

# OFFENCE OF ENFORCED DISAPPEARANCE : ENHANCING THE PARAMETERS OF CRIMINAL LAW OF SRI LANKA

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**Abstract** - Enforced disappearances (ED) have been an outspoken and debatable dialogue at different spectrums across the globe during the last century due to complexity of the situation itself. Presently, ED is considered a gross violation of human rights at both international and regional levels. Further, this approach has influenced many jurisdictions to recognise the ED as an offence in the domestic levels with the implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPAED) (2010). Recently, the legislature of Sri Lanka passed the enabling statute for the previously mentioned ICPAED in order to guarantee the rights of the victims of the same and further to impose criminal penalties the wrongdoers. The study focuses on assessing and elaborating the new dimensions of recognising a novel penal offence of ED by the introduced domestic statute in expanding the constraints of the criminal law of Sri Lanka. The study is based on legal research methodology which is totally based on the assessment of the qualitative data as analysing the primary sources of domestic and international legal instruments, cases and the secondary sources of books and articles in relation to the area. The study specifies the legal validity of recognising ED as a penal offence at the domestic sphere in order to achieve justice for the harm suffered and finally, the study develops a legal argument in achieving the justice for the victims of ED in Sri Lanka from the treaty-based mechanisms.

**Keywords** - Enforced Disappearances, Criminal Law, Penal offence, Sri Lanka, Treaty-based mechanisms.

## I. INTRODUCTION

Enforced Disappearance (ED) is not a situation that can be defined in a single format due to the nature of its continuity and complexity. Similarly, the incidents of EDs

are not novel to the history of human rights violations at different levels. However, their systematic and repeated use—as a means of creating a general state of anguish, insecurity and fear—is a recent phenomenon (Velasquez-Rodríguez v. Honduras, 1988).

Particularly the incident of ED could be classified under the scope of many branches of laws, including International Human Rights Law, International Criminal Law and International Humanitarian Law Due to the nature of “multiple” human rights violations, ED most commonly represents a violation of the right to life (Mojica v. Dominican Republic, 1991); the prohibition on torture and cruel, inhuman or degrading treatment the right to liberty and security of the person (Velásquez-Rodríguez v. Honduras 1988); and the right to a fair and public trial (Rehman, 2010).

It is evident that, the highest numbers of EDs were reported as taking place in the countries like Latin America, Iraq, Sri Lanka and the former Yugoslavia (Nowak, 2009). Therefore, the level of intervention of the international community and/or the states are significant in order to combat the situations of EDs and ensure the rights of the justice in the societies.

The content of the paper is organized as follows. The second part of this study deals with the methodology used. The third and fourth parts discuss the international standards applicable for criminalizing ED and the allied international regimes connected to clarify the incident of ED and rights connected thereof. The fifth part of the study summarizes the substantive standards of recognizing the crime of ED in Sri Lanka. Finally, the study concludes with developing a legal argument on possible in achieving the justice for the victims of ED in Sri Lanka from the treaty-based mechanisms.

## II. METHODOLOGY

This study follows the black letter approach and the qualitative data was used in order to examine the subject matter. Statutes, judicial decisions and international conventions were used as primary qualitative data while legal text books, legal treatises and journal articles were used to gather relevant information as secondary qualitative data. The comparative analysis was built based on the International standards on the reason that, the new dimensions of recognizing a novel penal offence of ED by the introduced enabling statute (2018) to the International Convention for the Protection of All Persons from Enforced Disappearance (ICPAED) (2010) does expand the constraints of the criminal law of Sri Lanka. The study does not focus on analyzing background, issues and concerns relating to the rules of extradition connected with the offence of ED.

## III. A BRIEF ON THE CORE STANDARDS APPLICABLE FOR CRIMINALISING EDs UNDER PUBLIC INTERNATIONAL LAW

There are few international/regional instruments which may qualify to address the issues of ED's in different perspectives; namely, Declaration on the Protection of all Persons from Enforced Disappearance (1992), the Inter-American Convention on Forced Disappearance of Persons (1994) (IACFDP), and the Rome Statute of the International Criminal Court (1998) and finally, the ICPAPED (2010).

The core international instrument, ICPAPED (2010) defines ED as;

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 (ICPAPED, 2010, art.2)

Further, according to the ICPAPED (2010) the state responsibility towards the people in relation to ED is of two types. Firstly, the widespread or systematic practice

of ED constitutes a crime against humanity as defined in applicable international law and the states shall ensure the justice for the victims of ED thereof (ICPAPED, 2010, art.5). In particular, Rome Statute of the International Criminal Court (RSICC) (2002), recognized ED as a crime against humanity (RSICC,2002, art.7 i). Therefore, the state parties to the RSICC do bare the obligation to refer the issue into the consideration of the international criminal court established by RSCCC (RSICC,2002, art.5,13).

