

Mandate of the Working Group on Enforced or Involuntary Disappearances

REFERENCE:
OL PAK 11/2021

13 October 2021

Excellency,

I have the honour to address you in my capacity as Chair–rapporteur of the Working Group on Enforced or Involuntary Disappearances, pursuant to Human Rights Council resolution 45/3.

In this connection, I would like to bring to the attention of your Excellency’s Government information we have received concerning **the *Report of the Standing Committee on Interior on the Criminal Laws (Amendment) Bill 2021*, which proposes amendments and additional clauses to the Bill. These changes appear to run contrary to the spirit and objectives of a law the purpose of which is to criminalize enforced disappearances.**

In a prior communication sent to Pakistan on 29 June 2021 (OL PAK 7/2021), the Working Group welcomed the decision by the Government to introduce the bill criminalizing enforced disappearances, in line with the recommendations made previously by the Working Group and other relevant human rights mechanisms. The Working Group had also welcomed the introduction in the bill of the definition of enforced disappearance, as established in the International Convention for the Protection of All Persons from Enforced Disappearance (the Convention), and had proposed some amendments with regard to the increase of the proposed penalties and the consistent use of the phrase “enforced disappearances” throughout the Bill.

The Working Group is alarmed, however, at recent information received indicating that on 29 September 2021, in its report on the Bill, the Parliamentary Committee on Interior proposed the inclusion of a new section entitled *The allegation or complaint in respect of Enforced Disappearance etc.* which reads as follows:

514. That allegation or complaint in respect of Enforced Disappearance etc.-

(1). Whoever files a complaint or gives information that proves to be false he or another person has been subjected to Enforced, Forcible or Involuntary Disappearance, or an attempt has been made in this regard, he shall be guilty of an offence punishable up to five years imprisonment and fine up to Rupees one hundred thousand.

(2). Notwithstanding anything contained in any law for the time being in force, in respect of Enforced, Forcible or Involuntary Disappearance, no officer or functionary of State, including the departmental head of an institution shall be charged with the offence if there is no evidence available to implicate such officer or functionary.

The Working Group is gravely concerned at the proposed introduction of a clause that would harshly penalize relatives and other sources for reporting alleged cases of enforced disappearances, leading to an increased underreporting of this crime and impunity for the perpetrators. It is already common for families to be reluctant to

report cases, or interact and exchange information with Government officials, either for fear of reprisals or due to a lack of trust. This fear and mistrust are understandable, and the Government should seek means to encourage relatives to come forward rather than creating additional barriers for them or introducing provisions that will have a chilling effect on relatives of disappeared persons and their representatives, who might find themselves in a climate of self-censorship fostered by the draft provision at stake, which would eventually leave them without any effective remedy.

In this respect, the Working Group recalls that article 13 of the Declaration on the Protection of all Persons from Enforced Disappearance states that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. The Declaration also states that steps shall be taken to ensure that all those involved in the investigation, including witnesses, are protected against ill-treatment, intimidation or reprisal.

The Working Group would also like to refer to its [Report on standards and public policies for an effective investigation of enforced disappearances](#), which specifies that relatives shall not only be enabled to lodge complaints on enforced disappearance without fear of reprisals, but also be closely associated to the investigation and enabled to contribute as much as they can and be kept informed on the progress or the obstacles encountered (see paras. 11-19). In any case, and pursuant to the Declaration, State authorities remain under an obligation to investigate even if no formal complaint has been lodged.

As to the second paragraph of the suggested clause, its formulation is too ambiguous and the evidentiary criteria that would be applied are unclear. It is similarly unclear who would bear the burden of proof, which might result in additional obstacles for the relatives and, in general, for the investigation of the crime at stake. In this respect, we would like to refer to relevant international jurisprudence related to the incorrect codification of enforced disappearances in national legislation, such as the 2005 judgment of the Inter-American Court of Human Rights (*Gómez Palomino v. Peru*), which analysed the definition of enforced disappearance in Peru's criminal code (IACtHR, judgment of 22 November 2005, Ser C No. 136)¹. The Court stressed how enforced disappearance is characterized by its clandestine nature, which requires the State to comply with its international obligations in good faith and to provide all necessary information insofar as it is the State which has control over the mechanisms to investigate incidents that took place within its territory. Consequently, any attempt to shift the burden of proof to the victims or their next of kin is contrary to international law standards.

¹ The definition of enforced disappearance in the Criminal Code of Peru stated that there would be a crime only if the disappearance was “duly proved”, making it almost impossible to prosecute persons for enforced disappearance, thus contributing to impunity. In its judgment, the Court found that such specific language complicates statutory construction thereof. Firstly, it is not possible to know whether such “due proof” must precede the criminal report or complaint and, secondly, it is not clear therein who should produce such proof either. The Court also agreed with the considerations put forward by the Peruvian Ombudsman, to the effect that: the additional condition that the disappearance be “duly proven” —which has no precedent in international rules— lacks any reasonable justification in criminal policy. Said condition must not imply imposing the burden of producing previous proof on the person reporting the crime, something which is completely absurd given the clandestine nature of the practice, but only the exhaustion of police and administrative proceedings commonly used to locate any missing person. It may not be understood as a condition precedent to punishment or prosecution, for such construction would mean fostering impunity. The Court, therefore, concluded that, the ambiguous requirement of “due proof” of the forced disappearance included in the Criminal Code prevents the State from fully complying with its international obligations.

As to the discussion of the Bill, the Working Group had also encouraged your Excellency's Government to enable a process that would allow the participation of victims, families, civil society organizations and other relevant actors, in an open, inclusive and transparent process. We reiterate our call to allow the participation of civil society actors wishing to contribute to the discussion of the Bill.

The Working Group wishes to recall the crucial role that the relatives of persons subjected to enforced disappearances have had in advancing the fight for truth and justice for all victims in Pakistan. Their lived experiences and their acquired knowledge on the subject matter should be acknowledged and duly incorporated into the State initiatives aimed at tackling this heinous crime.

The Working Group would be grateful to receive from your Excellency's Government, any additional information and/or comment(s) you may have on the abovementioned Criminal Laws (Amendment) Bill 2021 or the recent Report of the Standing Committee on Interior.

I would also like to reiterate the Working Group's readiness to assist the Pakistani State in its efforts to strengthen the country's legislative and institutional framework and provide technical and other assistance, in compliance with its mandate.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. It will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Luciano Hazan
Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances