

**THE APPLICATION OF INTERNATIONAL LAW FOR THE
PROTECTION OF PERSONS FROM ENFORCED
DISAPPEARANCES IN INDIA**

**Dissertation submitted to the
Jawaharlal Nehru University in partial fulfillment of
the requirements for the award of degree of**

Master of Philosophy

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CERTIFICATE

Certified that this dissertation entitled, "**The Application of International Law for the Protection of Persons from Enforced Disappearances in India**" which is being submitted by **D. Sridhar Patnaik** in partial fulfillment of the requirements for the award of the Degree of **Master of Philosophy** has not been previously submitted for any degree of this University or any other University and is his original work

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TO
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CHAPTER - 1

INTRODUCTION

1.1 Basic Human Rights and International Law

Human rights are considered to be a matter of international concern. The promotion and protection of human rights is crucial, not only for the States, but also for the international community on the whole, as they form part of the international legal system. It is of everyone's knowledge that protection of human rights of individuals is essential for the all round development as well as for having an organized society with social order intact. It would be noteworthy to mention that one of the achievements of the present era, is the recognition of human dignity and honour, which is clearly reflected in a number of international Conventions. More over with rising number of conflicts world wide, the protection of the 'individual' is at stake, affecting some of the core and basic rights like the right to life and liberty, freedom from torture and abuse. These rights form the crux of international human rights and inhere in the individual at all times. They even exist in morality and in law at the national and international levels. Therefore, it would be pertinent to have a cursory look at some of the fundamental rights enshrined in the international Covenants which are considered to be germane to this study, because a number of these rights are violated when a person is subjected to forced disappearances.

International Human Rights Instruments¹

A. Universal Declaration of Human Rights (UDHR)

The Preamble recognizes the inherent dignity and equal and inalienable rights of mankind, which is the foundation of freedom, justice and peace in the

¹ See, *International Instruments On Human Rights* (NLSIU:1996)

world. Further Article 3 enshrines that everyone has the right to life, liberty and the security of person. Under Article 5, it states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' And endorses the right to recognition everywhere before the law. According to Article 9, no individual should be subjected to arbitrary arrest, detention or exile. It also recognizes the right of an individual so detained, for a fair trial and impartial hearing.

B. International Covenant On Civil And Political Rights

Part III of the Covenant on Civil and Political Rights addresses the individual's right to life and liberty. Article 6 of the Covenant states that:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

The Covenant clearly establishes under Article 7 that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation. Article 9 lays down provisions relating to liberty and security of an individual and further held that anyone who is arrested should be communicated the reasons of his arrest and should also be entitled for an effective legal remedy. The right to claim compensation for unlawful detention is also establishes under the Covenant. Most importantly, the Covenant restricts against any acts or incidents leading infringement of a person's privacy, family or home. The Covenant provided for these measures under Article 17. The provisions of the Covenant is international norms establishing standards for all countries and primarily impose responsibilities on governments and international organizations.

C.U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention Against Torture recognises the inherent right of an individual not to be subjected to torture or cruel or inhuman treatment or punishment. It

clearly states that no justification, whatsoever could be invoked to justify torture. Further, the Convention according to Article 2, requires States Parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. The States parties should also ensure that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. This stipulation is made under Article 14 of the Convention. The requirement for educating and raising awareness of the provisions of the Convention amongst the law enforcement officials and other officials is laid down under Article 10 of the Convention. It forbids states to admit into evidence during a trial any confession or statement made during or as a result of torture.

Basic Human Rights Provisions Under Regional Instruments²

A. American Convention On Human Rights

Article 4 of the Convention provides that:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted

² Available at <http://plato.stanford.edu/entries/rights-human/>. Visited on 5.09.2004

prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

B. African Commission On Human And People's Rights

Article 4 of the Charter states:

Human beings are inviolable. Every human being shall be entitled to respect of his life and the integrity of his person. No one may be arbitrarily deprived of this right.

C. European Convention On Human Rights

According to Article 2:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent escape of a person unlawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

1.2 The Problem

Recognizing the crime of enforced disappearances as a serious offence and a core and emerging human rights issue, the United Nations has taken up measures to tackle this problem. This crime as an offence under international law is an emerging phenomenon. Measures to have a binding legal instrument started in the last decade, though efforts are underway in addressing this crime for the last two decades. But till now the position is not comprehensive, there is lack of clearly articulated and universally accepted standards of practice in addressing this problem. The crime of forced disappearances is a slowly developing concept with many gaps and uncertainties. As per the definition of disappearances, detention is not acknowledged by the State, which make

difficult to establish direct responsibility of the State, since evidence proving if State agents carried out deprivations of liberty is not often available. Establishing individual responsibility is another impediment in proving the crime of forced disappearance because disappearance is a process, which is carried out in various phases, and identifying the persons involved in this crime is difficult.

The first major International development pertaining to forced disappearances is the adoption of the 'U.N. Declaration on Protection of Persons From Forced Disappearances (1992)' followed by the 'Inter-American Convention on Protection of Persons From Forced Disappearances (1994)' and the '1998 U.N. Draft International Convention on Protection of All Persons from Forced Disappearances'. The declaration is however a set of principles and it is not legally binding instrument. It refers to certain important rights like right to prompt and effective remedy, right to fair trial established in International Law and also laid down that States shall have to take necessary administrative, legal, Judicial or other measures to take action on enforced disappearances. But the declaration does not establish the principle of universal jurisdiction. Another issue is the lack of consensus on definition of enforced disappearances, though it is serious crime constituting multiple human rights violations. States have argued that the definition should have a wider connotation including the role of non-state actors within its ambit. In this context even India pleaded for wider definition for the inclusion of non-state actors. This issue is yet to be resolved. The other legal instrument, which dealt with this crime, is the 1994 Inter-American Convention, adopted by the Organization of American States (OAS). This is legally binding instrument, but owing to the ambiguities in tackling this problem, it is very unlikely that

all the States would adhere to this treaty and even the fact remains that this is a regional mechanism.

Followed by these developments and basing upon the 1992 Declaration, in 1998 the 'UN Sub-Commission on Promotion and Protection of Human Rights' adopted the 'Draft International Convention on the Protection of all Persons from Forced Disappearances' (hereinafter referred to as Convention). The preamble of the convention recognizes forced disappearances as violation of 'Right to life' and also endorses the objective of increasing effectiveness of the struggle against crime of forced disappearances. Given the extreme seriousness of this human rights violation, this Convention calls for International cooperation and responsibility of States in taking up necessary institutional measures and redressal mechanisms in tackling these issues. It is a significant effort having a specialized Convention on forced disappearances of persons in order to overcome pitfalls and some of the fundamental problems. But there is also a general thinking if this treaty would lead to further proliferation of human rights treaties. The 'UN Draft Convention on Protection of All Persons from Enforced Disappearances' is a definite improvement over the 1992 declaration in addressing mechanisms for prevention and sanction of forced disappearances. They have been drafted with a sanguine purpose, but the real challenge lies in ensuring that they are used effectively both at National and International levels to prevent and punish forced disappearances. In order to overcome this obstacle, the 'Working Group on Enforced or Involuntary Disappearances (WGEID)' recommended that the UN Commission on Human Rights create a reporting system in which all Governments would submit periodic reports in implementing the declaration.

As discussed in the preceding paragraphs, situations of disappearances occurred in India as well. India is a party to several human rights treaties including the 'Convention Against Torture (CAT)', which was signed on 14th October 1997. But there is no comprehensive law, which deals with curbing the excesses of the police, military and para-military forces. Application of international human rights standards in this context is not clear.

Amidst this situation, it would be timely to make a study on the existing regime of law relating to forced disappearances with an emphasis on the 1998 convention and the various legal measures and remedies available in India offering the protection to the victims of forced disappearances.

1.3 Objective of the Study

This study attempts to make an overview of the 1998 Draft Convention. It analysis forced disappearances as an emerging and core human rights issue. It also discusses India's obligation under International Human Rights Treaties, application of the law in India and the remedies available for the victims of forced disappearances.

1.4 Research Methodology

This study is based upon the relevant official documents and reports of the United Nations—ECOSOC, General Assembly, Security Council and the United Nations High Commission for Human Rights (UNHCHR). Information gathered from the reports of Amnesty International, ICRC and the NHRC is also used for this study, apart from consulting various secondary sources like books, journals and information from websites on this topic.

CHAPTER - 2

ENFORCED DISAPPEARANCES: CONCEPT AND NORM

The problem and protection of human rights is the major preoccupation of states both at the domestic level as well as at the international level. Despite ensuring mechanisms for protection of human rights of the individuals, violations of rights occur in one manner or the other. There could be various reasons for the same viz the socio-economic situation of the country or the type of regime³ or governance in the country, so the causes are manifold and violations continue to exist. The degree of gravity of the situation depends upon the nature of the rights being transgressed, which is an issue of grave concern. One amongst such heinous acts is the crime of enforced disappearances. This crime results in causing agony to the ‘disappeared’ as well as the family and relatives of the ‘disappeared’.

In this context, this chapter would deal with the concept of disappearances and its significance. It would also be discussed how the crime of enforced disappearance is a core and emerging human rights issue and what constitutes the crime of enforced disappearances.

2.1 Concept Of Enforced Disappearances:

The phenomenon of missing persons occurs in almost every situation armed conflict or internal violence leading to a variety of reasons for which persons

³ In Africa, the continent is affected by weakened states and authoritarian regimes, Middle East/Iraq, prolonged military rule and international economic sanctions impeded the welfare of women and children in Iraq, leading to gross human rights violations. Other examples are Eastern Europe, Argentina and Korea, where human rights violations take place due to military’s reaction to perceived threats.

For further details see Horowitz, Shale et al “Human Rights and Societies in Transition-Workshop Report, Lessons and Policy Recommendations” United Nations University, Tokyo, December 2001. Available at [http://www.unu.edu/p&g/human rights-final report.html](http://www.unu.edu/p&g/human%20rights-final%20report.html). Visited on 12.09.04.

may be unaccounted for.⁴ This situation of armed conflict or internal violence leads to violation of international humanitarian and human rights laws. When the fate of the missing person is unknown to the family for over a period of time, then he or she is considered to be disappeared. Disappearances are considered to have emerged as a serious human rights problem. The victims or the persons subjected to forced disappearances are often detained in prisons, tortured and killed and their whereabouts are not disclosed, they are isolated from the outside world and are bereft of any sort of legal protection. Therefore these acts are of extreme cruelty, violating the laws of countries where they are perpetrated. Disappearances are considered to occur whenever:

- There are reasonable grounds to believe that a person has been taken into custody by the authorities or their agents, and
- The authorities deny that the victim is in custody, thus concealing his or her whereabouts and fate.⁵

Disappearances generally violate the right to a family life as well as various economic, social and cultural rights such as the right to an adequate standard of living and the right to education. In fact, it has been found that the disappearance of the family's main economic support, particularly in less affluent societies, frequently leaves the family in a desperate socio-economic situation in which the majority of the rights enumerated in the International Covenant on Economic, Social and Cultural Rights cannot be realized.

⁴ Amnesty international 14-Point Program for the Prevention of 'Disappearances' in "Disappearances And Political Killings, Human Rights Crisis Of The 1990s:A Manual for Action"(AI,Amsterdam, 1994) at p84.

⁵ Ibid

The serious economic hardships that usually accompany a disappearance are most often borne by women. When women are the victims of disappearance they become particularly vulnerable to sexual and other forms of violence. In addition, it is women who are most often at the forefront of the struggle to resolve the disappearances of members of their family. In this capacity they may suffer intimidation, persecution and reprisals.

Children are also involved in disappearances, both directly and indirectly. The disappearance of a child is a clear contravention of a number of provisions of the Convention on the Rights of the Child, including the right to a personal identity. The loss of a parent through disappearance is also a serious violation of a child's human rights.⁶

The crime of enforced disappearances leads to multiple human rights violations⁷ viz
-Right to life⁸

-Right to freedom from torture

-Right to liberty and security of a person.

So it is not just arbitrary deprivation, but it is of a more serious nature.

The rights to life, liberty and security of person are provided for even in the International Covenant on Civil and Political Rights (ICCPR). Any state party to the ICCPR which permits its officials to engage in 'disappearances' or extra

⁶ Fact sheet No.6 (Rev.2), Enforced or Involuntary Disappearances. Available at <http://www.ohchr.org/english/about/publication/docsfs6.htm>

⁷ Everyone has the right to life, liberty and security of person.
-Universal Declaration of Human Rights, Article 3

⁸ Basic international standards on the right to life are also contained in Article 6 of the International Covenant On the Civil and Political rights (ICCPR)
Article 2 Of the European convention on Human Rights
Article 4 Of the American Convention on Human rights
Article 4 Of the African Charter on Human and People's Rights

judicial executions has violated the obligations, which it agreed to fulfill in becoming a party to this treaty. Even in situations of public emergency, there are some rights which can never be suspended. And the rights that have been mentioned above are non-derogable⁹ in nature. These rights are so fundamental that they are not only considered to be customary international law, but are also norms of *jus cogens*.¹⁰ The recognition of these rights as a right of *jus cogens*, has the effect of making these rights binding upon the states which are not parties to the ICCPR, but also applies the rule of non-derogability to all states. Enforced disappearances violate the right to life in a comprehensive manner, because as discussed above it violates the human rights of an individual *in toto* and also it leads to psychological distress of the individual and his or her immediate family members and relatives. A person who has been killed and therefore disappears without trace amounts to violation of the right to life in the gravest possible manner. Further, these tendencies of 'disappearances' will have a terrible impact on the society at large; rights of members of the society to live in peace will be rendered meaningless. More so the victims or the families of disappeared persons access to information in the hands of the police and other state officials would often be affected by the legal and due process requirements.

The other important element constituting the crime of enforced disappearances is the right to freedom from torture. Article 7 of the ICCPR provides: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or

⁹ See generally, Jaime Oraa, *Human Rights In States Of Emergency* (Clarendon Press:1992) at p87 ff. Also see for a discussion on non-derogability and peremptory norms and the contribution of the case-law of the International Court Of justice, Antonio Augusto Cancado Trindade 'The Case-Law Of the International Court Of Justice On Non-Derogable Rights' in Daniel Premont et al (Ed), *Non-Derogable Rights And States Of Emergency*(Bruylant,Brussels:1996) at pp73-89.

¹⁰ See, W.Paul Gromley, 'The Right To Life And The Rule Of Non-Derogability: Peremptory Norms Of *Jus Cogens*' in B.G.Ramcharan (Ed), *The Right To Life In International Law* (Martinus Nijhoff:1985) at pp 120-121.Also see, Manoj K.Sinha,, *Implementation Of Basic Human Rights* (Manak,New Delhi:1999) at pp22-26.

punishment. Article 7 cannot be derogated from in any circumstances or even in times of public emergency. So international community has a duty to defend and preserve the moral integrity of a human being. There has been a significant measure in dealing with this problem of protection of persons from torture in specific. The Convention against Torture and Other Cruel Inhuman or Degrading or Punishment was adopted by the UN General Assembly on 10 December 1984.¹¹ The Convention requires State parties to take effective measures to prevent acts of torture in any territory under their jurisdiction. Under no circumstances, such as war or public emergency, can torture be justified (Article 2). Disappearances are a form of torture. And it is to everyone's knowledge that an act of torture is declared to be an offence to human dignity resulting in severe pain or suffering, both physical and mental and is condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration Of Human Rights.

