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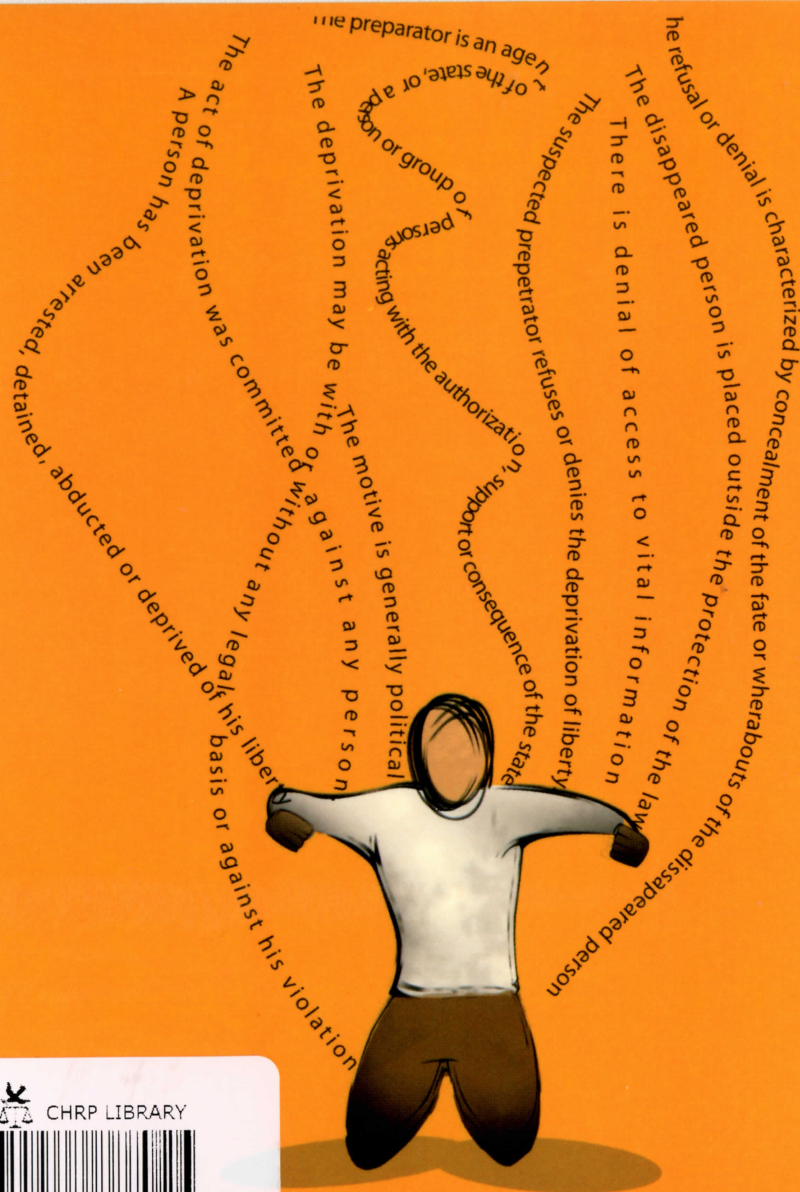


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COMMISSION ON HUMAN RIGHTS of the PHILIPPINES

# a primer on ENFORCED DISAPPEARANCE





COMMISSION ON HUMAN RIGHTS of the PHILIPPINES

a p r i m e r o n  
ENFORCED DISAPPEARANCE



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## P R I M E R

## The Right of All Persons to Protection from Enforced Disappearance

Pursuant to international and domestic human rights norms, standards and principles, the right of every person to protection from enforced disappearance is a fundamental human right. In view thereof, it is the primary obligation of the Philippine Government to protect the right of everyone, within Philippine jurisdiction, not to be subjected to enforced disappearance, as well as ensure the right of the victims to justice and reparation.

# 1

## What is enforced disappearance?

Enforced disappearance is defined as “any arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by person 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 concealment of the fate or whereabouts of the disappeared person, which place such person outside the protection of the law. (Article 2, U.N. International Convention for the Protection of All Persons from Enforced Disappearance)

# 2

## What are the elements of enforced disappearance?

- (a) a person has been arrested, detained, abducted or deprived of his / her liberty;
- (b) the deprivation may be with or without any legal basis, or against his / her volition;
- (c) the act of deprivation was committed against any person;
- (d) the motive is generally political;
- (e) the perpetrator is an agent of the State, or a person or group of persons acting with the authorization, support or acquiescence of the State



- (f) the suspected perpetrator refuses to acknowledge or denies the deprivation of liberty;
- (g) the refusal or denial is characterized by concealment of the fate or whereabouts of the disappeared person;
- (h) the disappeared person is placed outside the protection of the law; and
- (i) there is denial of access to vital information.

