IN THE

SUPREME COURT OF NEPAL

———

Writ No. 0010-2065

———

BHUWAN PRASAD NIRAULA & ORS, *Petitioners,*

V.

CONSTITUENT ASSEMBLY, LEGISLATIVE PARLIAMENT & ORS, *Respondents*.

———

Motion of the International Commission of Jurists and the National Institute of Military Justice for Leave to File Brief *Amici Curiae*, Revised Brief of *Amici Curiae*, and Motion of Eugene R. Fidell and Douglass C. McCrae for Leave to Appear *Pro Hac Vice*

———

Motion for Leave and Interest of the Amici Curiae

The International Commission of Jurists (the "ICJ"), a non-governmental organization ("NGO") based in Geneva, and the National Institute of Military Justice ("NIMJ"), an NGO based in Washington, D.C., respectfully move for leave to file the following brief *amici curiae*. Douglass C. McCrae and Eugene R. Fidell, counsel for the ICJ and NIMJ, respectfully move for leave to appear *pro hac vice*.

The ICJ, founded in 1952, is a worldwide organization of judges and lawyers dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. The ICJ holds consultative status with the United Nations ("UN") Economic and Social Council, the UN Educational, Scientific and Cultural Organisation, the Council of Europe, and the African Union, and maintains cooperative relations with various bodies of the Organization of American States. The ICJ's website is www.icj.org.

NIMJ is a not-for-profit corporation founded in 1991 and affiliated with the American University Washington College of Law. Its purposes are to advance the fair administration of justice in the armed forces of the United States and to foster improved public understanding

of military justice. In early 2010, NIMJ established a Global Military Justice Initiative to work with NGOs concerned with military justice in other countries. NIMJ's website is www.wcl.american.edu/nimj.

Eugene R. Fidell is President of NIMJ and a member of the bar of the Supreme Court of the United States. He teaches Military Justice at Yale Law School and is co-author of the law school textbook *Military Justice: Cases and Materials* (2007). He served as a judge advocate in the United States Coast Guard and has participated in the Meeting of Experts convened by the Office of the UN High Commissioner for Human Rights to consider the *Draft Principles Governing the Administration of Justice Through Military Tribunals*, E/CN.4/2006/58 (13 January 2006).

Douglass C. McCrae is the ICJ's Country Representative for Nepal. He is a member of the bar of the Supreme Court of the State of Washington.

Mr. Fidell and Mr. McCrae seek leave to appear *pro hac vice* solely for the purpose of submitting this brief. They will be present to observe the Court's proceedings on November 4, 2010.

Revised Brief of Amici Curiae[1]

Statement of the Case

This case arises from a writ petition filed on 26 September 2008 challenging the legality of provisions of the Army Act, 2063 (2006) and the Court-Martial Regulation, 2064 (2007), including sections 67, 68, 73, 81, 82, 98, 100, 108, 109, 110, 113, 115, 116 and 119 of the Army Act and rules 4, 7, and 30 of the Court-Martial Regulation. Petitioners are Ms. Bakhti Shah, who was discharged from the Army as the result of a court-martial in 2007, Bhuwan Prasad Niraula, a lawyer who represented Ms. Shah before the Special Court-Martial, and Prem Chandra Rai, a lawyer who has worked with the Blue Diamond Society

[1] The revised brief that follows differs from the version served on opposing counsel on November 4, 2010 chiefly by including a Statement of the Case .

advocating for the rights of sexual minorities. Another writ petition (Writ No WO-0183/2065) directly challenged Ms. Shah's court-martial while this case was filed as "Public Interest Litigation".

Ms. Shah's case began in 2007 at the Military Academy in Kharipati, Bhaktapur. A Court of Enquiry was established under rule 4 of the Court-Martial Regulation to look into allegations of indecent behavior against Ms. Shah, who was a corporal. She was alleged to have engaged in indecent conduct, including sharing a bed with another female soldier, and to have violated regulations with regard to the possession and exchange of money within the Academy. The Court of Enquiry recommended that she be prosecuted.

