



Republika ng Pilipinas
Komisyon ng Karapatang Pantao
(Commission on Human Rights)

POSITION PAPER
on
"ANTI-ENFORCED or INVOLUNTARY
DISAPPEARANCE ACT"

The Commission on Human Rights strongly supports the approval of the proposed bill on "Anti-Enforced or Involuntary Disappearance."

The urgency of the passage of this bill is grounded upon the numerous cases of disappearances primarily perpetrated or participated in by agents of the State. The existence of judicial remedies such as but not limited to "habeas corpus" has proved ineffective in locating and bringing before the courts people who have disappeared. This crisis may be attributed to problems like judicial procedures, a lack of cooperation from police and military authorities and the fear of witnesses to testify.

Controversies concerning the bill on "involuntary or enforced disappearance" arose time and again. Others contend that there is no need for a separate law on enforced disappearances because the Revised Penal Code already penalizes such acts particularly the provisions on Kidnapping and Arbitrary Detention. However, this argument does not hold because a thoughtful consideration and comparison between Arbitrary Detention and Enforced Disappearance shows that although both acts are committed by public employees yet these offenses deal with varied issues, to wit: Arbitrary Detention concerns illegality of detention and initial circumstances surrounding the arrest, while Enforced Disappearance is the subsequent disappearance of the detainee and addresses the situation after the arrest and during detention. On the other hand, kidnapping is a crime perpetuated by private individuals or by public officers acting beyond their authority while enforced disappearances are not simply the result of aberrant officials acting on their own private interest, rather, they are in furtherance of a political

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motive or objective. It is apparent that the purpose is to eliminate persons against whom the state has charges, which it is unwilling to pursue in court.

ANALYSIS of the BILL

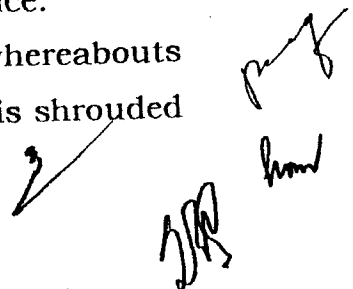
1. RE: Definition

The bill has adopted the definition of enforced or involuntary disappearance under the UN Declaration as well as the Draft Convention on the Protection of All Persons from Forced Disappearance. Thus, it limits the commission of forced disappearance to deprivation of liberty for political reason/s by agents of the State or by private persons or group of persons acting with the authorization, support or acquiescence of the State.

The bill, however, provides that in the event the prosecution fails to prove political motive, the deprivation of liberty of the victim who surfaces alive shall be punishable as Kidnapping or Serious Illegal Detention. Whereas, if the victim is subsequently found dead or his or her disappearance persists for over three (3) years, he/she is presumed killed by those responsible for his or her arrest or abduction, and the act of enforced disappearance in either case shall be punishable as murder.

Thus, it may be inferred that three minimum elements should be contained to constitute "involuntary disappearance," to wit:

- a. Deprivation of liberty against the will of the person concerned. This occurs when freedom is withheld from the victim without due process or just cause.
- b. Involvement of government official, at least indirectly by acquiescence. The act to constitute an offense is perpetrated by agents of the state. They may be people who do not formally belong to the security services but are operating by order of the authorities or with their complicity or acquiescence.
- c. Refusal to disclose the fate and whereabouts of the person concerned. The act is shrouded



in secrecy and the authorities deny holding the victim. This denial may be in the form of a public statement, a reply to inquiries by the victim's relatives, or a response to a judicial procedure such as habeas corpus, which has been invoked.

2. RE: Principle of Command Responsibility

Consistent with the principle of command responsibility, the bill holds the immediate commanding officer or equivalent senior official of persons who committed the act of enforced disappearance criminally liable for the same offense; and his or her failure to avert the act of enforced disappearance shall be taken as evidence of conspiracy.

