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# Action against Torture

## A Practical Guide to the Istanbul Protocol

## for Lawyers in the Philippines

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# Part 1: Overview of the Istanbul Protocol

## A. Introduction

Recognising the prevalence of torture in the world and the need to take active steps to combat it, medical, legal and human rights experts from a range of countries drafted the "***Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol).***" The Manual was finalised in August 1999 and has since been endorsed by the United Nations, regional organisations and other bodies.[1]

The Istanbul Protocol is intended to serve as a set of international guidelines for the assessment of torture or cruel, inhuman or degrading treatment or punishment, and for investigating such allegations, and reporting findings to the judiciary or other investigative bodies. The set of "***Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (The Istanbul Principles)*** annexed to the Istanbul Protocol was included in the Resolution on Torture unanimously adopted by the UN General Assembly in December 2000.[2] Subsequently, the United Nations Commission on Human Rights drew the attention of governments to these Principles and strongly encouraged them to reflect upon them as a useful tool in combating torture.[3]

Torture is defined in the Istanbul Protocol in the words of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

> "Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[4]

Accordingly, torture is the intentional infliction of severe pain or suffering, whether physical or mental, by or on behalf of a public official (such as the police or security forces) or with their consent. The calculated abuse of an individual's physical and psychological integrity, in a way that is designed specifically to undermine their dignity, is horrible in any circumstance. But when this act is perpetrated by or on behalf of a public official (someone with the very responsibility to protect an individual's rights) the crime becomes all the more reprehensible. Indeed torture is typically perpetrated/condoned by the State officials who are responsible for upholding and enforcing the law.

Torture may cause physical injury such as broken bones and wounds that heal slowly, or can leave no physical scars. Often torture will lead to psychological scars such as an inability to trust, and a difficulty to relax in case the torture happens again, even in a safe environment. Torture survivors may experience difficulty in getting to sleep or may wake early, sometimes shouting or with nightmares. They may have difficulties with memory and concentration, experience irritability, persistent feelings of fear and anxiety, depression, and/or an inability to enjoy any aspect of life. Sometimes these symptoms meet the diagnostic criteria for post-traumatic stress disorder (PTSD) and/or major depression. Physical and psychological scars can last a lifetime. To someone who has no experience of torture, these symptoms might appear excessive or illogical, but they can be a normal response to trauma.

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[1] Available at http://www.unhchr.ch/pdf/8istprot.pdf.
[2] UNGA Resolution 55/89 Annex, 4 December 2000.
[3] UN Commission on Human Rights Resolution 2003/33, 57th meeting, 23 April 2003 [E/CN.4/2003/L.11/Add.4].
[4] Article 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UNGA resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

The word 'torture' will, to most people, invoke images of some of the most horrific forms of physical and psychological suffering - the pulling out of fingernails, electric shocks, mock executions, being forced to watch the torture of parents or children, rape. The variety and severity of the methods of torture and cruel, inhuman or degrading treatment or punishment may simply defy belief. But there is no exhaustive list of acts that constitute torture;[5] torturers continue to invent new ways to brutalise individuals. And there is no limit on who can be victimised – survivors of torture come from all walks of life, and from most countries around the world. Even children may be victims.[6] But most frequently, torture survivors are criminal suspects, or victims of discrimination on the grounds of race, ethnicity, religion, gender or sexual identity.[7]

As noted in the Istanbul Protocol, "torture is a profound concern for the world community. Its purpose is to deliberately destroy not only the physical and emotional well-being of individuals, but the dignity and will of entire communities. It concerns all members of the human family because it impugns the very meaning of our existence and our hopes for a brighter future."

In other words, torture is abhorrent not only for what it does to the tortured but for what it makes of the torturer and the system that condones it. The Istanbul Protocol explains: "Perpetrators often attempt to justify their acts of torture and ill-treatment by the need to gather information. Such conceptualizations obscure the purpose of torture and its intended consequences…By dehumanizing and breaking the will of their victims, torturers set horrific examples for those who later come in contact with the victim. In this way, torture can break or damage the will and coherence of entire communities…."

For this reason, torture is absolutely prohibited by every relevant human rights instrument since the Universal Declaration of Human Rights of 1948. The violation of this prohibition is considered so serious that no legal justification may ever be found, even in times of emergency or armed conflict.

Despite the absolute prohibition of torture under international law, a glance at any of the reports of the United Nations Special Rapporteur on Torture, or of recent reports of the International Committee of the Red Cross (ICRC), or indeed many newspapers, makes it quite clear that torture is still commonplace in many countries around the world. This imbalance between the absolute prohibition on the one hand and the frequent practice of torture underscores the need to improve domestic implementation of international standards against torture and to improve the effectiveness of domestic remedies for torture survivors.

The Istanbul Protocol is an important instrument in the fight against torture - the effective investigation and documentation of torture helps to expose the problem of torture and to bring those responsible to account. The Principles contained in the Protocol reflect important international standards on the rights of torture survivors and States obligations to refrain from and prevent torture.

International law requires States to investigate allegations of torture and to punish those responsible. It also requires that victims of acts of torture obtain reparation and have an enforceable remedy to fair and adequate compensation, restitution of their rights and as full rehabilitation as possible. The Istanbul Protocol is a manual on ***how*** to make investigations and documentations of torture ***effective*** in order to punish those responsible, to afford adequate reparation to the victims and more generally, to prevent future acts of torture.

This Guide is aimed at lawyers in the Philippines working with torture survivors. For each key international standard contained in the Istanbul Protocol it outlines the relevant domestic laws and practices and highlights discrepancies between domestic laws and international standards and procedural violations of international standards in domestic practices. This Guide examines domestic law and practice in light of

[5] In its General Comment on Article 7 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee considered that it is not desirable to draw up a list of prohibited acts or a precise distinction between them. Furthermore, Sir Nigel Rodley, former UN Special Rapporteur on Torture, considered that it is extremely difficult and indeed dangerous to establish a threshold to distinguish acts of torture from cruel, inhuman or degrading treatment.

[6] See Amnesty International, *Hidden Scandal, Secret Shame* (AI Index ACT 40/38/00) for reports of torture perpetrated against children.

[7] See Amnesty International, *Crimes of Hate, Conspiracy of Silence* (AI Index ACT 40/016/2001) for reports of torture perpetrated against sexual minorities; *Broken Bodies, Shattered Minds* (AI Index: ACT 40/001/2001) for reports of the torture of women; *Racism and the Administration of Justice* (AI Index: ACT 40/020/2001) for reports of torture and racial discrimination.

these international standards and suggests practical ways that lawyers might improve the recognition and implementation of these international standards.

This Guide does not purport to be a comprehensive survey of domestic law and practice of torture in the Philippines. Rather, it aims to provide an outline of relevant legal provisions, case law and practice, in order to identify steps to ameliorate domestic implementation of applicable international standards.

Lawyers are key interlocutors for survivors of torture seeking justice and other forms of reparation. Equally, they may play a vital role in persuading governments to comply with their international obligations to refrain from acts of torture and to implement preventative measures. If lawyers are familiar with the applicable international standards, they may seek to interpret and apply domestic law in light of these standards, and may cite such standards in their legal argument, pleadings and complaints.

## B. The importance of legal professionals in the documentation and investigation of torture

The Istanbul Protocol states that lawyers have a duty in carrying out their professional functions to promote and protect human rights standards and to act diligently in accordance with law and recognised standards and ethics of the legal profession. Other human rights instruments, such as the "*UN Basic Principles on the Role of Lawyers*",[8] set out the duty of lawyers to assist clients "in every appropriate way" and to take legal action to protect their interests.

International standards to investigate torture are primarily formulated as obligation of States, as reflected in Chapter III of the Istanbul Protocol. However, lawyers play a crucial and active role in the documentation and investigation of torture, in particular by:

(i) documenting torture for use in legal or other proceedings, including future proceedings where national mechanisms at the time are unavailable or ineffective;

(ii) collecting evidence of torture that may prompt authorities to open or reopen an investigation;

(iii) providing evidence of torture that supports ongoing investigations or prosecutions at the national or international level;

(iv) recording the failure to investigate in spite of the availability of evidence or the shortcomings of any investigations undertaken with a view to prompting further investigations, including by taking cases to regional or international human rights bodies;

(v) collecting evidence to support reparation claims brought at the national or international level before judicial or administrative bodies.

## C. The importance of medical professionals in the documentation of torture and the need for lawyers to understand the medical symptoms of torture

The Istanbul Protocol highlights the important role of medical professionals in the documentation of torture and sets out detailed guidelines on methodology for obtaining medical evidence, including the recommended content of medical reports.

[8] See *UN Basic Principles on the Role of Lawyers*, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 27 August-7 September 1990.

It is important for lawyers working with torture survivors to know how torture can be medically documented and what are the physical and psychological symptoms of torture. This will not only help them to better understand their clients and assist them but equally, such insight is extremely important when lawyers lodge complaints of torture or other forms of ill-treatment on the survivors' behalf. As recognised in the Istanbul Protocol lawyers and doctors need to work closely together to effectively investigate and document acts of torture. Medical evidence will help prove that torture has occurred. It will also assist lawyers to determine victims' claims for reparations (e.g., restitution, compensation and rehabilitation). Similarly, lawyers will need to assess whether the official investigation of the police or other competent body took into account proper medical evidence or whether they need to arrange for independent medical examinations to attest to the victim's version of the events.

The Istanbul Protocol states that lawyers have a duty, in carrying out their professional functions, to promote and protect human rights standards and to act diligently in accordance with law and recognised standards and ethics of the legal profession. Other human rights instruments, such as the "*UN Basic Principles on the Role of Lawyers*", [9] set out the duty of lawyers to assist clients "in every appropriate way" and to take legal action to protect their interests. The Istanbul Protocol also states that there is a duty on medical professionals to always act in the best interests of the patient, regardless of other pressures or contractual obligations. Similarly, under the "*UN Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*"[10] it is a "gross contravention of medical ethics" for doctors to engage in acts which constitute participation in, complicity in, incitement to, or attempts to commit torture.

### D. Key International Standards in the Istanbul Protocol

The Istanbul Protocol outlines international legal standards on protection against torture and sets out specific guidelines on how effective investigations into allegations of torture should be conducted. It is not binding in itself though States are encouraged to use it.[11] The Istanbul Protocol is an important source as it both reflects existing obligations of States under international treaty and customary international law and aids States to effectively implement relevant standards. These guidelines (the Istanbul Principles) have been recognised by human rights bodies as a point of reference for measuring the effectiveness of investigations. For example, the Inter-American Commission of Human Rights cited the Istanbul Principles as the minimum requirements for medical reports prepared by medical professionals when investigating cases of alleged torture.[12] Similarly, a resolution of the African Commission on Human and Peoples' Rights affirmed that investigations into allegations of torture should be conducted promptly, impartially and effectively, guided by the Istanbul Protocol.[13]

The Istanbul Protocol identifies the following obligations on governments to ensure protection against torture as recognised in international treaties and customary international law:[14]

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[9] See UN Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 27 August-7 September 1990.

[10] The UN Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were adopted by the UN General Assembly on 18 December 1982.

[11] The Commission on Human Rights, in its resolution 2000/43, and the General Assembly, in its resolution 55/89, drew the attention of Governments to the Principles contained in Annex I (the Istanbul Principles) and strongly encouraged Governments to reflect upon the Principles as a useful tool in efforts to combat torture. The Special Rapporteur on Torture recommended in his General Recommendations, UN Doc. E/CN.4/2003/68, 17 December 2002, para.26 (k) that: "countries should be guided by the Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (the Istanbul Principles) as a useful tool in the effort to combat torture."

[12] *Ana, Beatriz and Celia Gonzalez Perez .v. Mexico* (Report No. 53/01), Inter-American Commission on Human Rights, 4 April 2001.

[13] See the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or degrading Treatment or Punishment in Africa, adopted by the African Commission on Human and Peoples' Rights at its 32nd Ordinary Session.

[14] In particular the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 7 and 10 of the International Covenant on Civil and Political Rights, Article 3 of the European Convention on Human Rights, Article 5 of the African Charter on Human and Peoples' Rights, Article 5 of the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture. Torture is also prohibited under international humanitarian law, in particular common Article 3 to the four Geneva Conventions of 1949, and constitutes an international crime, both in its own right and as an element of genocide, crimes against humanity and war crimes. See on the obligations of states parties under the Convention against Torture, REDRESS, *Bringing the International Prohibition of Torture Home: National Implementation Guide for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, January 2006.

**1. Prevention**

**(i) To take effective legislative, administrative, judicial or other measures to *prevent* acts of torture, for example, by:**

- Establishing effective monitoring mechanisms to prevent torture in all places of detention;
- Ensuring that any statement that is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made;
- Ensuring that the prohibition of torture is included in training of law enforcement and medical personnel, public and other relevant officials;
- Not expelling, returning, extraditing or otherwise transferring a person to a country when there are substantial grounds for believing that the person would be tortured (non-*refoulement*).

**(ii) To ensure that general *safeguards* against torture exist in places of detentions such as:**

- Granting detainees prompt and unrestricted access to a lawyer and a doctor of their choice;
- Informing family members or friends about the person's detention;
- Providing detainees access to family members and friends;
- Not holding persons in incommunicado detention;
- Enabling detainees to promptly challenge the legality of their detention before a judge.

**2. Accountability**

**(i) To *effectively* investigate allegations of torture, by:**

- Putting into place an effective complaints procedure, including by providing adequate victim and witness protection;
- Ensuring that the relevant authorities undertake a prompt and impartial investigation whenever there are reasonable grounds to believe that torture has been committed;
- Guaranteeing that all allegations of torture are effectively investigated.

**(ii) To ensure that alleged perpetrators are subject to *criminal* proceedings by:**

- Criminalising acts of torture, including complicity or participation, and excluding the defences of necessity or superior orders;
- Ensuring that the alleged perpetrators are subject to criminal proceedings if an investigation establishes that an act of torture appears to have been committed;
- Imposing punishments that reflect the seriousness of the crime;
- Enshrining the principle of universal jurisdiction, enabling the investigation and prosecution of torturers irrespective of the place where the torture was committed and the nationality of either the victim or the perpetrator; and
- Making torture an extraditable offence and providing assistance to other national governments seeking to investigate and/or prosecute persons accused of torture.

**3. Reparation**

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**(i) To ensure that victims of torture have the right to an effective remedy and adequate reparation by:**

- Ensuring that victims of torture have effective procedural remedies, both judicial and non-judicial, to protect their right to be free from torture in law and practice;
- Guaranteeing that domestic law reflects the different forms of reparation recognised under international law and that the reparations afforded reflect the gravity of the violation(s).

# Part 2: General legal framework and practice of torture in the Philippines

## A. The practice of torture in the Philippines

Torture and other serious human rights violations were perpetrated on a large-scale from 1965 to 1986 when the Philippines was ruled by Ferdinand Marcos. This was especially the case after the declaration of martial law in 1972, with several thousand killed or disappeared and tens of thousand arbitrarily detained and/or tortured.[15] Torture was mainly but by no means exclusively used as part of 'counter-insurgency' operations and against suspected political opponents of the regime. Torture and other violations were committed by the police, the army and other security forces, including para-military groups.[16] After Corazon Aquino came to power in 1986, several measures were taken to restore democracy and to ensure the protection of human rights, among them the adoption of the new Constitution in 1987. However, torture persisted with records of thousands of political arrests and torture cases.[17]

Later on, once the "political crimes" started to decrease, the focus shifted to the torture and ill-treatment of suspected common criminals. While the latter had also been tortured and ill-treated during the Marcos dictatorship, their plight was not given due attention then and no data and statistics are available from this period.

During the presidencies of Ramos from 1992 to 1998,[18] Estrada from 1998 to 2001, and President Arroyo, torture and ill-treatment continued to be widely reported, mainly resorted to in the context of criminal investigations.[19]

The Philippines National Police (PNP), the state security forces and the army have all reportedly resorted to torture.[20] Members of the police were suspects in 43 out of the 83 torture cases investigated by the Commission on Human Rights (CHR) between 2003 and 2006, with the remaining suspects referred to as arresting officers (12), members of the Intelligence Services of the Armed Forces (ISAFP) (2), National Bureau of Investigation (NBI) agents (2), Southcom marines (3), military men (2), armed men (11) or unidentified men (10). There appears to be less torture carried out in prisons though, conditions are poor and prisoner on prisoner violence is a serious problem that state authorities have failed to prevent effectively.[21]

Available statistics indicate that there have been hundreds of torture cases since 2001. The NGO Task Force on Detainees in the Philippines alone documented 109 cases of torture against 239 victims in the period from January 2001 to December 2006. Most of the torture took place in Mindanao, with responsibility attributed to the Philippines Army in 68 cases and the Philippine National Police in 23 cases.

Since 2001, there have been several cases of enforced disappearances and torture targeting political and civil society activists critical of the Government. While the identity of the perpetrators of these acts is not

[15] See Free Legal Assistance Group (FLAG) and Foundation for Integrative and Development Studies (FIDS), *Torture Philippines, Law and Practice*, 2003, p.2 and information about the Museum of Courage and Resistance (Martial Law Museum), which was opened in 1999, on the website of the Task Force Detainees Philippines, at http://tfdp.net/index.php?option=com_content&task=view&id=15&Itemid=32.
[16] According to FIND, the Families of Victims of Involuntary Disappearance, a domestic NGO, there have been 1,778 victims of disappearance alone during the Marcos dictatorship. See AFAD Statement, International Week of the Disappeared, May 27-31, 20002, Collective Struggle against Involuntary Disappearances in Asia. Several thousands of people were tortured during the Marcos period. The Task Force Detainees of the Philippines opened a Museum of Courage and Resistance (The Martial Law Museum) in which 6,000 documented cases of human rights violations are remembered. See www.tfdp.org.
[17] Task Force Detainees of the Philippines (TFDP), *Pumipiglas 3: Torment and Struggle After Marcos, A Report on Human Rights Trends in the Philippines Under Aquino*,1986- 1992, p. 167.
[18] TFDP, *Statistics of Human Rights Violations Under the Ramos Government*, June 1, 1992-May 31, 1998.
[19] See Amnesty International, Philippines, *Torture persists: appearance and reality within the criminal justice system*, January 2003, AI Index: ASA 35/001/2003, p.6 and pp.8, 9 for torture techniques used.
[20] Ibid., pp.5,8 and FLAG and FIDS, *Torture Philippines*, supra.
[21] Ibid., pp.36 et seq.

known, there are strong indications that segments of the army have been responsible for most violations as part of a campaign of intimidation of those seen as "leftists."[22]

Torture is apparently commonplace during arrest and investigations, as evidenced by sample interviews with detainees.[23] The main purposes of police torture appear to be punishment and the extraction of confessions and information. Torture has also been apparently committed for personal gains, i.e. extortion and sexual satisfaction.[24] Anyone who is a suspect in a criminal case is a potential target of torture by the police, in particular persons with a low social standing, such as street children and drug users.[25] There is said to be a consistent pattern of sexual harassment, including rape, of women detainees, amongst other forms of torture and ill-treatment.[26] There are also several reports of torture and ill-treatment of children and juveniles.[27]

Persons are regularly arrested without warrant, blindfolded and subjected to ill-treatment that may amount to torture, including physical beatings, dragging and kicking, hitting with objects, gun-pointing as well as electrocution and drowning.[28]

The victims of army torture are mainly those suspected of belonging to or sympathising with the Abu Sayyaf Group, the New People's Army (NPA) or other groups seen as hostile to the army or the state, including political activists.[29] Torture methods that have been reported against suspected members of the Abu Sayyaf Group include the use of bottles of gasoline with chilli pepper applied to bodily parts, hitting with water pipes, tying victims' necks with a rope, suffocating victims by covering their heads with plastic, blindfolding, mock executions and deprivation of water, food and sleep.[30] Torture methods used in anti-insurgency operations and political cases are said to be more brutal, systematic and prolonged in seeking to break down the victims. Several of the persons who have been disappeared and killed bore marks of torture, confirming the fear that many of those severely tortured either die as a result of torture or are killed subsequently.[31]

## B. Prohibition and definition of torture in the Philippines

The Republic of the Philippines is party to the following human rights and humanitarian law treaties[32]:

- Convention on the Prevention and Punishment of Genocide of 1948 (7 July 1950)
- Geneva Conventions of 1949 (6 October 1952)
- Convention on the Elimination of All Forms of Racial Discrimination (CERD) (15 September 1967)
- International Covenant on Economic, Social and Cultural Rights (ICESCR) (7 June 1974)
- Convention on the Rights of the Child (CRC) (21 August 1980)
- 1951 Convention relating to the Status of Refugees (22 July 1981)

[22] Special Report: *The Criminal Justice System of the Philippines is rotten*, in: Asian Legal Resource Centre, Article 2, Vol.6, No.1, 2007, pp.116 et seq. See in this context also Press Statement, Professor Phillip Alston, Special Rapporteur of the United Nations Human Rights Council on extrajudicial, summary or arbitrary executions, Manila, 21 February 2007.
[23] FLAG and FIDS, *Torture Philippines*, supra.
[24] Ibid., pp.26 et seq.
[25] Ibid., p.31.
[26] See Amnesty International, *Philippines, Fear, shame and impunity: Rape and sexual abuse of women in custody*, March 2001, AI Index: ASA 35/001/2001.
[27] FLAG and FIDS, *Torture Philippines*, supra, pp.33 et seq.
[28] Ibid.
[29] See TFDP, *Blood Stains the Arroyo Government, Human Rights under the Arroyo Government, January-December 2004*, June 2005, pp. 7 et seq.
30 Institute of Human Rights, U.P. Law Center, Diliman, Quezon City, *Manual on the Prevention and Prosecution of Torture* (undated), pp.59,60.
[31] *Rotten to the core: Unaddressed killings, disappearances & torture in the Philippines*, in 'Special Report: The Criminal Justice System of the Philippines is rotten', supra.
[32] Date of accession or receipt of instrument by UN.

- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (5 August 1981)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (18 June 1986)
- International Covenant on Civil and Political Rights (ICCPR) (23 October 1986)
- Additional Protocol II to the Geneva Conventions of 1949 (11 December 1986)
- Optional Protocol to the ICCPR (22 August 1989).

Article II, Section 2 of the 1987 Constitution (hereinafter the Constitution) stipulates that the Philippines "…adopts the generally accepted principles of international law as part of the law of the land …" This recognition of the doctrine of incorporation means that international law becomes directly operative and effective within the domestic legal system.[33] There is no need to enact legislation to transform international law into domestic law as long as the rule in question is 'self-executing.' This means that the rule is sufficiently clear to be applied directly by the courts and others, which is for example not the case where a treaty such as the UN Convention against Torture requires a state to take the necessary measures, such as to make torture a criminal offence (Article 4).

The Philippines has not enacted any legislation specifically implementing the UN Convention against Torture. Torture is expressly prohibited under Article III, Section 12(2) of the Constitution: "No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, *incommunicado*, or other similar forms of detention are prohibited." Article III, Section 19 of the Constitution contains a prohibition of ill-treatment: "1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted …; 2) The employment of physical, psychological, or degrading punishment against any prisoner or detainee, or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law."

The recently enacted Juvenile Justice and Welfare Act of 2006 (Republic Act 9344) specifically prohibits torture of children under the age of 18.[34] The Act Prohibiting the Imposition of Death Penalty in the Philippines of 2006 (Republic Act 9346) is also a significant measure as it abolishes a form of punishment that is increasingly seen as inhuman. It also removes the possibility of the death-row phenomenon which may amount to torture or ill-treatment.[35]

However, torture is not expressly defined in statutory law. There is no specific offence of torture in criminal law, and the courts have not defined torture in their jurisprudence.[36] This constitutes a continuing failure of the Philippines to implement its international obligations relating to the prohibition of torture, in particular Article 4 (1) of the UN Convention against Torture, according to which: "Every State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture." Successive governments have also failed to fulfil the constitutional duty to enact a "law [that] shall provide for penal and civil sanctions for violations of this section" (i.e. for the prohibition of torture) as stipulated in Article III, Section 12 (4) of the Constitution.

The absence of a specific offence of torture that is defined in line with international standards and carries appropriate punishments impacts adversely on the effective prohibition of torture in the Philippines in several ways:

1) Lack of official acknowledgment of the seriousness of torture as a crime: to subsume torture within a broader, more generic offence, such as maltreatment of prisoners, fails to recognise the particularly odious nature of torture.

[33] See José M. Roy III, *A Note on Incorporation: Creating Municipal Jurisdiction from International Law*, 46 Ateneo Law Journal 635 (2001), pp. 635 et seq., citing the case of *U.S.A. v. Guinto*, et al., 182 SCRA (1990) in which Justice Cruz explained the nature and consequences of the doctrine of incorporation.
[34] Section 5 (a) of the Juvenile Justice and Welfare Act.
[35] See *Wilson v the Philippines*, Communication 868/1999, UN Doc. CCPR/C/79/D/868/1999, 11 November 2003.
[36] However, the Supreme Court has used the term torture to describe acts of police brutality and "third-degree" methods used to extort confessions. See *People vs Manliguez*, 206 SCRA 812 (1992).

2) Limited awareness of the nature of torture: Because there is no clear definition of torture and relevant acts are not classified as torture, both institutions and the public at large are likely to have limited awareness of the nature of torture as an official crime and a serious human rights violation that attacks the core of the integrity of a person, both physical and mental. Torture, or at least certain forms of torture, may even be seen as legitimate means of law enforcement.
3) Insufficient institutional and public information: The lack of a specific offence of torture makes it difficult to track, report upon, and respond effectively to the prevalence of torture. In particular, it makes it impossible to compile statistics about complaints of torture and related investigations, prosecutions and trials because torture is not recognised as a separate offence.
4) Impunity: In the absence of a specific offence of torture, perpetrators are normally, if at all, only prosecuted for less serious offences, a practice resulting in partial accountability only. The legal lacuna often results in the failure to prosecute because certain acts amounting to torture: (i) such as mental torture, are not seen as constituting criminal offences; (ii) are classified as less serious crimes, such as physical injuries that are subject to short prescription periods; or (iii) are dealt with by the relevant agencies as disciplinary offences only.
5) No reparation: The absence of a definition of torture, including in laws that provide for remedies for torture victims, is bound to result in a lack of recognition and acknowledgment of the violation, which is in itself an important element of reparation. The limited awareness of the nature of torture following from the absence of a definition makes it less likely that administrative bodies or courts award compensation and other forms of reparation that adequately reflect the seriousness of the crime and are in line with international standards.

Representatives of the Congress and senate have submitted bills that specifically prohibit torture. In 2006, a single bill consolidating several anti-torture bills was tabled. The "An Act Penalising the Commission of Acts of Torture and other Cruel, Inhuman and Degrading or Punishments, prescribing penalties therefore, and for other Purposes", is known as the "Anti-Torture Act of 2006." The bill passed the third reading in the House of Representatives during the 13th congress but stalled in the senate.

Several new anti-torture bills have been filed in the 14th congress, namely:

- the Anti-Torture Act of 2007 (Senate Bill No.1306), filed by Francis G. Escudero on the 24th of June 2007,
- the Anti-Torture Act (Senate Bill No.39), filed by Rodolfo G. Biazon on the 30th of June of 2007; and
- the Anti-Torture Act of 2007 (Senate Bill No.1337) filed by Miriam Defensor Santiago on the 24 of July 2007,

all of which were pending in the Senate Committee on Justice and Human Rights as of December 2007.

The adoption of the Anti-Torture Act would mark a significant step towards enshrining the legal prohibition of torture in the Philippines. For the first time, a law would define torture in line with Article 1 of the UN Convention against Torture. The law would make torture a specific offence and would provide for an effective complaints system. However, the Anti-Torture Act 2007 is not comprehensive and contains some elements that either fall short of relevant international standards or may give rise to interpretations incompatible with the said standards, namely:

- It contains a list of forms of treatment constituting torture: Any list of acts of torture, even where it is detailed and non-exhaustive, runs the risk that the judiciary and others will in practice interpret torture as being limited to the acts enumerated. This might prompt potential perpetrators to resort to methods of torture that have not been included in the list, in particular certain forms of mental torture.

- It does not enable the Philippines to investigate and prosecute torture committed in third countries where the perpetrators are present in the Philippines (see articles 4-8 of the UN Convention against Torture).
- It stipulates only minor punishments for mental torture despite the fact that mental torture can have serious psychological consequences.
- It does not provide for effective remedies and adequate reparation in line with international standards, such as those set out in the 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 adopted by the UN General Assembly in 2005, as it only refers to the Board of Claims that is not in a position to provide adequate compensation.

The "Act Penalizing the Commission of Acts of Torture and Involuntary Disappearance of Persons arrested, detained or under custodial investigation, and granting jurisdiction to the Commission on Human Rights to conduct preliminary investigation for violation of the custodial rights of the accused, amending for this purpose sections 2, 3, and 4 of R.A. 7438, and for other purposes," filed by Jinggoy P. Ejercito-Estrada, on the 30th of June 2007 is a further important bill aimed at combating impunity for serious human rights violations, including torture.

## What steps can lawyers take?

- Lawyers should invoke international standards relating to the prohibition of torture in litigation as these standards are either directly applicable pursuant to domestic law, provided they are self-executing, or need to be taken into consideration by the judiciary when interpreting domestic legislation.
- Lawyers working with/for victims of torture should submit through NGOs or other organisations, "shadow" reports to the UN Committee against Torture and the Human Rights Committee. The intention of this type of reports is to describe the practices of governments in implementing their obligations under these international agreements, noting any deficiencies, as appropriate.
- In the course of their work, lawyers may gain the opportunity to influence future policy initiatives, such as advocating for the:
    - Enactment of implementing legislation to incorporate the UN Convention against Torture and the International Covenant on Civil and Political Rights into domestic legislation;
    - Ensuring that the proposed law on torture reflects international standards, in particular that the definition of torture therein covers all elements contained in Article 1 of the UN Convention against Torture and that the act legislates for universal jurisdiction and effective remedies and reparation in torture cases;
    - Adoption of the law on enforced disappearances;
    - Adoption of a comprehensive human rights code implementing, inter alia, Philippine's obligations under international law.

# Part 3: International standards contained in the Istanbul Protocol

This Part describes the Philippines's obligations in accordance with the international standards reflected in the Istanbul Protocol. It examines how lawyers can advocate for the implementation of these standards, through general advocacy work or by invoking domestic and international remedies on behalf of torture victims in specific cases. This Part will address the following international standards:

A) General measures of prevention
B) Specific safeguards in places of detention
C) Investigating allegations of torture effectively
D) Prosecution of alleged perpetrators and punishment of those responsible; and
E) Guaranteeing effective remedies and adequate forms of reparation for victims

## A. General measures of prevention in the Philippines

There are several bodies tasked with visiting detention facilities and acting as potential preventative mechanisms.

1. The Commission on Human Rights is mandated to conduct visits and inspections in jails, penitentiaries and other places where individuals are deprived of their liberty.[37] According to the CHR:

> "Under Visitorial Services, CHRP assesses jail and prison conditions against national and international human rights standards for the treatment of prisoners and detainees, reports to the public the results of such monitoring and prepares advisories to pertinent government agencies accountable to jail management and the protection of the rights of prisoners and detainees. The CHRP through its Regional Offices conducts jail visitation all over the Philippines. In all these visits, CHRP observed and noted the numerous problems facing the Philippine Custodial System that lead to violations of international standards to safeguard the rights of detainees."[38]

NGOs consulted in preparing this Manual view the preventative work of the CHR as inadequate, pointing out that visiting NGOs have outdone the CHR in terms of their documentation work, services rendered and projecting issues of prisoner/detainee welfare and rights.

2. The justices of the Department of Justice (DOJ) are mandated to conduct visits to the correctional facilities falling within their remit through the line bureau of the DOJ, the Bureau of Corrections. The Bureau is in charge of the 7 national penitentiaries, penal farms and colonies with around 30,000 prisoners, the largest being the New Bilibid Prison with a prison population of 17,000. No public information is available to show that any of the justices has conducted effective unannounced visits to any of these facilities, and if so, what the outcome of any such visits may have been. The DOJ Secretary Raul Gonzales has visited the New Bilibid Prison several times. However, his visits are pre-announced and prisoners have told human rights defenders (consulted in the course of the writing of this manual) that his walk-through is rehearsed. Human rights defenders report that many of the prisoners are seemingly conditioned (through fear and camaraderie with their guards) not to raise any complaints.

3. As part of their oversight powers and functions, the legislature, Senate and the House of Representatives have the power to visit and inspect any facility where individuals are deprived of their liberty. This includes the House of Representatives committee on human rights (that sponsored the OPCAT resolution in congress), which invited the member organizations of the United Against Torture Coalition to be involved in an Ad Hoc group. The non-governmental organizations of this Coalition, with

[37] Article XIII, Section 18 (4) of the Constitution: "The Commission on Human Rights shall have the following powers and functions: …exercise visitorial powers over jails, prisons, or detention facilities."
[38] http://www.chr.gov.ph/MAIN%20PAGES/services/hr_protect2_avo.htm#avo.

years of experience in providing services for detainees/prisoners and advocating for their welfare and policy reform, drew up a visitation programme for this ad hoc group and briefed the committee (which is practicing this oversight function for the first time) on the causes of the subhuman conditions and practices within correctional facilities. By early 2007, the Committee had carried out one visit to the New Bilibid Prison with three members of congress and the committee members. There have also been subsequent technical working group sessions/ round table discussions in congress.

4. The Ad Hoc Committee on Prison Reforms is made up of the Commission on Human Rights and NGO's of the United against Torture Coalition. The Ad Hoc Committee facilitates stakeholder discussions in the facilities (prisoners/detainees, correctional officials, CHR, NGOs, organizations of detainees/prisoners, the DOJ, Bureau of Pardons and Parole, Public Attorney's Office) and in subsequent formal round table discussions and meetings between the correctional institutions, concerned line agencies and departments, the CHR, and NGOs. It held a large inter-agency and prisoner dialogue in the New Bilibid Prison on 7 December 2006, which was attended by many representatives of the concerned agencies. Prisoners from the maximum, medium and minimum security facilities had a chance to voice their grievances and questions. A follow up dialogue was held in early 2007 with government representatives to check on progress concerning implementation of commitments made during the meeting in December 2006.

Since 2002, the United against Torture Coalition has been running a high-profile campaign for the ratification of the Optional Protocol to the United Nations Convention against Torture (OPCAT). The OPCAT envisages the setting up of a system of periodical visits to detention facilities by designated international and national bodies. These independent bodies are envisaged to work together in order to implement effective prevention measures and to improve prison conditions.[39] The process for the ratification of OPCAT by the Philippines Government has stalled because to date the Department of National Defense (DND), unlike the other 10 custodial executive departments, has not signed a resolution by the Presidential Human Rights Committee recommending ratification and issuance of the required certificate of concurrence. The reason given by the DND is the lack of a legal framework, namely an anti-torture law. The United against Torture Coalition is continuing its advocacy work to convince the DND and/or the President of the urgent need to ratify the OPCAT.

### What steps can lawyers take?

- Where a detainee is at risk of torture, request judges and magistrates to ensure protection from torture
- Support the continuity of the committee on civil, political and human rights led ad hoc group which is to conduct visits to detention centres once every three months
- Advocate for the filing of a bill that will allow legislative committees to deputize NGOs to conduct visits and, generally, allow more space for the public scrutiny of detention facilities
- Systematically document instances showing the failure of detaining authorities to comply with domestic law and regulations that protect the right of detainees and expose patterns of institutional failures in specific detention facilities
- Submit information on detainees at risk of torture to international preventative mechanisms, such as the UN Special Rapporteur on Torture
- Engage the DND to improve its understanding and perception of the OPCAT, and convince the President who can supercede the department concurrence level to take the requisite action

[39] See http://www.ohchr.org/english/bodies/cat/opcat/index.htm and http://www.apt.ch/content/view/33/58/lang,en/.

## B. Specific safeguards in places of detention and rights of persons deprived of their liberty

In light of the obligation on States to take measures to prevent torture, international human rights mechanisms have developed standards on specific measures that can be taken to minimise the risk of torture, such as implementing "custodial safeguards" in places of detention.[40]

This section highlights some of the key safeguards to protect detainees from the risk of torture:

- *Prohibition of arbitrary arrest, unnecessary force during arrest and secret detention*: aimed at preventing torture and ill-treatment during the arrest phase and depriving arrested persons from the protection of the law
- *Right to access a lawyer of their own choice:* granting detainees prompt access to a lawyer of their own choice
- *Right to communicate with and notify a third person of detention:* this includes granting detainees the possibility to immediately notify relatives or a third person of their detention and to communicate with the outside world.
- *Right to access a doctor*: this includes a prompt and independent medical examination upon a person's admission to a place of detention; the health of detainees should be ensured during the whole period of detention and detainees should have the right to an independent medical examination of a doctor of their own choice.
- *Right to challenge the lawfulness of detention:* a person who has been detained is entitled to a prompt review of the lawfulness of his or her detention by a judicial authority.
- *Invalidity of confessions extracted under torture*: providing that a statement that has been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

## I. SAFEGUARDS DURING ARREST PROCEDURES

Many cases of torture take place in the course of arrests during which recognised custodial safeguards do not apply. Rule 113, Section 2 of the Rules on Criminal Procedure clearly stipulates that “No violence or unnecessary force shall be used in making an arrest. The person arrested shall not be subject to a greater restraint than is necessary for his detention.” Anyone arrested without warrant shall be informed about the cause of arrest[41] and all arrested persons shall be informed of their right to remain silent and be assisted by counsel.[42]

In practice, these safeguards have failed to prevent arrests without warrants.[43] Arrests have reportedly been carried out by plain-clothes officers who use violence and often take arrested persons to secret places of detention where they are tortured.[44] This practice has become particularly worrisome in light of the increasing number of disappearances and extra-judicial killings.[45]

[40] International standards providing for detailed safeguards for detainees include (in addition to the relevant provisions contained in particular in the UN Convention against Torture, the ICCPR and regional human rights treaties) the UN Code of Conduct for Law Enforcement Officials, the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.
[41] Rule 113, Section 8 of the Rules on Criminal Procedure.
[42] RA 7438, Section 2 (b).
[43] Rule 113, Section 5 of the Rules on Criminal Procedure.
[44] See FLAG and FIDS, *Torture Philippines*, supra, pp. 22 et seq.
[45] See Asian Human Rights Commission, *Philippines: The Human Rights Situation in 2006* and Dr. Nymia Pimentel Simbulan, *Civil and Political Rights Violations: When state abuse goes too far*, in: PhilRights, INFOCUS, A Semestral Human Rights Situationer, Issue No.3, January-June 2006, pp.1 et seq.

### What steps can lawyers take?

- Raise awareness on the rights of those arrested for the benefit both of the public and those involved in executing warrants. Consider producing a pamphlet or booklet on the rights of those under custodial investigation
- Where a detainee at risk of torture is arrested or abducted and held in an unauthorised place of detention, mobilise existing networks, including religious or professional ones, and spread available information to the nearest lawyers, media and institutions immediately after the arrest/abduction
- Available lawyers should immediately visit the camp or other places of detention. To this end, networks of paralegals and others should be developed and/or strengthened in order to ensure country-wide coverage, in particular in remote areas
- Request that representatives of the CHR accompany an arrest or the serving of an arrest warrant in those cases where the identity of the arrested person gives cause to believe that they are at risk of torture, such as suspected members of the Abu Sayyaf group.

## II. CUSTODIAL SAFEGUARDS

### (i) Right to access a lawyer of one's own choice

Article III, Section 12(1) of the Constitution stipulates that:

> "Any person under investigation shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice."

According to Section 2(a) 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 Violation thereof',

> "Any person arrested, detained or under custodial investigation shall at all times be assisted by counsel."

