

# *Enforced Disappearances in Jammu and Kashmir*

- APDP -

## **1. Introduction**

### **(a) Status of enforced Disappearances after the 50th Anniversary of the Universal Declaration on Human Rights.**

Fifty years ago, during the Second World War, in Nazi Germany enforced disappearances were born as a practice against Jews and Communists. The Report of the Working Group on Enforced Disappearances, states that this practice, until today, has expanded to 63 countries of the world.

Actually, enforced disappearances have turned into a worldwide practice. Originally implemented in Latin America to repress dissenting political groups, whether legal or illegal, this practice expanded from harming selectively individuals, to be used against the civil population as a whole, which is today the most affected.

In the past, only military dictatorships were known for this practice. Today however, they are commonplace under any type of political regime, even under formal democracies, and in situations of armed conflict, of ethnic or religious “cleansing”, or declared international conflict.

### **(b) The situation of human right defenders and those who struggle against enforced disappearances.**

Fifty years after the adoption of the Universal Declaration on Human Rights the struggle of civil society against the practice of enforced disappearance has been responded with the same cruelty as the enforced disappearance itself. During 1997, human rights defenders were victims of enforced disappearance, of summary execution, of arbitrary imprisonment, of death threats, of exile and of internal displacement in many countries. Examples are the assassination of Monsignor Jose Gerald in Guatemala, the Colombian lawyer Dr. Eduardo Umana who testified and collaborated directly with the Working Group, the attempted murder of Akim Birdal, president of the Human Rights Association in Turkey, and the death threats against Mrs. Sofia Macher from Peru. In Indian State of Punjab and Assam, Human Right Defender, Jaswant Singh Kalra and Parag Das were eliminated by the state. In Kashmir, H.N. Wanchoo, Dr. Ashai, Dr. Guroo, Galilee Andrabi, got killed, while campaigning against human right violations.

### **(c) Role of the Working Group on Enforced or Involuntary Disappearances.**

In this context AFAD report to the Working Group during its session held in the July 14-1998, we are convinced that the role of the Group is of vital importance to the determination of the fate and the whereabouts of victims of enforced disappearances.

We agree with the conclusions of the Group’s report to the 54th Commission on Human Rights, in the sense that:

*“Impunity is one of the root causes of enforced disappearances, and at the same time one of the major obstacles to clarifying past cases. That is why the*

*declaration obliges States to make all acts of enforced disappearance offenses under domestic criminal law, to promptly, thoroughly and impartially investigate any allegation of Enforced Disappearances and to bring the perpetrators to justice”.*

As asserted by the Group in its Report on Amnesty laws,

*“In some States with a high number of outstanding cases, families of missing persons demand as a precondition for a lasting solution to this problem, that governments comply with their obligations under the Declaration to carry out thorough investigations, to inform the public of the outcome of such investigations and to punish the perpetrators.”*

#### **(d) Figures of enforced disappearances**

But regardless of the feeling of impotence, there still remain needs to be satisfied and gaps to be overcome. One of them is for the Group’s report to show the real quantitative and qualitative dimension of the enforced disappearances. One of our concerns is, that meanwhile on one hand the Working Group’s mandate is weakened with the adoption of partial forms of clarification, particularly of the so-called “old cases” - those of the seventies - and the inaction of the sources, on the other hand, the figure of 43980 disappearances, registered by the Group as pending cases, don’t reflect the whole quantitative dimension of enforced disappearances registered and denounced by non-governmental organisations.

The number of cases registered by non-governmental organizations is considerably higher than the number of cases registered by the Group. This discrepancy stems from the fact that some enforced disappearances are registered at the national level but never reported to the Group. Sometimes, the reports submitted do not meet the Group’s criteria. Other times, the person first reported as missing appears later killed. In the later case, the fact of finding a person’s corpse does not change the essence of the crime committed before the homicide took place. This means that the crime of enforced disappearance still remains and should be investigated.

As a result, these not registered, but real cases of enforced disappearances do not figure as a part of the Group’s data and remains invisible in the official statistics of the United Nations.

It is a matter of serious concern that the practice of enforced disappearances has been extended to international conflicts and is carried out in these circumstances a massive and systematic manner.

