



INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

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

Mr Subas Nembang
Speaker
Interim Legislature-Parliament
Parliament Secretariat
Singhadurbar, Kathmandu
Nepal

30 May 2007

Dear Mr Speaker,

The International Commission of Jurists (ICJ) takes note of the tabling of the Bill to provide for amendment to the Civil Code, which would add Chapter 8A "on causing disappearance" and Chapter 8B "on act of abduction or hostage taking".

The ICJ welcomes the initiative to criminalise the practice of enforced disappearance. The criminalisation of this practice would be a significant contribution to strengthening the protection and promotion of human rights in Nepal, and to ending impunity for this serious crime.

The problem of enforced disappearances in Nepal over the past ten years of conflict has been among the worst anywhere in the world. Between May 2000 and 13 January 2007, the National Human Rights Commission (NHRC) received 2028 cases of enforced disappearance. Over 600 of these cases remain unsolved. The ICJ welcomes the commitment of the interim Legislature-Parliament to provide relief to the families of victims of enforced disappearance under Article 33(q) of the Interim Constitution.

The ICJ is, however, concerned at the failure to hold accountable even a single perpetrator or to deliver on the commitment to provide compensation to victims, which continues to foster a culture of impunity in Nepal. The Bill does not address this as it fails to criminalize and to provide for the prosecution of those responsible for enforced disappearances. We would urge the Interim Legislature-Parliament to ensure that the Bill applies to enforced disappearances committed during the ten years of conflict.

Turning to the substance of the Bill, the ICJ has a number of concerns with regard to its compliance with recognised international

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human rights law and standards, including human rights treaties ratified by Nepal. The ICJ urges the Interim Legislature-Parliament not to adopt the Bill as currently drafted. It contains major flaws and omissions that need to be addressed through further consultation, followed by detailed and careful amendments. We also urge the Interim Legislature-Parliament to consider adopting legislation on enforced disappearances independent from the Civil Code, to ensure that legislation dealing with such crimes is sufficiently comprehensive, effective and in accordance with internationally recognised standards.

We welcome the attempt in Chapter 8B of the draft Bill also to criminalise abduction or hostage-taking, practices which are increasing in Nepal. Chapter 8B would envisage that non-state actors who abduct and/or hold hostage any person can be punished by imprisonment of between eight years to life. The ICJ supports the criminalisation of such offences by non-state actors, which represent affronts to international criminal law and human dignity. There are some technical drafting issues that need to be addressed, and the ICJ would welcome the opportunity to discuss matters of detail with you or Parliamentarians. However, we have confined our comments in this letter to Chapter 8A “on causing disappearance”.

The criminalisation of enforced disappearances is a complex area of law. We have therefore limited this letter to the most important issues of principle that should be immediately considered by the Interim Legislature-Parliament in deciding how to proceed with Chapter 8A. For convenience, the letter is divided into two main parts: (1) problems with the content of existing provisions of the Bill, and (2) international standards missing from the Bill. These issues could be further developed by direct consultation with you and Parliamentarians, if requested.

The ICJ would be grateful, Mr Speaker, if you would circulate our letter to all the members of the Interim Legislature-Parliament.

(1) Problems with existing provisions of the Bill

Civil code context

The proposed Bill is introduced in the framework of the Civil Code and is therefore written in a similar style to other Chapters of the Civil Code. Unfortunately, the Civil Code lacks the modern structure and procedural provisions that a law on enforced disappearances requires in order to comply with international standards. Due to the constraints of the Civil Code, it will be difficult for the Bill to be successfully amended to comply with the international standards that we highlight below, given the scope of the amendments required. Parliament may, however, wish to consider using the content of the Bill as the starting point for a more detailed and expanded draft law independent from the Civil Code.

Recommendation 1: The ICJ recommends that independent national legislation - separate from the Civil Code - should be introduced to deal with the crime of enforced disappearance.

Definition of enforced disappearance

Enforced disappearance is a complex crime involving multiple human rights violations, including the right to personal liberty and security, the right to recognition as a person before the law, the right to an effective remedy, the right not to be subjected to torture or other cruel, inhuman or degrading treatment, and a grave threat to or violation of the right to life. The definition of the offence is therefore of crucial importance.

