



INTERNATIONAL COMMISSION OF JURISTS

ASIA-PACIFIC REGIONAL OFFICE

" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "

24th November 2008

Honourable Chairperson Subhas Chandra Nembang
The Constituent Assembly
Singhadubar, Kathmandu, Nepal

President
Justice Arthur CHASKALSON, South Africa

Vice-Presidents
Dr. Rajeev DHAVAN, India
Justice John DOWD, Australia

Executive Committee
Prof. Vojin DIMITRIJEVIC, Serbia
Justice Unity DOW, Botswana
Dr. Gustavo GALLÓN GIRALDO, Colombia
Mr Stellan GÄRDE, Sweden
Prof. Robert GOLDMAN, United States
Dr. Pedro NIKKEN, Venezuela
Justice Michèle RIVET, Canada
Mr Raji SOURANI, Palestine
Prof. Leila ZERROUGUI, Algeria

Other Commission Members
Mr. Muhand AL-HASSANI, Syria
Mr. Ghanim ALNAJJAR, Kuwait
Mr Raja AZIZ ADDRUSE, Malaysia
Prof. Abdullahi AN-NA'IM, Sudan
Justice Solomy BALUNGI BOSSA, Uganda
Mr. Abdelaziz BENZAKOUR, Morocco
Justice Ian BINNIE, Canada
Prof. Alexander BRÖSTL, Slovakia
Prof. Santiago CORCUERA, Mexico
Ms Vera DUARTE, Cape-Verde
Prof. Louise DOSWALD-BECK, Switzerland
Justice Hisham EL BASTAWISSI, Egypt
Prof. Paula ESCARAMEIA, Portugal
Justice Elisabeth EVATT, Australia
Prof. Jochen FROWEIN, Germany
Mr. Roberto GARRETÓN, Chile
Prof. Jenny E. GOLDSCHMIDT, Netherlands
Ms Asma JAHANGIR, Pakistan
Ms Imrana JALAL, Fiji
Prof. David KRETZMER, Israel
Prof. Kazimierz Maria LANKOSZ, Poland
Justice José Antonio MARTÍN PALLÍN, Spain
Mr Kathurima M'INOTI, Kenya
Justice Sanji MONAGENG, Botswana
Ms Karinna MOSKALENKO, Russia
Prof. Iulia MOTO, Romania
Prof. Vitit MUNTABHORN, Thailand
Prof. Manfred NOWAK, Austria
Dr. Jorge Eduardo PAN CRUZ, Uruguay
Prof. Andrei RICHTER, Russia
Dr. Mary ROBINSON, Ireland
Sir Nigel RODLEY, United Kingdom
Mr Claes SANDGREN, Sweden
Mr. Belisario dos SANTOS JUNIOR, Brazil
Justice Philippe TEXIER, France
Prof. Daniel THÜRER, Switzerland
Prof. U. Oji UMOZURIKE, Nigeria
Prof. Vilenas VADAPALAS, Lithuania
Prof. Yozo YOKOTA, Japan
Justice E. Raúl ZAFFARONI, Argentina

Dear Mr. Nembang:

The International Commission of Jurists (ICJ) learns that the Bill on Disappearances (Crime and Punishment) Act, 2065 (Disappearances Bill) will be tabled by the Government of Nepal soon. The Disappearances Bill is intended to criminalize the practice of enforced disappearance and to provide for the establishment of a Commission of Inquiry to address the enforced disappearances that occurred during the armed conflict in Nepal from 13th February 1996 to 21 November 2007.

The ICJ welcomes initiatives taken by the Government of Nepal to criminalize the practice of enforced disappearances, investigate past cases, prosecute the perpetrators and provide reparation to the victims. In particular, the ICJ welcomes important improvements in the current bill from the draft bill proposed by the Interim Legislature-Parliament in May 2007, for example, by addressing past violations, including those committed by non-state actors. However, the ICJ is concerned that certain provisions do not comply with Nepal's obligations under international law and the ruling of the Supreme Court of 1st June 2007.

In its ruling, the Supreme Court found Nepal's legal framework inadequate to address the systematic practice of enforced disappearance during the armed conflict, and therefore held that the Government of Nepal must introduce new legislation to criminalize enforced disappearances and to ensure the establishment of a credible, effective, impartial and independent commission of inquiry. The Supreme Court order also stated that these measures should conform to the international standards as provided in "the Charter of the United Nations, the Universal Declaration of Human Rights, the Declaration on the Protection of All Persons from Enforced Disappearance, 1992, and the International Convention for the Protection of All Persons from Enforced Disappearance, 2006 (Disappearances Convention)."