## **2. Enforced Disappearances in Asia**

Though, the Enforced Disappearance is a global phenomenon but mostly it exists in the under developed countries. In Asia involuntary disappearances, are happening, even possibly in greater number than that of the other parts of the world. In Philippines during President Marcos and his successors President Corrosion Aquino and Fidel Ramos, 1640 cases of disappearances in the country have still remained unresolved. In South Korea during Kwangju appraising 2000 disappearances took place. In Srilanka, which has the largest number of documented cases of disappearances. Amnesty International has a record of sixty thousand cases from 1988 to 1994. Involuntary disappearances continue to be unresolved Phenomena, despite the three visits made by the United Nations Working Group on Enforced Disappearances in the country. In Thailand in May 1992 event resulting

from a *coup-d'etat* of the military against a corrupt government also caused the deaths, disappearances, and injuries of six thousand innocent people of Thailand. In Indonesia during 32 years of dictatorial regime of President Suharto in the areas of Aceh, Lampung, Tanjung, Eriok, Jakarta, Iriangaya with countless cases in East Timor. In Maluku alone, the horizontal conflict between the Christians and Muslims resulted in more than 3000 cases of killings and disappearances; most of them were perpetuated by military. In Cambodia whose record of human right violations surpasses that of many other countries of the world has an estimated number of 3 million undocumented cases of disappearances. In Burma the phenomenon of disappearances often takes place in the context of forced labour and forced pottering. However disappearances in Burma, continued to be difficult to monitor due to strict censorship by the SLORC (State Law and Order Restoration Council) on communications send from the country and because of the fear of the victims relatives to report the cases.

In India Enforced disappearances have taken place in the North East states reeling under armed conflict, like Nagaland, Mizoram, Manipur, Assam. The Disappearances in the state of Punjab since 1985 to 1997 were documented by the different Human Right organisations, including the Committee for Coordination on Disappearances in Punjab. Where in its interim report titled as *Enforced Disappearances, Arbitrary Executions and Secret Cremations* have provided the complete data of disappeared persons in Punjab.

### **3. Disappearances in Jammu and Kashmir**

The phenomenon of enforced disappearances emerged in Kashmir after 1989, after the outbreak of armed conflict. The heavily deployed security forces (more than six hundred thousand, the highest number of army during peacetime anywhere in the world)

during its campaign against combatant Kashmiris has resorted to different forms of human right violations like extra-judicial executions, custodial deaths, custodial torture, rapes, forced labour, **including the Disappearances**. As security forces suspect every Kashmiri so due to promiscuous arrests of the non-combatant Kashmiris and subsequent tortures has resulted in the disappearances from last 11 years. People from all spheres of life and different age groups, from 10 years to seventy years after their arrests have got disappeared. Militants, their sympathizers, political activists and large number of innocent persons have become the victims of E.D. It is reported that more than 2000 people since 1989, after their arrests by the law enforcing agencies have disappeared. And the disappearances have taken place during the Governors as well as civilian rule imposed in state since 1989 by the Government of India.

#### **(a) APDP**

The APDP was founded in 1994, when large number of parents used to visit the High court to file or to pursue the *Habeas Corpus* petitions. The relatives used to take the individual efforts in a disorganised manner. Finally the Patron, a practicing

lawyer and a Human Rights activist with the help of chairperson, herself the victim of Enforced disappearances put them on collective forum for collective efforts. The APDP technically is not a human right group but the association of the sufferers wronged by the functioning of the state, who are campaigning for knowing the whereabouts of their missing relatives. Any person victim of the disappearances could be the member of the association. The association has no political affiliations or political positions. It is an independent group seeking justice from the state. At the time of the formation of the association the APDP was not acquainted with this fact that there are identical organisations operating in different parts of world, the most famous were the Mothers of Plaza de Mayo, Argentina

FEDEFAM, Latin American Federation of Association of Relatives of Disappeared Detenués, Mothers of Saturday, Turkey, Disappeared persons of Algeria. After the support from Amnesty International and Linking Solidarity the Association got linked with the associations in Asia like FIND (Families of Involuntary Disappearances) Philippines, Organisation of Parents and Family Members of the Disappeared, Srilanka, Relatives Committee of the May 1992 Heroes- Indonesia, KontraS-Indonesia. After interacting with them the AFAD (Asian Federation Against Involuntary Disappearances) was launched in May 1998 in Manila. The APDP is the founding member of the AFAD. AFAD is a human rights federation of organisations concerned on the issue of disappearances in Asia. The main object of AFAD is to build, develop and promote international solidarity among organisations of families of disappeared, within Asia and to work for the adoption of international instruments in UN and inter American systems aimed at preventing enforced disappearances such as the United Nations Declarations on the Protection of All Persons From Enforced or Involuntary Disappearances (UNDPAPFEID) and the Draft Convention on the Protection of All Persons From Enforced or Involuntary Disappearances. The APDP as a constituent of the AFAD has attended few meetings in different countries like Manila, Bangkok, Srilanka etc. The resolution has been passed expressing grave concern over the disappearances in Kashmir.

