

Human Rights Mechanisms for the Protection of Women and Children from Enforced Disappearance

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Abstract Gender inequality is one of the most pervasive forms of social inequality and is often exacerbated by conflict and situations of gross human rights violations. Enforced disappearance can be among the factors leading to deterioration in the living conditions of women and girls, poverty, violence, multiple forms of discrimination and the limitation or denial of their human rights. The fact that women around the world already suffer from unequal status and treatment compared with men magnifies the difficulties they face as relatives of the disappeared. The enforced disappearance of children is an especially disturbing practice and complex in the issues to which it gives rise legally, morally and socially. The disappearance of a child is a clear contravention of a number of provisions of the Convention on the Rights of the Child. This article aims to analyze the legal mechanisms provided by human rights treaties for the protection of women and children as vulnerable groups affected by enforced disappearance. The focus of the analyze is concentrated on the UN Convention against enforced disappearance as the universal legal instrument for the protection of all persons from this international crime. Some recommendations will be provided for the state parties to implement legislation and policies aimed to protect and promote the rights of women and children.

1. Introduction: The impact of enforced disappearance on women and children

Some men arrive. They force their way into a family's home, rich or poor, house, hovel or hut, in a city or in a village, anywhere. They come at any time of the day or night, usually in plain clothes, sometimes in uniform, always carrying weapons. Giving no reasons, reducing no arrest warrant, frequently without saying who they are or no whose authority they are acting, they drag off one or more members of the family towards a car, using violence in the process of necessary.

This is often the first act in the drama of an enforced disappearance, a particularly heinous violation of human rights and an international crime. [Office of the United Nations High Commissioner for Human Rights, 2009, p. 1]

From the moment that a person disappears he/she and his/her relatives are subject to great distress and a range of practical difficulties.

Taking into account that the relatives of the disappeared persons are largely made up of women and children and their situation touches upon a number of legal and non-legal topics the reflection process needs to be interdisciplinary. It is necessary to elaborate a short analysis of the psychosocial, economic, legal and security issues with which are faced women and children as victims of enforced disappearances.

When women and children are subject to enforced disappearance they tend to suffer more than men because they endure not only physical and emotional violence, but often sexual violence as well.

Women and children as part of the family of the disappeared persons experience slow mental anguish, not knowing whether the victim is still alive and so if where he or she is being held, under what conditions, and in what state of health. Under these conditions women and children may face psychological and health problems that can affect the entire family system.

Women and children are most severely affected by economic, social and legal difficulties which generally arise after their relative's disappearance, in particular when women have to support their family in circumstances of great vulnerability. In these cases women and children are affected negatively on the enjoyment of various economic, social and cultural rights such as the right to an adequate standard of living, the right to health and the right to education.

Disappearance may cause a range of economic problems. The family distress is frequently compounded by the material consequences of the disappearance. The disappeared person is often the family's main breadwinner. The loss of their income can have an immediate and profound impact on families and especially on women who have the burden of raising children alone and continue keeping the house. In such situations women have the least access to food, health, education, training and opportunities for employment and other needs.

¹This paper only reflects the personal views of the author and not those of institutions of other bodies.

In addition to this loss of income women may not be able to access the bank accounts and pensions of the disappeared persons because of the unclearness of the legal status of the disappeared. The ambiguous legal status of the disappeared person can create problems for families in dealing with administrative issues such as registering children at schools and getting divorces.[Aim for Human Rights, 2009, p. 92]

More often are women - mothers, spouses, grand-mothers and others connected to the disappeared person – are those leading the struggle for truth with respect to the disappearance of their relatives. Consequently, they are intimidated, persecuted and often face a wide range of repercussions and reprisals. Searching for a disappeared person puts women at increased risk of becoming victims of human rights violations by state officials. Women searching for their loved ones may be at risk of sexual assault and other human rights violations aimed specifically at women. They may be at risk of being disappeared themselves². [International Center on Non violent conflict, 2010, p.36].

Women who are disappeared are exposed to violence, particularly sexual violence. This phenomenon is connected with another serious problem. Sometimes a woman may give birth to a child during her disappearance and the child is taken away from her and made the subject of adoption by the same authorities who are responsible for the disappearance of the mother. In Argentina and South American countries, such forced separations and adoptions of children were practiced systematically. [International Center on Non violent conflict, 2010, p. 38]. These criminal practices in addition to causing immense suffering to the children and their parents, also lead to considerable conflicts of interest between persons who adopt these children in good faith and members of the families of the disappeared parents.

