



STANDING COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE

Report of the International Convention for the Protection of All Persons from Enforced Disappearance



**PARLIAMENT OF THE REPUBLIC OF
FIJI**

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Chairperson’s Foreword

I am pleased to present the Review Report of the International Convention for the Protection of All Persons from Enforced Disappearance.

The Standing Committee on Foreign Affairs and Defence, hereinafter referred to as the “Committee” is established under Section 109 (2) (e) of the Standing Orders (SO) of the Parliament of the Republic of Fiji.

The purpose of the review was to scrutinise the International Convention on the Protection of All Persons from Enforced Disappearance hereinafter referred to as the “Convention”. Parliament had referred the above Convention to the Standing Committee on Foreign Affairs and Defence at its sitting on 4th April, 2019.

The International Convention for the Protection of All Persons from Enforced Disappearance 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 31st March 2019, the Convention has 98 Signatories and 59 States Parties.

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 disappearance and give credence to the person’s right to be free from enforced disappearance and the right of victims to justice and reparation.

It is prudent to note that in 2010, the Fijian Government in its Universal Periodic Review Report made a commitment towards ratifying all nine core human rights instruments within the next ten (10) 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 this convention is a part. Furthermore, the Prime Minister Honourable Voreqe Bainimarama in an address to the UN General Assembly in New York in February 2019 repeated Fiji’s commitment to ratifying the nine (9) core Human Rights Treaties.

The Committee when reviewing the Convention, heard oral submissions and received written submissions from:

- Ministry of Employment, Productivity and Industrial Relations;
- Republic of Fiji Military Forces;
- Fiji Revenue Custom Services;
- Ministry of Foreign Affairs;

- Ministry of Defence and National Security;
- Office of the Solicitor General;
- Fiji Police Force;
- United Nations Office for the High Commissioner on Human Rights;
- Office of the Commissioner Northern Division;
- Ministry of Industry, Trade and Tourism (written submission only);
- Office of the Director Public Prosecution (written submission only);
- International Committee of the Red Cross (written submission only); and
- Fiji Human Rights and Anti-Discrimination Commission (written submission only).

The Committee also extended invitations to the following offices and organizations but were unable to make submissions to the Committee for various reasons.

- Fiji Women Crisis Centre;
- Fiji Trade Unions Congress;
- Fiji Public Service Association;
- Pacific Conference of Churches;
- Fiji Media Industry Association;
- Department of Immigration; and
- Office of the Commissioner Western Division.

Fiji has ratified seven of the nine core UN human rights treaties.

The majority of submitters to the Committee support the full ratification of the Convention however reservations were received from the Solicitor General's Office and the Office of the Director Public Prosecution. A summary of these reservations are itemised at Appendix A.

The Committee agrees that Fiji fully ratify the Convention.

Despite the public announcements and advertisements of the Committee's public consultations, there were minimal contributions from members of the public in all regions visited.

The Committee commends the contributions by stakeholders that assisted it in the preparation of its report.

I take this opportunity to also thank members of my Committee for compiling this bipartisan report.

On behalf of the Standing Committee on Foreign Affairs and Defence, I submit this report to the Parliament.

A handwritten signature in black ink, appearing to read 'A. O'Connor', is positioned above a horizontal line.

Hon. Alexander O'Connor
Chairperson

Acronyms

FPF	Fiji Police Force
MODNS	Ministry of Defence, National Security
RFMF	Republic of Fiji Military Forces
SDG	Sustainable Development Goal
SO	Standing Orders
OHCHR	United Nations High Commissioner for Human Rights

Recommendation

The Committee recommends that Fiji fully ratify the Convention.

1.0 Introduction

1.1 Background and Terms of Reference

The Committee had reviewed the International Convention for the Protection of All Persons from Enforced Disappearance. Parliament referred the above Convention to the Standing Committee on Foreign Affairs and Defence at its sitting on 4th April, 2019.

Between 17th April to 6th May 2019, the Committee received submissions on the Convention at Parliament, Lautoka and Labasa.

The Convention on the Protection of all Persons from Enforced Disappearance (CED) was adopted by the United Nations General Assembly on 20 December 2006, and came into force on 23 December 2010.

The Convention is a legally binding instrument. It fully applies and is binding on the States that have ratified it. It prohibits and defines certain behaviour of States, and its violation obliges States to react. When States have only signed but not yet ratified it, they are nonetheless obliged not to take any action which goes against either the letter or the spirit of the Convention.

As of 31 March 2019, the Convention has 98 Signatories and 59 States Parties.

In the Pacific, only Samoa has ratified CED and Palau and Vanuatu only signed it. The Convention is foremost a legal instrument with a preventive character that fills the gaps between other human rights treaties and international criminal law. It commits States Parties to prevent forced disappearances which is defined, in certain cases under international law as a crime against humanity.

The convention is modelled heavily on the United Nations Convention Against Torture.

Key aspects of CED

- Part I (Articles 1 – 25) contains the substantive provisions and focuses primarily on the obligations of States parties to prevent and punish such crimes.
- Part II - Articles 26 – 36 establishes the Committee on Enforced Disappearances.
- Part III- Articles 37 – 45 contains the formal requirements regarding signature, entry into force, amendments and the relationship between the Convention and international humanitarian law.

The Convention provides protections to the victims, victims family and children and also to the general public. In order to prohibit enforced disappearance, the convention has four main aspects:

Combating impunity – The convention puts an obligation on States parties to bring enforced disappearance offenders to justice. States must do so not only with regard to persons who commit enforced disappearances on their own territory, but also in cases of alleged offences in other jurisdictions: in those cases States have to either prosecute or extradite the alleged offender, so that no one can escape justice. Therefore they protect the society from offenders.

Article 1 states that no one can be subjected to enforced disappearances under any circumstances and there is no exception to this rule. Enforced disappearance is a non-derogable right- no circumstances may be invoked to justify enforced disappearance. This includes a state of war, a threat of war, internal political instability or any other public emergency. Once ratified, Fiji's legal and administrative measures should be reviewed to guarantee this.

Under Article 3, the State has an obligation to investigate, prosecute and sanction non-State actors that commit acts of enforced disappearance, for example, terrorist groups, guerilla and insurgents and under Article 12 the State must also investigate complaints and reports implicating State actors and bring those responsible to justice before a competent authority.

Under Article 4, the State parties have an obligation to respect the right, and ensure national legislation expressly prohibits enforced disappearance, and that this prohibition applies in all circumstances. Fiji will need to enact domestic legislation criminalizing enforced disappearance as an autonomous offence in terms that are consistent with the definition in article 2. Penalties must be proportionate and take into account the extreme seriousness of the offence (Article 7). The Sanctions provided for in the national criminal code for acts of enforced disappearance must be in accordance with international standards as well as disciplinary sanctions established for those convicted for enforced disappearance.

Prevention – The Convention provides for a number of procedural safeguards so that people don't go missing: people deprived of liberty have to be kept in an official place, to be registered, to have all their movements registered. Most importantly everyone deprived of liberty must be allowed contact with the outside world, especially to communicate with their family and counsel, and the family and counsel have a right to information on the detention and whereabouts of the person. The State must enable individuals to report an enforced disappearance, protect witnesses and investigate complaints and reports of disappearances.

Secret Detention or unofficial detention is absolutely prohibited. Under Art 12, National competent authorities must have all powers and resources to conduct an effective investigation including:

- Access to documentation and information
- Access to places of detention

Rights of victims – This is the first convention that recognizes that the victims of enforced disappearances are not only the disappeared themselves but also their relatives. It acknowledges the right of the families to know the fate of their relatives, and also recognizes that victims of enforced disappearance have a right to reparation for the wrong that was done to them. Victims are guaranteed different forms of reparation such as restitution, rehabilitation, satisfaction including restoration of dignity and reputation and guarantee of non –repetition.

The Convention also seeks to prevent victimization by extending protections to those in danger of enforced disappearance arising from expulsion, surrender and extradition. It is focused on redressing past wrongs and strengthening accountability by requiring States to investigate and prosecute enforced disappearances.

Enforcement – The Convention establishes an international committee of ten independent experts to monitor compliance. These experts will review reports by states and can also receive individual complaints. The convention also foresees a 'habeas corpus' procedure by which relatives and other interested persons who fear that a person has been subjected to enforced disappearance can seize the international committee directly and if the complaint is substantiated the committee will ask the state to search for and locate the missing person

3.0 Requirements

The Report is divided into three parts:

- I. **Part One** - focuses on the Committee recommendations
- II. **Part Two** - covers the Findings of the report to Parliament
- III. **Part Three** -covers the Conclusion

1.2 Committee Remit and Composition

Pursuant to Standing Orders 109(2) (e) that the Standing Committee on Foreign Affairs and Defence is mandated to look into matters related to Fiji's relations with other countries, development aid, foreign direct investment, oversight of the military and relations with multi-lateral organisation.

The members of the Standing Committee on Foreign Affairs and Defence are as follows:

- 1.2.1 Hon. Alexander O'Connor – Chairperson
- 1.2.2 Hon. Dr. Salik Govind - Deputy Chairperson
- 1.2.3 Hon. Pio Tikoduadua – Member
- 1.2.4 Hon. Selai Adimaitoga – Member
- 1.2.5 Hon. Anare Jale – Member

1.3 Procedure and Program

The Standing Committee on Foreign Affairs and Defence conducted its deliberation on the Convention from 17th of April to 6th May 2019 and received written and oral submissions from stakeholders as follows:

- Ministry of Employment, Productivity and Industrial Relations;
- Republic of Fiji Military Forces;
- Fiji Revenue Custom Services;
- Ministry of Foreign Affairs;
- Ministry of Defence and National Security;
- Office of the Solicitor General;
- Fiji Police Force;
- United Nations Office for the High Commissioner on Human Rights;
- Office of the Commissioner Northern Division;
- Office of the Director Public Prosecution (written submission only);
- International Committee of the Red Cross (written submission only);

2.0 Committee Deliberation and Analysis

2.1 Committee Findings

The Committee's findings are outlined below:

1. The majority of submitters agreed that Fiji sign and ratify the Convention. Despite the allowance granted for reservation under Article 42 (2) the Committee strongly aligns itself with the written submission by the Republic of Fiji Military Forces to endorse the implementation of Article 31 of the Convention.
2. The Laws of Fiji in particular the Constitution and the Crimes Decree, incorporate the values and principles contained within the Convention, however Fiji still needs to review its laws so that it fully embraces the full spirit of the Convention.
3. In the event, of Fiji agreeing to ratify the International Convention on Protection of All Persons from Enforced Disappearance, it will need to review and amend its domestic legal framework from the lens of the Convention and other international human rights standards applicable to Fiji. Articles 3 to 25 of the Convention requires State Parties to fulfil their obligations to enact legislation through the Parliament, that gives the law enforcement agencies powers to apply the principles under the Convention and criminalize enforced disappearances according to required international standards. This will also enable Fiji to put in mechanisms for reporting, investigation, prosecution and sanction of State and non-State actors who commit enforced disappearances and provide redress to the victims.
4. The Fiji 2013 Constitution and the laws, such as the Crimes Act and the Inquest Act do have a number of provisions by which protection is available from enforced disappearances, however, this is not enough.
5. These comments, if elaborated, means that Fiji's constitution and laws such as the Crimes Act 2010 and Inquest Act 1978 do have certain provisions by which protection is available to Fijians from enforced disappearances already in Fiji. These provisions are found specifically in Sections 9(3), 11 and 13 of the 2013 Constitution that expressly provides for "Freedom from cruel and degrading treatment" and for the "Rights of arrested and detained persons" and that "state of emergency" cannot justify enforced disappearances. The 2013 Constitution also provides that persons who consider their rights under the Bill of Rights impinged, may seek redress from the High Court.

