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Remedying the 'Lost' people in human rights law – recent jurisprudence on involuntary and enforced disappearances

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Summary

No single court or body monitors observance of the rights and freedoms enshrined in the Universal Declaration of Human Rights. The UN Human Rights Council operates universal periodic review (see General Assembly Resolution 60/251 (2006) and Human Rights Council Resolution 5/1 (2007)), but enjoys no general competence to receive single individual communications. Of the two Committees monitoring the International Covenants (which give legally binding expression to the Universal Declaration on Human Rights) only the Human Rights Committee, at present, can receive individual communications against those states which accept that competence.¹ (NB An Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was approved by the General Assembly in December 2008 but is not yet open for signature/ ratification.)

This case note will examine two of the most recently issued opinions of the Human Rights Committee on the application of the International Covenant on Civil and Political Rights to two individuals who allegedly had disappeared, disappearances attributed to the action of state agents, and to their families.

¹ The UK does not accept the competence of the Committee to receive individual communications. As an experiment, it currently recognises the competence of the Committee on the Elimination of All Forms of Discrimination Against Women to receive individual complaints. Both complaints brought to date have been held inadmissible (*N.S.F v United Kingdom*, UN Doc CEDAW/C/38/D/10/2005 (views adopted June 2007) and *Constance Ragan Salgado v United Kingdom* UN Doc CEDAW/C/37/D/11/2006 (views adopted January 2007)).

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Enforced disappearances

‘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 anytime of the day or night, usually in plain clothes, sometimes in uniform, always carrying weapons. Giving no reasons, producing no arrest warrant, frequently without saying who they are or on whose authority they are acting, they drag off one or more members of the family towards a car, using violence in the process if necessary.’ (‘Disappeared Technique of Terror’ cited in OHCHR)

Sadly enforced or involuntary disappearances remain a coercive tactic deployed by states in conflict, under dictatorial regimes and established without due regard to the rule of law. One of the first acts of the new Human Rights Council when established in 2006 was to approve the text of the International Convention for the Protection of All Persons from Enforced Disappearances (HRC Resolution 1/1, 2006). It remains open for ratification and is the only one of the nine core UN human rights treaties which has not yet entered into force. As of January 2009, it has attracted only seven ratifications (Albania, Argentina, Bolivia, France, Honduras, Mexico and Senegal). Nevertheless this is encouraging as the contracting parties include states with a history of enforced disappearances.

The Convention was adopted in the wake of the UN Declaration on the same topic (GA Res 47/133(1992)). It declares enforced disappearances a crime and, in terms of the preambular passages to the Convention, aims at preventing enforced disappearances, combating impunity for the crime of enforced disappearance, reasserting the right of any person not to be subjected to enforced disappearance and the right of victims to justice and to reparation, not least through knowing the truth about the circumstances of an enforced disappearance and the fate of the disappeared person (freedom to seek, receive and impart information – from Article 19 UDHR).

One of the principal problems encountered with enforced disappearances lies in applying existing human rights and freedoms to an individual whose plight and indeed whereabouts remains unknown. Without a body it is hard to prove torture, without proof of detention, it is hard to argue arbitrary arrest, detention, failure to provide a trial etc.. The landmark case on enforced disappearances is one from the American (continent) regional system – the Organisation of American States – *Velásquez Rodríguez*, Inter-American Court of Human Rights 1988 Series C, No 4. The approach of the Inter-American Court of Human Rights was echoed in the European Court of Human Rights when considering the unexplained disappearances of a number of Cypriots during the divisive period of Cyprus’ recent history – *Cyprus v Turkey* European Court of Human Rights, Application no. 25781/94, Judgment 10 May 2001. The Human Rights Committee, overseeing as it does, the compliance of states with their obligations under the International Covenant on Civil and Political Rights (ICCPR), has followed a similar approach, utilising those UDHR rights tabulated in the ICCPR. Existing jurisprudence includes *Rafael Mojica v Dominican Republic* UN Doc. CCPR/C/51/D/449/1991 and *Bousroual v Algeria* UN Doc CCPR/C/86/992/2001.