2.2 Disappearances and Extra judicial Executions: Emerging Phenomenon

The crime of forced disappearances of persons can be traced back to Nazi Germany.¹² The government then used forced disappearances of persons as a tool to get rid of persons who either opposed the government or who were thought to be the enemies of the government. During the 1970s and 1980s

¹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature on 10 December 1984, came into force on 26 June 1987. See for text, Manoj K. Sinha, *Basic Documents On International Human Rights And Refugee Laws* (Manak, New Delhi: 2000) at pp 266-78.

¹² *Nacht und Nebel* decree of Nazi forces in occupied Europe: according to this decree suspected resistance movement members could be arrested and transferred 'under cover of night', Gortitz (ed), *The Memoirs Of Field Marshal Keitel* (1965). Cited in Nigel S. Rodley, *The Treatment Of Prisoners Under International Law* (2nd Ed, OUP: 1999) at p243.

Latin American governments¹³ resorted to the crime of enforced disappearances. The practice of disappearances was systematized and was resorted to in the southern cone of Latin America, particularly in Argentina. The first Latin American countries to practice disappearances were Haiti and Guatemala. It is estimated that more than 90000¹⁴ people were subjected to disappearances. At present, forced disappearances occur frequently in Columbia and Peru.

The 1980s witnessed hundreds of thousands of disappearances and extra judicial executions in Iraq, Uganda. Other situations of forced disappearances took place in Afghanistan, Angola, Ethiopia, Lebanon, Namibia, Syria, Zaire, and China. Unfortunately situations of forced disappearances also took place in India. Persons were subjected to forced disappearances in the states of Punjab, Jammu and Kashmir and parts of the Northeast.¹⁵ The situation of persons being subjected to this crime was phenomenal during the height of militancy in Punjab. Continued acts of internal strife lead to the practice of forced disappearances in the Jammu and Kashmir and the Northeast. Most

¹³ Other countries resorting to forced disappearances: Bolivia, Brazil, Chile, El Salvador, Honduras, Mexico, Paraguay, Uruguay. Growing awareness of this form of repression and the role of the movement of the families and common objectives gave rise to FEDEFAM. The Latin American Federation of Associations for Relatives of the Detained-Disappeared (FEDEFAM) is a nongovernmental organization formed by associations of relatives of the disappeared in countries of Latin America and the Caribbean, which have or are currently practicing forced disappearance. FEDEFAM is a non-profit humanitarian organization, independent of all political or religious doctrines and institutions. Available at <http://www.desaparecidos.org/fedafam/eng.html>. Last visited on 12.03.2004.

¹⁴ Ibid.

¹⁵ 'Disappearances' continued and hundreds of extra judicial executions were reported. At least 35 people were sentenced to death; no executions were reported. Armed groups committed grave human rights abuses, including torture, hostage taking and killings of civilians. 'Disappearances' continued to be reported during the year predominantly in Jammu and Kashmir, Assam and Manipur. Legislation protecting members of the security forces from investigation and prosecution continued to prevent the determination of the fate of the disappeared. See, Amnesty International Report 1999: India. Available at <http://www.amnesty.org/ailib/aireport/ar99/asa20.htm>. visited on 12.03.2004.

importantly the crime of forced disappearances is significantly higher in South Asia, Nepal¹⁶ recording the most number of persons subjected to forced disappearances alone last year. The crime of forced disappearances is also rampant in Sri Lanka, Myanmar and Indonesia. There are categories of victims of forced disappearances. The first are generally considered political opponents and members of grassroots organization. The second category of victims are the relatives and friends of those who have disappeared, who have formed into non-governmental organizations to bring attention to the issue of enforced disappearances of persons.

Subsequent to the growing problem of the crime of forced disappearances, in 1979 the U.N. General Assembly adopted Resolution 33/173 titled 'Disappeared Persons'. Prior to this, such persons were referred to as missing persons. In 1980, the Commission On Human Rights decided to establish a 'Working Group On Enforced or Involuntary Disappearances'.¹⁷ The group has a broad mandate, to examine questions relevant to enforced or involuntary disappearances. It may contact the relevant Governments, intergovernmental organizations, and humanitarian organizations. It reports annually to the 'Commission On Human Rights'. The gravity of the problem of enforced disappearances¹⁸ and its emergence as a core human rights issue could be assessed basing upon the annual reports of the Working Group to the Commission On Human Rights. The reports convey a sense of the problem

¹⁶ <http://web.amnesty.org/library/Index/ENGASA311552004?open&of=ENG-NPL>. Also see, United Nations Press Release dated 14.12.2004. Available at <http://www.unhcr.ch/hurricane/hurricane.nsf/NewsRoom?OpenFrameSet>.

¹⁷ Resolution 20 (XXXVI) of 29 February 1980. For details of the methods and mandate of the Working Group, see, Factsheet No. 6, note 4.

¹⁸ Since the beginning of the 1990s Amnesty International has recorded 'disappearances' in more than 30 countries. The organization even received reports of known or suspected extra judicial executions in over 60 countries. See note 4, p 93.

worldwide. Though it is impossible to predict the exact number or figures of disappeared persons.

The figures, which are provided by the UN Working Group on Enforced or Involuntary Disappearances, are probably just a fraction of the real number of disappearances. Since its establishment (1980) the UN Working Group is working to clarify a total of 43,980 disappearances. In 1996, the Working Group was engaged in 551 new reports from 27 countries. The number of countries the Working Group has contact with on disappearances, amounts to 63. In approximately 40 of these countries the relatives have organized in order to ask for clarification. This has not happened in the other 23 countries, probably due to the fact that this is too dangerous both for the disappeared person himself and for the relatives. It is therefore very likely that these countries are involved in 'disappearances', which cannot be found in official records.¹⁹

The sheer number of the cases recorded worldwide and the scale of situations involving the crime of forced disappearances is itself a proof, that international protection of human rights is not a mere desirability but an utter necessity. The problem of the crime of forced disappearances is contemporary in nature, looking at the magnitude of the issue; there is actually a gap in the existing international standards and in the actual practice of the protection of human rights of individuals.

¹⁹ Ibid p186. For a comprehensive survey of the statistics of the crime of forced disappearances, see Statistical Summary: Cases Of Enforced Or Involuntary Disappearances Reported to the Working Group Between 1980 and 1997. Available at <http://www.unhcr.ch/Hurodocda/Huridoca.nsf/0/b440d8cfa3b14e88c12566080050401b?OpenDocument#Annex2>.

2.3 The Legal Setting

Recognizing the crime of enforced disappearances as a serious offence and a core and emerging human rights issue, the United Nations has taken up measures to tackle this problem. This crime as an offence under international law is an emerging phenomenon. Measures to have a binding legal instrument started in the last decade, though efforts are underway in addressing this crime for the last two decades. But till now the position is not comprehensive, there is lack of clearly articulated and universally accepted standards of practice in addressing this problem. The crime of forced disappearances is a slowly developing concept with many gaps and uncertainties. Since the seriousness of the problem grew, the international and regional communities started to take preventive action. Human rights defenders and lawyers in Europe and in Latin America started working on the draft declarations and conventions on disappearances throughout the 1980s.²⁰ Around the same time even the Commission On Human Rights established the Working Group on Enforced or Involuntary Disappearances.²¹ International law considers 'Disappearances' as continuous crimes as long as the fate of the disappeared is not known. The notable development in international human rights law in addressing this crime is the 'U.N. Declaration on Protection of all Persons from Enforced Disappearances (1992)',²² it contains variety of state obligations to take preventive action. The '1994 Inter-American Convention on Forced Disappearances',²³ was the first legally binding instrument, it states that practice

²⁰ [http:// www.ishr.ch/](http://www.ishr.ch/)

²¹ See, Fact sheet No.6,note 6.

²² UN.G.A.Res 47/133,U.N.Doc.A/47/49 (1992)

²³ 33 ILM 1529

of forced disappearance constitutes ‘crime against humanity’.²⁴ The ‘1998 Draft International Convention on Protection of all Persons from Enforced Disappearances’²⁵ contains important obligation of states to criminalize this offence under domestic law. It also states that ‘the systematic or massive practice of forced disappearances constitutes a crime against humanity (Article 3)’ and lays down the principle of universal jurisdiction. Further, standards for protection against enforced disappearances is also found in the Rome Statute of the International Criminal Court (Article 7: Enforced Disappearances constitutes crime against humanity), Article 18 of the ILC Draft Code of Crimes Against Peace and Security of Mankind 1996²⁶ refers explicitly to forced disappearances of persons. Article 3 of the Universal Declaration of Human Rights states that everyone has the right to life, liberty and security and Article 5 says that no one shall be subjected to degrading treatment or punishment. International Covenant on Civil and Political Rights also refer to forced disappearances (Article 17: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence) and reiterates right to liberty and security of persons, The U.N. Code of Conduct for Law Enforcement Officials (LEOs) laid down the provisions for State officials and their obligation to protect the civilian population.²⁷ The code laid down basic principles of legitimacy of purpose,

²⁴ ‘Crimes against humanity’ developed largely as an outgrowth of ‘war crimes’. Genocide, war crimes and crimes against humanity form the main categories of international crimes. London charter (1945), Nuremberg Charter (1945) defines crimes against humanity as Murder, Extermination, enslavement, deportation committed against any civilian population, before or during the war.

²⁵ E/CN.4/Sub2/RES/1999/24

²⁶ www.un.org/law/ilc/texts/dccomfra.htm

²⁷ For example, other instruments which laid down the rules and principles for state officials to protect the civilian population are: Body of principles for the protection of all persons under any form of detention or imprisonment. G.A. RES 43/173, annex 43 GAOR supp (No. 49), U.N. Doc. A/43/49 (1988). Basic Principles for the Treatment of Prisoners, G.A. res. 45/111, annex, 45 U.N.

strict necessity and proportionality for LEOs while discharging their duties. There are also number of resolutions passed by the U.N.- ECOSOC, GA, SC and the UNHCHR in addressing the crime of forced disappearances. Various provisions of international humanitarian law are aimed at ensuring that people do not go missing as a result of armed conflict and that those who do are accounted for. Families have the right to be informed of the fate of missing relatives.²⁸ The parties to a conflict must search for persons reported missing by an adverse party²⁹ and facilitate enquiries made by members of families dispersed as a result of the conflict so as to help them restore contact with one another and try to bring them together again. A further responsibility incumbent upon the parties to a conflict concerns deceased persons: lists showing the exact location and markings of the graves, together with particulars of the dead interred therein, must be exchanged.³⁰ The parties to a conflict must also encourage the work of organizations engaged in this task.³¹

GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990). Basic Principles for the Treatment of Prisoners, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No.49A) at 200, U.N. Doc. A/45/49 (1990). Standard Minimum Rules for the Treatment of Prisoners adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No.1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No.1) at 35 U.N. Doc. E/5988 (1977). Body of Principles for the Protection of all persons under any form of detention or imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1998). Declaration on the protection of all persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

²⁸ Additional Protocol I, Article 32

²⁹ Ibid, Article 33

³⁰ Ibid, Article 34

³¹ Geneva Convention IV, Article 26

CHAPTER - 3

DEVELOPMENT OF INTERNATIONAL STANDARDS FOR THE PROTECTION OF PERSONS FROM ENFORCED DISAPPEARANCES

The concept of international protection of human rights is firmly established in international human rights law, the main concern being developing international human rights standards against violations by individuals, groups or nations. However one of the most serious problems facing the international community is the gap between internationally established standards and actual performance. In order to bridge the gap between the proclaimed standards and the establish an international legal order, the United Nations responded with a protection mechanism³² in place in order to monitor compliance with various

³² United Nations Intergovernmental bodies dealing with human rights:

- The General Assembly is the main deliberative body of the United Nations. It reviews and takes action on human rights matters referred to it by its Third Committee and by the Economic and Social Council.
- The Economic and Social Council, makes recommendations to the General Assembly on human rights matters, and reviews reports and resolutions of the Commission on Human Rights and transmits them with amendments to the General Assembly. To assist it in its work, the Council established the Commission on Human Rights, the Commission on the Status of Women and the Commission on Crime Prevention and Criminal Justice. It also works closely with agencies of the United Nations system which have a special interest in human rights matters.
- The Commission on Human Rights is the main policy-making body dealing with human rights issues. It prepares studies, makes recommendations and drafts international human rights conventions and declarations. It also investigates allegations of human rights violations and handles communications relating to them.
- The Sub-Commission on Prevention of Discrimination and Protection of Minorities undertakes studies and makes recommendations to the Commission concerning the prevention of discrimination against racial, religious and linguistic minorities. Composed of 26 experts, the Sub-Commission meets each year for four weeks. It has set up working groups and established Special Rapporteurs to assist it with certain tasks. For details, see www.un.org/rights/dpi. Also see Larry Johnson, "The United Nations System for the protection of Human rights", *Georgia Journal Of International and Comparative Law*, Vol 20, No.2(1990) at pp 363-75. For a detailed discussion on the concept of protection in existing



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international legal instruments and to investigate into alleged abuses and violations of human rights. In this context, an assessment would be made in this chapter on the work of the United Nations on the evolution of international standards on protection of persons from forced disappearances. It further elaborates on the scope and prospects for enforcement of the '1998 Draft Convention of Protection of All Persons from Enforced Disappearances'. Also an overview of the 'Inter-American Convention on Protection of Persons From Forced Disappearances' would be made. The chapter would also include the role of NGO's in protection of missing persons with reference to the work of the ICRC.

3.1 1992 UN Declaration On the Protection of All Persons from Enforced Disappearances

Although disappearances are classified as violations of basic international human rights, there existed many obstacles in the goal of its enforcement. However efforts have been underway in addressing the crime of forced disappearances as a matter of immense concern. In the pursuit of this humanitarian objective, in 1992, the UN General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearances.³³

The Preamble of the Declaration recognizes that forced disappearances is a matter of great concern, considering that the crime of forced disappearances is carried out in a persistent manner wherein persons are arrested, detained or abducted against their will or other wise deprived of their liberty by officials

law and practice, see B.G.Ramcharan, "The Concept and Present Status of the International Protection of Human Rights: Fifty Years After The Universal Declaration"(Martinus Nijhoff:1989) at pp 18-35.

