

Nepal: Joint Memorandum on the Disappearances of Persons (Crime and Punishment) Bill

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This Memorandum, submitted by Accountability Watch Committee, Advocacy Forum Nepal, Amnesty International, Asian Federation Against Involuntary Disappearances, Human Rights Watch, International Center for Transitional Justice, International Commission of Jurists and Informal Sector Service Centre to the government of Nepal, includes some comments and recommendations on the latest draft of the Disappearances of Persons (Crime and Punishment) Bill 2066 (hereinafter the Bill). The organizations welcome the opportunity to comment on the draft and look forward to a constructive dialogue with the government of Nepal.

The organizations welcome the initiative of the Ministry of Peace and Reconstruction of the Government of Nepal to make public the latest version of the Bill, as a step towards implementing the Comprehensive Peace Agreement and the June 2007 ruling of the Supreme Court of Nepal. The organizations believe that the criminalization of the act of enforced disappearance and the establishment of a Commission of Inquiry into enforced disappearances would help in ensuring that victims fully enjoy their right to truth, justice and reparations. In particular, the organizations welcome the improvements made with respect to previous versions of the draft Bill, on which they had provided comments.¹

In addition to such improvements, however, the current draft needs further amendments to be brought fully in line with international law and standards. Such amendments should include:

- Defining 'enforced disappearance' consistently with the internationally recognized definition and recognizing that, under some circumstances, the act of enforced disappearance amounts to a crime against humanity;
- Defining the modes of individual criminal liability, including responsibility of superiors and subordinates, consistently with internationally accepted legal standards;
- Establishing a minimum and a maximum penalty for the crime of enforced disappearance as such and for the crime of enforced disappearance as a crime against humanity;
- Ensuring the independence, impartiality and competence of the Commission of Inquiry into enforced disappearances;
- Ensuring that the Commission of inquiry into enforced disappearances is granted the powers and means to be able to effectively fulfil its mandate;

¹ See the end of this document for a list of documents and recommendations submitted by the organizations on previous versions of the draft Bill.

- Ensuring that all aspects of the work of the Commission of Inquiry into enforced disappearance respect, protect and promote the rights of victims, witnesses and alleged perpetrators;
- Ensuring that the recommendations of the Commission of Inquiry are made public and implemented.

The following recommendations are based on international law and standards relevant to the investigation and prosecution of enforced disappearances, as reflected in the jurisprudence of regional and international human rights bodies, international declarations and treaties, as well as the jurisprudence and practice of international and national criminal jurisdictions.

Section 2 (Definitions)

The definition of the act of “Disappearance of Persons” in Section 2(a) of the Bill is not consistent with the definition of enforced disappearance in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. In addition, the Bill does not recognize that, under some circumstances, the act of enforced disappearance amounts to a crime against humanity. It is recommended that Section 2(a) is amended as follows:

(a) “Enforced disappearance” means the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with 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.

(a-bis) “Crime against humanity of enforced disappearance” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to above against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

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 in previous versions of the Bill. However, the current list should not be considered to be exclusive. International law recognizes that victims include not only close relatives of the victim, but any person damaged as a direct consequence of the crime. It is recommended that Section 2(b) is amended as follows:

(b) “Victim” means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

Section 4 (The Person Committing an Act of Disappearances to be Deemed Principal Offender)

In order to reflect best practice and accepted international legal standards with respect to different modes of individual criminal liability, it is recommended that Sections 4(1) and (2) are amended as follows:

(1) A person shall be criminally responsible and liable for punishment for an act of enforced disappearance if that person:

- (a) Commits such an act, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;*
- (b) Orders, solicits or induces the commission of such an act which in fact occurs or is attempted;*
- (c) Aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;*
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an act of enforced disappearance;*
 - or*
 - (ii) Be made in the knowledge of the intention of the group to commit the act;**
- (e) Attempts to commit such a crime, but the crime does not occur because of circumstances independent of the person's intentions.*

In order to reflect international best practice and international legal standards with respect to responsibility of superiors, it is recommended that Section 4(3) is amended as follows:

(3) Commanders and other superiors shall be criminally responsible for an act of enforced disappearance committed by subordinates under his or her effective authority and control, where he or she:

- (a) either knew or should have known that one or more subordinates were committing or about to commit such act; and*
- (b) failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*

Finally, there is a concern that the current provision could be invoked to effectively shield subordinates from responsibility on grounds of obeying superior orders. In order to reflect international best practice and legal standards with respect to responsibility of subordinates, it is recommended that a Sub-Section (4) is added to Section 4 as follows:

(4) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility.