### 3 How is the act of enforced disappearance characterized?

It is characterized as a continuing offense, as long as the perpetrators continue to conceal the fate and whereabouts of the persons who have disappeared, and this act remains unclarified.

It is considered as a crime against humanity because of the degree of moral depravity that the perpetrators exercise.

### 4 What is the purpose of such characterization?

The Convention, by characterizing the act as a continuing offense, aims to preclude offenders from going scot-free and later claim the defense that the person has already been released even before the filing of the appropriate legal charges.

## 5 What is the extent of the act of enforced disappearance?

Enforced disappearance begins from the time of actual disappearance to the time the person appears. In case the person continues to be missing despite resort to appropriate legal remedies, up to the time the fact of disappearance is ascribed to the perpetrators.

## 6 What are the periods that constitute the disappearance?

- (a) First period.-- the actual taking of the disappeared person;
- (b) Second period.-- the concealment of his fate or whereabouts;
- (c) Third period.-- the production of the person, or the judicial determination of the fact of enforced disappearance, and the identification and conviction of the perpetrators.

## 7 Can the respondents invoke exceptional or justifying circumstances?

No exceptional or justifying circumstances whatsoever, whether a state of war or threat of war, internal political instability or any

other public emergency, may be invoked as a justification for enforced disappearance. Hence, even the Government's campaign policy against terrorism cannot be invoked to justify the commission of enforced disappearance.

No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offense of enforced disappearance.

## 8 **Is enforced disappearance a political offense?**

Pursuant to the Convention, for the purposes of extradition, enforced disappearance shall not be regarded as a political offense or as an offense connected with a political offense or an offense inspired by political motives.

Enforced disappearance is an extraditable offense. Therefore, in the absence of an extradition treaty between the requesting and requested States Parties, the Convention may serve as the legal basis for the extradition in respect to the offense of enforced disappearance.

## 9 **What are the legal bases for condemning acts of enforced disappearance?**

Under international law, enforced disappearance is within the purview of the United Nations International Convention for the Protection of All Persons from Enforced Disappearance, and the International Covenant on Civil and Political Rights.

In the domestic sphere, there is no law yet specifically outlawing the act of enforced disappearance. However, pursuant to the doctrine of incorporation under the 1987 Constitution of the Philippines, the International Convention for the Protection of All Persons from Enforced Disappearance can be implemented in Philippine jurisdiction even in the absence of a corresponding domestic legislation, because treaties and generally accepted principles of international law form part of the law of the land.

## 10 **What are the obligations of the State under the Convention?**

- (a) to take preventive action against enforced disappearance;
- (b) to investigate any act of enforced disappearance;
- (c) to bring the perpetrators to the bar of justice;

- (d) to make all acts of enforced disappearance criminal offenses under domestic law with appropriate penalties which shall take into account their extreme seriousness; and
- (e) to fortify the criminal justice system to preclude or repel acts of enforced disappearance.

## 11 Are the abovementioned obligations legally binding on the Philippines?

Yes, the said obligations are legally binding on the Philippines, consistent with the doctrine of incorporation as provided for under the 1987 Constitution.

## 12 What is the principal duty of the Philippine Government under the Convention?

To enact and implement the appropriate law specifically defining and penalizing acts of enforced disappearance, consistent with the International Convention for the Protection of All Persons from Enforced Disappearance and the doctrine of incorporation under the fundamental law of the Philippines.

## 13 Who, in particular, has the primary responsibility to comply with the aforementioned obligations?

The Philippine Government – which refers to the three (3) branches of government: the executive branch, the legislative branch, and the judiciary.

## 14 What are the rights violated in enforced disappearance?

- (a) right to recognition as a person before the law;
- (b) right to liberty and security of a person;
- (c) civil and political rights; and
- (d) right not to be subjected to torture and other cruel, inhuman, or degrading treatment or punishment.



# 15

## What are the immediate special legal remedies, under Philippine jurisdiction, against violations of a person's right to protection from enforced disappearance?

- (a) Writ of Amparo
- (b) Writ of Habeas Data
- (c) Writ of Habeas Corpus

### 15.a) What is a Writ of Amparo?

The petition for a writ of amparo is 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 of amparo shall cover extralegal killings and enforced disappearances or threats thereof.

