

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

"Promoting human rights by protecting those who defend them."

The Duty of the Philippines Government to Investigate Extra-judicial Killings

Matthew Stacey B.A., LL.B.

for

Lawyers Rights Watch Canada¹

Introduction

It has been widely reported that in recent years there has been a pattern of extrajudicial killings of lawyers, judges, human rights defenders, journalists and leaders of indigenous peoples in the Philippines.² There is serious concern that the Arroyo administration has not done enough to effectively address the extrajudicial killings, and that this inaction has led to a culture of impunity in which even more killings and human rights violations can take place.

This paper discusses the duty of the Philippines under international law to conduct effective investigations into the extra-judicial killings. The first part of this paper will

¹ Lawyers Rights Watch Canada is a committee of Canadian lawyers who promote human rights and the rule of law internationally by providing support to lawyers and other human rights defenders in danger because of their advocacy. LRWC is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations.

² Human Rights Watch, *Scared Silent: Impunity for Extrajudicial Killings in the Philippines*, June 28, 2007, <http://hrw.org/reports/2007/philippines0607/>; Dutch Lawyers for Lawyers Foundation, *From Facts to Action: Report on the Attacks Against Filipino Lawyers and Judges*, July 24, 2006, http://www.pinoyhr.net/reports/dutch_lflf.pdf; Philip Alston, Press Statement. *Extrajudicial killings have a corrosive effect on civil society and political discourse in the Philippines*, February 21, 2007, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/7B6094F7150CDC99C125728A003B12B1?opendocument>; Remollino, Alexander Martin, *Philippines Among the Most Dangerous for Lawyers*. Butlatlat. Vol VI, No. 45, Dec. 17-23, 2006; Hong Kong Mission for Human Rights and Peace in the Philippines July 23-28, 2006, *Mission Report on the extrajudicial killings and other human rights abuses in the Philippines*, November 14, 2006, <http://www.pinoyhr.net/reports/missionreport.pdf>.

focus on the general duty of states under international law to conduct effective investigations when individuals have been killed as a result of the use of force (the “duty to investigate”). The second part of this paper will focus on the duty to investigate applied to the Philippines.

Part I: The Duty to Investigate

This part will discuss the legal foundation for the duty to investigate, the standards for an effective investigation, and the remedies available when those standards are not satisfied.

Is there a duty to investigate?

The most developed body of jurisprudence dealing with the duty to investigate has been produced by the European Court of Human Rights (ECtHR), which hears complaints of violations of the *European Convention on Human Rights* (ECHR). The ECtHR has held that States are compelled to carry out an effective investigation by Article 2(1) in combination with Article 1 of the ECHR.³ The failure to properly investigate an extra-judicial killing constitutes a violation of these articles.

Article 2(1) states:

Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Article 1 provides that each State to the ECHR shall secure to everyone within its jurisdiction the rights and freedoms defined in the ECHR.

³ *Hugh Jordan v. the United Kingdom* (Application no. 24746/94) Judgment, Strasbourg, 4 May 2001, para. 105; *Çiçek v. Turkey* (Application no. 25704/94) Judgment, Strasbourg 27 February 2001, para. 148; *Kaya v. Turkey* (158/1996/777/978) Judgment, Strasbourg, 19 February 1998, . 105; *McKerr v. the United Kingdom*, (Application no. 28883/95), Judgment, Strasbourg, 4 May 2001, para. 111-115; *Kelly and Others v. the United Kingdom*, (Application no. 30054/96), Judgment, Strasbourg, 4 May 2001, *Shanaghan v. the United Kingdom*, (Application no. 37715/97) Judgment, Strasbourg, 4 May 2001; *Makaratzis v. Greece* [GC], (Application no. 50385/99), Judgment, Strasbourg, 20 December 2004, para. 73-79.

The most articulate discussion of the duty to investigate is found in *Finucane v. The United Kingdom*⁴, where the applicant claimed there had been no effective investigation of the execution style murder of her husband, Patrick Finucane. Evidence indicated collusion by UK, army, security and police with Finucane's killers. The ECtHR found that the obligation to protect the right to life, includes, when an individual is killed by the use of force, the duty to ensure an effective investigation culminating in appropriate prosecutions and punishment. The ECtHR described the duty to investigate as follows:

67. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 324, § 86). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances.

The ECtHR found that the proceedings following the death of Finucane failed to provide a prompt and effective investigation into the allegations of collusion by security personnel, and, as a result, the ECtHR found that the UK violated Article 2 of ECHR.

