

**THE RIGHT NOT TO BE DISAPPEARED:
NOTES ON THE INTERNATIONAL CONVENTION ON
ENFORCED DISAPPEARANCE AND
THE PHILIPPINES' CURRENT LEGAL FRAMEWORK TO
ADDRESS ENFORCED DISAPPEARANCE***

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ABSTRACT

The Philippines has the highest number of cases of enforced disappearance in the Southeast Asian region and one of the highest in Asia. Yet, of the core human right treaties, excluding optional protocols, the International Convention for the Protection of all Persons from Enforced Disappearance remains to be the only instrument that the Philippines has not yet acceded to. In its place, various domestic laws and rules have been enacted to address concerns on state-sponsored enforced disappearance. The Supreme Court has, however, recognized the binding nature of the terms of the Convention on the Philippines, premised on the incorporation of generally accepted principles of international law in domestic law. This paper explores and analyses the Philippine framework on protecting people from enforced disappearance and how the Convention, despite its non-ratification by the Philippines, remains relevant therewith.

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I. DESAPARECIDOS AND THE CONVENTION

The International Convention for the Protection of all Persons from Enforced Disappearance¹ defines “enforced disappearance” as:

[T]he 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 a person outside the protection of the law.²

The practice has been characterized as the “worst of all violations of human rights”³—“a crass abandonment of the values which emanate from the concept of human dignity.”⁴ It is not constrained by one right but involves a multitude of rights that states are obligated to respect and guarantee.⁵ Victims of enforced disappearance are arbitrarily deprived of their liberty and stripped of any right to challenge their arrest before a competent tribunal. Often, victims are also subjected to torture and cruel treatment, such as prolonged isolation and deprivation of any form of communication. When victims are summarily executed, their bodies are usually concealed—a final act

¹ U.N. General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance [hereinafter, “*Convention*”], art. 2, Dec. 20, 2006, U.N. Doc.A/61/448.

² *Convention*, art. 2. Enforced disappearance is listed among the crimes against humanity and is defined under the act as follows: “[T]he arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing from the protection of the law for a prolonged period of time.” Rome Statute of the International Criminal Court, art. 7(2)(i), July 1, 2002, 2187 U.N.T.S. 90. This definition of “enforced disappearance” was adopted in Rep. Act No. 9851 or the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity. See Rep. Act No. 9851 (2009), § 3(g).

³ M. Ehteshamul Bari, *The Use of Enforced Disappearance in Bangladesh as a Tool of Political Oppression: Human Rights in Retreat*, 29 MICH. ST. INT’L. L. REV. 413, 416 (2021), quoting Niall MacDermot, Secretary-General, International Commission of Jurists (1970–1990).

⁴ [Hereinafter, “*Velásquez Rodríguez*”], *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R., ¶ 158 (July 29, 1988).

⁵ Enforced disappearance is a “composite crime that occurs with many wrongdoings, including abductions, unlawful arrests, secret detentions (and therefore placing of the victims in unknown places and, consequently, outside the protection of the law), torture, extrajudicial executions, and the hiding or destruction of human remains.” Jeremy Sarkin, *Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law*, 81 NORDIC J. INT’L. L. 537, 538 (2012).

of disregard to their humanity.⁶ The victim's family members, relatives, or dependents are also subjected to agony, economic hardship, and social alienation. Severe psychological effects are also inflicted on victims' children.⁷ Most commonly, enforced disappearance is resorted to "in the context of a state policy to fight members of the insurgent movements or, more generally, political opponents and their supporters,"⁸ although there are other reasons, equally unjustifiable, as to why states resort to this practice.⁹

The modern-day roots can be traced to Adolf Hitler's *Nacht und Nebel* ("Night and Fog") decree, which recognized that "measures by which relatives of the criminal and population do not know the fate of the criminal" is one of only two efficient modes of intimidation, the other one being the imposition of a death sentence.¹⁰ The concealment of the whereabouts of an arrested individual for resisting Hitler's agenda was aimed to further paralyze dissent and imbue fear and apprehension in the populace, especially the friends and relatives of the arrested individual.¹¹ The practice also became notorious in Latin America, when military juntas and dictatorship governed most countries in the region in the 1970s and 1980s. This gave rise to the use of the term "*desaparecidos*" ("the disappeared") to describe the victims of enforced disappearances.¹²

Augusto Pinochet, for instance, in his almost twenty years in power, was known for his violent suppression of opposition. Based on the study of the Chilean National Commission on Truth and Reconciliation, almost 1,000

⁶ *Velásquez Rodríguez*, Inter-Am. Ct. H.R., ¶ 157.

⁷ United Nations Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances ¶ 339, Jan. 24, 1990, E/CN.4/1990/13.

⁸ TULLIO SCOVAZZI & GABRIELLA CITRONI, *THE STRUGGLE AGAINST ENFORCED DISAPPEARANCE AND THE 2007 UNITED NATIONS CONVENTION* 7 (2007).

⁹ Enforced disappearance of children, either born during the captivity of their disappeared mothers or abducted separately, for instance, is also used to prevent the opposition from growing and at the same time to obtain profit when they are put on adoption. *Id.* at 14. It has also been used "to achieve a sort of cleansing," usually to get rid of indigenous groups and other vulnerable social groups to obtain possession of their lands and economic resources. *Id.* at 21.

¹⁰ Khushal Vibhute, *The 2007 International Convention against Enforced Disappearance: Some Reflections*, 2 MIZAN L. REV. 287, 287 & n.3 (2008).

¹¹ Jackson Nyamuya Maogoto, *Now You See, Now You Don't: The Duty of the State to Punish "Disappearances" and Extra-Judicial Executions*, 10 AUSTL. INT'L. L.J. 176, 178-79 (2002).

¹² Ariel Dulitzky, *The Latin-American Flavor of Enforced Disappearances*, 19 CHI. J. INT'L. L. 423, 426 (2019). It is claimed that the term was first coined by human rights organizations in 1966, during secret government crackdowns on political opponents in Guatemala. Wasana Punyasena, *The Façade of Accountability: Disappearances in Sri Lanka*, 23 B.C. THIRD WORLD L.J. 115, 117 (2003).

desaparecidos were reported.¹³ During this period, some 40,000 cases were also reported in Guatemala, whereas as many as 30,000 and 60,00 incidents were discovered in Argentina and Colombia respectively, although these numbers are “necessarily imprecise” owing to the nature of the practice itself.¹⁴

The Philippines is no stranger to *desaparecidos*.¹⁵ During the martial law regime of Ferdinand Marcos Sr., human rights violations were prevalent and extrajudicial means were regularly employed to suppress dissent and opposition against the administration.¹⁶ Based on recent claims tallied by the Human Rights Violations Victims’ Claims Board,¹⁷ 2,326 claims for killings and enforced disappearance during the Marcos regime were recognized and awarded reparation,¹⁸ although the numbers, similar to Latin America, remain conservative since other victims remain unaccounted for.¹⁹ Unfortunately, even after Marcos’ regime, enforced disappearance remains to be an enduring concern in the country.

Desaparecidos were still prevalent during the transitional administration of Corazon Aquino.²⁰ Even during Gloria Macapagal-Arroyo’s term, more

¹³ Danilo Freire, John Meadowcraft, David Skarbek, & Eugenia Guerrero, *Deaths and Disappearances in the Pinochet Regime: A New Dataset* (2019) SocArXiv, 6, available at <https://doi.org/10.31235/osf.io/vqnwu>.

¹⁴ Kirsten A. Weld, *Because They Were Taken Alive: Forced Disappearance in Latin America*, REVISTA, HARV. REV. LATIN AM., (2013), available at <https://revista.drclas.harvard.edu/because-they-were-taken-alive-forced-disappearance-in-latin-america/>.

¹⁵ The term has been adopted and commonly used in the Philippines as well, probably owing to the enduring influence of Spanish language in the country.

¹⁶ United Nations Commission on Human Rights, Report on the visit to the Philippines by two members of the Working Group on Enforced or Involuntary Disappearances (27 August–7 September 1990) ¶¶ 7–12, UN Doc. E/CN.4/1991/20/Add.1., (Jan. 10, 1991).

¹⁷ The Board was created pursuant to Rep. Act No. 10368 (Human Rights Victims Reparation and Recognition Act of 2013) to “receive, evaluate, process, and investigate applications” for claims for reparation of victims of human rights violations during the Marcos regime. *Human Rights Violations Victims’ Memorial Commission, List of Victims and Recognized Motu Proprio*, available at <https://hrvmmemcom.gov.ph/list-of-victims-recognized-motu-proprio/>.

¹⁸ *Id.*

¹⁹ In the first nine months of 1983, 74 cases of enforced disappearance were reported in the island of Mindanao alone. Virginia Leary, A.A. Ellis, & Kurt Madlener. *The Philippines: Human Rights after Martial Law*, THE INTERNATIONAL COMMISSION OF JURISTS, 12 (1984), available at <https://www.icj.org/wp-content/uploads/1984/01/Philippines-human-rights-mission-report-1984-eng.pdf>. One report pegged the total number at about 3,240. See also Raphael Lorenzo A. Pangalangan et. al., *Marcosian Atrocities: Historical Revisionism and the Legal Constraints on Forgetting*, 19(2) ASIA-PACIFIC J. ON HUM. RTS. & L. 140, 142 (2018), available at <https://archium.ateneo.edu/peace-justice-strong-institutions/1/>.

²⁰ See Seth Mydans, *‘Disappearances’ of Filipinos Goes On Even Under Aquino*, THE NEW YORK TIMES, Nov. 14, 1988, available at

than 300 cases of enforced disappearance were reported,²¹ which prompted the Supreme Court to craft remedies to address the issue. For Rodrigo Duterte's bloody campaign against illegal drugs, cases of enforced disappearance were mostly associated with socioeconomic class, in contrast to ideological dimension; but these cases still relied on terror to spread government propaganda.²² Based on a 2021 Report of the UN Working Group on Enforced or Involuntary Disappearances (UN Working Group), the Philippines continues to hold the greatest number of unresolved enforced disappearance cases in Southeast Asia.²³

Against this background, the international legal community has rallied in the last few decades to protect and provide remedies for victims of enforced disappearance. In 1980, the United Nations Commission on Human Rights ("UNCHR") established the United Nations Working Group on Enforced or Involuntary Disappearances, the first international *ad hoc* mechanism to address the problem.²⁴ In 1992, the United Nations General Assembly adopted the non-binding Declaration on the Protection of All Persons from Enforced Disappearance, which characterized any act of enforced disappearance as an offence to human dignity and a grave and flagrant violation of human rights and fundamental freedoms.²⁵ The Rome Statute then codified enforced disappearance as among the acts that may constitute crime against humanity.²⁶ Regional human rights authorities have also incorporated various mechanisms to protect citizens from enforced disappearance and provide remedies in such cases, such as the Organization of American States' 1994 Inter-American Convention on Forced Disappearance of Persons.²⁷ But, undoubtedly, the single most important step

<https://www.nytimes.com/1988/11/14/world/disappearances-of-filipinos-goes-on-even-under-aquino.html>.

²¹ Sheith Khidhir, *Disappearing in the Philippines*, THE ASEAN POST, Sept. 9, 2019, available at <https://theaseanpost.com/article/disappearing-philippines>.

²² Aie Balagtas & Raffy Lerma, *The desaparecidos of Duterte's drug war*, PHILIPPINE CENTER FOR INVESTIGATIVE JOURNALISM, Apr. 11, 2022 available at <https://pcij.org/article/8103/desaparecidos-of-duterte-drug-war>

²³ United Nations Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, 11, 29, & 33, 4 August 2021, A/HRC/48/57.

²⁴ Human Rights Council Res. 20 (XXXVI), UN Doc. E/CN.4/RES/1980/20, (Feb. 29, 1980).

²⁵ G.A. Res. 77/133 [hereinafter "UN Declaration on Enforced Disappearance"], (Feb. 12, 1993). Declaration on the Protection of All Persons from Enforced Disappearance.

²⁶ Rome Statute of the International Criminal Court, art. 7(2)(i), July 1, 2002, 2187 U.N.T.S. 90.