A Summary General Court Martial was convened, pursuant to section 73 of the newly introduced Army Act, and began proceedings in June 2007. Ms. Shah appeared without counsel. The court found that Ms. Shah had committed an offence against discipline and the code of conduct both by having an unnecessarily close attachment to another soldier and by amassing money in violation of sections 52(b) and (g). She was sentenced to 60 days' imprisonment in military custody and to be discharged from military service.

Ms. Shah appealed the decision to the Special Court Martial. She obtained counsel and was represented before the Special Court Martial. The Special Court Martial upheld the verdict of the Summary General Court Martial, but overturned the confinement portion of the sentence, leaving in place the discharge. The court rejected Ms. Shah's contention that the verdict below was based upon prejudice against homosexuals.

Counsel for Ms. Shah then filed two parallel writ petitions, one challenging her conviction and another (this case) challenging the legality of various provisions of the Army Act and Court Martial Regulation.

Through this writ, petitioners have challenged provisions in the Army Act for violating the Interim Constitution and various legal principles including international law stan-

dards. The petition asserts that the various courts-martial provided for in the Act are not independent, impartial and competent tribunals as required by various international laws and principles, and therefore violate the fair trial rights guaranteed by the Interim Constitution of Nepal, 2007. Petitioners also challenge the limitations on access to legal counsel in courts-martial.

Argument

I

International Standards

Over the last several decades, international standards for the administration of military justice have come increasingly in focus. These standards emerge from several sources. The first is the 1966 International Covenant on Civil and Political Rights ("ICCPR"), together with the General Comments and decisional law developed under it by the UN Human Rights Committee. Of particular note is General Comment No. 32,[2] which elaborates on the requirements of ICCPR Art. 14 (Right to equality before courts and tribunals and to a fair trial). The second is the body of law being developed by regional human rights organizations such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, applying the generally similar principles laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African (or Banjul) Charter on Human and Peoples' Rights.

[2] UN Doc. CCPR/C/GC/32 (23 August 2007). A copy of General Comment No. 32 is attached to this brief for the Court's convenience.

A third international source is the *Draft Principles Governing the Administration of Justice Through Military Tribunals,*[3] which was adopted by the former UN Sub-Commission on the Promotion and Protection of Human Rights and are presently under consideration by the UN Human Rights Council.

Yet another international source that may properly be consulted in the search for general principles is the *Basic Principles on the Independence of the Judiciary*, adopted by the UN General Assembly in 1985.[4]

The latter two sources clarify and elaborate on the right to a fair trial under general international law and its universal expression in Article 10 of the Universal Declaration of Human Rights.[5] Nepal, along with 165 other States, is a State Party to the ICCPR, having acceded to it on May 14, 1991. Article 14 of the ICCPR provides in pertinent part that "everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law." The UN Human Rights Committee, which is the supervisory body responsible for the authoritative interpretation of the ICCPR, has repeatedly affirmed that the practice of using military courts to try military and police personnel who have committed human rights violations is incompatible with the State Party's obligations under the ICCPR.[6] The UN Committee against Torture, which implements the UN Convention against

---

[3] UN Doc. E/CN.4/2006/58 (13 January 2006). The elaboration of the Draft Principles was led by the Sub-Commission's Special Rapporteur, Prof. Emmanuel Decaux of the University of Paris. They are therefore commonly referred to as the Decaux Principles. A copy is attached to this brief for the Court's convenience. Also attached are two background notes prepared in connection with a Meeting of Experts convened by the Office of the UN High Commissioner for Human Rights in Brasilia, on November 27-29, 2007.

[4] UN Doc. A/CONF.121/22/Rev.1 at 59 (1985).