The ECtHR has found that the duty to investigate exists even in cases where the State was not directly implicated in the extra-judicial killing. In *Kaya v. Turkey*⁵, the ECtHR held that although it had not been established that the applicant's brother was unlawfully killed, Article 2 was breached nonetheless "on account of the failure of the authorities of the respondent State to conduct an effective investigation into the circumstances

⁴ (Application no. 29178/95) Judgment, Strasbourg, 1 July 2003.

⁵ *Supra* note 1.

surrounding the death of the applicant's brother". Similarly, in *Ergi v. Turkey*⁶, the ECtHR stated that the duty to investigate "is not confined to cases where it has been established that the killing was caused by an agent of the State".⁷

The Inter-American Court of Human Rights (IACtHR) hears complaints of violations of the *American Convention on Human Rights* (ACHR). The IACtHR has found that a State has a duty to investigate an extra-judicial killing as part of an overarching duty to ensure that all persons within the State's jurisdiction enjoy the full and free exercise of the human rights defined in the ACHR.⁸ The duty stems from Article 4(1) in combination with Article 1(1) of the ACHR.

Article 4(1) states:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

Article 1(1) states:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

In *Velasquez Rodriguez*⁹, the IACtHR discussed disappearances that occurred in Honduras from 1981 to 1984. The disappearances followed a similar pattern, and it was public knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders. The IACtHR found that

⁶ (Application no. 66/1997/850/1057), Judgment, Strasbourg, 28 July 1998.

⁷ *Ibid*, para.82.

⁸ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4; I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*. Judgment of June 7, 2003. Series C No. 99; I/A Court H.R., *Case of Myrna Mack-Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101.

⁹ *Supra*, note 7.

Manfredo Velasquez, a student who was allegedly involved in “dangerous” activities, was kidnapped by the Honduran Armed Forces. In commenting on Article 1(1), the IACtHR said the following:

172. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, or all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

Speaking specifically of the duty to investigate, the Court said the following:

176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

177. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

The IACtHR found Honduras directly responsible for the disappearance of Velasquez. It is important to note, however, that the IACtHR would have found a violation solely on the basis that Honduras failed to secure Rodriguez' human rights:

182. The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1 (1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.

In *Myrna Mack Chang*¹⁰, Mack studied the phenomenon of internally displaced persons in Guatemala during the armed conflict. Based on her research, she concluded that the main cause of the internal displacements of the Guatemalan indigenous communities was the Guatemalan Army's counterinsurgency program. After she criticized the Army's policies toward the displaced population, Mack was placed under surveillance and then executed in a military intelligence operation developed by the high command of the Presidential General Staff.

The IACtHR explained how the lack of an effective investigation into a series of extra-judicial killings violates the right to life:

152. On this matter, the Court has pointed out that when there is a pattern of extra-legal executions fostered or tolerated by the State, this generates an environment that is incompatible with effective protection of the right to life. This Court has established that the right to life plays a fundamental role in the American Convention because it is a prior condition for realization of the other rights. When the right to life is not respected, all the other rights lack meaning. The States have the obligation to ensure the creation of such conditions as may be required to avoid violations to this inalienable right and, specifically, the duty of avoiding attempts against it by the agents of the State.

153. Compliance with Article 4 of the American Convention, in combination with Article 1(1) of that same Convention, requires not only that no person be arbitrarily

¹⁰ *Supra*, note 7

deprived of his or her life (negative obligation), but also that the States adopt all appropriate measures to protect and preserve the right to life (positive obligation), under their duty to ensure full and free exercise of the rights by all persons under their jurisdiction. This active protection of the right to life by the State involves not only its legislators, but all State institutions, and those who must protect security, be these its police forces or its armed forces. Therefore, the States must adopt all necessary measures, not only to prevent, try, and punish deprivation of life as a consequence of criminal acts, in general, but also to prevent arbitrary executions by its own security agents.

[. . . .]

156. In cases of extra-legal executions, it is essential for the States to effectively investigate deprivation of the right to life and to punish all those responsible, especially when State agents are involved, as not doing so would create, within the environment of impunity, conditions for this type of facts to occur again, which is contrary to the duty to respect and ensure the right to life.

157. In this regard, safeguarding the right to life requires conducting an effective official investigation when there are persons who lost their life as a result of the use of force by agents of the State.

The IACtHR concluded that the extra-legal execution of Mack, carried out in a climate of impunity which was tolerated by various State authorities and institutions, violated Article 4(1) in combination with Article 1(1) of the ACHR.