The problems faced by the victims of the Enforced disappearances are multiple. The majority of E.D. victims are from the underdog community of the society who are mostly ignorant of their rights. Whenever a person is arrested, during raids or routine patrolling or during cordon and search operations (Crackdowns), the relatives of arrestee exhaust all the extra judicial remedies to locate their dear ones. First the law enforcing officials are approached to know the whereabouts, which invariably assure them that the detenués will be released shortly. After few visits of the helpless relatives they are “politely” told that they did not arrest the detenué at all. The relatives in a desperate state approach the other security officials for the help. They move from pillar to post. They move applications to the civil authorities including Deputy Commissioner and Divisional Commissioner. Some of them approach the politicians of different political parties who seem to be equally helpless. The police officials invariably hesitate to file a FIR against the security forces. These exhausted endeavors cost lot of money. In most of the cases the relatives have spend lakhs of rupees to know the whereabouts of there missing ones. The relatives travel different interrogation centers in the state and outside the state. The relatives at the first instant are hesitant to seek the judicial remedy, as it will endanger the life of the detenué. Finally with the passage of time exhausting all the channels the dejected, desperate relatives take the legal recourse.

The disappearances have economical dimensions. The disappearance of the earning member of the family threatens the very existence of the whole family and the

half widows with the passage of time either is deserted from their in-laws along with their children. They become burden on their parents and this economical dependence affects the education and the future of their children.

Besides the economical instability the relatives suffer from the constant agony, trans-generational trauma, and post traumatic stress disorder. They cease to have the normal existence. With the passage of time they suffer from different physiological and psychological disorders. With no organised institutions to help them in the state finally they resign to their fate.

## **(b) REMEDIES:**

*De-facto* remedies are available but *dejure* no remedies are available from the state. The Govt. has not acknowledged the phenomenon of disappearances in the state. So they have not addressed the issue. The civilian Govt. after coming to power in 1996 blamed the previous governments for the disappearances in the past. In past the Deputy Commissioners of different districts in the state had through a public notification invited the applications from the relatives for providing the details of the missing persons. With lot of hope the relatives responded but without any results. Nothing tangible was done. When civilian Govt. took over in 1996, contrary to the expectations that enforced disappearances will stop but the disappearances continued unabatedly. It has increased alarmingly this year. The Div. Commissioner Kashmir Mr. Khurshid Ganai through a public notification published in the local dailies advised the *people to seek the help of civil administration in case any member of their family disappears suddenly or is arrested by the security forces and task force.*

In the public statement Div. Commissioner directed *the people to immediately register a complaint with the concerned police station and request for information about their whereabouts and safety. Simultaneously, they must approach the senior officials of the civil administration including the deputy commissioners, sub-divisional magistrates, tehsildars and if need be even the divisional commissioner.*

Div. Commissioner further stated *that directions have been issued to all deputy commissioners that they must make themselves and their subordinate magistrates available to hear complaints and receive reports of such nature and subsequently intervene effectively to have the picked up persons released in case he or she is innocent. They must also ensure that the arrested persons, if they are not involved in militancy, are not harmed.*

Div. Commissioner stated *the deputy commissioners have also been directed to hold meetings of the district level coordination committee regularly and sought out complaints regarding arrests of innocent civilians and harassment to ordinary people during searches, checking of vehicles and anti militancy operations.*

And the government has issued a circular, which reads as:

*In continuation of Government Order No.723-GR-GAD of 1990 dated 10-7-1990 read with Government Order No.1073-GR of 1990 dated 19-11-1990, the following norms may be kept in view by the concerned while recommending the cases for grant of ex-gratia relief to persons who are reportedly missing or his body has not been identified: -*

(a) *The District Magistrate will place such cases before the **District Screening-Cum- Coordination Committee** where representatives of security forces, police are participants. The committee should decide that it can be presumed that the person is*

*dead and ex-gratia relief should be recommended by District Magistrate saying that Screening Committee has cleared him. This will also clear the case from the standpoint of the involvement of the missing persons in any militancy-related activity.*

*(b) The District Magistrate while recommending the case will furnish an indemnity bond as well as surety bond of a Person of substance to the effect that the amount of ex-gratia relief shall be refunded in the event of any subsequent event which proved that the death had not in fact taken place.*

