

Enforced Disappearance A Crime Against Humanity And United Nations Framework.

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Abstract: Enforced disappearance is taking place all over the world and is not any new type of human rights violation. Enforced disappearance has been a serious violation of human rights for decades. It violates number of rights including the disappeared person's rights and his family. The consequences of enforced disappearance are deep and long-lasting both for the individuals directly affected and for the societies in which it takes place. My paper examines how enforced disappearance is a crime and how it violates rights. It also focuses on steps taken by United Nations to combat this heinous crime.

Keywords: Enforced disappearance, rights, violations, United Nations.

INTRODUCTION.

The International Convention for the Protection of All Persons from Enforced Disappearance defines an enforced disappearance 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 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” (ICEPED)

Enforced disappearances are a 'doubly paralyzing form of suffering'. The victim is removed from the protection of the law, and is often subjected to torture and extrajudicial execution. In addition, the victim's family and friends are deliberately denied knowledge of the individual's arrest or detention, and are 'subjected to slow mental torture' as they wait, often for years and sometimes forever, to be informed of the victim's fate. (Anderson, 2006).

HISTORICAL BACKGROUND OF ENFORCED DISAPPEARANCES

Enforced disappearances were recorded for the first time during World War II, when thousands were disappeared due to the policy of the 'Night and Fog Decree' (known as the 'Keitel Order') (Ioanna Pervou, 2012). The practice was set up with the aim of spreading terror among civilian populations, preventing them from supporting or joining resistance movements and punishing resistance members. This scheme of disappearances, as devised and executed by the Nazis, was directed without any discretion against civilians in the occupied territories and, unsurprisingly, without any due process of law. (Kyriakou, 2012). This Gestapo policy later spread to Latin America taking the form of a systematic, governmental practice; this practice aimed at the suppression of political opposition, since it was considered a threat to

national security.(Ioanna Pervou, 2012). Starting in Guatemala between 1963-1966, it was followed by El Salvador, Chile, Uruguay, Argentina, Brazil, Colombia, Peru, Honduras, Bolivia, Haiti and Mexico in seventies and eighties. The armed agents of the State intelligence or paramilitary groups practiced enforced disappearances in these countries, as part of the internal conflicts, guerilla wars or struggle against the dictatorships or junta regimes. (Citroni, 2007) Now, however, governments in Asia, including Iraq and Sri Lanka, that hold the record for disappearing their citizens. For the most part, those disappeared have political opponents and members of grass-roots organizations(Brody et al., 2017).

ENFORCED DISAPPEARANCES AS CRIME AGAINST HUMANITY.

Enforced disappearance as a crime violates a number of human rights. It is one of the most terrible violations of human dignity of those who have been 'forced' to 'disappear'. It also constitutes 'an arbitrary deprivation of freedom' and causes 'serious danger to the personal integrity, safety and life of the victim'. It denies him the right to liberty (even in some cases the right to life), the right not to be subjected to torture or inhuman treatment, the right to association (with his dear ones), and 'the right to a fair trial, to protection against arbitrary arrest, and to due process of law.(Vibhute, 2006).Following rights are violated by enforced disappearances

- The right to recognition as a person before the law;
- The right to liberty and security of the person;
- The right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment;
- The right to life, when the disappeared person is killed;
- The right to an identity;
- The right to a fair trial and to judicial guarantees;
- The right to an effective remedy, including reparation and compensation;
- The right to know the truth regarding the circumstances of a disappearance.(J.Sarkin, 2012)

An important thing to notice is that enforced disappearances not only harms the 'disappeared', but his/her family as well, it is clear that there are two type of victims, the direct victim or disappeared and indirect victims, the family. The objective of enforced disappearance is to place the disappeared 'outside the law' by depriving the person of any communication and by the lack of acknowledge of his/her fate by the perpetrator (State or group). The harm here lies in the incommunication and the fear caused by that fact, in this sense it has been understood by different Human Rights Committees that 'incommunicado detention causes suffering and fear, and, as a consequence amounts to inhumane and degrading treatment.

Hitler's Field Marshal Keitel was convicted of carrying out enforced disappearances during the Nuremberg trials, although the judgement of the International Military Tribunal (Nuremberg) did not expressly state whether it was a war crime, a crime against humanity or both. However, lawyers involved in drafting the decrees and regulations implementing and carrying out the Night and Fog Decree were convicted of crimes against humanity and war crimes.(Triffterer, 2008) Thus the modern notion of a crime against humanity was developed during the International Military Tribunal trials in Nuremberg. Crimes against humanity were defined as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds (Anderson, 2006). International Criminal Tribunal of Yugoslavia is the first established international

criminal tribunal after the Nuremberg trials. During the ICTY proceedings, enforced disappearance was adjudicated as a crime against humanity in the Kupreskic and Kvočka cases.(Aguilar & Kovras, 2018)

