

**UNVEILING THE
“INVISIBILITY CLOAK”**

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Investigating the Extent to Which the Kingdom of Thailand’s Failure to Address the Issue of Enforced Disappearances Violates Their Responsibility towards the Protection of Basic Human Rights by Comparison with the International Human Rights Jurisprudence

SARAH M.J. MUZART



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ABSTRACT

Despite being an act that is widely practiced under the guise of a significant number of States, little is known about the intrinsic realities of enforced disappearances. General literature on the topic is lacking, and laws that address the problem are scarce. Enforced disappearances have only come to the attention of the international community fairly recently. At the dawn of this century, Thailand understandably remains one of the most active countries in the practice of enforcedly disappearing people as a means of removing them from the protection of the law because there is no legally justifiable reason for arrest or detention – an ultimate breach of the Rule of Law. This book aims to attribute responsibility to the Kingdom of Thailand for failing to introduce legal mechanisms and safeguards to protect its citizens – in breach of its State duties – from enforced disappearances. In an attempt to remove pre-existing ambiguities on what basic human rights are being violated and by whom, the author comparatively analyses international human rights jurisprudence vis-à-vis certain Latin American and European countries. The jurisprudence reiterates that the human rights implications of enforced disappearances do not only depend on the State refraining from committing such acts directly, but also from its indirect acquiescence and tolerance of the act being committed by non-State agents. The repeated reports of enforced disappearances throughout its history make Thailand *hypothetically* accountable, since no entity can supersede State sovereignty. Still, the author hopes that this book will provide the guidance needed to help improve the human rights compliance in Thailand and, in due course, rid the country of this terrible practice. To this end, this book contains first-hand contributions from human rights experts and advocates that the author gathered during her trip to Thailand in May 2011. Contributors include the Asian Human Rights Commission, Human Rights Watch and the International Commission of Jurists, among other national non-governmental human rights organizations.

To my future niece or nephew, may you live in a better world – a world where mistakes of the past are not repeated by leaders of the future.

Love, Sarah

TABLE OF CONTENTS

List of Abbreviations.....	IX
Acknowledgements.....	XI
Table of Cases.....	XIII
International Instruments.....	XV
Thai Domestic Instruments.....	XVII

I. INTRODUCTION..... I

Methodological Approach.....	5
a) Generating New Material.....	5
b) Expending on Existing Material.....	5

II. DEFINING ENFORCED DISAPPEARANCES..... 7

III. THE PROBLEM OF ENFORCED DISAPPEARANCES

IN THAILAND..... II

Enforced Disappearances within Different Contexts..... 12

a) Pro-Democracy Protests.....	13
b) War on Drugs.....	16
c) Southern Insurgency.....	18
d) Migrants.....	24
e) Human Rights Defenders.....	27

<i>The Neelapajit case</i>	29
----------------------------------	----

Explaining the Impunity..... 36

Existing Legal and Institutional Guarantees..... 40

a) Legal Guarantees.....	40
b) Institutional Guarantees.....	45
<i>National Human Rights Commission (NHRC)</i>	45
<i>ASEAN Intergovernmental Commission for Human Rights (AICHR)</i>	46

IV. INTERNATIONAL JURISPRUDENCE ON ENFORCED DISAPPEARANCES..... 51

Inter-American Court of Human Rights..... 52

UN Human Rights Committee (HRC)..... 59

European Court of Human Rights (ECtHR)..... 64

a) Turkey.....	66
b) Russia-Administered Chechnya.....	71

African Commission on Human and People's Rights..... 77

Opinions from the NGO Community..... 79

a) Asian Human Rights Commission.....	79
b) Justice for Peace Foundation.....	80
c) International Commission of Jurists.....	81

V. ATTRIBUTING RESPONSIBILITY TO THE KINGDOM OF THAILAND	83
Constructing a General Legal Framework of International Standards	83
a) Human Rights Violations.....	84
b) Evidential Criteria.....	85
<i>Standard of proof</i>	85
<i>Burden of proof</i>	85
Hypothetical Responsibility in Respect of the Situation in Thailand	86
a) Human Rights Violations.....	87
b) Evidential Criteria.....	88
<i>Current situation</i>	88
<i>Ideal situation</i>	91
VI. RECOMMENDATIONS	95
REFERENCES	99

LIST OF ABBREVIATIONS

AHRC	Asian Human Rights Commission
AU	African Unity
CPN-M	Communist Party of Nepal-Maoist
CrCF	Cross-Cultural Foundation
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
HCP	High Contracting Party
HRC	UN Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
INGO	International Non-Governmental Organization
JPF	Justice for Peace Foundation
KPP	Kurdish Worker's Party
NGO	Non-Governmental Organization
NHRC	National Human Rights Commission (of Thailand)
OAS	Organization of American States
SAPA- TFAHR	SAPA Task Force on ASEAN and Human Rights
SOA	School of Americas