Section 6 (Punishment)

It is recommended that Section 6 is amended to indicate: a minimum and a maximum penalty for the crime of enforced disappearance; and a minimum and maximum penalty for the crime of enforced disappearance as a crime against humanity. In both cases, the minimum and maximum penalties should be commensurate to the gravity of the crime, be in line with penalties for offences of similar gravity and exclude the death penalty and other cruel, inhuman or degrading punishments.

Any scheme granting some form of leniency in exchange for assistance to the Commission or to prosecution authorities should be designed with great care, to ensure that it is not manipulated by perpetrators to escape punishment. It is recommended that the leniency provisions currently included in Section 6(4) is amended as follows:

- (4) *Notwithstanding anything contained elsewhere in this Section, the court may reduce the punishment to be imposed against the perpetrator of an act of enforced disappearance in accordance with this Act if:*
 - (a) *He or she extends his or her cooperation to the Commission, the investigating officer, the prosecutor or the court; and*
 - (b) *the information or assistance substantially contributes to knowledge of the fate and/or whereabouts of the victim and/or of the circumstances of the disappearance.*

Section 10 (Formation of the Commission)

The current formulation of Section 10(1) indicates that the Government of Nepal 'may' form a Commission of Inquiry into enforced disappearances. It is recommended that Section 10(1) is amended to provide that the Government of Nepal 'shall' form a Commission of Inquiry into enforced disappearances.

With the view to ensure that the selection process of the members of the Commission is transparent and that the best candidates are selected, it is suggested that Section 10(4) is amended as follows:

- (4) *At least one member of the Recommendation Committee shall be a woman.*
- (5) *The Recommendation Committee shall organize a public nomination process as follows:*
 - (a) *Within two weeks of being appointed, the Recommendation Committee shall issue a public call for nominations for the Members of the Commission, inviting suggestions from all those concerned, including national and international civil society organizations, victims, human rights defenders and persons belonging to minorities and vulnerable groups.*
 - (b) *On the basis of the suggestions received, the Recommendation Committee shall compile a list of qualified candidates, including women and men in equal representation and make such a list public.*
 - (c) *Taking into account any further comment or suggestion, the Recommendation Committee shall make recommendations for the appointment of the Members.*
- (6) *The Members of the Commission shall be recommended and selected on the basis of their competence in human rights and other relevant fields, proven independence and recognized impartiality. They shall be chosen from amongst human rights activists, psychologists, lawyers, forensic experts, conflicts experts, sociologists or persons involved in the peace process with at least ten years of experience in the relevant field. The composition of the Commission shall reflect a fair balance of women and men and pluralism in the Nepalese society.*
- (7) *After their appointment, the Members of the Commission shall choose a Chairperson among themselves.*

Section 13 (Personnel and Experts of the Commission)

The Commission should have the support of adequate professional, technical and administrative staff, recruited on the basis of their competence, impartiality and independence. It is recommended that Section 13 be amended as follows:

- (6) Government personnel seconded to the Commission shall report to and be answerable only to the Commission.*
- (7) Notwithstanding any other provision of this Section, the Commission shall have the power to hire its own staff, hire or obtain the services of experts, solicit and receive technical assistance, as it considers to be necessary.*

Section 14 (Resources, Means and Expenditures of the Commission)

The Commission should receive sufficient national resources as well as, if necessary, targeted development assistance. At the same time, it should ensure compliance with internationally accepted standards of financial reporting and accountability. It is recommended that Section 14 be amended as follows:

- (2) Notwithstanding Sub-Section (1), the Commission shall have the power to raise its own funds without requiring the authorization of the Government of Nepal and to keep its own budget.*