³³ UN.G.A.Res 47/133,U.N.Doc.A/47/49 (1992)

of different branches or levels of government. The fate of the individuals remains unknown, placing the persons outside the protection of the law. In accordance with the declaration, the systematic practice of disappearances is of the nature of a crime against humanity and constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of a person, and the prohibition of torture, and it also violates or constitutes a grave threat to life.³⁴ States are under an obligation to take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearances,³⁵ in particular to make them continuing offences under criminal law³⁶ and even to establish civil liability.³⁷

³⁴ Article 1(2). However the Declaration did not contain a definition of forced disappearance. The prevailing view was that no satisfactory all-encompassing definition had been proposed. The drafters felt that definition was not necessarily required in a Declaration and that a definition might cause problems in light of the wide variety of ways in which disappearances could occur. And only working definition of the crime was included in the Preamble. See Reed Brody, Felipe Gonzalez, "Nunca Mas: An Analysis Of International Instruments On Disappearances", *Human Rights Quarterly*, vol 19 (1997) at p376. For detailed discussion on the problem of defining disappearances, also see Rodley, note 12 at pp245-247.

An independent expert noted that "After an in-depth analysis of the present international legal framework relating to humanitarian law, criminal law and human rights law, including the extensive case-law by regional human rights courts and the UN Human Rights Committee, I considered it as the main task of my mandate to identify those gaps and ambiguities in the present legal framework which need to be addressed and clarified by a future binding instrument. The most important gap is the lack of a binding obligation and another gap concerns the definition of disappearance which constitutes a multiple human rights violation of a much more serious nature than just arbitrary deprivation of personal liberty. In addition, the definition of enforced disappearance should go beyond the traditional human rights concept of referring exclusively to State agents". Oral Presentation of the Report on the international legal framework for the protection of persons from enforced disappearance submitted by Manfred Nowak to the 'Commission On Human Rights' dated March 26, 2002. Available at <http://www.unhchr.ch/huricane/huricane.nsf/0/9D59E8D8AA94A1E0C1256B8A002F8A12?opendocument>

³⁵ Article 3. In its resolutions 1993/35, 1994/39 and 1995/38, the Commission On Human Rights invited all Governments to take appropriate legislative or other steps to prevent and punish the practice of enforced disappearances, with special reference to the Declaration. See, E/CN.4/1996/38. Report Of the Working Group On Enforced or Involuntary Disappearances. Also see A/51/561. Report Of the Secretary-General at Para 1

³⁶ Article 4

³⁷ Article 5

Further the Declaration emphasizes that “No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances”³⁸. The Declaration also refers to the right to a prompt and effective judicial remedy, as well as unhampered access of national authorities to all places of detention,³⁹ the right to habeas corpus, the maintenance of centralized registers of all places of detention,⁴⁰ the duty to investigate fully all alleged cases of disappearances, the duty to try alleged perpetrators of disappearances before ordinary and not military courts,⁴¹ the exemption of the criminal offence of acts of enforced disappearance from statute of limitations, special amnesty laws and similar measure leading to impunity.⁴² Special provisions have been incorporated as far as the protection of children are concerned. In accordance with the Declaration, States shall prevent and suppress the abduction of children of parents subjected to enforced disappearances.⁴³

The Declaration is however a set of principles drawing its inspiration from the Convention Against Torture, UN Torture Declaration and the Principles of Extra-Legal Executions.⁴⁴ It is not legally binding instrument and Declaration does not establish the principle of universal jurisdiction. Perpetrators of crimes against humanity are subject to universal jurisdiction, according to which

³⁸ Article 7

³⁹ Article 9

⁴⁰ Article 10

⁴¹ Article 16(2)

⁴² Article 17

⁴³ Article 20

⁴⁴ See note 34 at p400. Also see, Reed Brody, “Commentary On The Draft UN Declaration On The Protection Of All Persons From Enforced Or Involuntary Disappearances”, *Netherlands Quarterly Of Human Rights*, Vol4 (1990), pp 381-94.

“states have jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern.”⁴⁵

However the intention behind drafting a Declaration is quite sanguine. But it is not a binding instrument, so there would be institutional problems in adopting the principles of the Declaration into the domestic legislations. States should first of all acknowledge the occurrence of the crime of forced disappearances in their respective countries. Despite various efforts by the Working Group to remind Governments of their obligation to implement the provisions of the Declaration by taking appropriate legislative, administrative, judicial or other measures, only little progress has been made in practice. But for some exceptions, States have not begun to take consistent steps to incorporate in their national legislations the principles set out in the Declaration. The Working Group stresses upon the obligation to implement the Declaration not only in the States where there have been previous occurrences of the crime of forced disappearances, but measures shall be taken by all States in order to ensure that acts of disappearances do not occur in the future.⁴⁶ Once this is done, it requires further streamlining of the existing procedures and laws in their national administrative, judicial and legislative mechanisms. It requires a sense of morality and social order. However the purpose of the Declaration cannot be understated and it is not to deny the fact

⁴⁵ See note 34 at pp390-92. Also see “ Universal Jurisdiction: The duty of States to enact and implement legislation”. Available at www.amnesty.org/library/index/engior530152001?opendocument. Visited on 21.01.04.11551

⁴⁶ E/CN.4/1996/38.Report Of the Working Group On Enforced or Involuntary Disappearances, at Para 46. The history of the application of the Declaration of All Persons from Forced Disappearances and related documents is rather short one due to the novelty of the crime as defined. The international community had some experience in attempting to apply the Declaration. The adhoc criminal tribunals of Yugoslavia and Rwanda have struggled to enforce the Declaration. See, Todd McIntyre and Catherine de Gaston, “Enforced Disappearance of Persons: Its Inclusion as a Crime against Humanity in the ICC”. Available at [http:// www.jil.byu.edu/byujil/papers/2001-2002/disappear1_finalPDF](http://www.jil.byu.edu/byujil/papers/2001-2002/disappear1_finalPDF). Visited on 31.03.2004

that having a Declaration in place is a definite improvement in addressing the crime of forced disappearances. Many States with large number of missing persons have emergency regulations that allow State forces greater secrecy in their operations. In countries where people are taken into custody under emergency regulations and other laws outside the routine human rights safeguards, there should be proper supervisory procedures in place, ensuring record keeping of the actions by the State forces operating under such regulations. Thereafter State forces should be required to submit periodic reports to supervisory agencies such as the national human rights commissions.⁴⁷ Effective monitoring may help curb the inhuman practice of illegal or extra judicial detentions. It may be quite untimely to evaluate the success of international instruments on disappearances, but they have surely succeeded in drawing the attention of international community at large to the vagaries of the crime of forced disappearances. Nevertheless the scope of the protection of persons from the crime of forced disappearances is broadening and this explicitly highlights the need to have an effective binding international legal instrument intact in addressing the basic guarantees of life and liberty of individuals. Efforts are underway in this direction.

3.2 An Overview Of the 1998 Draft International Convention On The Protection Of All Persons From Forced Disappearances

The drafting of a convention on forced disappearance is an initiative dating from the 1980s.⁴⁸ Despite adoption by the General Assembly, in 1992, of the

⁴⁷ See Vasuki Nesiah, "Overcoming Tensions Between Family And Judicial Procedures", *International Review Of the Red Cross*, Vol 84, Dec2002, at p835.

⁴⁸ E/CN.4/Sub.2/1998/19. Also see David Kramer and David Weissbrodt, "The 1980 U.N. Commission On Human Rights and the Disappeared", *Human Rights Quarterly* Vol3 (1981), pp18-33.

Declaration on the Protection of All Persons from Enforced Disappearance, the persistence of the practice of enforced disappearance, its complexity and its extreme gravity as a crime indicated a need for a universal Convention on the question. In a way the draft international convention was conceived and developed basing upon the principles of the Declaration. A preliminary draft Convention was prepared and presented, in 1995, by the working group on the administration of justice of the Sub-Commission on the Promotion and Protection of Human Rights. In summary form, the provisions in the draft international convention address, *inter alia*: the nature of any act of forced disappearance of a person; the definition of forced disappearance; the prescription of punishment for the perpetrator of, and other participants in, the offence of forced disappearance or of any constituent element of the offence; the systematic or massive practice of forced disappearance as a crime against humanity; undertakings of States Parties to the Convention related to a prohibition of forced disappearances and their investigation of them; legislative measures related to definitions and punishments; measures by states to establish jurisdiction in cases of forced disappearance and related acts; measures related to the apprehension and/or detention of a person suspected of having committed a forced disappearance or related act; legal assistance between states related to evidence necessary for the proceedings and to the search for, location, release and rescue of disappeared persons or, in the event of death, in the return of their remains.

The draft convention⁴⁹ on the whole contains substantive provisions on the protection of persons from the crime of forced disappearances. It is divided into thirty-nine articles. The Preamble states that the crime of forced disappearances undermines the deepest values of any society committed to the respect of the rule of law, human rights and fundamental freedoms, and that the systematic or widespread practice of such acts constitutes a crime against humanity, and emphasizes upon the fact that any act of forced disappearance of a person constitutes a violation of the rules of international law guaranteeing the right to recognition as a person before the law, the right to liberty and security of the person, and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It recognizes that forced disappearance violates the right to life or puts it in grave danger and denies individuals the protection of the law. It further calls for increasing the effectiveness of the struggle against forced disappearances of persons throughout the world. According to the provisions of the draft convention, forced disappearance is considered to be the deprivation of a person's liberty, in whatever form or for whatever reason, brought about by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by an absence of information, or refusal to acknowledge the deprivation of liberty or information, or concealment of the fate or whereabouts of the disappeared person.⁵⁰ Most importantly, the draft convention in its elaboration on the crime of forced disappearances of persons provides that the systematic or massive practice of forced disappearances constitutes a crime against humanity. Human rights groups and relatives of victims of disappearances insisted that forced disappearances should be

⁴⁹ E/CN.4/Sub.2/RES/1999/24. Draft International Convention On The Protection Of All Persons From Forced Disappearances.

⁵⁰ Article 1(1)

characterized as a crime against humanity. And the gravity and characteristics justify its categorization as crime against humanity.⁵¹ If persons are suspected of perpetrating or participating in an offence, they should be charged with a crime against humanity, that this act was part of a systematic or massive practice of forced disappearances and however limited the character of their participation.⁵² Enforcement of punitive measures for crimes committed in any State's jurisdiction depends upon the kind of administrative, judicial system in place and adherence to rule of law. Investigations of crimes should be carried out in a swift, but effective manner. It fosters confidence system and compliance with the law, because maintaining public confidence in the fairness of the criminal justice system is vital to administration. This principle is characterized in article 4 the draft convention, which states that investigations should be carried out in a swift manner regarding complaints of forced disappearances, and the family of the disappeared person should be informed of the fate and whereabouts of the disappeared person. Further, the draft convention calls for cooperation of the states with each other and with the United Nations to contribute to the prevention, investigation, punishment and eradication of forced disappearance. Incase of the crime of forced disappearance is proved, and then prompt and appropriate reparation for the damage caused should be provided.⁵³

⁵¹ Article 3. Also see Reed Brody, Felipe Gonzalez, note 34, at p378-82.

⁵² Ibid

⁵³ Article 4. This should be read with article 24, which states that:

1. States Parties guarantee, in all circumstances, the right to reparation for the harm caused to the Victims of forced disappearance.
2. For the purposes of this Convention, the right to reparation comprises restitution, compensation, rehabilitation, satisfaction, and the restoration of the honour and reputation of the victims of the offence of forced disappearance. The rehabilitation of victims of forced disappearance will be physical and psychological as well as professional and legal.

Most important is the obligation in article 5⁵⁴ to define forced disappearance as a crime under the domestic law, as of a continuous and permanent character, corresponding to the serious and continuous nature of the crime of forced disappearance. The need for international cooperation in crime prevention and control has been increasing all over the world. The internationalization of criminality makes international cooperation more than a necessity. The same has been propounded in the draft convention highlighting the need for international cooperation and legal assistance amongst the States. The draft convention states in article 8 that “States Parties shall afford one another the greatest measure of legal assistance in connection with any criminal investigation or proceedings relating to the offence of forced disappearance, including the supply of all the evidence at their disposal that is necessary for the proceedings”. The draft convention further addresses that no

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3. For the purposes of this Convention, the term "victim of the offence of forced disappearance" means the disappeared person, his or her relatives, any dependant who has a direct relationship with her or him, and anyone who has suffered harm through intervening in order to prevent the forced disappearance or to shed light on the whereabouts of the disappeared person.
 4. In addition to such criminal penalties as are applicable, the acts referred to in articles 2 and 3 of this Convention shall render the State liable under civil law, and the State may bring an action against those responsible in order to recover what it has had to pay, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law.

⁵⁴ According to this article:

1. The States Parties undertake to adopt the necessary legislative measures to define the forced disappearance of persons as an independent offence, as defined in article 1 of this Convention, and to define a crime against humanity, as defined in article 3 of this Convention, as separate offences, and to impose an appropriate punishment commensurate with their extreme gravity. The death penalty shall not be imposed in any circumstances. This offence is continuous and permanent as long as the fate or whereabouts of the disappeared person have not been determined with certainty.
2. The State Parties may establish mitigating circumstances for persons who, having been implicated in the acts referred to in article 2 of this Convention, effectively contribute to bringing the disappeared person forward alive, or voluntarily provide information that contributes to solving cases of forced disappearance or identifying those responsible for an offence of forced disappearance.

order or instruction by any public authority could be invoked to justify the crime of forced disappearance. States have a responsibility to prohibit such orders or instructions authorizing or encouraging a forced disappearance. Significantly forced disappearances committed by a subordinate shall not relieve his superiors of criminal responsibility, if the latter is knowledgeable of the crime being committed and fails to prevent the crime with the powers vested in him.⁵⁵ The provisions also address such areas as due process in courts of general jurisdiction and the exclusion of all courts of special jurisdiction, and particularly military courts; the prohibition on privileges, immunities or special exemptions; prohibition of an exemption from criminal responsibility; a guarantee of broad legal standing in the judicial process to any wronged party, or any person or national or international organization having a legitimate interest therein;⁵⁶ the right to complain to a competent and independent state authority and to have that complaint immediately, thoroughly and impartially investigated by that authority; investigation when there are reasonable grounds to believe that a forced disappearance has been committed.⁵⁷ The draft convention identified the need for not considering the crime of forced disappearance as a political offence for the purposes of

⁵⁵ Article 9.

Military commanders may also be responsible for war crimes committed by their subordinates. 'When troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof. Prosecution Brief on the Law of Principals in *United States v. Captain Ernest L. Medina* detailing the duties of a combat commander. Available at http://www.law.umkc.edu/faculty/project/ftrials/mylai/MYL_LAW3.HTM. Visited on 12.10.2004.