In recommending amendments to the Bill in order to conform to these international standards, the ICJ refers particularly to the provisions of the Disappearances Convention. As the Supreme Court noted in its landmark ruling, "[a]lthough the Disappearances Convention has not yet come into force and Nepal has not yet ratified it... there should be no barriers to use the provisions of the Convention as guiding principles."

The systematic practice of enforced disappearances is a dark chapter in Nepal's recent history. A just resolution founded on the rule of law and respect for human rights is essential to building a peaceful, democratic nation. The ICJ therefore urges the honourable members of the Constituent Assembly to adopt the following recommended amendments to the Disappearances Bill.

1. Definition of Enforced Disappearances

The definition of a 'Disappearance' in Section 2 (a)(1) of the Bill does not comply with the broad definition of enforced disappearances in Article 2 of the Disappearances Convention, which includes three elements:

- (1) deprivation of liberty in whatever form;
- (2) refusal to acknowledge the deprivation of liberty, or the fate or whereabouts of the disappeared person, and
- (3) placing the disappeared person outside the protection of the law and all recognized rights.

The Bill, for example, only covers an enforced disappearance carried out by a person 'having the authorization under the law' to arrest or investigate or implement laws, whereas the Disappearances Convention includes not only *all* agents of the State but also all "persons or groups of persons acting with the authorization, support or acquiescence of the State." Furthermore, the Bill does not specifically mention the refusal to acknowledge the deprivation of liberty as an element of the crime.

The ICJ recommends that the definition of an enforced disappearance fully reflect the elements contained in Article 2 of the Disappearances Convention.

2. Crimes Against Humanity

The Bill fails to mention that the widespread or systematic practice of enforced disappearances constitutes a 'crime against humanity' under international law, explicitly recognized in the statutes of international tribunals with jurisdiction over crimes under international law, including the International Criminal Court. Article 7(1) of the Statute of the International Criminal Court (Rome Statute) provides that enforced disappearances of persons constitutes a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Article 5 of the Disappearances Convention reaffirms this standard and provides that an act

of enforced disappearance, when it constitutes a crime against humanity, shall attract the attendant consequences provided for in international law.

The omission of a provision in the Bill covering crimes against humanity is particularly troubling given the magnitude of the problem of enforced disappearances in Nepal during the armed conflict.

The ICJ recommends that the Bill should include a provision on crimes against humanity in accordance with international standards.

3. Responsibility of Superior Officers

Section 4(3) of the Bill provides an excessively narrow construction of command responsibility, holding accountable only those who direct or order enforced disappearances. In contrast, Article 6 of the Disappearances Convention provides that a superior officer is guilty of an offence where he/she:

- (a) knew or consciously disregarded information indicating that subordinates were committing or about to commit the crime;
- (b) exercised effective responsibility, control or discipline over those committing the crime;
- (c) should have known about the conduct of subordinates, given the position of authority; or
- (d) failed to take all necessary and reasonable measures to prevent the crime or to submit the matter for investigation and prosecution.

The ICJ recommends that Section 4(3) be amended accordance with Article 6 of the Disappearances Convention.

4. Obeying Superior Orders

Section 4(2) of the Bill provides that the person under whose order a person has been arrested, kept in detention or taken under control and disappeared, shall be considered to be the 'principal offender'. There is a concern that this provision could be invoked effectively to shield subordinates from responsibility on grounds of obeying superior orders. Express provision should be made in the Bill that persons engaging in such conduct are not entitled to use a defence of obeying orders of a "principal offender" to avoid criminal responsibility.

The ICJ recommends that Section 4(2) be amended to ensure that subordinates cannot invoke the defence of obeying superior orders.

5. Continuing Violation and Limitation Period

An inherent characteristic of enforced disappearances is that the violation continues as long as the fate and whereabouts of the victims have not been established and the case remains unresolved. The continuing nature of the violation is explicitly mentioned under Article 8 of the Disappearances Convention. As the Supreme Court held in its ruling, “it is also necessary to have provisions on continuous inquiry until the status of an allegedly disappeared person is determined.” Even in cases where the fate of the disappeared person is known, Article 8(a) of the Convention provides that any limitation must be “of long duration and proportionate to the extreme seriousness of this offence.”

