

UNITED NATIONS INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

WRITTEN ANALYSIS

1.0 INTRODUCTION

- 1.1 The International Convention for the Protection of All Persons from Enforced Disappearance (Convention) is an international human rights treaty adopted by the United Nations General Assembly on 20 December 2006, and came into force on 23 December 2010. The Convention commits States Parties to prevent forced disappearances which is defined under international law as a crime against humanity. As of 31 March 2019, the Convention has 98 Signatories and 59 States Parties.
- 1.2 The aim of the Convention is to protect all persons from enforced disappearances and hold States Parties accountable for enforced disappearances at an international level. The Convention aims to combat impunity for the crime of enforced disappearances and give credence to the person's right to be free from forced disappearances and the right of victims to justice and reparation.
- 1.3 It is prudent to note that in 2010, the Fijian Government in its Universal Periodic Review Report made a commitment towards ratifying all core nine human rights instruments within the next ten years. At the last reporting cycle of 2014 in Geneva, before the Human Rights Council, the Fijian Government reaffirmed its commitment to ratifying all core human rights instruments, of which the Convention is a part.
- 1.4 Currently Fiji has ratified seven of the core nine human rights instruments.

2.0 SUMMARY OF THE CONVENTION

- 2.1 The Convention comprises 45 articles and is divided into three Parts which cover a broad range of aspects.

- 2.2 Part 1 of the Convention covers Articles 1 to 25.
- 2.3 Article 2 of the Convention defines "*enforced disappearances*" as 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 authorisation, 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.
- 2.4 Articles 4 to 6 of the Convention requires States Parties to take proactive steps to ensure that laws are implemented to reflect the criminality of enforced disappearances together with the reciprocating criminal responsibility and appropriate punishment, it also requires States Parties to encompass criminality in a broad context specifically to those that commit, order, solicit, or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance.
- 2.5 These articles also provide for States Parties to take appropriate measures to investigate acts of enforced disappearances committed by persons or groups acting without the authorisation and approval of the State and to bring those responsible to justice.
- 2.6 Articles 8 and 9 of the Convention require States Parties to establish competence to exercise jurisdiction over the offence of enforced disappearance and to ensure that the limitation period is a long duration and proportionate to the seriousness of the offence.
- 2.7 Article 10 of the Convention provides that a State Party may take persons suspected of committing the offence of enforced disappearance into custody after examining the available information, based on available evidence and if the circumstances so warrant. In such circumstances, a preliminary enquiry or investigation must be carried out to establish facts. The State Party must then notify the competent authorities of whether it intends to exercise its jurisdiction and further provide the measures taken including detention, the circumstances justifying detention and the findings of its preliminary inquiry or investigations.
- 2.8 Under Article 12 of the Convention States Parties are required to recognise a person's right to report to the competent authority the facts upon which an

alleged commission of the offence of enforced disappearance is made. The authority must then examine and investigate the allegation in a prompt and impartial manner.

- 2.9 The Convention further empowers the State Party to take necessary precautions to ensure that the suspected person is not in a position to influence the investigation's progress through pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.
- 2.10 The Convention strictly requires that no person be held in secret detention and that specific information be disclosed to persons with legitimate interest such as the detained person's relatives and counsel; such as the 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 and in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.
- 2.11 Part 2 of the Convention covers Articles 26 to 36. In summary, Part 2 of the Convention establishes the Committee on Enforced Disappearances (Committee) which consists of ten experts with the relevant experience elected by States Parties.
- 2.12 Under Part 2 of the Convention, States Parties must submit to the Committee through the Secretary-General of the United Nations (Secretary-General) reports on the measures taken to give effect to its obligations under the Convention within two years of the Convention entering into force and this report will be made available to all States Parties.
- 2.13 It is prudent to note that under Article 31 of the Convention, a State Party at the time of ratification or any time thereafter may declare that it recognises the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of provisions of the Convention. The Committee shall

not admit any communication concerning a State Party which has not made such a declaration.

- 2.14 Given that Fiji will not make such a declaration, Fiji will not be bound by Article 31 of the Convention.
- 2.15 Part 3 of the Convention covers Articles 37 to 45. In summary, Part 3 of the Convention governs general provisions and entry into force of the Convention. Part 3 specifically provides that for each State ratifying or acceding to the Convention, the Convention will enter into force on the thirtieth day after the date of the deposit of that State's instrument of ratification or accession with the Secretary-General.