[5] "Everyone is entitled in full equality to a fair and equitable hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[6] *See* Concluding Observations on Bolivia (CCPR/C/79/Add.74, paragraph 11), Brazil (CCPR/C/79/Add.66, 24 July 1996, paragraph 10), Chile (CCPR/C/79/Add.104, 30 March 1999, paragraph 9), Colombia (CCPR/C/79/Add.2, 25 September 1992, paragraph 393; CCPR/C/79/Add.76, 5 May 1997, paragraph 18), Croatia (CCPR/C/79/Add.15 - A/48/40, 28 December 1992, paragraph 369), Dominican Republic (CCPR/CO/71/DOM, 26 April 2001, paragraph 10), El Salvador (CCPR/C/79/Add.34, 18 April 1994, paragraph 5), Ecuador (CCPR/C/79/Add.92, 18 August 1998, paragraph 7), Guatemala (CCPR/CO/72/GTM, 27 August 2001, paragraphs 10 & 20), Lebanon (CCPR/C/79/Add.78, 1 April 1997, paragraph 14), Peru (CCPR/C/79/Add.8, 25 September 1992, paragraph 8), and Venezuela (CCPR/C/79/Add.13, 28 December 1992, paragraph 7).

Torture, to which Nepal is also a State Party, takes the same approach.[7] The international standards on impunity expressly incorporate this principle. Accordingly, Article 29 of the UN Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity provides: "The jurisdiction of military tribunals must be restricted solely to specifically military offenses committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized court."[8]

The Decaux Principles, unlike the other sources noted above, focus exclusively on military courts, and broadly reflect the current state of human rights law. The Principles, while they are not incorporated in a treaty, were elaborated by culling the standards derived from treaty sources and judicial and quasi-judicial bodies. They are, therefore, largely a distillation of existing international standards. The Principles have repeatedly been relied on as a source of authority by human rights bodies, such as the European Court of Human Rights.[9] Because Article 100(1) of the Constitution of Nepal includes "the recognized principles of justice" as a source of judicial rules of decision, reference to the Decaux Principles is not only proper, but compelling.

Without attempting to restate the entire contents of the Decaux Principles, the following are particularly relevant to Nepalese military justice.[10]

1. "Military tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of

---

[7] *See, e.g.*, Concluding Observations on Peru (A/55/44, 16 November 1999, paragraphs 61-62), Colombia (A/51/44, 9 July 1996, paragraphs 76 & 80), Jordan (A/50/44, 26 July 1997, paragraph 175), Venezuela (A/54/44, 5 May 1999, paragraph 142), and Guatemala (A/53/44, 27 May 1998, paragraph 162(e)).

[8] The Updated Principles were recommended by the UN Commission on Human Rights by Resolution 2005/81.

[9] *See, e.g.*, *Ergin v. Turkey* (No. 6) (*Application no. 47533/99*) at paragraph 24.

[10] The numbering of the following paragraphs corresponds to the Decaux Principles. Because some of the Principles are not referred to in this brief, those numbers have been omitted.

the general judicial system." To the extent that the Army Act is an enacted law, Nepal is in compliance with this Principle. However, to the extent that there are limits on the ability of persons tried before courts-martial to obtain direct appellate review in Nepal's regular court system, the current arrangements fall short of the second sentence of this Principle. Every military court judgment should be reviewable by the regular Nepalese courts.

2. "Military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law." Among the hallmarks of a fair trial are the right to free, independent, competent defense counsel, and an independent and impartial court. The current Nepalese arrangements fall short with respect to these standards because (a) defense counsel are not fully independent of the military command structure; (b) the judges lack the protection of a fixed term of office; and (c) the role of military commanders in convening and approving the proceedings of courts-martial, as well as assigning the voting members, deprives Nepalese courts-martial of the required independence.

* * *

8. "The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel." Nepalese military justice currently contemplates courts-martial for some civilian-type offenses (such as assault and property offenses) as well as military-type offenses (such as disobedience, disrespect, mutiny, absence without leave). Except where the civilian court system cannot exercise jurisdiction "for practical reasons arising from the remoteness of the [military] action," offenses that lack "service connection" should be tried in the ordinary (*i.e.*, civilian) courts.

9. "In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to

prosecute and try persons accused of such crimes." Current Nepalese law makes no provision for ensuring that serious human rights violations by military personnel are investigated and tried in the ordinary courts rather than courts-martial.

10. Decaux Principle 10 broadly prohibits the improper use of military secrecy in connection with the administration of justice. Nepalese legislation should ensure that (a) no one is imprisoned or detained secretly or incommunicado; (b) secrecy is not used to obstruct the investigation and trial of military criminal or disciplinary cases; (c) judges and others involved in the administration of military justice have access to classified documents and areas; (d) court-martial sentences are public; and (e) *habeas corpus* and similar remedies are available for persons who have been convicted.

