Philippines – The Anti-Enforced Disappearance Bill/Law: a good advance but misses out on non-state perpetrators

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The Anti-Enforced Disappearance Bill about to be signed (if not yet by this writing) into Law is definitely a most significant advance for the protection of human rights in the Philippines. The real test of course is in the implementation measures, including the deterrence and prevention of enforced or involuntary disappearance. It is defined as "the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the state or by persons or groups of persons acting with authorization or support from the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared."

There is, however, one significant drawback or gap in the Bill/Law. It is limited, by definition, to enforced disappearance committed by state or governmental agents, just like in the earlier breakthrough 2009 Anti-Torture Law, Republic Act (R.A.) No. 9745. These do not cover similar torture or enforced disappearance, as the case may be, committed by non-state actors (NSAs), including non-state armed groups (NSAGs) who also perpetrate it, as we shall shortly illustrate. Consequently and more importantly, it does not cover their victims for purposes of remedies and redress. Another dire consequence of this law that may be reasonably anticipated is NSAG impunity for enforced disappearance.

The said current Philippine legislation against torture and enforced disappearance, while hailed as pioneering national legislation in Asia, actually misses out on the best that has been created by humanity in terms of international and national, including constitutional, law. It is as if we are still in a time warp when it comes to human rights and international humanitarian law, and do not even seem to learn from the lessons of recent history.

Perhaps the clearest case in point was the anti-infiltration purges in the Communist Party of the Philippines-New People's Army (CPP-NPA) during the 1980s, in which at least a thousand or so of its cadres, members, commanders and fighters were tortured, forcibly disappeared or extra-judicially killed within the CPP-NPA in a number of regions, most notably Mindanao ("Kampanyang Ahos") and Southern Tagalog ("Oplan Missing Link"). The latter purge was notably documented by one of its survivors, longtime NGO worker Robert Francis B. Garcia, in his 2001 book *To Suffer Thy Comrades: How the Revolution Decimated Its Own*. He said that it was much easier to talk about military atrocities than the cruelty of one's own comrades. Thus, the truth was buried (literally and figuratively) for a long time. As with healing and justice.

Many of the demands by the relatives and friends of the victims of the purges, in particular to retrieve their bodies, inform the families of those killed, fully account for what happened, agree to a full and impartial investigation, and engage in a process of healing, remain unfulfilled. There is no fail-safe reassurance that these purges cannot and will not happen again, even within the breakaway factions which used to be part of the CPP-NPA during the time of the purges. More recently, another longtime NGO worker Milet B. Mendoza, wrote and serialized in the *Philippine Daily Inquirer* about her kidnapping (akin to enforced disappearance) and the kind of torture she suffered while in the

hands of another NSAG, the Al-Harakatul Al-Islamiyya, better known as the Abu Sayyaf Group (ASG), from September 15 to November 14, 2008.

Notwithstanding these factual realities and field experiences of torture and enforced disappearances at the hands of NSAGs, some of the main proponents of the relevant bills, including human rights advocates, chose to limit the definition of these crimes to commission by state agents. Their main reasons given for this are that: the corresponding "pristine" or "purist" definitions in the 1984 UN Convention Against Torture (CAT) and the 2006 UN Convention Against Enforced Disappearance (CAED) are limited to commission by state agents; NSAs should be covered by other existing criminal law; and the problem of enforcing the proposed laws as against NSAGs. But these are not meritorious reasons, some are even non-reasons.

It should be noted that the CAED itself, in its Art. 43, provides that it is "without prejudice to the provisions of international humanitarian law," and in its Art. 37, provides that it shall not "affect any provisions which are more conducive to the protection of all persons from enforced disappearances and which may be contained in: a) the law of a State party; b) International law in force for that State."

In the 1998 Rome Statute of the International Criminal Court, which is considered the highest development of international criminal law so far, and which was ratified by the Philippines in August 2011, both torture and enforced disappearance are key specific acts which may be committed as part or elements of a crime against humanity, in its Art. 7, par. 1 (f) and (i). The Rome Statute definitions of the crimes of genocide, crimes against humanity, and war crimes – "the most serious crimes of concern international community as a whole" – are not limited to commission by state agents.