⁵⁶ Article 10

⁵⁷ Article 11

extradition, it is important to consider the definition of offences for purposes of extradition, conditions and procedures related to extradition; cases of non-extradition. It shall be subject to the procedures established in the law of the requested State.⁵⁸ Further, the draft convention provides for prohibition on a statutory limitation relative to criminal proceedings and any punishment arising from forced disappearances and States parties should adopt necessary measures to comply with this provision, according to article 16 of the draft convention. Article 17 and 18 of the draft convention respectively provide for prohibition of any amnesty measure or similar measures prior to trial for the perpetrators and related concerns such as exemption or pardon; prevention and punishment of the abduction of children whose parents are victims of forced disappearance and of children born during their mother's forced disappearance. In the draft convention, various provisions have been made to address the need for training of public law enforcement personnel and officials including with regard to this Convention; the right to a prompt, simple and effective judicial remedy; designated officials who are authorized to order the deprivation of liberty, terms and conditions of detention, judicial control over any form of deprivation of liberty, access to all places of detention;

⁵⁸ Article 12, Read with article 15, which states:

1. No State Party shall expel, return (refouler) or extradite a person to another State if there are grounds for believing that he or she would be in danger of being subjected to forced disappearance or any other serious human rights violation in that other State.
2. For the purpose of determining whether such grounds exist, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State in question of situations indicating gross, systematic or widespread violations of human rights.

deprivation of liberty - place, records and centralized registers of persons detained and access to them; manner and conditions of release of persons detained; reparation for the harm caused to the victims of forced disappearance, rehabilitation, state liability under civil law.

Under article 25 of the draft convention would establish a Committee against Forced Disappearance, made up of ten experts who would be elected by State Parties for four-year terms with the possibility of being re-elected. Members should be of high moral standing with recognized competence in the field of human rights, which shall serve in a personal and independent capacity. The States Parties shall elect the experts, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience. Articles 26 to 33 refer to the manner in which the Committee would function; reporting obligations of States Parties;⁵⁹ the Committee's power of inquiry and to undertake missions;⁶⁰ inter-state complaints,⁶¹ an individual complaints procedure;⁶² the power of the Committee to undertake any effective procedure to seek and find persons who have disappeared.⁶³

⁵⁹ Article 27(1): The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. In connection with the submission of the first report of each State Party concerned, the Committee may make a visit to the territory under the control of that State Party. The State Party concerned shall provide all the necessary facilities for such a visit including the entry into the country and access to such places and meeting with such persons as may be required for carrying out the mission of the visit. Thereafter the States Parties shall submit supplementary reports at the request of the Committee.

⁶⁰ Article 28

⁶¹ Article 29

⁶² Article 30

⁶³ Article 31

3.3 Prospects For Enforcement Of the 1998 Draft International Convention On The Protection Of All Persons From Forced Disappearances

The Commission on Human Rights adopted resolution 2001/46 by which it decided to establish an inter-sessional open-ended working group with the mandate to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance. The mandate given by the Commission to this open-ended working group is to prepare a new instrument against forced disappearances on the basis of the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly in 1992, in the light of the work of the independent expert⁶⁴ and taking into account, the draft international convention prepared by the Sub-Commission. The status of the draft convention is still in the deliberations process, owing to the fact that the inter-sessional open-ended working group was only constituted recently. The Commission on Human Rights in its recent report⁶⁵ reviewed the provisions of the draft convention. The purpose of the future instrument, in contrast, was to offer the broadest possible protection for all persons against enforced disappearances, including those, which did not constitute crimes against humanity.⁶⁶ Emphasizing the new instrument's aim of prevention of the crime of forced disappearances and early warning of the occurrence of the crime, considered that it was important to confer on the

⁶⁴ Manfred Nowak was appointed to conduct a survey of existing legal standards and to report his findings to the 58th session of the Commission on Human Rights. The decision of last year's Commission to create a working group on the draft convention was endorsed by the UN Economic and Social Council in its decision 2001/221.

⁶⁵ E/CN.4/2004/59 dated 23 February 2004

⁶⁶ Ibid at para 18

persons concerned and the national and international monitoring bodies the ability to intervene as soon as the deprivation of liberty began, without the need to wait for a certain period.⁶⁷ References were made to various elements of the draft convention viz the status of perpetrators of enforced disappearances, enforced disappearance as a crime against humanity, the discussion in contention was whether a simple reference to the Preamble would be sufficient or not. A new article 1 bis was therefore proposed, stating that “the crime of enforced disappearance as defined in article 1 shall constitute a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Another proposal, namely the insertion of a new article 2 bis which would state that “the widespread or systematic practice of enforced disappearance constitutes a crime against humanity and shall attract the consequences provided for under international law”, was supported by several delegations.⁶⁸ Discussions were held on various other provisions, in order to make the draft instrument more elaborate and binding in future. References were made to provisions relating to protection against impunity, statute of limitations for criminal proceedings, prosecutions in domestic courts. In this context, it was proposed that States parties shall take the necessary measures to establish jurisdiction in respect of enforced disappearance when the alleged perpetrator of the offence is in a territory under its jurisdiction, unless the State extradites him or her or transfers him or her to an international criminal

⁶⁷ Ibid at para 22

⁶⁸ It was pointed out that the Rome Statute, which was concerned with punishment, did not cover all the points that an instrument designed to offer protection against enforced disappearance should contain, not least as regards preventive action. The purpose of the Statute was to define the competence of the International Criminal Court, and it did not contain any obligation to criminalize enforced disappearance amounting to a crime against humanity in domestic criminal law. Hence the future instrument should lay down such an obligation. See *ibid*, at para 45.

tribunal whose jurisdiction it has recognized.⁶⁹ Matters relating to international cooperation and legal assistance were also taken up in the agenda with specific reference to extradition agreements. Importantly the group in its discussion on the victims of the crime enforced disappearances considered that the instrument should distinguish between two types of victims: those against whom the crime of disappearance had been committed and those whose interests had suffered owing to the commission of that crime, including members of the victim's family.⁷⁰ The question of overlapping between the functions of the monitoring body⁷¹ and those of the Working Group on Enforced and Involuntary Disappearances was discussed it was felt that would be no overlapping in responsibilities if the monitoring body was assigned the functions of considering periodic reports, communications from individuals and States, and the conduct of investigation. Since the Working Group had no mandate in those areas and did not deal with the international responsibility of States for violations of their human rights obligations. The Working Group did indeed visit States, but for the purpose of discussing the general situation. Nevertheless, de facto overlapping could not be ruled out. Questions even arose regarding the scope of the application of the future instrument in war time, it was widely felt that "The present instrument is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, or the option available to any State to authorize the International Committee of the Red

⁶⁹ Ibid at para88

⁷⁰ Ibid at para 139

⁷¹ Many delegations expressed their concern to avoid the proliferation of treaty-monitoring bodies and agree on the least costly solution in financial and human terms. They therefore suggested the drafting of an optional protocol to the Covenant, with monitoring entrusted to the Human Rights Committee. See, ibid at para 144

Cross to visit places of detention in cases for which international humanitarian law does not provide.”⁷² It was emphasized⁷³ the future instrument should:

(a) Establish a specific and non-derogable right not to disappear within the meaning of article 1. It was not enough to affirm that enforced disappearance involved a violation of several rights, such as the right to life, the right to liberty and security, the right not to be subjected to torture or the right to acknowledgement of one’s legal personality. These were only partial aspects of the act of disappearance, which did not take into account its full complexity,

(b) Establish a right to the truth, from which family members in particular should be able to benefit expressly. This right was already recognized in international humanitarian law and in international judicial practice relating to human rights,

(c) Establish an obligation on States to carry out exhumations, since they constituted one of the most important means of investigation and were sometimes necessary in order to determine the fate of persons who have disappeared,

(d) Ensure that disappearances carried out by non-State actors were taken into account in the context not only of the State’s obligation to criminalize their acts, but also of the obligation to protect the rights of victims, such as the right to the truth, the right to a remedy and the right to reparation.

The deliberations of the inter-sessional working group would continue at the 61st session also for a binding legal instrument for the protection of all persons from forced disappearances. But precisely, a separate instrument addressing the crime of forced disappearances is imminent at the moment. It should go

⁷² Ibid, para 186

⁷³ Observations by Manfred Nowak

beyond the Convention on Torture. There could be a problem of States not ratifying the instrument also, for two reasons, firstly States may not acknowledge the occurrence of the crime of forced disappearances in their jurisdictions and secondly, States which have not ratified the Torture Convention, which also addresses the right to life and liberty of a person, may resist recognizing the convention on enforced disappearances. Nevertheless, the process of addressing this crime has begun and it would certainly pave way for a binding international legal instrument.

3.4 Regional Instruments For The Protection Of Persons From Enforced Disappearances:

Inter-American Convention On Enforced Disappearances⁷⁴

In view of the extreme seriousness of the crime of forced disappearances, the international community at the universal level has taken various measures in response, and certain standards have been developed in the framework of protection of persons from this crime even at the regional level. In this context it would be noteworthy to mention the efforts of the Organization Of American States (OAS) ⁷⁵ in drafting a convention for the protection of persons from the crime of forced disappearances. In 1994, the General Assembly of the Organization of American States adopted the Inter-American Convention on the Forced Disappearances of Persons. The process of drafting this convention was almost done during the same time when the drafting of the UN Declaration on the Protection of All Persons from Enforced

⁷⁴ 33 I.L.M. 1529(1994)

⁷⁵ The OAS has been intensely lobbied by the NGO Amnesty International on human rights issues. When Latin American dictatorships turned to 'disappearances', Amnesty International mobilized around that issue, building support for the 1994 Inter-American convention on the Forced Disappearance of Persons. See, McIntyre, note 46.

Disappearances began. In a way the UN Declaration on the Protection of All Persons from Enforced Disappearances influenced the Inter-American Convention for the Protection of Persons from forced Disappearances. Significantly it is the first legally binding instrument on the protection of persons from forced disappearances. The Preamble of the Inter-American Convention states that “the systematic practice of the forced disappearance of persons constitute a crime against humanity”. The crime of forced disappearance of persons is defined as “the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by the agents of the state or by persons or groups of persons acting with the authorization, support, acquiescence of the State, followed by an absence of information or a refusal to acknowledge the deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees”.⁷⁶ It further provides that the offence of the crime of forced disappearance will be considered to be a continuous crime for as long as the victim’s whereabouts or fate is unknown. Article 4 is the central provision of the Convention as it obliges States parties to take measures to enact the crime of forced disappearance as defined in article 2 and to establish jurisdiction over such cases when the crime was committed within its jurisdiction, when the accused is a national of that State, when the victim is a national of that State (and that State sees fit to do so), and, moreover, when the alleged criminal is within its territory and it does not proceed to extradite him. This provision can be interpreted as establishing universal jurisdiction among the member States of the OAS parties to the convention. Further the Convention under no circumstances will excuse someone from undergoing trial for committing acts constituting the crime of

⁷⁶ Article 2

forced disappearances, criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.⁷⁷ Obedience to orders or instructions from a superior is not an admissible defense⁷⁸ No person can invoke exceptional circumstances such as “state of war, the threat of war, internal political instability, or any other public emergency”, according to article 10 of the Convention. It states that the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom and the competent judicial authorities shall have free and immediate access to all detention centers and to each of their units, and to all places where there is reason to believe the disappeared person might be found including places that are subject to military jurisdiction. But it is to be noted that the scope of application of the Convention is not comprehensive. It was set out in the Convention that it shall not apply to the international armed conflicts governed by the 1949 Geneva Conventions and their Protocols, concerning protection of wounded, sick, and shipwrecked members of the armed forces; and prisoners of war and civilians in time of war.⁷⁹ The Convention was signed by most of the members of the OAS.⁸⁰

⁷⁷ Article 7

⁷⁸ Article 8

⁷⁹ Article 15

⁸⁰ Countries which have signed the Convention are Argentina ,Bolivia, Brazil ,Chile ,Columbia, Costa Rica, Ecuador,Guatemala,,Honduras Nicargua,Panama,Paraguay,Uruguay and Venezuela.Nonsignatories include US, Canada and Cuba. For more details about signatories and ratifications, see <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/juridico/english/treaties.html>. Official website of the Organization of American states.

3.5 Role Of the International Committee Of The Red Cross (ICRC) In The Protection Of Missing Persons

The International Committee of the Red Cross (ICRC)⁸¹ is a neutral, independent and impartial humanitarian organization, which acts primarily in the context of armed conflict, but also in situations of internal violence. It acts as a neutral intermediary between parties to a conflict. Amongst its many functions, it works to protect civilian populations and combatants no longer taking part in hostilities. By gathering information in the field and informing the parties of unlawful acts committed against the local population, the ICRC tries to bring such practices to a halt and to trigger appropriate remedial action. ICRC delegates take both direct action in the field and also draw up confidential reports to the appropriate authorities. The recommendations they make to both governmental authorities and armed groups can range from issues related to the conduct of hostilities, to preventing summary executions. These reports highlight rules of international humanitarian law, which must be observed in order to protect civilians and combatants from the effects of violence and to encourage respect for basic human rights. The ICRC may take the initiative of evacuating particularly vulnerable individuals from a dangerous area, reuniting separated family members, arranging for the exchange of family messages, and providing medical supplies, water and food for those in need. The ICRC also maintains a regular presence in areas where individuals or entire communities are at risk of being attacked. Its delegates stay in close contact with all potential perpetrators of violence - whether

⁸¹ <http://www.icrc.org>

regular army troops, rebel fighting units, and security or police forces. The ICRC also carries out visits to places of detention where persons are held in connection with the armed conflict or internal violence, examines the conditions of detention and treatment and interviews detainees about their experiences in detention. It seeks access to all places of detention where detainees falling within their field of activity are held, as well as the opportunity to interview the detainees themselves in private and without witnesses. In return, the ICRC maintains absolute confidentiality about what it observes during such visits. Because of its special mandate and methods of work, the ICRC is often able to gain access to places of detention, which others cannot visit. The ICRC has its own network and personnel, and functions independently of other organizations. Nonetheless, it is willing to receive information about patterns of violation or enquiries about specific populations, detainees or missing persons, which it may be in a position to follow up. It prefers to receive such information directly from relatives, but will accept it from NGOs on the understanding that the confidentiality protecting its work means that the NGO should not expect to receive feedback on any action taken. In the case of missing or disappeared persons, it may send a response to the family. In general, it will seek to make direct contact with the family before it decides to take action. Its guiding principle is that any action it takes is on behalf, and in the name of, the detainees themselves, not of other organizations. If information is passed on to the ICRC, it should be as detailed as possible. As a general rule, the ICRC will tend to act more readily in cases indicating a pattern, than in individual cases.

Recognizing the importance of the problem of disappearances, and the indelible impact it has on the families and relatives of the disappeared persons, the ICRC in the year organized a conference on the 'Missing Persons'.