The recognition of an international criminal responsibility of individuals in cases of enforced disappearances was symbolically expressed with the adoption, on December 18, 1992, of the UN General Assembly's Declaration on the Protection of all Persons from Enforced Disappearances. It has since then also been admitted that enforced disappearances, when committed in a widespread or systematic way, constitute a crime against humanity: the 1992 resolution (whose Preamble declares that "the systematic practice of such acts is of the nature of a crime against humanity") recognize it respectively on the universal and regional level.(Sevane, 2008). The 1998 Rome Statute 1998 includes "enforced disappearance of persons" among the crimes against humanity (Art. 7.1.i) "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. The inclusion of enforced disappearances, by Rome statute, as the crimes against humanity, was a historical change. It was not listed among such crimes in any of the previous instruments, namely the Charter of the Tribunal of Nuremberg, the Statute of the Tokyo Tribunal, the Statutes of the Tribunals for the former Yugoslavia and Rwanda(Citroni, 2007). While dealing with enforced disappearance as a crime against humanity we have to apply all the general elements that are necessary to qualify the criminal offence as a crime against humanity. These general elements are: being part of state policy, attacks being directed against a civilian population, being of a widespread or systematic nature.(Vitkauskaitė-Meurice & Žilinskas, 2010). A number of political and judicial pronouncements the gravity and characteristics of forced disappearance justification as a crime against humanity. The Parliamentary Assembly Council of Europe has stated that "the recognition of enforced disappearance as a crime against humanity is essential if it is to be prevented and its perpetrators are punished". The General Assembly of OAS has also stated that this crime, "is an affront to the conscience of the hemisphere and constitutes a crime against humanity" and that "this practice is cruel and inhumane".(Brody et al., 2017). Similarly, the Preamble of Inter-American Convention on Forced Disappearances also makes it clear that "the systematic practice of the forced disappearance of persons constitutes a crime against humanity"(Claude, 2010b). In many countries, forced disappearance has been particularly included in the list of acts constituting a crime against humanity in regulatory provisions. The following countries in Latin America have included it in their legislation: Argentina, Canada, Chile, Costa Rica, Panama, Trinidad and Tobago and Uruguay. In other countries, such as Colombia, this inclusion has been via case law.(International Commission of Jurists, 2015) Moreover, Article 18 of the 1996 International Law Commission draft Code of Crimes Against Peace and Security for Mankind and Article 5 of the 2007 Convention declare that any criminal act can be identified as a crime against humanity when committed in a systematic manner or on a large scale and instigated by a Government or any organization or group. Therefore, the crime of enforced disappearance country within/out the context of armed conflict can be considered as a crime against humanity if that has a systematic character in a particular(Claude, 2010)

THE UNITED NATIONS FRAMEWORK.

1. DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES

The atrocities committed in World War II were the direct cause for the international community to realize that international guarantees were necessary to protect the basic rights and freedoms of individuals. The Nazi regime had blatantly demonstrated the devastating power of the state to violate these rights and freedoms. The creation of the UN was the first step by the international community towards an international commitment to act together in the promotion of peace and

security. The foundation for human rights within this aspiration was laid down in the UN Charter and elaborated in the Universal Declaration of Human Rights followed by International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.(Vermeulen, 2012). Even though enforced disappearance was an integral part of Hitler's policy that prompted international awareness of the need to create an international protection system, reference to this practice is neither found in the Bill of Rights nor until recently in subsequent binding human rights treaties(Rodley, 1999). It was only in 1992 that United Nations adopted a non-binding Declaration on the Protection of All Persons from Enforced Disappearances ('DPPED'). It however includes several provisions which indirectly have binding effects in so far as they clearly reproduce generally recognized customary rules. It gave the first internationally agreed definition of the offence of enforced disappearance. It also provided a set of rules that all the States of the United Nations were called upon to apply as a minimum to prevent and suppress the practice(Citroni, 2007). The Declaration, proclaims a 'body of principles' (pertaining to enforced disappearance) and 'urges' all States to 'respect' them. Art I of the Declaration perceives 'any act of enforced disappearance' as 'an offence to human dignity' and lists, in a non-exhaustive way, the human rights that are violated by acts of enforced disappearance. It says:

- (1) Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.(Vibhute, 2006).

The UN Working Group on Enforced or Involuntary Disappearances since 1993, started reporting annually on the implementation of the Declaration and obstacles encountered therein. It has frequently invited relatives of disappeared persons, organizations representing them, and human rights NGOs to periodically inform and update it about the steps undertaken by Governments for implementing the Declaration. It regularly transmits to the Governments concerned a summary of allegations of enforced disappearance and of obstacles encountered in the implementation of the Declaration received from relatives of disappeared persons and NGOs. It invites the concerned states to, if they wish, comment upon the allegations of enforced disappearance leveled against them(Rodriguez Medina, 2013).