²⁷ Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529. In addition, the Council of Europe adopted Resolution 828, which urged the recognition of enforced disappearance as a crime against humanity. See Council of Europe Parliamentary Assembly, Res. 828 (Sept. 26, 1984).

undertaken by international organs is the adoption of the *Convention* in 2006: a universally binding instrument that expressly provides for a non-derogable right not to be subject to enforced disappearance:

1. No one shall be subjected to enforced disappearance.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.²⁸

The *Convention* serves as “an outcome of a quarter a century’s struggle against enforced disappearance”²⁹ and a “fulfilment of an evolutionary process resulting, with some contradictions, from non-binding legal instruments, the case law of a number of international human rights bodies and the only specific, although regional, precedent of the 1994 Interamerican Convention.”³⁰ When the *Convention* entered into force in December 2010, the Committee on Enforced Disappearance was consequently constituted to monitor the implementation of the Convention by States Parties. As of writing, the *Convention* has been signed by 98 states, with 74 countries either ratifying or acceding to its terms.³¹

The Philippines has also adopted various laws and issuances to address persistent cases of enforced disappearances and provide remedies and recourse for the victims and their families. In the last two decades, the Philippine Congress enacted the Anti-Enforced or Involuntary Disappearance Act of 2012³² and the Supreme Court adopted the Rule on the Writ of Amparo (“Amparo Writ Rule”).³³ Yet, the Philippines remains to be a non-party to the *Convention* and has expressed no indication to sign or ratify the *Convention*. During the *Convention*’s negotiation process, the representative from the Philippines, despite acknowledging the positive impact of the *Convention*, even seemed to criticize the *Convention*’s concentration on state-enforced disappearances, adding that “she would have preferred the *Convention* to reflect the reality that a significant portion of such disappearances were

²⁸ *Convention*, art 1.

²⁹ Vibhute, *supra* note 12, at 293–298.

³⁰ SCOVAZZI & CITRONI, *supra* note 8, at 265.

³¹ Status as of 24 May 2024, United Nations Treaty Collection Website, available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en (last accessed May 24, 2024).

³² Rep. Act No. 10353 (2012). Anti-Enforced or Involuntary Disappearance Act of 2012, [hereinafter “*Act*”].

³³ AMPARO WRIT RULE, A.M. No. 07-9-12-SC, Oct. 24, 2007.

committed by non-state groups.”³⁴ One author advanced two reasons behind the *Convention’s* non-ratification in the Philippines: “the fear of increasing external influence” and “a general lack of pressure by the public” on the government.³⁵

II. THE CONVENTION’S BINDING EFFECT ON PHILIPPINE LAW SANS RATIFICATION

Does the failure to sign and ratify the *Convention ipso facto* signify that the *Convention* has no binding effect whatsoever in the Philippines? Absent signature and ratification, is there no place for it in Philippine law? The simple answer is no. However, the *Convention’s* domestication³⁶ in the Philippines is not as straightforward as simply signing and ratifying it like any other source of conventional law.

A. Incorporating and Transforming International Law

Under the Philippine Constitution, international law can become part of domestic law either by transformation or incorporation.³⁷

Under the transformation method, international law is domesticated through constitutional mechanisms. The primary basis for the transformation is contained in Article VII, Section 21 of the 1987 Constitution, which states that “[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.”³⁸ Following such ratification by the Senate, no further action, legislative or otherwise, is necessary and the government is duty-bound to abide by the

³⁴ United Nations General Assembly, *Third Committee Approves Draft Resolution Concerning Convention on Enforced Disappearances; Hears Introduction of 17 Texts on Human Rights Issues*, UN Doc. GA/SHC/3872, (Nov. 13, 2006).

³⁵ Mary Aileen Bacalso, *An unattainable dream: Why the Philippines did not, and will not, ratify the Convention on Enforced Disappearances*, VÖLKERRECHTSBLOG, Dec. 21 2020, available at <https://voelkerrechtsblog.org/an-unattainable-dream/>.

³⁶ The article will refer to “domestication” as the process by which a “State incorporates [international law] and weaves it into its own domestic legislation and rule-making procedure.” Anthony D’Amato, *The Coerciveness of International Law*, 52 GERM. Y.B. INT’L. L. 437, 443 (2009).

³⁷ [Hereinafter “PHCAP”], Pharmaceutical and Health Care Association of the Philippines v. Duque, G.R. No. 173034, 535 SCRA 265, 289, Oct. 9, 2007.

³⁸ CONST., art. VII, § 21. Senate concurrence is required to provide “a healthy system of checks and balances indispensable toward our nation’s pursuit of political maturity and growth.” [Hereinafter “BAYAN”], BAYAN (Bagong Alyansang Makabayan) v. Zamora, G.R. No. 138570, 342 SCRA 449, 496, Oct. 10, 2000.

treaty or international agreement, consistent with the maxim *pacta sunt servanda*.³⁹ Mere ratification domesticates the treaty without any concomitant local legislation or action.

Although it may appear from the Constitution that the transformation method only applies to treaties, the Supreme Court has tacitly extended its application to international instruments that do not necessarily fall into the definition of a treaty or international convention.⁴⁰

In *PHCAP*,⁴¹ the Court recognized that non-treaty instruments may still be transformed into domestic law if they are specifically adopted by local legislation. In that case, the Philippine Congress enacted the Milk Code, an almost verbatim reproduction of the International Code of Marketing of Breastmilk Substitutes (ICMBS), adopted by the World Health Assembly (WHA) in 1981.⁴² Consequently, the Milk Code's implementing rules drafted by the health department referred to and emulated other WHA resolutions, although not embodied in the Milk Code itself. The Court ruled that the ICMBS, although not a treaty, had been transformed into domestic law through local legislation, such as the Milk Code.⁴³ However, it clarified that the implementing rules' reference to other WHA resolutions not specifically embodied in the Milk Code was inappropriate, since the resolutions were not properly transformed through local legislation and are therefore not binding on the Philippines.⁴⁴

³⁹ David v. Senate Electoral Tribunal, G.R. No. 221538, 803 SCRA 435, 528, Sept. 20, 2016. Professor Casis argues that this may not usually be the case since treaties may, in reality, require additional ratifications and even the enactment of an implementing legislation. Rommel J. Casis, *Domesticating International Law: Resolving the Uncertainty and Incongruence*, 2020 PHIL. Y.B. INT'L L., 128, 135.

⁴⁰ As a party thereto, the Philippines adopt the definition of treaty under the Vienna Convention on the Law of Treaties. *BAYAN*, *supra* note 38, 488. The Philippines signed the Vienna Convention on the Law of Treaties on May 23, 1969 and ratified the same on November 15, 1972. *See* Vienna Convention on the Law of Treaties, UNITED NATIONS TREATY COLLECTION WEBSITE, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (last accessed June 22, 2024).

⁴¹ *PHCAP*, *supra* note 37, at 289–90.

⁴² *PHCAP*, *supra* note 37, at 289–90.

⁴³ *PHCAP*, *supra* note 37, at 289–90.

⁴⁴ *PHCAP*, *supra* note 37, at 295. The Court added that although the WHA resolutions may not be treated as binding international law, they may constitute “soft law” which may affect State practice. *PHCAP*, *supra* note 37, at 297. *See also* In the Matter of the Urgent Petition for the Release of Prisoners on Humanitarian Grounds in the Midst of the COVID-19 Pandemic, G.R. No. 252117, 878 Phil. 628, Jul. 28, 2020 (Leonen, J., *separate opinion*) arguing that the Mandela Rules adopted by the United Nations General Assembly on the minimum standards for treatment of prisoners have been transformed as part of domestic

Hence, based on the current framework, transformation may either be through ratification, which is applicable to treaties or other international agreements, or through embodiment in a domestic law, which may be used even for non-treaty agreements. In the former, the treaty itself is binding and transformed; in the latter, only those subjects of local legislation are deemed binding and transformed.

The incorporation method, on the other hand, applies when “by mere constitutional declaration, international law is deemed to have the force of domestic law.”⁴⁵ No further act is necessary to facilitate domestication.⁴⁶ It is provided under Article II, Section 2, of the Constitution, which explicitly states that the Philippines “[a]dopts the generally accepted principles of international law as part of the law of the land,” even if they are not derived from treaty obligations.⁴⁷ Generally accepted principles of international law have been interpreted to refer to both customary international law and general principles of law under the ICJ Statute.⁴⁸ In this regard, Philippine courts subscribe to the classical formulation in international law that requires the concurrence of an established, widespread, and consistent practice on the part of States and a psychological element of *opinion juris sive necessitates to establish the existence of customary international law*.⁴⁹ For instance, the Supreme Court has considered renunciation of war,⁵⁰ sovereign immunity,⁵¹ equality and non-discrimination,⁵² and recognition of foreign judgments,⁵³ among others, as generally accepted principles of international law.

law, since the standards contained therein were embodied and adopted in Rep. Act No. 10575 (2013), or the Bureau of Corrections Act.

⁴⁵ *PHCAP*, *supra* note 37, at 289.

⁴⁶ [Hereinafter “*Pangilinan*”], *Pangilinan v. Cayetano*, G.R. No. 238875, 976 SCRA 509, 573, Mar. 16, 2021.

⁴⁷ CONST., art. II, § 2; [Hereinafter “*Mijares*”], *Mijares v. Ranada*, G.R. No. 139325, 455 SCRA 397, 421, Apr. 12, 2005.

⁴⁸ *Pangilinan*, *supra* note 46, at 577. The term has been subject of conflict after the Constitution was adopted. Early case law insisted that “generally accepted principles of international law” only referred to general principles of law under the ICJ Statute and is not inferior to international convention and custom. *Government of the United States of America v. Purganan*, G.R. No. 148571, Dec. 7, 2002 (Vitug, *J.*, *separate opinion*).

⁴⁹ *Mijares*, 455 SCRA 397, at 421.

⁵⁰ CONST., art. II, § 2.

⁵¹ *Baer v. Tizon*, G.R. No. L-24294, 57 SCRA 1, 3, May 3, 1974; *United States v. Guinto*, G.R. No. 76607, 182 SCRA 644, 653, Feb. 26 1990; *Arigo v. Swift*, G.R. No. 206510, 735 SCRA 102, 132, Sept. 16, 2014.

⁵² *International School Alliance of Educators v. Quisumbing*, G.R. No. 128845, 333 SCRA 13, 20, June 1, 2000.

⁵³ *Mijares*, 455 SCRA 397, at 421–423.

Similar to the transformation method, the Supreme Court has also expanded the application of the incorporation clause to treaties, ratified or not, non-treaty international instruments, and even to “international jurisprudence.”⁵⁴ For instance, in *Sehwani, Inc. v. In-N-Out Burger, Inc.*,⁵⁵ the Court held that the Paris Convention, to which the Philippines is a signatory to, and the 1999 Joint Recommendation of the World Intellectual Property Organization and the Paris Union, which were both non-binding, have the force and effect of law under the incorporation clause. In *Vinuya v. Executive Secretary*,⁵⁶ the Court ruled that although the Philippines had not acceded or signed the Hague Convention on Rules and Regulations covering Land Warfare, the convention nevertheless formed part of domestic law by virtue of the incorporation clause as a “commitment to the laws of war and humanity.”

B. The Spirit of the *Convention* Incorporated

In *Razon v. Tagitis*,⁵⁷ the Supreme Court expressly recognized the binding nature of the terms of the Convention. In the case, Morced Tagitis was reported missing. The respondent, Tagitis’ wife Mary Jean, filed a petition praying for a writ of *amparo*, claiming that based on information relayed to her by a high-ranking military official, Tagitis was in the custody of police intelligence operatives against his will for purported connections with terrorist organizations.⁵⁸

The petitioner, chief of police, denied knowledge of Tagitis’ whereabouts and claimed that the police investigated and searched for the respondent but to no avail.⁵⁹ The appellate court issued the writ and found Tagitis to be a victim of an enforced disappearance as defined in the United Nations Declaration on Enforced Disappearance.⁶⁰

When the case was elevated to the Supreme Court, there was still no statutory law governing enforced disappearance in the Philippines.⁶¹ Only the court-issued rules on the writ of *amparo* were in effect, which only provided

⁵⁴ *Bayan Muna v. Romulo*, G.R. No. 159618, 641 SCRA 244, 257, Feb. 1, 2011.

⁵⁵ G.R. No. 171053, 536 SCRA 225, 241–242, Oct. 15, 2007.

⁵⁶ G.R. No. 162230, 732 SCRA 595, 600, Aug. 12, 2014.

⁵⁷ [Hereinafter “*Tagitis*’”], G.R. No. 182498, 606 SCRA 598, 672, Dec. 3, 2009.

⁵⁸ *Tagitis*, 606 SCRA 598, at 655.

⁵⁹ *Tagitis*, 606 SCRA 598, at 626.

⁶⁰ *Tagitis*, 606 SCRA 598, at 649; *see also* UN Declaration on Enforced Disappearance, G.A. Res. 77/133.