The longer a situation goes on the more difficult it is to achieve a satisfactory solution, especially when children may have known from birth only an adoptive family. The difficulties that face any adopted child who learns the truth of his real parents can be significantly increased when this truth involves enforced disappearance. In addition to personal trauma, there are often highly complex legal matters especially when the child may have been brought up in another country from that in which he was born.

Experience has shown that children are particularly affected by the crime of enforced disappearance; they suffer most if their mother, father or even both parents disappear, and they may live all their childhood in a constant situation of uncertainty, between hope and despair.[Nowak, 2002, p.38]

The loss of a parent through disappearance is also a serious violation of child's human rights.[Mc.Crory, 2007, p. 559] The right to know the truth about the fate and the whereabouts also applies to the cases of children who were born during their mothers enforced disappearance and who were thereafter illegally adopted. Both the families of the disappeared and the child have an absolute right to know the truth about the child's whereabouts. [Report of the Working group on enforced or involuntary disappearances 2010, p. 7]

In the situations when a child is illegally removed from his or her family, his parents are victims of enforced disappearance, or he/she is born during the captivity of a mother subjected to enforced disappearance, he/she is a victim of enforced disappearance from which he/she is particularly vulnerable and the impact of such traumatic experience can affect negatively in his/her development and growth.

2. Legal approach on the situation of women and children affected by enforced disappearance

a) Rights of the women violated by enforced disappearance

The enforced disappearance of a woman violates her fundamental rights such as the right to life, the right to the liberty and security of the person, the right not to be subjected to torture and the right to recognition as a person before the law, as they are enshrined in the relevant articles of the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights. When a woman is a victim of enforced disappearance a number of articles of the Convention on the Rights of the Women may be infringed, namely, Article 10 on the right to education, Article 11 on the right to employment, Article 12 on the right to health, Article 13 on the right to family benefits, Article 15 on the right to equal presentation before the law, Article 16 on the equality in matters related to marriage and family relations.

b) Legal instruments addressing the issue of enforced disappearance on women

At the international level the rights of the women are recognized in a number of instruments. According to these instruments, States should take in all fields, in particular in the political, social, economic and cultural one all appropriate

²At the end of 1977 as the movement of Mothers of the Plaza del Mayo grew and gathered international attention, fourteen of the mothers themselves were disappeared.

measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights.

The most specific convention on the protection of women rights is the Convention on the Eliminations of all Forms of Discrimination against Women. This convention does not include any reference to enforced disappearance.

The Rome Statute on the International Criminal Court has not developed a gender approach in the inclusion of enforced disappearance as one of acts that amounts to the crime against humanity. Articles 7 and 8 of Rome Statute include gender-related crimes and crimes of sexual violence, which affirms that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence constitute, in defined circumstances, a crime against humanity and/or a war crime, and retains that acts of sexual violence in situations of armed conflict can constitute serious violations or grave breaches of international humanitarian law. These acts constitute separate figures of crime although as separate acts may be present during an enforced disappearance.

The Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the General Assembly on 18 December 1992, hasn't made any explicit reference to the situation of women.

The Inter-American Convention on forced disappearance of persons does not include any particular provision on women affected by enforced disappearances.

The International Convention for the Protection of all Persons from Enforced Disappearance which entered into force on 23 December 2010, is the first universal human rights instrument that asserts the non-derogable right not to be subject to an enforced disappearance. Article 1 proclaims that 'no one shall be subjected to enforced disappearance'. This definition expresses the aim of the convention to protect all persons, men and women, boys and girls.

Women are explicitly referred in the Convention on Enforced Disappearances only once, in Article 7 with reference to a special category: pregnant women. The CED is a rare example of referring to women as a special category for protection in cases of enforced disappearances.[Novak, 2009, p. 182] International humanitarian law usually offers a special protection for this category.³

According to Article 7/2 states parties may establish as aggravating circumstances the commission of an enforced disappearance in respect of pregnant women. This provision should be interpreted in conjunction with article 7/1 on the obligation of states parties to establish appropriate penalties for the crime of enforced disappearance, which take into account its seriousness. State parties should ensure that this aggravating circumstance in reference with the women is included in their domestic legislation and determine the appropriate penalty if such circumstance appears.

c) *Rights of the children violated by enforced disappearances*

In an enforced disappearance of a child the same rights are violated as those of an adult, but they may be additional rights violated because the victim is a child. The relevant articles of Convention on the Rights of the Child that may be violated by enforced disappearance are: Article 6 on the child right to live, Article 7 on the right to know and be cared for by his or her parents, Article 8 on the right to preserve his or her identity, Article 9 the right of the child to live with his parents, Article 16 on the right not to be subject to arbitrary or unlawful interference with his or her privacy, family and home, Article 19 on the right of protection from all forms of violence, Article 24 on the right to the enjoyment of the highest attainable standard of health, Article 27 on the right to a standard of living adequate for the children physical, mental, spiritual moral and social development, Article 28 on the right to education, Article 31 on the right to rest and leisure, Article 35 on the right not to be abducted, sold or trafficked, Article 37 on the right not to be subject to torture and other cruel, inhuman and degrading treatment or punishment and the right not to be deprived from his or her liberty unlawfully or arbitrarily.

