

Basic Guide to the International Convention for the Protection of All Persons from Enforced Disappearance Bill

Centre for Policy
Alternatives

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CENTRE FOR POLICY ALTERNATIVES
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The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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Background

The issue of enforced disappearances has impacted Sri Lanka's across the ethnic divide for decades. The use of enforced disappearances during the "youth insurrections" of the 1970's and 80's and during the protracted armed conflict by both state and non-state actors is well documented. Despite several commissions of inquiry appointed by successive governments to investigate these incidents, the fate of thousands remains unknown. Several such commissions of inquiry have recommended legal reforms to address the issue of enforced or involuntary disappearances and to eliminate this phenomenon in the future. An overwhelming majority of these detailed recommendations remained unimplemented for decades.

"....In order to address this issue comprehensively and to eliminate this phenomenon in the future as well as to fill an existing lacuna, the Commission strongly recommends that domestic legislation be framed to specifically criminalize enforced or involuntary disappearances." - **Report of the COMMISSION OF INQUIRY ON LESSONS LEARNT AND RECONCILIATION, 2011, 5.46**

Sri Lanka signed the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) in December 2015 and ratified it in May 2016. In order to give legal validity to the ICPPED in Sri Lanka, the Government of Sri Lanka introduced the International Convention for the Protection of All Persons from Enforced Disappearance Bill (Bill) which was gazetted on the 09th of February 2017 and subsequently tabled in Parliament.

The Centre for Policy Alternatives (CPA) produces this basic guide to raise awareness on the proposed legislation. The next phase of the law making process entails that the Bill is open to amendment at the committee stage debate. This basic guide is meant to inform those involved in the process and other stakeholders as to what is presently proposed.¹

Subsequent to enactment, CPA will update this guide to ensure that stakeholders are aware of the new legislation.

¹ For analysis and commentary on the Bill See South Asian Centre for Legal Studies, Commentary on the Bill titled International Convention for the Protection of All Persons From Enforced Disappearances, 4th May 2017, available at <http://sacls.org/resources/publications/reports>

What does this Bill do?

1. Defines the offence of ‘Enforced Disappearance’ and other ancillary offences.
2. Establishes new rights for disappeared persons, persons deprived of liberty, relatives and attorneys-at-law of disappeared persons, non-citizens arrested for an offence under the Bill.
3. Provides the framework for mutual legal assistance with different states in order to investigate and prosecute the offence of ‘Enforced Disappearance’.

How does the Bill define the offence of ‘Enforced Disappearance’? [Clause 3(1), 3(2) & 3(3)]

	Enforced Disappearance		
	Clause 3(1)	Clause 3 (2)	Clause 3 (3)
Who	Any person who, being a public officer or acting in an official capacity, or any person acting with the authorization, support or acquiescence of the State	Any person	A superior of a person in clause 3(1)
Does What	<p>arrests, detains, wrongfully confines, abducts, kidnaps, or in any other form deprives any other person of such person’s liberty; and</p> <p>(i) refuses to acknowledge such arrest, detention, wrongful confinement, abduction, kidnapping, or deprivation of liberty; or (ii) conceals the fate of such other person; or (iii) fails or refuses to disclose or is unable without valid excuse to disclose the subsequent or present whereabouts of such other person,</p>	<p>wrongfully confines, abducts, kidnaps or in any other form deprives any other person of such person’s liberty; and</p> <p>(i) refuses to acknowledge such wrongful confinement, abduction, kidnapping, or deprivation of liberty; or (ii) conceals the fate of such other person; or (iii) fails or refuses to disclose or is unable without valid excuse to disclose the subsequent or present whereabouts of such other person,</p>	<p>knowingly or consciously disregards information which clearly indicated, that subordinates under the effective authority and control of such superior were committing or about to commit an offence under subsection (1);</p> <p>exercises effective responsibility for and control over activities which were concerned with the offence of enforced disappearance; and</p> <p>fails to take all necessary and reasonable measures within his power to prevent or repress the commission of an offence under sub section (1) or to submit the matter to a law enforcement authority for investigation and prosecution,</p>

How does the Bill define deprivation of liberty?

The Bill defines deprivation of liberty to mean “confinement of a person to a particular place, where such person does not consent to that confinement” [\[Clause 25\]](#)

Additionally, the Bill provides several specific modes, such as wrongful confinement, kidnapping and abduction by which a person’s liberty can be deprived in order to commit the offence of Enforced Disappearance. In this section “wrongful confinement”, “kidnapping” and “abduction” have the same meaning as in the Penal Code [\[Clause 3\(1\) & 3\(2\)\]](#)

The Bill specifically states that if a Public Officer OR any person acting in an official capacity OR any person acting with the authorisation, support or acquiescence of the State arrests or detains or in any manner deprives the liberty of another and then does anything in I), II) or III) above such person will be guilty of this offence. [\[Clause 3\(1\)\]](#)

What are the other offences defined in the Bill?