Section 15 (Functions, Duties and Powers of the Commission)

The Commission should: clarify, as far as possible, the facts about past enforced disappearances, including the fate and whereabouts of disappeared persons; provide the information it gathers into continuing and new investigations and criminal and civil judicial proceedings; and formulate effective recommendations for providing full reparation to all the victims and their relatives. It is recommended that Section 15 be amended to include the following additional sub-Sections:

- (4) To examine the patterns, causes and contributory factors of the commission of enforced disappearances;*
- (5) To inquire into institutional responsibilities and practices;*
- (6) To make recommendations of legislative, institutional and other reforms intended to guarantee that enforced disappearances do not occur again;*
- (7) To investigate acts defined in Section 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice;*
- (8) To make recommendations to the Office of the Attorney General for prosecution.*

Section 17 (Powers of the Commission relating to Examination)

Victims and witnesses should be protected against intimidation or reprisals on the part of perpetrators who still hold public positions. It is suggested that Section 17 is amended as follows:

(4 - a) If, during the course of an investigation under this Act on a person holding public position, the Commission has reasons to believe that, if the person is allowed to stay in the same position, he or she may:

(a) destroy or tamper evidence;

(b) intimidate witnesses and victims; or

(c) interfere in any other way with the investigation;

the Commission shall write to the body concerned to suspend him or her from their public position. When such a written request is received, the concerned body shall suspend him or her for the period requested by the Commission.

(4-b) The person suspended may challenge his or her suspension according to the law.

Section 19 (Protection of Witness and Other Person)

In order to clarify that making statements or providing information to the Commission do not shield alleged perpetrators of enforced disappearances from prosecutions, it is suggested that Section 19 (3) and (5) is amended as follows:

(3) No case shall be filed nor shall any legal action shall be taken against any person only because of making statements or providing information to the Commission. This provision does not prejudice the provisions of Sections 23 (To Send in Writing for Actions) and 25 (Provisions Relating to Filing the Lawsuit) or prosecution based on untrue statements or false information provided to the Commission.

(5) If any one, who provides any information, notice or evidence to the Commission, wishes to keep his or her name confidential, the Commission shall keep his or her name confidential. This provision does not prejudice the provisions of Sections 23 (To Send in Writing for Actions) and 25 (Provisions Relating to Filing the Lawsuit) or prosecution based on untrue statements or false information provided to the Commission.

In addition, it is suggested that the following provision be added to Section 19:

(6) Notwithstanding any other provision in this Act, the practices and proceedings of the Commission will respect and protect the rights of victims, witnesses and alleged perpetrators.

Section 22 (Recommendations for Reparations May Be Made)

The government of Nepal has an obligation under international law to grant full reparation to victims of enforced disappearances and their families. Under international law and standards, taking account of individual circumstances, victims of enforced disappearance should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation. Such reparation includes: restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. It is suggested that Section 22 is amended as follows:

(2-bis) The Commission shall organize consultations with the victims and their families about other appropriate forms of reparation to which they are entitled and make recommendation to the Government of Nepal. During

such consultations, particular attention shall be paid to the needs of women, children, persons belonging to minorities and vulnerable groups.

Section 24 (Report to be Submitted)

The final report will be the most visible outcome of the work of the Commission. It is suggested that Section 24 is amended as follows:

- (1-bis) The Commission's report and its recommendations shall be officially proclaimed, published in full and widely disseminated without undue delay.*
- (1-ter) Information, the publication of which may adversely impact the right to privacy or personal security of victims or witnesses, may be redacted from the public edition, at the request such victims or witnesses.*

Section 25 (Provisions Relating to Filing the Lawsuit)

It is suggested that Section 25 is amended as follows:

- (2-bis) In case the decision has been taken not to initiate a case against such a person pursuant to Sub-section (1), the government attorney shall notify in writing the Commission or its follow-up body, explaining the reasons for such a decision.*

Section 26 (Time limits)

With respect to the statute of limitations of the crime of enforced disappearance, i.e. the maximum period of time within which criminal and civil proceedings may be initiated, it is recommended that Section 26(1) is amended as follows:

- (1) There shall be no time limit to present complaints and initiate proceedings before the courts related to allegations of enforced disappearance within the meaning of Section 2.*

The time limit to submit complaints to the Commission of Inquiry on enforced disappearances should take into account the climate of fear under which enforced disappearances were committed and the consequent reluctance of people to report these violations to law enforcement and other government authorities. It is recommended that Section 26(2) is amended as follows:

- (2) A complaint within the meaning of Section 16 shall have to be lodged within one year from the date of commencement of the Commission's operational work.*
- (3) Notwithstanding anything contained in Sub-section (2), the time limit for filing complaints in matters to be examined by the Commission shall be extended as determined by the Commission.*
- (4) Failure to lodge a complaint before the Commission shall not be a bar to presenting complaints to and initiate proceedings before the courts.*

Section 28 (Burden of the Proof)

A fundamental aspect of the right to a fair trial is the right of every person charged with a criminal offence to be presumed innocent unless and until proven guilty beyond a reasonable doubt

according to the law after a fair trial. The right to a presumption of innocence means that the burden of proving an accused person's guilt rests with the prosecution. It is suggested that Section 28 of the Bill be deleted.

Section 37 (Term of Office of the Commission)

The Commission should be allowed sufficient time to carry out its mandate. Laying down a particularly short time limit for reporting would make its work more vulnerable to changes in a political climate. At the same time, the Commission should be asked to end its operations and report as promptly as reasonably possible, as an extended period of operation risks losing the public's attention and political momentum. It is suggested that Section 37 be amended as follows:

- (1) *The Commission shall be established within three months of the enactment into law of this Act.*
- (2) *The Commission shall be in office for two years after its establishment, during which it will carry out its operational work and write its final report.*
- (3) *The mandate of the Commission may be extended for an additional year only.*

Section 38 (Dissolution of the Commission)

The Bill should provide for a successor body to monitor the implementation of the Commission's recommendations, continue its investigations, preserve its archives, etc. These functions may be carried out by an *ad hoc* body or by an existing body, such as the National Human Rights Commission. It is suggested that Section 38 is amended as follows:

- (2) *Within three months from the dissolution of the Commission, the government of Nepal shall entrust an existing body or a newly-established body with the following functions:*
 - (a) *Monitoring the implementation of the Commission's recommendations;*
 - (b) *Continuing the Commission's investigations, if necessary;*
 - (c) *Preserving and manage the Commission's archives, including protecting the confidential information collected by the Commission;*
 - (d) *Other functions as necessary.*

Section 42 (Power to Frame Rules)

It is recommended that Section 42 be amended as follows:

- (1) *The Government of Nepal may, in consultation with the Commission, frame necessary rules to carry out the objectives of this Act.*
- (2) *The Commission shall adopt the necessary internal regulations and procedures to carry out the objectives of this Act, in particular standard procedures to ensure the respect, protection and promotion of the rights of victims, witnesses and alleged perpetrators.*

For more detailed comments and recommendations see:

INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE

- **Comments on the Draft Disappearances Bill**, 16 December 2008
- **Comments on Nepal's Disappearances Ordinance**, 12 February 2009

INTERNATIONAL COMMISSION OF JURISTS

- **The ICJ urges human rights amendments to the Disappearances Bill**, press release, 24 November 2008
- **Nepal: "New Bill on Enforced Disappearances proposed by Government of Nepal fails to meet human rights obligations"**, 25 November 2008
- **Nepal: Government Should Allow Parliament to Debate**, 30 January 2009
- **Nepal: ICJ calls for amendments to Ordinance on Disappearances to Ensure Human Rights**, press release, 6 March 2009
- **Disappearances in Nepal: Addressing the Past, Securing the Future**, briefing paper, March 2009
- **Nepal: After Two Years, Government Still in Non-Compliance with Supreme Court Order on Enforced Disappearance**, press release, 1 June 2009.
- **Nepal - ICJ calls for amendments to Bill on Disappearances to address the Past and Securing the Future**, letter to the Peace Minister, 16 July 2007.