⁶¹ *Tagitis*, 606 SCRA 598, at 620.

remedies to victims of enforced disappearance and their families but did not exactly criminalize the practice or punish perpetrators.⁶²

Notwithstanding, the Supreme Court found support in international law to declare enforced disappearance as a flagrant violation of human rights.⁶³ Noting that the Philippines has neither signed nor ratified the *Convention* and is thus not required to enact any law penalizing enforced disappearance, the Court emphasized that the Philippines is still a member of the United Nations and is bound by its Charter and the various conventions it crafted on human rights.⁶⁴

It then discussed the various steps that the international legal community had taken, from the United Nations to American and European regional organizations, and related it to the International Convention on Civil and Political Rights to conclude the existence of a right against enforced disappearance as part of customary international law.⁶⁵ Thus:

While the Philippines is not yet formally bound by the terms of the Convention on enforced disappearance [...] and has not formally declared enforced disappearance as a specific crime, [...] enforced disappearance as a State practice has been repudiated by the international community, so that the ban on it is now a generally accepted principle of international law, which we should consider a part of the law of the land, and which we should act upon to the extent already allowed under our laws and the international conventions that bind us.⁶⁶

The Court then proceeded to evaluate the case on its merit: whether *Tagitis* was really a victim of enforced disappearance. In doing so, it relied on the definition of the term as contained in the *Convention*, adopting a four-prong elemental analysis based on the said definition:

1. Arrest, detention, abduction or any form of deprivation of liberty;
2. Carried out by agents of the State or persons or groups of persons acting with the authorization, support or acquiescence of the State;
3. Followed by a refusal to acknowledge the detention, or a concealment of the fate of the disappeared person; and

⁶² *Tagitis*, 606 SCRA 598, at 620.

⁶³ *Tagitis*, 606 SCRA 598, at 668–83.

⁶⁴ *Tagitis*, 606 SCRA 598, at 671.

⁶⁵ *Tagitis*, 606 SCRA 598, at 671–683.

⁶⁶ *Tagitis*, 606 SCRA 598, at 679.

4. Placement of the disappeared person outside the protection of the law.⁶⁷

Further relying on case laws from the European Court of Human Rights and the Inter-American Court of Human Rights, the Court held that despite the lack of direct evidence, the respondent was able to establish the government's complicity in the disappearance of Tagitis.⁶⁸ In the absence of a statutory law on the matter, however, the Court made no specific pronouncement as to the exact authorship and responsibility of the authorities involved and instead referred the matter to the authorities for further investigation and monitoring.⁶⁹

C. The *Convention* Transformed?

In 2012, the Philippine Congress enacted Rep. Act No. 10353 or the Anti-Enforced or Involuntary Disappearance Act of 2012.⁷⁰ The law expressly penalizes enforced disappearance as a crime and lays down the rules on liability of those found guilty of the crime. The *Act* embodies concepts contained in the *Convention*, including a verbatim reproduction of the definition of the term "enforced disappearance."⁷¹ The intersection between the *Convention* and the *Act* has not been addressed by the Supreme Court. However, using the pronouncement in *PHCAP*, it can be reasonably assumed that a treaty, even if the Philippines is not a signatory thereto, may be transformed through local legislation.⁷² If a simple resolution of an international body may be transformed, as in *PHCAP*, there is no sensible and sufficient hindrance to not extend the application of the transformation method to the terms of an unsigned or unratified treaty if the Congress in fact adopted them in domestic law.⁷³

⁶⁷ *Tagitis*, 606 SCRA 598, 694.

⁶⁸ *Tagitis*, 606 SCRA 598, at 682-685. Among the cases cited by the Supreme Court were *Velásquez Rodríguez*, supra note 6; *Timurtas v. Turkey*, App. No. 23531/94, 33 Eur. H.R. Rep. 147 (2000); *Kurt v. Turkey*, App. No. 24276/9, 27 Eur. H.R. Rep. 373 (1999).

⁶⁹ *Tagitis*, 606 SCRA 598, at 712-13.

⁷⁰ Rep. Act No. 10353 (2012). The Anti-Enforced or Involuntary Disappearance Act, [hereinafter "*Act*"] (2012).

⁷¹ *Act*, § 3(b).

⁷² *PHCAP*, 535 SCRA 265, 289.

⁷³ *PHCAP*, 535 SCRA 265, 289.

III. THE CURRENT PHILIPPINE LEGAL FRAMEWORK

The Constitution guarantees the people's right to life and liberty and declares as inviolable the right of the people to be secure in their persons,⁷⁴ corollary to the policy that the State must guarantee full respect for human rights.⁷⁵ The State is thus required to afford protection to these rights especially when they are under threat.

In cases of enforced disappearance, protection, according to the Supreme Court, includes “conducting effective investigations, organization of the government apparatus to extend protection to victims,” or threats thereof, and/or their families, and bringing offenders to the bar of justice.⁷⁶ These measures coincide with the *Convention's* mandate for States to take appropriate measures to investigate acts involving enforced disappearance and to ensure that perpetrators are held criminally liable.

A. The Three Classic Remedies in Philippine Law

In 1918, the mayor of Manila rounded up around 181 “women of ill repute” and shipped them against their will to Davao, a town located in the island of Mindanao, some 1,000 kilometres away from Manila. In *Villavicencio v. Lukban*,⁷⁷ the Supreme Court found the restraint on the women's liberty as arbitrary and illegal. The Court then indicated three remedies available when one's liberty is arbitrarily restrained: civil actions, criminal prosecutions, and the writ of *habeas corpus*.⁷⁸ For almost a century, cases involving enforced disappearance revolved around these three classic remedies.

Civil actions available for victims of enforced disappearance are contained in the Civil Code, particularly in the chapter pertaining to human relations. Under Article 32 thereof, a public officer or employee who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs rights and liberties of another person, including freedom from arbitrary and illegal detention and the right to be secure in one's person, shall be liable for

⁷⁴ CONST., art. III, §§ 1–2.

⁷⁵ CONST., art. II, § 11. The delegates of the 1986 Constitutional Commission, during their deliberation, considered cases of disappearances as one of the more severe cases of human rights violation. [Hereinafter “*Simon*”], *Simon v. Commission on Human Rights*, G.R. No. 100150, 229 SCRA 117, 133, Jan. 5, 1994.

⁷⁶ [Hereinafter “*Manalo*”], *Secretary of National Defense v. Manalo*, G.R. No. 180906, 568 SCRA 1, 57–58, Oct. 7, 2008.

⁷⁷ [Hereinafter, “*Villavicencio*”], 39 Phil. 778, 787 (1919).

⁷⁸ *Villavicencio*, 39 Phil. 778, 787.

damages.⁷⁹ Criminal actions, meanwhile, are governed by the Revised Penal Code. Although enforced disappearance is not explicitly punished under the Code, the act may fall under several punishable offenses, including arbitrary detention, expulsion, threats and coercion, physical injuries, and even murder.⁸⁰ Although not strictly criminal in nature, the Supreme Court has recognized administrative actions as a supplementary remedy to punish erring public officials who participate in the commission of enforced disappearance.⁸¹

The most commonly used of the three classic remedies is the writ of *habeas corpus*, one of the extraordinary writs introduced by the Americans during their occupation in the early 1900s,⁸² described by the Supreme Court as “the great and efficacious writ” and “serves as a swift and imperative remedy in all cases of illegal restraint or confinement.”⁸³

As the rules read now, the writ of *habeas corpus* is an independent remedy that extends to “all cases of illegal confinement or detention by which any person is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto.”⁸⁴ It is not limited to cases of enforced disappearance but covers all matters involving arbitrary restraint of liberty, such as in disputes involving custody of minors,⁸⁵ and mistaken identity during arrest.⁸⁶ The main office of *habeas corpus* is to inquire into the legality of one’s detention and to relieve a person therefrom if such restraint is illegal.⁸⁷ It is concerned not with the criminal act of which a complaint is made but with the right of liberty, notwithstanding the act.⁸⁸

⁷⁹ CIVIL CODE, art. 32.

⁸⁰ Vicente V. Mendoza, *A Note on the Writ of Amparo*, 82 PHIL. L.J. 1, 3 (2008).

⁸¹ *Id.* at 2. See also Cayago v. Lina, G.R. No. 149539, 449 SCRA 29, Jan. 19, 2005.

⁸² The writ first appeared in the PHILIPPINE ORGANIC ACT (1902), enacted by the United States Congress after the end of the Philippine-American War. Section 5 states that the “privilege of the writ of *habeas corpus* shall not be suspended” except in certain circumstances. The provision was reproduced in the JONES LAW (1916), the *de facto* constitution of the Philippines until 1934. The three subsequent Philippine Constitutions have retained the provision.

⁸³ Salas v. Bunyi-Medina, G.R. No. 251693, 956 SCRA 127, 143, Sept. 28, 2020.

⁸⁴ RULES OF COURT, Rule 102, § 1.

⁸⁵ In 2003, the Supreme Court issued the CUSTODY OF MINORS RULE, A.M. No. 03-04-04-SC, which provided specific rules on the issuance of a writ of *habeas corpus* in relation to custody of minors.

⁸⁶ In re Salibo, G.R. No. 197597, 755 SCRA 296, 301, Apr. 8, 2015.

⁸⁷ *Villavicencio*, *supra* note 78, at 790.

⁸⁸ Caballes v. Court of Appeals, G.R. No. 163108, 452 SCRA 312, 324, Feb. 23, 2005.

These remedies, however, were perceived to be ineffective to address enforced disappearance considering the number of unresolved cases during the Marcos regime and the subsequent democratic transition process post-Marcos. Civil and criminal actions were seldom resorted to due to the time it took for cases to be resolved and the consequent burden of proof required to attach guilt or liability to perpetrators.⁸⁹ Particularly in criminal cases where the presumption of innocence is constitutionally protected, proving illegal detention or murder in the absence of *corpus delicti* may prove difficult. The secretive nature of the offense also renders it impossible to ascertain the principal offender.⁹⁰

The writ of *habeas corpus* has also been viewed as insufficient to address enforced disappearances considering its general approach on arbitrary restraints of liberty. It neither compensates for past wrongful incarceration nor punishes the State for imposing it. Instead, it is only concerned with the legality or lawfulness of one's detention. Thus, detention must be proven first before the courts can decide whether it is lawful or not.

Proceedings can be dismissed by the mere denial of custody by the State.⁹¹ This can be particularly difficult in cases of enforced disappearance, because by its very nature, detention is committed in seclusion and evidence thereof is difficult to collect. And even if the restraint is initially illegal, a lawful process or order from the court can convert the illegal detention to a legal one, placing the detained individual outside of the writ's protection.⁹²

Moreover, under the present Constitution, the privilege of the writ may be suspended by the President, "except in cases of invasion or rebellion[,] when public safety requires it."⁹³ Recent interpretation of this provision by the Supreme Court tends toward judicial restraint, holding that the judicial power to review the sufficiency of factual basis of the suspension of the privilege of the writ does not extend to the calibration of the President's decision.⁹⁴

⁸⁹ *Mendoza*, *supra* note 80, at 3.

⁹⁰ Amrita Kapur, *The Impact of Enforced Disappearances on Women in BOOK OF THE DISAPPEARED: THE QUEST FOR TRANSNATIONAL JUSTICE* 73 (Jennifer Heath & Ashraf Zahedi ed., 2023).

⁹¹ *Mendoza*, *supra* note 80, at 4. See, e.g. *In re Gordula*, G.R. L-63761, 125 SCRA 152, Oct. 24, 1983.

⁹² RULES OF COURT, Rule 102, § 4. See *Rodriguez v. Bonifacio*, A.M. No. RTJ-99-1510. 344 SCRA 519, 540–41, Nov. 6, 2000. "Even granting that the arrest of Ma Jing was initially illegal, the filing of the Charge Sheet cured whatever incipient infirmity there was in her arrest."

⁹³ CONST., art. III, § 15.

⁹⁴ *Lagman v. Medialdea*, G.R. No. 231658, 829 SCRA 1, 157, Jul. 4, 2017.

B. The 2007 Rule on the Writ of Amparo

As a reaction to the “extraordinary rise” in the cases of extrajudicial killings and enforced disappearance during the Arroyo administration in the mid-2000s and the perceived lack of adequate remedies to address them,⁹⁵ the Supreme Court promulgated the Amparo Writ Rule⁹⁶ pursuant to its expanded power under the 1987 Constitution to promulgate rules to protect the people's constitutional rights.⁹⁷ The writ was patterned after Latin American constitutions that expressly provide for such remedy. Although no similar explicit provision is found in the 1987 Constitution, the Supreme Court explained that the broader policy of protecting human rights is imbued in the Constitution, including the power of the courts to determine whether there has been a grave abuse of discretion on the part of any branch or instrumentality of the government.⁹⁸

The court’s purpose for adopting the writ was expounded in this wise:

The writ of Amparo serves both preventive and curative roles in addressing the problem of extralegal killings and enforced disappearances. It is preventive in that it breaks the expectation of impunity in the commission of these offenses; it is curative in that it facilitates the subsequent punishment of perpetrators as it will inevitably yield leads to subsequent investigation and action. In the long run, the goal of both the preventive and curative roles is to deter the further commission of extralegal killings and enforced disappearances.⁹⁹

The writ of amparo is defined under the *Amparo Rules* as:

[A] remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity.

