

State Obligation to Combat Enforced Disappearance: An Empirical Analysis in Bangladesh Perspective

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Abstract: Enforced disappearance has been committed by members of the ruling political party, with the alliance of law enforcement agencies to intimidate political opponents in Bangladesh. Besides, law enforcement agencies gain pecuniary benefits from enforced disappeared victims and families, precipitating impunity as an agent of the ruling political party. Therefore, it is essential to stop this practice, not only for ensuring the human rights but also to protect the image of law enforcement agencies in Bangladesh. Purpose of this scholarship is to provide a summary of state liabilities to combat enforced disappearance under the domestic laws of the land. To know the level of compliance with the Enforced Disappearance Convention (from now on the Convention) is the other purpose of this manuscript. The quantitative methodology has been used to know the level of compliance with the provisions of Enforced Disappearance Convention, and the result shows that Bangladesh complies to a minimum level with the provisions of the Convention. Also, this paper reveals that enforced disappearance may be reduced if Bangladesh ratifies the Convention. The qualitative result demonstrates that even though, Bangladesh has not ratified the Convention; however, it must combat enforced disappearance under the Constitutional law as well as the Criminal law of the Land.

1 INTRODUCTION

The enforced disappearance was first manifested on December 7, 1941, when Adolf Hitler issued “*Nacht und NebelErlass*” as known as the Night and Fog Decree (Dalia Vitkauskaitė-Meurice, Justinas Žilinskas, 2010, p. 197). In the late 1960s, in Brazil and then in Guatemala where enforced disappearance re-emerged under Latin American military ruler by the name of so-called national security (Dalia Vitkauskaitė-Meurice, Justinas Žilinskas, 2010, p. 198). In between the 1970 and 1980, enforced disappearance was a common phenomenon in many States of this region. In addition to Latin America, the extreme level of enforced disappearances was reported and occurred in Iraq, Sri Lanka and the former Yugoslavia (Nowak, M. 2009, p. 152). In Bangladesh, the enforced disappearance was first reported in 1971 during the Liberation War. Numerous distinguished intellectuals and scholars were abducted, and their locations remained unidentified until their bodies were found (Odhikar, 2016, p. 14).

The international community firstly addressed enforced disappearance as a breach of human rights

and created a framework agenda to combat enforced disappearance. Thereafter, adopted *three* specific international instruments known as the UN Declaration on the Protection of All Persons from Enforced Disappearances, (GA Res. 47/133, 1992); Inter-American Convention on Forced Disappearance of Persons, (OAS Doc. OEA/Ser.P/Doc.3114/94, 1994); and finally the UN International Convention for the Protection of All Persons from Enforced Disappearance, (UN Doc. A/61/488, 2006) and this Convention is the expansion of the Rome Statute of the International Criminal Court, 1998. According to these three instruments enforced disappearance is amount to be crimes against humanity under the specific circumstances (Irena Giorgou, 2013). Now, enforced disappearance is not only a violation of human rights but also an international crime.

The Convention came into force on December 23, 2010, intended to prevent enforced disappearance. As of June 22, 2018, 58 states had ratified, and 97 countries have signed the Convention (United Nations Treaty Collection, n.d.). Bangladesh has not yet ratified the Convention as well as reluctant to follow the Conventional provision and presumes that

she is free from any obligation adopted by this Convention.

Though Bangladesh has not ratified the Convention, she is responsible in many aspects to follow the Conventional provisions under the national law of the land. To address the above statements, the research questions have been set in the following:

- Does Bangladesh oblige to combat enforced disappearance under the national law of the land? If so,
- To what extent are the provisions of Convention implemented to combat enforced disappearance in Bangladesh?

These research questions explored the people’s perception regarding compliance with the provisions

of Convention as well as the people's rights guaranteed by laws of the land. The study also assesses, evaluates, and analyzes the State obligations to follow the Convention as well as national laws of the land to combat enforced disappearance.