6. Section 95 of the Crimes Act 2010 criminalizes enforced disappearance of persons and makes it a crime against humanity while prescribing a maximum penalty of 17 years imprisonment. Section 98 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 which is consistent with the Convention.
7. The Inquest Act 1978 has a number of provisions that regulate the conduct and duties of police officers. Sections 3 and 4 of the Act requires an Inquest to be conducted when a person dies while in the custody of the police.
8. Under Sections 7 and 8 of the Inquest Act when a death occurs in prison, or whilst in the custody of any public officer, or in any other place specified by the Minister by notice in the Gazette, the officer who has the custody of such person or the person in charge of such prison or such other place, as the case may be, shall forthwith give intimation of such death to a magistrate, and such magistrate or another shall hold an inquest into the cause of death and, for such purpose, may request a police officer to make the investigation and submit a report (section 9).
9. The above are some of the provisions by which protection is available from enforced disappearances in Fiji. Despite a number of positive legal provisions, gaps remain in Fiji's current legislation.
10. The definition in the Crimes Act 2010 needs to be amended in line with the definition provided by article 2 of the Convention.
11. The widespread or systematic practice of enforced disappearance is another separate crime against humanity as referred to in Article 5 of the Convention. It needs to be added as a separate crime in the Crimes Act 2010 of Fiji and not as an element of enforced disappearance.
12. The inclusion, under Section 95, of a person to be criminally responsible if he/ she orders, solicits or induces, attempts to commit or is an accomplice or participates in an enforced disappearance would address an existing gap. Under Article 6 of the Convention, States have an obligation to hold any person directly responsible in the commission of the crime individually criminally responsible. Superiors must also be held criminally responsible when the superior has knowledge of the crime, exercised responsibility and control over activities concerned with the crime or failed to take all necessary measures to prevent or punish the commission of a crime.

13. Accession to this Convention will help Fiji to further strengthen protection of the rights of victims. There are currently no provisions in the legislation of Fiji that provides the right to victims to know the truth regarding circumstances of enforced disappearance, progress and results of investigations and the fate of disappeared persons.
14. The Convention obligates states to take steps to establish, mechanisms to conduct investigations, locate victims and, in the case of death, locate, respect and return their mortal remains to relatives. Protocols are established to handle mortal remains of disappeared persons to their families in line with international standards.
15. Fiji's 2013 Constitution provides freedom from cruel and degrading treatment which is just one aspect of that.
16. As stated in the preceding paragraphs, the 2013 constitution complements several aspects of the Convention. The Convention is foremost a legal instrument with a preventive character that fills the gaps between other human rights treaties and international criminal law. Although modelled on the Convention Against Torture, its application is much broader than CAT. The Convention on Protection of All Persons from Enforced Disappearances provides for the first time a universal right not to be subjected to enforced disappearances. Enforced disappearance is characterized by the specific aspect of denial – denying the abducted person's very existence, denying families information on their relatives. This aspect is recognized in the convention because it sees enforced disappearance as a violation in itself. It involves rights to victims as well and setting up mechanisms and enacting laws as part of the obligations of the State to protect people from enforced disappearances.

3.0 Benefits of Accession

- 3.1 Full ratification of the Convention will further solidify Fiji's position globally as Human Rights Champion. The election of Ambassador Nazhat Shameem as Vice President of the United Nations Human Rights Council is recognition of Fiji's unwavering commitment to uphold the rule of law and fundamentals of human rights protection.
- 3.2 This discourages the issuance of illegal orders to state actors to arrest citizens without due consideration of the convention and the relevant laws of Fiji.
- 3.3 There will be no need to make new laws to grant immunity to perpetrators that breach this convention or the laws of Fiji that enable the implementation of this convention.

3.4 It will oblige state actors to re-educate themselves about the ambits of their power under this convention.

Impact of the Convention

This will mean Fiji changes the laws.

4.0 Fijian Constitution

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).

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.

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.

5.0 Crimes Act 2009

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.

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”

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.”

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.

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.

Fiji to fully imbed the spirit of the convention cannot rely solely on the elements of Section 95 (b) of the Crimes Act to investigate or charge the origins or the issuer of an illegal order to cause enforce disappearance. A new law is to be enacted to ensure that persons issuing orders to cause enforced disappearance are to be charged independently.

Furthermore, accession to the Convention will promote cooperation and strengthen international relations with other States Parties who have acceded to or ratified the Convention.

Despite the observations above, the Committee is of the view that Fiji should ratify the Convention.

6.0 Requirements for Implementation

The laws of Fiji currently incorporate the values and principles contained within the Constitution of the Republic of Fiji (Constitution), particularly in relation to the recognition of the dignity and human rights of all workers, regardless of their nationality. Specific details in relation to the ways in which the laws of Fiji complement the Convention are provided under Part 4 below.

In relation to the procedural aspects for implementation, the Convention will enter into force on the first day of the month following a period of 3 months from after the date of deposit of the instrument of accession. Under Article 73 of the Convention, States Party to the Convention undertake to submit a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the present Convention to the

Secretary-General for consideration by the Committee. Once the Convention report is to be submitted within one year after the entry into force of the Convention, every five years thereafter.

7.0 Challenges

The Committee experienced minimal to zero-public participation in its consultations in Suva, Lautoka and Labasa. This could have been due to a number of reasons. Firstly, the communications from Parliament using public media were ineffective. Secondly, people may have been disinterested in the Convention. It is recommended that Parliament use smart communication methods through radio, television and social media to publicise its consultations program.

2.2 Oral and Written Evidence Received

The Committee received oral and written submissions from stakeholders and the public as listed on page 3 of this report and in *Appendix A*.

3.0 Gender Analysis

The convention is gender neutral and therefore benefits all genders.

4.0 Conclusion

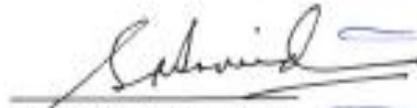
The Standing Committee on Foreign Affairs and Defence has fulfilled its mandate approved by Parliament which was to examine the International Convention on the Protection of All Persons from Enforced Disappearance. The Committee has conducted its review and concludes that the Convention will benefit the country upon ratification.

The report is bi-partisan and reflects the contributions and views from both sides of the Committee.

5.0 Members Signature



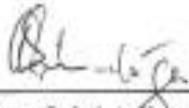
Hon. Alexander O'Connor
Chairperson



Hon. Dr. Salik Govind
Deputy Chairperson



Hon. Pio Tikoduadua
Member



Hon. Selai Adimaltoga
Member



Hon. Anare Jale
Member

6.0 Appendices

Appendix	Date/Submission Received	Stakeholders
A.		Convention Discussion Matrix
B.	17.04.2019	Ministry of Employment, Productivity and Industrial Relations
C.		Ministry of Foreign Affairs
D.	18.04.2019	Fiji Revenue Custom Services
E.		Ministry of Defence and National Security
F.		UN Office for the High Commissioner of Human Rights
G.		Office of the Solicitor General
H.	23.04.2019	Republic of Fiji Military Force
I.	26.04.2019	Fiji Police Force
J.	1.05.2019	Office of the Commissioner Northern Division
K.	13.5.2019	Fiji Human Rights and Anti-Discrimination Commission

Appendix A

Convention Discussion Matrix

Entities	Support/Reservations/NA	Comments
Ministry of Employment, Productivity and Industrial Relations	NA	Oral Submission
Ministry of Foreign Affairs	Wholly Support	Oral Submission
Fiji Revenue Custom Services	Wholly support	Oral Submission
Ministry of Defence and National Security	Reservation (unexplained)	Oral Submission
UN Office of the High Commissioner on Human Rights	Reservation: Para 7 pg. 28 of Verbatim 18.4.19 Fiji will have to implement two things; they will have to enact a national legislation which gives them the legal tools to apply this Convention. The Fiji's 2013 Constitution and the laws, such as the Crimes Act and the Inquest Act do have a number of provisions by which protection is available from enforced disappearances, however, this is not enough. Fiji's 2013 Constitution provides freedom from cruel and degrading treatment which is just one aspect of that.	Oral Submission
Office of the Director Public Prosecution	Wholly support	Written Submission
Office of the Solicitor General	"Reservation: Article 42 (2) It is prudent to note that under Article 31 of the Convention, the State party at the time of recommendation or any time thereafter, must declare that it recognises the competence of the committee to receive and consider communications from or on individual subject to its jurisdiction claiming to be victims of a violation by the State party or provisions of the Convention. The committee shall not admit any communication concerning a State party which has not made such a declaration. Part 3 of the Convention covers Articles 37 to 45. In summary, this part of the Convention governs the general provisions and entry into force of the Convention. Honourable Members, Article 42(1), once again like the previous Convention, provides that if there is a dispute in terms of the interpretation or implementation of the Convention between two State parties, State parties can apply for arbitration. However, Article 42(2) provides that each State party may, at the time of time signature or	Oral Submission