The writ shall cover extralegal killings and enforced disappearances or threats thereof.¹⁰⁰

⁹⁵ Tapuz v. Del Rosario, G.R. No. 182484, 554 SCRA 768, 784, June 17, 2008.

⁹⁶ AMPARO WRIT RULE (2007). It took effect on October 24, 2007.

⁹⁷ The power of the Supreme Court to promulgate the rules was inserted in the 1987 Constitution in response to the experience of the martial law regime. *Manalo*, 568 SCRA 1, at 38.

⁹⁸ *Manalo*, 568 SCRA 1, at 41.

⁹⁹ *Manalo*, 568 SCRA 1, at 43.

¹⁰⁰ AMPARO WRIT RULE, § 1.

The Supreme Court has, however, clarified that despite the broad concept encompassed by the first paragraph of the definition, the writ is confined only to instances or threats of extralegal killings and enforced disappearances.¹⁰¹ Extralegal killing has been defined as “killings committed without due process of law, *i.e.*, without legal safeguards or judicial proceedings.”¹⁰² This definition was lifted from various UN instruments.¹⁰³

Enforced disappearances, on the other hand, connote disappearances that are “attended by the following characteristics: an arrest, detention or abduction of a person by a government official or organized groups or private individuals acting with the direct or indirect acquiescence of the government; the refusal of the State to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of liberty which places such persons outside the protection of law.”¹⁰⁴ This concept was lifted from the UN Declaration on Enforced Disappearance.¹⁰⁵

The Amparo Writ Rule, in providing for a swifter remedy that would provide both interim and permanent reliefs, introduce several distinct concepts in the filing a petition:

1. Strictly speaking, the aggrieved persons in cases of enforced disappearances are the *desaparecidos* themselves. However, it would be impossible for them to file the petition themselves if they are still not found. The Rules thus introduced the concept of qualified persons to determine legal personality, and allow any of the following, observing the order, to file a petition on behalf of the aggrieved person:
 - a. Any member of the immediate family, namely: the spouse, children and parents of the aggrieved party;
 - b. Any ascendant, descendant or collateral relative of the aggrieved party within the fourth civil degree of consanguinity or affinity, in default of those mentioned in the preceding paragraph; or

¹⁰¹ *Manalo*, 568 SCRA 1, at 38.

¹⁰² *Manalo*, 568 SCRA 1, at 38.

¹⁰³ *Manalo*, 568 SCRA 1, at 75.

¹⁰⁴ *Manalo*, 568 SCRA 1, at 38-39.

¹⁰⁵ *Manalo*, 568 SCRA 1, at 38.

- c. Any concerned citizen, organization, association or institution, if there is no known member of the immediate family or relative of the aggrieved party.¹⁰⁶
2. The petition “may be filed on any day and at any time with the Regional Trial Court of the place where the threat, act, or omission or any of its elements” was committed, “with the Sandiganbayan, the Court of Appeals, the Supreme Court, or any justice of such courts.”¹⁰⁷
3. The writ is “enforceable anywhere in the Philippines.”¹⁰⁸
4. Filing of a petition is exempt from payment of all legal and docket fees.¹⁰⁹
5. The writ may be prayed for as a separate action or as a motion in pending criminal action.¹¹⁰

If the court finds the petition meritorious on its face, it will then issue a preliminary writ that would require the respondent to file a return, where all defenses available are interposed and necessary information disclosed.¹¹¹ Thereafter, the court will proceed to summarily hear the petition.¹¹² Pending trial, it may issue interim orders, such as temporary protection orders, inspection and production orders, or witness protection orders.¹¹³ It may also hold any person in contempt if the court’s order is disobeyed.¹¹⁴

A petition must be supported by substantial evidence, which is defined as evidence “which a reasonable mind might accept as adequate to support a conclusion.”¹¹⁵ In the case of *In re Rodriguez*,¹¹⁶ the abducted person himself testified and narrated the torture he suffered at the hands of military officials, which was supported by a medical examination conducted on him. In *Republic v. Cayanan*,¹¹⁷ the sole testimony of an eyewitness to the abduction

¹⁰⁶ AMPARO WRIT RULE, § 2.

¹⁰⁷ AMPARO WRIT RULE, § 3.

¹⁰⁸ AMPARO WRIT RULE, § 3.

¹⁰⁹ AMPARO WRIT RULE, § 4.

¹¹⁰ AMPARO WRIT RULE, § 22.

¹¹¹ AMPARO WRIT RULE, § 9.

¹¹² AMPARO WRIT RULE, § 13.

¹¹³ AMPARO WRIT RULE, § 14.

¹¹⁴ AMPARO WRIT RULE, § 16.

¹¹⁵ *Yano v. Sanchez*, G.R. No. 186640, 612 SCRA 347, 360, Feb. 11, 2010.

¹¹⁶ G.R. No. 191805, 660 SCRA 84, 118–20, Nov. 15, 2011.

¹¹⁷ G.R. No. 181796, 844 SCRA 183, 194, Nov. 07, 2017.

was found sufficient. The Supreme Court has, however, clarified that direct evidence is not the only means to establish entitlement to a writ and that there must be some adjustments for flexibility in the ordinary rules of evidence.

In *Tagitis*, the Supreme Court adopted the “totality of the obtaining situation” standard and discussed that:

The fair and proper rule, to our mind, is to consider all the pieces of evidence adduced in their totality, and to consider any evidence otherwise inadmissible under our usual rules to be admissible if it is consistent with the admissible evidence adduced. In other words, we reduce our rules to the most basic test of reason — [that is] to the relevance of the evidence to the issue at hand and its consistency with all other pieces of adduced evidence. Thus, even hearsay evidence can be admitted if it satisfies this basic minimum test.¹¹⁸

Although evidentiary rules may be relaxed, this does not relieve the petitioner of the *onus* of proving the case by testimonial, documentary, or at least circumstantial evidence.¹¹⁹ One cannot rely on mere rumors and speculations, without presenting any clear and independent evidence showing such threat to warrant the issuance of the writ.¹²⁰ Once the allegations in the petition are proven by substantial evidence, “the court shall grant the privilege of the writ and [order] such reliefs as may be proper and appropriate.”¹²¹ Any interim reliefs awarded may also be declared permanent. Otherwise, the privilege of the writ shall be denied.

C. The Anti-Enforced or Involuntary Disappearance Act of 2012

When the *Act* was passed in 2012, its proponents described it as a “cogent response”¹²² to the *Convention*. Notwithstanding the non-party status of the Philippines to the *Convention*, the *Act* heavily borrows the principal concepts and mechanisms contained in the *Convention*, on top of its verbatim reproduction of the definition of enforced disappearances.

¹¹⁸ *Tagitis*, 606 SCRA 598, at 692.

¹¹⁹ *In re Saez*, G.R. No. 183533, 681 SCRA 678, 694, Sept. 25, 2012.

¹²⁰ *Morada v. Rias*, G.R. No. 222226, Feb. 14, 2022.

¹²¹ AMPARO WRIT RULE, § 18.

¹²² H. No. 98, 15th Cong., 1st Sess. (2010).

1. *Nature of the right*

Article 1 of the *Convention* declares that “[n]o one shall be subjected to an enforced disappearance[]” and “[n]o exceptional circumstances [...] may be invoked as justification” to commit the same.¹²³ This is practically restated in Section 4 of the *Act*, which emphasizes the non-derogability of the right against enforced disappearance, and even added that the “safeguards for its prevention shall not be suspended under any circumstance including political instability, threat of war, state of war, or public emergencies.”¹²⁴

The principle of non-derogability is also reflected in Section 5 of the *Act*, which states that “[a]n ‘Order of Battle’ or any order of similar nature, official or otherwise, from a superior officer or a public authority causing the commission of enforced disappearance is unlawful and cannot be invoked as a justifying or exempting circumstance.”¹²⁵

2. *Definitions*

As earlier stated, the *Act* adopted the definition of enforced disappearance as found in the *Convention*.¹²⁶ The *Act* also adopted the *Convention’s* definition of a victim, as pertaining to “the disappeared person” himself or herself and “any individual who has suffered harm as the direct result of an enforced [or involuntary] disappearance”.¹²⁷

3. *Continuing character of the offence*

Under Section 21 of the *Act*, “[a]n act constituting enforced disappearance shall be considered a continuing offense as long as the perpetrators continue to conceal the fate and whereabouts of the disappeared person and such circumstances have not been determined with certainty.”¹²⁸ The continuing nature of any offense involving enforced disappearance is also explicitly stated in Article 8(1)(b) of the *Convention*.¹²⁹ As will be discussed in Part IV(B)(1), this characterization may have a significant impact on criminal liabilities for offenses committed prior to the enactment of the *Act* or as accession to the *Convention*.

¹²³ *Convention*, art. 1.

¹²⁴ *Act*, § 4.

¹²⁵ *Act*, § 5.

¹²⁶ *Act*, § 3(b).

¹²⁷ *Act*, § 3(d).

¹²⁸ *Act*, § 21.

¹²⁹ *Convention*, art. 8(1)(b).

4. Principle of Non-Refoulement

Article 16 of the *Convention* prohibits a State Party from expelling, returning, surrendering, or extraditing a person to another State “where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”¹³⁰ Section 25 of the *Act* contains an almost verbatim of the *Convention*’s non-refoulement provision.¹³¹

5. Official Register Requirement

Article 17(3) of the *Convention* requires a State Party to maintain “one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, at any judicial or other competent authority[.]”¹³² At minimum, the register must contain the following information:

- (a) The identity of the person deprived of liberty;
- (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
- (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
- (d) The authority responsible for supervising the deprivation of liberty;
- (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
- (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.¹³³

Section 10 of the *Act* also mandates the creation of an official up-to-date register of all persons detained or confined, which must contain the same

¹³⁰ Convention, art. 16.

¹³¹ *Act*, § 25.

¹³² Convention, art. 17(3).

¹³³ Convention, art. 17(3).

information enumerated in the *Convention*.¹³⁴ In addition, the *Act* requires the following additional information:

- (a) The date and time of each removal of the detained or confined person from his or her cell, the reason or purpose for such removal and the date and time of his or her return to his or her cell;
- (b) A summary of the physical, mental and medical findings of the detained or confined person after each interrogation;
- (c) The names and addresses of the persons who visit the detained or confined person and the date and time of such visits and the date and time of each departure;
- (d) All other important events bearing on and all relevant details regarding the treatment of the detained or confined person.¹³⁵

6. *Right to Information*

Free access to information contained in the register is mandatory. Under Article 18(1) of the *Convention*, access shall be given to “any person with a legitimate interest in the information, such as relatives of the person deprived of liberty” or counsel, subject to the provisions of data protection in Article 19, and the restrictions to access as allowed by Article 20.¹³⁶ Section 10 the *Act* likewise grants free access to the register to relatives, lawyers, and all persons who have a legitimate interest in the whereabouts and condition of the persons deprived of liberty.¹³⁷ However, the *Act* provides no similar provisos on data protection, although the Data Privacy Act and relevant freedom of information regulations may provide supplementary application.¹³⁸

7. *Liabilities*

In Section 15 of the *Act*, enforced disappearance is criminalized through the imposition of penalties for its commission, punishing regardless of participation (i.e., principal, accomplice, or accessory) and stage of execution (i.e., consummated or merely attempted).¹³⁹ The provision appears to be the Philippines’ compliance to the directive in Article 4 of the *Convention* “to ensure that enforced disappearance constitutes an offence” under

¹³⁴ Act, § 10; Convention, art. 17(3).

¹³⁵ Act, § 10.

¹³⁶ Convention, art. 18(1), 19, & 20.

¹³⁷ Act, § 10.

¹³⁸ See Rep. Act No. 10173 (2012). Data Privacy Act of 2012.

¹³⁹ Act, § 15.

domestic criminal law.¹⁴⁰ Moreover, it coincides with Article 6(1)(a) of the *Convention* that mandates that those who commit or attempt to commit or are an accomplice to or who participate in an enforced disappearance shall be criminally responsible.¹⁴¹

Further penalizing the act of committing enforced disappearance, and making the offence punishable by appropriate penalties which “take into account its extreme seriousness” as mandated by Article 7 of the *Convention*,¹⁴² the *Act* also contains the following provisions:

1. Under Section 15, the principal offender of a consummated enforced disappearance shall suffer the penalty of *reclusion perpetua* and its accessory penalties.¹⁴³ At present, considering the prohibition of death penalty in the Philippines[,] pursuant to Republic Act No. 9346, *reclusion perpetua* is the harshest penalty that may be imposed for the commission of a crime.¹⁴⁴ Section 18 provides that criminal liability under the Act shall not prevent prosecution for violations of Republic Act No. 7438 or “An Act Defining Certain Rights of Person Arrested, Detained or Under Custodial Investigation as well as the Duties of the Arresting, Detaining, and Investigating Officers, and Providing Penalties for Violations Thereof,” Republic Act No. 9745 or “An Act Penalizing Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and Prescribing Penalties Therefor,” and other applicable provisions of the Revised Penal Code.¹⁴⁵
2. Under Section 16, government officials and personnel who are found to be participants [...] in the commission of [an] enforced disappearance [...] shall be preventively suspended or summarily dismissed [...], depending on the strength of the evidence[.]”¹⁴⁶
3. Under Section 17, offenders shall also be held liable under civil law.¹⁴⁷

¹⁴⁰ *Convention*, art. 4.