In the Rome Statute's Art. 7, par. 2 (i), the particular definition of "enforced disappearance of persons" is "the arrest, detention or abduction of person 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 them from the protection of the law for a prolonged period of time." (underscoring supplied)

This definition is in fact already reflected in the 2009 Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, R.A. No. 9851, particularly in its Sec. 3 (g). So, the question comes to mind, why was the definition in the new Anti-Enforced Disappearance legislation not aligned with it? If a judgment call or policy choice had/has to be made, the decisive guiding principle should have been/ should be the one cited in the CAED itself's Art. 37 that it shall not "affect any provisions which are more conducive to the protection of all persons from enforced disappearances." Surely, a definition of enforced disappearance not limited to commission by state agents would be more conducive to the protection of all persons or possible victims.

Such wider-application definitions in the Rome Statute and R.A. No. 9851 actually represent new legal thinking in recent years on human rights (HR), that not only states but also NSAs, esp. NSAGs, have certain HR obligations and consequently may also commit HR violations. A growing number of international treaties (not just the Rome Statute), UN-related resolutions, pronouncements of international and non-governmental bodies, judicial decisions, and scholarly writings carry that new HR thinking.

The old or traditional thinking on HR is that its international legal regime was established for the protection of the individual from abuses of the powerful state which is supposed to have a monopoly of legitimate armed forces. But, over time, it has become clear that some power is also derived from

having “illegitimate” armed forces. And not only political power but also HR abuses can “grow out of the barrel of a gun.”

Enforced disappearance is a violation not only of human rights (HR) but also of international humanitarian law (IHL). This international law of armed conflict applies to both conflict parties, which can be a state and a NSAG in the case like that in the Philippines of internal or non-international armed conflicts on the Communist and Moro fronts. The prohibition against enforced disappearance is considered a rule of customary IHL, according to an authoritative 2005 study on this by the International Committee of the Red Cross (ICRC) which indicates it to be Rule 98.

There is also a comprehensive IHL regime which governs the matter of missing/unaccounted persons and their families as a result of armed conflict or internal violence, and this covers enforced disappearances committed by all parties to an armed conflict, including NSAGs. The ICRC has legal advisory material on this, particularly a 2003 tract entitled The Missing: Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence and to assist their families, which includes recommendations and a checklist for drafting national legislation. In the latter matter, let us avail of “the best created by humanity” in terms of international law.

In the 1998 Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL) between the Government of the Republic of the Philippines (GRP) and the National Democratic Front of the Philippines (NDFP), there are mutually agreed prohibitions against “involuntary disappearances,” “physical or mental torture,” and “other inhuman, cruel or degrading treatment, detention and punishment,” and a provision for the search and protection of “missing persons.” So, it is quite clear that here a particular NSAG, the NDFP which represents the CPP-NPA, has undertaken obligations pertinent to the HR-IHL matters of torture and enforced disappearance. Again, why could these not have been reflected in the Philippine legislation against torture and enforced disappearance?

And so, what is to be done? It is time we go back to and reaffirm the rights-holders, inc. all potential victims of enforced disappearance. In the final analysis, it is the victims and their human rights that matter. To restrict human rights obligations just to state agents, Canadian human rights lawyer David Matas once said, “is to narrow the scope of their literal meaning and the purpose of the constraints which is, after all, not to regulate governments, but to assert the human rights of individuals.”

From the point of view of the victims of enforced disappearance, there is no difference whether it is committed by a state or non-state perpetrator. State and non-state perpetrators may be differently situated but that cannot be said of their victims, who should be given equal protection. The law is not only about the effective prosecution of perpetrators but also about the available remedies and redress for victims. To the extent that the law effectively excludes victims of non-state enforced disappearance, then the law itself violates the constitutional principle and right of equal protection of the law.

This does not mean covering up or diluting the state’s primary responsibility in these human rights matters. This rather means that NSAs/NSAGs that commit violations can also be held accountable and liable for them. The legislative solution is to make such official (state agent) capacity an aggravating circumstance, not an element of enforced disappearance that would leave out non-state perpetrators – and their victims – from the application of the Anti-Enforced Disappearance Law. In this way, there would be fidelity to the principle of “All human rights for all.”

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P.S.

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