



**Statement by Richard Bennett**  
**Representative of the United Nations High Commissioner for Human Rights in Nepal**  
***Delivered at the Nepal Bar Association Discussion on Disappearances***  
**3 March 2008, Kathmandu**

Honourable Speaker of the Interim Legislature-Parliament Mr Subas Nemwang, Honourable Attorney General Mr Yagya Murty Banjade, President of the Nepal Bar Association Mr Bishwa Mainali, Chairperson and Secretary of the Human Rights Committee of the Nepal Bar Association, other members of the Bar Association, Government representatives, and fellow participants.

I would like to thank the Nepal Bar Association, the International Center for Transitional Justice and the International Commission of Jurists for the invitation to join you this evening to discuss legal framework for addressing disappearances.

The legacy of disappearances that took place during the decade-long conflict continues to haunt Nepal's transition to peace and democracy. Unfortunately, little has been done by the Government to establish the fate of several hundred persons disappeared during the conflict, to hold accountable those responsible for the disappearances or to deter such violations in the future. We have some idea of the scale of the problem from the 500 cases submitted by the UN Working Group on Enforced Disappearances to the Government in 2006, and the cases of nearly 250 persons disappeared after being taken into the custody of the Nepalese Army at Maharajgunj barracks and in Bardiya as documented by OHCHR-Nepal.

In discussing this topic, it is important to recall the continuing hardship of families of the disappeared, many of whom have endured years of uncertainty as to the fate and whereabouts of their family member. These families, predominately comprised of women and children, have been prevented from moving ahead with their lives, emotionally and practically. They deserve better, and it has been the goal of alleviating at least a part of their suffering that has motivated many of us.

It is also vital that appropriate action be taken in order to break the cycle of abuses and of impunity, to move towards the type of institutional reform necessary to ensure that Nepal does not again see such a pattern of serious human rights violations.

Members of the Bar Association, including some present this evening, have been instrumental in advancing the issue of accountability for disappearances cases. It was as a result of several petitions brought to the attention of the Supreme Court that the Court on 1 June 2007 ordered the Government to enact legislation criminalising disappearances and to establish a Commission of Inquiry on Disappearances that meets international standards.

As of yet, the Government has not implemented the Court's directive. While it is understood that the Government is drafting legislation and the 23 point Agreement of December 2007 referred to the rapid establishment of a Disappearances Commission, it is unfortunate that there is no public draft of either legislation or a policy paper as to how the Government will implement its obligation. It would be ironic if efforts to clarify the fate of hundreds were themselves cloaked in secrecy. The Government should immediately make available for public scrutiny its current draft legislation on disappearances so that there can be adequate discussion about the issues in relation to it.

In addition to availing itself of the technical expertise available by groups such as those present this evening, the Government should also prioritise consultation with those individuals most directly affected by disappearances: namely the victims of disappearances. This is particularly important for the success of the Disappearances Commission: to ensure that it is regarded as credible, and that its objectives are targeted and reflect community expectations for addressing disappearances.

In this context, OHCHR-Nepal welcomes this evening's discussion of an alternative draft bill on disappearances prepared by the Nepal Bar Association's Human Rights Committee. We hope that this discussion will be a first step in a much broader consultation on these issues.

To encourage informed debate of the details of the alternative draft bill, I would like to highlight a few key issues for OHCHR-Nepal with respect to each of the topics of criminalisation of enforced disappearance, and the establishment of a Disappearances Commission.

### *Criminalisation*

OHCHR-Nepal recommends that provisions on the criminalisation of enforced disappearance should draw upon the definitions of the crimes set out most clearly in the International Convention for the Protection of All Persons from Enforced Disappearance and the Rome Statute of the International Criminal Court.

Using these international instruments as guides assists in highlighting:

- Recognition of enforced disappearance as a crime in itself, as well as a crime against humanity when committed as part of a widespread and systematic attack against a civilian population.
- The range of persons culpable for enforced disappearances: not only in relation to State officials, but also those affiliated with political organisations, and individuals who act with the support or acquiescence of the State or a political organisation. Similarly to also recognise the liability of superiors (the notion of command responsibility).
- Appropriate penalties that take into account the seriousness of the offence as well as the relevant aggravating and mitigating circumstances.
- The way in which enforced disappearances can be considered a 'continuing crime' as long as the fate of the disappeared person remains concealed or unclarified.
- The need to consider criminalising the acts from the time at which they became recognised as criminal acts under international law.

Investigation and prosecution of allegations of enforced disappearance or crimes against humanity of enforced disappearance must be independent. This may require investing special mechanisms with exclusive jurisdiction: such as a special prosecutions unit or a special Court/Chamber.

### *Commission of Inquiry on Disappearances*

While individual criminal accountability is an important way of addressing disappearances, other mechanisms are equally necessary. The UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity speaks about victims' right to truth, the right to reparations and guarantee of non-repetition and the right to justice. In relation to disappearances, in particular the Principles speak of the "right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate". These are issues concerning which an effective Disappearances Commission could make a significant contribution. To take an international example, the Commission on Disappeared Persons in Argentina documented approximately 9,000 cases of disappearance, transferred over 1000 cases to the judiciary for potential prosecution and made recommendations for reparations.

In Nepal, the Supreme Court in its decision of 1 June 2007 has stressed the importance of any Commission being established in accordance with international standards. These include that:

- The terms of reference of the Commission are clearly defined. This includes defining the appropriate relationship between the Disappearances Commission and the proposed Truth and Reconciliation Commission.
- Commissioners are chosen for their competence, including expertise in human rights, and should include women and representatives of historically marginalised groups.
- Commissioners, investigators and other staff of the Commission should be independent and impartial.
- The Commission's procedures involve victims in its establishment and operations and that the Commission takes specific steps to provide for the security of victims, witnesses and other persons such as counsel and investigators.
- The Commission has sufficient powers and resources to accomplish its mandate. In addition to having powers with respect to gaining information from persons, documents and sites, and as necessary to be involved in exhumations, it is also important to consider whether the Commission has the necessary powers to address the practical needs of families of disappeared persons: for example, in issuing certificates of death or other documentation to overcome obstacles that families of the disappeared face.

In this respect, it will also be important for work to be carried out on the systemic weaknesses that allow for a pattern of disappearances to occur: including following up many of the recommendations of the UN Working Group on Enforced Disappearances that remain to be implemented.

To uphold the rights of victims of disappearance and to deter anyone from disappearing persons in the future, it is important for government decision makers to work together with

civil society, including victim groups. An inclusive process is vital to ensure appropriate action is formulated and that the rights of victims are not made secondary to vested interests.

OHCHR-Nepal continues to support efforts towards establishing a legal framework dealing with disappearances (including through disseminating draft provisions on criminalisation based on international precedents, and assisting in relation to criteria for a Disappearances Commission), and we remain ready to provide assistance in these efforts.

OHCHR-Nepal now looks forward to taking part in today's discussion of the Bar Association's draft bill, which we hope will lead to further consultations on comprehensive legislation by the Government with not only the legal community but also civil society, victim groups and others.

Thank you.

For further information contact Marty Logan at OHCHR-Nepal:  
Tel.: 428 0164 (Ext.321); Mobile 98510.16922 or [mlogan@ohchr.org](mailto:mlogan@ohchr.org)