This assistance is explained in section 2(b) as a:

> "right … to have competent and independent counsel, preferably of his own choice, who shall at all times be allowed to confer privately with the person arrested. If such person cannot afford the service of his own counsel, he must be provided with a competent and independent counsel by the investigating officer."

A further safeguard is set out in Section 3(c):

> "In the absence of any lawyer, no custodial investigation shall be conducted and the suspected person can only be detained by the investigating officer in accordance with the provision of Article 125 of the Revised Penal Code."[46]

Furthermore, Rule 113, Section 14 of the Rule of Court '*Right of attorney or relative to visit person arrested'* stipulates that:

> "Any member of the Philippine Bar shall, at the request of the person arrested or of another

[46] Article 125 of the Revised Penal Code stipulates that: "In every case, the person detained shall be informed of the cause of his detention and shall be allowed upon his request to communicate and confer at any time with his attorney or counsel."

acting in his behalf, have the right to visit and confer privately with such person in the jail or any other place of custody at any hour of the day or night."

The Juvenile Justice and Welfare Act also provides for the "right to prompt access to legal and other appropriate assistance."[47]

The Supreme Court has repeatedly affirmed that a detainee is "entitled to effective, vigilant and independent counsel"[48] at every stage of the proceedings.[49] However, this jurisprudence only applies where a person is under "arrest," which has resulted in a practice of authorities 'inviting' those arrested in order to deny access to a lawyer and to avoid being prosecuted for arbitrary arrest/illegal detention.

There are several common practices that undermine the right to access a lawyer, in particular:[50]

- the lack of information about the right to counsel and lack of co-operation of law enforcement personnel. This includes women at risk of sexual forms of ill-treatment and children;
- Those arrested without warrant frequently have no access to a lawyer within the first 36 hours after arrest;
- Authorities often deny that the arrested person is in their custody. Those held in secret detention by definition have no assistance from a lawyer. Those suspected of belonging to Abu Sayyaaf or other groups are often held in military camps without access to the outside world, including lawyers;
- The military and police are seen as discouraging detainees' access to lawyers. Where custody is admitted, lawyers are made to wait, or if access is granted, the consultation with the client is restricted and without privacy. Intelligence officers are sometimes present or visible, thereby making it impossible for an arrested person and his or her lawyer to consult freely;
- In political cases, access to a lawyer is delayed and access may be given only to a "friendly" lawyer with links to the authorities rather than a lawyer of the detainee's choosing;
- Many detainees cannot afford a lawyer and will commonly only see Public Defenders from the Public Attorney's Office late into their detention, usually just before the criminal charges are read out to him or her;
- Defence lawyers, including public defenders, often have to work under time pressure with limited resources that jeopardises the principle of equality of arms and make it difficult to prove that their client has been tortured, or is threatened by torture;
- Lawyers themselves are under threat, in particular in cases involving serious violations in which high-ranking and powerful officials are implicated.

[47] Article 5 (e) of the Juvenile Justice and Welfare Act.
[48] *People of the Philippines v Peralta et al.,* GR No. 145176, 30 March 2004 http://www.supremecourt.gov.ph/jurisprudence/2004/mar2004/145176.htm.
[49] *People of the Philippines v Rufino Bermas*, GR No. 120420, 21 April 1999http://www.supremecourt.gov.ph/jurisprudence/1999/apr99/120420.HTM.
[50] The list of concerns is based on interviews conducted with human rights lawyers in the Philippines in December 2006 and subsequent consultations.

### What steps can lawyers take?

- Call for the enactment of legislation that provides for immediate access to lawyers during custodial investigations and a requirement prohibiting such investigations in the absence of a lawyer
- Use strategic litigation and advocacy to tackle poor arrest procedures that undermine safeguards and other practices that are incompatible with the right of access to a lawyer of one's choice (see list above)
- Advocate for the introduction of criminal offences carrying adequate punishments in cases where anyone falsely denies the whereabouts of detainees, for example in the bill on involuntary disappearances
- Consider using as a source of rights and obligations the Comprehensive Agreement on Human Rights and International Humanitarian Law (CAHRIHL), signed between the Philippine Government and the National Democratic Front (NDF), which provides that the refusal of the military to allow lawyers or family members the right to visit the detained person is a violation of the agreement
- Improve communication facilities amongst lawyers so that they can be contacted immediately upon hearing of an arrest
- Call for a reform of the system of government-appointed lawyers, in particular the Public Attorneys Office lawyers, to ensure greater independence
- In submissions to international preventative mechanisms, include instances where authorities have denied detainees' rights to access to a lawyer of their choice as evidence of how the Government fails to implement measures to prevent torture.

## (ii) Right to communicate with and notify a third person of detention

Article III, section 12 (2) of the Constitution prohibits:

> "Secret detention places, solitary, incommunicado, or other similar forms of detention."

Section 2(f) of Republic Act No. 7438 stipulates that

> "any person arrested or detained or under custodial investigation shall be allowed visits by or conferences with any member of his immediate family, or any medical doctor or priest or religious minister chosen by him or by any member of his immediate family or by his counsel, or by any national NGO duly accredited by the Commission on Human Rights or by any international NGO."[51]

This section provides an important safeguard but fails to specify when a person arrested or detained is allowed to make contact and to receive visits, which is often of crucial importance in preventing torture at the earliest possible stage. The Juvenile Justice and Welfare Act equally fails to provide for an express right to communicate with and to notify a third person of detention at the earliest possible stage.[52] Rule 113, Section 14 of the Rules of Court '*Right of attorney or relative to visit person arrested'* stipulates a right of a relative of the person arrested to visit the arrested person "at any hour of the day or night" but makes this right "subject to reasonable regulations."

In practice, similar to the challenge of accessing a lawyer, detainees are often either held in secret places or not allowed to contact or to receive visits by family members or others. Authorities frequently fail to

[51] http://www.chanrobles.com/republicactno7438.htm.
[52] Section 5 (d) of the Juvenile Justice and Welfare Act: "A child in conflict with the law shall have the right to maintain contact with his/her family through correspondence and visits, save in exceptional circumstances."

ensure prompt access of detainees to communicate with the outside world, including not only relatives but also bodies such as the Commission on Human Rights. It is normally human rights organisations which inform the family of the arrest.[53]

### What steps can lawyers take?

- Immediate briefing and consultation with the family so that the family can make representations with the custodial officers
- If custody is confirmed but access is denied, file a habeas corpus petition to facilitate contact
- Lawyers should systematically document instances where law enforcement officials obstruct the right of detainees to communicate with a third person. At the same time, lawyers should seek sanctions against individual law enforcement officials and the head of the detention facility;
- In submissions to international preventative mechanisms, include instances where authorities have denied detainees' rights to communicate with a third person as evidence of how the Government fails to implement measures to prevent torture.

## (iii) Right to access a doctor

Section 2(f) of the Republic Act No.7438 grants the arrested or detained persons access to "any medical doctor". However, the section does not specify when and how such a visit may take place. The ruling of the Supreme Court in *Morono v Lomeda*,[54] that judges have a duty to ensure that confessants undergo a medical examination before administering an oath, recognises the right to a medical examination as a safeguard against confessions extracted under torture. Executive Order No.212 of 10 July 1987 pursuant to which a doctor should report the treatment of a person for physical injuries to the nearest government health authorities, aims to ensure that any such information is available as part of the public health system. However, these rulings and orders fail to grant the right to access a doctor before and after interrogation. Moreover, they reflect a limited understanding of medical examinations as they are confined to examining physical injuries, thus ignoring the psychological injuries that may and often do result from torture. The lacuna in the existing legal framework would be remedied if the Anti-Torture Bill were to become law as it contains a detailed provision on the right to access a medical doctor in line with international standards.[55]

A series of shortcomings have been identified in the actual practice of granting arrested persons and detainees access to a doctor of their choice.[56] There is no uniform practice and several cases indicate that authorities have failed to provide timely and adequate access to a doctor, in particular by:

- Not informing arrested persons or detainees of their right to see a doctor;
- Denying NGOs such as the Medical Action Group (MAG) access to detainees alleged to be members of the Abu Sayyaf group for the purpose of medical examination and documentation of any ill-treatment or torture;
- Medically examining detainees after arrest but only before and not after interrogation (thus giving the impression that the detainee was in good health during detention);
- Delaying the medical examination until after any physical injuries have healed;

[53] This assessment is based on interviews conducted with human rights lawyers in the Philippines in December 2006 and subsequent consultations.
[54] A.M. No. MTJ-90-400, 14July 1995, 246 SCRA 69 [1995].
[55] See Section 7 of the 2006 Anti-Torture Bill, Right to Physical and Psychological Examination: "Every person arrested, detained or under custodial investigation shall have the right to be informed of his/her right to demand a physical and psychological examination by an independent and competent doctor of his/her own choice before and after interrogation, which shall be conducted outside the influence of the police or Security forces. If such person cannot afford the services of his/her own doctor, he/she shall be provided by the state with a competent and independent doctor. If the person arrested is a female, she shall be provided with a female doctor. Furthermore, every person arrested, detained or under custodial investigation shall have the right to immediate access to quality medical treatment."
[56] The following paragraphs are based on a series of interviews conducted with several physicians and human rights activists in the Philippines in December 2006.

- Having medical examinations carried out by government doctors who are believed to favour the police or the military when making a certification;
- Creating an atmosphere of fear in which private doctors are reluctant to examine and document alleged cases of torture because of possible adverse repercussions.

There is also a shortage of qualified government doctors and medical health officers, in particular in the regions, who are capable of carrying out examinations in line with international standards. Municipal health officers examine detainees as a matter of routine. However, government health officers have limited expertise and knowledge of relevant standards and procedures due to a lack of forensic and specialist qualification, normally having attended brief medico-legal courses at university only. This knowledge and skills gap is particularly acute with regard to the psychological symptoms of torture. Examinations by municipal health officers are usually limited to superficial physical examinations. This problem affects other institutions as well; even the CHR has experienced some difficulties in respect of its capacity to examine and document psychological injuries. Often no qualified personnel is available and even autopsies in cases of death possibly resulting from torture are known to have been carried out in an ad-hoc manner by independent (NGO) experts who happened to be available.

In detention facilities, examinations take place in the presence of law-enforcement officials or prison guards, in disregard of the need for confidential examinations recognised in the Istanbul Protocol. This practice acts as a powerful deterrent against accurate and fully independent medical reports. This combination of factors frequently results in a lack of timely and proper medical examination of detainees so that vital evidence is lost. Medical reports produced under these circumstances are often of poor quality and of limited value in proving the occurrence of torture.

## What steps can lawyers take?

- Create an organisation of health workers as part of quick response teams to carry out medical examinations and write medical reports, where possible
- Bring test cases to address the shortcomings identified above with a view to setting precedents that enshrine the right to access a doctor and the obligation to conduct timely medical examinations in line with international standards, such as those contained in the Istanbul Protocol
- Request the CHR to take up these issues with the authorities so that the police and military draw up guidelines to ensure that timely medical examinations are taken in line with international standards
- Seek criminal prosecution of doctors who falsify medical report denying the occurrence/traces of torture. Call for heavier punishments of those who deny access to a doctor or those who are responsible for incomplete or false medical documentation of torture Cite jurisprudence from other countries recognising the obligation of medical professionals in torture cases
- When submitting petitions on behalf of torture victims, highlight the importance of ensuring the right of detainees to access an independent doctor showing the evidentiary weight given to medical evidence in torture cases
- In submissions to international preventative and complaint mechanisms, such as the Special Rapporteur on Torture and/or the UN Human Rights Committee, include instances where authorities have denied detainees' rights to access to a doctor as evidence of how the Government fails to implement measures to prevent torture.

## III. FURTHER SAFEGUARDS

### (i) Challenging the lawfulness of detention

The right to challenge the lawfulness of detention, also known as *habeas corpus* is enshrined in Article III, Section 15 of the Constitution and Rule 102 of the Rules of Court. A person, or any person on his/her behalf, who claims to be illegally confined or detained may apply for a writ of *habeas corpus* to the Regional Trial Court, the Court of Appeals or the Supreme Court.[57] Article 5 (e) of the Child and Juvenile Welfare Act also provides: "…the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on such action."

The writ of *habeas corpus* provides an important safeguard against torture in cases of enforced disappearances or other illegal detention, including following arrests without warrant in violation of the law. It also commonly presents a detainee with the first opportunity to complain of torture to a judicial body and to challenge the validity of any confession that may have been made under torture. In practice, however, the effectiveness of *habeas corpus* as a safeguard has been undermined by the reluctance of witnesses to testify out of fear of adverse repercussions which makes it difficult for a petitioner to prove his or her case in court. Moreover, the effectiveness of the remedy is hampered by the fact that law enforcement agencies may simply deny custody or may benefit from doctrines such as the presumption of regularity.

There is also a special procedure known as the inquest procedure that provides a safeguard in cases of arrests without warrant.[58] Within 36 hours, a suspect is to be brought before the inquest officer fiscal to determine the lawfulness of arrest. However, the fiscals are public prosecutors who act as judicial officers and it is questionable whether they have the necessary independence to exercise judicial power as envisaged by international standards. In practice, while some fiscals have acted as safeguards against arbitrary detention and further torture, the inquest procedure is often done summarily without a proper examination of the case, including whether or not the suspect has been subjected to torture or other forms of ill-treatment.[59] Suspects may also refrain from complaining because they are bound to be handed back to the very officials responsible for the torture.

In an important development with possibly far-reaching consequences, the Supreme Court, in September 2007, promulgated the Rule on the "Writ of Amparo."[60] The rule came into force on 24 October 2007, with the proviso that it applies retroactively to cases of extrajudicial killings and enforced disappearances, or threats of such violations, as well as to pending habeas corpus cases.[61]

The writ of amparo is, pursuant to Section 1 of the Rules, a remedy "available to any person whose right to life, liberty or security" is violated or "threatened with violation by an unlawful act or omission by a public official or employee or of a private individual or entity". It thus potentially covers situations where someone is at risk of torture.

The relationship between the habeas corpus remedy and the writ of amparo is not clear in situations of detention or other deprivation of liberty. It has been suggested that "the most likely interpretation of this

[57] See in particular Rule 102, Section 3 of the Rules of the Court: Requisites of application therefore.—Application for the writ shall be by petition signed and verified either by the party for whose relief it is intended, or by some person on his behalf, and shall set forth:
(a) That the person in whose behalf the application is made is imprisoned or restrained of his liberty;
(b) The officer or name of the person by whom he is so imprisoned or restrained; or, if both are unknown or uncertain, such officer or person may be described by an assumed appellation, and the person who is served with the writ shall be deemed the person intended;
(c) The place where he is so imprisoned or restrained, if known;
(d) A copy of the commitment or cause of detention of such person, if it can be procured without impairing the efficiency of the remedy; or, if the imprisonment or restraint is without any legal authority, such fact shall appear.
[58] See Rule 113 (Section 5) of the Rules on Criminal Procedure.
[59] Amnesty International, *Torture persists*, supra, pp.16 et seq.
[60] Supreme Court, AM No.07-9-12, 25 September 2007.
[61] The following overview and analysis draws on the following paper by Atty. Neri Javier Colmenares, *Initial Analysis on the Philippine Amparo*, (An Update on the Speech on the Writ of Amparo Presented at the NUPL Founding Congress on Sept. 15-16, 2007).

provision in the Philippine amparo—in cases of actual deprivation of liberty—is to limit amparo to cases where the fate or whereabouts of the person subject of the petition is unknown."

A (potential) victim, referred to as an "aggrieved person", or a family member or relative may file a petition for amparo. Standing for others, in particular NGOs, is limited to situations where "there is no known member of the immediate family or relative of the aggrieved party."[62] A petition for a writ of amparo may be filed in various courts, including the competent Regional Trial Court, Court of Appeal, Sandiganbayan or the Supreme Court.

An important feature of the amparo remedy is that public officials can no longer simply deny facts or knowledge but the respondents have to account in their return for the following:

- the steps taken to determine the fate or whereabouts of the victim;
- all relevant information in the possession of the respondent pertaining to the threats, acts or
- omissions against the victim;
- what they have done to recover and preserve evidence related to the death or disappearance
- of the victim;
- what they have done to determine the cause, manner, location and time of death of the victim.[63]

Refusal to make a return, the making of a false return or resistance or disobeying of a lawful process or order of a court is subject to a fine and imprisonment.[64] Moreover, a public official cannot rely on any "presumption of regularity" but must prove "that extraordinary diligence was observed in the performance of duty."[65]

The Court has the powers to provide various orders to grant immediate relief and remedies,[66] such as Temporary Protection Order and Witness Protection Order,[67] Inspection Order[68] and Production Order.[69]

It is premature to assess the utility and effectiveness of the writ of amparo. As an initial analysis of the writ rightly emphasises: "Despite possible venues for abuse, the rule on the writ of amparo contains many provisions that may be used to pierce the veil of impunity that shrouds the justice system."[70]

[62] Section 2.
[63] Section 9.
[64] Section 16.
[65] Section 17.
[66] Section 14 (a)- (c).
[67] The Court can order a government agency or a private person or an 'accredited' institution to give protection to the aggrieved parties, their family or the organization who filed the petition.
[68] The Court can order to allow entry into a public or private property for "the purpose of inspecting, surveying, measuring or photographing" the property or any relevant object thereon.
[69] The Court can order any person to produce "documents, papers, letters, photographs, objects or tangible things and those in digitized or electronic forms."
[70] Atty. Neri Javier Colmenares, *Initial Analysis on the Philippine Amparo*, supra.

### What steps can lawyers take?

- Call on the Supreme Court to lay down clear rules and strict prohibitive guidelines on the issue of arbitrary detention and custodial investigation
- Call for the reform of the inquest procedure so as to bring it in line with international standards
- Where applicable, persistently raise the issue of torture in habeas corpus proceedings with a view to the Supreme Court enacting guidelines on how to deal with torture complaints or the suspicion of torture in the course of such proceedings
- Establish a ready mechanism for habeas corpus petitions, such as through quick response teams by paralegals, to be backed up by an effective victims and witnesses protection programme so that witnesses do not refrain from testifying or signing sworn statements in support of habeas corpus petitions
- In submissions to international preventative and complaint mechanisms, such as the Special Rapporteur on Torture or the UN Human Rights Committee, include instances where authorities have denied detainees' right to habeas corpus as evidence of how the Government fails to implement measures to prevent torture
- Study the new writ of amparo carefully with a view to identifying its potential as an effective remedy and its strategic use
- Seek to build case law and precedents on amparo by filing petitions in cases that concern important issues and where strong evidence is available

## (ii) Lawfulness of confessions extracted under torture

Article III, Section 12 (3) of the Constitution stipulates that:

> "Any confession or admission obtained in violation of this [torture, force, violence, threat, intimidation, or any other means which vitiate the free will] … shall be inadmissible in evidence against him."

There is no statutory law containing a similar provision[71] but the Supreme Court has applied the constitutional principle in several judgments. It has declared confessions inadmissible where the suspect or accused person had confessed without benefiting from the assistance of counsel, including where a confession was made in the presence of a counsel after the suspect or accused had been interrogated without counsel.[72] This jurisprudence recognises that there is a fundamental difference between a confession in circumstances where the suspect or accused benefited from assistance of counsel throughout proceedings and a situation in which a person, once tortured, is willing to sign a confession even in the presence of counsel in order to prevent further torture. Despite this jurisprudence, the practice is undermined when law-enforcement authorities call in "pro-Government" lawyers to ensure that confessions will be accepted even in the absence of a lawyer.

Courts continue to admit extra-judicial confessions where they are deemed to have been made voluntarily, thereby placing the burden of proof on the suspect or accused to show that the confession was obtained by illegal means, including torture. In *People v Vallejo*, GR No. 144656, 9 May 2002, the Supreme Court listed the following factors as evidence of voluntariness:

> "where the defendant did not present evidence of compulsion, or duress nor violence on their person; where they failed to complain to the officer who administered their oaths; where they

[71] However, such provision is envisaged in Section 4 of the 2006 Anti-Torture Bill: "Any confession, admission or statement obtained as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that said confession, admission or statement was made."

