



International Law

Elixir Inter. Law 63 (2013) 18275-18276

Elixir
ISSN: 2229-712X

Enforced disappearances: An assault on the rule of law

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ARTICLE INFO

Article history:

Received: 2 August 2013;

Received in revised form:

29 September 2013;

Accepted: 2 October 2013;

Keywords

Disappearances,
Protection,
Family members,
Convention.

ABSTRACT

The term enforced disappearance has been derived from the Spanish word “*Desaparicion forzada*” which was coined in 1960s to signify a practice of abduction and secret detention used by security forces of Guatemala in furtherance of their counter insurgency measures. The idea of enforced disappearances was later applied by a lot of countries to deny the right of free speech to its citizens. According to the UN Working Group on Enforced or Involuntary Disappearances (WGEID) in the period between 1974 and 1995 more than 100 cases of forced disappearances were recorded in countries such as India, Sri Lanka, Indonesia, and Pakistan etc. Enforced Disappearances not only leads to a violation of the basic human rights of the victim but also leads to emotional abuse and economic marginalization of the family members. It also makes women and children vulnerable to sexual abuse and exploitation at the hands of the officials of the state. The Convention For The Protection of All Persons From Enforced Disappearances enjoins the state parties to make a special law on enforced disappearances in order to provide for such an offence in their penal code and also to provide a special mechanism for investigation, prosecution etc. However, a lot of state parties are yet to make a special law on it. The objective of this paper is to offer a critical insight into the developments in the International Plane for curbing this ghastly practice. The paper also conducts an analysis of the Convention and examines the loopholes present therein. In the end it attempts to suggest safeguards to prevent such a practice.

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Introduction

Enforced Disappearances simply refers to the practice of causing disappearance of political dissidents and opponents by the ruling governments. These disappearances may take place at the time of war, internal conflicts or even during peace time. The disappeared persons are denied the protection of due process and are detained, tortured or in some cases summarily executed. The state denies any information about such persons and thus becomes extremely difficult for the family members to avail any remedy before the courts of law. Very often, such people are never released. These disappearances seriously undermine the rule of law and are the cruelest form of state terrorism. Enforced disappearance is considered as a crime under the international criminal law but more often than not, the perpetrators of such crimes are not even identified.

These acts violate a number of human rights including :

- ⌚ Right to life and dignity
- ⌚ Right not to be subjected to torture, cruel or inhuman punishment
- ⌚ Right to fair trial
- ⌚ Right to be recognized as a person before law.

Enforced disappearances not only cause the violation of the human rights of the victim but also that of the family members who are made to undergo severe emotional and mental trauma in conducting the search of their missing family members. Often, their grievances are neglected by the state and also they are made aware of the fact that perseverance in search for their kins may result in their suffering the same fate. The situation is further aggravated if the missing person is the sole breadwinner

of the family; such families also have to face social and economic marginalization. The most severe implications of such disappearances are faced by women who get burdened with the additional responsibility of supporting their family. Most of such disappearances take place in semi rural and rural areas wherein the women do not possess the requisite skills to work and earn a living. Besides, if the subject of disappearance is a woman then she is vulnerable to sexual abuse and other forms of violence.

While, enforced disappearances take place all over the world often the perpetrators of such crime enjoy complete immunity. Since these acts are committed in secrecy it is difficult to even identify them.

States where enforced disappearances are rampant

Germany under Adolf Hitler's rule was the first country where the state adopted this practice to persecute political opponents.¹ By 1960s this practice became rampant in countries like Argentina, Chile, Iraq, Sri Lanka, former Yugoslavia etc.²

1 Adolf Hitler had issued Nacht und NebelErlas in 1941 under which perceived supporters of resistance movements in the occupied territories were detained and secretly transferred to Germany. The chief feature of this practice was the denial of information about the fate of the detained to the family members. The detainees were later summarily executed

2 Nowak, m. Torture and Enforced Disappearance, In International Protection of Human Rights : A Textbook. Krause,C; Scheinin,M.(eds) Turku: Institute of Human Rights, Abo Akademi University, 2009, p.152

Between 2003 to 2010, over half a million persons were reported to be missing in Iran. According to a UN report, the maximum number of disappearances took place in Iraq, Sri Lanka figured at No.2 on the list. The government of India during the Indira Gandhi regime was alleged to have caused enforced disappearances and illegal mass cremations of thousands of people in Punjab³. The Jammu and Kashmir Human Rights Commission's finding of 2156 unmarked grave near the Line of Control is also a manifestation of this grisly practice still existing in India

Objective of Disappearance

Enforced Disappearances help the governments in two ways

1) Disappearances are not apparent for a long period of time. By causing enforced disappearances, the state can persecute the person secretly without worrying about a possible backlash from the society. It is possible for a state to indulge in this practice for a long period of time without getting detected.

