



Samoa Office of the Ombudsman | National Human Rights Institution

**NHRI Submission to the Committee on  
Enforced Disappearances on**

**SAMOA'S implementation of the International Convention for  
the Protection of All Persons from Enforced Disappearance**

19 June 2023

## Introduction

1. This submission was prepared by the Samoa Office of the Ombudsman which is also the National Human Rights Institution (**Samoa NHRI**). It provides information to the Committee on Enforced Disappearances regarding the implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (**CED**) in Samoa. This submission covers the period from December 2012 to December 2022.
2. The Samoa NHRI was established in 2013 by the Constitution of the Independent State of Samoa 1960 (Part VIA) and the Ombudsman Act 2013. It is an independent constitutional office that looks into matters of maladministration, abuse of power by disciplinary forces such as Police and Prison, as well as the promotion and protection of human rights in Samoa. Samoa NHRI's broad human rights mandate allows it to look at various aspects of promoting and protecting human rights in Samoa. This includes awareness raising, monitoring of state compliance, reporting as well as engaging with various partners both locally and internationally to ensure that human rights of Samoans are respected and protected. Samoa NHRI is an 'A' status national human rights institution, operating in conformity with the Paris Principles.<sup>1</sup>
3. The Samoa NHRI establishment is a small office comprised of 16 staff, only 3 of which deal primarily with the human rights mandate of the office and 2 from the Engagement and Communications Unit to assist with human rights education and awareness. There has been some progress with the Samoan Government resourcing the Samoa NHRI, the establishment of a standalone unit on Engagement and Communications in 2020 with more than 50% of its work involving human rights awareness and education, and the hiring of a Senior Human Rights Officer (Human Rights Unit) and a Principal Multimedia Officer (Engagement and Communications Unit) are great developments for the Office. However, Samoa NHRI continues to face issues of limited budget and human resources, and expertise in certain areas of human rights given its broad human rights mandate provided in the Ombudsman Act 2013.
4. For ease of reference this submission follows the same structure as the Samoa State Party's report received by the Committee on 24 March 2023. However, the Samoa NHRI's submission does not comment on all matters contained in the State Party Report but only highlight specific matters that the Samoa NHRI believes are high priority concerns that should be considered by the Samoan Government to strengthen the fulfilment of the obligations and enjoyment of the rights enshrined in the CED.
5. This submission was prepared by using information and data collected from research carried out online (internet) by the Samoa NHRI as well from as its own work.
6. We recognize that the Samoan Government was already looking at addressing the issue of enforced disappearance prior to ratifying the CED in 2012. In 2002, Samoa ratified the Rome Statue of the International Criminal Court (**Rome Statue**) 1998 and subsequently in 2007 enacted the International Criminal Court Act 2007 (**ICCA 2007**) which makes references relating to the obligations under the CED.
7. The Samoa NHRI commends the Samoan Government for its proactive and continuous efforts in ensuring that its people are protected from being victims of enforced disappearances. However, there is still room for Samoa to strengthen domestic laws

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<sup>1</sup> More information about the Samoa NHRI can be found on our website: [www.ombudsman.gov.ws](http://www.ombudsman.gov.ws)

and practices as are necessary to ensure their conformity with obligations stemming from the CED as well as the enjoyment of human rights enshrined in the CED.

8. The Samoa NHRI through its Special Investigations Unit function record, notes two possible cases that may relate to enforced disappearance:

**Case 1 (2019):** A young man who went missing on 23 July 2019 at Coconut Hotel at Siumu village. There were allegations of foul play involved and fingers were pointed to 3 suspects including the missing man's girlfriend. The matter was reported to the Ministry of Police, and the Ministry of Police advised that they completed investigation and referred the file to the Office of the Attorney General. The Samoa NHRI requested for the Office of the Attorney General to meet with the family three times to provide some information as to the status of the file/investigation, with no success. The matter was out of the office jurisdiction pursuant to section 21(c)(ii) of the Ombudsman Act 2013.

