

**ENFORCED DISAPPEARANCES AND SRI LANKAN HUMAN RIGHTS PROFILE:  
AN ANALYTICAL REFLECTION ON THREE SELECTED ENFORCED  
DISAPPEARANCES INCIDENTS IN THE POST-WAR PERIOD**

*Kusal Kavinda Amarasinghe\**

**ABSTRACT**

According to the definition given by the United Nations' Working Group on Enforced or Involuntary Disappearances which has appointed under the provisions of the International Convention for the Protection of all Persons from Enforced Disappearances, an enforced disappearance can be defined by three cumulative elements: (1) Deprivation of liberty against the will of the person; (2) Involvement of government officials, at least by acquiescence; & (3) Refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person. As a result of the dark era in the past three decades in Sri Lanka, thousands of enforced disappearances cases have reported. Among those cases, this article focuses on three selected enforced disappearance incidents which had happened during the final phase of the civil war period and the post-war period of Sri Lanka. It also discusses on the Political Approach of the Discourse on the Right not to Forcible Disappearance in Sri Lanka and the contemporary domestic legal framework against the enforced disappearance. The central question sought to be raised in this article is whether Sri Lanka has been able to guarantee the basic human rights of its citizens and how the political factor can be affected on it? However, this article has prominently tried to focus on the legal regime of the study area.

*Keywords – Human Rights, Enforced Disappearance*

**1. INTRODUCTION**

Enforced disappearance means making someone disappear against that person's will. Therefore, enforce disappearance refers to the arrest, detention or abduction of a person,

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\* LL.B (Hons.) Attorney-at-Law, [kusalkavinda0@gmail.com](mailto:kusalkavinda0@gmail.com)

followed by a refusal to acknowledge the fate of that person.<sup>1</sup> Enforced disappearance is a violation not only of the rights of the direct victim, but also his or her relatives. According to the General Comment on the definition of the enforced disappearance which was submitted to the United Nations Human Rights Council in 2008, the enforced disappearance is defined as a ‘Crime against Humanity’<sup>2</sup>

International Convention for the Protection of All Persons from Enforced Disappearance defined that, "enforced disappearance" is considered to be the 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 or 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.<sup>3</sup>

Sri Lanka is a country which has one of the world’s highest number of disappearances rate. More than 60,000 of persons have disappeared since the late 1980s.<sup>4</sup> Even in the post-war period, many incidents have been reported about disappearances. In such a setting, the United Nations Human Rights Council (UNHRC) passed two resolutions to investigate the implementation of Human Rights in Sri Lanka.<sup>5</sup> However, Sri Lanka’s president, Mr. Gotabaya Rajapaksa acknowledged for the first time before the UN envoy that more than 20,000 people who disappeared during the country's civil war were dead.<sup>6</sup>

## 2. THE CHAIN OF INCIDENTS ON DISAPPEARANCES OF 11 PERSONS

The enforced disappearance incident of 11 persons in 2008-2009 is one of the most controversial cases of grave human rights violations in Sri Lanka. This incident happened during the last period of the civil war. In this particular case, eleven persons including five students between the ages of 17-18 were allegedly abducted by Sri Lankan Navy personnel

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<sup>1</sup> *Enforced Disappearance* - trialinternational.org (<https://trialinternational.org/topics-post/enforced-disappearance/>) accessed 18 November 2019

<sup>2</sup> Human Rights Council - Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development Report of the Working Group on Enforced or Involuntary Disappearances (2008) [A/HRC/7/2] 10 January 2008

<sup>3</sup> Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance

<sup>4</sup> *Sri Lanka: Release lists of the forcibly disappeared* "...Sri Lanka has one of the world’s highest number of disappearances, with a backlog of between 60,000 and 100,000 alleged disappearances since the late 1980s..." (Amnesty International, 18 May 2018)