[72] See People *of the Philippines v Marietta Patungan, Edgar Acebuche, & Elmerto Pulga*, GR No. 138045, 14 March 2001 and *People of the Philippines v Peralta et al.*, GR No. 145176. 30 March 2004.

did not institute any criminal or administrative action against their alleged intimidators for maltreatment; where there appeared to be no marks of violence on their bodies; and where they did not have themselves examined by a reputable physician to buttress their claim."

The UN Human Rights Committee has expressed its concerns

"that the victim bears the burden of proof [concerning the rule that evidence is not admissible if it is shown to have been obtained by improper means]."

It recommended that

"All allegations that statements of detainees have been obtained through coercion must lead to an investigation and such statements must never be used as evidence, except as evidence of torture, and the burden of proof, in such cases, should not be borne by the alleged victim."[73]

The inconsistent jurisprudence and the hurdles that victims face in proving that extra-judicial confessions were extracted under torture fail to send a clear message that investigatory short-cuts, such as forced confessions, will not be accepted under any circumstances.

### What steps can lawyers take?

- Seek to establish a legal precedent, invoking international and comparative jurisprudence, that the burden of proof that a confession was not made voluntarily should rest on the state;
- Advocate for human rights lawyers to represent pro bono those arrested who cannot afford counsel so as to lessen the risk of coerced confessions being made in the presence of lawyers not acting in the best interest of their clients;
- In submissions to international preventative and complaint mechanisms, such as the Special Rapporteur on Torture or the UN Human Rights Committee, include instances where authorities and/or courts have violated the rule that confessions extracted under torture should not be admissible as evidence of a failure to implement measures to prevent torture.

## C. Right to complain and Obligation to effectively investigate torture allegations

### I. International standards

The right to complain about torture is recognised in international law, both in international treaties, in particular in Article 13 of the UN Convention against Torture, and in customary international law. It derives from the absolute prohibition of torture and the right to an effective remedy and has been recognised and elaborated upon in a series of resolutions and declarations as well as in jurisprudence.[74]

Its corollary is the obligation of governments to carry out effective investigations which is firmly established in international law. Whenever there are indications that torture might have been committed, states are obliged to undertake an effective investigation, even without a formal complaint triggering it. Accordingly, the Istanbul Protocol provides that, "even in the absence of an express complaint, an investigation should be undertaken if there are other indications that torture or ill-treatment might have occurred". For an investigation to be "effective" under international human rights law, it must be:

[73] Concluding Observations of the Human Rights Committee: Philippines, UN Doc. CCPR/CO/79/PHL, 1 December 2003, para.12.
[74] See REDRESS, *Taking Complaints of Torture Seriously, Rights of Victims and Responsibilities of Authorities*, November 2004, p.5.

- **Prompt:** investigations should be commenced and conducted expeditiously;
- **Impartial:** investigations should be free from undue bias and the investigation should be in the hands of an authority without links to the alleged perpetrators;
- **Thorough:** the nature and scope of investigations must ensure that all relevant facts and the identity of the perpetrators are ascertained;

Amongst the key principles relating to effective investigations highlighted in the Istanbul Protocol:

- Investigators must be competent, impartial and independent of suspected perpetrators and the national authority for which the investigators work;
- Methods used to carry out investigations should meet the highest professional standards and findings shall be made *public;*
- Investigators should be obliged to obtain all information necessary to the inquiry and should effectively question witnesses;
- The investigative mechanism should have access to independent legal advice to ensure that the investigation produces admissible evidence for criminal proceedings;
- Torture victims, their lawyers and other interested parties should have access to hearings and any information relevant to the investigation and must be entitled to present evidence and allowed to submit written questions;
- Detainees should have the right to obtain an alternate medical evaluation by a qualified health professional and this alternate evaluation should be accepted as admissible evidence by national courts.

## II. Legal framework and practice in the Philippines

### 1. Criminal offences applying in lieu of a specific offence of torture and penalties

The Revised Penal Code of the Philippines does not include a specific offence of torture. However, torture is punishable under several other offences.

Maltreatment of prisoners is a criminal offence that carries a punishment of from 2 - 28 months imprisonment in addition to the liability of the acting public officer.[75] If the purpose of the maltreatment is to extort a confession, or to obtain some information from the prisoner, the offender is punishable by up to six years imprisonment, with a temporary special disqualification from public service and a fine, in addition to liability for the physical injuries or damage caused.[76]

Other criminal offences are mutilation,[77] inflicting serious physical injuries,[78] administering injurious substances or beverages,[79] inflicting less serious physical injuries,[80] inflicting slight physical injuries and maltreatment[81] and threats and coercion,[82] which carry penalties ranging from a fine to thirty years imprisonment.

[75] Article 235(1) Revised Penal Code: "The penalty of *prision correccional* in its medium period to *prision mayor* in its minimum period, in addition to his liability for the physical injuries or damage caused, shall be imposed upon any public officer or employee who shall overdo himself in the correction or handling of a prisoner or detention prisoner under his charge by the imposition of punishment not authorized by the regulations, or by inflicting such punishment in a cruel and humiliating manner."
[76] Article 235(2) Revised Penal Code in conjunction with a 1985 Executive Order.
[77] Article 262 Revised Penal Code.
[78] Article 263 Revised Penal Code.
[79] Article 264 Revised Penal Code.
[80] Article 265 Revised Penal Code.
[81] Article 266 Revised Penal Code.
[82] Articles 282-286 Revised Penal Code.

Homicide[83] and murder[84] are punishable by from twelve to twenty years imprisonment or life imprisonment. Rape carries a punishment of thirty years imprisonment and, under aggravating circumstances, can include life imprisonment.[85] This penalty will be imposed if the victim is under the custody of the police or military authorities or any law enforcement or penal institution. It will also be imposed if the rape is committed by any member of the Armed Forces or para-military units, the Philippine National Police or any law enforcement agency or penal institution, when the offender took advantage of his position to facilitate the commission of the crime.[86] Taking advantage of a public position constitutes an aggravating circumstance for any crime.[87]

Principals, accomplices and accessories are also criminally liable.[88]

Chiefs of Police and other disciplinary authorities may impose disciplinary sanctions ranging, depending on the seriousness of the offence, from withholding of privileges, restrictions, suspension or forfeiture of salary to dismissal.[89]

## 2. Right to lodge complaints and to protection

### (i) Complaints procedures

Anyone alleging to be a victim of torture can file a complaint relating to the perpetration of a criminal offence. For most offences, including maltreatment of prisoners, a complaint is to be filed with the Municipal Trial Courts/Municipal Trial Circuit Courts or the office of the Prosecutor. [90] A complaint may also be filed with the CHR and/or the office of the Ombudsman, which is mandated to receive complaints "filed in any form or manner against officers or employees of the government … and enforce their administrative, civil and criminal liability in every case where the evidence warrants in order to promote efficient service by the Government to the people."[91] A detainee may also bring a complaint before a judge. Such a complaint would be investigated by the competent Provincial or City officer, and/or the National and Regional State Prosecutors, judges of the Municipal Trial Courts and Municipal Circuit Trial Courts or other officers authorised by law.[92] A complaint must be in writing and has to satisfy several formal requirements.[93]

Where a preliminary investigation is required (for all offences carrying a punishment of at least four years, two months and one day,[94] such as rape or homicide), a complaint should be filed with the officer tasked with conducting the investigation.[95] The Internal Affairs Service is in charge of investigations into the conduct of the police.[96] This type of investigation may be initiated by complaint or *proprio motu*, in cases of incidents where death, serious physical injury, or any violation of human rights occurred in the conduct of a police operation or where a suspect in the custody of the police was seriously injured.[97] Immediate

[83] Article 249 Revised Penal Code.
[84] Article 248 Revised Penal Code. According to Article 248 (6), murder is the killing of another person with cruelty, by deliberately and inhumanly augmenting the suffering of the victim, or outraging or scoffing at his person or corpse.
[85] Article 266 A) and B) Revised Penal Code, as amended by Republic Act No. 8353, known as "The Anti-Rape Law of 1997."
[86] Ibid., Article 266, B) (2) and (7).
[87] Article 14 (1) Revised Penal Code.
[88] Articles 16-19 Revised Penal Code.
[89] See Republic Act No. 8551, known as the Philippine National Police Reform and Reorganization Act of 1998, Title VI, Articles 52 et seq.
[90] See Rule 110, Section 1 (b) 3 of the Revised Rules of Criminal Procedure.
[91] Section 13 of Republic Act No.6770: An Act providing for the functional and structural organization of the office of the Ombudsman and for other purposes.
[92] See Rule 112, Articles 1, 2 and 3 of the Revised Rules of Criminal Procedure.
[93] Rule 110, Article 2: "The complaint or information shall be in writing, in the name of the People of the Philippines and against all persons who appear to be responsible for the offense involved"; Art.3: "A complaint is a sworn written statement charging a person with an offense, subscribed by the offended party, any peace officer, or other public officer charged with the enforcement of the law violated"; Art.6: "A complaint or information is sufficient if it states the name of the accused; the designation of the offense given by the statute; the acts or omissions complained of as constituting the offense; the name of the offended party; the approximate date of the commission of the offense; and the place where the offense was committed."
[94] See Rule 112, Section 1 of the Revised Rules of Criminal Procedure.
[95] See Rule 110, Section 1 (a) ibid.
[96] Article 39, Republic Act No.8551, known as the Philippine National Police Reform and Reorganization Act of 1998.
[97] Ibid.

superiors or supervisors of the personnel under investigation are automatically included in the investigation.[98] A complaint relating to these offences must include the address of the suspect and must be accompanied by affidavits and statements as to witnesses as well as other supporting documents to establish probable cause.[99]

**(ii) Protection of Victims and Witnesses**

Complaints procedures can only work effectively where victims and others are willing to lodge complaints, as recognised in international treaties, in particular Article 13 of the UN Convention against Torture. In recent years, many states have taken measures to facilitate the lodging of complaints, particularly by enacting legislation on victim and witness protection and establishing programmes towards this end.[100]

In the Philippines, the Department of Justice operates a Witness Protection, Security and Benefits Programme implemented pursuant to the Witness Protection, Security and Benefits Act.[101] Admission to the programme is contingent on having witnessed a crime (or having knowledge or information on its commission) and on testifying or being about to testify before any judicial or quasi-judicial body or the investigating authority. However, a victim or witness will only be admitted if the offence concerned is a grave felony (such as maltreatment of prisoners), and if he or she can corroborate his or her testimony and is subjected to threats or harassment.[102]

Where the justice department recognises the need for protection, the National Bureau of Investigation is tasked with providing adequate protection. Witnesses admitted to the programme hasvethe right to a secure housing facility, assistance in obtaining a means of livelihood, securing employment, provision of travel expenses and subsistence, free medical treatment for any injury incurred or suffered as a result of witness duty, a burial benefit for the heirs if a witness is killed, and free education for his or her minors in case of death or permanent incapacity.[103] Moreover, harassment of a witness is a criminal offence that carries a penalty of a fine of up to 3,000 pesos (US $ 70), or up to one year imprisonment, and permanent disqualification from holding public office in the case of a public officer.[104]

In practice, the Victims and Witnesses Programme has failed to fulfil its promise of offering protection. Many victims of torture and other human rights violations refrain from lodging complaints out of a fear of retaliation. Threats and intimidation are commonplace, in particular at the local level, and witnesses of serious violations, in particular extra-judicial killings have been killed after coming forward.[105] Even where there is a clear risk for victims and witnesses, the responsible authorities have apparently failed to take the required action and to provide effective protection. While officials have attributed the lack of effective investigations to the failure of victims and witnesses to give testimony, victims and witnesses have in turn expressed little confidence that the victim and witness programme is capable of providing effective protection, if need be on a long-term basis.[106] While the need for more outreach to victims is generally

[98] Ibid., Article 48.
[99] Rule 112, Article 3 (a) Revised Rules of Criminal Procedure.
[100] See REDRESS, *Bringing the Prohibition of Torture Home: National Implementation Guide for the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, January 2006, p.69, Fn.188.
[101] According to Article 2 of Republic Act No. 6981, 24 April 1991.
[102] "Sec. 3. Admission into the Program. — Any person who has witnessed or has knowledge or information on the commission of a crime and has testified or is testifying or about to testify before any judicial or quasi-judicial body, or before any investigating authority, may be admitted into the Program: Provided, That: (a) the offense in which his testimony will be used is a grave felony as defined under the Revised Penal Code, or its equivalent under special laws; (b) his testimony can be substantially corroborated in its material points; (c) he or any member of his family within the second civil degree of consanguinity or affinity is subjected to threats to his life or bodily injury or there is a likelihood that he will be killed, forced, intimidated, harassed or corrupted to prevent him from testifying, or to testify falsely, or evasively, because or on account of his testimony; and (d) he is not a law enforcement officer, even if he would be testifying against the other law enforcement officers. In such a case, only the immediate members of his family may avail themselves of the protection provided for under this Act. If the Department, after examination of said applicant and other relevant facts, is convinced that the requirements of this Act and its implementing rules and regulations have been complied with, it shall admit said applicant to the Program, require said witness to execute a sworn statement detailing his knowledge or information on the commission of the crime, and thereafter issue the proper certification. For purposes of this Act, any such person admitted to the Program shall be known as the Witness."
[103] Ibid., Articles 3 and 8.
[104] Ibid., Article 17.
[105] Special Report: *The Criminal Justice System of the Philippines is rotten*, supra, pp.116 et seq.
[106] See ibid. and Press Statement, Professor Phillip Alston, Special Rapporteur of the United Nations Human Rights Council on extrajudicial, summary or arbitrary executions, Manila, 21 February 2007.

recognised, the problems appear to be more fundamental, namely that the programme does not function properly, in particular on the ground level where victims are vulnerable to violence. More far-reaching measures would be needed to break the climate of fear exacerbated by torture, scores of disappearances and extra-judicial killings.

Victims of rape are entitled to special rights, such as free legal assistance and medical examination.[107] The authorities are obligated to assist rape victims to hasten the arrest of the offender and the filing of cases in court.[108] To this end, police officers have an immediate duty to refer a rape case to a prosecutor for inquest, investigation and arrest as well as for counselling and medical services.[109] The investigating authorities and the courts can also take measures to protect a rape victim during proceedings.[110]

### What steps can lawyers take?

- Seek reforms of the rules of court so that the identity of the complainant can be kept confidential during the preliminary investigation
- Assess the victims and witnesses protection programme with a view to identifying major shortcomings

## 3. Investigating torture allegations "promptly", "impartially" and "effectively"

Investigations are carried out by the police, in particular the National Bureau of Investigation and task forces, as applicable, under the direction and control of the Public Prosecutor. In addition, the Ombudsman has the powers, functions and duties to "investigate and prosecute…any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient. It has primary jurisdiction over cases cognizable by the Sandiganbayan and, in the exercise of his primary jurisdiction, it may take over, at any stage, from any investigatory agency or government, the investigation of such case."[111]

The applicable procedure depends on the nature of the criminal offence. If the prescribed penalty is cognisable by the Regional Trial Court, a preliminary investigation is required.[112] This is the case for murder, rape, serious bodily injury and mutilation but not for maltreatment and similar offences carrying a lesser penalty. When carrying out the preliminary investigation, the prosecutor has to examine the complaint and supporting affidavits and all other evidence, including medical evidence[113] submitted by the complainant and to determine whether the suspect is likely to have committed the criminal offence. If the offence carries a punishment of over six years, the accused person if a member of the National Police force will be immediately suspended from office for a period not exceeding ninety days.

The prosecutor or investigating officer working on the complainant's behalf shall, within ten days after filing the complaint, either dismiss it if he or she finds no ground to continue or issue a subpoena to the suspect.[114]

[107] Article 3 (b) Anti-Rape Law.
[108] Ibid., Article 3 (c).
[109] Ibid., Article 4.
[110] Ibid., Article 5.
[111] Section 15 (1) of Republic Act No.6770.
[112] Rule 112, Article 1(2) Revised Rules of Criminal Procedure.
[113] Detainees have the right to medical visits and medical examinations. This is derived from the right to health provided in the Constitution (Article XIII), which can be found in Republic Act No.7438 (An Act Defining Certain Rights of Persons Arrested, Detained or Under Custody and Investigation) and is generally provided for in the prison rules of the respective prison.
[114] Rule 112, Article 3 (b) Revised Rules of Criminal Procedure. See Article 3 for further procedure in case of subpoena.

Where the investigating procedure recommends dismissal, the superior prosecutors or the Ombudsman may disagree with the recommendation and may file information[115] against the suspect or direct another prosecutor to do so without conducting another preliminary investigation.[116] The Secretary of Justice may, either upon petition or *proprio motu*, reverse or modify the resolution of the prosecutor, e.g., direct the prosecutor to file the information or dismiss the complaint with notice to the party.[117]

If the investigation continues, the investigating judge reviews the case and transmits his or her findings to the prosecutor[118] or the Ombudsman. The prosecutor or Ombudsman considers whether there is probable cause[119] and depending on the outcome, the suspect will be charged with the offence or the case will be dismissed. Generally, the decision of the prosecutor not to indict is not subject to review.. However, if the complainant can show grave abuse of discretion on the part of the prosecution and raises constitutional issues, he or she can file a petition for *certiorari* with the Supreme Court or with the Court of Appeal.

In cases not requiring a preliminary investigation, such as for the offence of maltreatment, the Prosecutor has ten days to decide whether there is probable cause and either to dismiss the case or to prepare a charge sheet for a summary hearing and possibly to issue a warrant of arrest or a summons,[120] followed by a full investigation.

The Internal Affairs Service undertakes its own investigations and should automatically recommend the dismissal or demotion of any uniformed member of the National Police found guilty of wrongful conduct, including violations of human rights, as well as any immediate superior or supervisor that is found to have acted negligently.[121]

Police investigations are marred by problems. Investigations are marked by corruption, extortion and outright theft of valuables, due to poor salaries and working conditions and insufficient accountability for such illegal acts. There is a high likelihood of violence during arrest and investigations and torture is frequently used as an investigation method to extract confessions, often in lieu of carrying out a full investigation.[122]

These systemic problems are compounded in cases that concern crimes alleged to have been committed by officials, such as in torture cases. Here, investigators are confronted with a closed and protective police culture. Often such cases have dragged on for years or have been closed altogether for lack of evidence. This has been attributed to a number of factors, in particular:

- Witnesses, including victims, are not coming forward for fear of retribution. This fear is well-founded as borne out by several incidents in which (potential) witnesses were intimidated, assaulted or even shot.[123] Police have also resorted to filing counter-charges against victims alleging torture and ill-treatment, a practice which is used to intimidate and to prompt them to stop pursuing their complaints.
- Incomplete investigations, in particular the failure to visit the scene of the crime promptly and to interview key witnesses. For example, in a case of disappearance, the relatives were given false information when lodging complaints with the result that the victim was further tortured instead of any investigations being commenced against the alleged perpetrators.[124]
- Failure to secure timely and well documented medical reports of the person allegedly tortured. In spite of the right of detainees to have access to a doctor, proper medical reports are often not available because: detainees are not informed about their rights, medical examinations are carried

[115] The information is the means by which criminal cases are prosecuted before the Courts. See Rule 110 of the Revised Rules of Criminal Procedure.
[116] Rule 112, Article 4 Revised Rules of Criminal Procedure.
[117] Ibid.
[118] Rule 112, Article 5 Revised Rules of Criminal Procedure.
[119] Ibid.
[120] Rule 112, Article 9 Revised Rules of Criminal Procedure.
[121] Article 49 a of the Republic Act No.8551, known as the Philippine National Police Reform and Reorganization Act of 1998.
[122] Supra, at Part 2. A.
[123] Special Report: *The Criminal Justice System of the Philippines is rotten*, supra, pp.12 et seq.
[124] Ibid.

out before (and not after) interrogations take place, examinations are carried out by doctors lacking the requisite knowledge and skills and/or are superficial and insufficient, and detainees face delays in accessing doctors until after torture scars have faded. Torture methods have also evolved and now can leave only minimal physical traces. This makes proof of torture extremely difficult in the absence of special expertise and an established practice of documenting and prosecuting forms of psychological torture.[125]

- The Office of the Prosecutor apparently has a department specifically tasked with investigating human rights violations but it has not played a strong role in the investigation of torture cases.

