

International Human Rights Law on Enforced Disappearances

Dr. Deepa Kansra

Deepa Kansra, Assistant Professor
Human Rights Studies Programme
School of International Studies
Jawaharlal Nehru University, Delhi, India

Introduction

The lecture slides give an overview of the international and regional jurisprudence on enforced disappearances. In specific, the importance and scope of the core human rights treaty (ICPED) on enforced disappearances has been discussed in light provisions on state responsibility and rights of victims. The mandate and role of the treaty body (Committee on ED) and the Working Group on Enforced Disappearances is also highlighted.

For further study, sub-topics on the subject have been provided. A set of research questions on the law on enforced disappearances have been raised.

Lecture layout

1. Human Rights Law and Enforced Disappearances
2. Statements by International and Regional Bodies
3. Statements- Scholars
4. Core Treaty: International Convention on the Protection of All Persons from Enforced Disappearance, 2006 (ICPED)
5. About ICPED
6. ICPED: Preamble
7. Article 1: Right against ED
8. Article 2: What is ED?
9. Article 3: State Obligation
10. Rights under ICPED: Information, Truth and Right against Detention
11. Victims under ICPED
12. Treaty Body: Committee on ED and ICPED Mechanisms
13. Scope of State Responsibility
14. Working Group on ED
15. Research Questions
16. Other documents on ED
17. References

Human Rights Law and Enforced Disappearances

Enforced disappearances constitute a grave violation of human rights. The international human rights framework provides a set of norms to facilitate the making of laws for investigation and prosecution of enforced disappearances by states, while preserving the rights of victims in the process.

On the subject, several international and regional bodies have contributed to the common pool of jurisprudence.

The following slides include a few of the key interpretations/statements given by human rights bodies, courts and scholars.

Statements by International and Regional Bodies

Enforced disappearance constitutes a unique and integrated series of acts and omissions representing a grave threat to life. [Human Rights Committee, General Comment No. 36, 2018]

Enforced disappearance is a crime , a crime against humanity [Article 5, ICPED].

It is a heinous crime [2020 Meeting, CED]

The prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*

[Goiburú v. Paraguay, 2006; Inter-American court on Human Rights]

Enforced disappearances entail the denial of the disappeared person's legal existence and, as a consequence, prevent him or her from enjoying all other human rights and freedoms. . [WGEID, 2015].

Statements by International and Regional Bodies Cont...

Enforced disappearances violate various economic, social and cultural rights and have a particularly negative impact on the enjoyment of such rights by the disappeared person, the family members of the disappeared person, and others. [WGEID, 2015].

Enforced disappearance can amount to a form of torture in relation both to the disappeared person and to their relatives (*Committee against Torture, 2011*).

Statements: Scholars

Multiple Violations

Enforced disappearance is often categorized as *multiple human rights violations* which simultaneously covers the violation of several human rights such as: the right to security and personal dignity; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; the right to humane conditions of detention; the right to legal representation; the right to a fair trial; the right to a family life; and even the right to life, when the abducted person is killed

Positive Obligations

The positive obligations of State Parties to prevent, investigate and punish the perpetrators in cases of enforced disappearances and torture are explicitly developed in the jurisprudence of regional human rights courts like the European Court of Human Rights and the Inter-American Court on Human Rights...the various international human rights bodies have denoted the importance of positive obligations and the role of the state in combating the phenomenon of enforced disappearances

[Dalia Vitkauskaitė-Meurice, Justinas Žilinskas, 2010].

Core Treaty

The International Convention on the Protection of All Persons from Enforced Disappearance, 2006 (ICPED)

ABOUT ICPED

- adopted by the General Assembly in its resolution 61/177 of 20 December 2006
- 98 signatory States [*2019 Report of the Committee on ED*]

[Katarzyna Łasak, 2019]

- **The Convention [ICPED] not only reflects international law, but also develops it with regulations concerning the prevention of enforced disappearances and the punishment for such offenses.**

[UNOHCR, January 2012]

- **The Convention is foremost a legal instrument with a *preventive character* that fills the gaps between other human rights treaties and international criminal law.**

