banc* Decision).

individual who had been so abducted.²⁷⁴ It disregarded Roxas' point that her abduction was consistent with other cases of abductions by government agents.²⁷⁵

Indeed, the standard employed in *Roxas* is higher than the standard required in *Velásquez Rodríguez*, despite the *Razon v. Tagitis* Court's reliance on that case. To recall, in *Velásquez Rodríguez*, the Inter-American Court determined that Honduras was responsible for the disappearance of a person based on an examination of a pattern of government conduct and the consistency of the facts of the case at bar with that pattern.²⁷⁶ On that basis, the Inter-American Court even awarded compensation to the victim's family.²⁷⁷ Some of the difference between the Inter-American Court and the Philippine Supreme Court's decision may be attributable to a distinction between the processes and procedures of an international human rights tribunal as compared to a domestic tribunal applying domestic law.²⁷⁸ Still, consistency with international standards for the protection of human rights, practicality, and consistency with the Supreme Court's decision in *Razon*, would seem to require that the Court apply *Velásquez Rodríguez* more whole-heartedly by placing greater weight on circumstantial evidence of government involvement in human rights violations.²⁷⁹ This would improve the effectiveness of that remedy and act as a template for full compensatory civil remedies for the underlying violations.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Velásquez Rodríguez*, *supra* note 168, at ¶ 147.

²⁷⁷ *Id.* at ¶ 194.

²⁷⁸ *See id.*, ¶ 132.

²⁷⁹ While it can be difficult to establish state culpability, there are ways in which it can be found. *First*, and most simply, the perpetrators may be identified by clearly visible military insignia either on their uniforms or the vehicles they are driving. *Second*, the "disappeared" may be released or escape after a period in police or military custody. *Third*, the victim may be found dead in police or military custody. *Finally*, even where the perpetrators are not self-evidently members of a military or paramilitary unit, eyewitnesses may be able to identify one or more of them by name or to identify some piece of their property, such as a vehicle, a weapon or an article of clothing. AMNESTY INT'L, PHILIPPINES: "DISAPPEARANCES" IN THE CONTEXT OF COUNTER-INSURGENCY 5 (1991).

(c) *A proposed civil remedy for extrajudicial killings and enforced disappearances*

Because the writ of amparo is not a compensatory scheme, legislation or perhaps an administrative order from the Supreme Court further codifying *Velásquez Rodríguez* and employing an adjusted, flexible burden of proof could be an effective means of compensating and vindicating victims and at the same time disincentivizing government violations of human rights. This proposed remedy would both respect the rights of victims and the unique challenges of suing the government with its monopoly on evidence. Such a remedy could involve all or some of the following components.

(i) *Waiver of Filing Fees*

First, the remedy should permit waiver of filing fees. Such waivers are already provided for in other legislation like the Anti-Trafficking in Persons Act of 2003.²⁸⁰ This would make the courts accessible for plaintiffs seeking judicial redress and be in line with the State's commitment to human rights.

(ii) *Allow the Civil Action to Proceed Independently*

Second, the civil action should be allowed to proceed independently of any criminal action. This is already the case with respect to suits brought under Articles 32, 33, 34 and 2176 of the Civil Code.²⁸¹ Otherwise, the pursuit of this remedy would have to be suspended or not instituted until the criminal case is resolved, making the availability of the remedy dependent on the resolution or termination of what could be a lengthy criminal case.²⁸² Alternatively, the remedy could be subsumed under a strengthened Article 32 of the Civil Code, which already concerns violations of constitutional rights by public officers.

(iii) *Apply Velásquez Rodríguez*

Third, the measure must be cognizant of the special difficulties involved in human rights suits against the State. The burden of proof must be adjusted. In *Velásquez Rodríguez*, this meant that there could be a judgment against the State where a plaintiff can show that there is an official practice of killings or disappearances, and the disappearance or killing at issue can be

²⁸⁰ Rep. Act No. 9208, § 13 (2003).

²⁸¹ RULES OF COURT, Rule 111, § 3.

²⁸² *Id.*, § 2.

linked to that practice by its consistency with prior *modus operandi* and by the State's unjustified refusal to investigate or prosecute that act seriously.²⁸³ Similarly, plaintiffs should be able to establish a claim for compensation from the government should they be able to show that a person has been killed or disappeared, that crime can be linked to some official activity or practice, and the State has not seriously investigated or prosecuted that act. This would allow plaintiffs to avoid having to establish that a specific individual was responsible for the particular act of pulling a trigger or having to conclusively identify, under a standard that is unreasonable under the circumstances, that the particular crime was indeed committed by State agents or authorities. Plaintiffs could instead point to patterns or practices of behavior to which their case bears a similarity in terms of the manner of execution of the violation, the political affiliation of the direct victim, and the motives for the act. That the Supreme Court already applies an altered standard of proof in its writ of *amparo* jurisprudence would bolster the use of a similarly flexible standard of proof under the proposed remedy.

(iv) *Use Burden Shifting*

Fourth, the burden of proof can be adjusted by using a burden shifting scheme similar to that employed in American employment discrimination law. In *McDonnell Douglas v. Green*, the United States Supreme Court applied burden shifting to race discrimination cases as follows: (1) a complainant carries an initial burden of establishing a *prima facie* case of discrimination; (2) if the complainant establishes a *prima facie* case, the respondent must articulate a legitimate, non-discriminatory reason for the act complained of; and (3) the complainant must have the opportunity to show that the given reason is pretextual.²⁸⁴ A similar approach, if applied to human rights violations, could permit a plaintiff to prevail so long as he or she makes a *prima facie* case that the government fails to rebut. An illustration of a similar scheme could be as follows: (1) the plaintiff has an initial burden of establishing a *prima facie* case that the direct victim has been subject to an extrajudicial killing or enforced disappearance; (2) if the plaintiff meets that initial burden, the government must then rebut the *prima facie* case by showing that it has seriously and thoroughly investigated the accusation and is engaged in the proper prosecution of the case; and (3) the plaintiff should have a final opportunity to

²⁸³ *Velásquez Rodríguez*, *supra* note 168, at ¶ 126.

²⁸⁴ *McDonnell Douglas*, *supra* note 261, at 802-04.

show that the investigation or prosecution was not serious or deeply flawed or that the government's defense is pretextual.

This kind of burden shifting would allow a sanction to be placed upon the government and compensation paid to victims if the government fails to comply with its duty to investigate and prosecute. It therefore penalizes the obstruction of a resolution of a human rights case rather than rewarding it with the case's dismissal or never-ending delay. As such, it would allow redress for victims precisely in the kinds of cases for which there has been impunity. In short, by tailoring a remedy to State acts, State violations could be remedied more effectively. This shows that confining extrajudicial killings to State acts can benefit responses to human rights violations.

CONCLUSION

A disappointing truth about extrajudicial killings in the Philippines is that they have gone on for too long and in too familiar a pattern. As Filipinos grapple with strategies and solutions towards the goal of ending extrajudicial executions, uniformity in defining what the problem becomes more pressing. A definition of extrajudicial killings as acts committed by the State would be consistent with the unique character of State killings and with the range of victims' rights affected when it is the State that kills. A unique crime may require a unique remedy, which may, in turn, lead to more effective legal solutions.