

Missing persons internationally

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The issue of the missing, specifically in the context of International Humanitarian Law (IHL), is directly linked to the Geneva Conventions. However 2006 saw the adoption of a new International Convention for the Protection of All Persons From Enforced Disappearance. This article aims to explore the existing IHL that pertains to the missing, as well as how the new convention enhances this.

The missing specifically relates to “missing persons or persons unaccounted for, are those whose families are without news of them and/or are reported missing on the basis of reliable information, owing to armed conflict (international or non-international) or internal violence (internal disturbances, internal strife) and situations requiring a specifically neutral and independent institution and intermediary. The term family and relatives must be understood in their broadest sense, including family members and close friends and taking into account the cultural environment.” (ICRC report on the Missing 2003).

Basically “the missing” in the sense of IHL may be either dead or alive, but in all cases they are entitled to certain protection under the Geneva Conventions whether they are combatants or non-combatants. If they are alive, they may be either detained by the enemy or free, but are separated from their families by front lines or borders. The aim in any of these circumstances is that the status of the missing is resolved, that families have a right to know the fate of their loved ones. There are, therefore, a number of areas of the Geneva Conventions that specifically address all of these areas.



The Geneva Conventions and Additional Protocol I contain a number of provisions for the protection of all of the abovementioned victims, and they aim also to empower the International Committee of the Red Cross (ICRC) in carrying out certain tasks in relation to the missing, these are primarily;

1) Forwarding family messages and other information (Art. 25, Fourth Convention). This includes:

- Receiving/ registering prisoner-of-war capture cards and civilian internment cards, duplicates of these cards being sent to captives families;
- Forwarding mail between people deprived of their freedom and families;
- Forwarding family news (Red Cross messages) between separated members of a family when normal postal channels are unreliable;
- Receiving and transmitting death notices.

2) Inquiring into the whereabouts of

missing persons (Art. 33, Protocol I; and Art. 26, Fourth Convention).

3) Reuniting dispersed families (See Art. 74, Protocol I; and Art. 26, Fourth Convention).

The Third Geneva Convention (Art. 122) states that upon the outbreak of hostilities, each neutral or belligerent power that has enemy nationals on its territory must set up an official information bureau for the prisoners of war there. Each belligerent power must inform its own information bureau of all prisoners captured by its forces and provide the bureau with every available detail concerning the identity of these prisoners, so that their next-of-kin can be advised as quickly as possible. If there is no such bureau, as is often the case in conflicts, the ICRC itself undertakes to gather information on people protected by the Geneva Conventions.

Central Tracing Agency

A Central Prisoners of War

Continued page 28

Missing persons internationally...cont.

Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organisation of such an Agency. The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as quickly as possible to the country of origin of the prisoners of war or to the Power on which they depend (...). (Art. 123, Third Convention)

Dispersed families

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible (...). (Art. 26, Fourth Convention)

Extract (Geneva Conventions & Additional Protocols).

Other international instruments exist that deal specifically with issues surrounding the missing, include;

- The Convention on the Rights of the Child;
- Universal Declaration on Human Rights;
- 1951 Convention on Refugees;
- Organization of African Unity (OAU) Convention;
- 1984 Cartagena Declaration;
- ICC statute (2001 came into force) - Crimes against Humanity – can be committed in both war and peacetime (Article 7 of the Statute of the ICC 17th July 1998 lists enforced disappearances as a crime against humanity.);
- Dayton Accord (specific to missing in relation to Balkan's

conflict); and

- Convention for the Protection of all Persons from Enforced Disappearance (adopted 2006 by UN general assembly December 2006, but not yet in force).

The essential difference in relation to all of these varying laws, accords and conventions is specifically related to which body of law they work within: eg. refugee law, IHL, or human rights law.

IHL is designed to regulate conduct of hostilities in armed conflict, and protection of victims and those no longer taking part in hostilities. Thus, only disappearances that occur in conflict are regulated by IHL. Human rights law imposes standards – mostly for governments and their treatment of individuals and refugee law focus is protection of those that have fled their countries. This in many ways is why the Convention for the Protection of all Persons from Enforced Disappearance will be so significant in terms of dealing with specific areas related to the changing nature of conflict on the international stage.

In some ways, this convention does overlap with aspects of the Geneva Conventions, however the new Convention does not limit the scope of enforced disappearances to having to be conflict related.