**Case 2 (2020):** This case was not a reported case directly to the Samoa NHRI, but rather it was identified in an investigation referred from the former Prime Minister pursuant to section 19 of the Ombudsman Act 2013 regarding the first break out of prisoners from the brand new prison. One of the prisoners that escaped 'Chong Nee' went missing for about 4 years now.<sup>2</sup> One of the witnesses that escaped with Chong Nee confirmed that the Police apprehended both him and Chong Nee, but when they were brought into custody, Chong Nee was missing. Although the referral was specifically on issues of administration relating to how the prisoners escaped, the issue of Chong Nee gone missing was flagged in the Ombudsman's final report to the former Prime Minister and Minister responsible for the Ministry of Police and Prisons.

## II. General legal framework prohibiting enforced disappearance in Samoa

9. Samoa's legal system adopts the dualist approach with regard to the domestic enforcement of an international human rights treaty. Despite this, the Samoan Supreme Court in the case of *Wagner v Radke* [1997] WSSC 6, 19 February 1997 applied an international convention (Hague Convention on the Civil Aspects of International Child Abduction 1980) in its decision even though Samoa was not a signatory or a party to the said convention.<sup>3</sup> The Samoan courts in this instance has widened the scope for applying human rights conventions in judicial decisions.
10. Since ratification of the CED by Samoa in 2012, there has been no specific legislation in place to give effect to the obligations contained in the CED. However, Samoa has in place various pieces of legislations which contains provisions that implement or relate to the obligations in the CED which the Government of Samoa has briefly outlined in Part II of its State Report.

*Overall, the NHRI Samoa recommends that Samoa either create a separate legislation to domestic the CED ensuring that it conforms to its articles or put in place a regulatory framework to unify all the measures which it currently has in order to respond effectively to implementing its obligations under the CED.*

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<sup>2</sup> Samoa Observer | Pati Chong Nee still on the run after 3 years; Samoa's notorious escapee Pati Chong Nee remains on the run since 2019 - Radio Station Polynesia - Stream Online - Talofa FM, Magik FM (radiopolynesialtd.com)

<sup>3</sup> *Wagner v Radke* [1997] WSSC 6, 19 February 1997.

*Although there have been no recorded cases regarding this specific offence but it is important to be well prepared for the same should the unexpected arise as*

- i. This will ensure that the correct definition of victim is in place;*
- ii. Ensure that the process from start to end is in place and easy to adhere and follow;*
- iii. There is no confusion as to the reparation as the definition will be housed in one legislation etc.*

*Awareness must be carried out so that the people can understand as to what this offence means and what amounts to an enforced disappearance. In order to protect our children, such awareness can be implemented into school curriculums or hot spot activities for children.*

*Furthermore enough capacity building, awareness raising and sensitization should be carried out especially for duty bearers within government such as police (who has a specific responsibility to investigate cases of enforced disappearances promptly, thoroughly and impartially) and judiciary (who have an obligation to bring perpetrators to justice and ensure punishment in accordance with gravity of the act and provision of effective remedies to victims).*

### **III. Article by Article presentation of the implementation of the Convention**

#### **Article 1**

11. In addition to what the Samoan Government noted in paragraph 15 of its State Report, it is also important to note that the exceptional circumstances that might be used to justify a restriction on the fundamental rights as set out in Part II of Samoa's Constitution including the right to life and personal liberty, are set out in Article 106 of the Constitution which regulate State of Emergencies in Samoa.

#### **Article 2**

12. While commending Samoa for having included enforced disappearance as a crime against humanity in the ICCA 2007, however, the wording of the definition of 'enforced disappearance' in the ICCA 2007 is not identical to the definition in article 2 of the CED.
13. The definition in the ICCA 2007 does not mention some of the aspects expressly mentioned in article 2 of CED such as a broad definition of the forms of deprivation of liberty '*or any other form of deprivation of liberty*' or that the crime should be committed by '*agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State*'.  
*or that the crime should be committed by 'agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State'.*
14. For that reason, the current definition in the domestic law is not in conformity with definition in article 2 of CED.

