



Academic Paper

RATIFICATION OF THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES

By:
Indonesian Coalition Against Enforced Disappearances

Commission for The Disappeared and Victims of Violence (KontraS)
Indonesian Association of Families of the Disappeared (IKOHI)
Indonesian Law and Policy Study (PSHK)
Human Rights Working Group (HRWG)
Indonesia Human Rights Monitor (Imparsial)
Institute for Policy Research dan Advocacy (Elsam)

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AGAINST ENFORCED DISAPPEARANCES



Bisma Petrus Anugerah

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CHAPTER I: INTRODUCTION

The crime of enforced disappearance as a violation of human rights began to raise attention of the international community in 1970s to the mid-1980s in Latin America. The military coup in many countries of the region resulted in tens of thousands people disappeared of which the regime in power always managed to avoid the responsibility, both to their own citizens as well as from the international pressure. Persecution and terror also simultaneously occurred in the region—known as “Operation Condor”—against those who endangered the military authoritarian regime, initially for political ideology reasons, and later evolved into solely the expression of arbitrary power.

In essence, the practice of enforced disappearance had applied long before the era of “Operation Condor” in Latin America. Systematically, this heinous practice began to be known widely as one of the Nazi regime’s practice of terror under Adolf Hitler’s orders, known as “*Nacht und Nebel Erlass*” (Night and Fog Decree) in the late 1941.¹ The name of “Night and Fog Decree” in itself has explained clearly the Nazi’s policy in their occupied territories, particularly in western Europe, to abduct and eliminate people who were accused or suspected—mostly activists or political oppositions—to threaten the Nazi regime in that region. In addition to suppressing the political opponents and eliminating their existence, this policy also aimed to terrorize and intimidate local people so they would not dare to resist or help the oppositions.² The decree was implemented by the Nazi to avoid international pressure and allow them to evade any International (law) mechanism, as well as to curb criticisms from the German public itself.³

Although the practice of forced disappearances became “popular” through the experiences of Latin America in the time of military authoritarian regime, the practices still take place in other places. United Nations Working Group on Enforced or Involuntary Disappearances (WGEID)⁴ in their regular reports always show the statistical findings in enforced disappearance cases since 1980, since its formation within the UN human rights mechanism. Their findings illustrate that the practice of enforced disappearances can occur in the context of territories of which the country experienced an internal armed conflict (Sri Lanka, Russia, Sudan, India and Nepal), besides its occurrence in other “normal” countries.⁵ This method was also used in the “war on terror” after 11 September 2001 incident in the United States. The suspected terrorists were arrested, detained and tortured in many secret detention centers.⁶ Since its formation, WGEID has

1 See the Decree at <http://www.yale.edu/lawweb/avalon/imt/nightfog.htm>.

2 Generally, the victims were taken to a detention center while awaiting execution. Nazi officials at the time believed that the punishments with the most severe deterrent effect were execution or enforced disappearance which have the effect of terror for the family or the general public because they do not know the whereabouts of the victim.

3 The practice of “Night and Fog Decree” was disclosed in the Nuremberg Tribunal—an international military tribunal to prosecute World War II Nazi war-criminals—in the trial Wilhelm Keitel (Commander of the Nazi-Germany Armed Forces) who were also primary responsible. Wilhelm Keitel was the first person convicted of the offence of enforced disappearance (but as part of “war crimes”, not as part of the “crimes against humanity. However, the exact number of victims of this enforced disappearance crime is unknown.

4 United Nations Working Group on Enforced Disappearances (WGEID) is a working group established by the UN Commission on Human Rights by Resolution 20 (XXXVI) on February 29th, 1980, with the mandate to examine all issues related to forced disappearance. WGEID’s mandate was renewed through Resolution A/HRC/16/16 which was adopted by the UN Human Rights Council in 2011.

5 WGEID report to the UN General Assembly on January 26, 2011, UN Doc. A/HRC/16/48, p. 140-149.

6 The findings are based on various formal investigations by the government for “extraordinary rendition” project under George W. Bush regime which disclosed a number of serious human rights violations. One of the investigations was conducted by the order of President Barack Obama. For the best study of secret detentions and their implications on human rights violations can be seen in the collective study with the UN Special Rapporteur, Martin Scheinin (UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism), Manfred Nowak (UN Special Rapporteur on Torture), Shaheen Sardar Ali (representing the UN Working Group on Arbitrary Detention), and Jeremy Sarkin (representing UN Working Group on Enforced or Involuntary Disappearances) in “Global Practice in Relation to Secret Detention in the Context of Countering Terrorism”, UN Doc. A/HRC/13/42, February 19, 2010. See also T. Scovazzi and G. Citroni, “The Struggle against

received 53,337 cases of complaints from the families of victims or their counselors, in which most of those cases (42,633 cases) have never been clarified by eighty three states concerned.⁷