The Convention was adopted in at the UN General Assembly in 2006. This convention is not yet in force given that a total of 20 countries have to ratify and become parties to the convention. Currently as of April 2008, a total of 72 countries are signatories with three of those party to the convention. The convention is the first universally binding treaty that defines enforced disappearance as a human rights violation and prohibits it.

Enforced disappearance has been defined briefly, as the abduction or deprivation of liberty of a person by state authorities, followed by the denial of those authorities to disclose the whereabouts or fate of the person. To stop the occurrences of enforced disappearance, the convention has four main aspects:

- Awareness of the seriousness of the act of enforced disappearances and the act constituting a crime against humanity.
- Determination to prevent enforced disappearance and combat impunity to the act.
- Consideration of the right of a person not to become subject to enforced disappearance and the right to justice and reparation.
- Affirming the right to truth about circumstance and fate of a person who has been disappeared.

This therefore requires states to incorporate the crime of enforced disappearance into their own legislation, and assist in the process of justice to the victims. It enshrines the right to know what has happened and recognises that this is important in terms of preventing disappearances, at the same time alleviating suffering of those detained. It outlaws secret detention and the process of rendition and requires that all states hold detainees in officially recognised places of detention and maintain up to date records, giving detainees the ability to communicate with their families and legal counsel. This also allows for competent authorities to have access to detainees which is also critical in prevention of enforced disappearances.

Really until 2006, the idea of enforced disappearances had only been seen in a very narrow construct in terms of violations of certain rights in existing treaties such as

freedom from torture, the right to Liberty or right to life. This specific convention characterises the idea of enforced disappearance as more than just the sum of those different areas, and shows that the issue is also about denying a persons existence, denying families knowledge and that the disappearances is itself a violation.

In real terms it can only ever be useful in the enforcement of human rights, if and when, it is implemented into national law and practice. The Geneva Conventions and additional protocols do deal with the area of the missing, and many of these areas, but in some ways its scope can be complemented with the implementation of this new convention to deal with the changing face of conflict on the world stage, as well as enshrine the issues of the missing more fully and comprehensively into human rights law.

According to the Advisory Service on IHL at the ICRC, there are calls for all necessary legislative, regulatory and practical measures to be taken to implement obligations arising from international humanitarian law, including obligations relative to the clarification of the fate of missing persons. It is important to note that all state parties are signatories of the Geneva Conventions – though not the two additional protocols. Australia is signatory to all. The issue with this relates to the idea that these obligations in domestic law are specifically directed towards conflict situations, but in the case of new humanitarian entrants (refugees) one may conceive that many of these individuals still have family members lost to them, alternatively those family members may not know the current location of those that have come to Australia as resettled refugees. Therefore there are implications in the idea of family unity in terms of domestic legislation as far as those areas of immigration law as well as issues



surrounding privacy legislation and its effect on the restoration of family links through tracing.

The context of the family weighs heavily in this idea that families have the “right” to know the fate of their loved ones. The idea of family is a fundamental unit within all societies entitled to protections both as a legal right and a fundamental principle by both society and the state. The idea of family unity and the right to it is more than just an idea as in the case of humanitarian migration, families are often very important in the process of resettlement. It has been recognised by the UNHCR that protection at its most basic level derives from, and builds upon, the material and support that family members give each other, and whilst families in the process of resettlement often rely on external agencies, it has been widely seen that those programs that develop the capacity of family members to care for their own are more successful than those that foster dependency. It is also clear that the trauma faced by refugees makes this support critical for success in the process of resettlement.

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Continued page 47

Criminal law – Appeals – Failure of judge hearing trial to give adequate reasons – Miscarriage of justice

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Constitutional law – Legislative powers – Acquisition of property – Provisions of *Trade Practices Act* requiring access be granted to infrastructure

In *Telstra Corporation v Commonwealth* [2008] HCA 7 (6 March 2008) all members of the High Court in a joint judgment concluded that the provisions of Part XIC of the *Trade Practices Act* that required Telstra (as the owner of “local loops” in the telephone system that was infrastructure that was a “declared” service) to grant access to others on terms that were agreed or imposed by the ACCC were not invalid as an acquisition of property on other than just terms contrary to the Constitution s51(xxxi).

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