*Samoa NHRI recommends the State to take all necessary measures to ensure that the definition of enforced disappearance in national legislation is fully consistent with the definition provided in article 2 of CED*

#### **Article 3**

15. Article 3 of the Convention deals with acts of enforced disappearances perpetrated by ‘persons or group of persons’ without state involvement. States parties are under an obligation to investigate cases involving such acts and bring those responsible to justice.

*arrest, detention, abduction or any other form of deprivation of liberty by persons or groups of persons acting without 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.*

16. As noted in paragraph 12 above, the definition of enforced disappearance in the ICCA 2007 is not compatible with the definition in article 2 of CED especially making reference to the crime carried out by ‘persons or groups of persons acting with the authorization, support or acquiescence of the State’.

17. It is important that article 3 of CED is incorporated in domestic legislation to conform to the duties contained in such article.

*Samoa NHRI recommends the State to incorporate into its domestic law the measures set out in article 3 of the CED relating to the acts defined in article 2 of the CED committed by groups of persons without the authorization, support or acquiescence of State officials.*

*Samoa NHRI recommends the State to explicitly specify in its domestic legislation the measures set out in article 3 of the CED relating to the acts defined in article 2 of the CED committed by persons or groups of persons acting without the authorization, support or acquiescence of the State.*

#### **Article 4**

18. To criminalize enforced disappearance in accordance with article 4 of the CED, it is important that the definition of ‘enforced disappearance’ is compatible with the one contained in article 2 of CED. As discussed in paragraphs 11 and 12 above, the current definition is not compatible with article 2 of CED.
19. Because the definition is not in full conformity with article 2 of CED, the definition must be reviewed and aligned with the Convention as obligation under article 4 of the Convention is also closely related with the other treaty obligations concerning legislation, such as those in articles 2, 6, 7 and 8 of the Convention.

*Samoa NHRI recommends the State to adopt the necessary measures to make enforced disappearance an autonomous offence in line with the definition contained in article 2 of the Convention*

#### **Article 5**

20. The Samoan NHRI acknowledges that Article 7(1) of the Rome Statute of the International Criminal Court (Statute), listed as Schedule 1 to the ICC Act 2006 recognizes enforced disappearance as a crime against humanity. However, the definition of ‘enforced disappearance is not compatible with article 2 of the convention. Refer to paragraphs 11 and 12 above.

*Samoa NHRI recommends the State to review the definition of enforced disappearance as a crime against humanity in order to ensure its full compliance with articles 2 and 5 of the Convention.*

## **Article 6**

21. The Samoa NHRI notes that ICCA 2007 recognizes that military commanders and other superiors or a person acting on his/her behalf are held accountable for the commission of enforced disappearances if their subordinates committed the crime whilst under their control and or supervision. However, the wording of this section 11 with special attention on the usage of term “military commander or a person effectively acting as a military commander” may limit the application of the section to those in military commanding position. The CED does not refer specifically to any military commander rather it is generally referring to ‘any person’. It also expressly states in Article 6(2) that no order of instruction from any public authority, civilian, military or other may be invoked to justify this offence of enforced disappearance. Again, the CED does not expect that superiors are limited to military commanders given the list of people which it listed.

*Samoa NHRI recommends the State take legislative measures necessary to ensure that domestic legislation specifically provides for the criminal responsibility of superiors in accordance with article 6 (1) (b) of the Convention.*

*Samoa NHRI recommends the State take the legislative measures necessary to ensure that domestic legislation specifically provides for the criminal responsibility of superiors in public, civilian and military institutions, in accordance with article 6 (1) (b) of the Convention.*