Regarded as one of the most horrendous human rights abuses, the practice of enforced disappearance generated criticisms and induced one of the most popular human rights movements. Mothers of the Plaza de Mayo in Argentina is regarded as one of the most legendary icon of victims (or victims' family) movements. By virtue of their perseverance and courage—although using a simple method: weekly silent rally and virgil—this group of mothers are capable to induce the initiatives of others—both regionally and internationally—to fight the practice of enforced disappearance in Argentina and other parts of the world.⁸

Not stopping at the victims' families protest movement and other solidarity movements, the issue of enforced disappearance also encourage institutional change in international human rights mechanisms which was still relatively underdeveloped at that time compared to today. A working group within the UN human rights mechanisms, United Nations Working Group on Enforced or Involuntary Disappearances (WGEID)⁹ which was formed in 1980 to bridge the victims' voices and demands to their government through a multilateral forum, UN Human Rights Commission. Through WGEID, the legal gap of the international human rights instruments concerning enforced disappearances begun to be identified. At that time, enforced disappearance was not specifically regulated as an autonomous category of human rights violation. The final result was a separate convention draft on disappearances made by WGEID in 2006, which is the International Convention for the Protection of All Persons from Enforced Disappearance (CPED—herein after will be mentioned as "the Convention") which was adopted by the UN General Assembly Resolution (A/RES/61/177) on December 20th, 2006.¹⁰

Until the writing of this paper, the Convention has been entered into force since December 23, 2010 (after the ratification of the 20th country) with 29 State Parties and 88 signatories (including Indonesia).

Endorsement (ratification or accession) of the Convention clearly supported by the community of victims and human rights organizations in Indonesia. Interestingly, the Government of Indonesia indicated a positive commitment towards the Convention ratification. This can be seen in the various statements of state officials in a number of forums.¹¹ The House of Representatives (of 2004-2009 period) at the end of their term even recommended the ratification of the Convention as part of efforts to resolve the enforced disappearance cases of activists in 1997-1998. This positive effort gained one step ahead when

Enforced Disappearance and the 2007 United Nations Convention" (Martinus Nijhoff Publishers, Leiden, 2007), p. 62-72.

7 Ibid., p. 6. From the tens of thousands of these cases, WGEID did not receive complaints of disappearances allegedly committed by actors such as non-state terrorist or armed rebel groups.

8 Their popularity, for example, can be seen in the "tribute" of two internationally popular artists: Sting who composed "They Dance Alone" song and U2 with "Mothers of the Disappeared". Both composed in 1987. Whether intentional or not, because of the global campaign against enforce disappearance, the use of the word "disappear" in English language also changed, which used to be an intransitive verb into transitive verb, that now we can use the term "to be disappeared".

9 Supra note, no. 5.

10 Before the International Convention for the Protection of All Persons from Enforced Disappearances (CPED), Declaration for the Protection of All Persons from Enforced Disappearances transpired from the UN General Assembly Resolution in 1992, and two years later a regional instrument was formulated, which is Inter-American Convention on Forced Disappearances of Persons.

11 This statement was confirmed by then Minister of Foreign Affairs, Hassan Wirajuda—on June 22, 2006 in Geneve, Switzerland—when he represented Indonesia as a member of UN Human Rights Council which had been recently formed at that time to replace UN Human Rights Commission. See the complete statement at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/statements/indonesia.pdf>. Also see the statement of the Minister for Justice and Human Rights at that time, Hamid Awaluddin in "High-Level Segment of the 4th Session of the UN Human Rights Council", March 12, 2007, <http://www2.ohchr.org/english/bodies/hrcouncil/4session/statements/%285%29Indonesia.pdf>.

the Government of Indonesia, through the Minister of Foreign Affairs, Marty Natalegawa, signed the Convention on September 27th, 2010, at UN Headquarters, New York, United States.

In the context of Indonesia, the systemic human rights violations were not always identical with enforced disappearance, as happened in Latin America in the decades of 1970-1980. Only at the near end of Soeharto and the New Order regime, the practice of enforced disappearance became public concern. At that time, it was strongly suspected that 23 persons became victims of enforced disappearance because their political activities. Out of that number, 9 persons returned, one was found dead, and thirteen other are still missing. Although based on the quantity this number is not proportional to the number of disappeared persons in Latin America, the incident can be regarded as the trigger for political reform in Indonesia.¹²

Although the issue of enforced disappearance started to become public concern at the end of New Order regime, in reality the similar practice had occurred before. The practice of enforced disappearance allegedly occurred in the period of power transition from 'the Old Order' to 'the New Order' regime, in which the persecution against people accused of being "communist" or their sympathizers happened. Enforced disappearances also allegedly occurred during military operations and occupation of East Timor (1975-1999) and within several months around the 1999 referendum; the period of military operations in Aceh prior to the peace agreement in 2005; and in Papua region under military operation.¹³

Up to the present, the potential victims of enforced disappearance are regular civilians who tried to speak the truth and oppose the authoritarian regime conducted by the government. However, the criminal law in Indonesia unfortunately has yet to address the enforced disappearance as a criminal offence. Even if the Criminal Code (Kitab Undang-Undang Hukum Pidana/KUHP) regulated clauses on "kidnapping", the clauses only describe the act of crime that occurs between individuals/inter-individual and does not construct any element of the "state/authority" in it, which is certainly different from the definition of enforced disappearance in this Convention. This has become an obstacle in resolving cases of enforced disappearance and bring the perpetrators to justice.