2. International Convention for the Protection of All Persons from Enforced Disappearance

The UN General Assembly adopted the International Convention for the Protection of All Persons from Enforced Disappearance in December 2006.The Convention entered into force on 23 December, 2010. To date, 90 states have become signatories, and 30 have ratified the Convention. The convention aims at preventing enforced disappearances from taking place, uncovering the truth when they do occur, punishing the perpetrators and providing reparations to the victims and their families.(Sourav, 2016). The Convention has three Parts. Part I defines 'enforced disappearance' and sets out the main requirements that need to be addressed in the domestic law of acceding States. Part II deals with the establishment of a Committee on Enforced Disappearances, the institution charged with the responsibility of monitoring 'enforced disappearance' in the States Parties and of implementing the Convention, while Part III provides for formalities required for ratification or accession and entry into force of the Convention.(Vibhute, 2006) The ICPPED is the first legally binding universal instrument that creates an autonomous and non-derogable right not to be subjected to enforced disappearance. A vast body of derivative obligations and rights in the ICPPED aim to realize and protect this right. Besides laying down the obligation to refrain from committing enforced disappearance, the ICPPED contains a wide range of positive obligations. (Vermeulen, 2012). Article 2 of the International Convention reads:

For the purposes of this Convention, "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. (ICEPD). The definition consists of three elements, first element is deprivation of liberty, the second element of an enforced disappearance is concerning the status of perpetrators and requiring them to be "agents of the State or persons or groups of persons acting with the authorization, support or acquiescence of the State and the third element of enforced disappearance is the refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person. (H.Keller and C.Heri, 2014) By devising a fully-fledged definition, it overcomes the pre-existing deficient and unsatisfactory legal situation, which attempted to capture the full complexity of enforced disappearances in a fragmented way. Indeed, other universal or regional instruments did not include a specific prohibition against enforced disappearances. (Nowak, 2009). One of the major developments found in the Convention is article 24, which includes in the definition of "victim" not only the disappeared person but also any individual who has suffered harm as the direct result of an enforced disappearance, such as family members. This article also establishes the right to truth "regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. (McCrary, 2007) The convention besides defining the victim also lists forms of reparation:

The right to obtain reparation includes material and moral damages and, where appropriate, other forms of reparation such as:

- a) Restitution;
- b) Rehabilitation;
- c) Satisfaction, including restoration of dignity and reputation;
- d) Guarantees of non-repetition (Vitkauskaitė-Meurice & Žilinskas, 2010)

Among other forms of effective reparation, the resolution includes the possibility of rehabilitation, which should include medical and psychological care, as well as legal and social services. It is noteworthy that the Convention also foresees the possibility of rehabilitation (Rodriguez Medina, 2013). Lastly, the Convention establishes a Committee on Enforced Disappearances to supervise the implementation of the Convention. The Committee on Enforced Disappearances may consider state reports, requests and communications. The Committee may consider the request that an abducted person be sought and found, and request the State Party concerned to provide it with information on the situation of the persons sought, within a time limit set by the Committee. (Vitkauskaitė-Meurice & Žilinskas, 2010) Being the monitoring body, the CED has the opportunity to give an authoritative interpretation of the norms laid down in the ICPPED and to develop the rules of evidence governing the attribution of state responsibility under this treaty. (McCrary, 2007) The Convention also establishes that, when an alleged perpetrator of an act of enforced disappearance is present in any territory under the jurisdiction of a State Party, such State shall take such measures as may be necessary to establish its jurisdiction over the offence, unless it extradites or surrenders the offender to another State in accordance with its international obligations or surrenders the offender her to an international criminal tribunal whose jurisdiction it has recognized. (Citroni, 2007).

CONCLUSION

Acts of enforced disappearance subject persons to psychological suffering, deliberately deny them knowledge of their fate, and usually result in their secret torture and death. Family members also suffer the psychological torment of being denied any knowledge of the fate of their loved ones and may never be given access to this information. It is therefore of the utmost importance for the international community to ensure that individual perpetrators are effectively brought to justice for committing acts of enforced disappearance. The past, recent and current incidents of enforced disappearance manifest the 'global' nature of this crime, and the need for a laws both at the national as well as international level creating the mechanisms to guarantee justice for past incidents, prevent future incidents and to protect victims of enforced disappearance. The recent International Convention on Enforced Disappearances not only prohibits enforced disappearance but also regulate States' obligation to criminalize enforced disappearance. With the emergence of the convention the crime of enforced disappearances has stopped in many countries to a large extent.

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