The ECtHR and the IACtHR have interpreted the ECHR and the ACHR as imposing a positive duty on ratifying states to conduct an effective investigation when individuals have been killed within state jurisdiction. This is a duty that arises from a person's "right to life"¹¹ in combination with the State's obligation to recognize and guarantee the rights of the respective Conventions.¹² A proper investigation is necessary to secure the effective implementation of the domestic laws, which protect the right to life. Further,

¹¹ Article 2(1) of the ECHR and Article 4(1) of the ACHR.

¹² Article 1(1) of the ECHR and Article 1(1) of the ACHR.

the failure to investigate, especially where there is a pattern of extra-judicial killings, creates a culture of impunity that is incompatible with this right.

As the *International Convention on Civil and Political Rights (ICCPR)*¹³ and the *African Charter of Human and People's Rights (ACHPR)*¹⁴ have “right to life” and “State guarantee” provisions¹⁵ comparable to those in the ECHR and ACHR, the States that have ratified these instruments are similarly bound by a duty to investigate. Article 6.1 of the ICCPR guarantees the right to life,

Every human being has the inherent right to life. This right shall be protected by law.

No one shall be arbitrarily deprived of his life.

Articles 1-3 of the ICCPR imposes on ratifying states a duty to take effective measure to protect the right to life and provide remedies for rights violations. Article 3 extends this duty to cases in which the rights violations have been committed by state agents.

3. Each State Party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

The United Nations Human Rights Committee (HRC) comments on Article 2 of the ICCPR are consistent with the view that States that have ratified the ICCPR have positive obligations to investigate violations of the rights protected under the ICCPR:

The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to

¹³ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

¹⁴ Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

¹⁵ Right to life: Article 6(1) of the ICCPR and Article 4 of the ACHPR. State guarantee: Article 2 of the ICCPR and Article 1 of the ACHPR.

violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.¹⁶

Even apart from the obligations created by human rights treaties, there is a strong argument that States have a duty to investigate extra-judicial killings under customary international law. The right to life is among the most strongly protected of all fundamental human rights and is widely recognized as having reached the status of customary international law.¹⁷ It follows that the duties and obligations flowing from this right must be undertaken under customary international law. In addition to the above caselaw and HRC comments, support for this position is evidenced by the fact that the United Nations has developed extensive detailed standards for investigation of extra-judicial killing, including the *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (the “UN Investigation Principles”)¹⁸ and the *Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions* (the “Minnesota Protocol”).¹⁹

Standards for an Effective Investigation

In *Finucane*, the EctHR summarized its views on what constitutes an effective investigation:

68. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see, for example, *Güleç v. Turkey*, judgment of 27 July 1998, Reports 1998-IV, p. 1733, §§ 81-82; *Oğur v.*

¹⁶ Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 8.

¹⁷ See Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law” (1995-96) 25 Ga. J. Int’l and Comp. L. 287 at 343.

¹⁸ Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.

¹⁹ Part III of the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/. 12 (1991).

Turkey [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, *Ergi v. Turkey*, judgment of 28 July 1998, Reports 1998-IV, pp. 1778-79, §§ 83-84, and the recent Northern Irish cases cited above, for example, *McKerr*, § 128, *Hugh Jordan*, § 120, and *Kelly and Others*, § 114).

69. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances (see, for example, *Kaya*, cited above, p. 324, § 87) and to the identification and punishment of those responsible (see *Oğur*, cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see, for example, *Salman v. Turkey* [GC], no. 21986/93, § 106, ECHR 2000-VII; *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV; and *Gül v. Turkey*, 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see the recent Northern Irish cases concerning the inability of inquests to compel the security force witnesses directly involved in the use of lethal force, for example *McKerr*, cited above, § 144, and *Hugh Jordan*, cited above, § 127).

70. A requirement of promptness and reasonable expedition is implicit in this context (see *Yaşa v. Turkey*, judgment of 2 September 1998, Reports 1998-VI, pp. 2439-40, §§ 102-04; *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80, 87 and 106, ECHR 1999-IV; *Tanrıkulu*, cited above, § 109; and *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-07, ECHR 2000-III). While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, for example, *Hugh Jordan*, cited above, §§ 108, 136 40).

71. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however,

the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç*, cited above, p. 1733, § 82; *Oğur*, cited above, § 92; *Gül*, cited above, § 93; and the recent Northern Irish cases, for example *McKerr*, cited above, § 148).

The IACtHR has not set out in detail what it considers to be acceptable standards for an effective investigation.