¹⁴¹ *Convention*, art. 6(1)(a).

¹⁴² *Convention*, art. 7(1).

¹⁴³ *Act*, § 15(a).

¹⁴⁴ Rep. Act No. 9346 (2005). An Act Prohibiting the Imposition of Death Penalty in the Philippines.

¹⁴⁵ *Act*, § 18.

¹⁴⁶ *Act*, § 16.

¹⁴⁷ *Act*, § 17.

4. Under Section 19, prosecution under this law in any Philippine court shall not bar “any other investigation [...] or proceedings before any appropriate international court or agency under applicable international human rights and humanitarian law.”¹⁴⁸

Where enforced disappearance is committed by the Philippine National Police or other law enforcement agencies, Section 14 of the *Act* prescribes the specific liabilities of the relevant commanding officer or superior.¹⁴⁹ This is in accordance with Article 6(1)(b) of the *Convention*, which requires that a superior be held criminally responsible for certain acts of his subordinates.¹⁵⁰

8. *Exemption from Prosecution*

Article 7(2)(a) of the *Convention* allows a State Party to establish mitigating circumstances for persons who, having been “implicated in the commission of an enforced disappearance, effectively contributes to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance[.]”¹⁵¹ On the other hand, Section 20 of the *Act* provides that “[an] offender who volunteers information that leads to the discovery of the victim of enforced disappearance [...] or the prosecution of offenders without the victim being found, shall be exempt from criminal and/or civil liability.”¹⁵² The exemption, however, shall apply only if the “offender does not appear to be the most guilty.”¹⁵³

9. *Statute of Limitations*

Owing to the continuous nature of the offence, Article 8 of the *Convention* requires that a State Party that applies a statute of limitations to ensure that the length of the terms is proportionate to the seriousness of the offence.¹⁵⁴ Thus, in the *Act*, the Philippines adopts a limited application of the statute of limitations. It shall run only when the victim surfaces alive, upon which the prescriptive period of 25 years shall start.¹⁵⁵

¹⁴⁸ *Act*, § 19.

¹⁴⁹ *Act*, § 14.

¹⁵⁰ *Convention*, art. 6(1)(b).

¹⁵¹ *Convention*, art. 7(2)(a).

¹⁵² *Act*, § 20.

¹⁵³ *Act*, § 20.

¹⁵⁴ *Convention*, art. 8(1).

¹⁵⁵ *Act*, § 22.

10. *Non-Exclusivity or Double Jeopardy*

The *Convention*, pursuant to Article 9(3), “does not exclude any additional criminal jurisdiction exercised in accordance with national law.”¹⁵⁶ In the same vein, Section 19 of the *Act* allows the “investigation, trial, or any legal or administrative process before any appropriate international court or agency under applicable international human rights or humanitarian law[.]” even when similar investigations, trials, or processes under national law are ongoing before Philippine courts.¹⁵⁷

11. *Reparation*

Article 24(4) of the *Convention* requires a State Party to ensure that “victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.”¹⁵⁸ Reparation under Article 24(5) constitutes material and moral damages, and restitution, rehabilitation, satisfaction, and guarantees of non-repetition wherever appropriate.¹⁵⁹ Meanwhile, Section 26 of the *Act* provides that “victims of an enforced [...] disappearance shall be entitled to monetary compensation, rehabilitation and restitution of honor and reputation.”¹⁶⁰ It goes into more detail as to what restitution of honor and reputation entails.¹⁶¹ Victims are also provided assistance so as to reintegrate into society under Section 27.¹⁶² Curiously, under Section 27 of the *Act*, rehabilitation extends beyond the victims, as the offender shall undergo a rehabilitation program pursuant to the policy of restorative justice.¹⁶³

12. *Provisions Not Adopted in the Act*

Notably, there are salient provisions in the *Convention* that are not adopted in the *Act*.

Article 12 of the *Convention*, for instance, requires that an investigation be conducted “[w]here there are reasonable grounds to believe that a person

¹⁵⁶ *Convention*, art. 9(3).

¹⁵⁷ *Act*, § 19.

¹⁵⁸ *Convention*, art. 24(4).

¹⁵⁹ *Convention*, art. 24(5).

¹⁶⁰ *Act*, § 26.

¹⁶¹ *Act*, § 26.

¹⁶² *Act*, § 27.

¹⁶³ *Act*, § 27.

has been subjected to enforced disappearance,” even if no formal complaint has been filed.¹⁶⁴

The *Convention*, in Article 21, also requires that “measures are taken to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released.”¹⁶⁵ No similar provisions are found in the *Act*. There is likewise no counterpart provision in the *Act* with respect to Article 23 of the *Convention*. Specifically, Article 23 requires a State Party to “ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials, and other persons who may be involved in the custody or treatment of any person deprived of liberty includes” education on the *Convention*.¹⁶⁶

IV. SELECTED ISSUES ON THE IMPLEMENTATION OF THE ACT

Although the enactment of the Act indicated a significant step toward achieving the goal of erasing the practice of enforced disappearance, we are still far from realizing its full potential and fulfilling its mandate.

A. Enforcing and Implementing the Act

The campaign that led to the enactment of a law that criminalizes enforced disappearance in the Philippines took 16 long years.¹⁶⁷ As the first anti-enforced disappearance law in Asia, the *Act* truly is a landmark piece of legislation. The work, however, does not end with its enactment.

More than a decade since, not a single conviction for the offense of enforced disappearance has been made. In 2023, the group Families of Victims of Involuntary Disappearance (FIND) called on the Philippine government to intensify its effort in implementing the law. FIND said that since the law’s enactment, 183 cases of enforced disappearance have been recorded, and not one person has been held accountable.¹⁶⁸ FIND cites the lack of funding and an “overall improper grasp of the concept of human

¹⁶⁴ *Convention*, art. 12.

¹⁶⁵ *Convention*, art. 21.

¹⁶⁶ *Convention*, art. 23.

¹⁶⁷ Caroliza Tulod-Peteros, *Campaigning a law against enforced disappearance: A sixteen-year battle won*, THE VOICE, 3 (2013).

¹⁶⁸ Jodesz Gavilan, *Families of the Disappeared Seek Justice through Implementation of Landmark Law*, RAPPLER, Aug. 30, 2023, at <https://www.rappler.com/nation/families-call-proper-implementation-anti-enforced-involuntary-disappearance-act-desaparacidos/>

rights” as reasons for the failure in implementation.¹⁶⁹ Unfortunately, law enforcement agencies seem to put the blame on the people for allegedly failing to report or belatedly filing claims of enforced disappearances and not cooperating with them in resolving reported cases.¹⁷⁰

1. *The Limits of the CHR and Other Implementing Bodies*

The Commission on Human Rights (CHR) is the agency primarily tasked with overseeing the Act’s implementation.¹⁷¹ For the initial implementation of the Act, the Congress appropriated the amount of PHP 10,000,000.00, with the mandate that further funding shall be provided for the continuing implementation of the Act.¹⁷² Said funding, however, has not appeared in the General Appropriations Act in the years subsequent to its enactment.

The CHR’s limited budget poses as one of its biggest barriers to fully carrying out its mandate. Although, the CHR is undeniably an independent constitutional creation,¹⁷³ it does not belong to the class of constitutional commissions that enjoy fiscal autonomy,¹⁷⁴ with its budget is subject to congressional approval. Even the CHR admits the financial constraints imposed by the *Act*.¹⁷⁵ For instance, the *Act* identifies the CHR as the principal organ to address the rehabilitation of victims and their families, including appropriate medical care and rehabilitation free of charge.¹⁷⁶ In its position paper during the deliberations of a prior bill on enforced disappearance, the CHR noted its lack of “sufficient facilities to participate in activities pertaining to rehabilitation” and explored the need “to establish [an] institutional network” for the rehabilitation of the victims.¹⁷⁷

¹⁶⁹ Jodesz Gavilan, *Poor Law Implementation Denies Desaparecidos Justice*, RAPPLER, Aug. 30, 2018, at <https://www.rappler.com/features/newsbreak/in-depth/210681-poor-implementation-law-denies-justice-victims-enforced-disappearances-philippines/index.html>

¹⁷⁰ Vivienne Gulla, *CHR Says Enforced Disappearance cContinues Despite Law Penalizing it*, ABS-CBN NEWS PHIL., Nov. 20, 2023, available at <https://news.abs-cbn.com/news/11/20/23/chr-says-enforced-disappearance-continues-despite-law>

¹⁷¹ *Act*, §§ 10–11, 13, 25, 27.

¹⁷² *Act*, § 30.

¹⁷³ CONST., art. XIII, § 17.

¹⁷⁴ Commission on Human Rights Emps. Ass’n v. Commission on Human Rights, G.R. No. 155336, 444 SCRA 300, 316, Nov. 25, 2004.

¹⁷⁵ Marc Jayson Cayabyab, *CHR asks for more budget for new laws*, INQUIRER.NET (PHIL.), Sept. 1, 2014, available at <https://newsinfo.inquirer.net/634422/chr-asks-for-more-budget-for-new-laws#ixzz8dbEU2rU3>.

¹⁷⁶ See *Act*, §§ 10–11, 13, 25, 27.

¹⁷⁷ Commission on Human Rights, *Position Paper on “Anti-Enforced Disappearance,”* 4, June 2, 2008, available at <https://chr2bucket.storage.googleapis.com/wp-content/uploads/2020/09/08164634/Position-Paper-on-Anti-enforced-Disappearance.pdf>.

Consequently, the CHR is at the mercy of the political climate at any given time. In 2017, as former President Duterte's policies received heavy criticism from the CHR, he publicly condemned and even threatened to abolish it.¹⁷⁸ His allies in the House of Representatives even voted to reduce the CHR's budget to a nominal amount, as a retribution for "only investigating government abuses."¹⁷⁹ There have been attempts in the Congress to bring the matter of implementation of the Act for the purpose of, among others, addressing questions of fund utilization and availability.¹⁸⁰ These attempts, however, have languished at the committee level.¹⁸¹

Moreover, the most power that was conceded to the CHR is its ability to investigate. The Supreme Court made it clear that the CHR's fact-finding authority is nowhere near adjudication.¹⁸² The CHR's findings of fact and conclusions of law, therefore, are "merely recommendatory" and not binding on the courts.¹⁸³ The determination, therefore, of whether there was probable cause to believe that the offence of enforced disappearance has been committed, and that a case on the same may prosper, still lies with the prosecution service.¹⁸⁴ For these reasons, the CHR has been criticized as a "tiger without dentures."¹⁸⁵

However, this is not to say that the CHR should be given absolute discretion in handling the investigation and prosecution of offenses punishable under the *Act* or be given quasi-judicial powers to adjudge violations. Under the present constitutional order, this cannot be done. However, the unfriendly attitude of certain agencies engaged in law

¹⁷⁸ Nestor Corrales, *Duterte Threatens to Abolish CHR*, INQUIRER.NET, July. 25, 2017, available at <https://newsinfo.inquirer.net/917250/duterte-threatens-to-abolish-chr>.

¹⁷⁹ Reuters, *Philippine Congress Agrees to Restore Rights Commission Budget from \$20*, REUTERS, Sept. 21, 2017, available at <https://www.reuters.com/article/us-philippines-duterte-rights/philippine-congress-agrees-to-restore-rights-commission-budget-from-20-idUSKCN1BV28/>.

¹⁸⁰ See House of Representatives Committee Affairs Department, Calendar of Committee Meetings 20-November-2023 to 24-November-2023, at https://www.congress.gov.ph/commsched/print_weekly.php?weekno=202347.

¹⁸¹ The most recent attempt is H. Res. No. 45, filed on Jul. 14, 2022.

¹⁸² *Cariño v. Commission on Human Rights*, G.R. No. 96681, 204 SCRA 483, 492, Dec. 2, 1991.

¹⁸³ *Cudia v. Superintendent of the Philippine Military Academy*, G.R. No. 211362, 751 SCRA 469, 584, Feb. 24, 2015.

¹⁸⁴ "The [] determination of probable cause is one made during preliminary investigation[.] [...] a function that [] pertains to the public prosecutor[.]" *Arroyo v. Sandiganbayan*, G.R. No. 210488, 930 SCRA 104, 123, Jan. 27, 2020, citing *De Lima v. Reyes*, G.R. No. 209330, 779 SCRA 1, 26–27, Jan. 11, 2016. See also RULES OF COURT, Rule 112.