Secondly, the state shall take the necessary measures to ensure that ED constitutes an offence under its criminal law and to achieve justice for the victims suffered from ED (ICPAPED,2010, art.4). As IACFDP (1994) prescribes, the states should take the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity (IACFDP, 1994, art.3).

## IV. ALLIED INTERNATIONAL REGIMES CONNECTED TO THE INCIDENT OF ED AND RIGHTS CONNECTED THEREOF

An incident of ED may infringe the rights of both the victim and secondary victims, recognized by international, regional and domestic standards in different levels, due to the inherit, complex nature of the issue.

A situation of ED may directly affect, but not limited to the rights recognized by the Universal Declaration of Human Rights (UDHR) (1948) such as right to life, liberty and security of person (UDHR, 1948, art. 3), right not be subjected to torture or to cruel, inhuman or degrading treatment or punishment or arbitrary arrest, detention or exile (UDHR, 1948, art. 5, 9), non-discrimination (UDHR, 1948, art.7) and right to social security (UDHR, 1948, art.22).

The crime of ED is a complex offence under the Rome Statute (RSICC,2002, art.7) as the offence of torture. It has been called an "octopus crime" as well as a "permanent crime" since it leads to the crime against humanity. It is noteworthy that the United Nations Convention against Torture (CAT) (1987) has become a source of reference for the ICPAPED (2010) since torture is as an element of ED, and the obligation of the State Parties' to criminalize torture, as an offence under domestic criminal law (Kittichaisaree, 2001). The CAT (1987) describes rights to

reparation (CAT, 1987, art 7) right to fair and adequate compensation (CAT, 1987, art 14), the right to complain about the torture and the obligation to investigate towards the victims (Nowak, 2009).

As the International Covenant on Civil and Political Rights (ICCPR) (1966) recognizes, ED as a violation of right to liberty and security of person (ICCPR,1966, art. 9); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (ICCPR,1966, art. 7); the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (ICCPR,1966, art. 10) and right to life (ICCPR,1966, art. 6).

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 (2005) prescribes standards of the right to obtain reparation, as for of restitution, rehabilitation, satisfaction (including restoration of dignity and reputation) and guarantees of non-repetition which had been followed by the Article 24(5) of ICPAPED (2010).

### V. SUBSTANTIVE STANDARDS OF RECOGNIZING THE CRIME OF ED IN SRI LANKA

Neither Penal Code of Sri Lanka (1883) nor any other law does recognize ED as a criminal offence until the ratification of the ICPAPED (2010) with passing the municipal law, ICPPEDA No. 5 of 2018. With the operation of the statute, Sri Lanka has three principal obligations to be fulfilled: first, to criminalize ED under domestic law; second, to grant detainees and the relatives of detainees a number of rights and remedies for breach of those rights; and third, to cooperate with other Convention States in the investigations, prosecutions, and extraditions of perpetrators of enforced disappearances (South Asian Centre for Legal Studies,2015).

For that reason, the statute ICPPEDA (2018) categorizes the penal offence of ED as an autonomous crime, related crimes and liability of command responsibility. Moreover, the enacted legal regime guarantees the right to justice and reparation to victims of ED. Here the term 'a victim of ED' is referred to a disappeared person or any individual who has suffered harm as the direct result of an enforced disappearance (ICPPEDA ,2018 s 14, 25).

It is prescribed that, the commission of offence of ED may be by an individual or any person who, being a public officer or acting in an official capacity, or any person acting with the authorization, support or acquiescence of the State, and finally by a superior (ICPPEDA ,2018 s 3). The level of the actus reas and mens rea expected to commission the offence is different for the above mentioned three categories of persons.

The commission of the offence by any person who, being a public officer or acting in an official capacity, or any person acting with the authorization, support or acquiescence of the State, does bare a slight difference from the definition undermentioned, where the offence is committed by an individual.

It omits action of the arrests, detains to the first limb of the section 3 (1) (a), considering the nature liability of an ordinary persons.

ED is defined as the commission of offence of ED by an individual as follows;

3. (2) Any person who;
  - (a) wrongfully confines, abducts, kidnaps, or in any other form deprives any other person of such person's liberty; and
  - (b) (i) refuses to acknowledge such arrest, detention, wrongful confinement, abduction, kidnapping, or deprivation of liberty; or
  - (ii) conceals the fate of such other person; or
  - (iii) fails or refuses to disclose or is unable without valid excuse to disclose the subsequent or present whereabouts of such other person, shall be guilty of the offence of ED (ICPPEDA ,2018 s 3 ss2).