The definition of “causing disappearance” in Section 1 of the Bill does not fulfill the recognised definition of enforced disappearance in international human rights law. The Bill, for example, only covers an enforced disappearance that is carried out by a person “having the authorization under the law” to arrest or investigate or implement laws. Unfortunately, enforced disappearances are also carried out by state agents who do not have any official law enforcement authority.

The definition of enforced disappearance is generally considered to contain 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 recognised rights. The *United Nations Declaration on the Protection of all Persons from Enforced Disappearances* and the *International Convention for the Protection of All Persons from Enforced Disappearance 2006* (‘Disappearances Convention’) also require the involvement of government officials or at least their indirect involvement by acquiescence.

Recommendation 2: The ICJ would recommend that the definition of the crime of enforced disappearance in national law reflect the internationally recognised definition, such as that contained in Article 2 of the Disappearances Convention.

Offence and penalties

Responsibility of superiors

Sections 2, 3, 4 and 5 of the Bill contain provisions that in certain circumstances would make a superior guilty of an offence, even where the actual commission of the crime is carried out by another person. This is consistent with international law, which provides that a hierarchical superior is responsible under penal law for enforced disappearances committed by subordinates.

However, the exact scope of responsibility of a superior under the Bill is unclear and is narrower than international law, which elaborates detailed provisions on the circumstances in which a superior will be responsible for an enforced disappearance. In the context of enforced disappearances international standards state that a superior should be 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. These circumstances, in which a superior will be held responsible for the crime of enforced disappearance, are well established in international law, are necessary to end impunity, and should be reflected in national legislation in Nepal

Recommendation 3: The ICJ recommends that national legislation ensures that superiors have criminal responsibility for enforced disappearances where a superior: (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.

Responsibility of subordinates

Section 2 of the Bill provides that where more than one person is responsible for the disappearance, the person who arrested, held in detention or took into custody the disappeared person shall be considered the “principal offender”. Experience shows that in most cases this person will be a subordinate, usually acting under superior orders. It is important therefore that legislation makes clear to subordinates that no superior order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

Recommendation 4: The ICJ recommends that national legislation ensures that subordinates who commit the offence of enforced disappearance cannot use the defence that they were obeying orders or instructions.

More often than not, subordinates will feel under pressure to obey superior orders. For this reason, it is a general principle of international law that subordinates who receive orders to commit enforced disappearances have the right and duty not to obey them. This principle is expressly contained in international instruments, such as Article VIII of the *Inter-American Convention on Forced Disappearance of Persons* and Article 5 of the *United Nations Code of Conduct for Law Enforcement Officials*. The Bill does not contain such a provision.

Recommendation 5: The ICJ recommends that national legislation expressly provides that subordinates who receive orders to commit enforced disappearances have the right and duty not to obey those orders.

Other offences

Sections 4 and 5 of the Bill also make it an offence to order, induce, attempt or abet the commission of a disappearance. This is narrower than the scope of criminal responsibility contained in the Disappearances Convention, which also includes a person who solicits, is an accomplice to, or participates in an enforced disappearance. This additional wording reinforces the principle that both those who encourage and participate in an enforced disappearance share responsibility for the crime.

Recommendation 6: The ICJ recommends that national legislation should also make it an offence to solicit, be an accomplice to, or participate in, an enforced disappearance.

Penalties

Section 3 provides that a person causing a person to disappear will be imprisoned for up to five years and fined up to 50,000 rupees. The period of time a person is disappeared and the conditions in

which a person is held can be taken into consideration in mitigating the level of sentencing. Section 5 provides that a person who induces, attempts, or abets the commission of a disappearance should receive half the penalty of the “principal offender”.

International law and principles also allow for mitigating circumstances to be taken into account in sentencing. However, because enforced disappearance is a crime in international law, only very limited mitigating factors are allowed, and they do not include the mitigating factors contained in Sections 3 and 5. Mitigating factors should be limited to factors, such as: the young age of the perpetrator, and/or where those implicated in the commission of the crime effectively contribute to bringing the disappeared person forward alive, or make it possible to clarify cases of enforced disappearance, or to identify the perpetrators of an enforced disappearance.