For example, in the case of abduction and enforced disappearance of pro-democracy activists in 1997-1998, the Government through the Armed Forces Commander did eventually make an effort to uncover and resolve this case by establishing the Honorary Officers Council (Dewan Kehormatan Perwira/DKP), which later proved that the abductions and enforced disappearances were carried out by the Army Special Forces (Kopassus), involving several military and national police agencies. However, the perpetrators such as Lieutenant General (TNI) Prabowo, Maj. Gen. (TNI) Muchdi PR, and Col. Inf. Chairwan were only sentenced to administrative sanctions by the Government and did not followed up with a legal process.

The absence of punishment mechanisms against the perpetrators allegedly involved in cases of enforced disappearance became a major issue, considering that the crime of enforced disappearance is a continuous crime which might happen again in the future. Challenging the Government of Indonesia to immediately ratify the International Convention for the Protection of All Persons from Enforced Disappearance becomes something that needs collective campaign, including by civil society.

12 The impact of the abduction of those activist, for instance, resulted in repositioning of several high ranking military officers who played major roles in determining the political configuration at that transitional time.

13 The lack of a formal mechanism to disclose the truth (right to truth) resulting in difficulties to confirm and inquire for explanation regarding the practice of enforced disappearance in this country which is important to prevent repetition.

CHAPTER II : THE IMMEDIATE NEED FOR RATIFICATION OF THE CONVENTION

II.1. The absence of specific definition for the crime of “enforced disappearance” in Indonesia’s legislations

The most important aspect in the commencement of this Convention is the specific definition of the crime of enforced disappearance as a human rights violation and put its status as an independent crime of human rights violation among other violations.¹⁴ Previously, enforced disappearance was considered as a combination of various human rights violations, such as the right to life, prohibition of torture, the right to personal integrity, the right to humane treatment during detention, the right as a subject of law, the right to fair trial and the right to effective remedy.¹⁵ The complexity of the crime of enforced disappearance and the effort to accumulate various types of human rights violations in practice led to various “definitions” of enforced disappearance, depending on the existing mechanism of human rights (body), both in international and regional levels.¹⁶

Until now, Indonesia has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance although the Convention has been signed by the Minister of Foreign Affairs, Marty Natalegawa, on September 27th, 2010. The immediate ratification is very important, considering that Indonesian legislation has no provision that explicitly regulates this crime. So far, enforced disappearance is mentioned in Article 33 Law No. 39 of 1999 (Law on Human Rights) which stipulates *“Everyone has the right to be free from enforced disappearance and the elimination of lives”*. However, the Law does not explicitly contain the definition nor the enforcement mechanism against enforced disappearance. Similarly, in the Penal Code (KUHP), there is no provision on the crime of enforced disappearance. This has become constraint on disclosing the cases of enforced disappearance.

If we take a look at Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance:

“For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

14 See Resolution of UN Human Rights Commission 2001/46, para. 11, requesting a study of international human rights experts to examine the gap between human rights law and international criminal law regarding the protection of all persons from enforced disappearance. The study was conducted by a well-known expert, Manfred Nowak. See the report, UN Doc. E/ CN.4/2002/71, January 8, 2002.

15 See Article 1(2) Declaration on the Protection of all Persons from Enforced Disappearance.

16 Aside from testing the provisions of legal instruments of human rights, humanitarian law (four of Geneva Conventions of 1949 and two of Additional Protocols 1977), and Rome Statute of International Criminal Court, Nowak also analyzed the verdicts of regional and international human rights bodies, such as Human Rights Committee, Inter-American Court of Human Rights, European Court of Human Rights, Human Rights Chamber for Bosnia and Herzegovina. Nowak, op cit, supra note no. 14, p. 10-21.

The definition above shows that there are several key-elements to the crime of enforced disappearance, such as:

- The involuntary deprivation of liberty of the victim ;¹⁷
- Actions including arrest, detention, abduction, or other forms of deprivation of liberty;
- Carried out by state actor/agent or by persons or groups of persons acting with the authorization, support or acquiescence of the State ;¹⁸
- Denial on the deprivation of liberty or concealment of the fate or the whereabouts of the missing person;
- Placing the victim outside the protection of the law.

The implication of the enforced disappearance practice on the victim is a possibility of their rights being violated and/or being subjected to torture. Furthermore, the possibility of their civil-political, economic, social and cultural rights also violated, although it's only facultative.

Before this Convention applied, only a few countries have similar provisions in their criminal law related to above definition of enforced disappearance, such as Colombia, Guatemala, Paraguay, Peru and Venezuela.¹⁹

The adoption of this Convention by the Government also shows the Government's seriousness to the victims' families who have fought and seek justice in the past thirteen years. For the victims' families, the need to know the whereabouts of their disappeared child or family member is something they cannot disregard although the regime might have changed.