The level of criminal liability towards any superior for the commission of the offence of ED as specified below, derive the duties and responsibilities assigned to those of officials by the governing law and that of may be related to the first category (ICPPEDA ,2018 s 3 ss1) of a public officer or acting in an official capacity, or any person acting with the authorization, support or acquiescence of the State.

- 3.(3) A superior who –
  - (a) knows, or consciously disregards information which clearly indicated, that subordinates under the effective authority and control of such superior were committing or about to commit an offence under subsection (1);

- (b) exercises effective responsibility for and control over activities which were concerned with the offence of enforced disappearance; and
- (c) fails to take all necessary and reasonable measures within his power to prevent or repress the commission of an offence under sub section (1) or to submit the matter to a law enforcement authority for investigation and prosecution (ICPPEDA ,2018 s 3 ss 3).

Every offence under this Act shall be a cognizable offence and a non-bailable offence (ICPPEDA ,2018 s5). It is evident that the punishment imposed (for both absolute and related offences) and the non-bailable statute reflect the serious constraint of the state towards eliminating the ED even if the offence is committed by a non-citizen with/without the jurisdiction of Sri Lanka (ICPPEDA ,2018 s 6 ss 2). Moreover, the mental element of the state in eliminating and punishing the wrongdoers while the ensuring the rights of the victims could be visible from the extradition of suspects of ED respecting the principles of Public International Law (ICPPEDA ,2018 s10,11,12,13,25).

Further, either category of commission of offence and wrongdoer shall be guilty of the offence of ED and shall upon conviction after trial on indictment by the High Court (ICPPEDA ,2018, s 6) be punished with imprisonment for a term not exceeding twenty years, and also be liable to pay a fine not exceeding one million rupees and shall further be liable to pay compensation not less than five hundred thousand rupees to a victim (ICPPEDA ,2018 s3 ss1,2,3, s25).

Supplementary, the law recognizes the related crimes of ED as any person who aids or abets or conspires or attempts to commit any offence set out in section 3, shall be guilty of an offence and upon proof court shall impose the similar punishment as of commission an offence of ED (ICPPEDA ,2018 s4, s25).

The basic rights recognized by the statute (of both victim and relative of a victim) are right to know the truth, the progress and results of the investigation, the fate of the person disappeared, the right to form and freely participate in organizations and associations and right to assistance. Further, it is enacted the duty of the law enforcement authorities, where they shall undertake an investigation, even if there has been no formal complaint and appropriate measures to search for and locate the disappeared person (ICPPEDA ,2018 s 14).

## VI. AN ARGUMENT ON THE POTENTIALS OF ENSURING RIGHTS OF VICTIMS OF THE CRIME OF ED'S IN SRI LANKA THROUGH THE TREATY-BASED MECHANISMS

It is evident that the domestic legislation on criminalizing the offence ED provides a sound penal law regime in order to ensure the rights of the people in the country in par with the general structure of the ICPAPED (2010). Further, the jurisdiction of the matters connected hereto lies with the High Court of Sri Lanka hold in Colombo, or the High Court established under Article 154P of the Constitution (1978), for the Western Province hold in Colombo.

Nevertheless, ICPAPED (2010) establishes a Committee on Enforced Disappearances (CED) to carry out the functions provided for under the Convention itself (ICPPED,2010 art. 26) including the mandatory to consider the communications received (individual and state) in relation to issues of ED where all effective available domestic remedies have been exhausted (ICPPED ,2010, art. 31).

Vienna Convention on the Law of Treaties (VCLT) (1980) provides the legal regime on the operation of the treaty obligation by the states. Therefore, the communications relating to ED sent by Sri Lanka may be admissible at the CED, subject to the above- mentioned requirements, unless the state had proposed reservations for the Article 31of ICPAPED (2010) which had not been opposed by the state parties. Although, Sri Lanka has declared that, the state shall only recognize the competence of the CED to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under ICPPED (ICPPED ,2010, art. 32).

Consequently, there is no any possibility to victims of ED in Sri Lanka, by themselves, to reach the CED in order to obtain justice even after exhausted of the domestic law. As discussed previously, ED has been described as a connected factor of the offences of torture and crime against humanity. With that, it generates a valid legal argument on the possibility of recognizing the victims of ED in Sri Lanka to approach the CAT Committee from or on behalf of individuals, subject to its jurisdiction as a violation of right to be free from torture.