Confronted with this issue on a daily basis, the ICRC has resolved to start a process of deliberation on it by addressing the problem from the perspective of both humanitarian and international human rights law. ICRC felt that it would be important to identify practical measures to address the pain and uncertainty suffered by the families and to provide empowerment and help to resolve the grave consequences and pain caused by the phenomenon of 'The Missing'. The concept of The Missing used by this Conference refers to a wide range of different situations which occur both in the context of armed conflict and internal violence, including people missing in action or held in secret or some forms of incommunicado detention, some internally displaced people and the victims of enforced disappearances. All share the uncertainty, trauma and immense suffering caused to the families of the victims and the universally recognized right of these families to know the fate and whereabouts of the missing persons. A wide array of governmental, non- governmental,⁸² intergovernmental organizations and individual experts participated in the conference. The conference attempted to propose practical and operative measures to address the problem of missing persons as a contribution to the effective implementation of existing international standards and norms and to support current efforts of the International Community to develop new legally binding instruments for protection of persons from forced disappearances.

From the foregoing discussion, it could be inferred that efforts have started to tackle the crime of forced disappearances, both at the international level and at the regional level. Under these circumstances, intergovernmental organizations like the United Nations play an important role in the protection

⁸² Organizations which participated are International Commission of Jurists (ICJ), Latin American Federation of Associations of Families of the Disappeared (FEDEFAM), International Service for Human Rights (ISHR), World Organization Against Torture (OMCT), Physicians for Human Rights (PHR) etc. See the special edition on 'The Missing Persons', *International Review Of the Red Cross*, Vol 84, Dec 2002.

and promotion of human rights worldwide. These new international human rights standards should be elaborated and adopted by governments in their legal, administrative systems and other mechanisms to enhance implementation of human rights.

CHAPTER-4

DISAPPEARANCES IN INDIA: A LEGAL STUDY

In India, human Rights viz the rights relating to life, liberty, equality and dignity of the individual form the very essence of the rule of law. But due to various reasons like intense social conflicts, insurgency in some parts of the country led to violations of these rights in a significant manner. These situations have led to these rights becoming a matter of public concern in view of increasing incidence of arbitrary arrest, illegal detention, custodial violence and other abuses of power resorted to by the law enforcement agencies especially in the States affected by terrorism and insurgency.

It is in this context, this chapter would examine the problem of disappearances in the States of Punjab, Jammu and Kashmir and North East. Further an assessment of National Security Legislations and Human Rights pertaining to this problem will be made. Also the availability of domestic remedies, the role of NHRC in addressing this problem will be examined. An overview of India's obligations under International Human Rights Treaties and its position with respect to the 'Draft International Convention on Protection of All Persons from Forced Disappearances' would be taken up to evaluate the application of International Law in tackling this problem in India.

Significant human rights abuses include arbitrary arrest, extrajudicial killings, illegal detention, custodial violence and forced disappearances. These abuses are quite rampant in insurgency inflicted States of Jammu and Kashmir, the Northeast, Punjab and in some States like Andhra Pradesh, Madhya Pradesh, West Bengal etc., where there are armed opposition groups actively operating. Primarily the reasons which could be cited for emergence of such grave situations leading to massive violation of human rights are the normal

police practices⁸³ in the form of resorting to custodial violence for extracting information from the detainees, in other situations it is the para-military⁸⁴ and military forces deployed in the insurgent prone areas for the maintenance of law and order. These law enforcement agencies operate under the mandate provided by the security legislations like the National Security Act, 1980, Armed Forces Special Powers Act, 1958, Jammu and Kashmir Public Safety Act, 1978.

Amidst these circumstances, it would be pertinent to have a cursory look at the communications sent by the 'Working Group on Enforced or Involuntary Disappearances' to the Government Of India on questions relating to the crime of forced disappearances. If this is any indication of the growing concern of the UN to the crime of forced disappearances, the Government should take measures to initiate measures to combat this problem by making laws which would be consistent with international human rights conventions in this regard. The Working Group serves as a channel of communication connecting sources of information on alleged disappearances - typically family members

⁸³ For details see, G.P. Joshi, "Violation of Human Rights by Indian Police", *World Focus*, January 2001, at pp. 10-18. Also see, Chaman Lal, "The Human Rights Controversy", PUCL Bulletin, February 2001 at www.pucl.org/reports/National/2001/controversy.htm. It was held that law enforcement agencies should respect the human rights of not only the law-abiding citizens but also the criminals including terrorists and insurgents and follow the due process even while dealing with serious situations of internal security. The police, they insist must adhere to the fundamental principles of jurisprudence that emphasize the innocence of the accused till the contrary is proved against him. They hold that even that even the dreaded terrorists should be allowed to enjoy all the rights that our Constitution and procedural laws grant to the accused persons. They are not willing to accept the police argument that it is compelled to excise its brief and cross the legal boundaries because of the increasing inability of the criminal justice system to cope with the challenge of organized violence. They opposed the special laws and enactment, which give additional powers to police and security forces to fight militancy and argue that these challenges must be met by using the normal legal provisions.

⁸⁴ Central Reserve Police Force (CRPF), Border Security Force (BSF), Indo-Tibetan Border Police (ITBP), National Security Guards (NSG) are some of the security forces engaged in combating organized crime, as it happens civil police depend on security forces for all law and order duties.

or non-governmental organizations, with respective Governments. According to the annual report 2004 of the Working Group, 347 cases have been transmitted to the Government of India. Majority of these cases occurred between 1983 and 2000, in the context of ethnic and religious disturbances in the Punjab and Kashmir regions. They were primarily attributed to the police authorities, the army and paramilitary groups. The disappearances were allegedly related to wide powers granted to the security forces under emergency legislation, in particular the Terrorist and Disruptive Activities Act and the Public Security Act, which allow for both preventive and prolonged detention in the absence of normal safeguards available under the criminal codes. The victims have included shopkeepers, a lawyer, journalists, human rights activists and students. Concern was expressed by the Working Group about the impunity enjoyed by the security forces, which is leading to this crime. Concern was also expressed about the alleged assimilation into the police force of the Special Operations Group, an elite volunteer force to which a large number of disappearances are attributed.⁸⁵ According to an AI report released in 2000, there have been between 700 and 800 unsolved disappearances in Kashmir since 1990. In June, the Jammu and Kashmir state government announced that 3,931 persons remained missing in the state since 1990. This figure contrasts with that given by the Association of Parents of Disappeared Persons (APDP),⁸⁶ which puts the number at more than 8,000. In

⁸⁵ See, E/CN.4/2004/58, dated 21 January 2004. Report of the Working Group on Enforced or Involuntary Disappearances at paras 138-140.

⁸⁶ APDP was founded in 1994, when large number of parents used to visit the High Court to file or pursue the *Habeas Corpus* petitions. Initially relatives of disappeared persons used to take individual efforts in a disorganized manner. Finally those efforts were put on a collective forum by a practicing lawyer. APDP, technically is not a human rights group, but it is an association of the sufferers of the pattern of forced disappearances. It is an independent group seeking justice from the State. Similar organizations functioning in other parts of Asia are the AFAD (Asian Federation Against Involuntary Disappearances), Sri Lanka, FIND (Families of Involuntary Disappearances), Philippines.

April, the Jammu and Kashmir judiciary established that 500 of these were disappearances in custody. There were 211 reported kidnappings in the northeastern states during 2002. For example, on February 24, unknown assailants abducted and killed Kishore Reang, the elder brother of a candidate in Kanchanpur. In July, unknown assailants abducted Rafiqul Islam in Tahirpur. He was subsequently freed from a hotel in Dimapur in September after his father refused to pay a ransom.⁸⁷

4.1 Situation of Disappearances in India

State of Punjab

Punjab is the historic home of India's Sikh population, a religious minority forming approximately 2% of the nation's population. From the late 1970's to the mid 1990's, Punjab faced a violent insurgency launched by separatists as well as a brutal government crackdown that left tens of thousands dead. The threat of militant secessionists provided the excuse for the implementation of security measures that targeted the entire Sikh minority. People were abducted from their homes in the dead of night, to be taken into custody, charged with crimes they did not commit, often tortured or raped, and sometimes killed outright. As counter-insurgency operations progressed, phenomenon of 'disappearances' became quite common. Year 1980s was termed as the 'Decade of disappearances'. In 1984, the Government intensified active armed oppression of Sikhs, which led to a violent crackdown of Sikh insurgency. The decade-long police crackdown of the insurgency after Operation

⁸⁷ See, "India: Country Reports on Human Rights Practices-2003". Released by the Bureau of Human Rights, Democracy and Labour, 25 February 2004. Available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27947.htm> Visited on 12.10.2004

Bluestar,⁸⁸ which the Indian Army launched in 1984 led to the deaths of at least 10,000 people in Punjab. A system of rewards for police for the capture of militants led to an increase in disappearances and extra-judicial executions. Although all Punjabi Sikhs were vulnerable to disappearance, police especially targeted Amritdharis (initiated Sikhs), those who were politically active with the Akali Dal parties, and families and friends of suspected militants. As part of its counter-insurgency operation, the Indian government passed laws that sanctioned police impunity. The Terrorist and Disruptive Activities (Prevention) Act (TADA) of 1987 established in camera courts and authorized detention of persons in a “disturbed area” based on mere suspicion. Between 1985 and 1995, the police registered 17,529 TADA cases in Punjab, only one person was eventually convicted. Similarly the Armed Forces (Special Powers) Act of 1983 empowered security forces to search premises and arrest persons without a warrant. Legislations like the National Security Act of 1980 also enabled authorized detention of suspected terrorists for about two years without any trial. Despite this gruesome situation, the Indian Parliament passed the 59th Amendment of the Constitution, in March 1988, to constitutionally mandate suspension of right to life where internal disturbances exist. All these situations culminated in successful practice of

⁸⁸ Similarly a police counter-insurgency movement was launched by name ‘Operation Rakshak II’. Human Rights Watch (HRW) describes this, as “the most extreme example of a policy in which the end appeared to justify any and all means, including torture and murder.” Cited in Jaskaran Kaur, “A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India”, *Harvard Human Rights Journal*, Summer 2002, at p272. In 1994, in response to reports of mass disappearances orchestrated by the police, Jaswant S. Khalra, Chairman of the Human Rights Wing of the Akali Dal, and Jaspal S. Dhillon, then General Secretary of the Wing, investigated illegal cremations conducted by the Punjab Police between 1984 and 1994 in three crematoria in Amritsar district. A few months after Khalra and Dhillon publicized their findings, the police abducted Khalra from outside of his house. (ibid). For a detailed report on disappearances in Punjab, see, Ram Narayan Kumar and Cynthia Mahmood, “Disappearances in Punjab and the Impunity of the Indian State: A Report on Current Human Rights Efforts. Available at <http://www.panthkhalsa.org/humanrights/index.php> Visited on 23.08.2004. Also see, Amnesty International, “India: Break the cycle of impunity and torture in Punjab”, January 2003 (AI Index: ASA20/002/2003).

forced disappearances of innocent persons. They had been victimized by the State in order to elicit information about 'suspected' links with terrorist outfits and simultaneously they were also subjected to undue harassment by the armed opposition outfits allegedly labelling them as 'informers' of the State.

State of Jammu and Kashmir

The phenomenon of enforced disappearances emerged in Kashmir after 1989, after the outbreak of armed conflict. The heavily deployed security forces (more than six hundred thousand, the highest number of army during peacetime anywhere in the world) during its campaign against combatant Kashmiris has resorted to different forms of human right violations like extra-judicial executions, custodial deaths, custodial torture, rapes, forced labour, including the 'disappearances'. As security forces suspect every Kashmiri resulting in arrests of the non-combatant Kashmiris and subsequent tortures has resulted in the disappearances from last 11 years. People from all spheres of life and different age groups, from 10 years to seventy years after their arrests have got disappeared. Militants, their sympathizers, political activists and large number of innocent persons have become the victims of enforced disappearances. It is reported that more than 2000 people since 1989, after their arrests by the law enforcing agencies have disappeared. And the disappearances have taken place during the Governors as well as civilian rule imposed in state since 1989 by the Government of India. The years of armed struggle have taken a heavy toll of lives lost, about which reliable figures are impossible to obtain. According to official handouts 19,866 people have died in Jammu and Kashmir since January 1990, including 9,123 members of armed opposition groups, 6,673 victims of armed opposition groups, 2,477 civilians killed by Indian security forces and 1,593 security personnel. The official figures conceal that hundreds of victims were not killed as legitimate

targets in situations of armed conflict but were deliberately and arbitrarily killed or died as the result of torture inflicted in the custody of state agents.⁸⁹ The Jammu and Kashmir Bar Association documented 218 deaths in custody in 1996; all victims had reportedly been arrested first and killed in detention centers inside and outside the state. According to the Institute of Kashmir Studies, some 200 people died in custody in 1997; in the first half of 1998, around 60 deaths in custody were reported. The real number of such deaths is considered by many observers to be twice as high as the number of reported deaths, i.e. some 350 to 400 deaths per year. Many people who have "disappeared" in custody are believed to have been killed by the detaining authorities. Foremost among the laws contributing to the abuse of human rights in Jammu and Kashmir is the Armed Forces (Special Powers) Act, 1958, which was introduced in Jammu and Kashmir in December 1990 after six districts in the Kashmir Division and two districts in the Jammu Division had been declared "disturbed areas". It gives the armed and paramilitary forces extraordinary powers, which facilitate arbitrary arrest and detention and extra judicial executions and provide impunity for offenders acting under it.⁹⁰

States of Assam and Manipur

The troubled northeastern region of India has experienced hundreds of enforced disappearances. Due to the limited scope of this study, phenomenon of disappearances would be discussed covering the States of Assam and

⁸⁹ The most well-documented recent case of a "disappearance" which was found to conceal a custodial killing is that of human rights lawyer and activist Jalil Andrabi. He was arrested by a unit of Rashtriya Rifles on march 9th, 1996. The following day the Jammu and Kashmir High Court Bar Association of which Andrabi was a member, filed a *habeas corpus* petition in the High Court. By that time, Andrabi was already dead and his dead body was found on the banks of river Jhelum a few days later. See Amnesty International, India, "If they are dead tell us: disappearances in Jammu and Kashmir", March 1999 (AI Index: ASA 20/002/1999)

⁹⁰ Ibid.,

Manipur. The Human Rights situation in the northeastern Indian state of Assam deteriorated rapidly after the Indian Army was deployed in November 1990 to fight against secessionist insurgents. To contain the insurgents and to diminish the support they enjoyed, especially in the rural areas, security forces have indulged in extra-judicial executions, custodial deaths, torture and rape. On the other hand, common villagers are intimidated and terrorized to divulge information about insurgents and on the other, insurgents are physically eliminated. Assam is another troubled area, wherein security forces resorted to abuse of human rights under the blanket immunity provided by the Armed Forces (Special Powers) Act of 1958. It was alleged that in order to avoid a popular protest against the policy of the Government by the more articulated urban population, the security operations have been confined to the rural areas of Assam. Insurgency in the state of Assam rose in a political context, as it has happened in the other adjoining states. But the government has chosen to view it solely as a security problem, and has adopted policies to root out insurgency militarily. But it has only aggravated the situation of human rights abuses more drastically. These intense military operations were taken up to counter the 'ULFA' that basically was a result of movement of self-determination taken up by the Assamese youth. In most of the cases, persons picked up by the security forces simply disappeared. These encounter killings have not only eroded the credibility of the security forces, but they have also helped the militants win back some of the sympathy lost over the years.⁹¹

⁹¹Manab Adhikar Sangram Samiti (MASS), since its inception has been making efforts to attract the attention of people and the media to the atrocities conducted by the security forces under the impunity cover. It also prepared a report of people subjected to disappearances between 1991-1997. See, <http://www.assam.org> Also see Udayon Misra, "No military solution for Assam", *The Hindu*, 8 October 2004

Similarly, in Manipur⁹² the phenomenon of 'disappearances' has been endemic for decades. Cases of enforced disappearances in Manipur is closely linked to the counter-insurgency operations conducted by the security forces. It occurs in conjunction with other forms of human rights violations like arbitrary detention, torture and extra judicial execution etc. The phenomena of 'disappearance' in Manipur can be broadly divided into two types, namely activists of the underground groups and ordinary civilians. The Government of India came down hard on the insurgency movement with the imposition of an undeclared state of emergency in the state of Manipur and armed its agents with special powers. The state was declared 'out of bounds' to international human rights monitors. Situations of disappearances in Manipur were even documented and communicated to the Government of India by the UN 'Working Group On Enforced or Involuntary Disappearances'.⁹³ It was stated that human rights abuses have become a routine affair. Grave concern has been expressed about attempts by the armed forces to prevent judicial inquiries ordered by the State government into the disappearance of a 15-year-old schoolboy, Yumlembam Sanamacha, who was reportedly arrested by members of the 17 Rajputana Rifles on 12 February 1998. The Government replied that he had been apprehended by the security forces during a search operation on suspicion of belonging to a terrorist organization, the United National Liberation Front, and had managed to escape when the security forces, who were taking him to be handed over to the police, had been attacked by members of 'Meira Paibis' a women's organisation, seeking to effect the release of the persons apprehended. The Government also stated that

⁹² See, *Manipur Update*, Vol I(III), February 2000.