2 RESEARCH DESIGN

The method of the study is qualitative as well as quantitative in nature. Both primary and secondary information have been collected according to the following table.

Table 1: The following table shows how to respond to the research questions:

| Research Questions | Method(s) | Tools | Sample | Respondents |
|---|--------------|--|---|---|
| Compliance with the provisions of Convention to combat enforced disappearance in Bangladesh | Quantitative | Structured& Semi-structured Questionnaire | Yes | Law Students of public & private universities in Dhaka, Bangladesh. |
| | | FGD | | Law Faculties of public & private universities in Dhaka, Bangladesh |
| | | KII | | |
| The obligations to combat enforced disappearance under the national law of the land. | Qualitative | Primary sources | Secondary sources | |
| | | National statutes, i.e., Constitution, Penal Code/leading cases/judicial opinions and so on. | Articles/ books/book-chapters in the edited volume/blogs and so on. | |

In the quantitative method, a total of 213 data has been collected between February and March 2018, using convenient sampling technique. FGD and KII were developed to capture some necessary qualitative information about students’ and teachers’ perceptions which were not covered by the structured questionnaire. The questionnaire included various statements, and perceptions of the students were measured by the response of interviewees to the separate items at a 5-Point Likert Scale. Point-5 indicates strongly agree; on the contrary point-1 means strongly disagree with a statement.

3 COMPLIANCE WITH THE PROVISIONS OF CONVENTION

In recent times, the incident of enforced disappearance is unusually rising in Bangladesh. According to *Odhikar*,¹ enforced disappearance is a new form of violation of human rights in Bangladesh which was recognized since 2009(Odhikar, 2017, p. 6). In 2017, a record number of extra-judicial killing in the form of crossfire and enforced disappearance perpetrated by government law enforcement agencies (Odhikar, 2017, p. 7). The UN Human Rights Committee, in its concluding observation of the ICCPR on March 28, 2017, termed the Bangladesh government as critical on such issues. The Committee

¹*Odhikar* is one of the leading human rights non-governmental organizations in Bangladesh. *Odhikar* is a *Bangla* (native)word that means ‘rights’. On October 10, 1994, it came into being with the aiming

at creating a broader monitoring and awareness raising system on the abuses of civil and political rights.

also expressed concern about the high level of enforced disappearances and the extreme use of force by the State security forces (United Nations Human Rights Committee, 2017). Though Bangladesh has not ratified this Convention, however, she is responsible for combating enforced disappearance in many aspects under the national law of the land. To address the State's obligation, a survey was conducted between February and March 2018, in Dhaka, Bangladesh to fulfill one of the objectives of

this study. At first, the respondents were asked by the following three *yes/no/undecided* general questions, intended to know their perceptions about the ratification and compliance with the Convention.

Question_1: Bangladesh should ratify and practice Enforced Disappearance Convention.

Question_2: Enforced disappearance will be reduced if Bangladesh ratifies the Convention.

Question_3: Bangladesh has customary obligation to comply with the Convention.

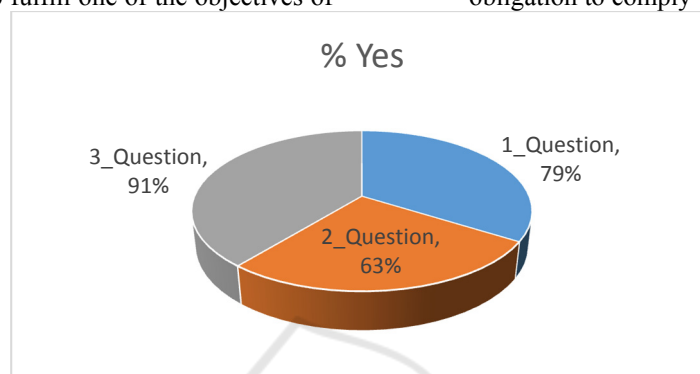


Figure 1: shows that Bangladesh should ratify and comply with the Convention, ratification of the Convention will reduce on enforced disappearance, and Bangladesh has customary obligation to comply with the Convention.