Recommendation 7: Any mitigating circumstances, which may be taken into account in reducing the penalty for the offence, should be limited to consideration of the age of the offender, and/or to where those implicated in the commission of the crime effectively contribute to bringing the disappeared person forward alive, or make it possible to clarify cases of enforced disappearance, or to identify the perpetrators of an enforced disappearance.

The Disappearances Convention provides for penalties that take account of the “extreme seriousness” of the offence. The ICJ does not consider that imprisonment up to five years reflects the seriousness of the crime. A higher level of penalty should be provided for in such cases, in line with the penalties for offences of similar gravity under Nepali law, such as homicide.

Recommendation 8: The ICJ recommends that the prison sentence for enforced disappearance should be increased to reflect the extreme seriousness of the offence, in line with offences of similar gravity under Nepali law, such as homicide.

Aggravating circumstances - torture

Section 6 of the Bill provides that where the disappeared person is subjected to torture during the period of the ‘disappearance’, or subjected to any other unlawful acts constituting an offence under Nepali law, the person responsible for arrest or detention, or responsible for taking control of such person, shall be held responsible for torture, unless proved otherwise. The Disappearances Convention (Article 7(1)(b)) provides for the possibility of ‘aggravating circumstances’ when considering the appropriate penalty. On the whole, therefore, Section 6 is a welcome provision. However, although Article 26 of the Interim Constitution declares torture to be a criminal act, torture is not defined in Nepali law, which would make this provision difficult to enforce in practice.

Recommendation 9: The ICJ recommends that national legislation is introduced making torture or other cruel, inhuman or degrading treatment or punishment a crime under Nepali law, in accordance with Nepal’s obligations under the UN Convention against Torture and the International Covenant on Civil and Political Rights.

Compensation and reparations

Section 8 of the Bill provides that the disappeared person shall, after being “made public or appears”, be provided financial compensation at the rate of NPR 500 per day. Compensation is only

payable to the disappeared person, except in the case of death, where compensation is payable to the closest heir. This is not consistent with the jurisprudence of international bodies, such as the United Nations Human Rights Committee and the United Nations Working Group on Enforced and Involuntary Disappearances, and international standards, which consistently define 'victims' of a disappearance to include other injured parties, such as the family of the disappeared person, and allows for provision of compensation and reparations to those other parties whether or not the disappeared person is dead.

Recommendation 10: The ICJ recommends that national legislation should not only provide compensation to the disappeared person, but also to any individual who has suffered harm as the direct result of an enforced disappearance.

International law also provides that the State shall ensure in its legal system that the victims of enforced disappearance have the right to obtain 'reparation'. This is most recently reflected in Article 24 of the Disappearances Convention. Reparation includes restitution,¹ rehabilitation, satisfaction² and guarantees of non-repetition of the offence. Accordingly, it is important that national laws ensure victims have the right to a legal remedy, the right to participate in all stages of legal procedures, that families have the right to be informed of the results of inquiries into the fate and whereabouts of the disappeared person, and that families have the right to know the truth.

Recommendation 11: The ICJ recommends that national legislation includes the right to reparations to the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance, as provided for in international standards, such as Article 24 of the Disappearances Convention.

Time limit

Section 9 of the Bill provides that no time limit will apply in the case of murder after disappearance. In cases not involving murder, no complaint can be made after six months from the date of disappearance, or the date the disappearance was known, or after the release is made public. International standards require limitation periods to be of long duration and proportionate to the extreme seriousness of this offence. A limitation period of six months is far too short and cannot be considered to be of long duration and proportionate to the offence. Moreover, where the enforced disappearance constitutes a crime against humanity, international law provides that there should be no statutory limitations.

Recommendation 12: The ICJ recommends that no limitation period should apply for the crime of enforced disappearance, to reflect the gravity of the offence.

Further, applying a time limit from the date when the disappearance begins, or is known about, does not take into account the continuing nature of enforced disappearances. The trigger for time limits should commence from the moment when the offence of enforced disappearance ceases and the case is

¹ Restoring the victim to his/her original position before the violation occurred.

