

**ENFORCED DISAPPEARANCES: INTERNATIONAL AND INDIAN LEGAL
PERSPECTIVE**

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Abstract:

The phrase and crime ‘enforced disappearances’ is not new and is continuing phenomenon for many decades. Various parts of India and Indians are mostly deprived of their human rights by this inhumane crime. There are numerous human rights violation associated with this practice of enforced disappearances. The crime of enforced disappearances has acquired global status and hence in the international scenario the international law tries to prevent, safeguard, and redress people suffering due to enforced disappearances. The International Convention for the Protection of All persons from Enforced Disappearances is one such convention enacted by the United Nations in order to curb this heinous crime. The crime of enforced disappearances was first expressly mentioned in Article 7 (i) of the Rome Statute of the International Criminal Court which was adopted in the year 1998 and came into force in the year 2002. Though Indians are suffering through this horrendous crime mainly in the parts of Jammu & Kashmir, the Indian government has not yet ratified the convention. The crime affects and provides psychological torture not only to the victims but also to the victim’s family members.

In the domestic perspective India has not explicitly and expressly has not considered the crime of Enforced disappearances as a special crime and no provision has been made by the legal framers

in the Indian Penal Code, 1860. The family members of the victim have no other option but to file complaint under general provisions of criminal procedure code and Indian penal code. Moreover writ of habeas corpus is to be filed to find the missing person. This paper discusses the reason and need for India to ratify the international convention of enforced disappearances.

Keywords: enforced disappearances, victim, torture, extrajudicial killings, ICCPR

Introduction

Every individual or human being irrespective of his/her caste, creed, race, sex, gender, nationality or any other status is entitled to enjoy human rights in all situations. Enforced disappearances is a major and unforeseeable crime that violates or breaches not just one but multiple human rights. The United Nations with the view to protect human rights of every individual of all the countries in the international sphere various conventions were made. Various laws are made the legal framers in the domestic level of each state to protect and safeguard the human rights of every national.

The Universal Declaration of Human Rights (UDHR) is one such crucial and major document which was declared and adopted by the United Nations (UN) and the states to safeguard the Human rights of their citizen or nationals. The convention that governs the heinous crime of Enforced Disappearances is the International convention for the protection of all persons from enforced disappearances. The crime of enforced disappearances is also known as forced or involuntary disappearances.

Enforced disappearances are not a new crime of Human rights violation that is erupting in the society currently. The phenomenon is prevalent and taking place in the world mainly in the states of Sri Lanka, Chile and India who is greatly affected by the crime of forced disappearances.

This complex crime emerged and came into existence during Adolph Hitler's reign when he issued the Nacht and Nebel Erlass on December 7th 1941 where people vanished with no traces and the victim's family were given no information or detail regarding their whereabouts. The practice later again re-entered in the Latin American region such as Brazil, Chile and Guatemala

during Military dictatorship and later various and highest number of cases on Enforced disappearances occurred in Sri Lanka, Iraq and the former Yugoslavia.

The paper is structured into four parts. First, the paper discusses the general view on enforced disappearances and the various human rights violation associated with it. The second part deals with the International convention for protection of all persons from Enforced disappearances. The third part of the paper concentrates on the working group on enforced disappearances and finally, the domestic framework and the role of Judiciary in this crime is dealt in this paper.

Review of literature:

- 1). Brian Finucane in his article 'Enforced disappearances as a crime under International law: A neglected origin in the law of wars', Yale journal of International law, Vol. 35 Issue 1 has dealt with the concept of enforced disappearances and the violation of family rights of the victims of the crime of enforced disappearances. The author mainly focuses and has done an in depth analysis on the Bosnia and Herzegovina case.
- 2) Laurel E. Fletcher in his article 'A legal Analysis of International and Domestic law relating to victims of Enforced disappearances : The right to remedy for Enforced disappearances in India- IHRLC Working paper series no.1 , 29th June 2016, SSRN library has done a brief analysis from the historical background, development of the international convention, international right to remedy and the various forms of remedies available to the victim. The article also provides India to develop laws and strategies to promote redress victims of enforced disappearances and torture.
- 3) Mukil Sharam in his book Human Rights in a globalised world: An Indian Diary All the aspects that violate human rights are dealt and chapter X of the book specifically addresses the issue of enforced disappearances pertaining to Indian context where the issue of enforced disappearances is still prevalent in Srinagar and also in the states of Gujarat, Maharashtra, A.P, U.P, Bihar, Rajasthan and Orissa. The victims are not only terror suspects but people of all ages and profession.
- 4) Khwaja Abdul Muntaquim in their book Protection of Human Rights: National & International perspectives' 2004. has focused on the major human rights issues and all the

conventions ratified by India. The book states the various bills enacted and measures taken to curb the issue of enforced disappearances in India and human rights violation.

