



HUMAN RIGHTS COMMISSION OF SRI LANKA

2017.09.28

His Excellency Maithripala Sirisena
President of the Democratic Socialist Republic of Sri Lanka
Presidential Secretariat
Colombo 1.

Your Excellency,

The International Convention for the Protection of All Persons from Enforced Disappearances Bill

The Human Rights Commission is writing to place before your Excellency its observations on the International Convention for the Protection of All Persons from Enforced Disappearances Bill (hereinafter the Bill).

The Commission believes the Bill is a positive step towards addressing the long history of disappearances in Sri Lanka and stemming impunity for gross violations of human rights. The Commission is of the view that enforced disappearance of a person is one of the most serious of human rights violations bringing untold sorrow to loved ones. As your Excellency is well aware, enforced disappearances have taken place in the Northern and Eastern as well as the Southern parts (during two insurrections) of the country, and affected all communities in Sri Lanka. It cannot be denied that these disappearances have had a devastating impact on families, sometimes resulting in families being torn apart following the enforced disappearance of the sole breadwinner.

Enforced disappearances have created thousands of women headed households in Sri Lanka that have struggled to meet the basic needs of their children, including access to education. Further, the emotional impact of not only losing a loved one but also of languishing for many years, even decades, not knowing the fate of the disappeared person has had a devastating psychological impact on family members. We have also witnessed many parents falling ill or passing away due to their inability to withstand the continuing sorrow and pain.

Hence, enforced disappearances is not only a legal and human rights issue but also a social issue that has devastated the lives of thousands of Sri Lankans. More importantly, the Bill would send the message that citizens are protected from this most cruel and inhumane crime. Enacting the Bill would most certainly contribute immensely towards re-building ethnic relations damaged by the ethnic conflict and strengthen the journey towards reconciliation.

Addressing this issue and enabling families to learn the truth about their disappeared loved ones is an important, courageous step Sri Lanka will be taking to re-affirm values of humanity, empathy and respect for the rule of law as a country. It would address the wounds caused by conflict in the country, including those caused by the recent civil war.

It is in this context and spirit, the Commission urges your Excellency, particularly in your capacity as Minister of National Integration and Reconciliation, to provide leadership to ensure that the Bill is enacted and Sri Lanka sets an example not only for the region but globally on how to humanely respond to the grievances and pain of those who have suffered due to serious human rights violations.

The Commission's observations on specific provisions of the Bill are attached.

Dr. Deepika Udagama
Chairperson



HUMAN RIGHTS COMMISSION OF SRI LANKA

OBSERVATIONS OF THE HUMAN RIGHTS COMMISSION OF SRI LANKA ON THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE BILL AUGUST 2017

The Human Rights Commission of Sri Lanka (HRCSL) welcomes the ratification by Sri Lanka of the International Convention for the Protection of All Persons from Enforced Disappearances in May 2016. The formulation and gazetting of a legislative Bill by the Government of Sri Lanka in order to incorporate the Convention into national law is a further step in the right direction. Given the long history of enforced disappearances in Sri Lanka, the Commission is of the view that it is an important forward step towards addressing impunity for the crime as well as enabling the families of the disappeared to find the truth and access remedies.

The Commission further welcomes the acceptance by Sri Lanka of the competence of the Convention Committee under Article 32 to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under this Convention.

1. In order to improve the Bill further, the Commission recommends the following:

- That the continuing nature of the violation be expressly recognised since enforced disappearances constitute a continuous act, as stated in the General Comment¹ issued by the UN Working Group on Enforced and Involuntary Disappearances (WGEID). Since the conduct violates several rights, it is a unique and consolidated act and not a combination of acts. Even if some aspects of the violation were completed prior to the enactment of legislation, other elements continue until the victim's fate or whereabouts are established. Hence, it is the element of 'continuance' that gives institutions the competence and jurisdiction to consider the offence as a whole.