1. Aiding or abetting the commission of any offence under Clause 3; OR conspires or attempts to commit any offence under Clause 3 is guilty of an offence [\[Clause 4\]](#)

‘Abet’ and ‘Conspiracy’ have the same meaning as in the Penal Code. The punishments for these offences are the same as the punishment for enforced disappearance.

2. Any person, including a person suspected of having committed an offence under Clause 3 and 4 of the Bill, shall be guilty of an offence if s/he does any of the following acts: [\[Clause 17\]](#)
 - interferes with the conduct of an investigation
 - influences the progress of an investigation by pressure or acts of intimidation or reprisal aimed at the,
 - ❖ complainant
 - ❖ witnesses
 - ❖ relatives of the disappeared person
 - ❖ attorneys-at-law of the disappeared person
 - ❖ persons participating in the investigation
3. An officer who is responsible for the official register shall be guilty of an offence if s/he [\[Clause 17\]](#),
 - intentionally fails to record the deprivation of liberty of any person, or records any information which s/he knew to be inaccurate;
 - refuses to provide information on the deprivation of liberty of a person, or provides inaccurate information, notwithstanding the fact that legal requirements for providing such information have been met.

Nature of the offences [Clause 5]

Every offence defined in this Bill is a cognizable (meaning that a police officer can arrest the accused without warrant) and a non-bailable offence for the purposes of the Code of Criminal Procedure Act, No 15 of 1979.

Which Court will have jurisdiction to try offences [Clause 6]

The High Court will have jurisdiction to try an offence under this Bill when;

1. It is committed within Sri Lanka
2. it is committed outside Sri Lanka, If;
 - Offender (regardless of his/ her citizenship) is present in any territory under the jurisdiction of Sri Lanka.
 - Offender is a Citizen of Sri Lanka or a national of the Convention State or a stateless person who has his habitual residence in Sri Lanka.
 - Such act is committed against, or on board-
 - ❖ a ship flying the flag of Sri Lanka, or
 - ❖ an aircraft registered in Sri Lanka at the time of the commission of the offence
 - The person in relation to whom the offence is alleged to have been committed is a citizen of Sri Lanka.

What are the categories of persons whose rights are protected under the Bill?

This Bill specifies rights to be guaranteed for different groups of persons such as disappeared persons, persons deprived of liberty, relatives and attorneys-at-law of disappeared persons and non-citizens arrested for an offence under this Bill.

Victims of enforced disappearance

1. Who is a victim?

- the disappeared person
- any individual who has been affected as a direct result of an enforced disappearance [\[Clause 25\]](#)

2. What are the rights of a victim?

- To know the truth regarding the circumstances of an enforced disappearance
- To know the progress and results of the investigations as are carried out by the law enforcement authorities
- To know the fate of the disappeared person
- To form and freely participate in organizations and associations concerned with attempting to establish the circumstances of offences committed under Clause 3 and the fate of disappeared persons and to assist victims. This right is subject to restrictions imposed by other laws. [\[Clause 14\]](#)

- The right to Privacy and have protected, the data gathered for the search of a disappeared person [\[Clause 19\]](#)

Personal information, including medical and genetic data, which is collected or transmitted in order to search for a disappeared person, shall not be;

- ❖ used or made available for purposes other than the search for the disappeared person; OR
- ❖ collected, processed, used or stored in a manner that infringes or has the effect of infringing the fundamental rights and freedoms or dignity of a person.

However, this will not prevent the use of this information in criminal proceedings relating to an offence committed under this Bill or the exercise of the right to obtain reparations.

3. What are the duties of law enforcement authorities?

- undertake an investigation where there are reasonable grounds for believing that a person has been subjected to an offence under Clause 3, even if there has been no formal complaint
- take all appropriate measures to search for and locate the disappeared person
- procure the release of a person who is held in secret detention
- locate, respect and return the remains of such person in the event of death

The Bill defines a ‘Law enforcement authority’ as a police officer or any other person or institution authorized by or under any written law to investigate into the commission of an offence. [\[Clause 25\]](#)

Persons deprived of liberty [Clause 15]

1. Who is a person deprived of liberty?

A person confined to a particular place, where such person does not consent to that confinement [\[Clause 25\]](#)

2. What are the rights of a person deprived of liberty?

- No person shall be held in secret detention.
Secret detention means circumstances in which a person is held in a place that is not a place of detention authorized by any written law and the whereabouts or fate of the person are not known to his relatives or others [\[Clause 25\]](#)
- Subject to the conditions established by law any person deprived of liberty shall have the right to communicate with and be visited by his/her relatives, attorney-at-law or any other person of his/ her choice.