Several ECtHR decisions have cited the UN Investigation Principles as guidelines for the investigation of killings where government officials were allegedly complicit and the subsequent legal proceedings.²⁰ Although they are non-binding, the principles represent a detailed guide to good practice in investigating alleged unlawful killings. The principles include requirements for:

- thorough, prompt, and impartial investigation of all suspected cases of extra-legal, arbitrary, and summary executions;
- an independent commission of inquiry for those cases in which the established investigative procedures are ineffective because of lack of expertise or impartiality, and for cases in which there are complaints from the family of the victim about these inadequacies or other substantial reasons;
- protection from violence or intimidation for complainants, witnesses, families, and investigators;
- removal from power or control over complainants, witnesses, families, or investigators of anyone potentially implicated in extra-legal, summary or arbitrary executions;

²⁰ *Finucane*, *supra* note 2 at para. 56, *Hugh Jordan*, *supra* note 2 at para. 90, *McKerr*, *supra* note 2 at para. 95.

- access by families and their legal representatives to any hearing and to all relevant information, and the right to present other evidence;
- a detailed written report on the methods and findings of the investigation to be made public within a reasonable time;
- government action to bring to justice persons identified by the investigation as having taken part in extra-legal, arbitrary and summary executions;
- responsibility of superiors, officers or other public officials for acts committed under their authority if they had a reasonable opportunity to prevent such acts; and
- fair and effective compensation for the families and dependents of victims of extra-legal, arbitrary and summary executions within a reasonable period of time.

Remedies for the Failure to Investigate

If the ECtHR finds that there has been a violation of a right of the ECHR, it may award “just satisfaction”.²¹ Thus far, where the ECtHR has found a violation of the right to life because of a failure to conduct an effective investigation, it has awarded only monetary compensation. It has not gone so far as to compel a State to carry out an effective investigation. In *Finucane*, the ECtHR said the following:

89. As regards the applicant's views concerning the provision of an effective investigation, the Court has not previously given any indication that a Government should, as a response to such a finding of a breach of Article 2, hold a fresh investigation into the death concerned and has on occasion expressly declined to do so (see *Ülkü Ekinci v. Turkey*, no. 27602/95, § 179, 16 July 2002). Nor does it consider it appropriate to do so in the present case. It cannot be assumed in such cases that a future investigation can usefully be carried out or provide any redress, either to the victim's family or to the

²¹ Article 41 of the ECHR.

wider public by ensuring transparency and accountability. The lapse of time and its effect on the evidence and the availability of witnesses inevitably render such an investigation unsatisfactory or inconclusive, by failing to establish important facts or put to rest doubts and suspicions. Even in disappearance cases, where it might be argued that more is at stake since the relatives suffer from the ongoing uncertainty about the exact fate of the victim or the location of the body, the Court has refused to issue any declaration that a new investigation should be launched (see *Orhan v. Turkey*, no. 25656/94, § 451, 18 June 2002). It rather falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance in each case (see, *mutatis mutandis*, *Akdivar and Others v. Turkey* (Article 50), judgment of 1 April 1998, Reports 1998-II, pp. 723-24, § 47).

In contrast to the ECtHR, the IACtHR has granted expansive remedies in cases where a State has breached its duty to investigate, including the ordering of a fresh investigation. The IACtHR has said that when an illegal act, which can be imputed to the State, occurs, the State's responsibility for the violation of the international norm in question arises immediately, with the consequent obligation to repair and to make the consequences of the said violation cease.²² In *Myrna Mack Chang*, the IACtHR said the following with respect to reparations where there has been an extra-judicial killing:

273. This Court has repeatedly referred to the right of the next of kin of the victims to know what happened and to know who are the agents of the State responsible for the respective facts. As the Court has stated, “[w]hen there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible, [...] and this obligation must be complied with seriously and not as a mere formality.”

274. The Court has reiterated that every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations. This right to the truth has been developed

²² *Myrna Mack Chang Case*, *supra* note 7, para. 235; I/A Court H.R., *Case of Bulacio v. Argentina*. Judgment of September 18, 2003. Series C No. 100, para. 71; *Juan Humberto Sánchez Case*, *supra* note 7, para. 148; and I/A Court H.R., *Case of the “Five Pensioners” v. Peru*. Judgment of February 28, 2003. Series C No. 98, para. 174. Note that Article 63(1) of the ACHR states that if the IACtHR finds that there has been a violation of a right or freedom protected by ACHR, the Court shall rule that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

by International Human Rights Law; recognized and exercised in a concrete situation, it constitutes an important means of reparation. Therefore, in this case it gives rise to an expectation that the State must satisfy for the next of kin of the victim and Guatemalan society as a whole.