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I would like to show my sincere gratitude to all my participants for their contribution. In alphabetical order I would like to thank the following persons: Angkhana Neelapaijit, Phil Robertson, Pornpen Khongkachonkiet, Pratubjit Neelapaijit, Sor Rattanamanee Polkla, Susan Appleyard, and finally, the person acting on behalf of the ICJ (who chose not to be named, but no doubt knows who s/he is). I would like to give my gratitude for their time, patience and amicability, and add special appreciations to Susan Appleyard for the ample amount of time she spent sharing her expertise with me. The place they all hold professionally has meant they were able to give me a priceless insight into the realities and deficiencies of the Thai executive, legislative and judicial systems. I hope I can myself carry on in their footsteps.

My heartfelt admiration goes to Angkhana Neelapaijit, who despite losing her husband at the hands of this defective system has found the strength to form the Justice for Peace Foundation, and in the process is providing unprecedented assistance to hundreds of families who also lost loved ones in the context of the crisis in the deep South.

I would like to give my thanks to Professor Wade Mansell and Sian Lewis-Anthony for their inspirational classes on international law and human rights. I hope to make them proud with this book.

Thanks to JPF for inviting me to sit-in their first strategic meeting on disappearances. I appreciate that resources will have gone into my being present. I encourage that they continue to bring the Thai civil society together in such a fashion, so that responses to this deep-seated problem can be properly coordinated – the power is in the will of the people.

Although they may never read this, I would like to give my sincere condolences and amazement to the 13 families of the 32 individuals – most of them youths – who disappeared on the “Black May” day. These families have been fighting for the truth since 1992 and every year they meet in commemoration. On the 19th anniversary of that dreadful day I was lucky enough to have two parents share with me their respective stories on how they had both lost sons at

UNVEILING THE “INVISIBILITY CLOAK”

the hand of the military. Their perseverance in the pursuit of justice is inspiring.

Last but not least, thanks to my partner, Mark, who has made available his support in a number of ways. Thank you for your patience, love and words of optimism. Thank you for believing in me even when I did not believe in myself.

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Kasnyeva v Russia, app no 28159/03, judgment of 11 June 2009
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UNVEILING THE “INVISIBILITY CLOAK”

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Treaties

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American Convention on Human Rights (adopted on 22 November 1969, entered into force on 18 July 1978) 1144 UNTS 123
Association of Southeast Asian Nations Charter (adopted on 20 November 2007, entered into force on 15 December 2008)
Canadian Charter of Rights and Freedoms (adopted and entered into force on 17 April 1982)
European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950, entered into force on 3 September 1953) ETS 5
First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force on 23 March 1976) 999 UNTS 302
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UNVEILING THE “INVISIBILITY CLOAK”

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December 1966, entered into force on 23 March 1976) 999 UNTS 171

Protocol to the Charter on the Establishment of the African Court on
Human and Peoples’ Rights (adopted on 11 July 2004, entered into
force on 1 January 2004)

UN Convention against Torture and Other Cruel, Inhumane or Degrading
Treatment or Punishment (adopted on 10 December 1984, entered into
force on 26 June 1987)

THAI DOMESTIC INSTRUMENTS

Acts of Parliament

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I. INTRODUCTION

The act of enforcedly disappearing someone has been described as many things. It has been described as ‘an affront to the conscience of the Hemisphere.’¹ It has been described as ‘a grave and abominable offense against the inherent dignity of the human being.’² It has been described as ‘a heinous violation of human rights.’³ It has even been described as ‘a crime against humanity’ at a time when there was no treaty in force that used that terminology.^{4, 5} An act that is without remorse to the victims or their families, yet an act tolerated by public officials that ‘continues in a considerable number of countries in a systematic manner’⁶ – Thailand is one of those countries.

Enforced disappearances have been common throughout history and across different continents. Although the practice dates back to World War Two,⁷ the term “disappearance” was actually created in

¹ Preamble to the Inter-American Convention, *infra* n 20

² *ibid*

³ UN Office of the High Commissioner for Human Rights, *Enforced or Involuntary Disappearances, Fact Sheet No. 6/ Rev.3* (UN Office, Geneva 1989) [hereinafter *Fact Sheet 6*], 3

⁴ Preamble to the Inter-American Convention, *infra* n 20

⁵ Now, under the Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3, Article 7 (1) (i), enforced disappearance of persons is “a crime against humanity”...when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.’

