

General Allegation

126th session (7 - 11 February 2022)

India

The Working Group received information from the sources concerning alleged violations and obstacles encountered in the implementation of the Declaration on the Protection of All Persons from Enforced Disappearance (hereafter, ‘the Declaration’) in India, with particular reference to the state of West Bengal.

1. According to the sources, since 2016, nearly 100 people have been forcibly disappeared by members of the Border Security Forces (hereafter, ‘BSF’) in the state of West Bengal, at the border with Bangladesh. In some of the cases reported, the victims’ fate and whereabouts remain unknown. Allegedly, victims include men, women and minors. In their majority, they are Muslims and often pertain to the lower castes.

2. Pursuant to the information received by the Working Group, the border area between India and Bangladesh is heavily populated, with large numbers of Muslims and people of lower castes. Traditional activities such as farming are currently no longer possible due to environmental degradation, including the erosion along the banks of the river Ganges, in the district of Murshidabad. This led to a worsening in the living conditions in the area and an increase in illegal activities such as cattle smuggling and human trafficking across the border.

3. The BSF is the force mandated to protect India’s borders and preventing transnational crimes, including trafficking and smuggling. In this context, they have been entrusted with both military and law enforcement functions. The BSF is under the control of the Indian Ministry of Home Affairs.

4. According to the information provided by the sources, members of the BSF target villagers – especially if pertaining to low castes – suspected of engaging in illegal smuggling and trafficking across the border. Allegedly, people meeting this “profile” (poor, low caste, and often Muslim) are often arrested, ill-treated and subjected to other human rights abuses, including enforced disappearance.

5. The sources further indicate that their quest for truth, justice and redress encounters multiple obstacles and has so far been unsuccessful. On the one hand, it is reported that often the police refuses to register complaints against the BSF. On the other hand, there seemingly is a loophole in the applicable domestic legal framework, which fails to codify enforced disappearance as an autonomous offence.

6. Moreover, pursuant to the information submitted by the sources, under section 197(1) of the Indian Criminal Procedure Code, in order to bring a lawsuit against members of the BSF prior government approval is required, making thus virtually impossible to seek and obtain justice. Allegedly, such approval is regularly denied under the argument that members of the BSF should be investigated and, where appropriate tried, under internal security forces

courts. According to the information received, no member of the BSF has been prosecuted and convicted by the mentioned courts. Similarly, victims of enforced disappearance or their families have so far been unsuccessful in obtaining compensation or any other form of reparation for the harm suffered.

7. Sources held that, pursuant to Section 19 of the 1994 Protection of Human Rights Act, the National Human Rights Commission (hereafter, 'NHRC') would also be prevented from directly investigating violations allegedly committed by members of the armed forces (including the BSF). In this regard, the NHRC could only request a report from the institution or agency of which the accused person is a member.

8. The Working Group was informed that a writ petition to challenge the procedural obstacles described in the previous paragraph, that eventually would favour impunity of members of the BSF implicated in the commission of gross human rights violations, including enforced disappearance, is pending before the Supreme Court of India since 2012.

The Working Group would like to bring to the Government's attention the following provisions of the Declaration, which are directly related to the present allegation:

Article 2

- 1. No State shall practice, permit or tolerate enforced disappearances.*
- 2. States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance.*

Article 3

Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.

Article 4

- 1. All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties, which shall take into account their extreme seriousness.*
- 2. Mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information, which would contribute to clarifying cases of enforced disappearance.*

Article 7

No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.

Article 13

1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.

2. Each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.

3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.

4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.

5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.

6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.

Article 16

1. Persons alleged to have committed any of the acts referred to in article 4, paragraph 1, above, shall be suspended from any official duties during the investigation referred to in article 13 above.

2. They shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.

3. No privileges, immunities or special exemptions shall be admitted in such trials, without prejudice to the provisions contained in the Vienna Convention on Diplomatic Relations.

4. The persons presumed responsible for such acts shall be guaranteed fair treatment in accordance with the relevant provisions of the Universal Declaration of Human Rights and other relevant international agreements in force at all stages of the investigation and eventual prosecution and trial.

Article 18

1. Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.

2. In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account.

Article 19

The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.

The Working Group would be grateful for your Excellency's Government cooperation and observations on the following questions:

1. Please provide any additional information and comment you may have on the above-mentioned allegations.
2. How does your Government ensure the right to a prompt and effective judicial remedy as a means of determining the whereabouts of persons deprived of their liberty?
3. Please provide information on the applicable criminal legal framework to deal with allegations of enforced disappearance and clarify whether the latter is codified as a separate criminal offence.
4. How does your Government secure that persons alleged to have committed an enforced disappearance are suspended from any official duties during the investigation of the corresponding complaint is carried out?
5. How does your Government ensure that any person, having knowledge or legitimate interest, who alleges that a person has been subjected to enforced disappearance is able to lodge a complaint to a competent and independent State authority? How does your Government ensure that enforced disappearances are promptly, thoroughly and impartially investigated by the authority even if there has been no formal complaint and, especially, if it has been impossible to register such a complaint?
6. Please provide information on how does your Government ensure that persons alleged to have committed an enforced disappearance are tried only by the competent ordinary courts, to the exclusion, in particular, of military courts.
7. How does your Government ensure that persons who have or are alleged to have committed enforced disappearance do not benefit from any measures that might have the effect of exempting them from any criminal proceedings or sanction?
8. Please provide information on the current status of the petition pending before the Supreme Court of India since 2012 that challenges the constitutionality of certain provisions hindering the powers of the NHRC to directly investigate alleged violations attributed to the BSF and establishing the competence of internal security forces for these cases, or any special court, including military tribunals.

9. How does your Government ensure the right of victims and their relatives to an effective remedy, which should at minimum guarantee cessation of violations, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition?

The Working Group requests your Excellency's Government to provide a response to the above questions within sixty days.