### 15.b) Who may file a petition for the issuance of a writ of amparo?

The petition for a writ of amparo may be filed by the aggrieved party or by any qualified person or entity in the following order:

- Any member of the immediate family, namely: the spouse, children and parents of the aggrieved party;

- 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
- Any concerned citizen, organization, or association or institution, if there is no known member of the immediate family or relative of the aggrieved party.

The filing of a petition by the aggrieved party suspends the right of all other authorized parties to file similar petitions. Likewise, the filing of the petition by an authorized party on behalf of the aggrieved party suspends the right of all others, observing the order established under Section 2 of the Rule on the Writ of Amparo.

### 15.c) Where and when can the aggrieved party or petitioner file the petition for the issuance of a writ of amparo?

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 was committed or any of its elements occurred; or
- The Sandiganbayan, the Court of Appeals, the Supreme Court, or any justice of such courts.

The writ shall be enforceable anywhere in the Philippines.

**15.d)** Is the petitioner required to pay docket fees?

The petitioner shall be exempted from the payment of the docket and other lawful fees when filing the petition. The court, justice or judge shall docket the petition and act upon it immediately.

**15.e)** What is the required burden of proof and standard of diligence in writ of amparo?

The parties shall establish their claims by substantial evidence. If the respondent is a private individual or entity, he/she/it must prove that ordinary diligence as required by applicable laws, rules and regulations was observed in the performance of duty. If the respondent is a public official or employee he/she must prove that extraordinary diligence was observed in the performance of duty.

**15.f)** Can the respondent public official or employee invoke presumption of regularity in the performance of duty?

No. The respondent public official or employee cannot invoke the presumption that official duty has been regularly performed to evade responsibility or liability.

**15.g)** Is there any legal sanction for refusing to issue or serve the Writ of Amparo?

A Clerk of Court who refuses to issue the writ after its allowance, or a deputized person who refuses to serve the writ, shall be punished by the court, justice or judge for contempt without prejudice to other disciplinary actions.

# 16

## What is a Writ of Habeas Data?

It is a remedy available to any person whose right to privacy in life, liberty or security is violated or threatened by an unlawful act or omission of a public official or employee, or of a private individual or entity engaged in the gathering, collection or storing of data or information regarding the person, family, home and correspondence of the aggrieved party.

Under the writ of habeas data the victim or his/her family can compel the respondents to divulge data or information which are essential to enforce their right to life, liberty or security. It can be availed also as an independent remedy to enforce, particularly, one's right to informational privacy. Apparently, the remedy against violation of the right to privacy or right to informational privacy include the updating, rectification or destruction of database or information or files in possession or in control of the respondents.

The writ of habeas data complements the writ of amparo in ensuring protection of the victim whose right to life, liberty and security has been violated or threatened by State officials / agents or even by private persons or entities.

**16.a)** Who may file a petition for the issuance of a writ of habeas data?

Any aggrieved party may file a petition for the issuance of a writ of habeas data. However, in cases of extralegal killings and enforced disappearances, the petition may be filed by:

- Any member of the immediate family of the aggrieved party, namely: the spouse, children, and parents; or
- 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.

**16.b)** Where can a petition for the issuance of a writ of habeas data be filed?

The petition may be filed with the Regional Trial Court where the petitioner or respondent resides, or that which has jurisdiction over the place where the data or information is gathered, collected or stored, at the option of the petitioner.

The petition may also be filed with the Supreme Court or the Court of Appeals or the Sandiganbayan when the action concerns public data files of government offices.

**16.c)** Does the filing of a petition for the issuance of a writ of habeas data preclude the filing of separate criminal, civil, or administrative actions?

No. The filing a petition for the issuance of a writ of habeas data shall not preclude or prevent the filing of a separate criminal, civil or administrative cases.

**16.d)** Is the petitioner required to pay docket fees?

No docket and other lawful fees shall be required from an indigent petitioner. The petition of the indigent shall be docketed and acted upon immediately, without prejudice to subsequent submission of proof of indigency not later than fifteen (15) days from the filing of the petition.

**16.e)** Is there any legal sanction for refusing to issue or serve the writ of habeas data?

Like in the writ of amparo, a Clerk of Court who refuses to issue the writ of habeas data after its allowance, or a deputized person who refuses to serve the same, shall be punished by the court, justice or judge for contempt without prejudice to other disciplinary actions.