This topic demonstrates the flexibility of core human rights: they can be adapted to apply to situations not at the forefront of the minds of the drafters of the Declaration sixty years ago.

The two ‘cases’

Precise figures on the number of people who disappear are difficult to ascertain as no official database of corroborated statistics is available. With the Convention not yet in force, existing human rights treaties are employed to offer succour to those affected. This case note will focus on the two most recent individual communications on the matter. The Human Rights Committee (which monitors state compliance with the ICCPR) issued views on *Yasoda Sharma v Nepal* UN Doc CCPR/C/94/D/1469/2006 and *Zohra Madoui v Algeria* UN Doc CCPR/C/94/C/1495/2006 at its most recent meeting on 28 October 2008. Both cases concerned disappearances of family members: Madoui’s son and Sharma’s husband. In both instances, the Committee concluded that multiple violations of the Covenant had occurred. These two communications will be considered in this comment.²

Zohra Madoui v Algeria – the facts

The author claimed (see paragraphs 2.1-2.11) her son was arrested and detained by gendarmes for failing to provide identity documentation during a check in March 1997. He had been held for thirteen days and was allegedly tortured during that time. Two months later, the son was in Larbaa during a major military and police sweep of the city. By nightfall he had not returned home following evening prayers at the

² For those not familiar with international conventions, note that international human rights law deploys non-contentious terminology: communications submitted by authors/ victims rather than cases brought/ lodged by plaintiffs; views adopted by a committee rather than a judgement of a court etc.. For ease of reference, ‘v’ is used in this case note to indicate the state the communication concerned, paragraph numbers are provided for the opinion and the entire text can be located easily from <http://www.ohchr.org> – simply enter the UN Doc number in the search box at the top-right of the homepage, or from the UN Treaty Bodies database (the document number is termed ‘symbol’ number).

central mosque. His mother investigated and a witness indicated that he had seen four young men arrested by plain-clothes police outside the mosque. She visited gendarmerie and barracks to no avail. At the operational command headquarters, she received news that her son was being held there but could not be visited. Daily visits to this building and others produced a variety of information and misinformation on her son whom she never saw. A fortnight later, at the behest of the mother, the public prosecutor wrote to the chief of police requesting an investigation into the son's disappearance, a similar letter from a government prosecutor was lodged a year later. Over the subsequent years, some witnesses emerged from detention claiming to have met the son who was allegedly being held in incommunicado detention and at various detention centres. None of this information led to the discovery of the son. The authorities continually officially denied her son had been arrested. Various avenues of complaint were considered but problems were encountered as alleged 'witnesses' to the detention could not be produced for fear of recriminations. Indeed the mother had previously been beaten by a security officer when investigating her son's disappearance. Official investigations were eventually closed.

As there is no right per se not to be disappeared, the author had to rely on a variety of pre-existing rights available in international human rights law, in the instant case under the ICCPR (see paragraphs 3.1-3.5). Thus she claimed violations of Article 7 (prohibition on torture or inhuman treatment), both of her son and of her and her family, Article 9 (liberty and security of person) as there was no record of her son's detention, Article 16 (recognition as a person before the law) and the provisions on providing an effective remedy for violations of human rights (Article 2) – she had explored all legal means of seeking information on her son's whereabouts without success.

In response, Algeria stated that every effort had been made to locate the author's son and it appears that her son was never arrested or held in any of the detention facilities mentioned by the author (see paragraph 4). However, no evidence was produced to prove or disprove the allegation of enforced disappearance. Such evidence has been required by the Committee in previous communications (eg *Quinteros v Uruguay*, UN Doc CCPR/C/19/D/107/1981).

Yasouda Sharma v Nepal – the facts

The author complained (see paragraphs 2.1-2.10) that her husband, a supporter of the Communist Party of Nepal (Maoist), had disappeared following his arrest in 2002. Reports of torture followed and the author made several unsuccessful attempts to visit her husband. A couple of weeks later, she was informed her husband had escaped and was presumed drowned in a river while taking his interrogators to a Maoist hideout. Yasouda Sharma then pursued a number of avenues determined to discover the fate of her husband, including recourse to the national human rights commission and the supreme court. Some two years later the Malego Commission, which was established to examine missing persons, listed the author's husband as missing. Her writ of habeas corpus was thus quashed as her husband was stated to have drowned after escaping and thus the writ was beyond the power of the state.

A number of civil and political rights were invoked by the author in her communication to the Human Rights Committee (see paragraphs 3.1-3.7): the lack of

an effective remedy under Article 2; the right to life enshrined in Article 6 of the Covenant; Article 7 (prohibition on torture, cruel, inhuman or degrading treatment) as he was held incommunicado and then disappeared, events also causing her anguish; Article 9 as the initial arrest was not under warrant, no grounds were provided for arrest, he was never charged and he was not permitted to consult a lawyer or challenge his detention; and Article 10 as he was a victim of enforced disappearance thus was not treated with humanity and respect for dignity during detention.

Nepal claimed (see paragraphs 4.1-4.6) that the author's husband was arrested by security forces for interrogation due to his involvement in terrorist activities and reiterated that he had escaped his captors, dived into a river to escape and did not emerge therefrom.

Rights engaged by disappearances

In both these communications, a number of procedural issues were raised. These are omitted for the purpose of focus in this comment – indeed they were ultimately dismissed by the Committee which, in each instance, continued its deliberations to comment on the infringements of rights and freedoms based on the facts before it.

Right to life

Undoubtedly the right to respect for life is of paramount importance and states are under a positive obligation to take measures to protect life and investigate unexplained deprivation of life. In the case of enforced disappearances, the obvious problem can be a lack of a body and/or any definitive or even circumstantial evidence of death. Article 6 of the ICCPR provides that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life' (based on Article 3 of the UDHR). In the communications under discussion, only Yasoda Sharma raised the right to life. Both she and the Nepalese authorities seemed to agree that death had resulted. However, the author was invoking the right to life while simultaneously requesting the release of her husband. It appears that she has thus not given up hope of her husband reappearing. Accordingly the Committee (at para 7.8) considered it inappropriate to make a finding on the right to life.

In contrast, when the European Court of Human Rights was considering mass disappearances in Cyprus, the right to life was considered infringed as the Turkish authorities had not taken adequate steps to investigate the fate of Greek-Cypriot people who had gone missing in 'life-threatening circumstances' (*Cyprus v Turkey* at para 136). Should it be proven that loss of life has occurred or should there be agreement that life has been lost then obviously it is easier to successfully invoke the right to life. In other circumstances, as there are a variety of additional rights engaged, it is preferable to focus instead on those rights and freedoms the invocation of which can be more easily argued.

Prohibition on torture, inhuman, cruel and degrading treatment

The lack of a body can also pose problems when arguing torture or other maltreatment has occurred during the alleged detention. Article 7 ICCPR provides that '[n]o one

shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’ (see also Article 5 of the UDHR). In many instances, allegations of torture are made against the state when an individual has vanished without trace. In the communication brought by *Yashoda Sharma*, holding her husband in captivity and preventing all communication with the outside world constituted a violation of Article 7 (see para 7.2). By definition, most enforced disappearances involve incommunicado detention thus Article 7 is engaged, irrespective of any physical ill-treatment of the detainee. Over the last sixty years, the mental element of torture has been increasingly recognised. (Initially the focus was on physical maltreatment.) As a result of this development, the Committee has also found infringements of Article 7 on account of the anguish suffered by loved ones whose family member has disappeared. The facts of *Zohra Madoui* and *Yasoda Sharma* thus disclosed a violation of Article 7 due to, respectively, the mother’s anguish (*Zohra Madoui* at para 7.5) and the anguish and distress of the wife (*Yasoda Sharma* at para 7.9).