Torture survivors have several procedural rights during the criminal process, such as the right to counsel, the right to secure witnesses and to subpoena records and documents. Moreover, if the authorities fail to investigate and/or prosecute, a torture survivor may file a criminal action of dereliction of duty against those responsible.[126]

### What steps can lawyers take?

- Document torture and collect evidence in line with recognised standards such as the Istanbul Protocol with a view to either strengthening ongoing investigations and prosecutions or triggering investigations where no measures have been taken
- Seek protection for victims and witnesses throughout investigations, in particular by ensuring utmost confidentiality and by making necessary arrangements, including by providing safe places where possible
- Call for a reform of the present system, in particular by setting up a body with sufficient independence and expertise, (e.g., the appointment of a special prosecutor with human rights background or a civilian oversight body to monitor investigations). Further measures include enhancing the rules on discovery and obtaining evidence from government agencies.

## 4. The Role of the Commission on Human Rights

The CHR was established pursuant to Article XIII, Section 17 of the 1987 Constitution and derives its mandate from Article XIII, 18. It has the power to:

> "investigate, on its own or on complaint by any party, all form of human rights violations involving civil and political rights."[127]

CHR Resolution No.A96-005 provides that the Commission has jurisdiction to investigate violations of civil and political rights of persons within the Philippines and Filipino nationals residing abroad, which includes, *inter alia*, "Rights of prisoners and detainees against physical, psychological and degrading punishment …" and "Constitutional guarantees against the use of torture, force, violence, threat, intimidation, and other means that vitiate the free will of any person, or force him to do anything or sign any document against his will."

A victim, his or her relatives or others concerned, including NGOs, may file a complaint relating to torture or ill-treatment or punishment with the CHR Regional office or the Barangay Human Rights Action Centres at the local level. The "Special Investigator (Duty Officer) should log/record the complaint and assist the

[125] Supra, at Part 2, A., and, for a case study, Amnesty International, *The Rolando Abadilla murder inquiry- an urgent need for effective investigation of torture*, AI Index: ASA 35/08/00, October 2000, in particular pp.24, 25.
[126] Article 203 Revised Penal Code.
[127] Article XIII, Article 18(1) of the Constitution.

complainant in accomplishing CHR Form No.9."[128] The Commission may also open an investigation on its own initiative on the basis of information coming to its attention.[129] The Attorney/Legal Officer dealing with the case carries out a preliminary review to establish, *inter alia*, whether there has been a human rights violation falling within the jurisdiction of the Regional CHR office. If this is the case, investigators will gather the relevant facts concerning the complaint to determine whether the case is amenable to conciliation or mediation or should be pursued by means of an investigation. Where the allegation concerns torture, the case will normally be docketed and an investigation carried out.

Investigations are carried out by a "Quick Reaction Team", which is composed of a lawyer, an investigator and a medico-legal officer. Under its Resolution No.A89-109-A, the CHR has the powers to: issue subpoenas in conformity with the Revised Rules of Court, to hold persons in contempt, to grant immunity from prosecution, to appoint counsel for indigent litigants and to request assistance from any government body. As a standard procedure, upon hearing about torture, the team visits the detention facilities where it is normally granted access. However, CHR has experienced difficulties in getting access to military camps, and the armed forces have in some instances denied that the person alleged to be a victim of torture was in their custody.[130] The CHR investigation team conducts an investigation in the area, *inter alia*, by taking sworn statements of complainants or witnesses with a view to determining the facts, identifying the perpetrators and collecting evidence for the purposes of prosecution. In cases of alleged torture or in other cases upon request of a victim, a doctor of the Forensic Medicine Services Office is made available to conduct a medical examination. Following the investigation, an investigation report will be prepared.[131]

If the evidence establishes a *prima facie* case and the investigation report is endorsed by the Attorney and the Regional Director, the Attorney, Investigator or any authorised officer may file a case for prosecution with the Prosecutor's Office.[132] Subsequently, the Commission monitors the status of the case. However, it has no powers of enforcement. In 1995, the CHR entered into an agreement with the Department of Justice, according to which CHR lawyers have been designated as special counsels to assist Department Of Justice prosecutors in the litigation of cases involving human rights violations. A bill to vest the CHR with prosecutorial powers only reached 2nd reading in the 13th Congress and the adoption of such a bill will need to be sought again in the 14th Congress.

The Commission has been criticised for its investigation methods, which have been described as siding with the perpetrators. This has been attributed to a lack of independence from the executive that appoints the Commissioners, and for the burden it places on torture victims to furnish evidence.[133] Members of the CHR consulted have pointed to a number of problems encountered in torture cases, which include the following:

- Detainees are not willing to lodge formal complaints, which prevents the Commission from filing a criminal case in cases of light physical injuries where the prescription period is two months;
- Investigators have not been able to gain timely access to military facilities; and
- Difficulties have been experienced in investigating torture committed in the course of armed conflict.
- Limited capacity is a further factor, including shortage of personnel, in particular investigators and interpreters, and insufficient skills to prove torture in the absence of physical signs.

In its practice, the Commission has carried out investigations in several torture cases (3 cases in 2002, 18 cases in 2003, 23 in 2004, 13 in 2005, 29 in 2006 and 13 from January to August 2007), rendered forensic services and, in some cases, recommended prosecution or administrative action.[134] However, most of these cases have not resulted in a trial let alone conviction of the perpetrators, in particular where the

[128] See Commission on Human Rights, *Operations Manual on Investigation and Case Management Process*, 2001 Edition, p.16.
[129] See on complaints procedures CHR Resolution No. A93-047.
[130] In the case of Abu Sayaf members held by the armed forces, the CHR team was only admitted to the military facilities after its 3rd visit, by the time of which physical injuries were already beginning to disappear.
[131] Commission on Human Rights, *Operations Manual on Investigation and Case Management Process*, 2001 Edition, pp.30 et seq.
[132] The decision by a lawyer of the regional office of the CHR to dismiss a case will be reviewed by the Regional Director of the CHR upon appeal.
[133] TFDP, *Breaking Impunity*, 2006, pp. 6, 7.
[134] See Annual Reports of the Commission.

Prosecutor or the Ombudsman have not proceeded to bring charges against the persons identified by the Commission.

### What steps can lawyers take?

- Support investigations of the CHR in torture cases by submitting evidence
- Support initiatives to provide the CHR with greater powers and resources so as to make its work more effective
- Maintain a dialogue and critically assess the effectiveness of the CHR based on objective data and criteria and suggest ways as to how the work of the CHR can be improved

## D. Prosecution of alleged perpetrators of torture and punishment of those responsible

### I. International standards

International law clearly establishes the obligation on governments to prosecute, when sufficient evidence exists, persons accused of torture. This obligation exists regardless of where the crime was committed, the nationality of the victim or the alleged perpetrator.[135] As stated in the Istanbul Protocol, "States are required under international law to investigate reported incidents of torture promptly and impartially. Where evidence warrants it, a State in whose territory a person alleged to have committed or participated in torture is present, must either extradite the alleged perpetrator to another State that has competent jurisdiction or submit the case to its own competent authorities for the purpose of prosecution under national or local criminal laws."[136] Article 7(2) of the UN Convention against Torture determines that a prosecuting authority must take a decision to prosecute an offence of torture in the same way as any other crime of a serious nature.

### II. Legal framework and practice in the Philippines

The Prosecutor has no express anti-torture policy and has not taken a strong lead in prosecuting human rights violations. High-ranking officials have attributed this to the lack of willingness on the part of witnesses to give evidence but little effort appears to have been made to address the systemic challenges of ineffective witness protection and the spread of serious violations.[137] Recently documented shortcomings in the prosecution of extra-judicial killings and disappearances are similarly relevant in cases of torture where the prosecution has failed to bring charges.[138]

A further problematic factor delaying or altogether preventing prosecutions is the role played by the Office of the Ombudsman for the Military and Other Law Enforcement Office. This body reviews all cases to be filed against a state officer, whether originating from a criminal investigation or investigations by the CHR, and recommends back to the Prosecutor whether charges should be brought. In practice, the Ombudsman has repeatedly failed to act timely on cases, thus hindering effective prosecutions.[139]

Trials relating to torture resulting in the death of the victim on charges of murder will be heard by the Regional Trial Court or the Sandiganbayan. The Municipal or Metropolitan Trial Court has jurisdiction for

[135] See in particular Articles 4-8 of the UN Convention against Torture.
[136] Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol), 9 August 1999, para.74.
[137] Special Report: *The Criminal Justice System of the Philippines is rotten*, supra, p.14.
[138] See on extrajudicial killings the Press Statement by the Special Rapporteur Philip Alston, supra, the report by the Melo Commission, submitted 22 January 2007, and AHRC, Philippines: The Human Rights Situation in 2006.
[139] Special Report: *The Criminal Justice System of the Philippines is rotten*, supra, pp. 119, 120.

less serious offences for charges brought in line with the procedure outlined above and after a pre-trial hearing has been held.[140] Civilian courts are also competent to hear trials against members of the Armed Forces and other persons subject to military law who commit crimes or offences penalised under the Revised Penal Code, except when the offence is service-connected, in which case the offence shall be tried by court-martial.[141] Proceedings are largely adversarial and the prosecution has to prove the guilt of the accused beyond a reasonable doubt.[142]

While a large number of torture cases remain unpunished, especially those committed during the Marcos era, there have been some torture trials.[143] A number of these trials has been prolonged and ended without a conviction. However there have been convictions resulting in heavy punishments in several high profile cases. In three cases decided by the Supreme Court on appeal in 1987, 1991 and 2002, the perpetrators, who were members of the army, the civilian home defence and the police respectively, were all punished. The punishment was life imprisonment in the first two cases, in which the victims were first tortured and then murdered, and the death penalty in the third case which concerned rape in custody.[144] Moreover, two other verdicts of rape in custody by police officers have been reported, in which the offenders were sentenced to death in 1996 and 1997.[145]

### What steps can lawyers take?

- Call for the abolishment of the Ombudsman's powers to review whether or not a prosecution should be brought
- Call on the Public Prosecutor to develop an anti-torture policy that seeks to hold perpetrators accountable and combat impunity more effectively
- Seek to expedite trials in torture cases and advocate for any changes that may be necessary in the administration of justice to achieve this objective

## E. Right to an effective remedy and reparation

### *1. International standards*

The right to an effective (procedural) remedy to guarantee the substantive right to adequate reparation for torture survivors is clearly established under international law (see Part II, Section E, *Action Against Torture: A Practical Guide to the Istanbul Protocol for Lawyers*). The right to reparation is a fundamental principle of general international law (under the law of state responsibility, the breach of an international obligation entails the duty to afford reparation).[146] The prohibition of torture is an obligation of all States under general international law, and therefore, if breached, a new international obligation to afford reparation arises. According to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of

[140] Rule 118 Revised Rules of Criminal Procedure.
[141] Article 1, Republic Act No. 7055, 20 June 1991, An Act Strengthening Civilian Supremacy over the Military by Returning to the Civil Courts the Jurisdiction over Certain Offenses involving Members of the Armed Forces of the Philippines, other Persons subject to Military Law, and the Members of the Philippine National Office, repealing for the purpose certain presidential decrees. See for court-martial proceedings Articles of War, 1938.
[142] See Rule 120 Revised Rules of Criminal Procedure and the Revised Rules of Evidence, 1989.
[143] According to the statistics provided by the CHR, out of a total of 255 cases in 1999 of human rights cases filed with various courts 166 (65.09%) were dismissed while defendants were only convicted in 26.67% of cases, the remaining percentage resulting in an acquittal. See CHR, Annual Report, supra, p.2.
[144] *People vs Alegarbes*, G.R. No.L-49761, 21 September 1987; *People vs Ravelo, et al.*, G.R. No.78781-82, 15 October 1991 and *People vs Torreja*, G.R. No.132339, 4 February 2002.
[145] See Amnesty International, *Rape and sexual abuse*, supra, p.15.
[146] See Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13).

International Humanitarian Law,[147] the forms that reparation may take include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

## *2. Domestic remedial avenues/mechanisms available to torture survivors*

### 2.1. Constitutional Law

Article III, Section 12(4) of the Constitution stipulates that:

"The law shall provide for penal and civil sanctions for violations of this Article [see above] as well as compensation to the rehabilitation of victims of torture or similar practices, and their families."

The Constitution itself provides no remedy for the breach of fundamental rights such as the right not to be tortured or for a procedure in which to claim reparation for such a breach. The proposed 2006 anti-torture act contains a provision that addresses compensation to victims of torture. However, this provision essentially refers to existing compensation schemes or programmes that have proved to be inadequate.[148] By so doing, it fails to provide for a statutory right to reparation for torture in line with international standards. The act does, however, envisage the formulation of a comprehensive rehabilitation programme for victims of torture and their families.[149]

### 2.2. Civil Law

As a general rule, any person who unlawfully causes damage to another, be it intentionally or by negligence, shall indemnify the latter.[150] Article 32 of the Civil Code provides for the liability of public officers for violating the constitutional rights and liberties of another person, as enumerated.[151] While torture is not expressly mentioned in Article 32 of the Civil Code, a claim for compensation can be based on the violation of the freedom from arbitrary and illegal detention, freedom from being compelled to be a witness against one's self, or from being forced to confess guilt, and freedom from excessive fines, or cruel and unusual punishment.[152] Moreover, Article 33 of the Civil Code provides a legal basis for claiming damages for physical injuries.

Public officers and employees who directly or indirectly violate such rights are personally liable for the damage caused by their intentional or negligent acts or omissions.[153] In the leading civil case of *Aberca vs. Ver*,[154] the Supreme Court reversed a dismissal and remanded for further proceedings a claim for damages arising from human rights violations including torture. The acts were allegedly committed by various intelligence units of the Armed Forces during the time of the Marcos regime. The Court held that the defendants could not claim immunity for any illegal acts since immunity is only to be granted for acts carried out in the performance of official duties within the ambit of their powers. It went on to note that Article 32 of the Civil Code encompasses those directly, as well as indirectly, responsible for its violation. Thus, a superior may be held responsible if he fails in his duty to properly supervise his subordinates.[155]

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[147] The Basic Principles were adopted by the UN General Assembly in 2005, see UN Doc. A/RES/60/147, 16 December 2005.

148 Section 12: "Any person who has suffered torture shall have the right to claim compensation as provided for under Republic Act No.7309, otherwise known as the 'Board of Claims Act of 1991', provided that in no case shall compensation be any lower than Ten Thousand Pesos (P 10,000.00). Victims of torture shall also have the right to claim for compensation from such other financial relief programmes that may be available to him/her."

149 Section 13: "Within one (1) year from the effectivity of this Act, the Department of Social Welfare and Development (DSWD) together with the Department of Justice (DOJ) and the Department of Health (DOH) and such other concerned government agencies, shall formulate a comprehensive rehabilitation program for victims of torture and their families. The DSWD, DOJ and DOH shall also call on human rights non-government organisations duly recognised by the government to actively participate in the formulation of a rehabilitation programme that shall provide for the physical, mental, social, psychological and spiritual healing and development of victims of torture and their families."

[150] Articles 20 and 2176 Civil Code.

[151] The violation of the constitutional rights in itself gives rise to liability, no bad faith or malice required, see *Lim vs. Ponce de Leon, 66 SCRA 299*.

[152] Article 32 (4), (17) and (18) of the Civil Code.

[153] Article 2176 Civil Code. However, in *Lim vs. Ponce de Leon*, supra, the Court held that the subordinate officer was not liable for executing unlawful orders of the superior officer where he was led to believe that there was a legal basis and authority to impound the launch. This line of reasoning will however in all probability not be applicable in torture cases.

[154] *Aberca vs. Ver*, G.R. No. L-69866, 15 April 1988.

[155] Ibid.

The State has only assumed liability for the damage caused by the conduct of special agents.[156] It is not be liable for illegal acts that are *ultra vires*.[157]

The Civil Code provides for actual or compensatory, moral, nominal, temperate, liquidated and exemplary damages.[158] The violation of constitutional rights entitles a victim to recover actual and moral damages from the public officer responsible.[159] Compensation for pecuniary loss includes the actual loss and lost profits.[160] In case of temporary or personal injury, loss or impairment of earning capacity may be claimed as damages.[161] If the amount of damages cannot be provided with certainty but it is evident that some pecuniary loss has been suffered, the Courts can award temperate or moderate damages instead of compensatory damages.[162] Moral damages may be recovered, *inter alia,* in cases of a criminal offence or quasi-delicts resulting in or causing physical injuries, rape and for the violation of rights as provided for in Article 32 of the Civil Code.[163] Such damages include physical suffering, mental anguish, fear, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury.[164] Moral damages are awarded at the discretion of the Court.[165] Finally, exemplary damages may be imposed by way of example for the public good but may not be recovered as a matter of right.[166] Such damages may be imposed in case of criminal offences as part of civil liability or in cases of gross negligence.[167]

In cases where torture results in death, the heirs may claim damages of around 50,000 pesos (US $ 1,164) as well as damages for loss of earning capacity of the deceased.[168] The spouse, descendants and ascendants may also claim moral damages for mental anguish.[169]

The victim can take legal action against the perpetrators before the Municipal Trial Court, either at the place of his/her own residence or that of the defendant.[170] While a victim may bring a suit against the individual perpetrator and the State, the latter cannot be sued without its consent.[171] A civil suit has to be brought within four years from the time of the infliction of injury.[172] The plaintiff has to pay court fees. Indigent persons, i.e. those without income or those whose income is insufficient to instruct a private lawyer, may receive legal aid from the Public Attorney's Office provided that they pass a merits test and are not already represented by private counsel.[173] Legal aid may also be provided by the CHR.