<sup>5</sup> Resolution 30/1 in 2015 & Resolution 34/1 in 2017

<sup>6</sup> Sri Lanka civil war: Rajapaksa says thousands missing are dead, BBC, (<https://www.bbc.com/news/world-asia-51184085>) accessed 20 January 2020

from the areas of Kotahena, Wattala, Dehiwela and Jinthupitiya between 09 August 2008 and 10 October 2008.<sup>7</sup>

As the first abduction of the chain of incidents on the 09<sup>th</sup> of August 2008 Kasthuri Arachchige John Reid (21) abducted from Wattala. Amalan Leon (50) and Roshan Leon (21) abducted from Kotahena on 25 August 2008. On the 17<sup>th</sup> of September 2008 Rajiv Naganathan (21), P. Vishwanathan (21), T. Ramalingam (17), Mohomed Sajid (21) Mohamed Ali Anver (age unknown) and Jamaldeen Dilan (age unknown) abducted from Dehiwela along with their vehicle in which they were travelling. 10<sup>th</sup> of October 2008 father of Kasthuri Arachchige John Reid, Kasthuri Arachchige Anton (48) abducted from Kotahena. Lastly, in October 2008 Thyagarajah Jegan (32) abducted from Jinthupitiya.<sup>8</sup> Finally, it was revealed that the 11 missing persons were last detained in an underground chamber belonging to the Trincomalee Naval and Maritime Academy.<sup>9</sup> After the regime change in 2015, the Crime Investigation Department carried out fresh investigations into the disappearance of the 11 persons at the Sri Lanka Maritime Naval Academy.

Accusations were made for the incident, against 14 suspected Sri Lanka navy personals along with former navy commandant. After the preliminary investigation done by Colombo Fort Magistrate, The Attorney General decided to indict against accused persons on committed punishable offences which come under section 102, 113 A, 356, 338, 333, 198, 372, 32 and 296 of the Penal Code in respect of conspiracy, abduction with intent to secretly and wrongfully confine a person, wrongful confinement for the purpose of confinement, conspiracy to extort, extortion, giving false information and conspiracy to commit murder.<sup>10</sup> On November 2019 the Chief Justice appointed a high court trial-at-bar to hear the case.<sup>11</sup>

### 3. THE DISAPPEARANCE OF PRAGEETH EKNALIGODA

Mr. Prageeth Eknaligoda, a well-known journalist and cartoonist, actively criticizing the then government, was abducted and made to disappear on the 24<sup>th</sup> of January 2010. At the time of his disappearance, Mr. Eknaligoda vehemently criticized the Rajapaksa administration and

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<sup>7</sup> The Need for Accountability in Sri Lanka's Criminal Justice System: A Glance at Seven Emblematic Cases, Centre for Policy Alternatives 2019. P. 31

<sup>8</sup> Nirmala Kannangara, "Abduction Of 11 Tamil Youths Twists and Turns In The Investigations" (Daily Mirror, 21 August 2018)

<sup>9</sup> Maneshka Borham, "Diary entry, et al lead to Commodore's arrest" (Sunday Observer, 23 July 2017)

<sup>10</sup> Notice issued on Karannagoda in 11 youth abduction case (Colombo Gazette, January 22, 2020)

<sup>11</sup> Trial-at-bar to be appointed in 11 youth abduction case (Colombo Gazette, November 11, 2019)

actively supported to the opposing candidate Sarath Fonseka in the 2010 presidential election. His disappearance occurred just two days before the 2010 presidential election.<sup>12</sup>

After the disappearance of Mr. Eknaligoda, his wife Mrs. Sandya Eknaligoda filed a *habeas corpus* petition in the Court of Appeal in early 2010, requesting the police to launch a thorough investigation immediately into the disappearance of her husband. On 23<sup>rd</sup> of August 2011, the Court of Appeal directed the Homagama Magistrate to give priority and inquire into the complaint regarding the disappearance of Eknaligoda as fast as possible and to report to the Court of Appeal.<sup>13</sup>