According to figure 1, about 91% of the respondents opined that Bangladesh has customary obligation to comply with the Convention. About 79% of the respondents think that Bangladesh should ratify and implement the provisions of Convention. Also, about 63% of the respondents agree that enforced disappearance will be reduced if Bangladesh ratifies the Convention.

Comparatively less number of the respondents think that enforced disappearance will be reduced if Bangladesh ratifies the Convention. However, this number of percentage is high (63%). Therefore, it can be said that the ratification of the Convention is positively associated to reduce the enforced disappearance. As a result, a hypothesis can be developed in the following manner:

H1: ratification of the Convention can reduce enforced disappearance.

The Focus Group Discussion (FGD) and Key Informant Interview (KII) argues that Bangladesh has ratified numerous international Covenants and Conventions adopted by the UN. For example, the Rome Statute of ICC, International Covenant on Civil and Political Rights (ICCPR), Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Geneva Conventions, Additional Protocols, Universal Declaration of Human Rights (UDHR). All the instruments mentioned above

expressly or impliedly suggest combatting enforced disappearance. Therefore, the State is responsible for combatting enforced disappearance under these instruments. As a result, it is better to sign and ratify the Convention and gain acceptance from the international community. The KII exposes that after ratification if Bangladesh fails to reduce the enforced disappearance or if the disappearance trend raises, the state will have to account and face severe criticism; thus, the state is unwilling to ratify the Convention.

The survey data replied to the questions of a fair investigation, appropriate penalties, abductors brought to justice, and to combat enforced disappearance in figure 2.

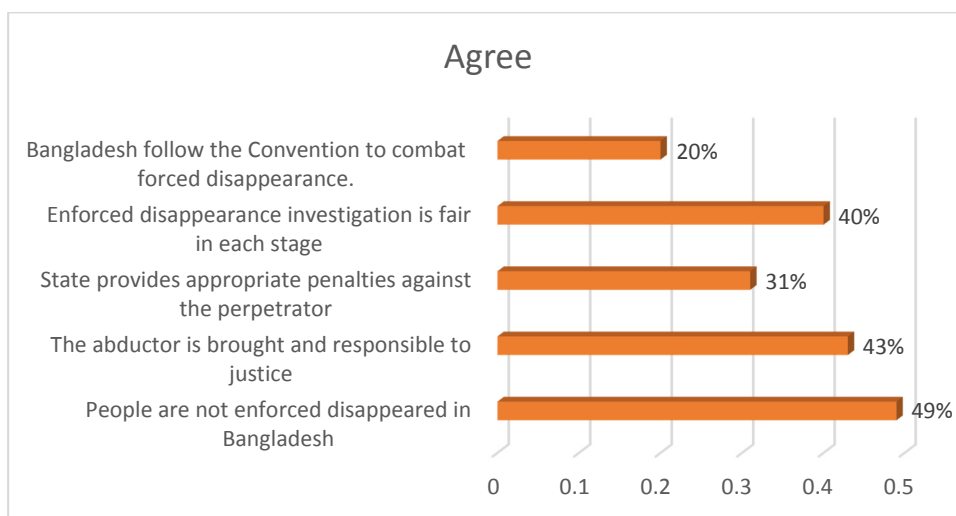


Figure 2: shows a limited level of compliance with the provisions of a fair investigation, penalty, abductor brought to justice, and to combat enforced disappearance.

The Convention has been adopted to combat enforced disappearance. Under article 1 (2) of the Convention in any circumstances such as internal political instability or public emergency or any state of war or threat of war may not invoke as a defense for forced disappearance. However, according to figure 2, only about 49% of the respondents agree that there is no enforced disappearance in Bangladesh, and only 20% of the respondents think that Bangladesh follows the provisions of Convention to combat enforced disappearance.