d) *Legal instruments addressing the issue of children and enforced disappearance*

The Convention on the Rights of the Child, as the specific convention on the protection of child's rights, does not mention enforced disappearance as a form of child's rights abuse. The Convention, which has a significant number of state parties (193), introduce many principles and rights that should be taken into account in facing the problem of the children victims of enforced disappearances. Under article 39 states parties to the Child Convention should take all appropriate measures to promote physical and psychological recovery and social integration on a child victim. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

³Protocol I of the Geneva Convention stipulates that "maternity cases and pregnant women, who refrain from any act of hostility, shall enjoy the same general protection as that accorded to the sick and wounded" (Art. 8).

The 1994 Inter American Convention deals with the issue in a limited way, providing that the states parties shall give each-other mutual assistance in the search for, identification, location and returning of minors who have been removed to another state or detained therein as a consequence of the forced disappearance of their parents or guardians.

Article 20.3 of the Declaration on the Protection of all Persons from Enforced Disappearance, provides that the abduction of children of parents subjected to enforced disappearance or of children born during their mothers enforced disappearance and the act of alternating or suppressing documents attesting to their true identity, shall constitute an extremely serious offence, which shall be punished as such. States shall devote special efforts to search for and the restitution of such children to their families of origin and shall allow for the annulment of any adoption which originated in enforced disappearances.

The Convention for the protection of all persons from enforced disappearance expands this article by setting forth a comprehensive regulation of the wrongful removal of children. The Convention has addressed this particularly important issue in accordance with its protective approach in defining a victim of enforced disappearance. Article 25 which stipulates specific obligations in respect of children, constitutes an important new element of the Convention.[Novak, 2009, p. 182]

Article 25 of Convention provides special protection to three categories of children⁴:

1. children who are subject to enforced disappearance,
2. children whose father, mother or legal guardian is subjected to enforced disappearance
3. children born during the captivity of a mother subjected to enforced disappearance.

According to this article state parties should take the measures to prevent and punish under their criminal law:

- the wrongful removal of these three categories of children.
- the falsification, concealment or destruction of documents attesting to the true identity of these children.

Under this article State Parties are obligated not only to codify in their criminal law an offence of enforced disappearance, but to have a separate provision on punishment of the wrongful removal of the children and the falsification and destructions of their documents. States parties should take into consideration, while establishing the penalties for the crime of enforced disappearance, as aggravating circumstances the commission of an enforced disappearance in respect of minors, in line with article 7.2.

In addition to the legislative measures, Article 25 imposes supplementary obligations to search for and identify children of disappeared parents and return them to their families of origin in accordance with legal procedures and applicable international agreements. The necessary measures may include legislative, administrative, judicial or other actions that must in the end be effective in returning the children to their families of origin.

Article 25/3 requires states parties to assist one another in searching for and identifying the children of disappeared parents. States Parties have also duties under article 15 of the Convention to assist each other in resolving enforced disappearance. There is a view that States parties should also assist states taking such steps that have not yet ratify or accede to the Convention.[Amnesty International, 2011, p.63.]

Article 25/4 recognizes the right of children of disappeared parents to preserve or to have reestablished their identity including their nationality, name and family relations as recognized by law. In addition it requires states parties that recognize a system of adoption or other form of placement procedure and where appropriate to annul any adopting or placement of children that originates in an enforced disappearance. This seems to be a very complex situation. This article does not require to automatic annulment of an adoption that originated from an enforced disappearance. The interpretation of this article requires States parties to have a procedure which make possible to request the review of an adoption covered by this article. The question of whether the adoption should be reviewed or annulled should be determined in accordance with the legal procedures of the state party.

Provisions on the protection of children victims of enforced disappearance are guided by the best interest of the child, with due respect for the right of a child to express freely its view regarding this issue. This right is subject to due considerations regarding its age and maturity.

e) Additional rights for women and children affected by enforced disappearance

The above analysis is mainly based on the articles of the Convention that expressly refer to the situation of women and children. There are many other Articles that apply implicitly to the situation of the women and children including Article 12, Article 17, Article 18, Article 24 of the Convention.