	<p>ratification to the present Convention or accession thereto, declare that it does not consider itself bound to the provisions of that Article."</p>	
<p>Republic of Fiji Military Force</p>	<p>Wholly support: recognize Article 31 and competency of Committee under Article 26 Article 31</p> <p>1. A State Party may at the time of ratification of this Convention or at any time afterwards declare that it recognizes 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 this Convention. The Committee shall not admit any communication concerning a State Party which has not made such a declaration.</p> <p>2. The Committee shall consider a communication inadmissible where:</p> <p>(a) The communication is anonymous;</p> <p>(b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;</p> <p>(c) The same matter is being examined under another procedure of international investigation or settlement of the same nature; or where</p> <p>(d) All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged.</p> <p>3. If the Committee considers that the communication meets the requirements set out in paragraph 2 of this article, it shall transmit the communication to the State Party concerned, requesting it to provide observations and comments within a time limit set by the Committee.</p> <p>4. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party will take such interim measures as may be necessary to avoid possible irreparable damage to the victims of the alleged violation. Where the Committee exercises its discretion, this does not imply a determination on admissibility or on the merits of the communication.</p>	<p>Oral Submission</p>

	5. The Committee shall hold closed meetings when examining communications under the present article. It shall inform the author of a communication of the responses provided by the State Party concerned. When the Committee decides to finalize the procedure, it shall communicate its views to the State Party and to the author of the communication."	
International Committee of the Red Cross	Wholly support	Written Submission
Fiji Police Force	Wholly Support	Oral Submission
Divisional Planning Officer Northern	Fully Support	Oral Submission
Fiji Human Rights and Anti-Discrimination Commission	Taking full cognizance of the positive legal developments towards the protection of all persons from enforced disappearances in Fiji's domestic procedures including the reciprocal respect for their constitutional right of access to information and the rights of persons deprived of liberty, the Human Rights and Anti-Discrimination Commission foresees no impediment and therefore unconditionally supports Fiji's accession of the Convention.	Written Submission

International Convention for the Protection of All Persons from Enforced Disappearance

Background

- ▶ This convention is considering the obligation of states under the charter of the United Nation to promote universal respect for, and observance of, human rights and fundamental freedoms
- ▶ This convention will increase the accountability of individual perpetrators of acts of enforced disappearance by extending international criminal jurisdiction to this acts
- ▶ It recalls the declaration on the protection of all persons from enforced disappearance adopted by the General Assembly of the United Nations in its resolution 47/133 of 18th December 1992
- ▶ This convention will also assist the victim and their families the knowledge of individuals arrest and detention and will ensure full information is provided to the families

Cont...

- ▶ It made aware of the extreme seriousness of Enforced Disappearance which constitutes a crime and, in certain circumstances define International Law a CRIME AGAINST HUMANITY
- ▶ The convention considers the right of any person not to be subjected to Enforce Disappearance, the right of victims to justice and to reparation and
- ▶ Affirms the right of any victim to know the truth about the circumstances of an Enforced Disappearance and the fate of the Disappeared person, and the right to freedom to seek, receive and impart information to this end

Responses

- ▶ The Ministry of Defence would be the best stakeholder to comment on this convention.

Appendix C: Ministry of Foreign Affairs

International Convention for the Protection of All Persons from Enforced Disappearance

1. Background

The **International Convention for the Protection of All Persons from Enforced Disappearance** (ICPPED) is an [international human rights instrument](#) of the [United Nations](#) and intended to prevent [forced disappearance](#) defined in international law, [crimes against humanity](#). The text was adopted by the [United Nations General Assembly](#) on 20 December 2006 and opened for signature on 6 February 2007. It entered into force on 23 December 2010.^[4] As of September 2018, 98 states have signed the convention and 59 have ratified it

2. Scope of the Convention

The convention is modelled heavily on the [United Nations Convention Against Torture](#) that Fiji has ratified.

"Enforced disappearance" is defined in Article 2 of the Convention 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 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.

Article 1 of the Convention further states that

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

The widespread or systematic use of enforced disappearance is further defined as a crime against humanity in Article 6.

Parties to the convention undertake to:

- investigate acts of enforced disappearance and bring those responsible to justice;
- ensure that enforced disappearance constitutes an offence under its [criminal law](#);

- establish jurisdiction over the offence of enforced disappearance when the alleged offender is within its territory, even if they are not a citizen or resident;
- cooperate with other states in ensuring that offenders are prosecuted or extradited, and to assist the victims of enforced disappearance or locate and return their remains;
- respect minimum legal standards around the deprivation of liberty, including the right for imprisonment to be challenged before the courts;
- establish a register of those currently imprisoned, and allow it to be inspected by relatives and counsel;
- ensure that victims of enforced disappearance or those directly affected by it have a right to obtain reparation and compensation. (Article 24. 4)
- the right to obtain reparation covers material and dangers and, where appropriate, other forms of reparation such as; a) [Restitution](#). b) [Rehabilitation](#). c) Satisfaction, including restoration of dignity and [reparation](#). d) Guarantee of non-repetition. (Article 24. 5)

The Convention is governed by a [Committee on Enforced Disappearances](#) elected by its Parties. Parties are obliged to report to this Committee on the steps they have taken to implement it within two years of becoming subject to it.

The Convention includes an optional complaints system whereby citizens of parties may appeal to the Committee for assistance in locating a disappeared person. Parties may join this system at any time, but may only opt out of it upon signature.

3. Applicable National Policies?

The offence of enforced disappearance is articulated and entrenched in the Constitution of the Republic of Fiji (Constitution) section on the Bill of Rights.

Section 13 of the Constitution, 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.

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 detention 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

- a) The Convention well complements various provisions under the Fiji 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.
- b) 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.”

Furthermore, it is clear that domestic laws in the Constitution and the Crimes Act, has entrenched Fiji’s position on the matter. Fiji’s accession to the Convention will further strengthen the protection of all persons from enforced disappearances.

ii. **Should Fiji ratify this Convention?**

Yes, Fiji should ratify the Convention.

Fiji’s accession will also fulfill its commitment to the objectives laid out in the Constitution, the Crimes Act of 2009, and Information Act of 2018.

Ratification will also realise Fiji's pledge at its last UPR session to ratify all remaining core Treaties. This pledge was also reiterated during Fiji's successful Human Rights Council campaign.

Fiji's accession to the Convention will promote cooperation and strengthen international relations with other States Parties who have acceded to or ratified the Convention.

Furthermore, the U.N. Charter of which Fiji's foreign policy practice is intricately bound, assumes that **human rights** are a common concern of the **international** community, and that their denial impedes the stability necessary for peaceful **relations** among nations, and that it is possible to set minimum standards-and implement these-because all peoples - irrespective and nationality or creed - do share basic aspirations and values.

Appendix D: Fiji Revenue Custom Services

SPEAKING NOTES

Presentation to the Standing Committee on Foreign Affairs and Defence on International Convention for the Protection of All Persons from Enforced Disappearance

Introduction

1. This presentation is in response to the request from the Parliament Standing Committee on Foreign Affairs and Defence for comments from Fiji Revenue and Customs Service (FRCS) on how the International Convention for the Protection of all Persons from Enforced Disappearance (“Convention”) would impact FRCS from an operational perspective.

Background

2. The **International Convention for the Protection of All Persons from Enforced Disappearance** (“Convention”) is an international human rights instrument of the United Nations and intended to prevent forced disappearance defined in international law. The text was adopted by the United Nations General Assembly on 20 December 2006 and opened for signature on 6 February 2007. It entered into force on 23 December 2010. As of September 2018, 98 states have signed the convention and 59 have ratified it

Organizational Perspective

The Fiji Revenue & Customs Service (FRCS) provides Border Security apart from accounting for 90% of Government revenue and facilitating trade and travel.

We note the provision of the Constitution and Crimes Act in respect of detention of persons.

The Customs Act also allows for a proper customs officer to:

- a. Detain and search persons;

- b. Detain without warrant; and
- c. Power to arrest

These powers are only in respect of offences or suspected offences under the Customs Act. We are duty bound to present a person so detained to produce a person within 48 hours after the person has been taken into custody, inquire into the case and unless the offence appears to the officer to be of a serious nature, release the person on that person entering into a bond with or without sureties, for a reasonable amount to appear before a Magistrates Court at a time and place to be named in the bond.

The Customs Act also empowers a proper officer to release a person so arrested on suspicion of committing a Fiji Revenue and Customs Offence when, after due FRCS inquiry, insufficient evidence is, in his or her opinion, disclosed on which to proceed with the charge. Customs Penal Provision are so contained in the Customs Act penal provisions.

The Customs Act is specific in making FRCS officials accountable to the Magistrates Court and the Fiji Police Force in its role as the Boarder Security Agency and remains fettered under law.

Recommendation

Fiji Revenue & Customs Service supports the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance and will allow for the following:

- Integration and collaboration at national and international level
- opportunities for information amongst boarder agencies
- training and capacity building for law enforcement agencies

- END -



INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

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INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

Ministry Perspective

The Ministry supports the intention of the International Convention on the Protection of All Persons from Enforced Disappearance. From a Human Rights perspective, all citizens and individuals should have the right to be free from any unlawful and unconstitutional deprivation of liberty through secret detention (Article 17).

Reservations

The Ministry has no reservations, however, advises that the Republic of Fiji Military Forces (RFMF) and the Fiji Police Force (FPF) would be the relevant institutions to address the current convention.

The Ministry is informed that the committee has also requested the RFMF to present on the same convention.

With regards to FPF, the institution has provided the Ministry with their stance below:

- The Fiji Police fully accedes and supports the Convention, and as custodians of the Law, it is mandated to operationalize its functions as stipulated in the Constitution of the Republic of Fiji, 2013, pursuant to s.13 which describes the Rights of person(s) arrested or detained.
- In addition, s.9, sub.3, of the Constitution of the Republic of Fiji, 2013, conforms to the detainment of persons in times of emergency (-ies) as stipulated under this convention.
- Furthermore, the FPF conforms to the convention as stipulated under the Crimes Act, 2009, s.95, which legislates as per Fig 1.0.



Fig 1.0

Crime against humanity—enforced disappearance of persons

95.—(1) A person (the perpetrator) commits an indictable offence if—

- (a) the perpetrator arrests, detains or abducts one or more persons; and
- (b) the arrest, detention or abduction is carried out by, or with the authorization, support or acquiescence of, the government of a country or a political organization; and
- (c) the perpetrator intends to remove the person or persons from the protection of the law for prolonged period of time; and
- (d) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population; and
- (e) after the arrest, detention or abduction, the government or organization refuses to acknowledge the deprivation of freedom of, or to give information on the fate or whereabouts of, the person or persons.