During the investigations, the Crime Investigation Department arrested 11 military intelligence officers of the Sri Lanka Army, as suspects. Afterwards, they were granted bail by Avissawella High Court in 2016.<sup>14</sup> On the 27<sup>th</sup> of November 2019, Attorney General indicted nine army officials before The Colombo Special Trial-at-Bar for the allegations of kidnapping, disappearing and conspiring to murder of Mr. Prageeth Eknaligoda between the 25<sup>th</sup> and the 27<sup>th</sup> of January, 2010.<sup>15</sup>

The Court of Appeal decided to *lay by* the *habeas corpus* petition filed by Mrs. Sandhya Eknaligoda to allow the preliminary investigations in the lower court. After 10 years of the incident, the case is still pending before The Colombo Special Trial-at-Bar.

#### 4. THE DISAPPEARANCE INCIDENT OF LALITH & KUGAN

Two Sri Lankan Human Rights defenders and left-wing political activists disappeared in Jaffna on 9th December 2011. Mr. Lalith Kumar Weeraraj is a political activist and human rights defender who worked in the North and East of Sri Lanka. He was the Jaffna District Coordinator of the Movement for People's Struggle (MPS) affiliated to the Front-Line Socialist Party, Sri Lanka.<sup>16</sup> Mr. Weeraraj is also an Executive Committee member of 'We Are Sri Lankans' (WESL), a university student-based organization aimed to promote and protect the rights of the Tamil people in order to build national harmony and reconciliation in post-war, Sri Lanka.

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<sup>12</sup> "Prageeth: A politically motivated Crime" (Sunday Observer, 20 January 2019)

<sup>13</sup> "Appeal Court orders Homagama Magistrate: Give priority to Eknaligoda disappearance complaint" (The Island, 23 August 2011)

<sup>14</sup> "Eknaligoda disappearance: Two more intelligence officers get bail" (Daily News, 21 Feb 2019)

<sup>15</sup> Prageeth Eknaligoda case: Nine army officials indicted (Dailymirror, 27 November 2019)

<sup>16</sup> The Frontline Socialist Party (FLSP) is a Marxist-Leninist party in Sri Lanka which was dissident from Peoples' Liberation Front (*Janatha Vimukthi Peramuna* - JVP)

Mr.Kugan Muruganandan is a close associate of Mr.Weeraraj and has been involved in organizing several protests and campaigns against human rights violations including events with the families of the disappeared. Mr.Muruganandan assisted Mr Weeraraj in his work for the Movement for People's Struggle and the WESL. These two activists were last seen by relatives, leaving Mr.Muruganandan's home at Avarangal Jaffna, at 5.00 pm on 9th December.<sup>17</sup>

Before their disappearance, Mr.Weeraraj and Mr.Muruganandan organized a press conference to be held in Jaffna on 10th December for International Human Rights Day.<sup>18</sup>

On 15<sup>th</sup> December, former Cabinet Spokesperson, Minister Keheliya Rambukwella explained the media during a Cabinet briefing that Mr.Weeraraj and Mr.Muruganandan had not disappeared. He also said that the two activists had not been detained unlawfully. In addition, if they were arrested by the police or military, they would be produced before a Magistrate according to the law.<sup>19</sup> However, until now, the two activists have not been produced before the magistrate. The Human Rights Organizations firmly believes that the government of Sri Lanka is responsible for the disappearance. The Government of Sri Lanka has not been able to provide any concrete information on the two missing persons and their whereabouts.

## 5. THE POLITICAL APPROACH OF THE DISCOURSE ON THE RIGHT NOT TO FORCIBLE DISAPPEARANCE IN SRI LANKA

As a country which is striving to get the Transitional Justice after the Civil War. First and foremost, challenges that have been faced by Sri Lanka is to ensure that there is an effective framework in place to protect the Human Rights locally. The Government of Sri Lanka initiated several approaches to enrich the protection of human rights, both domestically and internationally.