3. What are the duties of law enforcement authorities?

- Law enforcement authorities and the Human Rights Commission of Sri Lanka shall have access to the places where persons are deprived of liberty.
- Law enforcement authorities shall assure the compilation and maintenance of an up-to-date official registers or records of persons deprived of liberty. These registers and records shall be promptly made available upon request to any judicial or other competent authority or institution authorized for that purpose by the law.
- These registers or records shall contain-
 - ❖ the identity of the person deprived of liberty;
 - ❖ the date, time and place where the person was deprived of liberty;
 - ❖ the identity of the authority that deprived the person of liberty;
 - ❖ the authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
 - ❖ the authority responsible for supervising the deprivation of liberty;
 - ❖ the place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
 - ❖ information relating to the state of health of the person deprived of liberty;
 - ❖ the circumstances and cause of death and destination of the remains, in the event of death during the deprivation of liberty; and
 - ❖ the date and time of release or transfer to another place of deprivation of liberty, the destination of the place of deprivation of liberty to which a person is transferred, and the authority responsible for the transfer.

Relatives, representatives and attorneys-at-law of a person deprived of liberty [Clause 16(1)]

1. What are the rights of a relative or representative or attorney-at-law of a person deprived of liberty?

- The right to access the following information:
 - ❖ the person or authority that ordered the deprivation of liberty;
 - ❖ the date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;
 - ❖ the authority responsible for supervising the deprivation of liberty;
 - ❖ the whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
 - ❖ the date, time and place of release;
 - ❖ information relating to the state of health of the person deprived of liberty;
 - ❖ the circumstances and cause of death and destination of the remains, in the event of death during the deprivation of liberty.

2. Regardless of the lawfulness of the deprivation of liberty, the relatives, representatives and attorneys-at-law of a person deprived of liberty will have the

right to an immediate and effective judicial remedy as a means of obtaining the information referred above, without delay. This right to a remedy shall not be suspended or restricted in any circumstances.

3. Any relative of a person deprived of liberty, the representative of a person deprived of liberty or an attorney-at-law of a person deprived of liberty **as well as persons participating in the investigation**, shall be protected from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

Non-citizens arrested for an offence under this Bill [Clause 7]

A non-citizen who is arrested for an offence under this Bill is entitled to:

- communicate without delay, with the nearest appropriate representative of the State of which s/he is a national, or which is otherwise entitled to protect his/her rights, or if s/he is a stateless person, with the nearest appropriate representative of the State in the territory of which he was habitually resident; and
- to be visited by a representative of that State; and
- be informed of his above stated rights.

How can these rights be enforced? [Clause 20]

As per Clause 20(1), without prejudice to any judicial or other remedy provided by any written law, any person with a legitimate interest is entitled to seek the enforcement of the above stated rights, in Clauses 7,14,15,16 or 19, by way of petition addressed to the High Court.

A Petition can be filed by any person who has a legitimate interest or through any other person on his behalf, within three months from the date when such person came to know of the non-enforcement of those rights.

The High Court where it considers it appropriate may refer such matter to the Human Rights Commission of Sri Lanka for an inquiry at any stage of the proceeding relating to a petition. Furthermore, the High Court may request the commission to submit a report to it within a specific time period.

Any person aggrieved by an order made by the High Court can appeal to the Supreme Court within six weeks of the date of the High Court order.

What is the punishment for the offence of ‘Enforced Disappearance’?

Persons convicted for the offence of enforced disappearance by the High Court shall be punished with-

- imprisonment for a term not exceeding twenty (20) years;
- fine not exceeding one million rupees(1,000,000); and
- compensation not less than five hundred thousand rupees (500, 000) to a victim
[\[Clause 3 \(1\), \(2\) & \(3\)\]](#)

The impact of the Bill on extradition

What is the legal framework for extradition in Sri Lanka?

The Extradition Act No. 8 of 1977 (the Extradition Law) provides the legal framework relevant to extradition. The provisions of this Act will apply to:

- Commonwealth countries upon an order published in the Gazette by the Minister
- Any other country with which the government of Sri Lanka has entered into an **extradition arrangement** and after Minister gazettes a declaration that the provisions of this law shall apply for that particular country

How will the Bill impact the Extradition Law?

This Bill makes 3 main changes to the Extradition Law;

Firstly

As per Clause 11 of the Bill, ICPPED can be treated as an extradition arrangement between Sri Lanka and any Convention State.

“Convention State” is a State which the Minister has certified -by an Order published in the Gazette- as being party to the ICPPED. **(Clause 2)**

Secondly

As a result of the Bill, extradition is possible from and to Sri Lanka for any of the offences defined in the Bill, in the following instances:

- To any Convention State regardless of whether there is an existing extradition arrangement between Sri Lanka and any Convention State.
- To any Commonwealth country, which recognizes an offence which, however described in that law, falls within the scope of an offence in the Bill. **(Clause 10, 11 and 12)**

Thirdly

Request for extradition for any of the offences specified in the Bill cannot be refused on the ground that such offence is of a political character or an offence connected with a political offence or an offence inspired by political motives. **(Clause 13)**