ICPED *Preamble*

Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity,

Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance,

Considering the right of any person not to be subjected to enforced disappearance, the right of victims to justice and to reparation,

Affirming the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end,

[William A. Schabas, 2017]

- **The preamble confirms the ‘extreme seriousness of enforced disappearance’.**

Article 1: Right against ED

Article 1: (1.) No one shall be subjected to enforced disappearance. 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

[Katarzyna Łasak,
2019]

- **Imposing a ban on enforced disappearance, which is not to be revoked under any circumstances, even exceptional ones such as a state of war, is significant progress indeed.**

[Committee on Enforced
Disappearances,
Eighteenth session, May
2020]

- **In light of COVID-19, no exceptional circumstances could be invoked as a justification for enforced disappearance. The principles enshrined in the Convention continued to apply in the context of the coronavirus disease 2019 (COVID-19) pandemic.**
- **ED is a non-derogable right.**

Article 2

What is ED?

Article 2: ***enforced disappearance*** is considered to be 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 or 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.

[UNOCHR]

- **An enforced disappearance is defined by three cumulative elements:**
- **(1) Deprivation of liberty against the will of the person;**
- **(2) Involvement of government officials, at least by acquiescence;**
- **(3) Refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person.**

Article 3 : State Obligation

Obligation for the State party to investigate the acts committed by “persons or groups of persons acting without the authorization, support or acquiescence of the State.”

Rights under ICPED: Information, Truth and Right against Detention- Articles 17, 18, 24

The ICPED covers a set of rights including;

1. Right against secret detention
2. Right to information
3. Right to be found
4. Right to the truth

[WGEID, General
Comment on Right to
truth]

- **The right to information on the person detained, together with the non-derogable right of habeas corpus, should be considered central tools to prevent the occurrence of enforced disappearances.**

[WGEID, General
Comment on Right to truth]

- **The existence of the right to the truth as an autonomous right was acknowledged by the Working Group on Enforced or Involuntary Disappearances (WGEID) in its very first report in 1981.**

[Katarzyna Łasak, 2019]

- **It is preferable that the guarantees of *habeas corpus* be enshrined in basic state law, and that they be developed through ordinary legislation. Deprivation of liberty may only take place on the basis of a decision issued in accordance with the law by a competent state authority**

Victims under ICPED

Article 24 (1) For the purposes of this Convention, “victim” means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

(7.) Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

[Katarzyna Łasak,
2019]

- An innovation which is not present in other legislative solutions is the actual definition of victim which appears in the Convention. For the purpose of the Convention, a victim does not only mean the disappeared person, but also any individual who has suffered harm as the direct result of an enforced disappearance, such as family members. The victim is provided with the right to know the truth regarding the circumstances of the enforced disappearance, the progress of the investigation and the fate of the missing person.

[European Court of
Human Rights, 2006]

- The distress caused by the attitude of the authorities to the complaints by victims or family members of disappeared person is an important factor while dealing with ED.
- * *Also see Report on Gender Dimensions of ED, Committee on ED.*

Treaty Body

Committee on Enforced Disappearances & ICPED Mechanisms

Article 26: A Committee on Enforced Disappearances shall be established to carry out the functions provided for under this Convention.

The mechanisms under ICPED;

1. Mandatory reporting mechanism
2. Optional Individual communications procedures
3. Inter-state complaints procedure
4. Tracing Procedure under Article 30- to communicate for urgent action and interim measures provided the request presented is admissible
5. Urgent matters including widespread and systematic practice of enforced disappearances to be placed before the General Assembly
6. Country Visits

[UNOHCR, 2012]

• States parties could also accept the optional mechanisms, notably for individual communications. The Committee established under the Convention has monitoring and early warning functions.

Scope of State responsibility

The following are key responsibilities of states under the Convention.