3. RE: Imposition of RP, not Death

Notwithstanding the heinousness of involuntary disappearance, the bill imposes the maximum penalty of Reclusion Perpetua, not Death. As a staunch defender of the right to life and therefore consistently opposed to the imposition of the death penalty. CHR fully endorses the penal sanctions that the bill seeks to impose. These sanctions that are commensurate to the gravity of the offense are not meant to be punitive but to be rehabilitative.

4. RE: Preventive Suspension

To prevent the accused from influencing the investigation and prosecution of the cases, the bill provides for his/her preventive suspension upon the filing of the information or complaint in the proper court.



5. RE: Justifying Circumstance not Available as a Defense

Section 16 of the proposed bill provides:

"An order from a superior officer or a public authority causing the commission of enforced or involuntary disappearance is unlawful and cannot be invoked as a justifying circumstance."

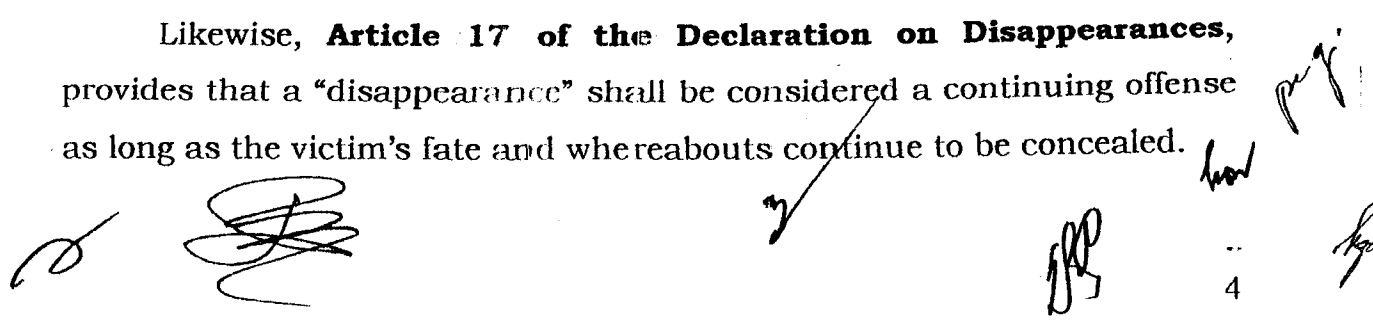
This proviso further ensures that subordinates will not be cowed by higher authorities to take part in the commission of enforced disappearance, the bill declares **unlawful an order** from a superior officer or a public authority causing the commission of enforced disappearance and therefore such order cannot be invoked as a justifying circumstance.

6. RE: Continuing Offense

Continuing offense is defined as "one which may consist of separate acts or a course of conduct but which arises from that singleness of thought, purpose or action which may be deemed a single impulse". The bill considers enforced disappearance as a continuing offense as long as the perpetrators continue to conceal the fate and whereabouts of the disappeared and these facts remain unverified.

This is consistent with **Article 5.1 of the Draft International Convention on the Protection of All Persons from Forced Disappearance** which provides that the **"offense is continuous and permanent as long as the fate or whereabouts of the disappeared person has not been determined with certainty."** As such the act is not committed and consummated in the past or prior to the enactment of the law penalizing it. Thus, the "Anti-Enforced or Involuntary Disappearance Act" **cannot be considered an "ex post facto law"**.

Likewise, **Article 17 of the Declaration on Disappearances**, provides that a "disappearance" shall be considered a continuing offense as long as the victim's fate and whereabouts continue to be concealed.