Accordingly, in 2010, the former President, Mr. Mahinda Rajapaksa, appointed the Lessons Learnt and Reconciliation Commission (LLRC) to investigate into the failure of the 2002 ceasefire agreement and identify and compile the lessons learned, which is instrumental in

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<sup>17</sup> 'Disappearance of Human Rights Defenders & Political Activists Lalith Kumar Weeraraj and Kugan Murugan on 9th December 2011' (GROUNDVIEWS, 19 December 2011) <<https://groundviews.org/2011/12/19/disappearance-of-human-rights-defenders-political-activists-lalith-kumar-weeraraj-and-kugan-murugan-on-9th-december-2011/>> accessed 18 November 2019

<sup>18</sup> *Ibid*

<sup>19</sup> Minister Keheliya Rambukwella on 15<sup>th</sup> Dec, 2011. <https://soundcloud.com/lanka-views/keheliya>

promoting national harmony and reconciliation. The report made several findings with recommendations, including criminalising the enforced disappearances as a penal offence.<sup>20</sup>

The Report of the UN Working Group on Enforced or Involuntary Disappearances (WGEID) appointed in 2015,<sup>21</sup> which made several recommendations to the Government Sri Lanka. One of the key recommendations is concerned with adopting a comprehensive legislation on enforced disappearances and enforcement of the obligations under the Declaration of the Protection of All Persons from Enforced Disappearance.<sup>22</sup>

Under the ‘Good Governance’ government which was elected in 2015, Government of Sri Lanka locally acted as counterpart to the International Convention for the Protection of All Persons from Enforced Disappearance. The Office of the Missing Persons (OMP) was established under the Parliamentary Act in 2016<sup>23</sup> whilst the Convention on Protection of All Persons from Enforced Disappearances Act was enacted in 2018.<sup>24</sup>

However, The South Asian Centre for Legal Studies declared that due to shortcomings in the definition of ‘enforced disappearance’ in the International Convention for the Protection of All Persons from Enforced Disappearance Act, it is difficult to prosecute the perpetrators.<sup>25</sup>

## 6. DOMESTIC LEGAL REFORMS AGAINST ENFORCED DISAPPEARANCES

### a. *Office of Missing Persons Act, No 14 of 2016*

According to the act a “missing person” refers to:

- i. A person whose fate or whereabouts are reasonably believed to be unknown and the person is reasonably believed to be missing and unaccounted for; or
- ii. Persons The Office of the Missing Persons (OMP) Act<sup>26</sup> is the first legislation in Sri Lanka which missing in connection with the conflict which took place in the Northern and Eastern Provinces or its aftermath; or
- iii. A member of the armed forces or police who is identified as “missing in action”;  
or
- iv. A person in connection with the political unrest or civil disturbances; or

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<sup>20</sup> Report of the Commission of Inquiry on Lessons Learnt and Reconciliation: November 2011, Chapter 5, Human Rights, p.154

<sup>21</sup> Report of Working Group on Enforced or Involuntary Disappearances: 2015

<sup>22</sup> Adopted by General Assembly resolution 47/133 of 18 December 1992

<sup>23</sup> Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 Of 2016

<sup>24</sup> Convention on Protection of All Persons from Enforced Disappearances Act, No 05 of 2018

<sup>25</sup> South Asian Centre for Legal Studies, “Commentary on the Bill titled International Convention for the Protection of All Persons from Enforced Disappearances”, 5 May 2017

<sup>26</sup> Act No. 14 of 2016

- v. As an enforced disappearance as defined in the “International Convention on Protection of All Persons from Enforced Disappearances”<sup>27</sup>

The core objectives of this act are:

- i. To provide appropriate mechanisms for searching and tracing of missing persons, and to clarify the circumstances in which such persons went missing,
- ii. To make recommendations to the relevant authorities towards reducing the incidents of ‘missing persons’ within the meaning of this Act;
- iii. To protect the rights and interests of missing persons and their relatives as provided for in this Act;
- iv. To identify proper avenues of redress to which such missing persons or their relatives may have recourse.<sup>28</sup>