⁹³ See, E/CN.4/1999/62. Report of the Working Group on Enforced or Involuntary Disappearances at paras 153 and 154.

a case had been filed with the Imphal Bench of Guwahati High Court regarding the alleged disappearance and the Army had filed a counter affidavit. This incident depicts the deplorable conditions of human rights abuses resulting in disappearances in this small Northeastern State, affecting or violating even human rights of children and women.⁹⁴

If these heinous crimes continue to take place, it would only lead to intense agony for the families and friends of the 'disappeared', which would haunt them for years together. They cannot even go through the normal bereavement process that needs to be observed after the death of a family member.

4.2 An Assessment of National Security Legislations

Despite a strong international mandate for the protection of basic human rights of individuals, there is enough documentation to highlight the fact that abuses are rampant; particularly in areas there is history of militancy and related activities. The Government of India from time to time enacted various security legislations like the Armed Forces Special Powers Act, National Security Act, Disturbed Areas Act, Public Safety Act etc, which have given ample powers to the military and paramilitary forces for maintenance of law and order in disturbed areas. But these laws have come under intense scrutiny and public debate owing to the rampant violations of human rights by the security forces, deriving their mandate from these laws. The purpose of National security legislation is not just a question of restoring law and order, in the preservation of such order it is equally important not to dilute the ethos of human rights.

⁹⁴ Recently in July, 2004 a woman by name Thangjam Manorama was taken into custody by Assam Rifles. The authorities claim, she was an active cadre of the outlawed People's Liberation Army. A few hours later after she was abducted, her body was found lying nearby her home. This gory incident led to large scale protests in Manipur, demanding the repealing of the Armed Forces (Special Powers) Act. See, M.S. Prabhakara, "The Furies Come to Life", *The Hindu*, 30 July 2004.

But evolving experiences have shown that there are some deficiencies in the existing practice. In the light of this background, it would be timely to make an overview of some of the existing national security laws viz the National Security Act, 1980 and the Armed Forces Special Powers Act, 1958.

Overview of the National Security Act, 1980⁹⁵

The National Security Act (NSA) of 1980 permits detention of persons considered security risks; police anywhere in the country may detain suspects under NSA provisions. It extends to the whole of India except the State of Jammu and Kashmir.⁹⁶ Section 3 of the NSA elaborates upon the powers to make orders detaining persons. It is provided that if the appropriate Government⁹⁷ may detain a person, if it is satisfied with respect to any person that he is acting in a manner prejudicial to the maintenance law and order. This provision does not mention of any specific circumstances amounting to threat of security or maintenance of law and order. Under these provisions, powers are even conferred upon the District Magistrates and Police Commissioners⁹⁸ to detain a person, which could be done by an order of the State Government. A person can be detained for three months in the first instance, but if the concerned Government is satisfied that there are enough grounds, may detain a person for a further time period, not exceeding three months at any time. It would be significant to note, according to these provisions, that the Government may exceed the period of detention by three

⁹⁵ Act No. 65 of 1980-dated 27th. December, 1980

⁹⁶ Section 1(2)

⁹⁷ Section 2 provides the definition for 'appropriate' Government. It could be Central or State Government.

⁹⁸ Section 3(3)

months; it may amend such order from time to time by any period.⁹⁹ When any order is made or approved by the State Government, it shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order. This may provide the State Government a scope to interpret and elaborate upon the situations, which may as well be inimical to the interests of the detained person. Because it is the State Government which provide the grounds of detention.¹⁰⁰ According to section 5 of the Act, a detained person may be removed from one place of detention to the other place of detention, within the same State or another State, provided the consent of the Government of other State is obtained. This may lead to a situation wherein the concerned of the detained person may be ignorant of the place of detention, as the State Government by virtue of this extraordinary power will not hold any accountability. A reading of section 6 makes this circumstance more noteworthy. Under this provision, no detention order shall be invalid or inoperative merely by reason that the person detained there under is outside the limits of the territorial jurisdiction of the Government or officer making the order, or that the place of detention of such person is outside the said limits. Further, under the provisions of this Act when a person is detained in pursuance of a detention order, the authority making the order shall, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government. This should be done not later than five days and in exceptional circumstances not later than ten days. But if the

⁹⁹ Ibid

¹⁰⁰ Ibid at sub-clause 5.

authorities consider this to be against the public interest, then they need not communicate the same.¹⁰¹ Every detained person has the right to know the reasons of the detention and the State cannot delay the same, for it would impede the basic right to representation and fair trial. And not informing of the grounds of detention at all would only make the situation of the detained person more adverse. Sections 9 to 12 of the Act deal with deal with constitution of advisory boards and their procedures. Accordingly, the Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards. Such boards shall consist of three persons who are qualified to be judges of the High Court. The state government must confirm the detention order, which is reviewed by an advisory board of three high court judges within 7 weeks of arrest.¹⁰² The authorities may detain a suspect without charge or trial as long as 1 year¹⁰³ on loosely defined security grounds. The Act provides immunity to the authorities ordering detentions or relevant actions taken on the ground that action is purported to have been taken in good faith and consequently no suit or other legal proceeding can be initiated against the Central Government or State Government or a person authorized to make a detention.¹⁰⁴

Overview of the Armed Forces Special Powers Act, 1958 (AFSPA)

Under this Act, all security forces are given unrestricted and unaccounted power to carry out their operations, once an area is declared disturbed. It was first applied to the North Eastern states of Assam and Manipur and was

¹⁰¹ Section 8

¹⁰² Section 11(1)

¹⁰³ Section 13

¹⁰⁴ Section 16

amended in 1972 to extend to all the seven states in the north- eastern region of India. They are Assam, Manipur, Tripura, Meghalaya, Arunachal Pradesh, Mizoram and Nagaland. The enforcement of the AFSPA has resulted numerous incidents of arbitrary detention, torture, rape, and looting by personnel of the security forces. These events led to intense agitations by people and human rights groups as well for repealing of this Act. Section 3 of the Act deals with power to declare Areas to be 'Disturbed Areas'. It grants the power to declare an area disturbed to the Central Government and the Governor of the State, but does not describe the circumstances under which the authority would be justified in making such a declaration. Rather, the AFSPA only requires that such authority be "of the opinion that whole or parts of the area are in a dangerous or disturbed condition such that the use of the Armed Forces in aid of civil powers is necessary." Apart from this, the relevant provisions of this Act grant special powers to the personnel of the security forces, these powers are granted to the commissioned officer, warrant officer, or non-commissioned officer.¹⁰⁵ These powers include 'shoot to kill',¹⁰⁶ to destroy suspected places,¹⁰⁷ to arrest without warrant,¹⁰⁸ and entry and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises and may for that Purpose use such force as may be necessary.¹⁰⁹ This

¹⁰⁵ Section 4

¹⁰⁶ Ibid at 4(a)

¹⁰⁷ Ibid at 4(b)

¹⁰⁸ Ibid at 4(c)

¹⁰⁹ Ibid at 4(d)

ignores a fundamental issue, the Constitution does not permit military rule. The military can only aid the civil power and to empower even non-commissioned officers with 'shoot to kill' is ignoring the tenets of the Constitution. According to section 5 of the Act, any person arrested and taken into custody under this Act shall be made over to the officer-in-charge of the nearest police station with the least possible delay, together with a report of these circumstances occasioning the arrest. It is not mentioned as to what constitutes the least possible delay. Since this provision could be interpreted as depending on the specifics circumstances of each case and there is no prescribed time limit after which the section is violated and the holding of such arrested person, without review by a magistrate, constitutes arbitrary detention. Section 6 of the Act provides immunity cover to members of the armed forces, exercising their functions from the mandate of this Act. This section establishes that no legal proceeding can be brought against any member of the armed forces acting under the AFSPA, without the permission of the Central Government. This amounts to lack of remedy for the victims of the armed forces abuses.

In situations of internal violence, the entire system of civil administration is effectively suspended paving way for the uniformed services – the police, the paramilitary forces and the army and with the wide powers bestowed upon them by the AFSPA they resort abuse and harassment undermining the 'Rule of law' and imposing kind of 'martial law' and leading to a variety of circumstances resulting in illegal detentions, extrajudicial murders, torture and disappearances. The Government should recognize the futility of such laws and institute mechanisms to punish State agents for horrendous acts committed under the garb of uniform.

4.3 Remedies Available Under the Indian Law for ‘Disappearances’

In India, there is no comprehensive law as yet addressing the crime of forced disappearances. But the criminal justice system of the country provide enough safeguards for arrested persons or detainees, which even if routinely implemented would go a long way in addressing the problem of disappearances and punishing the perpetrators of that crime. Also the Constitution of India provides for a right to legal remedy and for the protection of life and liberty of an individual and freedom from arbitrary detention.

Human Rights of Accused Person¹¹⁰

1. Protection against arbitrary or unlawful arrest (Section 41, 55 and 151 Cr.P.C.)
2. Protection against arbitrary or unlawful searches (Sections 93, 94, 97, 100 (4) to (81) and 165 Cr.P.C.)
3. Protection against “Double Jeopardy” (Section 400 Cr.P.C.)
4. Protection against arbitrary or illegal detention in custody (Sections 56, 57 and 76 Cr.P.C.)
5. Right to be informed of the grounds, immediately after the arrest (Sections 50 Cr.P.C., as also Sections 55 and 75 Cr.P.C.)
6. Right of the arrested person not to be subjected to unnecessary restraint (Section 49 Cr.P.C.)
7. Right to consult a lawyer of his own choice (Section 303 Cr.P.C.)
8. Right to be produced before a magistrate within 24 hours of his arrest (Sections 57 and 76 Cr.P.C.)

¹¹⁰ See, DrS.Subramanian, “Human Rights: International Challenges Vol I” (Manas, New Delhi: 1997) at pp227-228

9. Right to be arrested on bail, if arrested (Sections 436, 437 and 439 Cr.P.C., also Sections 50 (2) and 167 Cr.P.C.)
10. Right not to be a witness against himself
11. Right to get copies of the documents and statements of witnesses on which the prosecution relies (Section 173 (7), 207, 208 and 238 Cr.P.C.)
12. Right to have the benefit of the presumption of innocence till guilt is proved beyond reasonable doubt (Sections 101-104 Evidence Act)
13. Right to insist that evidence be recorded in his presence except in some special circumstances (Sections 273 Cr.P.C.; also Section 317 Cr.P.C.)
14. Right to have due notice of the charges (Section 218, 228 (2), 240 (2), etc of Cr.P.C.)
15. Right to test the evidence by cross-examination (Section 138 Evidence Act)
16. Right to have an opportunity for explaining the circumstances appearing in evidence against him at the trial (Section 313 Cr.P.C.)
17. Right to have himself medically examined for evidence to disprove the commission of offence by him or for establishing commission of offence against his body by any other person (Section 54 Cr.P.C.)
18. Right to produce defence witnesses (Section 243 Cr.P.C.)
19. Right to be tried by an independent and impartial judge (The scheme of Separation of Judiciary as envisaged in Cr.P.C., also Sections 479, 327, 191, etc. of Cr.P.C)
20. Right to submit written arguments at conclusion of the trial in addition to oral submissions (Section 314 Cr.P.C.)
21. Right to be heard about the sentence upon conviction (Section 235 (2) and 248 (2) Cr.P.C.)

22. Right to fair and speedy investigation and trial (Section 309 Cr.P.C.)
23. Right to appeal in case of conviction (Sections 351, 374, 379, 380 Cr.P.C.)
24. Right not to be imprisoned upon conviction in certain circumstances (Section 360 Cr.P.C. and Section 6 of the Protection of Offenders Act)
25. Right to restrain police from intrusion on his privacy
26. Right to release of a convicted person on bail pending appeal (Section 380 Cr.P.C.)
27. Right to get copy of judgment when sentenced to imprisonment (Section 363 Cr.P.C.)

Also a Code of Criminal Procedure (Amendment) Bill was presented to Parliament in May 1994, it suggested an amendment to section 176 of the CrPC to provide for judicial inquiries into every case of death in custody, "disappearance" and rape. It included an amendment that would empower the detainee to inform a nominated person of their arrest and an amendment prohibiting the arrest of a woman "after sunset and before sunrise" except in "exceptional circumstances". It is mandatory to make judicial inquiries into cases of extra judicial deaths.¹¹¹ The Indian Penal Code addressed provisions penalizing activities amounting to kidnapping and abduction, wrongful restraint and wrongful confinement. Sections 343 to 348¹¹² deal with aggravated forms of wrongful confinement. Under the provisions of IPC, whoever keeps any person in wrongful confinement, knowing that a writ

¹¹¹ See, Amnesty International, "India: Submission to the Human Rights Committee concerning the application of the International Covenant on Civil and Political Rights" July 1997(AI Index: ASA 20/027/1997).