A claim for damages arising out of torture based on Articles 32 and 2176 of the Civil Code is independent of the result of criminal proceedings.[174] In claims for damages based on other grounds the civil action will be suspended before the judgment on the merits of any criminal case. The civil claim is in these cases

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[156] Article 2180 (6) Civil Code. A special agent is one who must be specially commissioned to do a particular task. If the agent is a public official, the task must be foreign to his or her usual scope of functions. Where the agent is not a public official, the State's liability is based on employers' liability. See Cezar S. Sangco, *Philippine Law on Torts and Damages*, 1994.
[157] See Article 2180 (6) in conjunction with Article 2176 Civil Code and *Ministerio vs. Court of First Instance of Cebu,* 40 SCRA (Supreme Court Reports Annotated) 464; also *Isberto vs. Raquiza*, 67 SCRA 116.
[158] Article 2197 Civil Code.
[159] *Lim vs. Ponce de Leon*, supra.
[160] Article 2199, 2200 Civil Code.
[161] Article 2205 (1) Civil Code.
[162] Article 2224 Civil Code.
[163] Article 2219 Civil Code.
[164] Article 2217 Civil Code.
[165] Article 2216 Civil Code.
[166] Articles 2229, 2233 Civil Code.
[167] Articles 2230, 2231 Civil Code.
[168] Article 2206 (1) Civil Code. The amount of P3,000 has been gradually increased and the prevailing jurisprudence fixes the amount at P50,000. See *Gregorio Pestano and Metro Cebu Autobus Corporation vs Tetimo Sumayang and Paz C. Sumayang*, G.R. No.139875, December 4, 2000 with further references.
[169] Article 2206 (3) Civil Code.
[170] Rule 4, Art. 2, Rules of Civil Procedure, 1997.
[171] Article 16 (3) of the Constitution. Consent is implied when the State enters into a private contract or business operation unless it is merely incidental to the performance of a governmental function and when the State sues as a private party unless the suit is entered into only to resist a claim. See Joaquin G. Bernas, SJ, *The 1987 Philippine Constitution: A Reviewer-Primer*, 3rd ed., Manila: Rex Book Store, 1997, pp. 474, 475.
[172] Article 1146 Civil Code.
[173] The legal basis is Article 11 of the Constitution. See for other forms of legal aid, Medina, *Legal Aid Services in the Philippines*, www.pili.org/cle/legal_aid_service_in_the_philippines.htm.
[174] Rule 111 (3) Revised Rules of Criminal Procedure.

also independent of the outcome of the criminal proceedings with the exception of the binding nature of a finding that the act or omission from which the civil liability may arise did not, in fact, exist.[175]

A preponderance of evidence is sufficient proof.[176] The victim has to prove liability and pecuniary loss, whereas the assessment of other kinds of damages, such as moral and exemplary damages, is left to the discretion of the Court.[177] As a general rule, costs follow the results of the claim.[178] A creditor can enforce the judgment by filing a motion for issuance of a writ of execution with the Court and once granted, it can be enforced by the sheriff in the manner provided by Articles 8 and 9 of Rule 39 of the Revised Rules of Court. A judgment against the State cannot be enforced by execution.[179]

Victims and human rights lawyers working on their behalf have hardly used civil remedies to claim reparation for torture. This is due to the difficulties in accessing justice and specific features of litigating torture cases, in particular:

- Many torture survivors belong to marginalised groups in society and have limited education and means at their disposal. There is limited rights awareness in torture cases and know-how on how to assert one's rights;
- Even where torture survivors decide to bring a case, the costs involved can be prohibitive. This applies both to physically accessing courts, in particular in remote regions, and to the costs of litigation, which is expensive. Existing legal aid programmes, in particular the Public Attorney's Office, and pro-bono services offered by civil society groups are insufficiently developed to cope with demand;
- Torture survivors and human rights lawyers tend to have limited confidence in the effectiveness of litigation. The court system is suffering from a huge backlog of cases and compensation awards are generally low. This means that torture survivors would face years of costly litigation with an uncertain outcome;
- This uncertainty is compounded in torture cases: Torture survivors and witnesses may face threats and harassment for bringing cases; it might be difficult to prove torture, in particular liability of an individual perpetrator; and, given that there is limited state liability, any awards are of limited reparative value and difficult to enforce.[180]

### 2.3. Criminal Law

A torture survivor may claim damages against the accused as part of criminal proceedings. A civil action is automatically instituted jointly with the criminal action unless the victim waives the civil case, reserves the right to institute a separate civil case or institutes the separate civil case prior to the criminal case.[181] After a criminal trial has begun, a separate civil action cannot be instituted, with the exceptions outlined above, until the final judgment has been rendered in the criminal case.[182] Upon filing an action for damages, the victim has to pay in full the filing fees, the amount of which depends on the damages sought.[183] For the duration of the criminal proceedings, the period of prescription of the civil action which cannot be instituted separately or whose proceeding has been suspended shall be suspended.[184]

Civil liability follows criminal liability in cases of conviction.[185] Remedies include restitution, reparation of the damage caused and indemnification for consequential damages.[186]

[175] Rule 111 (2) Revised Rules of Criminal Procedure.
[176] Articles 30 and 2177 Civil Code.
[177] Article 2216 Civil Code.
[178] See Rule 142.
[179] See *Republic v.s. Villasor*, 54 SCRA 83.
[180] This assessment is based on interviews conducted with human rights lawyers in the Philippines in December 2006 and subsequent consultations.
[181] Rule 111 Revised Rules of Criminal Procedure.
[182] Ibid., Art.2.
[183] Ibid., Art.1 (b).
[184] Ibid., Art.2.
[185] Article 100 Penal Code. But see above, civil liability can also exist independent of outcome of criminal case.
[186] Article 104 Penal Code.

Compensation has been awarded as part of the judgment in criminal cases. In 1987, the heirs of a victim of torture and murder committed by a member of the army were awarded P 30,000 ($ 699) as compensation. In 1991, the heirs of a victim of torture and murder, this time at the hands of members of the Civilian Home Defences, were awarded compensation of P 50,000 ($1,164).

In three recent cases of rape in police custody, the victims were awarded the following amounts of damages:

- In 1996, P100,000 ($2,328) compensation for the rape and as support for the baby, which was born as a result of the rape;
- In 1997 P50,000 ($1,164) [187], and,
- In a case decided by the Supreme Court in February 2002, P75,000 ($ 1,746) for rape and P50,000 ($1,164) moral damages in line with the jurisprudence of the Supreme Court in similar cases.

In the three cases decided by the Supreme Court in 1987, 1991 and 2002, the Court increased the amount of damages initially awarded by the lower courts.

In practice, the major problem faced by torture survivors and lawyers acting on their behalf is the absence of criminal prosecutions in torture cases. There have only been few successful prosecutions, which means that civil remedies in criminal proceedings have been largely ineffective. Moreover, the considerations relating to the lack of state responsibility and difficulties of enforcement apply equally in criminal cases.

### What steps can lawyers take?

- Advocate for the recognition of the right to reparation for serious human rights violations, in line with Article 12 (4) of the Constitution and international standards
- Use strategic litigation, i.e. bringing cases that address the key systemic problems to bring about changes that would benefit a large number of victims, for example establishing state liability and securing enforcement of awards. This includes in particular bringing cases to the Supreme Court and invoking international standards and comparative experiences
- Build a network of committed lawyers, and seek to enhance the capacity of these lawyers to litigate in torture cases through exchange, training and other methods
- Seek to follow the most effective and efficient mechanism for investigations of cases, preservations of evidence, and documentation, drawing in particular on medical expertise
- Provide legal aid and pro bono services to victims of torture most in need
- Seek to protect victims from adverse repercussion for bringing cases
- Request the government to provide rehabilitation services to torture survivors, or the means for torture survivors to seek rehabilitation
- Request those responsible for torture to acknowledge publicly their wrongdoing and to apologise to the victims

### 2.4. The Board of Claims

Victims of crimes and of certain human rights violations are entitled to compensation and there are special measures of assistance for rape victims. The Government set up a board of claims for certain categories of victims, which has the power to award compensation from a National Treasury fund.

The Board, which is composed of three officials from the Department of Justice, has the power, *inter alia*, to receive, evaluate, process and investigate applications for claims as well as to conduct an independent

[187] See for both cases, AI, *Rape and sexual abuse*, supra, p.15.

administrative hearing and resolve applications for claims.[188] The following persons may file for compensation before the Board:

- (a) any person who was unjustly accused, convicted, and imprisoned but subsequently released by virtue of a judgment of acquittal;
- (b) any person who was unjustly detained and released without being charged;
- (c) any victim of arbitrary or illegal detention by the authorities as defined in the Revised Penal Code under a final judgment of the Court; and
- (d) any person who is a victim of a violent crime.[189]

A person claiming to be a victim of arbitrary arrest must show that he was unjustly detained without being charged and a person unjustly accused, convicted and imprisoned must provide certified copies of relevant judicial documents.[190] A person claiming to be a victim of violent crimes must submit "any evidence that would prove that he is a victim of violent crimes including but not limited to the certified true copy of the report to the police or a doctor's /psychiatrist's certificate, if necessary."[191] In case of heirs, a death certificate and proof of the relationship (marriage certificate, birth certificate, others, as applicable) is required.[192] The case is then assigned to an evaluator who evaluates the merits of the claim.[193] Following receipt of the evaluator's recommendation, the Board of Claims resolves the claim, which should be done within 30 working days after the filing of the application.[194] This decision is subject to a further final appeal to the Secretary of Justice.[195] The amount of compensation is based on the number of months of imprisonment or detention for victims of unjust imprisonment or detention[196] and, in all other cases, a maximum amount shall not exceed 10,000 Pesos ($233) or the amount necessary to reimburse the claimant the expenses incurred for hospitalisation, medical treatment, loss of wages, loss of support or other expenses directly related to the injury, whichever is lower.[197] The awarding of compensation is without prejudice to the right of the claimant to seek other remedies under existing laws.[198]

A victim has to file his or her claims to the Department within six months after being released from prison or after suffering the damage or injury, otherwise he or she is declared to have waived the right to claim.[199] If any person entitled to damages under the Act dies or is incapable of bringing the claim, the heirs may file a claim.[200] The Board must resolve the claim within thirty working days after filing of the application in an expeditious and inexpensive procedure.[201] A claimant may appeal against the decision of the Board within fifteen days of receipt of the resolution to the Secretary of Justice whose decision shall be final.[202]

Since its inception in 1992 until the end of 2006, the Board of Claims received 28,411 applications of which 28,075 had been processed. The number of applications has risen steadily, beginning with 94 in 1992 and 268 in 1993. From 1994 to 1999, the number ranged from 1, 379 to 1,723 applications, and after 2000 annually exceeded the 2,000 mark.[203] Out of the 28,411 applications, the Board granted 23,716 compensation claims for violent crimes and 173 for unjustly accused persons while rejecting a total of

[188] Articles 1 and 2 of Republic Act No. 7309: 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, 30 March 1992.
[189] Article 3, Act No. 7309. According to the Act, violent crimes shall include rape and shall likewise refer to offenses committed with malice, which resulted in death or serious physical and/or psychological injuries, permanent incapacity or disability, insanity, abortion, serious trauma, or committed with torture, cruelty or barbarity.
[190] Section 2 (a), (b) and (c) of the Implementing Rules and Regulations of Republic Act No.7309.
[191] Section 2 (d) (1) ibid.
[192] Section 2 (e) ibid.
[193] Section 3 (a) ibid.
[194] Section 3 (c) ibid.
[195] Section 3 (d) ibid.
[196] Such compensation shall not exceed 1,000 (US $ 22) pesos per month up to a maximum amount of 60,000.00 (US $ 1,331) according to a Memorandum by Atemio G. Tuquero, former Secretary of Justice to ACSP Lualhati R. Buenafe, Chairperson, Board of Claims, dated 2 August 2000.
[197] Article 4 Act No. 7309.
[198] Ibid.
[199] Article 5, ibid.
[200] Article 6, ibid.
[201] Article 7, ibid.
[202] Article 8, ibid.
[203] 1994 = 1,551; 1995 = 1,379; 1996 = 1,723; 1997 = 1,697; 1998 = 1,589; 1999 = 1,392; 2000 = 2,050; 2001 = 2,304; 2002 = 2,475; 2003 = 3,189; 2004 = 2,752; 2005 = 2,962; 2006 = 3,008. See Board of Claims, Accomplishment Report, 1992-2006.

3,808 claims, i.e. granting around 86% of all claims.[204] The Board of Claims classifies the application it receives into two categories: victims of arbitrary detention/unjust accusation and victims of violent crimes. For victims of violent crimes, no further classification as to the cause of their death/physical injuries is made.[205] Thus, the Board of Claims does not collect any torture specific data.

The Board of Claims constitutes an important additional mechanism for victims of crime, including torture. However, it cannot be considered as an effective remedy in its own right. Its main goal is to provide financial support to victims of arbitrary detention/unjust accusation and/or violent crimes and has been conceived as an administrative mechanism that responds to the needs of particular categories of victims. The procedure followed by the Board of Claims is not torture specific even though torture survivors may benefit from it. Moreover, the amount of financial assistance is low and clearly insufficient in torture cases where compensation should reflect the seriousness of the crime. The procedure is moreover limited to financial measures and does not envisage other forms of reparation, such as rehabilitation and satisfaction. While it may provide some limited financial succour, it clearly lacks the acknowledgment function that is an essential element of reparation in torture cases. Furthermore, the short period of six month for filing claims does not take into account the traumatic experience of torture as recognised in relevant international standards.[206]

### What steps can lawyers take?

- Advocate for a change in procedure to extend substantially the overly short period of six month for filing claims to the Board of Claims
- Request the Board of Claims to publish data regarding the type of violent crime for which compensation was paid
- Lobby the government and/or both the Board of Claims and the Commission on Human Rights to increase substantially the amount of financial assistance provided to victims of human rights violations

### 2.5. Financial assistance provided by the Commission on Human Rights

The CHR may also provide financial assistance to victims of human rights violations. Victims, their relatives or anyone on their behalf may file a claim for financial assistance to the Commission. Such a claim presupposes that the claimant has filed a substantive claim alleging a violation of human rights with the Commission. An investigation report from the regional office concerned must be attached to the claim, containing details about the act complained of, evidence, which should engender a well-founded belief that a human rights violation has been committed, and, if known, the identity of the perpetrator(s).

The financial assistance provided is temporary relief, not compensation. The eligibility for, and the nature of the financial assistance provided is determined by the Commission on a case-by-case basis. Based on CHR Resolution No. A96-060 of 10 September 1996, such financial assistance includes:

(a) Survivor's benefit = P 15,000 ($ 349) for immediate surviving heirs of the victim;
(b) Medical Assistance = up to P 7,500 ($174.5);
(c) Incidental Emergency Expenses = ranging from P 2,500 ( $58) to 8,000 ($186) per month to cover the cost of providing for the urgent needs of human rights violations such as transportation expenses, food, medicines and other expenses;
(d) Community Assistance = P 3,000 ($70) per month for families uprooted from their place of abode as a result or in the course or by reason of the commission of human rights violations;

[204] 378 claims were deferred as of the end of 2006.
[205] Letter by Jovencito R. Zunõ, Chief State ProArtutor, Chairman, Board of Claims to Atty. Sarmiento, 3 March 2003, on file with REDRESS.
[206] See Principle IV of the 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, UN Doc. A/RES/60/147, 16 December 2005.

(e) Special Assistance = up to P 5,000 ($116) for victims of human rights violations not covered under the existing guidelines on financial assistance who are in dire need of financial grants because their life, health and security are threatened and it appears that there is no government agency which can provide immediate assistance to them;
(f) Rehabilitation Assistance = up to P 1,000 per month ($23) (maximum P 10,000) for victims of unjust imprisonment or detention based on the number of months spent in prison or detention with every fraction thereof considered one month.

Other forms of rehabilitation assistance are provided to any person under detention who was subject to cruel, inhuman and degrading punishment by the prison authorities. He or she is entitled to financial assistance of an amount not exceeding P 10,000 ($233).[207] Any person under custodial investigation who was subject to cruel or inhuman treatment or punishment in order to extort confessions or for any other purpose is entitled to the same amount of financial assistance.[208] Finally, any person who has been detained on charges of committing crimes in pursuit of political belief or who has been convicted of committing similar offences and later released after serving the sentence or by virtue of the grant of an amnesty or clemency is entitled to financial assistance in the amount of P10,000 ($233) to enable the person to start a new and productive life.

CHR has released funds of P 8,111,620.000 (US $188,904.00) to 764 beneficiaries in the period of 1998 to 2002.[209] The breakdown of the various types of benefits is as follows:

- Survivor's benefit = 6,841,000.00 (US $ 159,313) to 571 beneficiaries
- FIND = 360,000.00 (US $ 8,384) to 37 beneficiaries[210]
- Medical Assistance = 708,770.00 (US $16,506) to 91 beneficiaries
- Witness Protection = 5,400.00 (US $ 126) to 1 beneficiary
- Special Assistance = 167,600.00 (US $ 3,903) to 22 beneficiaries
- Emergency and incidental expense = 28,950.00 (US $ 674) to 42 beneficiaries.

Similar to the compensation available through the Board of Claims, the financial assistance provided by the CHR provides some limited assistance rather than an effective remedy. The minimum amount of 7,500 pesos and the standard rate of 10,000 pesos are clearly insufficient in torture cases. Moreover, lawyers who have brought claims on behalf of torture survivors view the paperwork involved as tedious, point to the difficulty of proving eligibility and claim that the expenses required to see a claim through mean that the final sum is not worthwhile.[211]

### What steps can lawyers take?

- Lobby the Commission on Human Rights to make procedures for claiming financial assistance more accessible and to provide adequate information to potential victims for doing so
- Request the Commission on Human Rights to publish data on the number of claims for financial assistance, the type of violations and the outcome of cases
- Lobby the Government and/or both the Board of Claims and the Commission on Human Rights to increase substantially the amount of financial assistance provided to victims of human rights violations

[207] This is subject to fulfilling the documentary requirements spelled out in CHR Resolution No. 89-125.
[208] Ibid.
[209] Figures provided Dr. Rene Basas, from the CHR forensic, investigative section.
[210] Note that F.I.N.D., an NGO, has been allotted a yearly P 5 million fund known as justice fund for the victims of involuntary disappearances. They distribute these to help the families of the victims and at the same time to conduct their advocacy, campaigns etc.
[211] Interviews conducted with human rights lawyers in the Philippines in December 2006.

### 2.6. Assistance to Victims of Sexual Violence

The Government has also recently passed the Rape Victim Assistance and Protection Act of 1998.[212] Under this Act, rape crisis centres are to be set up in government hospitals, health clinics or any other suitable places, and are to provide rape victims with psychological counselling, medical and health services, including their medico-legal examination. Psychological counselling and medical services are also to be provided for the family of rape victims whenever necessary. The responsible departments and NGOs shall moreover adopt and implement programs for the recovery of rape victims.[213]

### 2.7. Reparation for torture and other serious violations committed during the Marcos regime

The human rights violations committed by the Marcos regime have been the subject of a lawsuit in the case of *Aberca v. Ver* mentioned above. This is still awaiting resolution at the time of writing. On 24 September 1992, the Hawaii Federal District Court held, in a class action brought by victims of the Marcos regime that Marcos was responsible for involuntary disappearance, summary execution and torture of 9,539 Filipinos and had to pay indemnity to the victims.[214] On 23 February 1994 the jury awarded $1.2 billion in punitive damages, which was an aggregate award to be divided *pro rata* among all the plaintiffs. In January 1995, a further $759 million in compensatory damages was awarded. The final judgment of the US District Court awarding the total damages of nearly $2 billion was upheld on appeal to the United States Court of Appeals for the Ninth Circuit on 17 December 1996. In the same year, the Swiss Supreme Court ruled that the money from Marcos Swiss accounts could be handed back to the Philippines. The condition was that the Government inform the Swiss authorities about legal proceedings in relation to the confiscation and restitution of the money and steps taken to ensure that the money was used to compensate the victims of human rights violations who had obtained the judgment in the US.[215]

On 12 April 2005, the 2nd division of the Philippine Supreme Court ruled in favour of the nearly 10,000 Marcos human rights victims in a long-running legal battle on the enforceability of the US court judgment.

In a separate development, following a judgment by the Philippines Supreme Court in July 2003 that awarded the Marcos assets to the Government of the Philippines on the grounds that it was ill-gotten wealth, the President pledged that 8 billion pesos, out of the $682m recovered and turned over by Swiss banks, will be given to human rights victims as compensation for violations committed during the Marcos regime.[216] The disbursement of the money is contingent upon the passage of a law that would authorise its allocation.

As of late 2007, the victims still had not received compensation. A human rights compensation bill for martial law victims was filed in 1998. After several years without progress, the Marcos Compensation Bill, which allots $200 for each Marcos vctim was ratified by the Senate but failed to pass in Congress due to "lack of quorum" in the House of Representatives in the 13th Congress.

## What steps can lawyers take?

- Support ongoing advocacy efforts to put in place legislation that would allow sufficient funds to be allocated for the benefit of the victims of the Marcos regime
- Seek to ensure that any mechanism put in place to this end will recognise the rights and needs of victims and will be in line with internationally recognised standards

[212] Republic Act No. 8505.
[213] Article 3 of Act No. 8505.
[214] See *Republic of Philippines v Marcos,* 862 F.2d 1355 (9th Cir.1988) (en banc), cert. denied, 490 U.S. 1035, 109 S.Ct.1933 (1989), 104 L. Ed.2d 404 and *Hilao et al. v Estate of Ferdinand Marcos*, 25 F.3d 1467; 1994 U.S. App. LEXIS 14796. *Hilao v Marcos,* 103 F.3d 767 (1996).
[215] The Swiss Supreme Court cited in this context Articles 2 (2) and (3) as well as 14 of the ICCPR and Articles 12-16, in particular Article 14 of the Convention against Torture. BGE_123_II_595, 10 December 1997.
[216] The Official Website of the Republic of the Philippines, 'Rights Victims, CARP beneficiaries to get share from Recovered Marcos Wealth, GMA assures,' 21 July 2003, http://www.gov.ph/news/default.asp?i=3299.