¹⁸⁵ *Simon*, 229 SCRA 117, at 137 (Padilla, J., *dissenting opinion*).

enforcement towards the CHR, as evidenced by their refusal to, if not contempt for, certain actions and statements from the CHR during the Duterte administration, may contribute to the prevailing dilemmas of the commission, may need to be checked and monitored by the courts.¹⁸⁶

The CHR's lack of funding and its limited authority are not the only obstacles that prevent the *Act's* successful implementation. FIND believes that perpetrators cannot be brought to court because authorities are unaware of the nuances or character of an enforced disappearance and dismiss it at first instance for the lack of probable cause.¹⁸⁷

Other implementing agencies have also failed to fulfil their respective duties in the implementation of the *Act*. Section 11 of the *Act*, for instance, requires all concerned government agencies to submit to the CHR "an updated inventory of all officially recognized and controlled detention facilities, and the list of detainees."¹⁸⁸ No compliance was made by the required agencies, which pushed the CHR to issue an advisory in 2021, which implored the Philippine National Police, Armed Forces of the Philippines, Bureau of Jail Management and Penology, and other law enforcement agencies to abide with their obligations under the *Act*.¹⁸⁹ The *Act* itself criminalizes non-compliance with the register requirement,¹⁹⁰ and yet there has been no recorded prosecution for this violation.

The failure of these law enforcement agencies to comply with their obligations under the *Act* is not surprising. After all, an enforced disappearance, by definition, is committed by agents of the State or through their authorization, support, or acquiescence.¹⁹¹ Laws that seek to fight enforced disappearances through the positive action of the same State agents who may perpetrate the act may naturally be unproductive. The events from the last administration's failed anti-drug campaign should serve as a lesson, with high-ranking officials even refusing to cooperate with the Supreme Court

¹⁸⁶ See Jodesz Gavilan, *Duterte Gov't Stonewalled CHR's Drug War Probes*, RAPPLER, May 17, 2022, available at <https://www.rappler.com/philippines/duterte-government-stonewalled-commission-human-rights-drug-war-investigations/>; Christian Deiparine, *CHR: PNP Non-cooperative in Recent Probes Involving Cops*, PHILSTAR GLOBAL, Dec. 22, 2020, available at <https://www.philstar.com/headlines/2020/12/22/2065622/chr-pnp-non-cooperative-recent-probes-involving-cops>; Bea Cupin, *No More CHR? No Problem, say Lorenzana, Dela Rosa*, RAPPLER, July 25, 2017, available at <https://www.rappler.com/philippines/176706-duterte-abolish-chr-lorenzana-dela-rosa/>.

¹⁸⁷ Gavilan, *supra* note 171.

¹⁸⁸ *Act*, § 11.

¹⁸⁹ CHR Adv. No. CHR IV-A-HRA-2021-002 (2021).

¹⁹⁰ *Act*, § 15(e).

¹⁹¹ *Act*, § 3(b).

in cases pending before it.¹⁹² Without reasonable measures to hold the implementing agencies accountable for their inaction and the political drive from those in the relevant positions to cause a change in the system, the *Act* and all its ideals will be for nothing.

2. *The Effects of Characterizing Violations as Continuing Offenses*

As discussed above, both the *Act* and the *Convention* consider any act constituting enforced disappearance as a continuing offense¹⁹³ as long as the perpetrators continue to conceal the fate and whereabouts of the disappeared person, and such circumstances have not been determined with certainty.¹⁹⁴ This treatment owes its basis on the fact that acts constituting the offense “cannot be separated and the conviction should cover the enforced disappearance as a whole.”¹⁹⁵

This characterization has a significant effect on the jurisdiction *ratione temporis* of treaty-based bodies monitoring the *Convention*. Ordinarily, a treaty cannot apply or retroact to acts or facts that occurred prior to its entry into force.¹⁹⁶ As an effect, treaty-based bodies, such as the UN Human Rights Committee (HRC) and the Committee on Enforced Disappearance (CED), do not have the power to act on complaints pertaining to acts or facts that precede the accession of a State party to a treaty.¹⁹⁷ However, by

¹⁹² See *Almora v. Dela Rosa*, G.R. No. 234359, slip op., Apr. 3, 2018.

¹⁹³ *Act*, § 21; *Convention*, art. 8. The Supreme Court defined *delito continuado* or continuous crime as “a single crime consisting of a series of acts arising from a single criminal resolution or intent not susceptible of division. [...] In order that it may exist, there should be ‘plurality of acts performed separately during a period of time: unity of penal provision infringed upon or violated and unity of criminal intent and purpose, which means that two or more violations of the same penal provision are united in one and the same intent leading to the perpetration of the same criminal purpose or aim.’” *Gamboa v. Court of Appeals*, G.R. No. L-41054, 68 SCRA 308, 314, Nov. 28, 1975.

¹⁹⁴ There is no basis to hold otherwise. The language of the *Act* and the *Convention* and the intention of the lawmakers and State parties, respectively, are explicit in declaring acts of enforced disappearance as continuing offenses. See *Toussie v. United States*, 397 U.S. 112 (1970).

¹⁹⁵ Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, 12 ¶ 5, UN Doc. No. A/HRC/16/48 (2020).

¹⁹⁶ “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party.” Vienna Convention on the Law of Treaties, art. 28, May 23, 1969, 1155 U.N.T.S. 331.

¹⁹⁷ “The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.” *Convention*, art. 35(1).

characterizing an act constituting enforced disappearance as a continuing offense, the HRC or the CED can still exercise jurisdiction and State parties can still be held liable for all violations that result from the enforced disappearance, even if some aspects of the violation were completed before the entry into force of the *Convention* as long other parts of the violation are still continuing.¹⁹⁸

As explained by the UN Working Group:

[W]hen an enforced disappearance began before the entry into force of an instrument or before the specific State accepted the jurisdiction of the competent body, the fact that the disappearance continues after the entry into force or the acceptance of the jurisdiction gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole, and not only acts or omissions imputable to the State that followed the entry into force of the relevant legal instrument or the acceptance of the jurisdiction.¹⁹⁹

Then, if the Philippines accedes to the *Convention* in the future, such belated acceptance would not be a hindrance for victims of enforced disappearances and their families from seeking recourse under the *Convention* for unresolved cases at the time of accession.

The retroactive application of the *Act*, however, is more tricky, considering the Philippines' prohibition against *ex post facto* laws.²⁰⁰ A strict reading of the *Act* can be argued as more consistent with the rule that penal laws must be strictly construed against the State and liberally in favor of the accused and thus pose a significant argument against retroactivity.²⁰¹ Indeed, aside from characterizing offenses under the Act as continuing offenses, there is a lack of clarity with respect to the retroactive applicability of the Act.

¹⁹⁸ Human Rights Council, *supra* note 197, at 12 ¶ 4.

¹⁹⁹ Human Rights Council, *supra* note 197, at 12 ¶ 3. For a review and critique of Human Rights Council case law on *ratione temporis* and enforced disappearances, see Grażyna Baranowska *How Long Does the Past Endure? 'Continuing violations' and the 'very distant past' before the UN Human Rights Committee*, 41 NETH. Q. HUM. RTS. 97 (2023).

²⁰⁰ CONST., art. III, § 22.

²⁰¹ See Families of Victims of Involuntary Disappearance (FIND) & Asian Federation Against Involuntary Disappearances (AFAD), *FIND and AFAD Joint Submission to the 4th Cycle of the United Nations Universal Periodic Review: An Inability to Grieve*, ¶ 26 (2022), available at <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=9822&file=EnglishTranslation>.

FIND tried to test the retroactivity of the Act, when it assisted in filing a complaint under the Act on behalf of six Filipino workers who disappeared in 2000.²⁰² The prosecutor dismissed the case on the ground that the workers disappeared in 2000 and thus, their case was not covered by the Act.²⁰³ The Secretary of Justice affirmed the dismissal, grounded on the constitutional prohibition against *ex-post facto* laws.²⁰⁴ FIND insisted that on account of the continuing nature of offenses contained of the Act, “while the fate of the disappeared is unknown, the enforced disappearance is ongoing and is being committed until today.”²⁰⁵ As of 2022, the Secretary of Justice has not acted on FIND’s motion for reconsideration.²⁰⁶

There is no dispute as to the constitutional proscription against *ex post facto* laws,²⁰⁷ which include, among others, laws that penalize an act which was not an offense at the time of its commission.²⁰⁸ So far, the Supreme Court, has only recognized one exception to the prohibition: when the law is favorable or advantageous to the accused who is not a habitual criminal.²⁰⁹

Continuing offenses, however, could very well carve out another exception. Consistent with this proposition, the UN Working Group posited that “it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non[-]retroactivity.”²¹⁰ The CHR is also of the view that through the continuing offense characterization, a law that punished an act constituting enforced disappearance cannot be considered as an *ex post facto* law even if the act or fact punished started prior to its enactment.²¹¹

US courts appear to take a similar stance on the non-application of the *ex post facto* prohibition to continuing offenses. In *United States v.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ FIND & AFAD, *supra* note 203, at ¶ 26.

²⁰⁵ *Id.* at ¶ 27.

²⁰⁶ *Id.* at ¶ 28.

²⁰⁷ CONST., art. III, § 22.

²⁰⁸ *People v. Vilo*, G.R. No. 1656, 82 Phil. 524, 530 (1949).

²⁰⁹ REV. PEN. CODE, art. 22. *See also* *Inmates of the New Bilibid Prison v. De Lima*, G.R. No. 212719, 905 SCRA 599, 631, June 25, 2019.

²¹⁰ *See* Human Rights Council, *supra* note 197.

²¹¹ Commission on Human Rights, *Position Paper on “Anti-Enforced or Involuntary Disappearance Act,”* 4, Aug. 25, 2006, available at <https://chr2bucket.storage.googleapis.com/wp-content/uploads/2020/09/08164635/Position-Paper-on-Anti-Enforced-or-involuntary-Disappearance-Act.pdf>.

Calabrese,²¹² the increased penalties of the Comprehensive Crime Control Act of 1984 became effective on October 12, 1984. The accused were indicted for the continuing offense of conspiracy to manufacture and distribute methamphetamine, which they committed from October 1982 to November 2, 1984.²¹³ The district court applied the increased penalties.²¹⁴ The Ninth Circuit of the US Court of Appeals affirmed the imposed penalty, rejecting the claim of violation of *ex post facto* law prohibition on the ground that the conspiracy continued until after the new law was passed.²¹⁵

Meanwhile, in *United States v. White*,²¹⁶ the district court applied the sentencing guidelines to a drug conspiracy conviction where the conspiracy had begun prior to its effectivity in November 1, 1987 but continued beyond that date.²¹⁷ The appellate court of the Eighth Circuit also rejected the *ex post facto* argument, holding that:

Conspiracy is a continuing offense. Assuming that the guidelines proscribe a sentence for her drug conspiracy offense greater than the previous norm, the *ex post facto* [c]lause, which bars an increase in the punishment for an offense after it has been committed, is not violated by applying an increased penalty to White's conspiracy that continued after the effective date of the increased penalty. [...] The sentencing guidelines apply 'only to offenses committed after' the effective date of the Act. White's conspiracy offense continued well after November 1, 1987, and thus was an offense committed after the effective date[.]²¹⁸

This would not be the first time that continuing offenses constitute an exception to a constitutional right in our jurisdiction. Although arrests must, as a rule, be made pursuant to a warrant issued by a judge, persons may be arrested without warrant if they are committing an offense in the presence

²¹² [Hereinafter "*Calabrese*"], U.S. v. Calabrese, 825 F.2d 1342 (9th Cir. 1987).

²¹³ *Calabrese*, 825 F.2d 1342.

²¹⁴ *Calabrese*, 825 F.2d 1342.

²¹⁵ *Calabrese*, 825 F.2d 1342.

²¹⁶ [Hereinafter "*White*"], 869 F.2d 822 (5th Cir. 1989).

²¹⁷ *White*, 869 F.2d 822.