5) Atula Gaur in his book Protection and implementation of International Human Rights in Domestic law, 2010 has specifically focused on the role played by the National Human rights Council and the recommendations regularly provided by it for the effective implementation of human rights in India.

Hypothesis:

The Indian legal regime on the crime of Enforced Disappearances is inadequate

Objectives:

- 1) To analyse the legal framework on enforced disappearances and its utility in India
- 2) To trace the evolution of International human rights law on Enforced disappearances
- 3) To study the multiple human rights that is violated during enforced disappearances.

The researcher has done a doctrinal on enforced disappearances by referring only to secondary sources such as Journals, books, internet sources.

Scope of the Study

The study is confined to the crime of enforced disappearances in India and the Convention on Protection of All Persons from Enforced Disappearances in the International Perspective.

Enforced disappearances and the various human rights associated with it

The crime of enforced disappearances is committed when a person is secretly abducted, imprisoned by the state, political organisation or third party/person with the authorisation, support or acquiescence of state or political organisation followed by refusal to reveal the fate or details of whereabouts of the vanished person or refusal to acknowledge the deprivation of their liberty, which places such person outside the protection of the law. Not only the person but the family of the victim is also affected. [\(Fletcher 2014\)](#)

The crime of enforced disappearances is complex and horrendous. There are numerous violations of human rights is present when the crime is committed on a person or on number of individuals. Some of the articles of the International convention of civil and political rights and UDHR get violated.

Article 9 – right to liberty and security of the person

India has ratified the convention on civil and political rights which under Article 9 protects individuals from arbitrary detention. Arbitrary detention is one such violation linked with the crime of enforced disappearances. The right is derogable that is it can be suspended at time of emergency with certain limitations. The crime of Enforced disappearances is heinous in nature as the state may not likely reveal the state or fate of the victim to his/her family members.

General comment No.6 of Human Rights Committee under the ICCPR

The crime of extrajudicial killings is also included under the crime of enforced disappearances. The general comments are though are authoritative they are not binding interpretation of the convention on civil and political rights. The definition and the obligation for the states parties to the convention on extrajudicial killings is prescribed under general comment no.6. During the visit of the special rapporteur of extrajudicial killings in India stated that the some of the extrajudicial executions will come under the purview of the crime enforced disappearances as the state has not revealed the state of the victims to their family members.

Incommunicado Detention

The victim's are prevented or restrained from having link or contact with the outside world. Though there is provision that expressly deals with the protection of these but the Human rights commission (HRC) had found that incommunicado detention is likely possible to result or linked with torture which may violate Article 7 of ICCPR - Freedom from torture.

Other rights

The various other rights that are violated are:[\(Amnesty International 1994\)](#)

- Right to recognition as a person before law (Art.16 of ICCPR)
- Right to humane conditions of detention
- Right to fair trial (Art.14&15)
- Right to family life
- Right to life (Art.6)

Rights of the victim's family

The above mentioned rights are suffered and violated only to the victim but other social, economic and cultural rights of the victim as well as his/her family members are affected:([Finucane 2010](#))

- Right to protection and assistance to family
- Right to an adequate standard of living
- Right to education
- Right to health

The government of India must give the heinous crime of enforced disappearances is to be given the status of special crime and laws should be made in the legislation to reduce the occurrence of this crime as breach and violation of multiple rights is not good for the state, the victim and the nationals.

International Convention for the Protection of all Persons from Enforced Disappearances

On December 1978 the UN in its general assembly used the term Enforced disappearances and referred to the crime for the first time. In the year 1992 the declaration of the protection of all persons from Enforced disappearances was instituted.

The international convention for protection of all persons from enforced disappearances was adopted by UN general assembly on September 23rd 2005. To address the issue of enforced disappearances resolution 33/173 was passed. In order to examine questions related to the crime of enforced disappearances in 1979 the human rights commission gave the mandate to appoint a sub-commission. Hence the working group was appointed which consisted of experts.

The first draft of the UN declaration was drafted and prepared in the year 1998. On December 1992 the declaration of protection of all persons from enforced disappearances was adopted by the UN general assembly. Later in the year 2006 on June 29th the convention on enforced disappearances was adopted and finally the text was adopted by the general assembly on December 20th 2006.([Website](#))

Critical Analysis of the Convention on Protection of All Persons from Enforced Disappearances

The reason behind the creation of the international convention on enforced disappearances is to keep watch and monitor the horrendous crime of enforced disappearances. The crime of enforced disappearances violates not only derogable rights prescribed under ICCPR and ICESCR but also various other non derogable rights stated and enshrined under the Universal declaration of

Human rights (UDHR). The human rights group had stressed on number of preventive measures to be taken in order to curb the issue and crime of enforced disappearances.