² For example: guarantee of non-recurrence of violations, effective measures aimed at the cessation of continuing violations, verification of the facts and full and public disclosure of the truth, the search for the whereabouts of the disappeared, public apologies (including recognition of the facts and acceptance of responsibility), public memorials and/or commemorations, changes of relevant laws and practices, and bringing to justice the perpetrators of human rights violations.

solved, which will normally be when the whereabouts or fate of the disappeared person has been publicly revealed.

Recommendation 13: The ICJ recommends that any time limit for filing a complaint should commence from the moment when the offence of enforced disappearance ceases, which will normally be when the whereabouts or fate of the disappeared person has been publicly revealed.

(2) International standards missing from the Bill

The Bill does not provide specific provisions in certain areas required by international law and standards; such as, investigative powers, measures to prevent the crime of enforced disappearance, and procedures for international cooperation and assistance. Below we have highlighted some of the most important provisions, which if included would contribute to ensuring national legislation in Nepal complies with international law and best practice. The ICJ stands ready to expand on these suggestions if requested.

Past violations

The ICJ is deeply concerned that the Bill does not seek to deal with the issue of enforced disappearances that occurred during the ten years of conflict. Whilst there was no specific crime of disappearance under Nepali law during this period, enforced disappearance was a crime under international law, and, accordingly, in international law there is no bar to prosecution and punishment for the commission of enforced disappearances during the conflict. Moreover, because of the nature of disappearances, any act of enforced disappearance is a continuing crime, as long as the perpetrators continue to conceal the fate and whereabouts of the disappeared person and the case remains unsolved.

Recommendation 14: The ICJ strongly recommends that national legislation criminalising enforced disappearances should apply to enforced disappearances committed during the conflict and/or that may still be continuing.

Further, given the serious nature of the crime of enforced disappearance, perpetrators should not benefit from any specific amnesty law or similar measure that might exempt them from any criminal proceedings or sanction.

Recommendation 15: The ICJ recommends that national legislation should prohibit the granting of amnesties or any similar measure for those responsible for an enforced disappearance.

Powers of investigation

International standards provide that States should take appropriate measures to investigate allegations of enforced disappearance. The Bill as drafted does not contain any such provisions. The absence of such provisions would significantly weaken its impact. Such investigative measures are an important part of ensuring that the fate and whereabouts of the disappeared person are disclosed as soon as possible, which is the right of the disappeared person and their family. They also provide essential tools to combat impunity.

For example, the Disappearances Convention (Articles 3, 12 and 18) requires States Parties to ensure, among other things: provisions guaranteeing a rapid exhaustive and impartial inquiry, including broad powers of investigation; access to places of detention, including military sites; temporary suspension from official duties of persons presumed responsible for enforced disappearance; a duty to search and investigate the fate of disappeared person as long as the fate of the person is not known; designated places for the submission of complaints of disappearance; protection of relevant documents; and powers to make available relevant data to discover the whereabouts of disappeared persons.

Recommendation 16: The ICJ recommends that national legislation should expressly contain the powers and provisions of investigation, as contained in international standards, such as Articles 3, 12 and 18 of the Disappearances Convention.

Crimes against humanity

States have an obligation to make enforced disappearance a crime against humanity in national criminal law, in cases where the acts involve a massive or systematic practice. The Bill does not contain such a provision. Given the experiences in Nepal, national law should address when disappearances may lead to a crime against humanity, together with provisions for the investigation, prosecution and appropriate penalties for such a crime.

Recommendation 17: The ICJ recommends that national legislation should make enforced disappearance a crime against humanity in Nepal's criminal law, for cases where the acts involve a massive or systematic practice.

Prevention measures

International law and standards also provide for a number of measures seeking to prevent enforced disappearances. Such measures include: official and centralised registries of persons deprived of liberty; provisions guaranteeing the legality of the deprivation of liberty and its control by a judicial body or other competent authority; a *non-refoulement* clause prohibiting the expulsion, extradition or return of a person to a State if the risk exists that he/she will be a victim of enforced disappearance; an obligation to inform the families of persons deprived of their liberty about their arrest or transfer, as well as their lawyer or another person having a legitimate interest; provisions protecting persons from secret detention with sets of guarantees for those deprived of their liberty; release procedure of person deprived of liberty; and, an offence of obstruction to administration of justice.