The main purpose of this Act is to establish the Office of the Missing Persons (OMP).<sup>29</sup> The OPM has a mandate:

- i. to search for and trace missing persons and identify appropriate mechanisms for the same and to clarify the circumstances in which such persons went missing;
- ii. to make recommendations to the relevant authorities towards addressing the incidence of missing persons; to protect the rights and interests of missing persons and their relatives;
- iii. to identify avenues of redress to which missing persons and relatives of missing persons are entitled and to inform the missing person; to collate data related to missing persons; and
- iv. to do all such other necessary things that may become necessary to achieve the objectives under the Act.<sup>30</sup>

## 6.2. *Convention on Protection of All Persons from Enforced Disappearances Act, No 05 of 2018*

Sri Lanka is a Dualist country.<sup>31</sup> According to ‘Dualism’, any international treaty or convention does not become a part of domestic law automatically by signing or ratifying. In order for a part of international law to be made a part of domestic law, that law must be

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<sup>27</sup> Section 27 - Interpretation

<sup>28</sup> Section 02 - Objectives of the Act

<sup>29</sup> Section 03 - Establishment of the Office on Missing Persons (OMP)

<sup>30</sup> Section 10 - Mandate of the OMP

<sup>31</sup> *Singarasa (Nallaratnam) v Attorney General* SC Spl (LA) No 182/99, ILDC 518 (LK 2006)

enforced by a locally enabling legislation. A more important explanation on ‘Dualism’ was made by German jurist, *Heinrich Triepel*.<sup>32</sup> He has mentioned in his book ‘*The International Law and the State*’<sup>33</sup> that the domestic law is based on statutory provisions, but international law is based on the principle of the fulfilment of contractual obligations (*pacta sunt servanda*).<sup>34</sup>

Therefore, as a dualist country, Sri Lanka needs to enact enabling legislation to enforce a part of international law at the domestic level. Sri Lanka became a signatory state party for the International Convention for the Protection of All Persons from Enforced Disappearance in 2015 and ratified the convention in 2016.<sup>35</sup> Accordingly, Sri Lanka is supposed to enforce this international obligation at the domestic level. Therefore, a particular Act was enacted by the parliament of Sri Lanka in 2018 to make this international convention as a part of the domestic law.

According to Section 3 of the Act, any public officer or person acting with the authority or support of the State, who arrests, details, wrongfully confines, abducts, kidnaps and refuses to acknowledge the arrest, detention, confinement or abduction, conceals the fate of such a person or refuses to disclose the person’s whereabouts, will be guilty of the crime of enforced disappearance.<sup>36</sup> Every offence under this Act shall be a cognizable offence and a non-bailable offence.<sup>37</sup> The High Court of Sri Lanka has exclusive jurisdiction to try offences which are defined under this Act.<sup>38</sup>

## 2. IS THE DOMESTIC LEGAL FRAMEWORK ADEQUATE TO PREVENT THE ENFORCED DISAPPEARANCES?

The question remains as to whether these new laws can genuinely help victims of the past. The Enforced Disappearance Act does not appear to have a retroactive effect. The Sri Lankan Constitution emphasises the explicit prohibition on the retroactive application of penal laws. Article 13(6) provides: ‘No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence.’<sup>39</sup> Therefore, any prosecution of a person alleged for an enforced disappearance that took place

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<sup>32</sup> A German jurist and legal philosopher. Professor of Law at Berlin University in 1913

<sup>33</sup> Heinrich Triepel, *Völkerrecht und Landesrecht*. 1899; reprint by Scientia Antiquariat Aalen, 1958

<sup>34</sup> The meaning of this Latin term is ‘*agreements must be kept*’

<sup>35</sup> Preamble - Convention on Protection of All Persons from Enforced Disappearances Act, No 05 of 2018

<sup>36</sup> Section 03 - Enforced Disappearances

<sup>37</sup> Section 04 - Cognizable and non-bailable offence

<sup>38</sup> Section 05 - High Court to try offences under this Act, and penalties

<sup>39</sup> Article 13(6) of the Constitution



prior to the Act was enacted could arguably be challenged as a violation of Article 13(6) of the Constitution.