The two elements required are:

- Declared as crime against humanity and have legal effects.
- The instrument must dictate effective mechanism to prevent and investigate and sanction these responsible to provide compensation to the relatives of the victims and to trace the children of the disappeared.

Numerous Non Governmental Organisations (NGOs) have produced and given evidences against the crime of enforced disappearances. The convention on enforced disappearances adopted by the UN general assembly has 97 signatories and 58 parties to it. In Paris the convention had already attracted 57 signatories.

The ICAED is another convention that deals with the crime and practice of enforced disappearances. The motive behind the formulation of the ICAED is to work towards the ratification and effective implementation of ICCPED.

Working group on Enforced and involuntary disappearances

The Working group on Enforced and involuntary disappearances is one of the special thematic procedures implemented and overseen by the United Nations Human rights council. The main and primary purpose of the working group is to aid and help the relatives who are suffering and are affected without the person who has disappeared and to investigate and reveal the fate and whereabouts of their disappeared family member.

The working group in order to help the relatives communicates with the government of the disappeared person's state to know the missing cases of Individuals and requests the state to investigate the same and asks them to provide the information of the outcome of the investigation conducted by the state government on the cases. Ultimately the working group on Enforced and involuntary disappearances has acted and is acting as a communicating device and channel between the disappeared person, family members and the government concerned. Irrespective of the ratification of any legal instrument relating to individual human rights complaint procedure, the working group has created and developed dialogues with many governments to reduce the crime of enforced disappearances that violates various human rights in the many countries in the international perspective.

The working group on enforced and involuntary disappearances was established by the UN commission on human rights in 1980 with resolution (20) (XXXVI).([Website](#)) The process to mandate the working group on enforced and involuntary disappearances was done by the human rights council in 2007 and 2011. In the year 2014 the Human rights council decided to postpone the renewal of the mandate of the working group until its 24th session (resolution 25/116). The main activities undertaken by the working group on enforced and involuntary disappearances are:

- **Country visits**

The working group on when invited by a government is bound to undertake country visits in order to analyse and come to an understanding on the situation pertaining to forced disappearances. The working group on its visits communicates and meets the government officials, NGOs, legal professional and most importantly the relatives of the disappeared person. Once the visit is done it's the duty of the working group to provide mission report that elucidates the conclusion and recommendations for the concerned state.

The mission report given by the working group is to help the government of the state to trace the main reasons that contribute to enforced disappearances and also must help the state in providing solutions to implementing international standards. Each year four country visits are undertaken by the working group in case when a government of a state has not already given an invitation the working group on its own action will visit the country if there are numerous and serious reports of disappearances.[\(Website \)](#)

- **Receiving information and complaints**

The communications between the state and the working group is known as procedures. The working group on receiving an individual complaint cannot move with the investigation. The working group can do nothing but communicate with the concerned state government to investigate the case and request to provide with the information of the result of the investigation conducted by the state.

- **General Allegations**

General allegations are nothing but when the working group receives allegations from the relatives of the victim and NGOs it sends the allegations to the state government. It is the

discretion of the state to decide whether comment on the allegations summary sent by the working group.

- **Prompt Interventions**

Under this the working group transmits the cases directly to the Ministers of Foreign Affairs. The working group appeals to the concerned to take adequate steps to protect and safeguard the fundamental rights of the vanished person.

- **Standard Procedures**

The cases where the alleged enforced disappearances which had taken place before more three months the working group reserves such cases and directs the concerned government to carry on with the investigation through a letter by the chairperson for the working group to the governments permanent representative to the UN office at Geneva. Once the investigation is done the results of the whereabouts of the disappeared person is to be informed.

- **Urgent Appeals**

When on receiving credible allegation that a person has been arrested , abducted, or deprived of his liberty the working group starts urgent appeal process and the allegation is transmitted by the working group to the Minister for foreign affairs of the concerned government and request for investigation to be conducted and to provide with information on the same.

- **Urgent Procedures**

When some cases that are reserved by the working group which was reported to it less than three month after the crime of enforced disappearance took place the case is transmitted in a most rapid way to the Minister of foreign affairs of the country. The sources of information are informed regarding the imitation of urgent procedures by the working group so that the sources may communicate to the authorities.