⁶ UN Commission on Human Rights, ‘Civil and Political Rights, Including Questions of: Disappearances and Summary Executions’, Report submitted by independent expert Manfred Nowak pursuant to paragraph 11 of the Commission resolution 2001/46 (8 January 2002) E/CN4/2002/71 [hereinafter *Nowak Report*], 4

⁷ Under the Nazi decree of *Nacht und Nebel* (“Night and Fog”) issued on 7 December 1941 by Adolf Hitler. See Gabriella Citroni & Tullio Scovazzi, ‘Recent Developments in International Law to Combat Enforced Disappearances?’ (2009) 3 *Revista Internacional de Direito e Cidadania* 89, 90; Sir Nigel Rodley with Matt Pollard, *The Treatment of Prisoners under International Law* (3rd Ed OUP, Oxford 2009), 329

the sixties by the School of Americas (SOA).⁸ The institution was founded in 1946 by the US Army to teach the latest in counter-insurgency warfare to Latin American and Caribbean military agents. As Gutman stresses, the soldiers at SOA are taught ‘to make war against their own people, to subvert the truth, silence poets, domesticate unruly visionaries, muzzle activist clergy, hinder trade unionist, hush voices of dissidents and discontents, neutralize the poor, ... and transform paladins and protesters into submissive vassal.’⁹ Within a few years, the methods and rationales of enforced disappearances became common teachings of the SOA curriculum.

In the eighties, there were reports of political actors disappearing across the Latin Americas. Simultaneously, the separationist agenda of the Kurdish Worker’s Party (PKK) caused an on-going campaign of armed violence between their members and the Turkish Government. The nineties saw the practice being used to fight another war for independence by the Chechens against the Russian Government. Then ten years of conflict from 1996 to 2006 saw thousands of members on each side of the Communist Party of Nepal (Maoist) (CPN-M) and the Nepali security forces disappear. The curse has plagued, and is still plaguing many other countries but always within the realms of a narrowly defined conflict between the official government and insurgents; the practice is usually well delineated, politically or ideologically.

Although it is true that Thailand’s ethno-religious battle in the deep South yields the majority of disappearances (between the Thai security forces and the Islamic insurgency),¹⁰ we must not forget that these are not the only victims. In comparison to other global inci-

⁸ Abdus Zattar Ghazali, ‘The Issue of 10,000 Disappeared Persons Haunts Pakistan Government’ *Countercurrents.org* (9 January 2010), at: <http://www.countercurrents.org/ghazali090110.htm> accessed 26 August 2011

⁹ W E Gutman, ‘Politics of Assassination: The Bloody Legacy of the US Army School of Americas’, *Z Magazine* (September 1995), at: http://pangaea.org/street_children/latin/soa.htm accessed 26 August 2011

¹⁰ Joint-interview with Susan Appleyard, Project Manager on Disappearances, and Pratubjit Neelapaijit, Justice for Peace Foundation (Bangkok, 17 May 2011) [hereinafter ‘JPF interview with S Appleyard & P Neelapaijit’], Appleyard: ‘I think the advocacy is a lot stronger in regards to disappearances in the South. For example, even our organization (and correct me if you disagree [Pratubjit]) has very much focused in our advocacy on disappearances in the South.’

dents, disappearances in Thailand are affecting groups of people with different political orientations, different social backgrounds, different educational levels, different job titles, different ethnicities, and different religious beliefs. Essentially, disappearances have become a ‘chronic problem in Thai society’¹¹ and urgency to address it lies in the fact that not one homogenous group is being targeted.

The scale of the problem is intensified by the fact that, to this day, the people of Thailand remain schematically unprotected in law from this continuing practice. Not only does Thai domestic law refuse to portray enforced disappearances as a crime, but South-Asia, and more specifically South-East Asia, has no functioning regional human rights institution that can protect people from human rights violations committed by states.

In the author’s opinion, an enforced disappearance is the epitome of the crime that is committed under the shield of “invisibility”; where damage is real, but origin and culpability are indiscernible. This book aims to unveil this “cloak” by, on the one hand, shining light over the intrinsic realities of the problem as it is happening in Thailand, and on the other hand, remedying the gap in the law with an analytical exploration of how other corners of the globe have resorted to international human rights law to address their own problems with enforced disappearances. Hopefully, the new Government¹² will find inspiration and ultimately endorse the author’s recommendations in the near future.

This book is structured in the following way:

- The author will start by defining “enforced disappearances” isolated from the situation of Thailand. (Chapter II)
- This next section will allow readers to appreciate the enormity of the problem specific to Thailand. The author will

¹¹ Pratubjit Neelapaijit of the Justice for Peace Foundation, ‘Enforced and Involuntary Disappearances Situations in Thailand: Challenges and Hopes’, in Equipo de Estudios Comunitarios y Accion Pisosocial (ECAP) (ed), *We Need the Truth: Enforced Disappearances in Asia* (ECAP, Colonia Lo de Bran 2011), 34

¹² The Puea Thai Party won the Thai general elections on 3 July 2011 with a solid majority. Yingluck Shinawatra has now become the new Prime Minister of Thailand. She is the sister of Thaksin Shinawatra, former Prime Minister and leader of the Thai Rak Thai – he was ousted, exiled and convicted of corruption charges five years before.