¹¹² Section 343: Wrongful confinement for three or more days
Section 345: Wrongful confinement for ten or more days

for the liberation of that person has been issued, shall be punished.¹¹³ Further, whoever wrongfully confines any person in such a manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant or if the place of such confinement is not known or discovered, then such act shall be punishable with imprisonment for a term which may extend to two years, in addition to any other punishment to which he may be liable for such wrongful confinement.¹¹⁴ Though provisions have been addressed to punish acts of kidnapping and abduction resulting in murder and kidnapping¹¹⁵ or abduction of any person with intention of secretly confining that person,¹¹⁶ but there are no specific measures of punishment if public servants are indulged in acts resulting in abduction. It is to be noted that torture in any form can never be justified even in exceptional circumstances. The criminal law of the country should be amended in such a manner, so as to bring even perpetrators of forced disappearances to book.

Role of the Judiciary

The Constitution of India¹¹⁷ envisages democracy and rule of law, it ensures freedom and dignity of the individual at all times, as has been held Constitution play a decisive role even in the protection of human rights even

¹¹³ Section 345

¹¹⁴ Section 346

¹¹⁵ Section 364

¹¹⁶ Section 365

¹¹⁷ See, Durga Das Basu, "Human Rights In Constitutional Law" (2nd Edition, 2003:Nagpur)

during emergency.¹¹⁸ The Constitution of India provides certain rights to the individuals in Part III of the Constitution, known as fundamental rights. No law, ordinance, custom, usage or administrative order can abridge or take away one's fundamental rights., according to article 13(2) of the Constitution of India. Judicial control is necessary to ensure safeguards to prevent arbitrary use of extra ordinary powers and to ensure measures to protect non-derogable rights. Interpretation of the Constitution is the function of the judiciary and the Constitution under Article 21 fully protects the life and liberty of a person. There are two fundamental rights under the Constitution, which acquired the status of non-derogable rights.¹¹⁹ They are contained in Articles 20 and Articles 21 respectively.

According to Article 20:

1. No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
2. No person shall be prosecuted and punished for the same offence more than once.
3. No person accused of any offence shall be compelled to be witness against himself.

¹¹⁸ See, Umesh Kadam, "Protection Of Human Rights During Emergency Situations: International Standards And The Constitution Of India", *Indian Journal Of International Law*, Vol41 (4), Oct-Dec 2001, pp 601-621

¹¹⁹ See, Sinha note 10 at p.185

According to Article 21

No person shall be deprived of his life or personal liberty except according to procedure established by law.

The judiciary interprets 'the right to life and personal liberty' to encompass all basic conditions for a life with dignity and liberty. Such an approach allows the Court to come down heavily on the system of administration of criminal justice and law enforcement. In a number of post-Maneka cases,¹²⁰ the Supreme Court of India held that the right to human dignity is included in Article 21. This would even include right to decent burial. Basing upon this, it could be deduced, the crime of forced disappearance violates all this and even a person who is dead after disappearing is not accorded the decency what is due to him or her. Right to life as a fundamental right has been made available to all convicts, undertrials and detunes at all times.¹²¹ Further a range of legal safe guards have been made available by the Supreme Court through its innovative interpretation of the Indian Constitution in the form of right to a speedy trial, right to free legal aid and victims right to compensation. It was laid down by the Court that State holds the responsibility for death of a person in custody and under any circumstances detained person's personal liberty cannot be put at stake. In this context the Supreme Court observed "It is axiomatic that convicts, prisoners or under trials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons.. It is an obligation of the State to ensure that there is no

¹²⁰ Maneka Vs Union of India AIR 1978 SC 597. Post Maneka cases, for example are Sunil Vs Delhi Admn AIR 1978 SC 1675, Kishor Vs State of Rajasthan AIR 1981 SC 625, NHRC Vs State Of Arunachal Pradesh AIR 1996 SC 1234. Cited in Basu, note 117 at p405.

¹²¹ State of AP Vs. Challa Ramakrishna Reddy, AIR 2000 SC 2083

infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of this life except according to the procedure established by law.”¹²² This depicts the importance of life of an individual and under no circumstances can the State by itself or through its agents can violate or transgress these rights, which usually are violated in a worst manner in the case of disappearances. Further, the Supreme Court opined that there is a need to evolve tools to provide relief to the victims in the form of monetary compensation in the process of protecting the rule of law.¹²³

Article 22 of the Indian Constitution guarantees protection against arrest and detention in certain cases and states that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and the arrested person shall not be denied the right to consult and defend himself by a legal practitioner of his choice. The Supreme Court upheld these provisions in *D.K.Basu Vs State of West Bengal*¹²⁴, in this case the Court

¹²² Nilabati Behera Vs. State of Orissa, (1993 (2) SCC 746)

¹²³ Ibid. In the same case, the Supreme Court awarded monetary compensation to the mother of a young man who was beaten to death in police custody.

¹²⁴ AIR 1997 SC 610 at para 36

outlined the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by atleast one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.
3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the, police officials in whose custody the arrestee is.
7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.
8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a panel for all Tehsils and Districts as well.
9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.
10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
11. A police control room should be provided at all district and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on conspicuous notice board.

Legal protection is clearly embedded for the protection of life and liberty and freedom from arbitrary detention for arrested persons. Families of persons being subjected to disappearances by the State agents can vouch for these remedies as well in seeking justice. At the same moment, it would be timely to make a mention of the justifiability of fundamental rights available under the Indian Constitution. Article 32 provides the right to move the Supreme Court by appropriate proceedings for the enforcement of fundamental rights. These can also be enforced under Article 226 by moving the High Courts. The general principle is that any person whose fundamental right is violated can seek remedy under Article. In the present context of 'disappearances', the writ available is *Habeas Corpus*. The writ of *Habeas Corpus* is used to secure the release of a person who has been detained unlawfully or without legal justification. It enables an immediate determination of an individual's right to freedom. The power of detention vested in an authority if exceeded, abused or exercised in a malafide way makes the detention unlawful. A person who is arrested or detained should be produced before the concerned magistrate within twenty-four hours. The purpose of this writ is to secure the release of a detainee from unlawful detention and not to punish the detainee.

The Supreme Court through a number of judgments interpreted the Constitution from time to time, which could be deduced as guidelines to be followed depending upon the nature and circumstances of the case. In India though there is no conditional law addressing the phenomenon of disappearances, still in a way victims of disappearances can seek remedies basing upon the contribution of Constitutional jurisprudence, which have been identified in the present study and which could be meaningfully invoked to punish perpetrators of the crime of disappearances.

4.4 National Human Rights Commission and Its Role in Addressing Problem of Disappearances

National Human Rights Commission (NHRC) established by the Government of India in 1993 has a crucial role to play in the protection of human rights in the country. In the context of 'disappearances' it would be significant to study the interventions taken up by the NHRC in providing assistance to the victims of forced disappearances. NHRC draws its mandate from the Protection of Human Rights Act 1993, which contains provisions relating to the function, powers, composition and other related aspects enabling the Commission in its functioning.

The functions and powers related to inquiries and investigation are covered in Part III of the Protection of Human Rights Act 1993. The functions of the Commission are dealt with in Section 12 of the Act. According to this section, the Commission shall perform all or any of the following functions:

- (a) Inquire, *suo motu* or on a petition presented to it by a victim or any person on his behalf, into complaint of-
 - (i) violation of human rights or abetment thereof; or
 - (ii) negligence in the prevention of such violation, by a public servant;
- (b) Intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;
- (c) Visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or

protection to study the living conditions of the inmates and make recommendations thereon;

- (d) Review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;
- (e) Review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures;
- (f) Study treaties and other international instruments on human rights and make recommendations for their effective implementation;
- (g) Undertake and promote research in the field of human rights;
- (h) Spread human rights literacy among various sections of society and promote awareness of the safeguards available for protection of these rights through publications, the media, seminars and other available means;
- (i) Encourage the efforts of non-governmental organizations and institutions working in the field of human rights;
- (j) Such other functions as it may consider necessary for the promotion of human rights.

Section 13 of the Act stipulates the Powers of the Commission relating to inquiries. As per Section 13 (1) – The Commission shall, while inquiring into complaint under this Act, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908, in matters relating to; summoning and enforcing the attendance of witnesses and examining them on oath; discovery and production of any document; receiving evidence on affidavits; requisitioning any public record or copy thereof from any court or office; issuing commissions for the examinations of witnesses or documents. Further,

Section 13 (5) stipulates that, every proceeding before the Commission would be deemed to be a judicial proceeding.

Procedures relating to inquiry into complaints and procedure with respect to armed forces is laid down in Chapter IV of the Act. Under these provisions, the Commission while inquiring into the complaints of the violations of human rights may call for information or report from Central Government or any State Government or any other authority or organization subordinate there to.¹²⁵ Relating to steps after inquiry, the Commission may recommend to the concerned Government or authority for the initiations of the proceedings for prosecution, if it was found that there has been an occurrence of violation of human rights or negligence in the prevention of violation of human rights by a public servant.¹²⁶ The Commission may also approach the Supreme Court or the High Court for such directions, orders or writs, as the Court may deem necessary. It may also recommend the concerned Government or Authority for the grant of interim relief to the victims of human rights abuses.¹²⁷ Procedure with respect to armed forces is laid down under Section 19 of the Act, accordingly the Commission either on its own motion or on receipt of a petition seek a report from the Central Government; after the receipt of the report, it may, either not proceed with the complaint or may make recommendations to that Government. Subsequently the Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as stipulated by the Commission.¹²⁸

¹²⁵ Section 17

¹²⁶ Section 18 (1)

¹²⁷ Ibid at sub-clause 2

¹²⁸ Section 19 (2)

Following the mandate provided by the Protection of human Rights Act, 1993, the NHRC awarded compensation to the families of victims of forced disappearances, following is the illustration of the cases where the NHRC intervened and has been successful in ordering for compensation or initiating remedial measures in the process.

Punjab Mass Cremations Order: NHRC's Intervention¹²⁹

In December 1996, the Supreme Court referred the matter of police abductions leading to disappearances and secret cremations in Punjab to the National Human Rights Commission (NHRC) observing that the Central Bureau of Investigation's (CBI) report disclosed "flagrant violations of human rights on a mass scale". The December 1996 report by the CBI showed 2098 illegal cremations at three cremation grounds of Amritsar district. Of these, the CBI identified 582, partially identified 278 and failed to identify 1238. On August 4, 1997, the NHRC declared that in this case it was vested with all of the powers of the Supreme Court under Article 32 of the Constitution. The NHRC also indicated that it intended to examine cases of disappearance from all over Punjab. The Government of India challenged the NHRC's decision before the Supreme Court but the Court largely upheld the NHRC's interpretation in September 1998. Subsequently, however, the Commission itself limited its mandate. In its January 13, 1999 order, the NHRC placed a territorial restriction on its investigation, narrowing its mandate to the three crematoria in Amritsar district. Also, the Commission limited its study to cremations, ignoring the starting point of forced disappearances and other methods of disposing of bodies. The NHRC decided to only entertain claims of people

¹²⁹ See, *Annual Report 2000-2001* (NHRC: New Delhi) at pp 161-163. A full text of the order available at <http://www.nhrc.nic.in>

who could swear on oath that their relatives had been cremated at one of the three cremation grounds in Amritsar. The scope of inquiry by the NHRC remains limited to 2097 cremations, divided into three lists of 585 identified, 274 partially identified and 1,238 unidentified corpses, mentioned in the CBI's report as having taken place in three crematoria of Amritsar district. After four years of debating these preliminary issues and deciding to restrict the inquiry, the NHRC collected claims and offered limited redress to 18 families. In its August 18, 2000 order, the NHRC agreed to the Punjab government's proposal to offer compensation of 100,000 rupees, with no admission of wrongdoing or prosecution of officials. The 18 families unanimously rejected the government's offer and moved the NHRC to expand the inquiry into forced disappearances in all of Punjab. The Commission reaffirmed its commitment to investigate only the 2097 cases from Amritsar district. On September 16, 2002, the Commission directed the State government of Punjab to file their affidavits. By the end of 2003, the State of Punjab had filed affidavits in 577 of 582 cases from the identified list; 64 of 66 cases identified by the petitioners from the partially identified list; and 47 of 97 cases identified by the petitioners from the unidentified list. The Commission had then planned to take up these cases in the coming months to first determine the facts regarding established violations and the issues of liability of the State, before moving on to quantify compensation and to pronounce on the measures required by the Indian State to fulfill its obligations in domestic and international law towards victims' rights to knowledge, justice and reparation. Finally, in early November, the NHRC announced a reward of 2.5 lakhs to 109 families, with no admission of liability or inquiry into the facts. The police merely admitted custody of these 109 victims, but maintained that the detainees were killed in

the crossfire after militants attacked police convoys searching for hidden weapons.

Procedure with respect to complaints against Armed Forces: Disappearance of Mohammed Tayab Ali, who was last seen in the company of para-military forces (Case No. 32/14/1999-2000)¹³⁰

The Commission received a complaint alleging the disappearance of Mohammed Tayab Ali on 25 July 1999 after he was taken away to the headquarters of the 17 Assam Rifles Battalion. The Commission considered the report submitted by the Ministry of Defence. Mohammed Tayab Ali was seen being picked up in the Maruti van and being taken to the battalion headquarters of 17 Assam Rifles. His relatives and friends also made attempts to reach him at 17, Assam Rifles on the same day, but failed. Pursuant to a notice issued by the Manipur State Human Rights Commission to the Inspector General of Police (Law and Order) to ascertain the whereabouts of Mohd. Tayab Ali, the Inspector General of Police (Law and Order), Manipur submitted his inquiry report to the State Commission. It stated that the Director General of Police, Manipur, Imphal had issued crash messages to all concerned police authorities in the State of Manipur for flashing the information regarding whereabouts of Mohd. Tayab Ali. It had also taken up the matter with the Commander, Manipur Range. On 22 August 1999, the Staff Officer of Commander, Manipur Range, Imphal informed the Director General of Police, Manipur that the case of the alleged arrest of Mohd. Tayab Ali of Kairang Muslim village was investigated and inquiries were made from 17 Assam Rifles and all other units in that behalf. It was confirmed by them that no individual by the name of Mohd. Tayab Ali was picked up by 17

¹³⁰ *Annual Report 2001-2002* (NHRC: New Delhi) at pp 166-174.