## **Article 12**

22. The Samoa NHRI is of the view that in order for these obligations to effectively work, the work force dedicated to this task especially the police must be aware of their duties and how to process the same. The measures in place, it appears to be the same as reporting a (usual crime), however, when an offence against humanity arises, this may cause a lot of upheaval, tension and friction. As such, the officers handling such matters must be well prepared, mentally, physically and alert to undergo the pressures of such crime. Although there may be a low number in reported cases to the Samoa NHRI, and one may say that Samoa may be at low risk of such offending. However, prevention is better than cure. As such, awareness is crucial so that the measures put in place can be effectively executed and the rewards of being well organized is fruitful in that the victims are rescued, recovered and well protected.
23. In addition to the human rights functions of the Samoa NHRI, the office also has the Special Investigative Unit (SIU) mandate. In section 41 of the Ombudsman Act 2013 the SIU is mandated to receive, investigate and determine complaints against a police officer, prison officer or an officer of another prescribed disciplinary authority. Furthermore, the Ombudsman (Special Investigations Unit) Regulation 2016 provides for the Unit to: monitor the progress of complaints made to a disciplinary force; advice and make recommendations to a disciplinary force on how to efficiently dispose of complaints made directly to the disciplinary force; and consult and engage with a disciplinary force relating to complaints to that force.

24. In light of this function, the SIU carries out bi-annual reviews of the Police Professional Standards Unit procedures, policies and investigation files. Regulation 7, allows the Ombudsman to pull out one of the file reviews to investigate if he sees that there is a need for the office to investigate. In this instance, the Ombudsman can request from the disciplinary force to transfer the file to the Ombudsman. Part 4 of the Regulation establishes an Ombudsman Tribunal that can hear and determine any complaint investigated by the SIU, impose penalties provided under the disciplinary force rules and make any other order as it sees fit. The SIU has yet to utilize this function as it has not had a case that needed to go through the Tribunal.
25. Some of the final investigation reports of the Ombudsman relating to referrals from the Prime Minister gets addressed by Cabinet where they issue an official Cabinet Directive for responsible Government agencies to implement Ombudsman recommendations.

*Samoa NHRI recommends the State to take necessary measures to ensure that adequate technical, financial and human resources are provided to the authorities in charge of investigating enforced disappearances so that they will be able to discharge their duties promptly and effectively.*

#### **Article 17**

26. In addition to paragraph 70 of Samoa State Party report, the Samoa NHRI adds that Samoa has given great commitment to ensure that there are robust measures to ensure that the treatment of detainees and inmates complies with international human rights standards. This is evident in section 3(b) of the Prisons and Corrections Act 2013 where it make reference to the Nelson Mandela rules and human rights conventions that Samoa has ratified as guiding as applicable principles to guide the management and operations of the prisons.
27. The Samoa NHRI is mandated in section 33 (e) the Ombudsman (Komesina o Sulufaiga) Act 2013 to visit all public and, subject to section 48, private places of voluntary and involuntary confinement or detention. The places of detention that the Samoa NHRI has inspected include police custody cells, court cells, prison as well as the public hospital's mental health unit.<sup>4</sup>
28. In addition to the inspections, the Samoa NHRI through its SIU function, has placed in each prison (3) and police outpost (about 11 outposts) with Ombudsman complaint boxes that can only be opened by staff of the Ombudsman. These complaint boxes are for prisoners or detainees who wish to make a complaint directly to the Ombudsman's office. Due to lack of human resources, the SIU team visits and checks on the boxes in the main island of Upolu on a monthly basis and on the big island on a quarterly basis.

#### **Article 19**

29. Samoa NHRI notes the efforts that Samoa has in place as per paragraphs 72 and 73 of its State Report and commends them for the same. However, it appears that the legislation in place only covers information of the suspect but not on the disappeared people. The personal information, medical and genetic data of the disappeared person is not covered by legislation.

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<sup>4</sup> Inspection reports can be found on NHRI Samoa website [Human Rights Documents – Office of the Ombudsman](#)

30. As such, Samoa NHRI suggests that this area can be improved by ensuring that the information collected of the disappeared person is protected and is to be used only for the search of that disappeared person.

#### **Article 20**

31. The Samoa NHRI agrees with paragraph 75 of the State Report that the Judge must have regard to the likely extent of harm that may result from the disclosure of the communication or information. Additionally, the Judge of competent jurisdiction to try matter of crimes against humanity specifically enforced disappearance has inherent jurisdiction to make orders that will protect the information from being used adversely. For instance, in a criminal case of rape, in order to avoid harm on the victim, the Judge usually prohibits the media from reporting the name of the victim and at times goes further by withholding the name of the defendant.