²¹⁸ *White*, 869 F.2d 822. See further *United States v. Torres*, 901 F.2d 205 (2d Cir. 1990) holding that "the *ex post facto* clause is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of [the statute];" *United States v. Duncan*, 42 F.3d 97, 104 (2d Cir. 1994), stating that "according to our precedents, continuing offenses such as conspiracy and bank fraud do not run afoul of the *ex post facto* clause if the criminal offenses continue after the relevant statute becomes effective;" U.S. v. Campanale, 518 F.2d 352, 365 (9th Cir. 1975) ruling that "[i]t is well established that a statute increasing a penalty with respect to a criminal conspiracy which commenced prior to, but was continued beyond the effective date of the statute, is not *ex post facto* as to that crime."

or within the view of an arresting officer.²¹⁹ This exception includes the instance when the offense is continuing.²²⁰ By virtue of the continuing offense characterization, the Implementing Rules and Regulations (IRR) of the *Act* explicitly provides that the statute of limitation for offenses punished does not run “unless the victim actually surfaces alive[.]” upon which a prescriptive period of 25 years shall apply.²²¹ This is in contrast with the general rule under our criminal laws, which commences the running of the prescriptive period “from the day on which the crime is discovered by the offended party, the authorities, or their agents[.]”²²²

B. Reparations

Under various human rights auspices, not just the *Convention*, the State’s obligation to ensure, secure, and guarantee the enjoyment of human rights necessarily includes the obligation to provide adequate remedies and procedural measures for victims of human rights violations,²²³ such as enforced disappearances. Victims of enforced disappearances, as defined in both the *Convention* and the *Act*, include not only the disappeared persons, but also those who have “suffered harm as a direct result of an enforced [...] disappearance.”²²⁴

Indeed, the effects of an enforced disappearance on the victims create a sense of an “ambiguous loss”²²⁵ — a constant, unending suffering. Punishing the perpetrators alone would plainly not constitute an adequate remedy to relieve the victims of their burdens and sufferings. As elucidated by the Supreme Court in *Mijares*, the damage done by human rights violations

²¹⁹ RULES OF COURT, Rule 113, § 5(a).

²²⁰ *United States v. Samonte*, 16 Phil. 516, 519 (1910). This ruling is not without any dissent or controversy, especially in the context of warrantless arrest of those charged with the crime of rebellion. See *Umil v. Ramos*, G.R. No. 81567, 202 SCRA 251, 293, Oct. 3, 1991 (Feliciano, J., *concurring and dissenting*), arguing that “the doctrine of ‘continuing crimes,’ [...] cannot be invoked for weakening and dissolving the constitutional guarantee against warrantless arrest.” See also *Lacson v. Perez*, G.R. No. 147780, 357 SCRA 756, 779–82, May 10, 2001 (Kapunan, J., *dissenting opinion*).

²²¹ Rep. Act No. 10353 Rules & Regs. (2013), § 23.

²²² REV. PEN. CODE, art. 91.

²²³ International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioner’s Guide*, 21 (2018) available at <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.

²²⁴ *Act*, § 3(d); *Convention*, art. 24(1).

²²⁵ Mina Rauschenbach, Pamela Favre, Alejandro Jimenez, Lisa Ott, Ana Srovina Coralli, & Bronwen Webster. *Who are they to say? Experiences and recognition of victimhood of enforced disappearance in Colombia and El Salvador*, 31(2) TORTURE J. 50 (2021). doi: 10.7146/torture.v31i2.125771.

are not merely personal but institutional, hence “the proper rebuke to the iniquitous past has to involve the award of reparations due within the confines of the restored rule of law.”²²⁶

1. *The “Value” of Disappearing*

The feeling of powerlessness caused by an enforced disappearance cannot be quantified or reduced to mere calculations. Nonetheless, the amount of reparation for material harm or damage must be converted into numbers to make payment possible.

The UN Basic Principles and Guidelines consider five forms of reparation: “restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.”²²⁷ Restitution refers to the restoration of victims to their original situation before the violations, such as release from illegal detention, “return to one’s place of residence, [and] restoration of employment and return of property.”²²⁸ Compensation considers the “economically assessable damage” resulting from the violations, such as physical or mental harm, lost opportunities, material damages, loss of earnings, moral damages, and legal and medical expenses, which may not be appropriately addressed by simple restitution.²²⁹ Rehabilitation includes “medical and psychological care as well as legal and social services.”²³⁰ These three modes often address the material and physical harm suffered by the victim.²³¹

²²⁶ *Mijares*, 455 SCRA 397, at 400.

²²⁷ G.A. Res. 60/147, ¶ 18 (Dec. 15, 2005). 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. The *Convention* does not include compensation in its categories of reparation. *Convention*, art. 24. The difference in categorization, however, does not miss the purpose and intent of the award. Compensation can be considered as necessarily included in the concept of restitution.

²²⁸ *Id.* at ¶ 19.

²²⁹ *Id.* at ¶ 20.

²³⁰ *Id.* at ¶ 21.

²³¹ Satisfaction and guarantees of non-repetition are forms of reparations that go beyond the material impact on the victim. Satisfaction, as a form of reparation, delves into the impact and non-material harms of the violation. It includes ordering the implementation of “[e]ffective measures aimed at the cessation of continuing violations,” the verification and disclosure of the facts surrounding the violation, public apologies, and commemorations and tributes to the victims. In cases of enforced disappearance, this aspect of reparation requires the search for the whereabouts of the disappeared and assistance in the recovery and identification of their persons. *Id.* at ¶ 21.

Actions that guarantee non-repetition of the violation include “[e]nsuring effective civilian control of military and security forces[.]” promoting the observance of codes of

The *Convention* and the *Act* mandate reparation through the award of “material and moral damages”²³² and “monetary compensation,”²³³ respectively. The *Act*, however, is silent as to the amount or value of compensation that a victim may be entitled to and the body that would ascertain and award the monetary compensation to the victim.²³⁴ The IRR provides more abundant discussions on reparation, which additionally states that victims and their relatives may claim compensation pursuant to remedies provided under Republic Act No. 7309 (“Board of Claims Act”).²³⁵ The said law was enacted in 1992, more than a decade before the adoption of the *Convention* and before the concept of enforced disappearance as a crime was fully comprehended.²³⁶ It created the Board of Claims, an office under the Department of Justice, originally for victims of unjust imprisonment or detention and violent crimes.²³⁷ This jurisdiction is thus expanded by the *Act*.

Section 4 of the Board of Claims Act provides:

For victims of unjust imprisonment or detention, the compensation shall be based on the number of months of imprisonment or detention and every fraction thereof shall be considered one month; *Provided, however*, [t]hat in no case shall such compensation exceed One Thousand pesos (P1,000.00) per month.

In all other cases, the maximum amount for which the Board may approve a claim shall not exceed Ten thousand pesos (P10,000.00) or the amount necessary to reimburse the claimant the expenses incurred for hospitalization, medical treatment, loss of wage, loss of support or other expenses directly related to injury, whichever is lower. This is without prejudice to the right of the claimant to seek other remedies under existing laws.²³⁸

conduct and ethical norms by public servants and the law enforcement, and providing continuous human rights law education to all sectors of society. *Id.* at ¶ 23.

²³² *Convention*, art. 24(5).

²³³ *Act*, § 26.

²³⁴ This is in contrast to the Human Rights Victims Reparation and Recognition Act of 2013) which specifically created the Human Rights Victims’ Claims Board to process claims from victims of human rights violation during the Marcos regime. *See* Rep. Act. No. 10368 (2013), §§ 8–15.

²³⁵ Rep. Act No. 10353 Rules & Regs. (2013), § 27.

²³⁶ Rep. Act No. 7309 (1992). An Act Creating a Board of Claims Under the Department of Justice for Victims of Unjust Imprisonment or Detention and Victims of Violent Crimes and For Other Purposes, [hereinafter “*Board of Claims*”].

²³⁷ *Board of Claims*, §§ 1 & 3.

²³⁸ *Board of Claims*, § 4. (Emphasis in the original.)

The provision, however, poses problems not addressed by the *Act* or its IRR. How should enforced disappearances be characterized in relation to the victim's compensation program from the Board of Claims Act? Is it an unjust detention, which refers to a person's detention without being charged?²³⁹ In such case, the maximum compensation that victims of enforced disappearances may be entitled to is one thousand pesos (PHP 1,000.00) per month.²⁴⁰

Should it instead be considered as another case of violent crime, which refers to “offenses committed with malice[,] which resulted in death, serious physical and/or psychological injuries, permanent incapacity or disability, insanity, abortion, serious trauma, or committed with torture, cruelly or barbarity[?]”²⁴¹ If so, victims can be entitled to a maximum of ten thousand pesos (PHP 10,000.00).²⁴² Moreover, the IRR provides that “[a]ny grant of compensation to any victim shall not be less than ten thousand pesos (Php 10,000.00).”²⁴³ How do we reconcile these maximum and minimum amounts?

More importantly, Republic Act No. 7309 was enacted in 1992 and the value threshold contained therein is no longer appropriate in the current times. Although ten thousand pesos (PHP 10,000.00) may have been a considerable sum at that time, the same amount more than three decades later, inflation considering, would barely make an impact on victims of enforced disappearances. In fact, the 52,000 total claims processed by the Board of Claims since its creation until 2023 only amounted to a significantly disproportionate PHP 514,900,000.²⁴⁴ Attempts to increase the amount under Republic Act No. 7309 are not inexistent but have so far languished in the halls of the Congress with no end in sight.²⁴⁵

It can be argued that the last paragraph of Section 26, the reparation provision of the Act, could qualify as its saving clause. It states that “[t]he package of indemnification for both the victims and the immediate relatives

²³⁹ *Board of Claims*, § 3(b) provides that “any person who was unjustly detained and released without being charged [...] may file claims for compensation before the Board.”

²⁴⁰ *Board of Claims*, § 4.

²⁴¹ *Board of Claims*, § 3(d).

²⁴² *Board of Claims*, § 4.

²⁴³ See Rep. Act No. 10353 Rules & Regs. (2013), § 27.

²⁴⁴ Clarist Zablan, DOJ, *CHR Pushes for Referral System to Compensate Rights Violations Victims*, NEWS 5, Mar. 14, 2024, available at <https://news.tv5.com.ph/breaking/read/human-rights-doj-chr-pushes-for-referral-system-to-compensate-rights-violations-victims>.

²⁴⁵ See e.g., H. No. 5029, 19th Cong., 1st Sess. (2022); H. No. 7054, 19th Cong., 1st Sess. (2023); H. No. 7081, 19th Cong., 1st Sess. (2023); H. No. 7307, 19th Cong., 1st Sess. (2023).

[...] shall be without prejudice to other legal remedies that may be available to them.”²⁴⁶ Section 26 could thus be viewed as positive inaction since the victims would have the option to seek recourse before the courts and possibly other awards-granting bodies, which can be given wider discretion to determine the extent of material harm that victims suffered or damage that the violation caused them.

However, the discretion could also be exercised for the worse. This problem is highlighted by the lack of any factors in the *Act* or its implementing rules that would determine the amount of compensation.²⁴⁷ Without an appropriate structural scheme, victims and their families may be subjected to the whim or caprice of the court or body, especially if the latter is composed of the same government agencies whose function may be related to the very same action or violation in question. This could also contribute to the delay in awarding compensation.

The closest that the Philippines has been to awarding reparation to victims of enforced disappearance was the implementation of Republic Act No. 10368. In the said legislation, victims of human rights violations during the Marcos regime were declared entitled to monetary reparation. Amounts were awarded through a point system, where more points are awarded to victims who suffered from more grave human rights violations.²⁴⁸ Victims who died or disappeared are still missing, for example, are given the maximum of 10 points,²⁴⁹ with each point corresponding to an amount of PHP 176,779.00.²⁵⁰ The amounts awarded were principally sourced from the funds adjudged as ill-gotten wealth from the Marcos regime and those forfeited in favor of the Republic.²⁵¹

In contrast, no such source is identified under the *Act*. Will the award be obtained from the government agency found guilty of the act constituting enforced disappearance? Reference to Republic Act No. 7309, which specifically tapped into the income of the Philippine Amusement and Gaming Corporation and the proceeds of the sales and disposition of military camps in Metro Manila to cover the awards of the Board of Claims²⁵² may be done;

²⁴⁶ *Act*, § 26.

²⁴⁷ See Rep. Act No. 10353 Rules & Regs. (2013), § 27.

²⁴⁸ Rep. Act No. 10368 (2013), § 6.

²⁴⁹ Rep. Act No. 10368 (2013), § 19.

²⁵⁰ Jodesz Gavilan, *11,103 Victims of Human Rights Violations Under Martial Law to Get Compensation*, RAPPLER, May 10, 2018, available at <https://www.rappler.com/nation/202033-human-rights-victims-claims-board-final-list-eligible-claimants-released>.

²⁵¹ Rep. Act No. 10368 (2013), § 7.

²⁵² *Board of Claims*, § 9.

however, it may raise further issues on the propriety in the use of funds and as to whether they are sufficient to provide adequate compensation to victims of enforced disappearances.

More recently, the CHR signed a memorandum of agreement with the Department of Justice aimed at simplifying and expediting the processing of application for financial compensation with the Board of Claims.²⁵³ Its effectiveness nonetheless remains to be seen.