[the list is not exhaustive]

1. Criminalization of Enforced Disappearance in Domestic Law
[Committee on Enforced Disappearances, 7th, 8th Sessions, 2014-2015]
2. Conduct of Investigations
3. Search, Locate & Release of disappeared person [Guidelines on Search, 2019]
4. Preventing ED
5. Respect for rights including rights of victims , right to truth, information, organize groups for search etc.
6. Follow up mechanisms
7. Training & Education of agencies
8. Cooperation with Member States

Working Group on Enforced Disappearances

In 1980, the Commission on Human Rights decided to establish for a period of one year a working group consisting of five of its members, to serve as experts in their individual capacities, to examine questions relevant to enforced or involuntary disappearances of persons.

In 1992, the Declaration on the Protection of all Persons from Enforced Disappearance was adopted by the GA.

With the adoption, the Working Group was also entrusted with monitoring the progress of States in fulfilling their obligations deriving from the Declaration and to provide to Governments assistance in its implementation. [See OCHR webpage]

Important Comments

In light of the 1992 Declaration, the Working Group has issued several Comments ;

E.g.

1. General Comment on the definition of enforced disappearance
2. General comment Enforced disappearances as a crime against humanity

Research Questions

POINTS FOR FUTURE STUDY

1. UN Guidelines on Search under ICPED, 2016
2. Right to know the truth as embodied within the ICPED
3. Status of ED within domestic jurisdictions without adequate legislative instruments on the subject.
4. Enforced disappearances and impact on economic, social and cultural rights
5. ED as covered under international criminal law, humanitarian law and human rights law.
6. The interlinkage between migration and enforced disappearances
7. Gender dimensions of Enforced Disappearance
8. CED Jurisprudence on COVID-19 vulnerabilities.

QUESTIONS

1. Concerns over ratification of the ICPED.
2. The adequacy of mechanisms for monitoring and mapping violations.
3. The overlapping standards as prescribed by different treaty bodies.
4. The nature of rules of evidence and proof during investigation and trial of enforced disappearances.
5. Nature of penalties prescribed for ED under domestic laws.

Other Relevant Documents

1. Guiding principles for the search for disappeared persons, CED May 2019.
<https://undocs.org/en/CED/C/7>
2. International Law Commission [Commentary of the 1996 Draft Code Code of Crimes Against the Peace and Security of Mankind.
3. Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly
4. Rome Statute of the International Criminal Court
5. CAT, Torture Convention
6. Inter-American Convention on the Forced Disappearance of Persons, 1994
7. 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.
8. Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration, 2017. A/HRC/36/39/Add.2

References

1. Katarzyna Łasak, The Use of the “Dry Submarine” Technique and Other Allegations in Proceedings Before the United Nations Committee on Enforced Disappearances. Remarks on the Yrusta v. Argentina case no. 1/2013 , Adam Mickiewicz University Law Review, DOI 10.14746/ppuam.2019.9.03
2. William A. Schabas, Defining Enforced Disappearance As A Crime Against Humanity, 2017
3. María Clara Galvis Patiño, The Rights of the Victims of Enforced Disappearance Do Not Have an Expiration Date, *Opinio juris*, July 2020. <http://opiniojuris.org/2020/07/07/the-rights-of-the-victims-of-enforced-disappearance-do-not-have-an-expiration-date/>
4. ICCPR Human Rights Committee, General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant , 2004 . CCPR/C/21/Rev.1/Add. 13
5. Committee against Torture, Communication No. 456/2011 Decision adopted by the Committee at its fifty-fourth session (2015). CAT/C/54/D/456/2011
6. ICPED Committee on Enforced Disappearances, Concluding observations on the report submitted by Peru under article 29 (1) of the Convention , 8th May, 2019. CED/C/PER/CO/1
7. CED Report on Follow up to Concluding Observations, 2018 . CED/C/15/2
8. OHCHR, Follow-Up to Concluding Observations, <https://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx>
9. Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances: Study on enforced or involuntary disappearances and economic, social and cultural rights, 2015 [A/HRC/30/38/Add.5]
10. Working Group – Report on Best Practices on Enforced Disappearances in Domestic Criminal Legislation, 2010
11. Kevin L. Cope & Cosette D. Creamer, Disaggregating the Human Rights Treaty Regime, 56 *Virginia Journal of International Law* 459 (2016).

Classroom Series: Reading Human Rights

Copyright,-Dr. Deepa Kansra, 2020

www.betheclassroomseries.com