II.2. The Convention for the Protection of All Persons from Enforced Disappearance in synergy with international humanitarian and criminal law

The conception of enforced disappearance as a crime is also regulated by international law, such as humanitarian law (Geneva Conventions and its Additional Protocols) and international criminal law (Rome Statute).

In the context of international humanitarian law, available in Four Geneva Conventions in 1949 and two Additional Protocols in 1977,²⁰ there is still a gap. In those humanitarian law, the parties which have to be protected during armed conflicts—both international and non-international—are the refugees, journalists, stateless persons or other categories in the status of “protected person” that when they fell into the hands of the opposing party they do not become citizens.²¹ Moreover, under those humanitarian laws, the provision of protection—related to the issue of enforced disappearance—for those categorized as “civilians and civilian population” also guarantees the right to life, freedom from torture, personal freedom,

17 The involuntary deprivation of liberty element of the victim is important to distinguish the crime of enforced disappearance by the practices of espionage in which an “agent” might be voluntarily arrested or imprisoned in order to infiltrate the enemy or looking for specific information.

18 This is a consequence of an agreement's character in which the legal subject is the State. On the other hand, humanitarian law (the Geneva Conventions and its Additional Protocols) and international criminal law (Rome Statute) also includes non state actors.

19 Nowak, op cit, supra note no. 14, p. 22 and UN Working Group on Enforced or Involuntary Disappearances, Addendum, Best Practices on Enforced Disappearances in Domestic Criminal Legislation Reports, A/HRC/16/48/Add.3, December 28, 2010, para. 19, p. 6.

20 These instruments regulates the protection of people and properties in times of armed conflict—either internal conflict/ non-international or conflict between states/international—which have nothing to do with the conflicting parties. Details of international humanitarian law can be seen at http://www.icrc.org/eng/resources/documents/misc/party_main_treaties.htm Indonesia has ratified the four Geneva Conventions, but none of the Additional Protocols.

21 Fourth Geneva Conventions, Article 4 and Additional Protocols I, Article 50.

the right to fair trial, the right to have family, the right for families to know the well-being of their relatives and children's rights.

However, international humanitarian law has different character compared to international human rights law. There are at least three differences: humanitarian law is a special provision which applies only in armed-conflict situations, provisions in humanitarian law bound both state actors and non-state actors involved in armed conflict, and humanitarian law knows no limits (derogation) of rights.²² In addition to character differences of the two international laws, in the humanitarian law perspective the term "enforced disappearance" is unknown. The term of "the missing/missing person" is better known in the humanitarian law which has a broader conceptual scope; of which a person missing during armed conflict can be caused by various factors (and motivations) that are a lot more complex than the concept of "enforced disappearance" according to the international human rights law.²³

The only clear definition of enforced disappearance which is similar to the definition in the Convention on the Protection of All Persons from Enforced Disappearance is written in the Rome Statute of the International Criminal Court which was adopted in July 1998 and entered into force in July 2002.²⁴ The Rome Statute is a codification of international criminal law that regulates the most serious crimes under international law, which also includes the gross and systematic human rights violations.²⁵ Since the beginning of the long discussion to draft the Rome Statute, various human rights groups including the relatives of the victims of enforced disappearance (FEDEFAM, The Latin American Federation of Associations for Relatives of the Detained-Disappeared) submitted a proposal to constitute enforced disappearance as a crime against humanity.²⁶

Eventually enforced disappearances were included in the Rome Statute as [Article 7(i)] one element in crime categories of crimes against humanity. However, it should be noted that enforced disappearance of persons as one element of the crimes against humanity had to be done as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".²⁷ The provision specifies that the scope of the crime (enforced disappearance) within the jurisdiction of the International Criminal Court (ICC) which occurs only in special situations (including war and peace) or have a "contextual elements", which is a widespread or systematic attack directed against any civilian population, and the perpetrator had the knowledge of the attack. 45 countries in the world have been nationally codified a systematic and widespread enforced disappearance as such, including Indonesia by the Law No. 26 Year 2000 on Human Rights Court. This number is far beyond the codification of "the regular crime of enforced disappearance".²⁸ The ICC jurisdiction could not reach the criminal acts of enforced disappearance which did not included

22 Nowak, *supra* note no. 14, p. 25. As the international human rights law applies both in times of armed conflict and peace, only binds state actors, and have provisions on derogable rights.

23 There is a special study regarding "missing persons" in the context of armed conflict, according to the UN Human Rights Council Resolution 7/28, March 28, 2008. Until now, this study has been twice developed, UN Doc. A/HRC/AC/6/2 and UN Doc. A/HRC/16/70. The scope of the study was clearly explained differently compared to the Convention on the Protection of All Persons from Enforced Disappearance.

24 Until now 114 States have ratified it and 34 have signed it. Indonesia has not signed nor ratified it, but there is a plan to do so, which has been listed in National Human Rights Action Plan (RANHAM) 2004-2009. A new RANHAM has not been issued. A small part of the Rome Statute provisions was adopted as the Law No. 26/2000 on Human Rights Court (two types of serious human rights violations; genocide and crimes against humanity, in which one of the elements is enforced disappearance).