Penalty — Imprisonment for 17 years.

(2) A person (the perpetrator) commits an indictable offence if—

- (a) one or more persons have been arrested, detained or abducted; and
- (b) the arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, the government of a country or a political organization; and
- (c) the perpetrator refuses to acknowledge the deprivation of freedom, or to give information on the fate or whereabouts, of the person or persons; and
- (d) the refusal occurs with the authorization, support or acquiescence of the government of the country or the political organization; and
- (e) the perpetrator knows that, or is reckless as to whether, the refusal was preceded or accompanied by the deprivation of freedom; and (f) the perpetrator intends that the person or persons be removed from the protection of the law for a prolonged period of time; and
- (g) the arrest, detention or abduction occurred, and the refusal occurs, as part of a widespread or systematic attack directed against a civilian population; and
- (h) the perpetrator knows that the refusal is part of, or intends the refusal to be part of, such an attack.

Appendix F: United Nations Office for the High Commissioner of Human Rights



Oral Briefing to the Standing Committee on Foreign Affairs and Defense On the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and

International Convention for the Protection All Pesons from Enforced Disappearance

OHCHR Regional Office for the Pacific
Suva, Fiji
18 April 2019

I. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)

CMW is adopted by the GA on 18 December 1990 and entered into force on 1 July 2003. Currently it has 54 States parties. No country from Pacific and the region has ratified the Convention. From South-East Asia, it is Sri Lanka, Bangladesh, Indonesia and Philippines that are party to CMW. It has 93 articles – 71 substantive articles, one of the longest human rights treaties. It is divided into EIGHT parts- Part I deals with scope and definition.

The Convention provides that a "migrant" is a person engaged or remunerated in a State where the migrant is not a national, and this may include a foreign worker or an expatriate. Seasonal workers are also defined as a category of migrant workers although foreign investors and those who work for their own States in another jurisdiction are not migrant workers.

Part II non-discrimination (**meaning, migrant workers and members of their families, irrespective of their legal status, enjoy the same fundamental rights as nationals of the country**); Part III human rights of all migrant workers and member of their families (**does not create any new rights, they are entitled to same civil and political and economic, social and cultural rights, such as the rights to life, freedom from torture, slavery, servitude and forced labour, freedom of religion**).

Part IV deals with other rights of documented migrant workers (**freedom of movement in territory of State of employment and freedom to choose their residence, equality of treatment with nationals also in respect of access to education, vocational guidance and placement services, vocational training and retraining, access to housing including social housing schemes**); Part V categories of migrant workers (**frontier worker, seasonal worker, seafarer, itinerant worker, project-tied worker, self-employed workers**); Part VI on promotion of sound migration policy; Part VII on final clauses and Part VIII general provisions.

CMW seeks to establish minimum standards of protection for migrant workers, both documented and undocumented, and members of their families. It recognizes migrant workers as human beings with human rights. CMW also recognizes that the contribution migrant workers make to host and home countries is dependent on legal recognition and protection of human rights of migrants.

The Convention includes members of the family: persons married to migrant workers or having a relationship that according to the applicable law produces effects equivalent to marriage; dependent children; other dependents as recognized by the law of the States concerned.

However, CMW does not relieve migrant workers from obligation to comply with laws and regulations of any State of transit and employment or obligation to respect the cultural identity of inhabitants of these States.

CMW does not cover refugees— but the Committee on the Rights of Migrants has made it clear that the exclusion of refugees is limited to recognized refugees only and not asylum-seekers who fulfill the Convention’s definition of migrant worker; employees of a State or international organizations; students; investors; seafarers and workers on an offshore installation not admitted to engage in a remunerated activity in the State of employment.

Why Fiji should accede to CMW?

Fiji has committed that by 2020, it will ratify and become party to nine core international human rights treaties. On 26 February, Hon’ble Prime Minister of Fiji, while addressing High-Level Segment of the 40th Session of the Human Rights Council in Geneva, renewed Fiji’s commitment to accede the remaining core international human rights treaties- that is now down to two- CMW and CED.

Fiji is the first Pacific Island State to be elected to the Human Rights Council and will serve until January 2021. In Geneva, Ambassador Khan as Vice- President of the Council (on behalf of the Asia-Pacific grouping) plays a key role in sensitizing the international community about the needs of Pacific Island States. As the Secretary-General's first Special Envoy for the Oceans, Ambassador Thomson is seeking to galvanize efforts to protect the world's seas.

Fiji is going to be reviewed under 3rd UPR cycle in 34th Session of the HRC UPR and focus will be on the implementation of the previous UPR recommendations. That means Fiji has to live up to its commitment made during 2nd UPR cycle with regard to ratification of treaties.

Also, Fiji has demonstrated a leadership at regional and global level in its fight against climate change. It has announced that it would accept climate refugees in future. Given the climate change and its negative impact on livelihoods and enjoyment of fundamental human rights, there is a high chance that Fiji might end up as receiving country of migrant workers not only as a country of origin as it increasingly looks so now.

Today, no one can deny the positive economic effects and dividends that migrant workers contribute. According to various reports, migrants spend 85% of earnings in their host communities and send back remaining 15% to the countries of their origin.

Globally, in 2017, migrants sent home approximately USD 600 billion in remittance- which is **3 times of all official development assistance**. Fiji is not exception to this as remittance has grown each year to the point where in 2018 - foreign remittances exceeded F\$0.5bn for the first time making foreign remittances Fiji's highest foreign exchange earner surpassing even tourism.

CMW Implications on Fiji

Reporting to the Committee on Migrant Workers as article 74 of CMW requires Fiji to report to the Committee within two years and after every four years or when the Committee so requests. But it should not be taken as a burden and reporting obligations can be fulfilled in a more efficient and coordinated manner if a standing mechanism on reporting and follow-up (NMRF) is established. Fiji, led by the Office of the Attorney General, is currently mulling over having such a mechanism in place. Last week, Fiji hosted a regional dialogue on NMRF led by Fiji's ambassador to Geneva Nazhat Shameem Khan.

Article 76 deals with inter-State communication. It is optional and the State party must declare the competency of the Committee for this article to be effective.

Article 77 deals with individual communication procedures. It is optional and the State party must declare the competency of the Committee for this article to be effective.

Domestication of CMW or amending or enacting laws to be compliant with CMW and its standards. Laws related to immigration, Employment Relation (Amendment) Act 2015.

The arrival of Chinese migrant workers to the Pacific is on rise and this has particularly increased in recent years as the speed of development/investment from China picks up.

The Employment Relations Tribunal recent decision in **Daniel Sanchez v The Sheraton** (16 January 2019) demonstrates that the employment contract is paramount and that Fiji's law relating to termination of employment will be applied to the employer. In brief, Mr Sanchez was from Mexico and recruited by an agent of the Sheraton resort on Denarau Island to work in a restaurant known as the Flying Fish Restaurant. Mr. Sanchez is a chef and was employed as a chef but then he was terminated from his employment after just one month. The Employment Relations Tribunal awarded Mr. Sanchez \$37,760 for 5 months wages and relocation allowance - because the hotel/resort had not followed its own disciplinary procedures in terminating his employment.

Climate Change - while it is a global issue - for Fiji and the Pacific it is likely to increase pressure for good regulation of migrants due to increased migration within/around the Pacific. Fiji has already publicly stated that it is ready and willing to assist climate change refugees from the Pacific.

Given the lack of consistent employment standards across different legal jurisdictions it is important for all jurisdictions to collaborate and ensure for migrant workers that they are aware of their rights before they arrive in the jurisdiction they want to work in. Ultimately, laws may provide some protection for migrant workers, but it should also be remembered that enforcing those legal rights can also be difficult. For example, the Sanchez case still took 4 years to reach a final determination.

II. International Convention for the Protection All Pesons from Enforced Disappearance (CED)

The Convention on the Protection of all Persons from Enforced Disappearance (CED) was adopted by the United Nations General Assembly on 20 December 2006, and came into force on 23 December 2010.

The Convention is a legally binding instrument. It fully applies and is binding on the States that have ratified it. It prohibits and defines certain behaviour of States, and its violation obliges States to react. When States have only signed but not yet ratified it, they are nonetheless obliged not to take any action which goes against either the letter or the spirit of the Convention.

As of 31 March 2019, the Convention has 98 Signatories and 59 States Parties.

In the Pacific, only Samoa has ratified CED and Palau and Vanuatu only signed it. The Convention is foremost a legal instrument with a preventive character that fills the gaps between other human rights treaties and international criminal law. It commits States Parties to prevent forced disappearances which is defined, in certain cases under international law as a crime against humanity.

The convention is modelled heavily on the United Nations Convention Against Torture.

Key aspects of CED

- Part I (Articles 1 – 25) contains the substantive provisions and focuses primarily on the obligations of States parties to prevent and punish such crimes.
- Part II - Articles 26 – 36 establishes the Committee on Enforced Disappearances.
- Part III- Articles 37 – 45 contains the formal requirements regarding signature, entry into force, amendments and the relationship between the Convention and international humanitarian law.

The Convention provides protections to the victims, victims family and children and also to the general public. In order to prohibit enforced disappearance, the convention has four main aspects:

Combating impunity – The convention puts an obligation on States parties to bring enforced disappearance offenders to justice. States must do so not only with regard to persons who commit enforced disappearances on their own territory, but also in cases of alleged offences in other jurisdictions: in those cases States have to either prosecute or extradite the alleged offender, so

that no one can escape justice. Therefore they protect the society from offenders.

Article 1 states that no one can be subjected to enforced disappearances under any circumstances and there is no exception to this rule. Enforced disappearance is a non-derogable right- no circumstances may be invoked to justify enforced disappearance. This includes a state of war, a threat of war, internal political instability or any other public emergency. Once ratified, Fiji's legal and administrative measures should be reviewed to guarantee this.

Under Article 3, the State has an obligation to investigate, prosecute and sanction non-State actors that commit acts of enforced disappearance, for example, terrorist groups, guerilla and insurgents and under Article 12 the State must also investigate complaints and reports implicating State actors and bring those responsible to justice before a competent authority.

Under Article 4, the State parties have an obligation to respect the right, and ensure national legislation expressly prohibits enforced disappearance, and that this prohibition applies in all circumstances. Fiji will need to enact domestic legislation criminalizing enforced disappearance as an autonomous offence in terms that are consistent with the definition in article 2. Penalties must be proportionate and take into account the extreme seriousness of the offence (Article 7). The Sanctions provided for in the national criminal code for acts of enforced disappearance must be in accordance with international standards as well as disciplinary sanctions established for those convicted for enforced disappearance.