- **Reports to the Human Rights Council**

Every year the working group reports to the Human rights council all the activities performed by it.

Enforced disappearances in India

Number of cases where recorded during the two armed insurrections in sri lanka in the early 1970s and the late 1980s, only after the 2009 civil war when most of the Tamils were involved in fighting for the Liberation Tigers of Tamil Eelam (LTTE) the cases of enforced disappearances was reported.[\(United Nations High Commissioner for ...\)](#) Mainly the persons suspected to be

supporting for the LTTE disappeared in Sri Lanka by the security forces. While in Nepal in the early 1997 the conflict related enforced disappearances were reported.

In the north western region of Pakistan the crime of enforced disappearances were largely reported. Mainly the people involved in activities related to terrorism or who were accused of belonging to militant organisation were subjected to enforced disappearances. The crime of enforced disappearances is largely reported in the region of Balochistan as well.

In India, the conflicted areas have reported of this crime. That is in the regions of Manipur and other states in the North East the cases of enforced disappearances have been reported largely in the 1980s and 1990s. From 1983 to 1997 in Punjab during the counter insurgency period various cases on enforced disappearances were reported. The practice of enforced disappearances is prevalent in Jammu and Kashmir from 1989 and is still an ongoing issue in the region.

Firdous case([Website](#))

Firdous's husband was a shawl maker. He usually goes to Calcutta along with his friends to sell his products on the previous day before leaving to Calcutta he did not return home from prayers as he was last seen at the mosque. Firdous's questions of her husband and his whereabouts remained unanswered. She sustain and survived for her two daughters though she suffered from mental trauma and depression. Later firdous died within years of her husband's disappearance.

The two daughters started with their lives but the memories of their father never left their hearts. In the year 2006 when one day zainab's 12 year old son did not come home from school as after enquiring she was not able to find him. When her son returned he found his mother lying dead covered in blood stains and vomits.

The Association of Parents of Disappeared persons in J&K have been holding banners and photographers in a park. Recent on August 30th the families of the vanished persons had gathered and were holding photographs and banners of the missing persons in the same park where the APDP had gathered.([Website](#))

One of the other main reason as to why enforced disappearances is still an ongoing issue in Jammu & Kashmir is due to the "Armed forces and special powers Act, 1958 which has implementation extending beyond the original geographical objective and is now being utilised as a means to suppress and violate the Human rights of the people in the Jammu & Kashmir region."([Website](#) ; [Website](#))

The non allowance of the working groups is also a major flaw as when allowed it will examine and analyse the factors that contributes towards the crime of forced disappearances in India.[\(Website \)](#)

In India there is no specific legislation for enforced disappearances but there are international, constitutional legal protections available for torture, extra judicial killings and forced disappearances such as the Armed forces and special powers Act, 1958, prevention of terrorism bill, prevention of torture bill, right to information act and so on.

Role of courts

The victims and the family members though cannot seek effective remedy through any specific legislation for enforced disappearances due to the lack of an adequate domestic framework but still through the general provisions available in the Indian penal code and criminal procedure code the families have used that such as the habeas corpus writ to find the missing person, complaints are made under abduction or kidnapping. In numerous cases the court has laid down strong decisions by directing the government to investigate the whereabouts of the missing person and in the Supreme Court in Nepal has directed its government to criminalise the issue. But some of the officials with their power have failed to abide by the orders made by the courts. The legal weakness in the domestic level is that there is no effective enforced mechanism of the legal frameworks and the inadequate laws for the crime of enforced disappearances. Moreover the even after the recommendations made by the National Human rights commission the government has taken no step to amend the Armed forces and special powers Act, 1958.[\(Gaur 2010\)](#)

Suggestions and recommendations

- To criminalise the crime of enforced disappearances and to ratify the international convention for protection of all persons from enforced disappearances.
- To amend the armed powers and Special powers Act, 1958
- To implement adequate or specific legislation for the crime of enforced disappearances
- To form monitory mechanism to overlook on the implementation of the enacted legislation and it's working.
- To allow the working group to visit India and to communicate with the Government, victims and the family of the victims.

Conclusion

Enforced disappearances are a never ending phenomenon in various regions of India unless and until India ratifies the convention of protection of all persons from enforced disappearances. The heinous crime needs to be criminalised and specific legislation for the crime is to be enacted. The government is to take the issue seriously and try to investigate and find the whereabouts of the missing persons. The crime though is easily stated it is one horrible crime and hence the government has to take the still prevalence of disappearances of persons in various regions of India as a wake call and needs to change the scenario of inadequate laws to adequate laws to overcome and eradicate this crime in India.

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