Sri Lanka has ratified the CAT (1987) (with the enabling statute passed in 1994) and accepted the inquiry procedure for Sri Lanka under Article 20 of CAT (1987). In 14.08.2016, it recognized the competence of the CAT Committee to receive and consider communications from or on behalf of individual's subject to its jurisdiction who claim to be victims of a violation by Sri Lanka of the provisions of the CAT (CAT, 1987, art.22).

Yet, the issues of ED shall not be referred to the International Criminal Court as of violation crime against humanity since Sri Lanka is not a state party to the Rome Statute of International Criminal Court (1998).

Considering implementation of the suggested recommendations obtained from the treaty-based mechanisms in Sri Lanka has been a fact against the sovereignty of the state as interpreted by the judiciary in the *Nallarathnam Singharasa V Attorney General* (S.C. SpL(LA) No. 182/99, 2006) by Sarath N. Silva, Chief Justice in relation to the ICCPR (1966).

“Therefore, the accession to the Optional Protocol in 1997 by the then President and Declaration made wider Article 1 is inconsistent with the provisions of the Constitution specified above and is in excess of the power of the President as contained in Article 33(f) of the Constitution. The accession and declaration does not bind the Republic qua state and has no legal effect within the Republic.”

The Directive Principles of State Policy of the Constitution (1978) provides inter alia that, the state must “endeavour to foster respect for international law and treaty obligations in dealing among nations” (Constitution, 1978, art.27). That obligation is not justiciable (Constitution, 1978, art.29). However, there have been instances where the Supreme Court has relied on Directive Principles of State Policy in interpreting the obligations of the State (*Seneviratne v. UGC* (1978-79-80) 1 Sri L.R. 182, *Sugathpala Mendis & Others v C B Kumaratunge and Others* SC (FR) No 352/2007, Supreme Court Minutes 8th October 2008).

However, prior to *Nallarathnam* case (2006), there had been several instances where the Supreme Court has held the view that it could rely on treaties that have been ratified by Sri Lanka, even in situations where the legislature has not adopted an enabling legislation for the same.

In *Weerawansa v. Attorney General* (2000), Justice MDH Fernando, writing for the Court held that even in

situations where there was no express enabling legislation, the Supreme Court could enforce the obligations undertaken by Sri Lanka (*Samararatne*, 2010), under the ICCPR (1966), as stated;

“Sri Lanka is a party to the ICCPR (as well as the Optional Protocol)...Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to “endeavour to foster respect for international law and treaty obligations in dealing among nations.” That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes. In that background, it would be wrong to attribute to the Parliament an intention to disregard those safeguards” (SC (FR) 730/96, S.C. Minutes 3rd August 2000)

Therefore, it is evident that, except few instances, the judicial practice of the state, had not been developed as to the duty of judiciary to mandatorily consider the recommendations obtained from the treaty-based mechanisms in order to protect rights of the victim suffered in every aspect. In such a way, even if a victim of ED obtains a favorable recommendation from the CAT Committee in relation to his violation of rights, there is no obligation on the domestic judiciary to mandatorily follow such a recommendation.

## VII. CONCLUSION

Being a dualistic country, Sri Lanka practices the process of passing an enabling statute to incorporate the international law into the municipal law. Following the aforesaid rule, Sri Lanka introduced the enabling statute of ICPAPED (2010) in order to recognize the ED as a penal offence and to protect the rights of the victims/secondary victims of the same. It is evident that, the penal law of the country supplement with the operation of the ICPAPEDA (2018) in guarantying the rights of the people in the territory including, right to equality/equal protection of the law, right of non- discrimination, right to free from torture as specified by the constitution.

On the other hand, the power of the president in excessing the international law into the municipal law under the Article 33(f) of Constitution does restrict/limit the principle of *pacta sunt servanda* (“agreements are to be kept”).

Similarly, Sri Lanka is not a state party to VCLT (1980). Therefore, the accessibility to the treaty-based mechanisms and the enforceability of the recommendations for issue thereof have also been restricted for Sri Lankans due to the municipal legal practices/traditions/laws. However, rationally, those practices do violate respecting the treaty obligations of the state towards the both citizen of the state and the international community at large.

Anyway, it has been recognized ED as form of torture as well as a component of crime against humanity by the many domestic/regional/international dispute resolution mechanisms. Moreover, the ICPAPED (2010) specified as aforesaid fact as follows;

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law (ICPAPED, 2010, art.5).

Hence the crime against humanity has reached the status of jus cogens, it could be argued that ED as a pattern of crime against humanity too constitute a norm of jus cogens, which is the strongest possible rule under the customary international law (Brownie,2008).

Finally, it is the duty of the state, Sri Lanka, to bare the accountability of respecting the standards of the customary international law and treaty obligations while strengthening the municipal law in order to protect the rights of the people, specially the victims of ED.

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