275. In light of the above, to completely redress this aspect of the violations committed, the State must effectively investigate the facts in the instant case, so as to identify, try, and punish all the direct perpetrators and accessories, and the other persons responsible for the extra-legal execution of Myrna Mack Chang, and for the cover-up of the extra-legal execution and of the other facts in the instant case, aside from the person who has already been punished for these facts. The outcome of the proceeding must be made known to the public, for Guatemalan society to know the truth.

Among others, the IACtHR made the following orders:

- (a) the State must effectively investigate the facts of the case, with the aim of identifying, trying, and punishing all the direct perpetrators and accessories, and all others responsible for the extra-legal execution of Myrna Mack Chang, and for the cover-up of the extra-legal execution and other facts of the case;
- (b) the State must remove all de facto and legal obstacles and mechanisms that maintain impunity in the case, provide sufficient security measures to the judicial authorities, prosecutors, witnesses, legal operators, and to the next of kin of Myrna Mack Chang, and resort to all other means available to it so as to expedite the proceeding; and
- (c) the State must publish within three months of notification of the Judgment, at least once, in the official gazette “Diario Oficial” and in another national-circulation daily, the proven facts set forth in certain parts of the Judgment.

The IACtHR made similar orders in *Juan Humberto Sanchez*²³, including an order to effectively investigate the case.

²³ *Supra*, note 7.

Part II: Application of the Duty to Investigate to the Philippines

As concluded above, the duty to effectively investigate extra-judicial killings arises from the obligations imposed by the human rights instruments that guarantee the right to life. Also, there is a strong argument that customary international law compels a State to investigate an extra-judicial killing as part of recognizing and ensuring the right to life.

The Philippines has ratified the ICCPR and the *Optional Protocol to the International Covenant on Civil and Political Rights* (OPICCPR).²⁴ The Supreme Court of the Philippines²⁵ has invoked the ICCPR²⁶ and ruled that treaties to which the Philippines is a party have the force and effect of law.²⁷ Article 6 of the ICCPR provides that “every human being has the inherent right to life. This right shall be protected by law.” Article 2 states that each State Party to the ICCPR “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”. These Articles impose on the Philippines a positive obligation to effectively investigate extra-judicial killings.

Further, the *1987 Constitution of the Republic of the Philippines* explicitly “adopts the generally accepted principles of international law as part of the law of the land”²⁸, thereby incorporating customary international law into the law of the Philippines. Although the Supreme Court has not considered whether international law compels the Philippines to conduct effective investigations, the decision of *Juan Antonio Munoz*²⁹ demonstrates the importance of international human rights law in helping to interpret and

²⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 9. The Philippines signed the ICCPR on December 19, 1966 and ratified the ICCPR on January 23, 1987. The Philippines ratified the OPICCPR on November 22, 1989.

²⁵ The Supreme Court is the country's highest judicial court, as well as the court of last resort.

²⁶ *Marcos v. Manglapus*, G.R. No. 88211 September 15, 1989; *Agcaoli v. Felipe*, G.R. No. 77224 April 29, 1987.

²⁷ *Tañada v. Angara*, G.R. No. 118295 May 2, 1997.

²⁸ Article 2, Section 2.

²⁹ *Government of Hong Kong v. Hon. Felix T. Olalia and Juan Antonio Munoz*, G.R. No. 153675, April 19, 2007.

define the rights of Filipinos. In that case, the issue was whether a person in extradition proceedings had the right to a bail hearing. In *Purganan*³⁰, the Supreme Court had previously ruled that the right to bail was only available in criminal hearings and not in extradition hearings. The Court cited the development of international human rights law to reverse this decision:

At first glance the above ruling applies squarely to private respondent's case. However, this Court cannot ignore the following trends in international law: (1) the growing importance of the individual person in public international law who, in the 20th century, has gradually attained global recognition; (2) the higher value now being given to human rights in the international sphere; (3) the corresponding duty of countries to observe these universal human rights in fulfilling their treaty obligations; and (4) the duty of this Court to balance the rights of the individual under our fundamental law, on one hand, and the law on extradition, on the other.