Article 3 of the Convention states that the state party shall be responsible for prosecuting the perpetrators. Also, according to article 4 of the Convention, state party shall criminalize forced disappearance under its national criminal law. Nonetheless, figure 2 shows only 43% of the respondents who think that the perpetrators are brought to justice, and only 31% of the respondents opined that the perpetrators get appropriate penalty under the national criminal law.

The State is also responsible for providing stringent punishment to the perpetrators who take into account the extreme seriousness of the offence as per the provision of article 7 of the Convention. Furthermore, according to article 12 of the Convention, the victim has a right to report to the appropriate authority, and article 3 refers that the state will be responsible for investigating the allegation promptly and fairly. Nevertheless, according to figure 2, only 40% of the respondents think that the State complies with these provisions.

The survey data replied to the questions of secret detention, official registers, access to information,

access to the progress report, and adequate compensation as shown in figure 3.

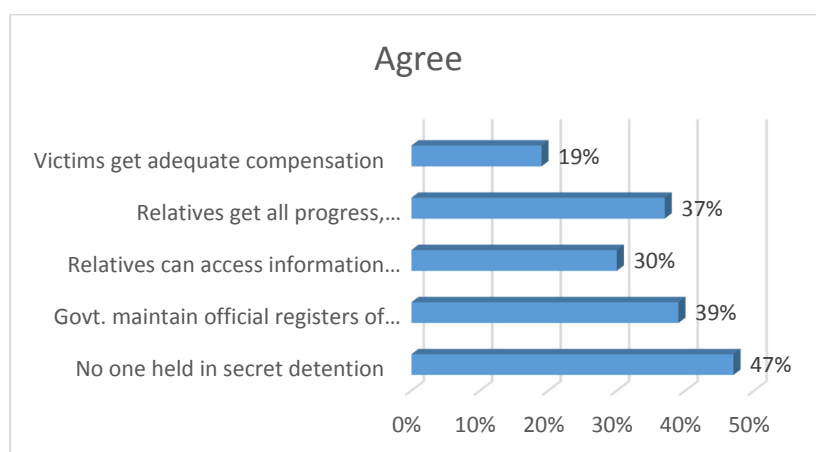


Figure 3: shows a limited level of compliance with the Convention particularly on compensation, investigation and progress, access to information, to maintain official registrar, and secret detention.

Article 24 of the Convention states that the victim of forced disappearance has a right to get fair compensation. However, according to figure 3, only 19% of the respondents agree that the victim of the enforced disappearance has been accorded adequate compensation.

The government is responsible for maintaining an official register of enforced disappearance, and the State must ensure that no one may be held in secret detention following article 17 of the Convention. However, only 39% of the respondents believe that the Government maintains official registers about the enforced disappearance incidents, and only 47% of the respondents think that no one is held in secret detention in Bangladesh.

Further, the State must provide information to victim's relatives following article 18 of the Convention. Also, the Government is obliged to provide all progress and investigation report to the victim's relatives in accordance with article 24 of the Convention. The data indicates that only 30% of the respondents opined that the relative of the victims have access to get information from the Government while only 37% of the respondents think that relatives of the victims of enforced disappearance have access

to get the investigation and other progress reports from the Government.

So, to answer the first research question, the discussion can be summarized that the provisions of Enforced Disappearance Convention have not been adequately implemented in the context of Bangladesh.