25 Codification of international criminal law began in Nuremberg and Tokyo (Military) Court to prosecute war criminals and perpetrators of crimes against humanity during World War II, and developed further by the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (International Criminal Tribunal for Rwanda (ICTR)).

26 Nowak, *op cit*, *supra* note no. 14, p. 28.

27 Rome Statute, Article 7(1): "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: ..."

28 UN Working Group on Enforced or Involuntary Disappearances, Addendum, Best Practices on Enforced Disappearances in Domestic Criminal Legislation, A/HRC/16/48/Add.3, December 28, 2010, para. 13, p. 5.

within the category of crimes against humanity (not a widespread or systematic attack directed against any civilian population). Furthermore, the ICC jurisdiction reaches the individual responsibility in which the perpetrators also includes non-state actors, which in Rome Statute referred to as “political organization”.²⁹

The Convention for the Protection of All Persons from Enforced Disappearance affirms (Article 5) “the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.” That is, the Convention implicitly acknowledges the distinction between acts of enforced disappearance and the widespread or systematic enforced disappearance practices which fall into the category of crimes against humanity.

In addition, Article 1 (2) of the Convention also asserts that the right not to be subjected to enforced disappearance is a “non-derogable rights”, the right which cannot be reduced and restricted in any emergency situation, including in times of war or armed conflict (international and non-international). In this context, the Convention for the Protection of All Persons from Enforced Disappearance shows synergy with humanitarian law and international criminal law.

The legally binding reference regarding “the right to know the truth” might only be found in Article 32 of Geneva Conventions Additional Protocol Referensi 1977 which defines “the right of families to know the fate of their relatives”. The provisions of the right to know the truth in the Convention ensure a broader application than the 1977 Additional Protocol, particularly in 3 (three) aspects:

1. Additional Protocols of 1977 was set down at the realm of international humanitarian law that applies only in situations of armed conflict;
2. The right to know the truth applies to “any victim” which has broader meaning than just “family/relatives” as set forth in the Additional Protocols of 1977;
3. The right to know the truth is not limited on the “fate” of the missing person but also the situation of enforced disappearance, the progress and results of the investigation of the disappearance.

II.3. The International Convention for Protection of All Persons from Enforced Disappearance contains definitions of victims and victims’ rights

The Convention for the Protection of All Persons from Enforced Disappearance has made a break through by defining “any individual who has suffered loss as a direct result of action as well as victims of enforced disappearance”.³⁰ Family members or relatives of victims and sometimes the general community can be declared as victim either because of the deep sadness they experienced or the terror and fear for recurrence. Which means, the Convention also acknowledges families who have suffered as an independent category of victims. Article 24 (1) of the convention indicates:

“For the purposes of this Convention, “victim” means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”.

This comprehensive definition of victims was never explicitly set by any international human rights treaty and only regulated by an instrument that is not legally binding, which is the “Basic Principles and

29 Rome Statute, Article 7[2(i)]. Aside from that, since 2002 ICC developed the “Elements of Crimes” to elaborate on enforced disappearance as a crime against humanity with an explanation (which is problematic, where there are elements of the perpetrator’s motives such as “aware that the act of enforced disappearance is intended to remove the victim from the protection of the law for a prolonged period of time.” The element of the perpetrator’s intention to remove the victim from the protection of the law is difficult to prove; as well as proving quantitatively “a long period of time.”

30 The Convention for the Protection of All Persons from Enforced Disappearance, Article 24(1).

Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law".³¹ This definition was developed into a provision of the Convention based on the case law from the human rights bodies and international/regional courts.³²

In addition, efforts to expand the scope of the definition of victim is also developed further with considerations for human rights defenders who fight for these issues and advocate the victims. In practice, human rights defenders often become victims of human rights violation as the result of their advocacy works.³³ The convention specifies it in Article 24 (7):

"Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance".

Interestingly, the above stipulation was included into the Convention based on the murder of Munir, the prominent figure of human rights in Indonesia who was identical with the issue of enforced disappearance in the country.³⁴

Other than regulates the definition of victims, the Convention also progressively asserts the (victims') human rights which has never been explicitly stated in any international human rights instrument before; the right to know the truth.³⁵ Article 24 (2) affirms this right to know the truth:

"Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard".

In the meantime, the State, as the duty bearer of human rights, must "take all appropriate measures" [Article 24 (3)] to "search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains." The right to know the truth has also emerged as a consequence of numerous "truth commissions" which was established to unveil massive human rights violations, including the systemic practice of enforced disappearance.³⁶

31 Adopted by UN General Assembly resolution 60/147, December 16, 2005.

32 Nowak, *op cit*, *supra* note no. 14, p. 33.

33 UN Working Group on Enforced or Involuntary Disappearances Report, UN Doc. E/CN.4/2006/56, December 27, 2005, para. 35-36, p. 14.