#### **Article 23**

32. The Samoa NHRI will continue to work closely with the relevant Ministries to ensure that Samoa's obligation to train law enforcement personnel, medical personnel, public officials and other persons involved in the custody of persons deprived of liberty on the principles and provisions enshrined in the Convention are implemented effectively. Additionally, as one of the major recommendations is to carry out trainings and awareness programs as to what "enforced disappearance" means so that everyone is well informed of the same. It is in the best interest of everyone in Samoa to understand and know about this so that they know the procedure should such offence occur or affect them.

#### **Article 24**

33. The Samoa NHRI notes that the Sentencing Act 2013 is the only legislation that provides for the definition of victim. However, it is not sufficient to cover the definition of victim under the CED. 'Victim' should not just mean the enforced disappeared person but victim should also include family members of the disappeared person as they too have suffered emotional harm from this catastrophe.<sup>5</sup> Therefore, in terms of reparation not only the victim to be given reparation but also the affected family members of the victim.
34. The Samoa NHRI suggests that the State party develop guidelines as to who exactly falls in this category so as to limit the flood of claims from second to third cousins trying to benefit from someone's demise.

#### **Article 25**

35. The Samoa NHRI wishes to note that there were cases of adoption whereby foreigners having no connection to Samoan families came to Samoa to adopt children. The promise of a better future by these foreigners to the parents of these children and that the children will be returned to Samoa at some point. This was all a scam, and in 2009, in Utah four people involved in the scam were convicted and sentenced. It was believed that not all the children were returned home.<sup>6</sup> A similar story was recently

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<sup>5</sup> General Comments, on women affected by enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012)

<sup>6</sup> ABC News, [Four Sentenced in Scheme to 'Adopt' Samoan Kids - ABC News \(go.com\)](#), Accessed 29 May 2023

published on the Samoa Observer on Tuesday 16 May 2023 whereby a child adopted under false pretence for a better education and the child victimized her entire adopted life as she claimed that she was raped by her adopted brother.<sup>7</sup> Such adoption would have taken place in 2003 to 2005.

36. The Infants Ordinance 1961, was again reviewed after this information came to light around 2007 and 2008. It brought more stringent measures whereby the Attorney General's certificate was required when it is an overseas adoption by a foreigner who has no connection to the Samoan family adopting the said child. Additionally, since 2018 the Prime Minister at the time, has been advocating for changes to tighten adoption laws to stop slavery<sup>8</sup> and to stop child exploitation respectively.<sup>9</sup>
37. It appears since then, the adoption criteria has been amended and the Court recently issued a new directive to all law firms as late as December 2022.<sup>10</sup> This was to enforce more measures to protect the children from falling as victims to scams.
38. However, there is no process after the adoption order has been granted or a procedure of follow up to ensure the child is safe and not subjected to exploitation or other forms.
39. The Samoa NHRI notes that for such an obligation to be implemented generally and efficiently, Samoa requires allocation of resources and work force specifically to monitor and follow up on all adoption cases to ensure that the best interest of the child is upheld.

*Samoa NHRI recommends the State to put in place measures for after adoption to ensure that the adopted child are not victims of enforced disappearance.*

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<sup>7</sup> Samoa Observer, *Samoa's stolen children, woman speaks out*, 16 May 2023.

<sup>8</sup> RNZ, Samoa to tighten adoption law to counter slavery, 29 October 2018 <https://www.rnz.co.nz/international/pacific-news/369683/samoa-to-tighten-adoption-laws-to-counter-slave-labour#:~:text=Prime%20Minister%20Tuilaepa%20Sailele%20Malielegaoi,loopholes%20to%20counter%20the%20abuse>.

Accessed 29 May 2023

<sup>9</sup> Samoa Observer, P.M moves to stop child exploitation, 27 October 2018 <https://www.samoobserver.ws/category/samoa/29792> Accessed 29 May 2023

<sup>10</sup> Directive from the Supreme Court of Samoa