### 2.8. Findings

- **Effectiveness of remedies**

Besides the isolated cases mentioned above, torture survivors and heirs have hardly received any compensation in civil or criminal cases, let alone other forms of reparation. It is only in a very few instances that victims can obtain compensation as part of criminal proceedings. Thus, victims of torture have to resort to bringing a civil case though lack of access to courts, insufficient resources, fear of adverse repercussions, evidentiary hurdles and the fact that effectively no legal recourse against the State is available have often combined to make victims abstain from bringing a civil case in the first place . Moreover, there have been delays in concluding cases, such as in the *Aberca* case mentioned above, where the trial following the reversal of the dismissal has not yet commenced and the applicants have not yet received compensation. It is against this background that the UN Human Rights Committee held that there is a lack of effective remedies in torture cases in the Philippines.[217]

- **Adequate reparation**

Most torture survivors and victims of torture in the Philippines have not received any reparation. Judicial avenues have been largely ineffective. The only money that victims have a reasonable prospect of receiving is the 10,000 pesos financial assistance provided by the Board of Claims and/or the CHR. Yet, this amount is not meant to compensate victims but to assist them. As financial assistance, the money is not awarded or paid with the implicit recognition that the victims have been wronged and that the party paying the money is liable. Instead, the money is paid out of public funds designed to assist a range of victims for public policy reasons rather than being a specific response to torture. Moreover, the amount provided as financial assistance is clearly inadequate and does not reflect the seriousness of the human rights violation of torture. The fact that the amount is normally awarded as a capped lump sum means that individual circumstances of the torture, in particular the impact on the victim, are not taken into account when determining financial assistance.

Some of the financial assistance is provided for the purpose of medical assistance but there is no state rehabilitation programme for torture survivors, past or present. Rehabilitation services are solely provided by NGOs, such as the Balay Rehabilitation Centre. Successive governments have also largely failed to provide satisfaction, in particular acknowledging responsibility for torture, apologising for torture, holding the perpetrators accountable or taking symbolic measures to commemorate the victims of torture. The same assessment applies to guarantees of non-repetition, as successive governments have not enacted laws, such as anti-torture laws, or undertaken reforms, such as police and army reforms, which would act as effective countermeasures against torture.

# Part 4: International remedies available to torture survivors

## *1. International Human Rights Complaints Procedures*

- **UN Human Rights Committee**

The UN Human Rights Committee was established pursuant to Article 28 of the International Covenant on Civil and Political Rights (ICCPR) in order to monitor State Parties' implementation of the ICCPR. As the Philippines has ratified the first Optional Protocol to the ICCPR, torture victims directly or through their lawyers may submit an individual communication to the Committee complaining that their rights under the

[217] Views of the Human Rights Committee, A*lbert Wilson v. The Philippines*, Communication No. 868/1999, U.N. Doc. CCPR/C/79/D/868/1999, 11 November 2003).

ICCPR have been violated. If found admissible, the Committee issues a decision with its views on the merits and, if appropriate, on the forms of reparation due to the petitioners/victims. The Committee's decisions are not binding in and of themselves but are sent as recommendations to the State Party, which is expected to comply with the decision in conformity with its obligations under the ICCPR, and are made public in its annual report.

The UN Human Rights Committee has decided twelve cases brought against the Philippines in the period from October 2000 to April 2007. The Committee considered the issue of torture and ill-treatment in four cases, finding violations in three cases.[218] A further case concerned the effectiveness of remedies in relation to torture compensation claims.

- *Albert Wilson v. The Philippines*, *Communication No. 868/1999*

Mr. Wilson was convicted of raping his own step-daughter and sentenced to death, as well as to P50,000 (US $1,164) indemnity, and placed on death row. Subsequent to the submission of the communication under the Optional Protocol by the author, the Supreme Court considered his case on automatic review, set aside the conviction, finding it based on allegations "not worthy of credence", and ordered his immediate release. On release Mr. Wilson was fined P22,740 (US $529) for overstaying his tourist visa which expired during the period in which he was in detention.

Decision of the UN Human Rights Committee on the merits concerning Articles 7 and 10:

> "As to the author's claims under articles 7 and 10 regarding his treatment in detention and the conditions of detention, both before and after conviction, the Committee observes that the State party, rather than responding to the specific allegations made, has indicated that they require further investigation. In the circumstances, therefore, the Committee is obliged to give due weight to the author's allegations, which are detailed and particularized. The Committee considers that the conditions of detention described, as well as the violent and abusive behaviour both of certain prison guards and of other inmates, as apparently acquiesced in by the prison authorities, are seriously in violation of the author's right, as a prisoner, to be treated with humanity and in with respect for his inherent dignity, in violation of article 10, paragraph 1. As at least some of the acts of violence against the author were committed either by the prison guards, upon their instigation or with their acquiescence, there was also a violation of article 7. There is also a specific violation of article 10, paragraph 2, arising from the failure to segregate the author, pre-trial, from convicted prisoners.
>
> As to the claims concerning the author's mental suffering and anguish as a consequence of being sentenced to death, the Committee observes that the authors' mental condition was exacerbated by his treatment in, as well as the conditions of, his detention, and resulted in documented long-term psychological damage to him. In view of these aggravating factors constituting further compelling circumstances beyond the mere length of time spent by the author in imprisonment under a sentence of death, [footnote omitted] the Committee concludes that the author's suffering under a sentence of death amounted to an additional violation of article 7. None of these violations were remedied by the Supreme Court's decision to annul the author's conviction and death sentence after he had spent almost fifteen months of imprisonment under a sentence of death."

Views adopted by the UN Human Rights Committee:

> "The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by the Philippines of article 7, article 9, paragraphs 1, 2 and 3,

[218] No violation was found in the case of *Messrs. Geniuval M Cagas, Wilson Butin and Julio Asteillo v. The Philippines*, Communication No. 788/1997, as the Committee held that the authors had not sufficiently substantiated torture and ill-treatment.

and article 10, paragraphs 1 and 2, of the Covenant. In accordance with article 2, paragraph 3 (a), of the Covenant, the state party is under an obligation to provide the author with an effective remedy. In respect of the violations of the article 9 the state party should compensate the author. As to the violations of articles 7 and 10 suffered while in detention, including subsequent to sentence of death, the Committee observes that the compensation provided by the State party under its domestic law was not directed at these violations, and that compensation due to the author should take due account both of the seriousness of the violations and the damage to the author's caused. In this context, the Committee recalls the duty upon the State party to undertake a comprehensive and impartial investigation of the issues raised in the course of the author's detention, and to draw the appropriate penal and disciplinary consequences for the individuals found responsible. As to the imposition of immigration fees and visa exclusion, the Committee takes the view that in order to remedy the violations of the Covenant the State party should refund to the author the moneys claimed from him. All monetary compensation thus due to the author by the Sate party should be made available for payment to the author at the venue of his choice, be it within the State party's territory or abroad. The State party is also under an obligation to avoid similar violations in the future."

- *Leon R. Rouse v. The Philippines*, *Communication No. 1089/2002*

Mr. Rouse who was in detention at the time in question, complained that he started suffering serious pain in 2001 due to his kidney problems. He alleged that not being able to do the necessary tests and to receive a proper diagnosis and treatment constituted torture or inhuman or degrading treatment. He also alleged that the denial of his request to visit his dying father amounted to emotional torture or cruel, inhuman and degrading treatment or punishment.

Decision of the UN Human Rights Committee on the merits concerning Article 7:

"As to the author's claim under article 7, the Committee recalls that States parties are under an obligation to observe certain minimum standards of detention, which include provision of medical care and treatment for sick prisoners, in accordance with rule 22 (2) of the Standard Minimum Rules for the Treatment of Prisoners. [footnote omitted] It is apparent from the author's uncontested account that he suffered from severe pain due to aggravated kidney problems, and that he was not able to obtain proper medical treatment from the prison authorities. As the author suffered such pain for a considerable amount of time, from 2001 up to his release in September 2003, the Committee finds that he was the victim of cruel and inhuman treatment in violation of article 7. In the light of this finding, it is unnecessary to consider the author's additional claim under article 7."

Views adopted by the UN Human Rights Committee:

"The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 14, paragraphs 1 and 3 (c) and (e); 9, paragraph 1; and 7 of the International Covenant on Civil and Political Rights.
In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation, inter alia for the time of his detention and imprisonment."

- *Franciso Juan Larranaga v. The Philippines*, *Communication No. 1421/20005*,

The Supreme Court of Philippines found the author guilty of kidnapping and serious illegal detention with homicide and rape of Marijoy Chiong and sentenced him to death under Article 267 of the Revised Penal Code. The author alleged the violation of Article 7 along with Articles 6, 14 and 9 stating that he was being

subject to a prolonged period of detention on death row. In response to the alleged violation of Article 7, the Human Rights Committee considered that the imposition of death sentence on a person after an unfair trial subject that person to the fear that he will be executed and this fear give rise to considerable anguish which cannot be dissociated from the unfairness of the proceedings underlying the sentence.

Decision of the UN Human Rights Committee on the merits concerning Article 7:

> "With regard to the alleged violation of article 7, the Committee considers that to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. In circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to considerable anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. Indeed, as the Committee has previously observed [footnote omitted], the imposition of any death sentence that cannot be saved by article 6 would automatically entail a violation of article 7. The Committee therefore concludes that the imposition of the death sentence on the author after the conclusion of proceedings which did not meet the requirements of article 14 of the Covenant amounts to inhuman treatment, in violation of article 7. [footnote omitted]"

Views adopted by the UN Human Rights Committee:

> "The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of article 6, paragraph 1; article 7; and article 14, paragraphs 1, 2, 3 (b), (c), (d), (e), 5, of the Covenant.
> In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including commutation of his death sentence and early consideration for release on parole. The State party is under an obligation to take measures to prevent similar violations in the future."

- *Mariano Pimentel et. al. v. The Philippines, Communication No. 1320/2004*

The authors, victims of torture during the regime of President Marcos, brought an action against the Marcos estate before the United States District Court in Hawaii, which awarded a total of US $ 1,96,005,859.90 to the 9,539 victims (or their heirs) of torture, summary execution and disappearance. Thereafter the authors filed a complaint before the Regional Trial Court of Makati City to obtain enforcement of the United States' judgment. The Regional Trial Court dismissed the complaint holding that the complainants had failed to pay the filing fee of PHP 472 million (US $ 8.4 million), calculated on the total amount in dispute (US $ 2.2 billion). On 4 August 1999, the authors filed a motion with the Philippines Supreme Court, seeking determination that the filing fee was PHP 400 (US $ 8.9) rather than PHP 472 million (US $ 10,454,014). The Supreme Court did not decide the matter by the time of the submission of the communication before the Human Rights Committee (11 October 2004). In the communication the authors alleged that the proceedings in the Philippines on the enforcement of the US judgment were unreasonably prolonged and that the exorbitant filing fee amounted to a de facto denial of their right to an effective remedy to obtain compensation for their injuries, under article 2 of the Covenant.

Decision of the UN Human Rights Committee on the merits concerning Article 14 in relation to the torture compensation claims:

> "As to the length of the proceedings relating to the issue of the filing fee, the Committee recalls that the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principle of fairness. [footnote omitted] It notes that the Regional Trial Court and Supreme Court spent eight years and three hearings considering this subsidiary issue and that the State party has

provided no reasons to explain why it took so long to consider a matter of minor complexity. For this reason, the Committee considers that the length of time taken to resolve this issue was unreasonable, resulting in a violation of the authors' rights under article 14, paragraph 1, read in conjunction with article 2, paragraph 3, of the Covenant."

Views adopted by the UN Human Rights Committee:

"The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 1, read in conjunction with article 2, paragraph 3, as it relates to the proceedings on the amount of the filing fee.
The Committee is of the view that the authors are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy. The State party is under an obligation to ensure an adequate remedy to the authors including, compensation and a prompt resolution of their case on the enforcement of the US judgement in the State party. The State party is under an obligation to ensure that similar violations do not occur in the future."

In its concluding observations on the state party report submitted by the Philippines, the Human Rights Committee expressed its concerns concerning:

- "the absence of information regarding the status in domestic law of the Covenant and on whether any Covenant provisions have been invoked in court proceedings to date;
- the lack of information on the procedure for the implementation of the Committee's Views under the Optional Protocol. In particular, it is concerned by the grave breaches by the State party of its obligations constituted by its lack of compliance with the Committee's requests for interim measures of protection in cases submitted under the Optional Protocol (Piandiong, Morallos and Bulan v. Philippines)." [219]

### ❑ Committee against Torture

The United Nations Committee against Torture may consider individual communications relating to states parties who have made the necessary declaration under article 22 of the Convention. As at 30 December 2006, 61 states parties had recognised the competence of the Committee to hear individual complaints and a total of 308 complaints had been made. The Philippines has yet to accept the competence of the Committee to hear individual complaints under article 22 of the Convention.

## What steps can lawyers take?

- Raise awareness and provide information as well as training on the individual complaints procedure before the UN Human Rights Committee
- Identify cases that highlight systemic obstacles adversely impacting on prevention, accountability and reparation for torture and, where domestic remedies have been exhausted or are not available, bring a case before the UN Human Rights Committee
- In cases where the UN Human Rights Committee has found a violation, seek domestic enforcement by appealing to the executive, seeking legislative changes or petitioning competent courts, as appropriate, while informing the UN Human Rights Committee about the status of implementation, or lack thereof.

[219] UN Doc. CCPR/CO/79/PHL, 1 December 2003.

## *2. International Human Rights Reporting Procedures*

### ❑ UN Committee against Torture

The Committee is tasked with the examination of reports that all states parties are obliged to submit at regular intervals pursuant to Article 19 of the UN Convention against Torture.[220] In examining these reports, the Committee may also consider information from other UN organs, such as the Special Rapporteur on Torture, alternative reports produced by civil society groups as well as additional information available to it, and discuss these with representatives of the state concerned during its periodic sessions. Following the consideration of state party reports, the Committee will issue concluding observations.[221] The Committee may appoint one or more rapporteurs to monitor the state's compliance with the Committee's conclusions and recommendations.[222]

Under Article 20 of the UN Convention against Torture, if the Committee receives reliable information that appears to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee must invite that State party to cooperate in the examination of the information and submit observations with regard to the information concerned. In agreement with the State Party, the inquiry may include a visit to its territory. The Committee may, after consultation with the State party concerned, decide to include a summary account of the results of the inquiry in its annual report to the other States parties and to the UN General Assembly.

The Philippines submitted its initial report (due on 25 June 1988) to the Committee against Torture on 28 April 1989. It has not submitted any reports since, its second, third, fourth and fifth reports being overdue for almost fifteen years, eleven years, seven years and three years respectively. As a result, the Committee against Torture has not had the opportunity to consider compliance by the Philippines with its treaty obligations under the Convention against Torture over the last fifteen years.

This practice of non-reporting constitutes a failure by the Philippines to comply with its obligations and undermines the effectiveness of the international system. Although the Committee against Torture has adopted various methods to address the problem, these have been largely ineffective to date.[223] The Committee has recently embarked on a process of appointment of Special Rapporteurs to report on the situation in countries whose initial reports have been overdue for a long time, thereby providing an incentive for non-reporting states to engage with the Committee against Torture.[224]

[220] Article 19 states that parties have to submit an initial report "within one year after the entry into force of the Convention for the State party concerned". This initial report is supposed to give an overview of the relevant domestic law and practice. To this end, the Committee against Torture has requested states parties to provide information of a general nature and information in relation to each of the articles in Part I of the Convention. In the subsequent periodic reports, which are to be submitted every four years, states parties are requested, according to the general guidelines issued by the Committee, to provide information on new measures and new developments relating to the implementation of the Convention following the order of articles 1 to 16, as appropriate, additional information requested by the Committee and information on compliance with the Committee's conclusions and recommendations.

[221] Since the mid-1990s, the Committee has been following a consistent practice where the concluding observations are divided into three parts, namely positive aspects, subjects of concern, and recommendations. The state party concerned may reply to the concluding observations.

[222] See rule 68 (1) of the Rules of Procedure of the Committee against Torture, UN Doc. CAT/C/3/Rev.4. The Committee against Torture has now appointed two rapporteurs to follow-up on conclusions and recommendations on states parties reports. See UN Doc. A/57/44, para.16.

[223] See for the practice of the Committee until 2000 Chris Ingelse, *The UN Committee against Torture, An Assessment*, Kluwer Law International, The Hague/London/Boston, 2001, pp. 137 et seq.

[224] See UN Doc. CAT/C/SR.619/Add.1.

**What steps can lawyers take?**

- Raise public awareness about the failure of the Government of the Philippines to report to the Committee against Torture
- Request the Committee against Torture to invoke Rule 65 (3) of its Rules of Procedure concerning non-submission of reports according to which: "In appropriate cases the Committee may notify the defaulting State party through the Secretary-General that it intends, on a date specified in the notification, to examine the measures taken by the State party to protect or give effect to the rights recognized in the Convention, and make such general comments as it deems appropriate in the circumstances."

### ❑ UN Human Rights Committee

The Human Rights Committee is tasked with the examination of reports that all states parties are obliged to submit at regular intervals pursuant to Article 40 of the International Covenant on Civil and Political Rights. It issues concluding observations and engages with the state party to monitor compliance with its recommendations.

The Philippines submitted its initial report to the UN Human Rights Committee on 22 March 1988. Thereafter, it submitted its consolidated second and third report over nine years after its due date, on 26 August 2002. The UN Human Rights Committee issued its concluding observations on this state party report on 1 December 2003 (UN Doc. CCPR/CO/79/PHL), expressing its concerns, in particular about:

- "the lack of appropriate measures to investigate crimes allegedly committed by State security forces and agents, in particular those committed against human rights defenders, journalists and leaders of indigenous peoples, and the lack of measures taken to prosecute and punish the perpetrators. Furthermore, the Committee is concerned at reports of intimidation and threats of retaliation impeding the right to an effective remedy for persons whose rights and freedoms have been violated.
- the reports of persistent and widespread use of torture and cruel, inhuman or degrading treatment or punishment of detainees by law enforcement officials and the lack of legislation specifically prohibiting torture in accordance with articles 7 and 10 of the Covenant. The Committee notes that evidence is not admissible if it is shown to have been obtained by improper means, but remains concerned that the victim bears the burden of proof in this event;
- that the measures of protection of children are inadequate and the situation of large numbers of children, particularly the most vulnerable, is deplorable. While recognizing that certain legislation has been adopted in this respect, many problems remain in practice, such as:

  a) The absence of adequate legislation governing juvenile justice and the deplorable situation of children in detention, including those held without evidence for prolonged periods of time;

  b) Persistent reports of ill-treatment and abuse, including sexual abuse, in situations of detention and children being detained together with adults where conditions of detention may amount to cruel, inhuman and degrading treatment (art.7)."

The Human Rights Committee recommended in particular that:

"The State party should institute an effective system of monitoring treatment of all detainees, to ensure that their rights under articles 7 and 10 of the Covenant are fully protected. The State party should ensure that all allegations of torture are effectively and promptly investigated by an independent authority, that those found responsible are prosecuted, and that victims are given adequate compensation. Free access to legal counsel and a doctor should be guaranteed in practice, immediately after arrest and during all stages of detention. All allegations that statements of detainees have been obtained through coercion must lead to an investigation and such statements must never

be used as evidence, except as evidence of torture, and the burden of proof, in such cases, should not be borne by the alleged victim."