The modern trend in public international law is the primacy placed on the worth of the individual person and the sanctity of human rights. Slowly, the recognition that the individual person may properly be a subject of international law is now taking root. The vulnerable doctrine that the subjects of international law are limited only to states was dramatically eroded towards the second half of the past century. For one, the Nuremberg and Tokyo trials after World War II resulted in the unprecedented spectacle of individual defendants for acts characterized as violations of the laws of war, crimes against peace, and crimes against humanity. Recently, under the Nuremberg principle, Serbian leaders have been persecuted for war crimes and crimes against humanity committed in the former Yugoslavia. These significant events show that the individual person is now a valid subject of international law.

On a more positive note, also after World War II, both international organizations and states gave recognition and importance to human rights. Thus, on December 10, 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights in which the right to life, liberty and all the other fundamental rights of every person were proclaimed. While not a treaty, the principles contained in the said Declaration are now recognized as customarily binding upon the members of the international community. Thus, in *Mejoff v. Director of Prisons*, this Court, in granting bail to a prospective

³⁰ *Government of United States of America v. Hon. Guillermo G. Purganan, Presiding Judge, RTC of Manila, Branch 42, and Mark B. Jimenez, a.k.a. Mario Batacan Crespo*, G.R. No. 148571, September 24, 2002, 389 SCRA 623, 664.

deportee, held that under the Constitution, the principles set forth in that Declaration are part of the law of the land. In 1966, the UN General Assembly also adopted the International Covenant on Civil and Political Rights, which the Philippines signed and ratified. Fundamental among the rights enshrined therein are the rights of every person to life, liberty, and due process.

The Philippines, along with the other members of the family of nations, committed to uphold the fundamental human rights as well as value the worth and dignity of every person. This commitment is enshrined in Section II, Article II of our Constitution which provides: "The State values the dignity of every human person and guarantees full respect for human rights." The Philippines, therefore, has the responsibility of protecting and promoting the right of every person to liberty and due process, ensuring that those detained or arrested can participate in the proceedings before a court, to enable it to decide without delay on the legality of the detention and order their release if justified. In other words, the Philippine authorities are under obligation to make available to every person under detention such remedies which safeguard their fundamental right to liberty. These remedies include the right to be admitted to bail. While this Court in *Purganan* limited the exercise of the right to bail to criminal proceedings, however, in light of the various international treaties giving recognition and protection to human rights, particularly the right to life and liberty, a reexamination of this Court's ruling in *Purganan* is in order.

The Court held that bail could be available in extradition hearings "in the light of the various treaty obligations of the Philippines concerning respect for the promotion and protection of human rights". The above excerpt provides insight into how the Supreme Court would approach the issue of the duty to investigate extra-judicial killings. Clearly, the Supreme Court is committed to upholding human rights and looks to international law to provide guidance as to how those rights should be applied in the Philippines.

It is notable that the rights and freedoms enumerated in the ICCPR are entrenched in Article III (Bill of Rights) of the *1987 Constitution of the Republic of the Philippines*. The right to life, protected under Philippine law by ratification of the ICCPR, is also protected by the *1987 Constitution of the Republic of the Philippines*.

Article 3(1) states,

"no person shall be deprived of life, liberty, or property without due process of law, nor

shall any person be denied the equal protection of the laws”.

Article 2(11) states,

“the State values the dignity of every human person and guarantees full respect for human rights”.

Conclusions

The right to life is the fundamental human right because it is a prior condition for realization of all other human rights. The failure to effectively investigate an extra-judicial killing violates the right to life because an effective investigation is paramount to the implementation of laws, which protect the right to life. Further, where there is a pattern of extrajudicial killings, the failure to conduct an effective investigation creates an environment of impunity, within which further killings could occur. The initial remedy for the loss of life by violence is an investigation that can effectively determine if the death occurred by an illegal use of force. If the loss of life was the result of illegal violence, then the State has a duty to prosecute the perpetrator and, if the State was complicit in the killing, to compensate the family of the victim.

The Philippines is obliged to respect and ensure the inherent right to life of every person within its jurisdiction by virtue of its ratification of the ICCPR, in accordance with customary international law, and under its Constitution. Under international law, the duty to conduct an effective investigation into extra-judicial killings is implicit in the obligation to protect the right to life. Accordingly, the Philippines has a duty to conduct effective investigations into the extra-judicial killings that have occurred in recent years. The UN Investigation Principles reflect a global consensus on the appropriate standards for such investigations and should be adopted by the Philippines in undertaking its duty.

September 16, 2007, Vancouver, BC.

Lawyers Rights Watch Canada

3220 West 13th Avenue, Vancouver BC, Canada V6K 2V5

lrwc@portal.ca; www.lrwc.org