Recommendations on revisions to provisions of the Bill

¹ Report of the Working Group on Enforced or Involuntary Disappearances, 2010. Document A/HRC/16/48

- Given the history of enforced disappearances in Sri Lanka, it is imperative that Section 15 (3) of the Bill on conditions of detention includes Article 17 (c) of the Convention, which explicitly states that persons should be held only at authorised places of detention. Further, in addition to the Human Rights Commission accessing places where persons are deprived of liberty, the Bill should make reference to Section 12 (f) of the OMP Act and recognise the right of the OMP to visit places where persons are deprived of liberty.
- With regard to Section 15 (2) of the Bill and the stipulation the right of any person deprived of liberty to be visited by an attorney-at-law is subject only to the conditions established by written law, the Human Rights Commission's recommendation set out in its letters to the Hon. Prime Minister on the proposed amendments to the Code of Criminal Procedure (Special Provisions) Act No 2 of 2013 should be adopted. The said recommendation states that all those deprived of liberty should be able to access legal representation from the commencement of detention.
- Section 14 (2) of the Bill aims to reproduce Article 24 (7) of the Convention which guarantees the right to form and participate freely in associations to assist victims, find the truth etc. However, Section 14 (2) of the Bill reproduces the Convention Article with a qualification that the right is "subject only to the conditions established by written law". Since this qualification could possibly lead to curtailing freedom of association and expression it should be ensure that any such law must be fair and in compliance with human rights standards.
- Section 15 of the Bill should provide explicit time limit to enter the name of the arrested person/detainee in the official register of persons deprived of liberty. Furthermore, a provision which imposes a penalty for wilfully omitting to inform or resisting or obstructing an officer from doing so, should be included.
- Section 20 (3) of the Bill states the High Court may refer a petition made to it to the Human Rights Commission for an inquiry and report; the Section should include both the Office of Missing Persons as well as the Human Rights Commission in respect of their respective mandates.
- The law should not restrict jurisdiction to the High Court in Colombo to try offences, as it currently does as per Sections 3 and 4, but also give the High Court in the area in which offence was committed the jurisdiction to do so.

2. The following Articles of the Convention be included:

- Article 1 of the Convention which states that 'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance'. It is pertinent to point out that the report of the Sub-Committee on

Fundamental Rights of the Constitutional Assembly of Sri Lanka also uses the exact language of Article 1 of the Convention in the section on the 'Right not to be subjected to enforced disappearance' (page 3).

- Article 6 (2) of the Convention, which explicitly states that no order or instruction may be used as justification for an offence of enforced disappearances. It should be incorporated into the section on the responsibility of the superior officers, i.e. Section 3 (3).
- Article 7 of the Convention sets out mitigating circumstances for persons who were implicated in enforced disappearance who then contribute to bringing the person forward alive or enable the identification etc. In exceptional instances mitigating circumstances should allow suspended sentences. It also sets out aggravating circumstances when the offence is committed against pregnant women, minors, persons with disabilities or other vulnerable persons.
- Article 8 which takes the continuous nature of the offence into account and stipulates that the time period within which criminal proceedings should be instituted should be of long duration, and commences only from the moment the offence ends. The offence ends only when 'the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual'.
- Article 12 (1) which requires measures to be taken to ensure complainants, witnesses, relatives of the disappeared person and their defence counsel as well as persons participating in the investigation are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.
- Article 21 of the Convention, which states a person should be released by detaining authorities in a manner that enables reliable verification of release.
- Article 23 of the Convention on the training of law enforcement personnel, and other relevant officials who may be involved in the custody or treatment of persons deprived of liberty is imperative to ensure prevention, as well as investigation and resolution of cases of enforced disappearances. In this regard, Article 23 (2), which states that orders or instructions prescribing, authorising or encouraging enforced disappearances should be prohibited, is of particular importance.
- The Bill makes no reference to Article 24 of the Convention on reparation. The Commission recommends it should acknowledge and refer to relevant provisions on reparations in the OMP Act and to all relevant laws. In particular, the Bill should include Article 24 (5) of the Convention, which sets out the types of reparation that a victim is entitled to, including material and moral damages in addition to, where appropriate, other forms of reparation such as restitution and guarantees of non-repetition.

- Incorporating Article 25 on the wrongful removal of children and related rights into the Bill is of critical importance.

The Commission urges all political parties represented in Parliament to vote for the adoption of this Bill, which has great significance for human rights protection in Sri Lanka.