34 Among those who were involved in drafting the Convention was AFAD—the organization for families of the disappeared in Asia-Pacific in which Munir was their president when he was killed—call it "the Munir clause" because this provision was proposed to prevent similar incident

35 Conception of the right to truth is the evolution result of the international human rights law in the context of right to effective remedy, an explicit concept of this right can be seen in the International Covenant on Civil and Political Rights (ICCPR) Article 2(3), in the context of systematic and serious human rights violations. There is a specific study on the right to truth: E/CN.4/2006/91, February 8, 2006 and A/HRC/15/33, July 28, 2010. The right to truth should be distinguished—although both have overlapping roles—with the right to information in the context in Article 19, ICCPR. The right to information as part of the right of expression, to seek, receive and convey informations included in the category of derogable rights, the rights which can be limited and reduced in certain emergency situation. Meanwhile, the right to the truth as part of the right to effective remedy, can not be limited or reduce in any given situation. See "Study on the Right to the Truth", E/CN.4/2006/91, February 8, 2006, para. 42-44, p. 12.

36 These non-judicial commissions have been established in dozens of post-conflict or post-authoritarian regime States, with varying mandates. Truth commissions in many Latin America States are specifically formed to resolve issues of systematic enforced disappearances. Of the various existing differences, generally the mandate is: to focus on the massive crimes that occurred in the past (in the authoritarian regime or in the internal armed conflict); focus on the search for crime patterns; and non-permanent (with a period of duty). Generally the recommendation from these truth commissions—in the context

In addition to the right to know the truth, in this Convention, victims also entitled to “reparation and prompt, fair and adequate compensation.” [Article 24 (4)], which includes “material and moral damages” in forms of “restitution; rehabilitation; satisfaction, including restoration of dignity and reputation; and guarantees of non repetition.” [Article 24 (5)].

As further concern for the well-being of the disappeared’s family members, the Convention [Article 24 (6)] also imposes its State Party, in the context that the investigation of the missing person has not concluded, an obligation to “take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, political rights, family law and property rights.”

This provision outlines how the state should ensure that the civil rights of the missing persons’ families are secured, and that they have access to economic, social, civil, political and cultural rights. Often the wives and children of missing persons cannot access their rights to inheritance, specific economic program (which requires authorization of the male head of the family), etc., due to the uncertain state of the husband or father, considering that the family usually refuse to declare their disappeared relatives to be “dead”.

II.4. Ratification of the Convention as the State’s preventive obligation

The Convention also has provisions of recommendations for its State Parties to take steps to prevent the practice of enforced disappearance within each states’ jurisdiction. These efforts include:

First, the most important preventive measure is to establish provisions for enforced disappearance in domestic criminal law—particularly those practiced as individual crimes (not the systematic and widespread ones)—as a criminal offence (Article 4).³⁷ Codification of enforced disappearance in the domestic criminal system is important as a basis to prevent the practice of impunity.³⁸ In order to complete the codification of enforced disappearance in the national penal code, the Convention has several supplementary articles, such as:

- Ensure that enforced disappearance constitutes an offence under the State’s criminal law (Article 4) and not regarded as a political offence [Article 13 (1)] and the Perpetrator of this crime must be punished with consideration of the alleviating or aggravating factors (Article 7). The perpetrator who can be subjected to criminal responsibility is the one who “commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance” [Article 6 (1 a)];
- Implement the criminal responsibility of superior order in the crime of enforced disappearance. A superior can be held criminally responsible if: the superior knew or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and

of enforced disappearance—bind the state agencies to search the disappeared persons and official acknowledgment of responsibilities (apology) from the State. See Office of the United Nations High Commissioner of Human Rights, Rule-of-Law Tools for Post-Conflict States; Truth Commissions, New York dan Geneva, 2006, <http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>, p. 1; and Priscilla Hayner, *Unspeakable Truths. Confronting State Terror and Atrocity*, Routledge, New York and London, 2001, p. 14.

³⁷ A study by UN Working Group on Enforced or Involuntary Disappearances on this, Best Practices on Enforced Disappearances in Domestic Criminal Legislation, UN Doc. A/HRC/16/48/Add.3, December 28, 2010, p. 6-10.

³⁸ One thing to consider in adopting the provisions of Article 2 (definitions) and Article 4 (national level codification) of this Convention is the different characters between the international human rights law (binding only to state actors) to the national criminal law (binding to non-state actors and state). Therefore, a modification of the definition for enforced disappearance perpetrator is required within the national criminal law. See Scovazzi and Citroni, **op cit**, **supra note no. 6**, p. 280-282.

control were committing or about to commit a crime of enforced disappearance; exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution [Article 6 (1 b)];

- Apply a long duration of the statute of limitations in respect of enforced disappearance, taking into account its continuous nature and the extreme seriousness of this offence (Article 8);
- A mechanism for receiving complaints of alleged disappearance [Article 12 (1)];
- Prohibition of secret detention and the obligation to give information to the detainee's family or relatives (Article 17-22).