Recommendation 18: The ICJ would recommend that national legislation contain provisions setting out measures to prevent enforced disappearances; especially, (a) a requirement for official and centralised registries of persons deprived of liberty, (b) a requirement that detained persons be held in officially recognised places of detention, (c) the non-derogable right to *habeas corpus* for and on behalf of the disappeared person, and, (d) the right of access to information concerning the whereabouts of detained persons by family members and others having a legitimate interest.

International cooperation and mutual assistance

International standards provide for a number of measures to facilitate international cooperation and mutual assistance regarding investigation, and application of penal procedures for the repression of

the crime of enforced disappearance by national courts. This reflects the particular seriousness of enforced disappearances, which engages the interest of the international community in ensuring offenders are brought to justice, wherever they might be.

In this context, the Disappearances Convention (Articles 13, 14, 15 and 16) sets out a number of specific measures, including: safeguards against providing asylum or refuge to actual or presumed perpetrators of enforced disappearance; an obligation to extradite those wanted for the crime of enforced disappearance in other countries and the recognition of the non-political character of the crime of enforced disappearance for the purposes of extradition; an obligation to exercise territorial competence, active competence (national perpetrator), and passive competence (national victim); and, an obligation to exercise universal competence and the principle of *aut dedere aut judicare* (extradite or prosecute).

Recommendation 19: The ICJ would recommend that national legislation contain provisions providing for international cooperation and mutual assistance, as provided for in international standards, such as Articles 13, 14, 15 and 16 of the Disappearances Convention.

Conflicts and states of emergencies

Experience around the world shows that enforced disappearances are most common during times of conflict, political instability, or public emergency. Accordingly, international human rights law provides that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. Any national law on enforced disappearances should therefore reflect this; otherwise the law is likely to prove ineffective in practice.

Recommendation 20: The ICJ recommends that national legislation contains an express clause stating that no exceptional circumstances whatsoever may be invoked to justify the crime of enforced disappearances.

Finally, the rule of law and the justice system is also most likely to be in jeopardy during conflict, political instability or public emergency. It is therefore important to ensure that courts hearing cases of enforced disappearances are competent and independent. In the ICJ's experience, this is best achieved by giving exclusive jurisdiction to ordinary civilian courts and expressly excluding the possibility of military tribunals.

Recommendation 21: The ICJ recommends that national legislation contains an express clause giving exclusive jurisdiction to common law courts to hear cases involving the crime of enforced disappearance, and expressly excluding military tribunals.

Specific legal procedures

In the case of enforced disappearances, it will not be possible for the disappeared person to bring a legal action themselves in relation to their enforced disappearance, unless they are claiming after the event for compensation for unlawful detention and/or ill-treatment. It is therefore important that the national law allows third parties with a legitimate interest to bring legal actions for and on behalf of the disappeared person.

Recommendation 22: The ICJ recommends that national legislation contains an express clause allowing third parties with a legitimate interest to bring legal actions for and on behalf of the disappeared person in relation to the disappearance.

Further, because of the secretive nature of enforced disappearances, it will not always be possible for victims to provide first-hand evidence in support of an allegation of enforced disappearance. It is therefore necessary to give the courts the widest possible access to evidence. Accordingly, national courts should be permitted to rely on circumstantial evidence, leaving the court to decide on the weight to be given to such evidence.

Recommendation 23: The ICJ would recommend that national legislation allows Nepali courts to rely on circumstantial evidence in cases of allegations of enforced disappearance.

This letter is not intended to represent an exhaustive list of concerns. The ICJ would welcome the opportunity to offer further, more detailed submissions on the development of national legislation to make enforced disappearances a criminal offence in Nepal, or to discuss these matters directly with you and parliamentarians, as the legislative process develops.

Yours sincerely,

A handwritten signature in black ink, reading "Nicholas Howen". The signature is written in a cursive style and is positioned above a horizontal line that serves as a separator.

Nicholas Howen
Secretary-General