2. *Beyond Individual Reparation*

Although individuals are the usual targets of enforced disappearance, the practice is similarly used as a systematic attack or strategy to instill fear in a particular community or the society as a whole. According to the human rights group KARAPATAN, peasant communities were the primary victims of enforced disappearances and extrajudicial killings during the previous administration.²⁵⁴ Indigenous groups,²⁵⁵ environmental defenders²⁵⁶ were targets as well of these heinous activities. The United Nations itself recognized that suffering, as a result of gross human rights violations, may be suffered collectively, not just individually.²⁵⁷ The Rome Statute also recognizes that the practice can be used in a widespread manner against the civilian population and accordingly punishes such an act as a crime against humanity.²⁵⁸ Yet, reparations under the *Act* are limited to the victims of enforced disappearance and, to some extent, their families.²⁵⁹

²⁵³ Commission on Human Rights, DOJ, *CHR sign Memorandum of Agreement for the Victims Compensation Program to establish referral system for human rights violation victims*, COMMISSION ON HUMAN RIGHTS WEBSITE, Mar. 14, 2024, available at <https://chr.gov.ph/doj-chr-sign-memorandum-of-agreement-for-the-victims-compensation-program-to-establish-referral-system-for-human-rights-violation-victims/>.

²⁵⁴ International Coalition for Human Rights in the Philippines and IBON International, *Duterte Killings Continue: State Terror & Human Rights in the Philippines*, 5 & 8, (2018), available at <https://iboninternational.org/wp-content/uploads/attachments/DKC-booklet.pdf>.

²⁵⁵ Ratzel San Juan, *Sheltering Lumads Not a Crime*, ENVIRONMENTAL GROUPS STRESS, PHILSTAR GLOBAL, Oct. 7, 2019, available at <https://www.philstar.com/headlines/2019/10/07/1958221/sheltering-lumads-not-crime-environmental-groups-stress>.

²⁵⁶ Gaea Katreena Cabico, *CHR to gov't: Resolve 'desaparecidos' Cases, Protect Environmental Defenders*, PHILSTAR GLOBAL, Sept. 7, 2023 available at <https://www.philstar.com/headlines/climate-and-environment/2023/09/07/2294529/chr-govt-resolve-desaparecidos-cases-protect-environmental-defenders>

²⁵⁷ See United Nations General Assembly, *supra* note 229 at ¶ 8.

²⁵⁸ Rome Statute of the International Criminal Court, art. 7(2)(i), July 1, 2002, 2187 U.N.T.S. 90.

²⁵⁹ *Act*, §26.

Adopting a reparations policy that addresses the concerns of community affected would relate to the diverse and collective harms that result from enforced disappearances. The case law and directives of the Inter-American Court of Human Rights (“IACtHR”) on gross human rights violation may provide some guidance in this endeavor. The IACtHR has awarded collective reparations to the communities or groups of individual victims, notwithstanding issues on their legal personality and proof of prior existence of violations of their rights, and even to the “society as a whole.”²⁶⁰ In *Plan de Sánchez Massacre v. Guatemala*,²⁶¹ military forces murdered 268 people, most of whom were members of the indigenous Mayan community, as a part of a broader state policy to supposedly counter insurrection in the region. The IACtHR, on top of providing compensation for the victims and their families, ordered several measures to address the affected community, such as the award of USD 25,000.00 for maintenance and improvements to the chapel where the victims pay homage to those who were executed in the massacre.²⁶² It also ordered the respondent State to improve and develop the social and economic welfare of the members of the community, including the maintenance of water supply, sewage, and road system and the establishment of school and health facilities in the village.²⁶³

The International Criminal Court also recognizes collective reparation. In *Prosecutor v. Katanga*,²⁶⁴ the court explained that:

[A] group or category of persons may be bound by a shared identity or experience, but also by victimization by dint of the same violation or the same crime within the jurisdiction of the Court. Collective reparations may, therefore, benefit a group, including an ethnic, racial, social, political or religious group which predated the

²⁶⁰ See Judith Schonsteiner, *Dissuasive Measures and the “Society as a Whole”: A Working Theory of Reparations in the Inter-American Court of Human Rights*, 23 AM. U. INT’L. L. REV. 127 (2011). It is claimed that “the IACtHR has more discretion than criminal courts in determining reparations beneficiaries, owing in part to the IACtHR’s rights-focused approach as compared to a criminal court’s injury-focused approach.” Marissa R. Brodney, *Implementing International Criminal Court-Ordered Collective Reparations: Unpacking Present Debates*, 2016 J. OXFORD CTR. SOCIO-LEGAL STUD., 1, 12.

²⁶¹ *Plan de Sánchez Massacre v. Guatemala*, Merits, Judgment, (Merits), 2004 INTER-AM. CT. H.R. (ser. C) No. 105 ¶ 2 (Apr. 29, 2004).

²⁶² *Plan de Sánchez Massacre v. Guatemala*, Judgment, (Reparations), Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 104 (Nov. 19, 2004).

²⁶³ *Id.* at ¶ 110.

²⁶⁴ [Hereinafter “*Katanga*”], *Prosecutor v. Katanga*, ICC-01/04-01/07, Order for Reparations, (Mar. 24, 2017).

crime, but also any other group bound by collective harm and suffering as a consequence of the crimes of the convicted person.²⁶⁵

Two categories of collective reparation were determined in the case: “those aimed at benefiting the community as a whole and those focused on the individual members of the group.”²⁶⁶ In the first category belong those that are for the general help of the community, such as “the building of a school or hospital.”²⁶⁷ The second category focuses on “the individual members of the community, which include providing healthcare which, although “provided to all members of the group, [...] is specialized and addresses each victim individually.”²⁶⁸ Further, in *Prosecutor v. Al Mahdi*,²⁶⁹ the court recommended the following collective measures to rehabilitate the affected Timbuktu community: community-based educational and awareness raising programs to promote Timbuktu’s cultural heritage, return and resettlement programs, a “‘microcredit system’ that would assist the population to generate income, or other cash assistance programs to restore the [community’s] lost economic activity.”²⁷⁰

The United Nations Working Group has also shared the same sentiment:

Individual and collective reparations may be granted concurrently and they do not exclude each other, given that both their essence and purpose are different. Collective reparations respond to collective harm or harm to society as a whole. Public apology or acceptance of responsibility as well as the construction of monuments or memorials for victims of enforced disappearances are possible forms of collective reparation.²⁷¹

However, expanding the context of reparation to the collective and indirect victims may be perceived as conflicting domestic standards on damages and may require courts and award-granting bodies to find a way to

²⁶⁵ *Katanga* at ¶ 274.

²⁶⁶ *Katanga* at ¶ 278.

²⁶⁷ *Katanga* at ¶ 279.

²⁶⁸ *Katanga* at ¶ 280.

²⁶⁹ [Hereinafter “*Al Mahdi*”], *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Reparations Order, (Aug. 17, 2017).

²⁷⁰ *Id.* at ¶ 83. One author, however, observed that although the Trial Chamber of the International Criminal Court may have taken a liberal approach in collective reparations, the Appeals Chamber later significantly narrowed this concept. Brodney, *supra* note 262 at 13.

²⁷¹ Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, ¶ 66, UN Doc. A/HRC/22/45, (Jan. 18, 2013)

reconcile the unique character of enforced disappearances with current damages framework or carve out a new concept altogether.

The Supreme Court has defined damage as “the detriment, injury, or loss which are occasioned by reason of fault of another in the property or person.”²⁷² In all cases, the person who has done the injury must repair it through the payment of “indemnity proportionate to his fault and the loss it has caused[.]”²⁷³ The award of this damage mirrors the concept of reparations under international law. An action for damages in our jurisdiction is an *action in personam*²⁷⁴ — that is, any judgment issued by the court is binding only upon the parties impleaded.²⁷⁵

For an action for damages to prosper, the party seeking redress must establish their cause of action, or “the act [...] by which a party [causes injury, or] violates a right of another.”²⁷⁶ In all cases, the person who has done the injury must repair it through the payment of indemnity proportionate to his fault and the loss it caused.²⁷⁷ The concept of collective reparations may thus involve parties who were not properly impleaded. It is also established in the Philippine jurisdiction “that courts cannot grant a relief not prayed for in the pleadings or in excess of what is sought[.]”²⁷⁸ The courts are likewise not allowed to “grant a relief without first ascertaining the evidence presented in support thereof”, as due process requires that judgments must conform to and be supported by the pleadings and evidence presented.²⁷⁹ Taking for example again, the case of *Al Mabdi*, collective reparations of such extent may prove difficult, if not improper, for the simple reason that the claimant would have to allege and prove their entitlement to every single measure prayed for.²⁸⁰

Still, individual reparations supplemented by collective reparations would constitute a more holistic approach in addressing the victims’ and their communities’ material needs. While the victims’ well-being and conditions must be highlighted, equally important are the symbolic benefits integrated into collective reparations to signify the need to make sense of and learn from their traumatic past.

²⁷² [Hereinafter “*Manzaneras*”], *Manzaneras v. Moreta*, 38 Phil. 821, 829 (1918).

²⁷³ *Manzaneras*, 38 Phil. 821, 829.

²⁷⁴ *Duremdes v. Jorilla*, G.R. No. 234491, 933 SCRA 639, 642 Feb. 26, 2020.

²⁷⁵ *Paderanga v. Buissan*, G.R. No.49475, 226 SCRA 786, 790, Sept. 28, 1993.

²⁷⁶ RULES OF COURT, Rule 2, §1–2.

²⁷⁷ *Manzaneras*, 38 Phil. 821, 829.

²⁷⁸ *Diona v. Balangue*, G.R. No. 173559, 688 SCRA 22, 35, Jan. 7, 2013.

²⁷⁹ *Diona v. Balangue*, 688 SCRA 22, 35.

²⁸⁰ *Al Mabdi*, ICC-01/12-01/15.

V. CONCLUSION

The struggle against State abuses, in this case, in the context of enforced disappearances, cannot be resolved by the mere passage of laws or acquiescence to some international legal order. One can even argue that we have too many laws on the matter that implementation even becomes more nuanced, if not serpentine. This particular dilemma can, however, be sourced from the unique character of enforced disappearances. To more adequately address the problem, such distinctiveness would necessarily require the introduction of legal concepts and frameworks that may be novel or may not fit in the familiar discourse on legal actions and remedies. This will require legal recalibration. However, there is nothing to fear with the unfamiliar.

To be clear, addressing these predicaments emanating from the distinct character of enforced disappearances does not absolutely require the ratification of the *Convention*. But in the face of seemingly foreign concepts which could further advance the plight of the *desaparecidos*, coupled with the possibility of ineffectiveness of State forces, ratifying the *Convention* could potentially fill in the lacuna left, intentionally or not, by the current legal and institutional structure by providing additional safeguards and remedies for victims of enforced disappearances and their families, particularly in international bodies,²⁸¹ should domestic mechanisms fail. The mandatory reportorial and monitoring requirements in the *Convention*²⁸² could also keep the government on its feet, lest it subject itself to more scrutiny. Ratification would also transplant in our domestic laws some notable provisions in the *Convention* that were missed in the *Act*, including the requisite training and education of concerned officials on the matter of enforced disappearances.

There is also an “expressive role” in treaty ratification. Treaties are essentially contracts between States and their adoption expresses “the position of the community of nations as to what conduct is and is not acceptable.”²⁸³ Thus, when a State ratifies a treaty, it engages in “position taking, defined as the public enunciation of a statement on anything likely to be of interest to domestic or international actors.”²⁸⁴ By signifying its assent to the *Convention*,

²⁸¹ See *Convention*, arts. 30–35.

²⁸² *Convention*, art. 29.

²⁸³ Oona A. Hathaway, Do Human Rights Treaties Make a Difference, 111 *YALE L. J.* 1935, 2005 (2002).

²⁸⁴ *Id.* She, however, recognized that “expressive function can work either in unison with or in opposition to the instrumental role of the treaty. [...] Where there is little monitoring, noncompliance is not likely to be exposed. Therefore, the countries that join the treaty will enjoy the expressive benefits of joining the treaty, regardless of whether they actually comply with the treaty’s requirements. And where there is little enforcement, the costs of

the Philippines would be communicating to the international community its commitment to eradicating the practice of enforced disappearances and further affirm its faithfulness to the intent and purpose of the *Act*.²⁸⁵

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membership are also small, as countries with policies that do not adhere to the requirements of the treaty are unlikely to be penalized.” *Id.* at 2006.

²⁸⁵ The CHR has also called for the ratification of the Convention. *See* Commission on Human Rights, *supra* note 179. *See also* Commission on Human Rights, *Statement of the Commission on Human Rights on the alleged abduction of two young women environment defenders in Bataan*, COMM’N ON HUM. RTS. WEBSITE, Sept. 7, 2023, *available at* <https://chr.gov.ph/statement-of-the-commission-on-human-rights-on-the-alleged-abduction-of-two-young-women-environment-defenders-in-bataan/>.