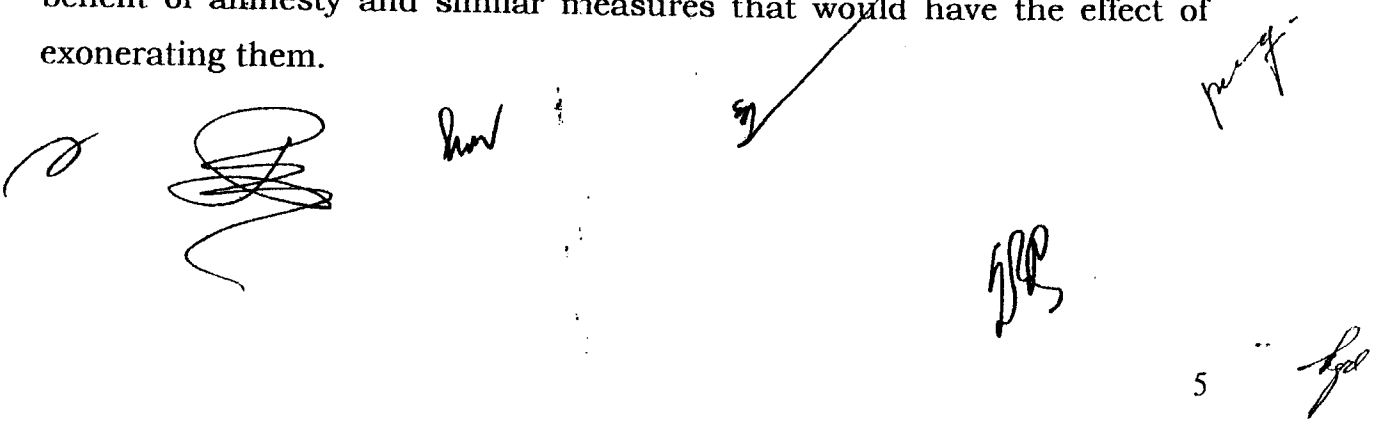
7. RE: Exclusion from Statute of Limitation

The bill further provides that the prosecution of persons responsible for the enforced disappearance shall not prescribe unless the victim surfaces alive, in which case the prescriptive period shall start to run from the date of his or her reappearance.

It should be emphasized that inclusion of this provision is significant if not indispensable because impunity for the perpetrators is a common feature of governmental programs of "disappearances". The illusion of invincibility feeds the cycle of violence, encourages further abuses and denies the victims justice. Impunity can be reinforced by Statute of Limitations for prescription allows the criminals to go scot-free if the aggrieved party within a certain time frame has instituted no action.

8. RE: Special Amnesty Law and/or Executive Clemency

The bill likewise excludes persons who have committed the act of enforced disappearance from the coverage of any special amnesty law or similar measures that will have the effect of exempting them from any criminal proceedings and sanctions. It is worth noting that previous amnesty laws, i.e., Proclamation No. 348 (issued on March 25, 1994) as amended by Proclamation No. 377 (issued on May 10, 1994) and Proclamation No. 723 (issued on May 17, 1996) and concurred in by Congress through Concurrent Resolutions numbered 12-A and 14, respectively, excluded torture among other serious human rights violations, from the coverage of such amnesty laws. Hence, it is just and reasonable for persons who committed enforced disappearance, which is considered as the most cruel form of torture, to be barred from the benefit of amnesty and similar measures that would have the effect of exonerating them.



Involuntary disappearance violates practically all human rights, most often including the right to life. It wreaks incalculable pain and anxiety not only on the victims but on their families as well who agonize between hope and despair as they search for their missing loved ones. For this reason, no act of executive clemency should extinguish criminal liability of the perpetrators, more so because these offenders are agents of the State who are duty-bound to protect, promote and fulfill, not to violate the rights of the people.






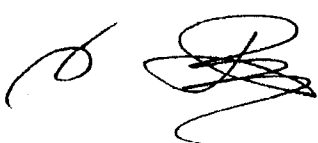
9. RE: Witness Protection

The bill mandates the State through its appropriate agencies to ensure the safety of all persons involved in the investigation and prosecution of enforced disappearance cases. These include the complainant/s, legal counsel, witnesses and relatives of the victims of enforced disappearance.