Freedom from arbitrary arrest

Enforced disappearances usually are linked to arbitrary arrests. *Yasoda Sharma*’s husband was arrested by uniformed army personnel without a warrant (see paragraph 7.3). He was then held incommunicado and was never brought before a court. *Zohra Madoui*’s son was allegedly arrested by state officials. Several witnesses corroborated his detention in official detention centres yet he was never brought before a court. In neither case did the state submit an explanation for the circumstances presented to the committee thus in both cases the Committee concluded that Article 9 ICCPR was infringed (*Yasoda Sharma* para 7.3, *Zohra Madoui* para 7.6) – Article 9 provides that

‘1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.’

Thereafter the article provides for the detainee to be brought promptly before a judge for trial and to have the legitimacy of his or her detention confirmed by a legal body, which failing, to be released and compensated for unlawful arrest or detention (see also Article 9 UDHR).

The failure to bring detainees to court prompts a likely violation of Article 9. In most instances of enforced disappearances, there are no court appearances. In some instances (eg Latin America during military regimes) military courts were deployed. These can be problematic as cases on the military tribunals at Guantanamo Bay demonstrate (eg *Hamdan v Rumsfeld* (No. 05-184) 415 F. 3d 33 (US Supreme Court)).

Humane detention

Article 10 ICCPR requires states to ensure that ‘[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’ (arguably derived from elements of articles 6, 8 + 9 of the Universal

Declaration of Human Rights). *Zohra Madoui* did not complain about a violation of this article, but it was at issue in *Yasoda Sharma's* complaint. Any enforced disappearances are likely to engage this provision. The question of proof may be problematic – a lack of dignity is being implied by the absence of evidence to the contrary. In the complaint made by *Yasoda Sharma*, a violation of Article 10 was found simply because the state made no comment (at para 7.7).

Effectiveness of existing human rights

As these two cases demonstrate, existing human rights treaties can provide a remedy for those who disappear and their relatives. This aptly demonstrates the versatility of the Universal Declaration of Human Rights and its associated treaties.

All human rights derive from the provisions in the UN Charter demanding recognition of the equal worth of human beings and of non-discrimination. Respect for human dignity is thus of paramount importance and, arguably, all human rights aim at guaranteeing respect for the inviolability of human dignity. Enforced disappearances are clearly an affront to human dignity yet there is no obvious right or freedom engaged: for example, if there is no body, it is difficult to prove infringement of the right to life or the prohibition on torture. Nevertheless, the UN treaty bodies have succeeded in articulating complex violations of human rights in such situations, thereby demonstrating the flexibility of international human rights.

In the principal case on enforced disappearances (cited above), Velásquez Rodríguez had disappeared following an 'arrest' in Tegucigalpa, Honduras. It was alleged that the State was responsible as he had been arrested by State security forces although this was consistently officially denied. The complaint also alleged that he had been subjected to interrogation and ill-treatment/ torture. Although Honduras had repeatedly failed to respond to requests for information, the Inter-American Court found violations of the Convention (see Velásquez Rodríguez judgment paragraphs 185-188). Parallels can be drawn with the complaint of Zoha Mahoudi, the extension of the arguments to the complaint of Yasouda Sharma being logical: no body was found, the facts surrounding the 'escape' were disputed etc.. There is clearly a positive obligation on states to ensure that any arrest and detention is carried out with scrupulous regard to international standards.

Conclusions

Without doubt, the communications discussed herein demonstrate the advantages of the international human rights system. Those thwarted at every turn when trying to find information on loved ones who have disappeared do have a supra-national remedy through the United Nations if the state in question has ratified the Optional Protocol to the ICCPR (neither the UK nor the US have ratified it). Enforced disappearances clearly involve multiple breaches of human rights. The new Convention on Enforced Disappearances merely highlights the issue. It does little to provide additional avenues of complaint. However, in the wider context, there is a working group on disappearances and the issue is unlikely to drop from the UN agenda.