### What steps can lawyers take?

- Monitor the status of implementation of the recommendations contained in the UN Human Rights Committee's concluding observations, and
- Highlight any failings while proposing means of how the Government and national authorities can best comply with the obligations of the Philippines under the ICCPR

#### ❑ UN Special Rapporteur on Torture

The Special Rapporteur's remit to provide the UN Commission on Human Rights with information on governments' legislative and administrative actions in relation to torture extends to all UN Member States. Torture victims, their families or lawyers may submit a communication to the Special Rapporteur, who may, if he receives "credible information suggesting that an individual or a group of individuals is at risk of torture at the hands, consent, or acquiescence of public officials" transmit an urgent appeal (to prevent possible incidents of torture) or raise the allegation in a standard communication with the Philippines Government.[225]

The Special Rapporteur has raised a number of cases with the Government of the Philippines, such as regarding the arrest and subsequent torture by the army of a 60 year old woman, Agnelian Bisuña Ipong, who was later charged with rebellion.[226] The Government has submitted replies to a number of cases, informing the UN Special Rapporteur on what steps have been taken, if any, in response to the urgent appeals raised by the UN Special Rapporteur.[227]

The Special Rapporteur may also undertake country visits, which:

> "provide the Special Rapporteur with a firsthand account of the situation concerning torture, including institutional and legislative factors that contribute to such practices.. Visits are undertaken only at the invitation of a Government. However, the Special Rapporteur may solicit an invitation, based on factors such as the number, credibility and gravity of the allegations received, and the potential impact that the mission may have on the overall human rights situation."[228]

Country visits, which are normally followed by reports providing an overview and analysis of the situation in the country, together with detailed recommendations that will be followed-up by the Special Rapporteur, provide an important occasion to highlight any existing problems and to advocate for specific changes. The Special Rapporteur visited the Philippines in 1991.[229] At present, there are no pending requests from the Special Rapporteur to visit the Philippines.

[225] For more information and contact details, see REDRESS, *Action against Torture: A Practical Guide to the Istanbul Protocol for Lawyers*, IPIP, Revised Edition, October 2007, Annex 1.
[226] UN Doc. E/CN.4/2006/6/Add.1, pp.205, 206.
[227] Ibid. pp.206 et seq.
[228] http://www.ohchr.org/english/issues/torture/rapporteur/visits.htm
[229] UN Doc. E/CN.4/1991/17. http://daccessdds.un.org/doc/UNDOC/GEN/G91/100/26/PDF/G9110026.pdf?OpenElement

## What steps can lawyers take?

- Bring cases of torture, including particular patterns of torture, to the attention of the Special Rapporteur on Torture, requesting him to take appropriate action
- Raise and discuss further with the Special Rapporteur on Torture the possibility of requesting the Government of the Philippines to invite him for a country visit

# ADDENDUM: Torture by non-state actors in the Philippines

## Introduction:[230]

Over the last decades, steps to combat torture worldwide have focused almost entirely on states- for good reason. Torture constitutes the negation of one of the core functions of the state to guarantee the rights of those coming within its jurisdiction, and to ensure their security and well-being. The history of state torture in the Philippines starkly illustrates this point. The responsibility of the state is reflected in the international system for the protection of human rights that does not traditionally contemplate the responsibility of actors other than states. Yet non-state actors are increasingly engaged in conduct that violates human rights, including torture as one of the integral coercive means used to gain or exercise power. This applies in particular to armed groups that have been held responsible for torture worldwide, including in the Philippines.

Under international law and the Constitution of the Philippines, the Government has a duty to refrain from inflicting torture. The duty extends to conduct including providing support, or acting in collusion with non-state actors that engage in torture and enforced disappearances, as has been alleged in relation to the recent spate of abductions and killings.[231] The Philippines also has a positive obligation to protect those within its jurisdiction from torture and ill-treatment irrespective of the identity of the perpetrators, and, where such torture has occurred, to carry out prompt, effective and impartial investigations with a view to holding the perpetrators accountable. Victims should also have an effective remedy to claim reparation from those responsible.

Preventing torture by non-state actors, holding such actors to account and providing justice to victims can be difficult. Under international law, there is a lack of clarity as to whether and how non-state actors are bound by international human rights. Armed groups may commit themselves to human rights, such as the CPP-NPA in the 1998 peace agreement, but there is often no effective remedy or enforcement procedure in case of breach. Armed groups engaged in an armed conflict are bound by the prohibition of torture under international humanitarian law, namely article 3 common to the four Geneva Conventions of 1949. However, there are no international complaints procedures and enforcement mechanisms. Equally, there are normally no national laws that would allow holding armed groups or their members accountable for violations of international humanitarian law. Perpetrators incur liability under international criminal law for torture, in particular where such acts constitute crimes against humanity and/or war crimes. However, they can only be prosecuted for international crimes where such crimes are recognised in domestic law or where an international criminal tribunal has jurisdiction to try such crimes. The Philippines has neither recognised international crimes in its domestic legal order nor become a party to the Rome Statute giving jurisdiction to the International Criminal Court.[232] In lieu of international mechanisms and the recognition of international standards in domestic law, non-state actors can only be held accountable under domestic law, which is often, including in the Philippines, ill-equipped to ensure effective access to justice and accountability in such cases.

## 1. Practice[233]

Several armed groups have reportedly been responsible for torture, including the Communist Party of the Philippines-New People's Army- National Democratic Front (CPP-NPA-NDF), Moro National Liberation Front (MNLF), Moro Islamic Liberation Front (MILF), the Abu Sayyaf Group (ASG) and the Rajah

[230] This chapter draws on a report by REDRESS, *Not only the State: Torture by non-state actors: Towards Enhanced Protection, Accountability and Effective Remedies*, May 2006.
[231] See Amnesty International, *Philippines: Political Killings, Human Rights and the Peace Process* (AI Index: ASA 35/006/2006), Asian Human Rights Commission, *The State of Human Rights in Eleven Asian Nations- 2006: Philippines*, pp.220 et seq. and Human Rights Watch, *Sacred Silent: Impunity for Extrajudicial killings in the Philippines*, June 2007.
[232] The Philippines has signed, on 28 December 2000, but not ratified the Rome Statute of the International Criminal Court
[233] This section focuses on torture reportedly committed by armed groups. It draws on a range of information, in particular by PATH (Peace Advocates for Truth, Healing and Justice), most of which is available from the PATH website at http://path-philippines.blogspot.com/

Solaiman Movement (RSM).[234] It is notoriously difficult to obtain reliable information about torture by armed groups, given the nature of their operations and the threat of retribution facing anyone who dares to speak out. The situation in the Philippines is special because it is one of the first cases worldwide where survivors of torture by non-state actors have organised themselves and have spoken out publicly about the torture they suffered.[235]

Torture and executions were an intrinsic part of internal purges that were launched systematically as regional operations or campaigns in the various CPP-NPA-NDF regions and sustained throughout the '80s.[236] The range of torture methods documented in detention camps include: beatings, lacerating the skin with a blade, hanging by the wrists or ankles, rape, sexual molestation and humiliation (e.g., women stripped naked were forced to brawl), clamping and mutilating male and female genitalia with forceps, searing the private parts with molten plastic, water cure, suffocation with plastic bags, denial of food and water; tranquilizers and drugs used as truth serum, like Ativan, Novain, and Demerol; and other methods. Methods of execution included: bashing the back of the skull with a wooden club, stabbing with a fixed bayonet or sharpened bamboo stick, breaking the neck ("marine hold"), beheading, and disembowelling. While the exact number of those tortured and killed in these campaigns is unknown, it is clear that there are at least several thousands of victims.

When the corrosive nature of the purges resulted in increasing paranoia and began to threaten the survival of the party itself, the CPP-NPA-NDF decided to intervene and to halt the campaigns in 1988. There continue to be sporadic reports about cases of torture and arbitrary executions of suspected infiltrators by the CPP-NPA-NDF but these could not be validated. Following the end of the campaigns, the party vindicated some individual members who were told not to tell anyone about the purges. In 1992, the CPP made a general admission that the purges had been "madness", due to "extreme paranoia" and a prevailing "siege mentality," and had resulted from a "deviation to CPP principles and strategies of protracted people's war." In a press statement issued on 9 February 2002, the CPP admitted that the Operation Plan Missing Link (OPML) had been an error and declared that the victims of the purge were "martyrs of the revolution."

The CPP has apologized to some of the families and relatives and took limited disciplinary measures, ranging from stern warnings to suspension of membership of some of those responsible. The party also paid out P 10,000 for victims of the OPML and between P 10.000-20,000 to victims of the KAHOS campaigns but only few relatives of those killed received any money.

Many of the demands by the victims of the purges, in particular to retrieve the body, 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.

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[234] See on the ASG and RSM the report by Human Rights Watch, *Lives Destroyed, Attacks against Civilians in the Philippines*, July 2007, that documents bombings, kidnappings and killings attributed to these groups.

[235] The NGO PATH has worked since 2001 to bring out the truth about arbitrary detentions, torture and killings committed by the CPP-NPA-NDF in the 1980s and to obtain justice for the victims. Its efforts received widespread attention in 2000 with the publication of the book by its former chair, Bobby Garcia, *To Suffer Thy Comrades: How the Revolution Decimated its Own*, in which he details the torture he and others suffered.

236 The first campaigns were launched at the height of the anti-insurgency drive of Marco's regime in the Southern Tagalog Region (Oplan Cadena de Amor). While the CPP-NPA-NDF's direct responses to Cadena de Amor were either counter-offensives or defensive strikes, they also formed internal investigation and arresting teams to purge suspected spies. Around thirty cadres suspected as "AAs" (Action Agents with primary mission to assassinate key leaders) or "DPAs" (Deep Penetration Agents assigned to infiltrate the highest Party organs) were tortured and killed during the 1981 campaign in the Quezon-Bicol Zone. In Northern Luzon, Anti-DPA operations throughout the 1980s were marked by widespread torture and resulted in 300 accounted deaths of party members and an estimated 1,000 deaths of ordinary citizens. In the Kahos campaign (July 1985-March 1986) in Mindanao, more than 1,500 persons were arrest and tortured, and 800 killed. Oplan Missing Link (OPML) lasted from April to December 1988 in the NPA Sierra Madre camps in the Laguna and Quezon provinces. 112 party members and supporters are the known victims of this campaign: 46 survived detention and torture and 66 were confirmed killed. Almost all victims were middle-level political or military cadres; many were labour leaders and youth and student organizers, and some were regional party members. A number of cadres and activists were tortured and killed in a further operation, "Olympia", carried out in the last quarter of 1987 and finally stopped in early 1989, with some members known to have been detained were 'contained' until 1992.

## 2. Liability of non-state actors in the law of the Philippines

### (i) Criminal Law

Torture by non-state actors, in particular armed groups, is subject to the Penal Code. Members of armed groups responsible for torture may be prosecuted and tried for ordinary criminal offences only, such as murder and inflicting serious physical injuries, which apply in lieu of a specific criminal offence that would encompass torture by non-state actors. Torture by non-state actors may amount to war crimes and/or crimes against humanity where committed in a widespread and/or systematic manner that states may prosecute or may even be bound to prosecute under relevant treaties and customary international law. However, there is no domestic legislation that would allow prosecuting non-state actors for international crimes in the Philippines. For these reasons, there is a serious lacuna in the applicable legislation that limits criminal responsibility of non-state actors.

Several cases have been filed against leading members of the CPP-NPA. Survivors and victims of those killed brought a complaint concerning five cases of murder and serious illegal detention against Medardo Buncayo and Rogelio Ballester, purported to be responsible for implementing OPML in the period February to December 1988. The complaint was filed with the Laguna Provincial Prosecutor Office on 12 February 2006 (I.S. Number 06-143 for Preliminary Investigation (P.I.) under the sala of Provincial Prosecutor George Dee and Investigating Fiscal Jose Albert Cumilang.[237]

The murder charge was dismissed on the grounds of lack of direct evidence, "either testimonial or documentary that would show that the mass killings were actually and in fact perpetrated or ordered by herein respondents."[238] Prosecutor Dee also dismissed the initial determination that there is probable cause for the offence of serious illegal detention, and the recommended filing of the appropriate information. In a Memorandum dated 16 August 2006, he decided not to take action on the ground that the complainants had "freely, willingly and voluntarily submitted themselves to the jurisdiction of the party organs including the investigating committees" and that they had "failed to produce independent evidence to substantiate the fact that herein respondents were indeed liable for their purported detention."[239] The complainants filed a motion for reconsideration on 18 September 2006, requesting that an appropriate information for serious illegal detention be filed against the Respondents, asserting that the Prosecutor:

> "may have overlooked the fact that the complainant's admission of their membership in the Communist Party is not synonymous to an assent to submit themselves to serious illegal detention whereby they were tortured, subjected to verbal and physical abuse and their lives threatened…[and] the fact that complainants were able to identify the respondents and their particular participation as the most responsible perpetrators of "Operation Plan Missing Link" of the Communist Party of the Philippines-New People's Army (CPP-NPA)."[240]

No final decision on this motion for reconsideration has been made to date. The case illustrates the difficulties faced by survivors in holding perpetrators to account, in particular:

- Lack of sufficient evidence because there are often no independent witnesses and because some survivors and victims are not willing to testify and/or to execute an affidavit against the perpetrators, out of fear or for other reasons. Moreover, most of the victims have no medical certificates or other such evidence to corroborate their accounts; and
- Willingness of prosecution to reject accusations, on the grounds that the victims were members of armed groups and had brought the suffering about themselves by submitting to party discipline. This

[237] Complaint brought by Rogel M. Navarro (survivor) and Robert Francis B. Garcia (survivor), Manuel P. Quimbao (survivor), Jose Paner (son of Maximiano Paner, toruterd and killed during OPML), Mon Liboro (brother of Ka Romy, tortured and killed during OPML), on file with REDRESS.
[238] In their motion to reconsider, dated 18 September 2006, the complainants stated that: "… we have reasons to conform with the findings of the Honorable Investigating Prosecutor that MURDER, though undeniably committed in the course of the communist purge subject matter of this complaint, as we cannot as yet establish the facts of the same as the exhumation therefor was conducted by the military in the late 80's and we cannot find records that would sustain our allegations sufficient to establish the quantum of proof required in preliminary investigations."
[239] On file with REDRESS.
[240] On file with REDRESS.

effectively indicates a strong reluctance on the part of the State to "interfere" in internal matters. As armed groups are known to have tortured their own members, this is an abdication of the states' responsibility to protect those coming within its jurisdiction, which equally applies to members of armed groups.

In spite of calls by victims associations and others, to date there has not been any impartial inquiry into the factual circumstances and responsibility for the torture and killings committed during the communist purges or in the course of operations by other armed groups. Survivors and victims continue to call for such inquiries in order to establish the truth and to obtain justice.

### (ii) Civil Law

Victims of torture by non-state actors may sue the perpetrator(s) for damages either in criminal or civil proceedings, liability being based on quasi-delicts (tort law) pursuant to articles 2176 of the Civil Code. Perpetrators may be sued individually. Victims may also be able to sue both the individual perpetrators and the entity on the grounds of joint liability.

There are no known cases in which victims of torture by non-state actors sued those responsible. This may be due to the difficulties that victims face when contemplating to bring cases against non-state actors, in particular obtaining reliable evidence in the face of possible retribution by the perpetrators. Moreover, claims relating to torture and other violations committed during the CPP-NPA-NPF purges in the 1980s, will most probably be time-barred because claims have to be brought within four years from when the violation occurred. This time limit is unreasonably short in torture cases.

### (iii) Commission on Human Rights

The Commission on Human Rights may in principle deal with cases of torture committed by non-states but has not done so in practice. One reason for this is the difficulties encountered in investigating violations in the course of armed conflict.

## 3. Legal proceedings against non-state actors in third countries

Where possible under the law of the country concerned, victims may bring criminal or civil proceedings against accused persons in foreign countries. Victims may also seek to prevent perpetrators from obtaining refugee status.

In August 2006, the administrative court in Minden, Germany excluded a prominent member of the CPP-NPA, Jose Luneta alias Pepe, from obtaining refugee status on the grounds that there was credible evidence that he was responsible for crimes committed during OPML in the late 1980s.

The decision of the Court was based on section 60, para.8 of the German Residence Act, [241] which incorporates Article 1 F of the Geneva Convention.[242] The Court found evidence of Jose Luneta's responsibility for OPML, and provided evidence of arrests and detentions, physical and psychological ill-treatment and executions committed during OPML that amounted to serious non-political crimes. Having denied Jose Luneta refugee status, the Court found that he could, at least for the time being, not be deported to the Philippines because, if returned, he would face a significant risk for his life, limb or freedom. [243]

[241] ((Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG)), 2004.
[242] Section 60 para 8 of the Residence Act stipulates that a person is not a refugee if there are serious reasons for considering that
- he has committed a crime against peace a war crime, or a crime against humanity as defined in international instruments drawn up to make provision in respect of such crimes; or - he has committed a serious non-political crime outside Germany prior to his admission as a refugee; or
- he has been guilty of acts contrary to the purposes and principles of the United Nations.
[243] Section 60 para 7 of the Residence Act.

### What steps can lawyers take?

- Raise awareness about torture committed by non-state actors, in particular armed groups, and the need for accountability and justice for such crimes
- Seek ways of holding non-state actors accountable and obtaining reparation for victims of torture by such actors, in particular by setting precedents in criminal, civil and administrative proceedings, both in the Philippines and in third countries as appropriate
- Enter into a dialogue with the Commission on Human Rights to explore ways of better addressing the problem of torture by non-state actors by means of engagement as well as accountability mechanisms

## 4. Peace process and engagement

Several non-state actors and the Government of the Philippines have entered into peace agreements that include a commitment by both parties to human rights and/or humanitarian law, in particular the:

- Comprehensive Agreement on Human Rights and International Humanitarian law entered into between the Government of the Philippines and the National Democratic Front, including the Communist Party and the New People's Army (CARHRIHL), 16 March 1998
- Peace Agreement between the Government and the RPMP-RPA-ABB, 6 December 2000; and
- Agreement on peace between the Government and the Moro Islamic Liberation Front, known as the Tripoli Agreement, 22 June 2001

The CARHRIHL is the most far-reaching agreement with regard to human rights commitments and monitoring mechanisms, and has a number of notable features. Both parties recognise human rights and humanitarian law and "commit themselves to respect human rights and the principles of international humanitarian law and to uphold all rights." The rights listed in the agreement include the prohibition of torture under both international human rights and international humanitarian law. The agreement also contains a noteworthy affirmation of the right to reparation for victims of violations committed by either party, namely "the rights of the victims and their families to seek justice for violations for human rights, including adequate compensation or indemnification, restitution and rehabilitation, and effective sanctions and guarantees against repetition and impunity." The parties "encourage all victims of such violations or their surviving families to come forward with their complaints and evidence" and stipulate that "the persons liable for violations of the principles of international humanitarian law shall be subject to investigation and, if evidence warrants, to prosecution and trial. The victims or their survivors shall be indemnified. All necessary measures shall be undertaken to remove the conditions for such violations and to render justice to and indemnify the victims."

The agreement establishes a Joint Monitoring Committee mandated to receive complaints, to request investigations of a complaint by the Party concerned and to make recommendations. However, agreement on operational guidelines for the JMC was only reached in 2004, with the respective committees set up subsequently. In a recent development, the older sisters (Consolacion Anasco-Niduelan and Angelita Longanilla) of Luz and Herculano Laguna whose remains had been exhumed by members of PATH in September 2006, filed a complaint against the CPP-NPA-NDF Joint Monitoring Committee (JMC) on 27 November 2006. The JMC sent a letter acknowledging receipt of the complaint and promised to investigate but it is not clear what steps, if any, have been taken subsequently. The JMC's constitute a significant monitoring and complaints mechanism. However, while it may be premature to assess the effectiveness of the JMC's given their relatively recent establishment and the circumstances in which they operate, there are concerns that they are ill-equipped to investigate complaints effectively.

Human rights organisations and the ICRC have engaged members of armed groups to discuss about human rights issues, including past violations, and to engage in training activities. It is difficult to assess

how effective this engagement has been on the ground as violations continue to be reported. However, there is certainly a greater general awareness of relevant standards amongst non-state actors, including of the possibility of facing criminal prosecutions for any violations that constitute international crimes, such as torture.

### What steps can lawyers take?

- Invoke the Comprehensive Agreement on Human Rights and International Humanitarian Law (CAHRIHL), and use it as a source of rights and obligations in monitoring and advocacy initiatives, and, as appropriate, in litigation
- Engage with the army and members of armed groups to raise awareness through discussions, training and other such activities