10. RE: Monetary Compensation and State Responsibility

State responsibility evolves from the principle that the State is held accountable for human rights violations committed within its territory and is obligated to prevent such violations or to investigate them when they have occurred.

The Philippine government is bound to comply with the guarantees and obligations imposed by treaties which it has ratified. Moreover, the **1987 Constitution** states that the Philippines adopts the generally accepted principles of international law, also known as the Law on Incorporation. No less than the **Vienna Programme of Action of the World Conference on Human Rights** welcomed the adoption by the General Assembly of the Declaration on Disappearance, and called upon all States to take effective legislative, administrative, judicial and/or other measures to prevent, terminate and punish acts of enforced disappearances.



Essentially, both the **Declaration on Disappearances and the Draft Convention** obligate the State to prevent "disappearances", investigate them, bring to justice those responsible and provide redress for the victims and their families. In addition, "no circumstance – whether internal political instability, threat of war, a state of war, any state of emergency or suspension of individual guarantees – may be invoked in order not to comply with the obligations established in this Convention."

The bill also mandates the State to render monetary compensation to the victims and ensure restitution of their honor and reputation. The Commission on Human Rights is also mandated to provide them with appropriate medical care and rehabilitation free of charge. The nearest of kin of the victim may claim for compensation as provided for under **RA 7309** and other relief programs of government without prejudice to other available legal remedies.

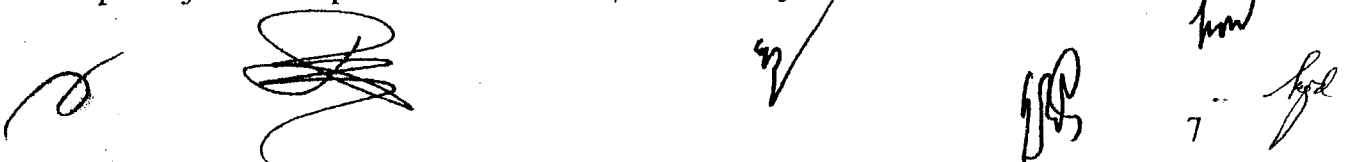
Article 19 of the Declaration provides that "the victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation..."

11. RE: CHR as Oversight Committee

To ensure compliance with the provision of the "Anti-Involuntary Disappearance Act", the bill creates an Oversight Committee to periodically oversee the implementation of the Act. The Committee shall be headed by a Commissioner of the CHR.

Putting an end to impunity may not bring back the desaparecidos to life and to the fold of their families and communities. However, it will definitely help prevent other men, women and youth from involuntarily disappearing, sparing their families the agony of waiting and searching, and permitting their communities to make full use of their contribution to sustainable development.

In a "disappearance", victims are cut off from the world and placed completely in the power of their captors. They often suffer torture and

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eventually, extra-judicial execution; for female prisoners, there is the vulnerability to sexual abuse. Even those who do “reappear” are never free. Their movements are restricted and their communications monitored

Article 3 of the Declaration on Disappearances states that the “systematic or massive practice of forced disappearances constitutes a crime against humanity.” This parallels the **Rome Statute of the**


International Criminal Court, to which the Philippine Government is a signatory, which delimits crimes against humanity, to a list of certain acts that are committed as part of a widespread or systematic attack directed against any civilian population. This list includes the enforced disappearance of persons.

Accordingly, the CHR earnestly seeks the immediate passage of the “Anti-Enforced or Involuntary Disappearance Act of 2005”.

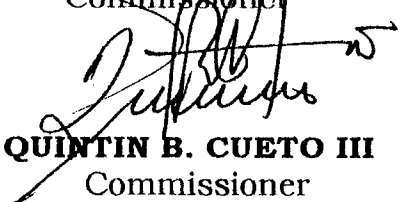
Done this 25th day of August, 2006 at Quezon City.


PURIFICACION C. VALERA QUISUMBING
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