*(c) A certificate should be furnished by the District Magistrate to the effect that the NOK's of the missing person are not involved in any militancy-related activities.*

The relatives of the E.D.P families had provided the details to the deputy commissioner's office way back in 1996 when they were asked to do so but without any results. They did so half-heartedly this year before the office of Div. Commissioner but nothing tangible was done. The Div. Commissioner in a meeting with Chairperson of APDP admitted that the administration is helpless to prevent the enforced disappearances or to locate the missing persons, however the efforts could be made for ex-gratia relief. The government has issued two SRO's, where in the people getting killed in militancy related incidents but not related with the militancy, are entitled to an ex-gratia relief of 1 lakh for which an NOC certificate has to be obtained from the concerned police stations regarding the non involvement of the deceased / victim with the ongoing militancy. Wide SRO 43, on compassionate grounds the nearest relative is being appointed in Govt. jobs.

The Govt. circular dated 12-7-1999 is ambiguous and arbitrary. The District Screening-Cum-Coordination Committee (D.S.C.C.C.) is composed of the very perpetrators of disappearances and due to lack of transparency and non-participation of the victims the very functioning of the committee is questionable. No parameters have been laid to qualify the missing persons. D.S.C.C.C. is working in secrecy and very few people are beneficiary of this executive order.

### **(c) Role of Judiciary**

The judiciary was the only institution of the state on which people had reposed faith. Since 1990, there were thousands of *Habeas Corpus* petitions instituted before the J&K High Court by the people, only with the passage of time to get disillusioned with the time consuming process of the judiciary. Like truth the judiciary became also the casualty of the armed conflict. The orders passed by the judges were seldom complied by the executive, compelling one of the judges to observe in October 1994, in petition No. 850/94 “ ***There is total break down of law and order machinery. I shall not feel shy to say that this court has been made helpless by the so-called law enforcing agencies. Nobody bothers to obey the order of the Court. Thousands of directions have given to top administrative and law enforcing agencies which have not been responded to***”.

In the early 90's relatives of E.D. with lot of hope and expectations were approaching to the High Court for justice but justice seem to be a mirage to them. Though the lawyers of the J&K High Court Bar Association were not charging any fee in these petitions but with the passage of time the majority of lawyers lost interest in free briefs. The disillusioned relatives also lost interest to pursue their cases as the cumbersome judicial process had added their agony, only to the advantage of the state Govt., the majority of the petitions due to non-persuasion got dismissed. Only some determined relatives are still fighting their cases. Some of them are fighting legal battle from more than 10 years including the Chairperson (whose son Javed Ahmed

Ahanger who was arrested in 1990). The relatives of the recent E.D.P. are now hesitant to file the petitions. The most deplorable has been the role of the High Court Judges who have behaved more executive than the executive and their conduct has given impression to the people that Judiciary in state is disgracefully prejudice towards Kashmiris and is behaving like the colonial judicial system.

#### **(d) State Human Right Commission (SHRC)**

The Govt. controlled State Human Right Commission has no mandate over the security forces and is only a recommendatory body. It behaves like any other state commissions. This toothless institution has in few cases recommended ex-gratia relief of 1 lakh to the Govt but seldom the Govt. pays compensation to the victims. It is believed that the institution is a fig leaf for the Govt. before the growing International humanitarian concern about human rights excesses in Kashmir. The people who have been the part of coterie & caucus are manning this institution. It is a Club of Superannuated Judges and Police official. Notwithstanding more than 200 hundred people have filed complaints before the institution including the victims of ED. The SHRC has forwarded more than 100 complaints to the NHRC (National Human Right Commission) in the cases where the allegations against the security forces are involved and the victims of ED are being directed to pursue their cases at Delhi, nevertheless NHRC has equally no mandate over the military and paramilitary forces. The NHRC is seeking the amendment in The Protection of (Human Rights) Act for extending their mandate over the security forces.

#### **(e) Strategies**

(1) The APDP is giving more emphasis on extra judicial remedies. The top priority is documentation of the missing persons. Since 1990, believed to be more than 2200, taken place during three gubernatorial regimes of Jagmohan, G.C. Saxena, and General Krishna Rao and so called civilian government of Farooq Abdullah. For this gigantic task lot of Human and material resources are required, but for a credible documentation the most important thing is the cooperation of the relatives who have a right to know what happened to their dear ones after their arrests by the security forces. Since the relatives are ignorant about their rights, the APDP shall campaign for educating them about their legal rights. Only the collective efforts could force the government to address this humane issue. The APDP will further lobby with the press, which has been cooperative at local level, but the metropolitan press has remained uncooperative. Besides this the International press is to be further apprised about this worst form of human rights violation not permissible even in war times in the state of J&K.