Prevention – The Convention provides for a number of procedural safeguards so that people don't go missing: people deprived of liberty have to be kept in an official place, to be registered, to have all their movements registered. Most importantly everyone deprived of liberty must be allowed contact with the outside world, especially to communicate with their family and counsel, and the family and counsel have a right to information on the detention and whereabouts of the person. The State must enable individuals to report an enforced disappearance, protect witnesses and investigate complaints and reports of disappearances.

Secret Detention or unofficial detention is absolutely prohibited. Under Art 12, National competent authorities must have all powers and resources to conduct an effective investigation including:

- 3 Access to documentation and information
- 4 Access to places of detention

Rights of victims – This is the first convention that recognizes that the victims of enforced disappearances are not only the disappeared themselves

but also their relatives. It acknowledges the right of the families to know the fate of their relatives, and also recognizes that victims of enforced disappearance have a right to reparation for the wrong that was done to them. Victims are guaranteed different forms of reparation such as restitution, rehabilitation, satisfaction including restoration of dignity and reputation and guarantee of non –repetition.

The Convention also seeks to prevent victimization by extending protections to those in danger of enforced disappearance arising from expulsion, surrender and extradition. It is focused on redressing past wrongs and strengthening accountability by requiring States to investigate and prosecute enforced disappearances.

Enforcement – The Convention establishes an international committee of ten independent experts to monitor compliance . These experts will review reports by states and can also receive individual complaints. The convention also foresees a 'habeas corpus' procedure by which relatives and other interested persons who fear that a person has been subjected to enforced disappearance can seize the international committee directly and if the complaint is substantiated the committee will ask the state to search for and locate the missing person.

Why should Fiji accede to CED?

In 2010, the Fijian Government in its UPR Report made a commitment towards ratifying all core nine human rights instruments by 2020. This was affirmed in 2014 and in recent speeches made by the Prime Minister of Fiji at UN Human Rights Council meetings.

There are no known reports of politically motivated disappearances in Fiji yet. However, there are several deaths in custody cases that warrants the ratification of this convention.

There have been four deaths in custody cases that were reported at the time of the last UPR, and in only one of those cases had the perpetrators been charged and sentenced. One of the examples of a death in custody case is the case of Vilikesa Soko. In 2014, police assaulted Vilikesa Soko, a suspect in an armed robbery, between the point of his arrest and arrival at the police station. Soko died afterwards, likely as a result of medical complications brought on by the beating. On 11 November 2016, nine security force members (eight police officers and a military officer) were convicted for their involvement in the 2014 rape, sexual assault, and death in custody of Vilikesa Soko. On 22 November, the judge sentenced each of them to prison ranging from seven to nine years.

Fiji has also experienced several cases of missing persons although none are known to be by the State.

As there is a need for preventative approaches in the Pacific, building international societies that recognize human dignity must be a universal goal. Through Ratification, Fiji becomes an active member towards achieving this universal goal.

Up until now, enforced disappearance had only been seen as a violation of certain rights in existing treaties, such as freedom from torture, the right to liberty or the right to life. But enforced disappearance is more than just the sum of these different aspects. It is characterized by the specific aspect of denial – denying the abducted person's very existence, denying families information on their relatives. This aspect is recognized in the convention because it sees enforced disappearance as a violation in itself. Moreover, there are a number of new binding norms in the text that did not exist before in any human rights treaty.

Implication on Fiji

Fiji, once becoming party to CED, is obliged to submit its initial report the Committee on the measures taken to give effect to its obligations under the Convention within two years after the entry into force of CED for Fiji (*article 29*).

In accordance with article 31, Fiji may at the time of ratification of this Convention or at any time afterwards declare that it recognizes 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 this Convention.

Most importantly, Fiji will have to amend or enact legislation so as to have the legal tools to apply the convention.

Fiji's constitution and laws such as the Crimes Act 2009 and Inquest Act do have certain provisions by which protection is available from enforced disappearance.

The 2013 Constitution expressly provides under Section 11 for "freedom from cruel and degrading treatment". Article 13 provides for the "Rights of arrested and detained persons". Article 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.

Article 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.

In 2012, the Fiji Police Force introduced a pilot scheme for the video taping of police interviews. Police officers are currently being trained to conduct such interviews. The introduction of taped interviews will lead to greater transparency and fairness in police procedures.

The Constitution provides that persons who consider their rights in the Bill of Rights impinged, may seek redress from the High Court. All persons have the right to lodge a complaint with the Human Rights and Anti-Discrimination Commission alleging that a right or freedom under the Constitution has been denied, violated or infringed, or is threatened. Given that the Human Rights and Anti-Discrimination Commission is not subject to the direction or control of any person or authority, investigations into these allegations of breach of the Bill of Rights will be independent.

Furthermore, judges have in certain cases deemed confessions made by detained persons in custody as inadmissible.

Article 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 counselor 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.

The separate offence of enforced disappearance of persons is established by section 95 of the Crimes Act and prescribes a maximum penalty of 17 years imprisonment. It is also defined as a crime against humanity.

However the burden of proof in the Crimes Act is beyond the requirements of the convention and may need to be amended to include the words “or any other form of deprivation of liberty by” to 95 (a) and remove 95 (c) and “(d) which involves” the intention component”. It does not also necessarily need to meet the requirements of being widespread or the systematic attack directed at a civilian population within the same definition.”

The widespread or systematic practice of enforced disappearance is another separate crime against humanity (article 5) which will need to be added to the Crimes Act.

Section 95 will need to be further amended to include a person to be criminally responsible if he/ she orders, solicits or induces, attempts to commit or is an accomplice or participates in an enforced disappearance.

Section 98 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.

Article 8 does not matter in Fiji's case as there is no limitation to criminal offences.

The Convention obligates states to take steps to establish, mechanisms to conduct investigations, locate victims and, in the case of death, locate, respect and return their mortal remains to relatives. Protocols are established to handle mortal remains of disappeared persons to their families in line with international standards. A lot will need to be done in terms of fulfilling the State obligations when it comes to the rights of the victims.

The State needs to put in procedures in place for obtaining compensation and reparation for victims and whether these procedures are codified or in any way formalized for example, rehabilitation programmes for victims of enforced disappearance.

Under Article 23 of the Convention, the State party must ensure proper education and training of law enforcement personnel, civil or military and medical personnel involved emphasizing the importance of the prevention and investigation of cases of enforced disappearances and ensuring that those persons recognize the urgency of solving cases of enforced disappearances.

Reservations

Reservations are unilateral statement made by a State by which it purports to exclude or modify the legal effect of a treaty provision in its application to that State. A reservation maybe entered when signing, ratifying, accepting, approving or acceding to a treaty.

However, the reservation is permitted only if i) it is not explicitly prohibited by the treaty; ii) it is explicitly authorized by the treaty itself; or iii) the reservation is compatible with the object and purpose of the treaty.

Other States parties and signatories to the treaty may lodge objections to a State party's reservation.

Reservations may be withdrawn completely or partially by the State party at any time.

SUPPLEMENTARY SUBMISSIONS
TO THE STANDING COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE:
CONVENTION ON PROTECTION OF ALL PERSONS FROM ENFORCED
DISAPPEARANCE

OHCHR Regional Office for the Pacific
30 April 2019

The Standing Committee on Foreign Affairs and Defence has sought elaboration on the comments made by OHCHR.

Comment 1

‘Fiji will have to implement two things: they will have to enact national legislation which gives them the legal tools to apply this Convention.’

In the event, of Fiji agreeing to ratify the Convention on Protection of All Persons from Enforced Disappearance (hereinafter “the Convention”), it will need to review and amend its domestic legal framework from the lens of the Convention and other international human rights standards applicable to Fiji. Articles 3 to 25 of the Convention requires State Parties to fulfil their obligations to enact (make) legislation through the Parliament of Fiji, that gives the law enforcement agencies powers to apply the principles under the Convention and criminalize enforced disappearances according to required international standards. This will also enable Fiji to put in mechanisms for reporting, investigation, prosecution and sanction of State and non-State actors who commit enforced disappearances and provide redress to the victims.

Comment 2

‘The Fiji 2013 Constitution and the laws, such as the Crimes Act and the Inquest Act do have a number of provisions by which protection is available from enforced disappearances, however, this is not enough.’

These comments, if elaborated, means that Fiji’s constitution and laws such as the Crimes Act 2010 and Inquest Act 1978 do have certain provisions by which protection is available to Fijians from enforced disappearances already in Fiji. These provisions are found specifically in Sections 9(3), 11 and 13 of the 2013 Constitution that expressly provides for “Freedom from cruel and degrading treatment” and for the “Rights of arrested and detained persons” and that “state of emergency” cannot justify enforced disappearances. The 2013 Constitution also provides that persons who consider their rights under the Bill of Rights impinged, may seek redress from the High Court.

Section 95 of the Crimes Act 2010 criminalizes enforced disappearance of persons and makes it a crime against humanity while prescribing a maximum penalty of 17 years imprisonment. Section 98 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 which is consistent with the Convention.

The Inquest Act 1978 has a number of provisions that regulate the conduct and duties of police officers (Sections 3 and 4). When any person dies while in the custody of the police (Sections 7 and 8), or prison, or whilst in the custody of any public officer, or in any other place specified by the Minister by notice in the Gazette, the officer who has the custody of such person or the person in charge of such prison or such other place, as the case may be, shall forthwith give intimation of such death to a magistrate, and such magistrate or another shall hold an inquest into the cause of death and, for such purpose, may request a police officer to make the investigation and report (section 9).

The above are some of the provisions by which protection is available from enforced disappearances in Fiji. Despite a number of positive legal provisions, gaps remain in Fiji's current legislation.

The definition in the Crimes Act 2010 needs to be amended in line with the definition provided by article 2 of the Convention.

The widespread or systematic practice of enforced disappearance is another separate crime against humanity (article 5). It needs to be added as a separate crime in the Crimes Act 2010 of Fiji and not as an element of enforced disappearance.

The inclusion, under Section 95, of a person to be criminally responsible if he/ she orders, solicits or induces, attempts to commit or is an accomplice or participates in an enforced disappearance would address an existing gap. Under Article 6 of the Convention, States have an obligation to hold any person directly responsible in the commission of the crime individually criminally responsible. Superiors must also be held criminally responsible when the superior has knowledge of the crime, exercised responsibility and control over activities concerned with the crime or failed to take all necessary measures to prevent or punish the commission of a crime.