⁴According to international law, child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. (Article 1 of CRC)

According to Article 12 state parties should ensure the women and children who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities which should examine the allegation promptly and impartially.

State parties should take the necessary steps to protect women and children whom are witnesses or relatives of a disappeared person, against all ill-treatment or intimidation as a consequence of the complaint or the evidence given.

Article 17 which establishes the right not to be held in secret detention should be interpreted with particular attention for women and children, taking into account the vulnerability of these categories, in situation of detention.

States parties should secure a treatment for women as provided in the Standard Minimum Rules for the Treatment of Prisoners and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

States parties should implement this article with particular attention for children detainees and in conformity with the rules of international law especially with the CRC, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the "Havana Rules"), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the "Riyadh Guidelines").⁵

Article 18 should be interpreted in the way to guarantee access to information regarding the detention of a person deprived from liberty for women and children that are relatives of the detainee and to secure protection from ill-treatment, intimidation or sanction as a result of the search of information.

Article 24 presents an innovative concept of the victim. Under this provision women and children can be victims of enforced disappearance when they are themselves subject of enforced disappearance or as individuals who have suffered harm from the direct result of an enforced disappearance. In both cases they have the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. They also have the right to obtain reparation and prompt, fair and adequate compensation.

This Article creates obligations to provide humanitarian assistance to the families of the disappeared. States should take appropriate steps with regards to the legal situation of the disappeared persons whose fate has not been clarified and of their relatives, in field of social welfare, financial matters, and family law and property rights. States are obliged to offer provide immediate humanitarian assistance to families after a disappearance occurs. The action of the state party under this provision should not be considered as reparations, but as necessary steps for which the vulnerable groups such as women and children are most in need.

3. Recommendations

At the end of this short analysis on women and children affected by enforced disappearance, the conclusion is clear: special attention should be paid in cases where enforced disappearance is committed against vulnerable groups such as women and children. The Working Group on Enforced or Involuntary Disappearance⁶ and the Committee on Enforced Disappearance⁷ have acknowledged that enforced disappearance has special consequences for vulnerable groups especially women and children as they most often bear the serious economic hardships which usually accompany a disappearance and when they are subject to disappearance themselves they may become particularly vulnerable to sexual and other forms of violence. These two organisms should elaborate a sensitive approach for women and children as victims of enforced disappearance.

Some recommendations can be provided for eradicating the effects of enforced disappearance for all persons, especially for women and children.

- States parties to international conventions on human rights have an affirmative duty to promote and protect the human rights of women and children and must exercise due diligence to prevent, investigate and punish acts of enforced disappearances against women and children.
- States should ratify and implement the International Convention on the protection of all persons from enforced disappearances.

⁵See General Comment 10 (2007) of the Committee on the Rights of the Child.

⁶The Working Group on Enforced or Involuntary Disappearances was established by the UN Commission on Human Rights in 1980 to assist families in determining the fate and whereabouts of disappeared relatives.

⁷The Committee on Enforced Disappearances (CED) is the body of independent experts which monitors the implementation of the CED by the States Parties.

- States Parties to the International Convention for the protection of all persons from enforced disappearance should ensure that enforced disappearance constitute an offence under their criminal law and establish as aggravating circumstances the commission of an enforced disappearance in respect to pregnant women and children and to establish appropriate harder penalties on such cases.
- States should punish under their criminal law the wrongful removal of children who are subjected to enforced disappearance, children whose father, mother and legal guardian is subjected to enforced disappearance of children born during the captivity of a mother subjected to enforced disappearance and the falsification, concealment or destruction of documents attesting the true identity of such children.
- States should take appropriate steps to ensure that women as relative of the disappeared person are protected against all ill-treatment or intimidation as a consequence of the complaint or the evidence given.
- States parties should provide data disaggregated by age, gender and in their reports for the implementation of the CED to enable its Committee to adequately evaluate the implementation of the Convention and to describe, as far as possible, factors affecting the incidence and prevention of enforced disappearance on children and women.
- It is necessary to integrate a gender perspective into relevant policies, strategies and programs of action of the states in the fight against enforced disappearances. Programs and policies which are based on gender-neutral criteria may cause indirect discrimination against women. It's not enough to guarantee women treatment that is identical of that of man.[Recommendation nr. 25 of CEDAW]. Women in general and affected groups of women in particular should have a role in the design, implementation and evaluation of such programs.
- It is recommendable especially the collaboration and consultation with civil society and non-governmental organization in the design, implementation and evaluation of such programs.
- States, UN mechanisms and civil society should intensify efforts to raise collective and individual awareness about violence against women and to highlight the role of men and boys in the prevention and elimination of violence against women.

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