3.0 REQUIREMENTS FOR IMPLEMENTATION

- 3.1 The laws of Fiji currently incorporate the values and principles contained within the Convention, particularly in relation to the recognition of the rights of detained or arrested persons. Specific details in relation to the ways in which the laws of Fiji complement the Convention is provided under Part 4 below.
- 3.2 In relation to the procedural aspects for implementation, the Convention will enter into force on the thirtieth day after the date of the deposit of the State's instrument of ratification or accession with the Secretary-General. Under Article 29 of the Convention, States Parties to the Convention undertake to submit a report to the Enforced Disappearance Committee within two years after the entry into force of the Convention and thereafter when the Committee requests.

4.0 IMPACT OF THE CONVENTION

- 4.1 The benefits of acceding to the Convention are as follows:

Fijian Constitution

- 4.2 The offence of enforced disappearance is further reinforced by the rights afforded to arrested and detained persons entrenched in the Bill of Rights under the Constitution of the Republic of Fiji (Constitution).

- 4.3 Section 13 of the Constitution, in particular, provides detained and arrested persons with rights that render enforced disappearances repugnant in cases of a normal detention and arrest as they are mandatorily required to be permitted communication with their legal representative, spouse, partner or next-of-kin and a religious counsellor or social worker. Section 13 further requires that they be produced before a court for review within 48 hours of arrest. Thus, in the instance of a normal detention or arrest, the offence of enforced disappearance would clearly constitute the infringement of a constitutional right giving rise to grounds for constitutional redress against the State.
- 4.4 Furthermore, section 9(3) of the Constitution specifically affords rights to persons detained in a state of emergency which mandatorily requires that they be allowed communication with their spouse, partner or next-of-kin, legal representative, religious counsellor or social worker and medical practitioner. It further requires that they be produced before a court for review within a month of their detainment and thereafter, at intervals not more than a month. The effect of section 9(3) is that perpetrators cannot use a "state of emergency" to justify an enforced disappearance given the specific rights captured therein. This essentially renders enforced disappearances in a state of emergency unconstitutional giving rise to grounds for constitutional redress against the State.

Crimes Act 2009

- 4.5 The Convention will complement various provisions under the Crimes Act 2009 (Crimes Act). Prior to the Crimes Act, enforced disappearance was not an offence under the laws of Fiji. The offence of enforced disappearance of persons is established by section 95 of the Crimes Act and prescribes a maximum penalty of 17 years imprisonment.
- 4.6 Consistent with the Convention, section 95 of the Crimes Act addresses the offence of enforced disappearance by imputing criminal liability and responsibility even in circumstances where the perpetrator's actions are done in accordance with the authorisation, support or acquiescence of the government or a political organisation. In further reinforcement of criminal responsibility and liability in such circumstances, consistent with the Convention, section 98 of the Crimes Act provides as follows:

"Defence of superior orders

98. The fact that genocide or a crime against humanity has been committed by a person pursuant to an order of a Government or of a superior (whether military or civilian) does not relieve the person of criminal responsibility."

- 4.7 Thus, since the offence of enforced disappearance is recognised as a crime against humanity under the Convention as well as the Crimes Act, the defence of superior orders is inapplicable and perpetrators remain criminally responsible and liable even if acting pursuant to an order of a government official or superior officer.
- 4.8 Given the various sections under the Constitution and the Crimes Act, Fiji's accession to the Convention will further strengthen the protection of all persons from enforced disappearances.
- 4.9 Furthermore, accession to the Convention will promote cooperation and strengthen international relations with other States Parties who have acceded to or ratified the Convention.

5.0 DECLARATION AT THE TIME OF ACCESSION

- 5.1 It is prudent to note that under Part 3 of the Convention, Article 42(1) provides that any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organisation of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
- 5.2 However, Article 42(2) also provides that each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by Article 42(1).
- 5.3 Countries such as Cuba, Morocco, Ukraine and Venezuela have made similar declarations at the time of ratification or accession.
- 5.4 Given the legal implications of Article 42(1) of the Convention, it is recommended that Fiji makes the following declaration at the time of accession:

"The Republic of Fiji declares that it does not consider itself bound by the provisions of Article 42(1) of the Convention".

6.0 RECOMMENDATION

- 6.1 It is recommended that Fiji accede to the Convention and make the appropriate declaration under Article 42(2) at the time of accession to the Convention.