Accession to this Convention will help Fiji to further strengthen protection of the rights of victims. There are currently no provisions in the legislation of Fiji that provides the right to victims to know the truth regarding circumstances of enforced disappearance, progress and results of investigations and the fate of disappeared persons.

The Convention obligates states to take steps to establish, mechanisms to conduct investigations, locate victims and, in the case of death, locate, respect and return their mortal remains to relatives. Protocols are established to handle mortal remains of disappeared persons to their families in line with international standards.

Comment 3

“Fiji’s 2013 Constitution provides freedom from cruel and degrading treatment which is just one aspect of that”.

As stated in the preceding paragraphs, the 2013 constitution complements several aspects of the Convention. The Convention is foremost a legal instrument with a preventive character that fills the gaps

between other human rights treaties and international criminal law. Although modelled on the Convention Against Torture, its application is much broader than CAT. The Convention on Protection of All Persons from Enforced Disappearances provides for the first time a universal right not to be subjected to enforced disappearances. Enforced disappearance is characterized by the specific aspect of denial – denying the abducted person's very existence, denying families information on their relatives. This aspect is recognized in the convention because it sees enforced disappearance as a violation in itself. It involves rights to victims as well and setting up mechanisms and enacting laws as part of the obligations of the State to protect people from enforced disappearances.

Appendix G: Office of the Solicitor General

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

WRITTEN ANALYSIS

INTRODUCTION

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.

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.

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.

Currently Fiji has ratified seven of the core nine human rights instruments.

SUMMARY OF THE CONVENTION

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

Part 1 of the Convention covers Articles 1 to 25.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Given that Fiji will not make such a declaration, Fiji will not be bound by Article 31 of the Convention.

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.

REQUIREMENTS FOR IMPLEMENTATION

- (a) 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.
- (b) 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.

IMPACT OF THE CONVENTION

The benefits of acceding to the Convention are as follows:

Fijian Constitution

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).

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.

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

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.

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.”

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.

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.

Furthermore, accession to the Convention will promote cooperation and strengthen international relations with other States Parties who have acceded to or ratified the Convention.

DECLARATION AT THE TIME OF ACCESSION

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.

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).

Countries such as Cuba, Morocco, Ukraine and Venezuela have made similar declarations at the time of ratification or accession.

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”.

RECOMMENDATION

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.

**PRESENTATION TO THE PARLIAMENT STANDING
COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE**

Mr Chairman, and distinguished members of the Standing Committee on Foreign Affairs and Defence. A very good morning to you all. May I take this opportunity in conveying to you all the gratitude of the Commander, Republic of Fiji Military Forces for the kind invitation to appear and present to the Standing Committee, its views regarding three (3) International Conventions namely:

- (1) United Nations Convention on International Settlement Agreements Resulting from Mediation;
- (2) International Convention on the Protection of All Migrant Workers and Members of their Families; and
- (3) International Convention for the Protection of all Persons from Enforced Disappearance.

The three Conventions in question does not present any direct security implications. However, in adverse or unfavorable circumstances, it may develop into matters of national or international concerns. Although there are no presenting security implications on which we would have presented, however there are few other relevant issues which we intend to bring to the attention of the Committee.

Mr Chairman, I will address each Convention in turn.

(1) United Nations Convention on International Settlement Agreements Resulting from Mediation

Mr Chairman, undoubtedly, we all have witnessed a steady drift in resolving disputes through the prescriptions of Alternative Dispute Resolutions. What the Convention is advocating is a means of resolving commercial dispute outside the Court System. There are running debates as to the pros and cons associated with the Alternatives Dispute Resolution Process compared to the Adversarial or Court process. Arguments extend to the delay in resolving cases in court, rising cost associated with the litigations, and many other. The Mediation process provided in the Convention is an informal alternative to litigation or adversarial process.

Mr Chairman, the Convention in question has a caveat as to its applicability. The scope of its application is provided in Article 1. The restriction placed, in our opinion is adequate to discourage undesirable attempts to invoke the provisions.

Article 2 to 15 are working provisions of the Convention which adequately provides for the framework of the Mediation Process.

Article 16 is important, in that, it provides us an opportunity to withdraw – or exit if we agree to the

ratification of the Convention. We submit, that the Convention offers us an opportunity to have in place an alternative process in the resolution of commercial disputes. It provides an opportunity also to have amicable resolution. As such, in support, we submit that Committee seriously considers recommending the adaptation of the Convention on International Settlement Agreements Resulting from Mediation.

Mr Chairman

The Convention on the Protection of the Right of all Migrant Workers and members of their Families extends from the international principles and norms associated with Human Rights. The provisions of the Convention is in line with the recognitions rights provided in Chapter 2 of our Constitution.

Sir, we are of the opinion that there a numerous Fijian living abroad who fall under the definition of a ‘Migrant Worker’ as provided in Article 2. We have no data to support the ascertain, but believe that those affected by the provisions of the Conventions will be significant.

In our opinion, the Conventions main focus is the protection of migrant workers’ rights. We must, not confuse ourselves with ‘migration’, rather we are referring to our nationals or other nationals who are not citizens of

the country but only engaged in an activity for a prescribed remuneration or wages.

Mr Chairman, the Convention prescribes very high standards for the States to adhere to. Although the standards are high, the protection of rights accorded to immigrant workers will help our nationals and equally to those migrant workers here in Fiji. This Convention origin is from the 9 core international human rights instruments i.e.:

- (1) 1923 Declaration of the Rights of child;
- (2) 1948 Universal Declaration of Human Rights;
- (3) 1975 Declaration of the Right of Disable Person;
- (4) 1986 Declaration on the Rights to Development;
- (5) 1993 Vienna Declaration and Programme of Action;
- (6) 1998 Declaration of Human Duties and Responsibilities;
- (7) 2001 Universal Declaration on Cultural Diversity;
- (8) 2007 Declaration of Rights of Indigenous Peoples;
and
- (9) 2008 UN declaration on sexual orientation and gender identity.

From our reading, the Migrant Rights Convention does not advocate any new rights rather guidelines of how existing basic rights should apply to migrant persons. We note the creation of check and balances of the state and status of migrant workers.

Reservations

(1) Article 18 (6)

“When a migrant worker or a member of their families has, by a final decision, been convicted of a criminal crime and when subsequently his or her conviction has been reverse or he or she has been pardoned on the grounds that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated accordingly to law, unless it is proved that the non-disclosure of unknown fact in time is wholly or partly attributable to that person.”

This provision needs further scrutiny. The Attorney General’s Office assistance must sought regarding compensation – for person discharged of any criminal liability. This provision may recognize or give rise to a new understanding or application which individuals discharged of criminal liabilities were not enjoying before.

(2) Article 40

“Migrant workers and members of their families shall have the right to form associations and trade unions

in the State of employment for promotion and protection of their economic, social, cultural and other interest.

No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interest of national security, public order (order public) or the protection of the rights and freedoms of others.”

The issue of migrant workers forming association and trade Unions needs further scrutiny. Is such permissible under our current legal provisions? The AG’s office needs to provide guidance.

(3) Article 46

“Migrant workers and members of their families shall, subject to the applicable legislation of the States concerned, as well as relevant international agreement and the obligation of the States concerned arising out of their participation in customs unions, enjoy exemption from import and export duties and taxes in respect of their personal and house hold effects as well as the equipment necessary to engage

in the remunerated activity for when they were admitted to the State of employment:

- (a) Upon departure from the State of origin or State of habitual residence;*
- (b) Upon initial admission to the State of employment;*
- (c) Upon final departure from the State of employment; and*
- (d) Upon final return to the State of habitual residence.*

The issue of exemption from import and export duties and taxes need further scrutiny. These provision may not conform to the standing provisions of our excise duties and taxes.

(4) Article 47

“Migrant workers shall have the right to transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or any other State. Such transfers shall be made in conformity with procedures established by applicable legislation of the State concerned and conformity with applicable international agreements.

States concerned shall take appropriate measures to facilitate such transfers.”

The issue of remittance needs more scrutiny. Our reading is that remittance are done in compliance with standing National Laws and Regulations.

(5) Article 49

“(2) Migrant worker who in the State of employment are allowed freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permits or similar authorizations.”

Again, considerations are to be made regarding ‘migrant workers’ changing employment and opting for another employment. The issue of visa status and work permit needs further scrutiny and discussion.

(6) Article 92

“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 organization of the arbitration, any one of those Parties may refer the dispute to the International Court with the Statute of the Court.

Each State Party may at the time of ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.

Any State Party that has made a declaration with paragraph 2 of the present article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.”

The Committee must decide whether the provisions regarding “arbitration” is acceptable or that, arbitration is only involved after there is agreement of both parties. Also, we must decide whether or not the matter be referred to the International Court of Justice is acceptable.

Mr Chairman, we submit that the Committee considers the adaptation of the Convention on the Protection of the Rights of all Migrant Workers and Members of their families with the reservations presented.

(3) Convention for the Protection of All Persons from Enforced Disappearance.

Mr Chairman, in normal practices, international legal instruments that are adopted are incorporated into our national laws. The Convention against Torture and other, Cruel, Inhumane or Degrading treatment or Punishment as an international human rights treaty came into force on 26 June 1987. Fiji signed on the 1st of March 2016 and had it rectified on 16 March 2016. Importantly, the Crime of Torture is classed as a Crime against Humanity in accordance with Section 87 of our Crimes Act 2009.

In usual circumstances, we consider forwards adopting as national laws, any conventions or legal instruments that have been signed or recognized internationally. In the case of the Convention for the Protection of All Persons from Enforced Disappearance, the process is reversed and somewhat a proud moment for Fiji. Basically, through the good wisdom of the Legislators, we have recognized an area of concern and brought about legal provisions that addressed such concerns. The Government should be complimented for their foresight and wisdom. Our earlier timely recognition is a proud moment indeed.

As the Committee may have already heard. We already have within our national laws, a recognition that any Enforced Disappearance persons constitutes A Crime against Humanity.

Section 95 of the Crimes Act 2009 is relevant. I leave the reading of the provisions to the Committee leisure. However, the provisions contained in Section 95 adequately addresses the circumstances and the concerns of this Convention. Not only has the provisions of our Crime Act adequately addressed , in cooperated and recognized issues pertaining to Protection of Persons from Enforced Disappearance, through Section 82 to 97 has recognized other breaches against a person constituting a Crime against Humanity.