However, according to the proviso in article 13(6), a person could still be tried and punished for ‘an act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.’<sup>40</sup> enforced disappearance is a crime according to the general principles of law recognized by the nations before the enactment of Sri Lanka’s Enforced Disappearance Act. From the viewpoint, it can be argued that the Enforced Disappearance Act have a retroactive effect.

Furthermore, the jurisdiction of the Court of Appeal in writ applications of *habeas corpus* can be invoked in terms of Article 141 of the Constitution to seek whereabouts of the “disappeared” while in official custody.<sup>41</sup> According to Article 141, the Court of Appeal may grant and issue orders in the nature of writs of *habeas corpus* to bring up before such court (a) the body of any person to be dealt with according to law, or (b) the body of any person illegally or improperly detained in public or private custody.

However, two *habeas corpus* writ applications were filed against the government for the Lalith-Kugan disappearance incident in 2012.<sup>42</sup> Court of Appeal forwarded the case to the Jaffna Magistrate's Court to conduct hearings on the primary investigations in the same year. After 7 years, the lawsuit is still pending before the court and the government is unable to produce these two persons before the court.

### 3. CONCLUSION

Sri Lanka has a history of full of armed conflicts, riots, insurgencies, political conflicts, ethnic-racial and religious conflicts. As a result, Sri Lanka is among the countries which have the highest enforced disappearances rate in South Asia.<sup>43</sup> In Sri Lanka, many cases of enforced disappearances were recorded during the ethnic-racial conflict in 1983. Thousands of youth still disappears after two major armed insurrections against the State in the South at 1971 and the late 1980s’.<sup>44</sup> Most of the cases on enforced disappearances were reported during the civil war in the North and East which was ended in 2009. Now Sri Lanka is in post

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<sup>40</sup> Proviso of the Article 13(6) of the Constitution

<sup>41</sup> Article 141 – Powers to issue writs of Habeus Corpus

<sup>42</sup> 6/2012(pending) and 7/2012(pending)

<sup>43</sup> International Commission of Jurists, *No More “Missing Persons”*: *The Criminalization of Enforced Disappearance in South Asia*, August 2017

<sup>44</sup> Sri Lanka - Amnesty International, *Extrajudicial Executions, Disappearances and Torture, 1987 to 1990* (1990)

armed conflict era. However, in the so-called peacetime, significant violations of human rights have been reported. Since 2009, there have been a number of incidents of enforced disappearances happened in Sri Lanka. Such incidents degraded the country's Human Rights profile.

After the regime change in 2015, Sri Lanka has enacted new legal measures to ensure Human Rights. The main purpose of these enactments is to protect Human Rights and ensure the law and justice in society. However, these mechanisms have not yet contributed to the process of healing trauma effectively. The 'Office of Missing Persons Act and International Convention for the Protection of All Persons from Enforced Disappearance Act are still unable to make the justice for who were forcibly disappeared in the past era.

In Sri Lanka, the discourse on Human Rights is polarized to the narrow political divisions. Most of Sri Lankans are still believing that Human Rights are western imperialist concepts. There is a subtle political agenda underneath this thought. In such a situation the rights of the people are being taken away by the rulers. But people are not aware of that.

The lack of attention to human development in a system which is dominated by the economic factors creates many issues. Sri Lanka, as a third world country, strives to achieve economic development. Nevertheless, the government of Sri Lanka should consider the importance of human rights approaches and their implementation, alongside the country's economic growth. One of the major challenges which is encountered by the present regime is how to implement the domestic Human Rights protection approaches and mechanisms productively and efficiently to the best interest of the people of Sri Lanka.