Second, considering the crime of enforced disappearance is a serious crime in international law, the Convention mandates the State Parties to implement the principle of universal jurisdiction, although not in its most perfect form. The provisions mandates the State Parties to take legal measures against the perpetrator regardless of citizenship, nationality of the victim, the territory where the crime was committed and if not, extradites or surrender him or her to another State for the purpose of prosecution (Article 1, 10, and 11);

Third, the Convention also requires the State Parties to adopt the principle of non-refoulment in their domestic legal systems, which means the prohibition to extradite a person to another State where there are substantial grounds for believing that he or she would be subjected to enforced disappearance (Article 16). Other than that, the State Parties shall also regard the crime of enforced disappearance as an extraditable offence and therefore should be regulated in the law of extradition treaties of the concerning States (Article 13);

Fourth, the Convention provides the foundation for its State Parties to have mutual assistance in searching for disappeared persons and mutual legal assistance in criminal proceeding of enforced disappearance (Article 14 and 15);

Fifth, the Convention urge the State Parties to ensure training of law enforcement, civil or military, medical personnel, public officials, and other persons who may be involved in the custody system (Article 23);

Sixth, the Convention affirms the necessity to protect the rights of children who are victims of enforced disappearance, based on their best interest (Article 25).

II.5. Ratification as the State's corrective obligation

In addition to the recommendation of preventive measures against the practice of enforced disappearance, the Convention also outlines a corrective mechanism in case of enforced disappearance. The corrective obligations of State Parties in the event of enforced disappearance according to the Convention are:

First, the obligation to investigate when there are allegations of enforced disappearance and bring those responsible to justice (Article 3).

Second, investigation shall be conducted when there is substantial allegations that the offence has been committed even without any report of complaint [Article 12 (1)].

Third, the right of any person with a legitimate interest such as family, relatives, or legal representatives/ counsel to access informations regarding the deprivation of liberty of an allegedly disappeared person (Article 18).

Fourth, the Convention explicitly requires its States Parties to provide a mechanism of reparation for the broadly defined victims. These rights includes the rights of victims (or victims' families) to:

- Know the truth regarding the circumstances of enforced disappearance, the progress and results of investigations, and particularly the fate of the disappeared person, either living or, in the event of death, to return their remains [Article 24 (2 and 3)];
- Obtain material and moral reparation (right to reparation) which can take the form of "compensation, restitution, rehabilitation, satisfaction—including restoration of dignity and reputation, and guarantees of non-repetition" [Article 24 (4 and 5)].

CHAPTER III: THE ADVANTAGEOUS AND DISADVANTAGEOUS ASPECTS ON THE RATIFICATION OF THE CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

The Convention is one of the International legal mechanisms that has a tremendous impact as well as the national law in each state. However, before the Convention becomes legally binding, the State needs to ratify it. After the State becomes a subject of the Convention, the State has obligation to harmonize it into national legislation.

On the International Convention for the Protection of All Persons from Enforced Disappearance, since it was adopted in 2006, at the moment only 88 States signed it including Indonesia, but only 29 States have ratified it.³⁹

III.1. The Advantages of Ratifying the International Convention for the Protection of All Persons from Enforced Disappearance

Currently, no alleged perpetrator of enforced disappearance has been tried for his or her crime. On the contrary, the perpetrators hold important positions in the government. With the ratification of this Convention, no one can elude punishment or trial for his or her actions, although the perpetrators were government officials.

This can open up the chance of legal certainty for victims and their families. In cases of enforced disappearance, the rule of law provides certainty of the victim's whereabouts/status, legal certainty is also important for people to avoid repetition of enforced disappearance practices, and serves as an acknowledgement that the practice of enforced disappearance is a serious crime against humanity.

Moreover, there is currently no State in Southeast Asia that has ratified this Convention; which becomes an opportunity for Indonesia as the first State in Southeast Asia which has signed the International Convention for the Protection of All Person from Enforced Disappearance. This ratification proves that the government of Indonesia does have a high commitment to promote and uphold human rights and seeks to encourage legal reform in Indonesia. Not only that, the image of Indonesia would be better in the eyes of the world, especially as Indonesia also hosted the ASEAN Summit in 2011 and re-elected to Human Rights Council which shows the world's acknowledgment for Indonesia.

Ratification of this Convention also demonstrate the commitment of the government of Indonesia to fulfill the victims' rights such as rights to justice, rights to the truth, rights of reparation and guarantee of non-repetition. Moreover, ratification would strengthen the existing initiatives of the Indonesian government in regional and international level such as Convention on the Rights of the Child, and would support the implementation of recommendation of Indonesia-Timor Leste Commission for Truth and Friendship (KKP).

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III.2. Disadvantages of Not Ratifying the International Convention for the Protection of All Persons from Enforced Disappearance

As we all know, the act of enforced disappearance occurs with the involvement of authorities/state. Learning from past events, although currently the perpetrators of enforced disappearance had been removed from

³⁹ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en

⁴⁰ See Article 25 Convention and Recommendation of Commission of Truth and Friendship Indonesia-Timor Leste ("*Per Memoriam ad Spem*"), 2008, p. 331.

their position, yet those perpetrators still have strategic position in the government and still receiving other rewards. Without the ratification of this convention, the efforts of law enforcement against perpetrators of enforced disappearance cannot be accomplished. That means the practice of impunity will continue as long as there is no legal mechanism imposed against the cases of enforced disappearance.