Also, Article 7 of the Rome Statute of the International Criminal Court provides for Crime Against Humanity where the act in question involves enforced disappearance of persons.

On 29 November 1999 Fiji signed as a party to the Rome Statute of the International Criminal Court. The Statute was rectified on 29 November 1999. The provisions came into Force on 1 July 2002. With no reservations, we have accepted the provisions relating to enforced disappearance.

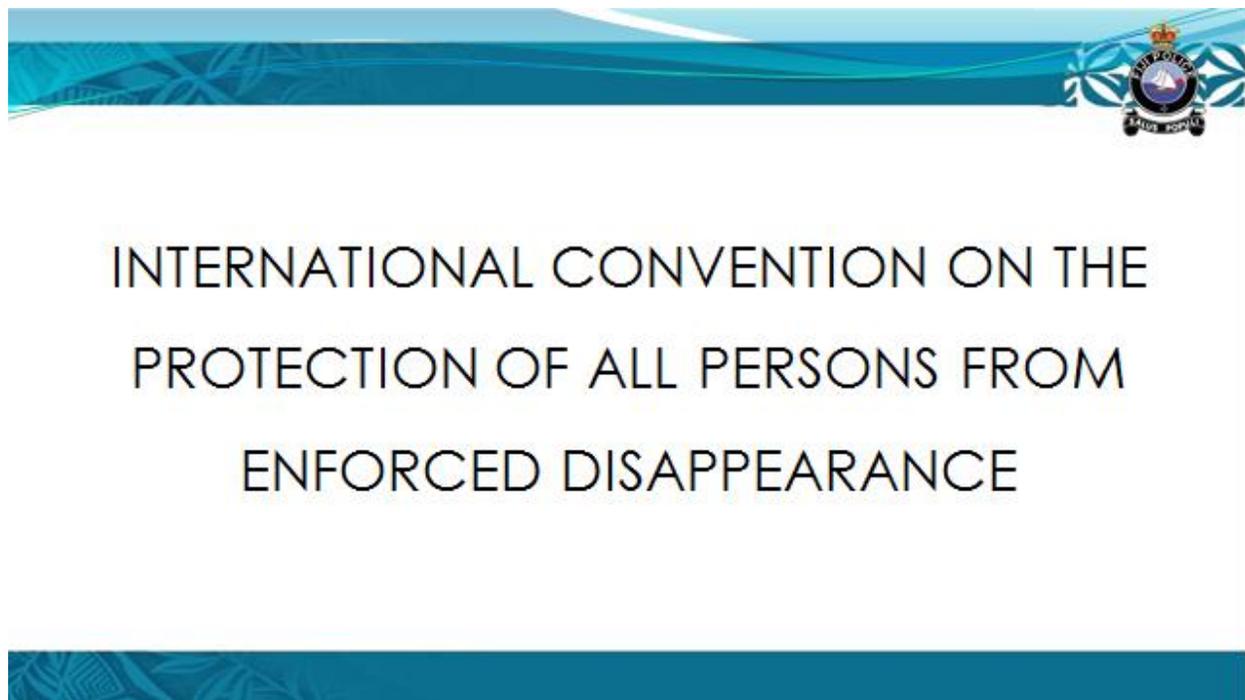
Sir, this recognition of the Convention for the Protection of all Persons from Enforced Disappearance now becomes an exercise or mere formality. We have already recognized its provisions in our domestic laws and through the ratification of other international legal instruments.

Mr Chairman, we strongly recommend that the Committee considers recommending the adoption of the International Convention for the Protection of all Persons from Enforced Disappearance.

Furthermore, we recommend that we recognize Article 31 and the competency of the Committee's role and function.

Mr Chairman, I have no further remarks.

Appendix I: Fiji Police Force



SHOULD FIJI RATIFY THIS CONVENTION



In our opinion, Fiji should ratify this treaty

WHY SHOULD FIJI RATIFY THIS CONVENTION



1. There are laws that has been domesticated, in line with Enforced Disappearance Crimes Act 2009, section 95 which is classed as the Crime against humanity – Enforced Disappearance.
2. Secondly the rights of arrested and detained person is also covered in the 2013 Constitution as well, section 9 and section 13 which describe the Rights to personal liberty.
3. Thirdly the convention is not inconsistent with any of our laws.
4. The ratification of the Convention will strengthen the Protection of All Persons from enforced disappearance.
5. Ratification will strengthen ties with all State Parties.

IMPLICATION OF THE CONVENTION TO FPE



- It is believed that there is no implication of the Convention as there was domestic laws that deals with the enforced disappearance.

ANY OTHER RELEVANT POINTS



NIL

**STANDING COMMITTEE ON
FOREIGN AFFAIRS & DEFENCE**

**[Verbatim Report of Interview with the
Office of the Commissioner Northern Division]**

HELD AT THE

LABASA TOWN COUNCIL CONFERENCE ROOM

ON

WEDNESDAY, 1ST MAY, 2019

VERBATIM NOTES OF THE MEETING OF THE STANDING COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE HELD AT THE LABASA TOWN COUNCIL CONFERENCE ROOM ON WEDNESDAY, 1ST MAY, 2019 AT 9.30 A.M.

Submittee/Interviewee: Office of the Commissioner, Northern Division

In Attendance

1. Mr. Soko Tuima - Divisional Secretary, Office of the Commissioner Northern
2. Mr. Vishwa Deo - Executive Officer, Office of the Commissioner Northern

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MR. CHAIRMAN.- Good morning, Honourable Members, and the Secretariat. Honourable Members, we have before us the Divisional Planning Officer Northern, Mr. Soko Tuima, and his Executive Officer, Mr. Vishwa Deo. Welcome gentlemen to the Standing Committee on Foreign Affairs and Defence. As you will appreciate by the letter of invitation, we would like your good selves to come and have your submission on the three Conventions before Parliament.

With those few words of welcome, Sirs, you can go straight into your submission. Thank you.

MR. S. TUIMA.- Mr. Chairman and Honourable members of the Standing Committee, I am sitting in this morning on behalf of the Commissioner Northern Division, who had some prior official engagement today and he has sent his apology for not being able to be here this morning.

My name is Soko Tuima as has been introduced earlier and I am the Divisional Secretary of the Commissioner Northern's Office.

In terms of our submission in regards to the three Conventions before us on behalf of the Government agencies here in the Northern Division we fully support and concur with this Convention. I will just highlight on few areas that we have noted our interest in those Conventions.

The first one is on the United Nations International Convention for the Protection of All Persons from Enforced Disappearance. The Office of the Commissioner Northern Division, we appreciate the Convention, taking note that the Government is committed to the prevention of Enforced Disappearances which is also being defined under the International Law as a crime against humanity.

We are also aware of the aim of this Convention which is the Protection of All Persons from Enforced Disappearances and it calls the Government accountable for the enforced disappearances at international level.

We acknowledge that the provisions of the Convention will eliminate all arrests and detention of Fiji citizens or any other form of deprivation of liberty that used to happen in the past. On behalf of the Office of the Commissioner Northern Division and all other Government *S/C on JLHR Interview with Officials from the Office of the Commissioner Northern 2. Wednesday, 1st May, 2019*

agencies in the Northern Division, we fully support and we show our appreciation in the formulation of this Convention.

Sir, on the second Convention, the International Convention on the Protection of Rights of all Migrant Workers and Members of their Families, as I had mentioned earlier, we also concur with the contents and all the issues that are part of this Convention.

We note that this Convention is in line with Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment. Also, the objectives of the International Labour Organisation (ILO) under the Protection of interest of workers when employed in countries other than their own, bearing in mind the expertise and experience of that organisation in matters related to migrant workers and members of their families.

We also note that this Convention will recognise the importance of the work done in connection with migrant workers and members of their families.

We also note and appreciate that this Convention will recognise the progress made by certain States on regional or bilateral basis towards the protection of the rights of migrant workers and members of their families.

We also are aware of the considerations upon the vulnerability of migrant workers and members of their families, who frequently find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from the impressions in the State of employment.

We also noted that under this Convention, the rights of migrant workers and members of their families, I can that in the current practice the ... has not been sufficiently recognised and, therefore, require appropriate international protection as it is covered in this Convention.

We also note from the Articles in this Convention that it takes into account the fact that migrant workers who are in irregular situations are frequently employed under less favourable conditions of work and some of the employers are taking advantage of this.

So, we acknowledge and appreciate the establishment of this Convention that it will be able to eliminate the areas that I have mentioned.

Sir, on the second Convention and on behalf of the Commissioner Northern Division and the Government agencies in the Northern Division, we concur to all the Articles and the issues that are being highlighted in the second Convention that I have mentioned.

On the third Convention, the United Nation Convention on International Settlement Agreements Resulting from Mediation, we also support all the areas that are being highlighted in this Convention. A few areas of interest that we have noted is, firstly, this Convention will recognise the value for international treatment of mediation as a method of settling commercial disputes.

Secondly, the parties and mediators should pay special attention to the clarity and comprehensibility of the content of the settlement that is agreed by considering them along with *S/C on*

JLHR Interview with Officials from the Office of the Commissioner Northern 3. Wednesday, 1st May, 2019 -----

circumstances surrounding the disputes and the applicable law of the place of enforcement. Also that mediation may become another main dispute resolution mechanism besides arbitration and mitigation, and this will help promote commercial interactions amongst better and good countries and the regions.

Mr. Chairman and Honourable Members of the Standing Committee, those are the submissions from the Office of the Commissioner Northern Division and as I have said, we fully support and concur with the three Conventions that I have highlighted this morning. Thank you.

MR. CHAIRMAN.- Thank you, Mr. Tuima. Honourable Members, do you have any questions for Mr. Tuima?

HON. A. JALE.- Mr. Chairman, *vinaka vakalevu* Mr. Tuima. Thank you very much for appearing before the Committee. The two Conventions; one on Migrant Workers and the other one on the Enforced Disappearances have Clauses about reservations, that the State of Fiji can state its reservation in terms of two areas in the Convention.

Your recommendation of support from the Government group in the Northern Division I think is coming very clear. The point that I would like to raise with you, if you consider that area of reservation in those two Conventions where Government will say, “We have reservation about these two Clauses”, I think Clause 42 and Clause 91. I hope you have considered that and you still consider that you fully support that the Government accedes to this.