4 THE OBLIGATION UNDER THE DOMESTIC LAWS

The Enforced Disappearance Convention obliges the State to criminalize forced disappearance under their national laws (Sourav, 2015). The Convention emphasizes to enact a national law to take necessary steps against enforced disappearance (Enforced Disappearance Convention, 2006, art. 4) and the Convention intends to encourage the national law to take additional steps to combat enforced disappearance (Enforced Disappearance Convention, 2006, art. 8.3). In response to the above provisions, different countries enacting their national laws to combat enforced disappearance.² However, there is no

² For example: Armenia (Art. 392, Criminal Code); Belgium (136ter, Criminal Code); Australia (Section 268.21, International Criminal Court (Consequential Amendments) Act 2002); Canada (Sections 4(1) (b), 6(1) (b), Crimes Against Humanity and War Crimes Act); Colombia (Arts 165, 166, Criminal Code); Bosnia and Herzegovina (Art. 172(1) (i), Criminal Code); Costa Rica (Art. 379, Criminal Code); Croatia (Art. 1, Decision No. 01-081-03-3537/2); El Salvador (Arts 364–366, Criminal Code); Ethiopia (Art. 281, Criminal Code); Guatemala (Art.

201ter, Criminal Code); Cyprus (Law No. 23 (III)/2006); Ireland (Sections 7(1), 9(1), International Criminal Court Act 2006); Paraguay (Art. 236, Criminal Code); Mali (Art. 29(1), Criminal Code); South Africa (Sections 1(vii), 4(1) and Schedule 1, Implementation of the International Criminal Court Act 2002); Republic of the Congo (Art. 6(i), (k), Law No. 8-98); Trinidad and Tobago (Section 10(2)(i), International Criminal Court Act 2006); Malta (Section 2, International Criminal Court Act 2002); Venezuela (Art.

explicit provision in the Penal Code of Bangladesh, 1860 against enforced disappearance. However, the provisions relating to abduction under section 362³ and kidnapping under section 359 (classify two types of kidnapping: kidnapping from Bangladesh⁴ and kidnapping from lawful guardianship⁵) in the Penal Code, 1860 may amount to be similar to the meaning of enforced disappearance (Huq, 2010). Therefore, the perpetrators shall be held liable for breach of the said provisions.⁶ However, there is no successful prosecution record against the perpetrators in the experience of Bangladesh.

Along with the criminal responsibilities, the State has Constitutional⁷ obligation to combat enforced disappearance. According to Ratner, Abrams & Bischoff, (2009, pp. 128-129) enforced disappearance is a cumulative violation of human rights; thus, it may affect many aspects. For example, victims are deprived of right to dignity (Constitution of Bangladesh, 1972, art. 11); right to protection of the law (Constitution of Bangladesh, 1972, art. 31); right to be free from arbitrary detention and right to human conditions during detention (Constitution of Bangladesh, 1972, art. 33); right to fair trial (Constitution of Bangladesh, 1972, art. 35); right to life (Constitution of Bangladesh, 1972, art. 32); right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Constitution of Bangladesh, 1972, art. 33); and right to free movement (Constitution of Bangladesh, 1972, art. 36). All the rights mentioned above has guaranteed by the Constitution of Bangladesh and enforceable by a competent court of the State (Islam, 2010). In (*Edriss El Hassy v. The Libyan Arab Jamahiriya*, 2007) the United Nations Human Rights Committee (UNHRC) focused on the duties of the State party and mentioned the responsibilities of the State parties to establish proper judicial as well as administrative mechanisms for combating the alleged abuses under the national law. In its General Comment No. 31, the UNHRC

181-A, Criminal Code); United Kingdom (Sections 50, 51, 58, International Criminal Court Act 2001).

³ "Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person."

⁴ "Whoever conveys any person beyond the limits of Bangladesh without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from Bangladesh according to section 360 of Penal Code, 1860."

⁵ According to section 361 of the Penal Code, 1860, "whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the

addressed that if a State party fails to investigate the allegations of violation, it may amount to be a breach of the Convention. The committee also recalled that every State party is duty-bound to eliminate enforced disappearance (Sourav, 2015, pp. 233-234).