Section 26(2) of the Bill is especially problematic in that it fails to recognize the continuing nature of the violation and provides a six month period of limitations from the date when a disappearance became known or made public. This period is far too short given the climate of fear under which enforced disappearances were committed and the consequent reluctance of people to report these grave violations to law enforcement authorities.

The ICJ recommends that the Bill recognize the continuing nature of enforced disappearances and that Section 26(2) be amended to increase the limitation period in proportion to the seriousness of the crime.

6. Penalties

An essential ingredient of any system of justice founded on the rule of law is that penalties be proportionate to the offence. Enforced disappearances, especially when practiced as part of a systematic policy, are heinous crimes. Accordingly, Article 7(1) of the Disappearances Convention provides for penalties that take account of the “extreme seriousness” of the offence. In contrast, Section 6 of the Bill provides that a person who commits the crime of enforced disappearance will be imprisoned for up to five years and fined up to 100,000 rupees. This maximum penalty is not proportionate to the gravity of the violation.

The ICJ recommends that the possibility for higher maximum penalty be provided, in line with penalties for offences of similar gravity, such as homicide.

7. Definition of a Victim

Section 2(b) of the Bill defines the victim to include family members of the disappeared person. This is a welcome expansion of the definition but should not be considered an exclusive list. International law recognizes that victims include not only close relatives of the crime victim, but any person damaged as a direct consequence of the violation. According to Article 24(1) of the Convention a victim includes “any individual who has suffered harm as a direct result of an enforced disappearance”

The ICJ recommends that Section 2(b) be amended to conform to Article 24(1) of the Disappearances Convention.

8. Appointment of Commissioners

To ensure competence, effectiveness, independence and impartiality, the Commission should consist of persons with a proven expertise and experience in the field of human rights. The Commissioners should be of high moral character with a demonstrated commitment to human rights. To be accepted as credible by the people of Nepal, members of the Commission should be selected through a transparent and participatory process with public consultation. The panel that selects the Commissioners should include representatives from the Government, other parties represented in the Constituent Assembly, civil society organizations, human rights defenders, victim groups, the National Human Rights Commission and members from marginalised and vulnerable groups.

The Bill provides no guidance on the procedure or criteria for selecting Commissioners and no mechanism for ensuring public participation. Under Section 10(3), the panel empowered to recommend the appointment of Commissioners is limited to two ministers appointed by the Government of Nepal and the Chairperson of the Constituent Assembly. This is not a credible process for selecting members of this important public institution responsible for addressing a systematic violation of human rights that affected many groups and individuals throughout Nepal.

The ICJ recommends that Section 10 be amended to establish eligibility criteria to ensure that the Commissioners are competent, independent and impartial, and to provide for a broad consultative selection process involving different stakeholder groups such as the government, the opposition, the National Human Rights Commission, human rights organizations and victim groups.

9. Implementing the Commission's Recommendations

Justice for the victims and their families and the people of Nepal can only be ensured if the recommendations of the Disappearances Commission are effectively monitored and implemented. It is therefore important that the Bill establish an independent, credible and effective process for implementing the Commission's recommendations, especially concerning prosecutions.

The ICJ recommends that Section 25 be amended to ensure the effective implementation of the Commission's recommendations, by including for example, provisions specifying the role of the Attorney General in prosecuting cases forwarded by the Commission, and granting civilian courts (not military tribunals or other special courts) jurisdiction over all persons alleged to have committed enforced disappearances, including members of the Nepalese Army.

The passage of the Disappearances Bill will be a milestone in Nepal's ongoing process of political transition and legal reform, a potentially crucial step towards ending the culture of impunity and moving towards a more peaceful and democratic society. The ICJ acknowledges and welcomes the commitment of the Constituent Assembly to effectively address the issue of enforced disappearances. However, the ICJ is concerned that certain provisions remain inadequate to the task, and therefore urges the Constituent Assembly to consider making amendments necessary to bring the proposed law in line with Nepal's international obligations and the ruling of the Supreme Court.

As the Supreme Court noted, '*[a]t a time when the nation is making a leap forward with great hope and confidence in the direction of democratization, if the present State does not become serious on matters relating to disappeared persons, the objective underlining the People's Movement will not be realized*'.

The ICJ would appreciate if this letter could be circulated to all members of the Constituent Assembly and would welcome an opportunity to discuss these issues with the honourable Chairperson and members of the Assembly.

Sincerely,



Roger Normand
Director
Asia-Pacific Programme

c.c: *All Members of the Constituent Assembly*
Secretary-General, Constituent Assembly