MR. S. TUIMA.- Sir, we take note of the reservations Clauses that are in the Convention. In principle, we agree and support the Convention and we also agree to the reservations. We also support Government stand on the areas mentioned that they need to have their reservations and their stand on certain Clauses in the Convention.

We have noted that on the first Convention, the United Nations International Convention for the Protection of All Persons from Enforced Disappearance, there is a certain Clause 42(2) that needs to be further considered by Government and we fully support that as well.

MR. CHAIRMAN.- Honourable Members, since there are no further questions, at this junction, Sir, I wish to thank you again, Mr. Tuima. But we do plead that you convey our message to the Commissioner Northern and we would like you to join us for morning tea.

We have another submission but if you do not mind taking the back seat for now and just hang around, while we listen to this other submission. Thank you once again for your brief input. Thank you. The committee adjourned at 9.57 a.m.

Appendix K: Fiji Human Rights and Anti-Discrimination Commission



Human Rights and Anti-Discrimination Commission

T +679 330 8577 | F +679 330 8941 | E info@hradc.org.fj | W www.hradc.org.fj
Level 2 Nadaki House 9 Goodenough Street, Suva, Private Mail Bag, Suva, Fiji Islands

International Convention for the Protection of All Persons from Enforced Disappearances

Ashwin Raj, Director HRADC

Submission to the Parliamentary Standing Committee on Foreign Affairs and Defence- Treaties

13 May 2019

Introduction

1. The International Convention for the Protection of All Persons from Enforced Disappearances considers “enforced disappearances” in the context of the Convention¹ 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.
2. The Convention places an obligation on State parties to enact specific laws establishing the crime of enforced disappearances, implores on the State to investigate complaints and reports of enforced disappearance and bring those responsible to justice without impunity. The Convention obligates the State to detain persons in officially approved and monitored places of detention where all those arrested and held in detention are registered. The Convention recognizes the right to Habeas corpus (legal action for release from unlawful detention) and calls for the interdiction of willful concealment or suppression of the whereabouts of arrested and detained persons which often places them outside the protection of the law. It is premised on the right to receive information about those arrested and detained and recognizes the right of victims and their families to know the truth about the circumstances and the fate of the disappeared. The Convention also addresses the unlawful abduction of children whose parents were victims of enforced disappearances.

Does Fiji have adequate legal safeguards against the offence of enforced disappearances?

3. The Crimes Act of 2009, the Constitution of the Republic of Fiji, the Criminal Procedure Act of 2009, and the Information Act of 2018 provide adequate legal safeguards against the offence of enforced disappearance.
4. The *Crimes Act of 2009* specifically recognizes enforced disappearance as an offence under the laws of Fiji. Section 95 of the Crimes Act 2009 prescribes a maximum penalty of 17 years of imprisonment for the offence of enforced disappearance. Section 95 of the Act expressly provides:

¹ Article 2 of the Convention

Crime against humanity—enforced disappearance of persons

95. — (1) *A person (the perpetrator) commits an indictable offence if—*

1. *(a) the perpetrator arrests, detains or abducts one or more persons; and*
2. *(b) the arrest, detention or abduction is carried out by, or with the authorisation, support or acquiescence of, the government of a country or a political organisation; and*
3. *(c) the perpetrator intends to remove the person or persons from the protection of the law for a prolonged period of time; and*
4. *(d) the perpetrator's conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population; and*
5. *(e) after the arrest, detention or abduction, the government or organisation refuses to acknowledge the deprivation of freedom of, or to give information on the fate or whereabouts of, the person or persons.*

Penalty— Imprisonment for 17 years.

(2) A person (the perpetrator) commits an indictable offence if—

1. *(a) one or more persons have been arrested, detained or abducted; and*
2. *(b) the arrest, detention or abduction was carried out by, or with the authorisation, support or acquiescence of, the government of a country or a political organisation; and*
3. *(c) the perpetrator refuses to acknowledge the deprivation of freedom, or to give information on the fate or whereabouts, of the person or persons; and*
4. *(d) the refusal occurs with the authorisation, support or acquiescence of the government of the country or the political organisation; and*
5. *(e) the perpetrator knows that, or is reckless as to whether, the refusal was preceded or accompanied by the deprivation of freedom; and*
6. *(f) the perpetrator intends that the person or persons be removed from the protection of the law for a prolonged period of time; and*
7. *(g) the arrest, detention or abduction occurred, and the refusal occurs, as part of a widespread or systematic attack directed against a civilian population; and*
8. *(h) the perpetrator knows that the refusal is part of, or intends the refusal to be part of, such an attack.*

Penalty— Imprisonment for 17 years.

5. Consistent with the convention, the Crimes Act of 2009 imputes criminal liability and responsibility for the offence of enforced disappearance, regards it as a crime against humanity, and considers perpetrators criminally responsible if even where the perpetrators actions have been sanctioned or executed in accordance with the authorization, support or acquiescence of the government or superiors. Section 98 of the Act provides:

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.*

6. Furthermore, consistent with the requirements of the Convention, section 139 of the Crimes Act of 2009 provides for redress and accountability against superiors or public office holders that order, support or are acquiescent in the commission of the offence of enforced disappearance. In the context of the offence of enforced disappearance, under the Crimes Act of 2009, a superior holding public office that orders, supports or is acquiescent is liable to prosecution for the offence of abuse of office which entails a maximum penalty of 10 years. Section 139 of the Crimes Act 2009 provides as follows:

Abuse of office

139. *A person commits an indictable offence which is triable summarily if, being employed in the public service, the person does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another. Penalty— 10 years imprisonment*

7. Consistent with the requirements of the Convention, section 45, 46, 48 and 49 of the Crimes Act of 2009 renders it an offence for persons to aid, abet, counsel or procure the commission of an offence including persons that conspire or incite others to commit an offence imputing criminal liability on joint offenders that commit an offence with a common unlawful purpose enabling all persons involved in the execution of an enforced disappearance to be held criminally responsible and liable; including those that effect the enforced disappearance upon the authority of superior orders as well as those that provide the authorization.
8. Further to the *Crimes Act of 2009*, the offence of enforced disappearance is further reinforced by the rights afforded to arrested and detained persons entrenched in the Bill of Rights of the Fijian Constitution. *Section 13 of the Constitution*, in particular, provides adequate legal safeguards for arrested and detained persons that render enforced disappearances repugnant in cases of a normal arrest or detention. Section 13(1) (c) affords every person who is arrested or detained the right:

to communicate with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under the scheme for legal aid by the Legal Aid Commission;

9. Section 13 (1) (f) requires that that are arrested and detained persons are

to be brought before a court as soon as reasonably possible, but in any case not later than 48 hours after the time of arrest, or that is not reasonably possible, as soon as possible thereafter;

10. Section 13 (1) (k) further recognises the right of arrested and detained persons

to communicate with, and be visited by,- (i) his or her spouse, partner or next-of-kin; and (ii) a religious counsellor or worker

11. Therefore, the offence of enforced disappearance would clearly constitute an interdiction of the constitutional rights of arrested and detained persons in the case of a normal arrest giving rise to grounds for constitutional redress against the State.
12. The Fijian Constitution also addresses, an equally legitimate concern of the Convention, enforced disappearance under the pretext of and justification on the grounds of emergency. Section 9 (3) provides that

If a person is detained pursuant to a measure authorised under a state of emergency-

- (a) *the person must, as soon as it is reasonably practicable and in any event within 7 days after the start of the detention, be given a statement in writing, in a language that the person understands, specifying the grounds of detention;*
- (b) *the person must be given the opportunity to communicate with, and to be visited by-*
 - i. *his or her spouse, partner or next-of-kin;*
 - ii. *a legal practitioner;*
 - iii. *a religious counsellor or a social worker; and*
 - iv. *a medical practitioner*
- (c) *the person must be given reasonable facilities to consult with a legal practitioner of his or her choice;*
- (d) *the detention must, within one month and thereafter at intervals of not more than one month, be reviewed by a court; and*
- (e) *at any review by a court, the person may appear in person or be represented by a legal practitioner.*

9(4) At any review of the detention under subsection (3), the court may make such orders as to the continued detention of the person.

13. In addition to the availability of the provisions for constitutional redress, the *Criminal Procedure Act of 2009* also provides an alternative mechanism for redress under the criminal jurisdiction of the High Court if a person is detained illegally or improperly. Section 280(b) of the *Criminal Procedure Act of 2009* provides the High Court with the power to issue directions of the nature of a *habeas corpus* to liberate illegally or improperly detained persons. This again is consistent with the Convention. Section 280(b) of the *Criminal Procedure Act of 2009* provides that:

280. — (1) The High Court may direct — ...

(b) that any person illegally or improperly detained in public or private custody be set at liberty;

14. The right of access to information guaranteed under section 25 (1) and further entrenched under section 150 of the Fijian Constitution provide an important safeguard on the right to seek information relevant to situations of enforced disappearance where government or public bodies refuse to divulge information on person detained or to even acknowledge the deprivation of liberty.

15. The passing of the *Information Act 2018* derived from section 150 of the Constitution provides members of the public with an avenue to exercise their right to access official information. The Act specifically identifies requests for information pertaining to the deprivation of a person's liberty as "urgent requests" under section 11 which provides as follows:

Urgent requests

11. Where the information requested in a request made under section 6 is strictly a matter of urgency concerning the life or liberty of a person, the particulars of the information specified in the request must, subject to this Act, be provided as soon as reasonably practicable from the receipt of the request and in the manner determined by the Commission.

16. Furthermore, in the event of a denial of access to information sought under the *Information Act 2018* by the relevant public authority, section 22 and section 25 of the Act has a further provision to apply to the Accountability and Transparency Commission to facilitate access to the information and thereafter, if dissatisfied with the decision of the Commission, to appeal to the High Court of Fiji on questions of law only.

Jurisprudence on Enforced Disappearance

17. It is imperative to note that since the establishment of the offence of enforced disappearance under the Crimes Act 2009, there has been no jurisprudence on the said provision. Moreover, since the assent of the Constitution, there has been no case of constitutional redress concerning enforced disappearance. The absence of jurisprudence, in this regard, is a vindication of the effective enforcement of the preventative measures entrenched in Fiji's laws in relation to enforced disappearances.

Recommendation

18. Taking full cognizance of the positive legal developments towards the protection of all persons from enforced disappearances in Fiji's domestic procedures including the reciprocal respect for their constitutional right of access to information and the rights of persons deprived of liberty, the Human Rights and Anti-Discrimination Commission foresees no impediment and therefore unconditionally supports Fiji's accession of the Convention.



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