From the discussion mentioned above, can be summarized that Bangladesh has a clear obligation to combat enforced disappearance under the national criminal law as well as Constitutional law as the supreme law of the land. However, the shattering truth is that none of the perpetrators was brought to justice for committing the offence of enforced disappearance. No law has been implemented to protect the rights of disappeared victims. Instead, there has been a sequence of arbitrary arrest, kidnap, abduction, extra-judicial killings and excessive use of power by the Government law enforcement officials as well as internal political armed groups which has resulted into the breach of the rights of innocent individuals.

5 CONCLUSION WITH RECOMMENDATIONS

Bangladesh has a clear obligation to combat enforced disappearance under the numerous provisions of its national laws. However, the State has failed to combat enforced disappearance under the law of the land (*Bangladesh Legal Aid and Services Trust (BLAST) and others*, 2003). Also, the existing criminal law is insufficient to protect from indiscriminate arrest and enforced disappearance ("Enforced disappearances must be halted," 2010). The codified domestic laws have some limitation to criminalize the perpetrators under a uniform category of offence such as crime against humanity. In the absence of the application of UN Conventional provisions, the Government actively precludes media coverage of death in custody, does not grant anybody

lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

⁶ "Whoever kidnaps any person from Bangladesh or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine" and "Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine" according to existing Penal Code in Bangladesh.

⁷ The Constitution of the People's Republic of Bangladesh.

to visit any spot of extra-judicial killings (“Enforced disappearances must be halted,” 2010).

In the experience of Bangladesh, most of the enforced disappearances committed by the Government law enforcement agencies such as police, Rapid Action Battalion (RAB) and so on. A tradition has been set up that the ruling political party uses law enforcement agencies to commit enforced disappearance to intimidate the political opponents. The law enforcement agencies sometimes, gain pecuniary benefits from the enforced disappeared victims and relatives, precipitating impunity as an agent of the ruling political party. The recent seven murder heinous incident committed by the RAB high ranking officials in *Narayanganj* in 2014 is a glaring example (Sourav, 2015, p. 221).

Therefore, true political wisdom among the political parties is essential to combat enforced disappearance in Bangladesh. The Government may establish a new department under the domestic court of justice to deal with the enforced disappearance incidents. A healthy and independent judicial committee may investigate each incident with due care and prudence. Along with this initiatives, a comprehensive training can make it clear to the law enforcement agencies that the enforced disappearance is equivalent to war crime and crime against humanity (Alexander Murray, 2013, p. 59; *US v Greifelt et al*, 1948; *US v Altstoetter et al*. 1947) for which an individual and the State may have to face prosecution under the International Criminal Court.

Bangladesh ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT). Therefore it is a conventional obligation under article 10 of CAT to train and educate the law enforcement agencies about the prohibition of torture during arrest and detention. To prevent torture, Bangladesh must periodically review arrest, detention, and interrogation as provided under article 11 of the CAT.

The civil society actors can play an active role to combat enforced disappearance. The civil society can suggest the Government to ratify and comply with the Convention as well as enact a domestic law to prevent enforced disappearance. They can participate in the debate on new legislation to battle against the enforced disappearance. The international community can play an important role to stop enforced disappearance in Bangladesh. In their diplomatic relations, they can refer to forced disappearance as a crime against humanity. Donor agencies may urge the Government to ensure that, no one will be kidnapped or tortured or enforced to disappear for their different political identity and

everyone will get equal protection of the law regardless of the political identity. The international community also may urge the Government to ratify the Convention and its compliance incorporating new provisions in domestic criminal law in parity with the Convention.

Bangladesh is an active member of the United Nations and a robust participant in several UN peacekeeping missions. To keep the goodwill intact, the State should take necessary steps to ratify the Convention, amend the national criminal law with a view to refraining her from the onslaughts of enforced disappearances.

6 LIMITATION

Enforced disappearance violate disappeared relatives’ rights (Alexander Murray, 2013, p. 57; *Maria del Carmen Almeida de Quinteros et al v Uruguay*, 1990). However, this paper does not include this issue. Therefore, disappeared relatives rights may be the future scope of the study.

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