2) In case information about an enforced disappearance comes into the public domain, the state can simply shift the blame on non state actors or on opposition parties for resorting to such tactics to destabilize the government.

International legal response to enforced disappearances

The crime of enforced disappearances in spite of being a grave human right violation was not protected by a universal legally binding convention until the International Convention For the Protection of All Persons From Enforced Disappearances was adopted by UN General Assembly on 20 December 2006. The Convention defines enforced disappearances as

*The arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support, acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.*⁴

Some of the striking features of this convention are that it declares enforced disappearances as a crime against humanity, subject to fulfillment of certain conditions.⁵ It also provides for a mechanism for extradition of the perpetrator⁶, compensation and reparation⁷, criminalization of the act in the domestic jurisdiction⁸, prohibition of the defence of due obedience of lawful orders⁹. It also specifically prohibits commission of enforced disappearances under any circumstances¹⁰.

Further, the convention provides for universal jurisdiction, introduces stringent safeguards for protection of people deprived of their liberty, and also provides measures to resolve the legal situation of those whose fate has not been clarified and their relatives¹¹. It also provides for an investigating complaints and reports of enforced disappearances, protection of witnesses and

other involved in the investigation against ill treatment and intimidation¹². It prevents and punishes the wrongful removal of children of victims of enforced disappearances and provides for search of, identification and return of such children¹³.

The convention has established a 10 member, independent expert Committee on Enforced Disappearances to monitor the implementation of its provisions and to take action in individual cases.

Drawbacks of the Convention for Protection of all Persons from Enforced Disappearance

The convention for protection of all persons from enforced disappearances is a breakthrough and welcome change for international human rights regime, although it is humbly submitted that the convention suffers from certain shortcomings as well. Article 4 of the convention states that "Each state party shall take necessary steps to ensure that enforced disappearance constitutes an offence under its criminal law"¹⁴ although the article doesn't state that such inclusion must be done in a manner so that the offence is regarded as a grave offence. Article 8 of the convention states that the state parties can provide a period of limitation for the offence of enforced disappearance but such period of limitation must be reasonably long, keeping in mind the seriousness of the offence it is suggested that there must be no period of limitation at all for the offence of the enforced disappearance. Article 24(1) of the convention states that "victim means the disappeared person and any individual who has suffered harm as the direct result of the enforced disappearance"¹⁵, the phrase direct result introduces a lot of ambiguity and may often result in inclusion of remote consequences as direct result or sometimes may lead to ignorance of proximate consequences. Furthermore Article 35(1) of the convention provides that the committee on enforced disappearance will have no power over the cases of enforced disappearances which took place prior to the convention coming into force thus the past cases of enforced disappearances remain without any redressal.

Conclusion

Enforced disappearance is a serious invasion on human rights that has haunted humanity since time immemorial, although with the coming of the "Convention for Protection of all Persons from Enforced Disappearances" a ray of hope can be seen with as many as 91 signatories and 32 ratifications the convention have shown a steady growth, but still there is a long way to go ahead. Attempts must be made to ensure more and more ratifications to the convention and at same time there must be minimal reservations, although there are only few shortcomings in the convention those must also be done away with as soon as possible and all the drawbacks and malpractices that come up in the process of practical implementation of the convention must also be eliminated so that enforced disappearance become a thing of past.

3 Report of Ensaaf available at <http://www.ensaaf.org/publications/reports/descriptiveanalysis/>

4 Art2, The Convention for the Protection of All Persons from Enforced Disappearance (2006)

5 Art5., Ibid

6 Art 9 and 11 ,Ibid

7 Art 24,Ibid

8 Art 4, Ibid

9 Art 6, Ibid

10 Art 1,Ibid

11 Art 17,18 and 21,Ibid

12 Article 12, Ibid

13 Article 25, Ibid

14 Article 4 of the "Convention for Protection of all Persons from Enforced Disappearances"

15 Article 24(1) of the "Convention for Protection of all Persons from Enforced Disappearances"