(2) The Amnesty International has already opened an Action File on APDP and all the groups of Amnesty International in different countries have been expressing their concern time to time to the Indian Govt. and the State Govt. about the continued disappearances in the valley and also their concern about the security of the APDP activists.

(3) The APDP is lobbying with the independent Indian Human Right organisations to campaign against disappearances in Kashmir. Since APDP was founded, due to different reasons the required work has not been done as the association gives prime importance to the safety of the relatives. After the last press conference in July 1998, the unidentified gunmen along with her son killed next day

one of the female member Halima. In this incident her daughter got also severely injured. Since the ED are continuing unabatedly in the state, dispelling the optimism that in Civilian Govt. it will get minimized or stopped, the association has decided to adopt proactive approach for stopping altogether the inhuman practice.

#### **4. Recommendations**

(1) As in other Asian countries the Governments have appointed Commissions for the investigation of the disappearances. Srilankan Govt. has appointed four commissions and four high-armed officials including the rank of a brigadier have been sentenced life imprisonment by the Srilankan Court. The association recommends for appointment of a Commission under the Commissions of Inquiry Act to investigate all the Enforced Disappearances, which has taken, place since 1990 in J&K. The Commission be headed by a reputed High Court or Supreme Court judge.

(2) The association recommends for repealing the impunity laws like section 6 of The Armed Forces (Special Powers) Act. The impunity laws, which prevent the accountability from the perpetrators, are the major factor behind the ED. The impunity that empowers the law enforcing officials to resort to all sort of human right violations are to be withdrawn. A powerful campaign is needed in this behalf.

(3) The association is approaching to the United Nations Working Group on Enforced or Involuntary Disappearances to visit Kashmir as the same has made three visits to Srilanka. We reiterate our demand that the United Nation expedite the process of the ratification of the Draft Convention on the Protection of All Persons From or Involuntary Disappearances and the Rome Statute on the International Criminal Court so that those who were involved in these incidents may finally face prosecution.

(4) The association recommends the Chief Justice of the J&K High Court to opponent a bench exclusively to deal with the cases of the missing persons on weekly bases.

(5) There should be institutional safeguard for the custodial disappearances. The concerned Session Judge of the districts in J&K should be empowered to conduct an investigation in any allegations made, within his jurisdiction.

(6) The Govt. should amend the Govt. order no. 723-GR-GAD of 1990 to the extent that any person alleged to be missing should be paid the ex-gratia relief within reasonable time.

(7) The association recommends that the 14-point recommendations made by Amnesty be adopted.

(8) International Human Rights organisations, like Amnesty International, Asia Watch to be allowed to visit J&K.

Amnesty has been allowed to visit Turkey, Ruwanda, Iran, Combodia, Egypt, Pakistan, Romania, Argentina, Chile, Croatia, Sierra Leone, Russian federation, Morocco, Israel / occupied territories, Palestinian Authority, Hungary, Kyrgyzstan, Kazakstan, Nepal, most of these are non democratic countries. Preventing Amnesty and Asia Watch (Human Right Watch) from visiting Kashmir, which is reeling under armed conflict from last 10 years in which reportedly more than 70,000 people have got killed and there is a growing International Humanitarian concern about the human right violations. It implies that the largest democracy is against the transparency and openness as far Kashmir is concerned.

(9) We also call on the respective governments, especially here in Asia, to draft a Regional Convention for the Protection of All Persons From Enforced Disappearances and adopt national laws that would criminalize such crime against humanity.

We must make both governments and the immediate perpetrators answerable for whatever wrongdoing that has been committed. Everyone must be made aware that tyranny cannot go unpunished though the perpetrator, be he a simple armed security force or the other higher state functionaries. What is important is that justice be meted out, truth be ferreted, perpetrators be prosecuted and families be indemnified. The process begins by assuaging our fears and saying to ourselves: “**Never again.....tyranny**”.

## **5. Appeal**

The association appeals to the local people that they should support the children of the economically deprived families of the disappeared persons directly. The association can be approached to provide the names of such families qualified to get such financial support. The association has decided to raise a monument in the memory of disappeared person's since 1990, for which the land is required. The association appeals to people for bequeath the land for this cause.

***We shall never allow the past to be forgotten and we shall never allow it to happen again to future generations. The justice we seek lies not in forgetting the past but in remembering those which should never be forgotten.***