Assam Rifles or any other Assam Rifles unit. After receipt of this report, the State Commission summoned the complainant Smt. Mina Khatoon in order to find out if her husband had been located. She appeared before the Commission and reiterated that her husband was last seen being carried in a Maruti van to 17 Assam Rifles campus at Kangla, Imphal. She also filed some photographs of her husband. On consideration of the entire matter, the State Commission referred the case to this Commission as it relates to the 'armed forces'. On receipt of the reference from the Manipur State Human Rights Commission this Commission issued notices to the Ministries of Defence and Home Affairs, Government of India and called for a report in accordance with Section 19 of the Protection of Human Rights Act, 1993. The report of the Ministry of Defence received with their letter dated 11 April 2000 stated that on 25 July 1999, at around 9.45 hours, information was received that some valley based insurgents after firing on CRPF personnel at Langjing were fleeing towards Dimapur. A column of 17 Assam Rifles accordingly established a Mobile Check Post. Apparently, one of the vehicles attempted to speed towards Dimapur. The security team stopped the vehicle. There was an exchange of fire and one individual died. The driver of the vehicle managed to escape with the vehicle. This body was later identified as that of Mohd. Tayab Ali. It was handed over to Kangpokpi police station on 25 July 1999. Thus the Defence Ministry's report concluded that Mohd. Tayab Ali had died in retaliatory fire opened by the personnel of the armed forces. Hence no cognisance could be taken of the complaint submitted by Smt. Mina Khatoon. This was a totally different and inconsistent stand taken by the Defence authorities from the earlier report of DGP Manipur which had denied that any person by the name of Mohd. Tayab Ali was picked up by 17 Assam Rifles or any other Assam Rifles unit. As per the report of the Defence authorities, the

body of the person killed in the encounter was handed over to Kangpokpi police station. No attempt seems to have been made by Kangpokpi police station to identify the body despite information having been flashed to all the police stations about the disappearance of Mohd. Tayab Ali. The body was disposed of as unidentified. The Commission, therefore, directed by its order dated 13 December 2000, that the photographs of the dead body of the person killed in the encounter on 25 July 1999 should be shown to the complainant to ascertain whether the photographs were of Mohd. Tayab Ali. The Commission received a letter dated 15 January 2001 from the Director General of Police, Manipur, Imphal stating that the Kangpokpi police station had shown the photographs of the unidentified dead body to the close relatives of Mohd. Tayab Ali, i.e. the complainant Mrs. Mina Khatoon, his wife, Mohd. Tahir Ali, the father and Mohd. Vazir Ahmed, the elder brother of Mohd. Tayab Ali. But none of them could identify the deceased in the photograph and they stated that the body was not of Mohd. Tayab Ali. Thus, it is proved that the person who was killed in an encounter on 25 July 1999 was not Mohd. Tayab Ali. Thus, facts clearly indicate that Mohd. Tayab Ali while he was travelling on a Luna Moped was picked up apparently by some armed forces men in a Maruti van without any registration number and was taken to the Headquarter of 17, Assam Rifles. There is the unrebutted testimony of several witnesses who had seen him being taken in this fashion. Since then Mohd. Tayab Ali is missing. The stand taken by the Defence authorities that Mohd. Tayab Ali was killed in an encounter on 25 July 1999 was rejected since the dead body of the person killed in that encounter was not that of Mohd. Tayab Ali. It was concluded that 17 Assam Rifles in whose custody Mohd. Tayab Ali was last seen, has failed to account for him, thereafter. Mohd. Tayab Ali, husband of the complainant is proved to have been taken in custody by the 17 Assam

Rifles, and the custodian has been unable to prove satisfactorily the lawful termination of custody, when he was alive. Basing on these facts 17 Assam Rifles was held liable and was made accountable for his disappearance.

The Commission considered the report submitted by the Ministry of Defence and, in the light of the evidence on record, including the deposition of witnesses, who stated that they had seen Mohammed Tayab Ali being picked-up by security men, held that the security forces were liable for the disappearance of Mohammed Tayab Ali. The Commission accordingly awarded a sum of Rs.3 lakhs as immediate interim relief, under section 18(3) of the Act, to the complainant. The Ministry of Defence reported compliance with the Commission's directions and made payment of the amount of compensation.

The Case of Jalil Andrabi, Advocate: Jammu and Kashmir (Case No.9/123/95-LD)¹³¹

Andrabi was arrested on 9 March 1996 by a unit of the Rashtriya Rifles stationed at Badgam, headed by a Sikh major and accompanied by renegades acting as "spotters". On the following day the Jammu and Kashmir High Court Bar Association of which Andrabi was a member, filed a *habeas corpus* petition in the High Court. While hearings took place and various law enforcing agencies swore that Andrabi was not and had never been in their custody, Andrabi was already dead. His decomposed body was found in the Jhelum river on 27 March. His hands were tied and his face was mutilated. The autopsy report said that Andrabi had probably been killed some 14 days earlier.

¹³¹ Ibid at pp 175-176

The Commission took *suo moto* cognizance of this killing and directed the Chief Secretary of Jammu and Kashmir for a detailed report in regard to this incident. A writ petition had already been filed in the Jammu and Kashmir High Court and subsequently a special investigation team had been appointed to make an inquiry into the incident. The matter continues to be *sub judice* and the final judgment is still awaited.

The Commission's response on these matters is commendable considering the fact that it has been established only during the last decade. Drawing mandate from the Act, it is the statutory responsibility of the Commission to uphold the fundamental rights guaranteed in the Constitution particularly on questions relating to violations of right to life and liberty, which are at the foremost in 'disappearances', the widening of human rights jurisprudence in this direction would be significant.

4.5 India and International Human Rights Law

It would be heartening to note that India is a party to the International Covenant on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR). By becoming a party to these international Covenants India has shown that it has faith in the promotion and protection of human rights. The ratification of these instruments brings with them an obligation to fulfill the provisions in good faith; otherwise the objectives of these international instruments provide would be meaningless. Also Part IV of the Indian Constitution under Article 51 provides that the "State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized people with one another". Further Part IV of the Constitution obligates the States, including the Supreme Court, to apply the Directive Principles of State Policy in the making of the laws. So respect for international treaties obligations is embedded in the

Constitution of India itself. Apart from India becoming a party to the above two Conventions, it is still supposed to become a party to a host of other Conventions viz UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Status of Refugees, Optional Protocols to the ICCPR and the Protocol relating to the status of refugees.

In the present context of 'Draft International Convention on Protection of all Persons from Forced Disappearances', India was opposed to the proliferation of human rights mechanisms. Though India attached utmost importance to the issue of enforced or involuntary disappearances but contradicted creation of an inter-sessional Working Group on enforced and involuntary disappearances. However, it may be said that though the position taken by India with respect to the treaty on forced disappearances is negative for the moment,¹³² still it does not mean that India can abstain from offering any kind of protection and remedies made available by the 'Declaration on the Protection of All Persons from Forced Disappearances' and the 'Draft Convention on the Protection of All Persons from Forced Disappearances' to the victims of forced disappearances. But by signing the ICCPR in 1978, India has the responsibility of securing the rights enunciated by the ICCPR to all its citizens. The rights enunciated by the ICCPR are those, which must be guaranteed during times of peace by the member states. In times of public emergency, the ICCPR foresees that some rights may have to be suspended. However, the ICCPR remains operative even under such circumstances since certain rights are non-derogable. The standards of international human rights law, including the right

¹³² See, United Nations Press Release, Commission On Human Rights, 57th Session, 23 April 2001. Available at

<http://www.unhchr.ch/hurricane/hurricane.nsf/0/5COF45A72A063C58C1256A380032640E?Opendocument>

to life and liberty and right to an effective remedy in cases of disappearances, are all part of the fundamental rights under the Indian Constitution, especially given India's obligation as a party to the ICCPR. India's adherence to international law have also been upheld by the Supreme Court on a number of occasions, significantly in situations wherein there is no domestic legislation incorporating the norms of international law. In *Magan Bhai Vs Union of India* (AIR 1969 SC 783)¹³³ it was held that a treaty may also be implemented by the exercise of executive power under Article 53 of the Constitution, though the legislative power belongs exclusively to the Parliament and in the absence of an express legislation contrary to a rule of international law, Indian Courts are bound to give effect to the Indian law, but while doing so the Courts have to be circumspect in not violating any established principle of international law.¹³⁴ It was also noted by the Supreme Court in *Apparel Export Promotion Council Vs A.K.Chopra*,¹³⁵ that Courts are not only obliged to give due regard to international law when construing domestic laws, but when there is no inconsistency between them and there is a void in domestic law and particularly in cases involving violation of human rights, then it would be important to consider international instruments and Conventions and apply the same to a given case when there is no inconsistency between international norms and the domestic law. In the case of *People's Union for Civil Liberties Vs Union of India*,¹³⁶ the Supreme Court further held that international law can be incorporated into the fundamental rights under the Indian Constitution, since the provisions of the ICCPR elucidate and effectuate the fundamental

¹³³ See, Basu, note 117 at p.28

¹³⁴ Ibid

¹³⁵ AIR 1999 SCC 759

¹³⁶ 1997 SC 568

rights guaranteed by the Constitution and could be made enforceable by Courts as facets of fundamental rights.

National Human Rights Commission also has a mandate to enforce fundamental rights guaranteed by the international Covenants. In this context the Commission noted that it has statutory responsibility to study treaties and other international instruments on human rights and make recommendations for their effective implementation.¹³⁷ If India could at least ratify the Convention Against Torture, which it had signed on 14 October 1997, it would be a significant leap in the direction of adhering to the principles of the draft Convention on forced disappearances, because forced disappearance as a crime would also involve element of torture to the victim and also to the concerned of the disappeared person. The NHRC has been urging the Government to fulfill its promise of ratifying the Convention Against Torture. The Ministry of External Affairs has initiated action in this matter and emphasized to the concerned authorities for bringing in effective changes in the domestic legislation, which would be in conformity with the UN Convention Against Torture.¹³⁸

So in the context of international standards for the protection of persons from forced disappearances and India's position, it could be stated that the evolving Constitutional precepts are guiding principles for adherence to standards of international human rights law. India's obligations under the ICCPR make this position even firmer.

¹³⁷ See, NHRC Report, note 130 at p.52

¹³⁸ Ibid., at p.53

CHAPTER – 5

CONCLUSION

The crime of forced disappearances of person is a highly emotional issue, as the fate and whereabouts of the abducted person are not known by any means to the families, relatives and concerned of the disappeared person. Forced disappearance could be stated as a comprehensive crime, because it simultaneously involves the violation of all basic human rights viz right to life, right to liberty and security and right to freedom from torture and ill treatment. It could be said that the gravity of the offence is immense when compared to any other crimes. These rights inhere equally in all individuals at all times, and therefore no justification could be made whatsoever in the occurrence of this offence. International human rights instruments stipulated provisions for the promotion and protection of these basic human rights at all times, whether during peacetime or emergency, though they have not addressed or defined the crime of forced disappearance of persons *per se*. The phenomenon of the crime of forced disappearances of persons is now considered to be an emerging one, and at this outset it could be laid down that the practice of subjecting persons to ‘disappearances’ is taking part place worldwide. This practice, which has its basis in Germany during the Second World War, later became a terror tactic in Latin America, wherein Governments resorted to this practice in the process of weeding out individuals and groups considered to be a threat to the establishment. Later when internal violence and terrorism started being on the upsurge, forced disappearance have become a norm to curb the menace of militancy. It was innocent people, women and children who were affected the most. Abducting an individual means, affecting the livelihood of the family as well, and the

consequences were widely felt by women and children. This is a horrifying consequence of the crime of forced disappearance.

Efforts have been in place to address this crime, only during the last decade with the adoption of a 'Declaration on Protection of Persons from Forced Disappearances, it was entrusted with task of monitoring States compliance with their obligations deriving from it. Its nature of work includes reporting and gathering of information; its humanitarian task includes a procedure to trace the whereabouts of missing persons. The declaration was followed by a 'Draft International Convention on the Protection of All Persons From Enforced Disappearances' in 1998. The declaration does not establish universal jurisdiction for the crime of forced disappearances, on an improved note, the same has been addressed in the draft Convention for protection of persons from forced disappearances. States are also supposed to criminalize this offence of forced disappearance under their domestic legal systems respectively. But the impediment in having a law intact is the acknowledgement of the occurrence of the crime of forced disappearances by the concerned State, another practical hurdle is levying individual responsibility, because in subjecting a person to involuntary disappearance, there could be more than one person who may be involved in committing the act of abducting an individual and eventually subjecting him or her to disappearance. This crime could also be carried out in several phases. Nevertheless, in such situations, judicial and administrative guarantees in the form of redressal and reparation to the victims of forced disappearances, particularly the right to information campaign should be strengthened, so that the families and victims of the persons disappeared have access to information without any administrative or legal hassles. The 'Inter-American Convention on the Protection of all Persons from Forced Disappearances' is the first legal

instrument addressing this problem, but it is a regional instrument and States like Argentina, Bolivia etc criminalized this offence under their domestic law and framed laws in tune with the American Convention. Another noteworthy development is the inclusion of the crime of forced disappearances as a crime against humanity in the Statute of the International Criminal Court (ICC), and in this direction the ICC has a crucial role to play in punishing the perpetrators of the crime of forced disappearances in the future. It may take some more time before a binding international legal instrument on forced disappearances comes into place, but it is a commendable step initiated by the United Nations in addressing this crime under international human rights law and international criminal law. It would be pertinent to note that there is a general feeling also, if this would lead to further proliferation of human rights treaties, instead States want the strengthening of reporting obligations under international human rights law as a measure in offering remedial measures to forced disappearances, because such reporting obligations would bring nations under immense international scrutiny.

In the case of India *vis a vis* draft international Convention on protection of persons from forced disappearances, the stand is not clear as yet. But certainly India should consider adhering to the Convention, as problems of torture, extrajudicial killings, disappearances are rampant in most parts of the country, despite this the law enforcement officials involved in the maintenance of law and order resort to inhumane behaviour, under the immunity provided by the national security legislations. That is also violation of the basic principles enshrined in the 'UN Code of Conduct for Law Enforcement Officials'. India being a party to the International Covenant on Civil and Political Rights (ICCPR), even if those provisions are implemented in consonance with the basic rights enshrined in the Constitution of India, would go a long way in the

protection of human rights of the individuals. It would be imminent for India to ratify the 'Convention Against Torture' at least to take a lead in the country's commitment to the protection from human rights abuses and keeping up the ethos of rule of law. With a vibrant judiciary and institutional mechanisms like the National Human Rights Commission, it would not be far fetched to state that demands of securing basic human rights could be met. Further, with an advanced medical system in place, the concept of 'Human Rights Medicine' should be developed, so that psychological distress of families of victims of forced disappearances could be meted out. The criminal justice system of the country should be revamped with proper reforms, stipulating provisions for the crime of forced disappearances and also addressing penal measures for the perpetrators without blanket immunity to public servants and law enforcement officials in particular. The importance of national security legislations cannot be ruled out, but at the same time all such legislations should remain open to amendments, without diluting the commitments to human rights. Such amendment exercise should be an ongoing process in the light of ever-evolving experiences resulting in violations of human rights. In this process, a question arises as to how the liability of armed forces is established for activities of the personnel of armed forces. The possibility of human rights abuses may recur or continue despite having an amended or a new legislation, but with the passage of new laws, safeguards have to be defined, so that at least the scope of abuse is restricted. Human rights concerns should be made a part of the ethics of law enforcement personnel, which may be done by imbibing training on important international human rights and humanitarian law provisions and principles enshrined in instrument like the 'UN Code of Conduct for Law Enforcement Officials'.

With these measures in place, atleast minimum human rights of persons can be secured and out of all a preventive system would be a viable recourse to address the problem of disappearances.

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