Not only that, Indonesia has also ratified a number of international human rights instruments. Failing to ratify the International Convention for the Protection of All Persons from Enforced Disappearance would show that Indonesia is not seriously strive to enforce the law and human rights, particularly on cases of enforced disappearance, considering that enforced disappearance occurred in Indonesia.

III.3. The Prospect of Ratification of the International Convention for the Protection of All Persons from Enforced Disappearance

There are several notions that can be used as opportunity for the government to ratify the International Convention for the Protection of All Persons from Enforced Disappearance, such as:

1. The inclination to ratify this Convention has actually emerged for quite a while, as once communicated by the former Minister of Justice and Human Rights, Hamid Awaluddin, on March 12, 2007, when he addressed the High Level Segment of United Nations Human Rights Council. At that time the Minister stated that Indonesia intends to ratify this Convention. In addition, several state institution and the individuals within them such as the Ministry of Justice and Human Rights of Indonesia, the Minister of Justice and Human Rights, Commission III in Indonesia House of Representatives (DPR RI), and the Indonesia National Commission on Human Rights (Komnas HAM RI) have already expressed their commitment and support to ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

Until now, 88 States have signed the Convention (including Indonesia) and from that number, 20 states have ratified the Convention; in which Iraq was the 20th state which ratified the Convention on November 23, 2010.⁴¹ This Convention has practically entered into force on December 23, 2010.

2. Four recommendations issued by the House of Representatives Special Committee (Pansus DPR RI) on September 28, 2009, containing:
 - Recommend to the President to form an Ad Hoc Human Rights Court;
 - Recommend to the President and all government institutions and relevant parties to immediately conduct a search of 13 persons who are still declared missing by the National Commission on Human Rights (Komnas HAM);
 - Recommend to the Government to rehabilitate and provide compensation to the families of missing persons;
 - Recommend to the Government to immediately ratify the International Convention for the Protection of All Persons from Enforced Disappearance as a form of commitment and support to stop the practice of Enforced Disappearance in Indonesia.
3. Similar points stated in the National Action Plan for Human Rights (RANHAM) 2011—2014 which already scheduled to ratify this convention. These initiatives could serve as opportunities for the Government to immediately ratify the Convention.

41 The Convention has now been signed by 88 States and ratified by 29 States (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en), accessed on August 9, 2011

CHAPTER IV: AFTERWORD

It is important to immediately ratify the International Convention for the Protection of All Persons from Enforced Disappearance as an International Legal Instrument, because the Convention can prevent repetition of similar practices in the future. This is necessary considering the number of cases of enforced disappearances that occurred in Indonesia in the past.

The need to immediately ratify the Convention also serves as the preventive and corrective functions of the State. Preventive function does not only mean that the Government of Indonesia needs to recognize and include enforced disappearance as a crime in domestic criminal law mechanisms, but also to apply the principle of universal jurisdiction mechanism; to adopt the principle of non-refoulment in domestic legal system; to have mutual assistance in searching the disappeared persons and mutual legal assistance in criminal proceeding of enforced disappearance; to ensure training of law enforcement, civil or military, medical personnel, public officials and other persons who may be involved in the custody system; and to affirm the necessity to protect the rights of children who are victims of enforced disappearance, based on their best interest.

Whereas the corrective function indicates that the Government of Indonesia has the obligation to investigate when there are allegations of enforced disappearance and bring the responsible to justice even without any report of complaint; to provide informations to the families or legal representatives of the enforced disappearance victims regarding the deprivation of liberty of an allegedly disappeared person; and provide a mechanism of reparation for the victims such as compensation, restitution, rehabilitation, satisfaction—including restoration of dignity and reputation, and guarantees of non repetition.

As a state with commitment to promote and uphold human rights, Indonesia must demonstrate its seriousness by ratifying this Convention. In addition, Indonesia's position as a member of United Nations Human Rights Council prove that Indonesia has good faith, not only to eradicate the practice of impunity and provide legal certainty but also to implement the reform in the enforcement of human rights. The fact that there has not been any State in Southeast Asia which has ratified the International Convention for the Protection of All Persons from Enforced Disappearance is an excellent opportunity for Indonesia to elevate its image in the view of the International community, especially after Indonesia also hosted ASEAN Summit 2011. The ratification will also prove the State's favor towards the victims and their families in the prevention and settlement of enforced disappearance cases in Indonesia.

The opportunity to ratify this Convention has been constructed by the Government of Indonesia by including the draft of ratification for this International Convention to the Human Rights National Action Plan (RANHAM) 2011—2014. In addition, the four recommendations issued by the House of Representatives Committee, which in its fourth point recommend the immediate ratification of the Convention to the government as a manifestation of commitment and support to stop the practice of Enforced Disappearance in Indonesia must be followed up by a concrete action.