UNVEILING THE “INVISIBILITY CLOAK”

give examples of enforced disappearances within specific contexts, concomitant with political troubles that have erupted over the years. The author will then try to find explanations for the enduring culture of impunity that plagues Thai society. The remainder will focus on the existing legal and institutional framework that is in place in Thailand to combat enforced disappearances, and will debate over any deficiencies that these may have. (Chapter III)

- The author then provides an analysis of the international jurisprudence on enforced disappearances. Subsections will focus on judgments and opinions from the Inter-American Court of Human Rights, the United Nations Human Rights Committee, the European Court of Human Rights, and the African Commission on Human and People’s Rights. This section finishes with opinions from the NGO community on the righteousness of some of the legal considerations raised in this jurisprudence. (Chapter IV)
- The author brings to a close the analysis from the previous sections by providing a clear picture of the extent of Thailand’s responsibility across international human rights standards and norms. The author will first construct an overarching legal framework based on those international standards reaffirmed in the jurisprudence. This book culminates in drawing an hypothetical but *de facto* responsibility onto the Kingdom of Thailand for its involvement in enforced disappearances (since we will see that there currently exists no mechanism by law to hold it accountable). Attitudes from the NGO community, when paralleled with the international jurisprudence, will play a big part in comparing international norms on evidential criteria with those that already exist in Thailand. (Chapter V)
- The final section of this book will be dedicated to the author offering concluding recommendations to not only the Government of Thailand, but also the Thai people, the South-East Asian community and to the international community. (Chapter VI)

Silencing “undesirables” who could not be silenced with the bounds of the law by forcibly disappearing them is a terrible affront

on both a person's civil and political rights – the Rule of Law must be restored now.

Methodological Approach

a) Generating New Material

In the quest to address the problem of enforced disappearances in Thailand as exhaustively as possible, the author has produced first-hand data. A total of five different national and international NGOs, but seven different individuals, agreed to share their expertise and knowledge during several questionnaire-based interviews. In alphabetical order, the following NGOs contributed: the Asian Human Rights Commission (AHRC), the Cross-Cultural Foundation (CrCF), Human Rights Watch (HRW), the International Commission of Jurists (ICJ) and the Justice for Peace Foundation (JPF). Interviews were carried out in person and lasted for an average of one hour each. Based on these, the author generated a vast amount of conversational data.

The seven participants were interviewed consistent with the ethical standards of the relevant institution.¹³ Readers must note that in an effort to convey their voice as clearly as possible, the author of this book quotes them unabridged; correcting neither grammatical errors nor abbreviations, except where the author believed that such modifications were necessary to clarify the messages they were trying to pass.

b) Expending on Existing Material

Conventional research methods are also employed – these include published books, journals and reports, as well as case law and legal documents, from individuals who have a prestigious reputation in the field.

¹³ University of Kent, England

II. DEFINING ENFORCED DISAPPEARANCES

*Some men arrive. They force their way into a family's home, rich or poor, house, hovel or hut, in a city or in a village, anywhere. They come at any time of the day or night, usually in plain clothes, sometimes in uniform, always carrying weapons. Giving no reasons, producing no arrest warrant, frequently without saying who they are or on whose authority they are acting, they drag off one or more members of the family towards the car, using violence in the process if necessary.*¹⁴

The act above describes someone being denied the right to liberty, but we know that it is only the first of a series of cumulative human rights abuses that await them. ‘Having being removed from the protective precinct of the law and disappeared from society, they are in fact deprived of all rights and are at the mercy of their captors.’¹⁵ Brutality and torture becomes part of daily life. This form of dehumanization may go on for years and by comparison death is more compassionate.

A sense of pure oblivion befalls not only on the victim, but also on the family members. Confusion, fear, despair – these are some of the many emotions that will take over the life of those who are left wondering. Not knowing whether their loved ones are alive becomes ‘slow mental torture’¹⁶; a feeling that will most likely forever stay since chances of finding the whereabouts of the persons – whether dead or alive – are slim to non-existent. What is more, the family’s

¹⁴ Independent Commission on International Humanitarian Issues (Report), *Disappeared!: Technique of Horror* (St Martin’s Press, New York 1986) cited in *Fact Sheet 6, supra* n 4, 3

¹⁵ *Fact Sheet 6, supra* n 4, 3

¹⁶ *ibid*