# 17

## What is a Writ of Habeas Corpus?

The object of a Petition for a Writ of Habeas Corpus is to secure a Writ from the Court directing the officers responsible to produce the body of the disappeared person. Preponderance of evidence is required to establish the culpability of the respondents.

The Rules of Court, Rule 102, Section 1 provides that: “Except as otherwise expressly provided by law, the writ of habeas corpus shall extend to all cases of illegal confinement or detention by which any person is deprived of his / her liberty, or by which the rightful custody of any person is withheld from the person entitled thereto.”

# 18

## What other legal remedies can be availed of in addressing enforced disappearance cases?

- (a) criminal action
- (b) civil action for damages
- (c) administrative case

The filing of criminal cases before a court of competent jurisdiction is primarily aimed at penalizing with imprisonment and attendant accessory penalties the officers / persons responsible for the illegal confinement or detention of a person resulting to the deprivation of liberty of the victim and/or to denial of the rightful custody of the victim to the person entitled thereto. The quantum of evidence required in the finding of guilt of the accused is proof beyond reasonable doubt. The prosecution of the criminal cases shall be under the control of the prosecution pillar.

The filing of a separate civil action before a court of competent jurisdiction is aimed at seeking payment for damages to compensate for the loss suffered by the victim. As a rule, the civil action for damages is impliedly instituted with the criminal case. However, the aggrieved party or the family of the disappeared person has the option to file a separate civil action for damages. The quantum of evidence required is preponderance of evidence.

The aggrieved party or the family of the victim of enforced disappearance can also file an administrative case aimed to cause the dismissal or suspension from the service of, or to reprimand, warn or impose other administrative penalty upon the public officers who perpetrated the enforced disappearance of the victim. Substantial evidence is required. The offices where the administrative complaint can be filed include the National Police Commission, the

Ombudsman, the People's Law Enforcement Bureau, the Head of Agency where the respondent is employed.

The aggrieved party or the family of the disappeared or concerned group can also file a complaint for human rights violation before the Commission on Human Rights.

## 19 **Can the aggrieved party or the family of the victim of enforced disappearance or concerned group seek international redress?**

There are available international remedies which can be explored, such as the filing of individual complaint before the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. As a rule, this can be done after available domestic remedies have been exhausted. The decision of the U.N. body may result to an unfavorable public declaration against the Philippine Government for violation of its primary obligation to respect, protect and fulfill rights of the people within its jurisdiction.

## 20 **What is the role of the Commission on Human Rights of the Philippines in the implementation of the Convention?**

As a national human rights institution, the Commission on Human Rights has the fundamental mandate to:

- (a) conduct independent investigation, *motu proprio* or upon complaint, of all human rights violations involving enforced disappearance;
- (b) provide free legal assistance to the aggrieved party and/or their families, as well as to the witnesses;
- (c) provide other forms of assistance within its Constitutional powers and functions;
- (d) conduct regular or on the spot visits or inspections of jails, prison or detention places, and other holding areas, whether operated by the Philippine National Police, the Armed Forces of the Philippines, other government institutions, or private entities;
- (e) monitor Philippine Government's compliance with the Convention upon its ratification; or pursuant to the doctrine of incorporation of the generally accepted principles of international law as embodied in the 1987 Constitution of the Philippines;

- (f) conduct legislative lobby to ensure that Congress give urgent priority to enact a law defining and penalizing enforced disappearance as a serious form of human rights violations and providing for necessary assistance and resources to the victims and their families;
- (g) advise government, stakeholders, civil society and the media on their respective role in the protection of all persons from enforced disappearance;
- (h) conduct a continuing program of research, education and information on the right to protection from enforced disappearance;
- (i) coordinate / linkage / network with both government and non-government organizations, civil society and the media to strengthen human rights protection and promotion measures.

## 21 **Where can one report incidents of, or file complaint for, human rights violation involving enforced disappearance of a person:**

The family of the victim, or any concerned citizen or non-government organization may report the incident of enforced disappearance, or file a complaint about such violation of human

rights, with the nearest Regional Office of the Commission on Human Rights (CHR), or with the CHR Central Office.

## 22 **What are the rights of the victim of enforced disappearance?**

- (a) right to life
- (b) right to liberty and be freed immediately from his / her captors
- (c) right to security
- (d) right to freedom from torture
- (e) right to humane treatment
- (f) right to immediate assistance from dutyholders
- (g) right to due process
- (h) right against unreasonable searches and seizures
- (i) right to access to justice

The victim's family and the witnesses have the right to protection and necessary assistance from the State, civil society/ non-government organizations/the media, and from the national human rights institution.



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