The UN Working Group on Enforced or Involuntary Disappearances (initially established by Commission on Human Rights Res. 20(XXXVI) (1980) for a single year, mandate renewed thereafter) also receives reports on disappearances (WGEID). With the status of special mechanism of the now Human Rights Council, its primary role is to assist the family of disappeared persons in their attempts to ascertain the fate and/or whereabouts of their relatives. It does not confine its activities to states ratifying specified treaties, but rather extends its jurisdiction globally as required. In a spirit of constructive dialogue, institutional-governmental channels of communications are engaged to seek information on the fate of the individual concerned thereby allaying or confirming the fears of the family/ friends instituting the investigation. The Working Group has no power to award compensation or other remedies. Thus an investigation by the Working Group may subsequently form part of a communication to one of the UN treaty bodies (usually CAT or HRC) alleging state/state-sanctioned violation of human rights. Where disappearances are systematic and numerous, the state concerned may also be referred to the Human Rights Council under the Council Complaint Procedure. Alternatively, should the individual perpetrator(s) be identified, then criminal proceedings under national law and/or international criminal law can ensue.

Existing human rights seem well-placed to add weight to the argument that enforced disappearances violate human rights. However, all the UN human rights committees remain comparatively impotent to effect real change. They can add political, public and moral pressure to a state but little coercion. As is so often the case with international affairs, human rights remain limited by the will of the states themselves – the committees thus only have the power vested in them by the states parties to the relevant treaty.

The Human Rights Committee has provided guidance to Algeria and Nepal as to international human rights' expectations – they must investigate the disappearances, prosecute those involved and take steps to prevent similar violations in the future. Compensation was also deemed appropriate given the violations found. In each instance, the state has been given six months to respond detailing the steps taken to give effect to the Committee's views. Both countries have experienced recent political change so arguably the political landscape could be different. However this is immaterial as a willingness to engage with the covenant and ensure the rights and freedoms enshrined therein are fully protected and promoted within each and every state is required. Thus internal procedures are required to ensure that all detainees are registered, treated fairly and entitled to the determination of the lawfulness of any ongoing detention (eg Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (9 December 1988); Basic Principles for the Treatment of Prisoners Adopted and proclaimed by General Assembly Resolution 45/111 (14 December 1990)). All detainees should be traceable and the state is responsible for their fate during detention, ensuring an effective investigation of deaths or injuries in custody, for example. Effective national remedies are also required should an individual disappear and state agents appear to be involved (Article 6 et seq of the International Convention for the Protection of All Persons from Enforced Disappearances reinforces this).

Undoubtedly, the clock is ticking for Algeria and Nepal – the Human Rights Committee awaits (and will monitor) their response. Nonetheless a final satisfactory resolution to the plight of disappeared persons has not yet been reached. It is sadly likely that further victims will be identified and more complaints brought. Satisfactory resolution of serial disappearances requires a national redress – often Truth/Reconciliation Commissions play an important role in this process. Compensation is usually a moot point when discovering the fate of a family member or friend is at issue. Uncovering the truth is far more satisfactory.

The 2006 Convention makes clear that

‘No one shall be subjected to... arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support, acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law’. (Articles 1-2)

As the foregoing discussion has made clear, pre-existing human rights have been moulded to rise to the challenge posed by enforced disappearances. However, the mainstreaming of the issue into a core human rights treaty remains a positive step towards eradicating this heinous practice.

Bibliography

OHCHR (gen) Fact Sheet No 6 (Rev.2) Enforced or Involuntary Disappearances (Geneva: OHCHR), available from

<http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx> (January 2009)

WGEID (gen) For information on the Working Group on Enforced and Involuntary Disappearances, see <http://www2.ohchr.org/english/issues/disappear/index.htm> (January 2009)