* * *

12. Under Decaux Principle 12, any military person who is deprived of liberty must have the right to seek a writ of *habeas corpus* from a civilian court of law to test his or her imprisonment. The proceedings on such a writ should be prompt, and the court must have access to the place of confinement or detention and the power to order the complainant's release from custody or detention. Current Nepalese law does not provide these remedies for military personnel who are detained or confined.

13. Decaux Principle 13 states: "The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy. In no circumstances should military courts be allowed to resort to procedures involving anonymous or 'faceless' judges and prosecutors." Current Nepalese law falls short of

several aspects of Decaux Principle 13. Anonymous or "faceless" judges are not provided for in Nepalese military justice, but judges are not independent of the chain of command. Critical decisions with respect to who shall be prosecuted, on what charges, and what the final sentence shall be are currently left in the hands of military commanders. Only personnel with formal training as lawyers should be permitted to serve in a judicial capacity, applying the same standards as govern the selection of civilian judges. Decisions on issues of law should be made by persons with legal training, and not by laypersons. There should be specific protection against the exercise of unlawful command influence over judicial functions.

14. Decaux Principle 14 concerns the "public nature of hearings." Courts-martial should be public except for the very rare case in which good cause exists for conducting parts of a hearing *in camera*. The reasons for any closure of the hearing should be fully stated on the record and any such closure should be kept to the bare minimum. Current Nepalese law does not guarantee either public trials in courts-martial or public hearings in court-martial appeals.

15. Decaux Principle 15 lists a number of procedural rights that are essential to a just and fair court-martial:

> (a) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law;
>
> (b) Every accused person must be informed promptly of the details of the offence with which he or she is charged and, before and during the trial, must be guaranteed all the rights and facilities necessary for his or her defence;
>
> (c) No one shall be punished for an offence except on the basis of individual criminal responsibility;
>
> (d) Everyone charged with a criminal offence shall have the right to be tried without undue delay and in his or her presence;
>
> (e) Everyone charged with a criminal offence shall have the right to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where

> the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
>
> (f) No one may be compelled to testify against himself or herself or to confess guilt;
>
> (g) Everyone charged with a criminal offence shall have the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
>
> (h) No statement or item of evidence which is established to have been obtained through torture, cruel, inhuman or degrading treatment or other serious violations of human rights or by illicit means may be invoked as evidence in the proceedings;
>
> (i) No one may be convicted of a crime on the strength of anonymous testimony or secret evidence;
>
> (j) Everyone convicted of a crime shall have the right to have his or her conviction and sentence reviewed by a higher tribunal according to law;
>
> (k) Every person found guilty shall be informed, at the time of conviction, of his or her rights to judicial and other remedies and of the time limits for the exercise of those rights.

Current Nepalese law (including the Interim Constitution, *see* Nepal Interim Const. art. 24) incorporates a number of these guarantees, but military justice legislation should include all of them specifically. Because the right to counsel is critical to many of the other rights enumerated in Decaux Principle 15, it is particularly important that the independence of military counsel from the chain of command be carefully and specifically protected. The following explanatory comment is worth quoting:

> 53. The provision of legal assistance by military lawyers, particularly when they are officially appointed, has been challenged as inconsistent with respect for the rights of the defence. Simply in the light of the adage that "justice should not only be done but should be seen to be done", the presence of military lawyers damages the credibility of these jurisdictions. Yet experience shows that the trend towards the strict independence of military lawyers - if it proves to be genuine despite the fundamental ambiguity in the title - helps to guarantee to accused persons an effective defence that is adapted to the functional constraints involved in military justice, particularly when it is applied extraterritorially. Nevertheless, the principle of free choice of defence counsel should be maintained, and accused persons should be able to call on lawyers of their own choosing if they do not wish to avail themselves of the assistance

> of a military lawyer. For this reason, rather than advocating the simple abolition of the post of military lawyer, it seemed preferable to note the current trend, subject to two conditions: that the principle of free choice of defence counsel by the accused is safeguarded, and that the strict independence of the military lawyer is guaranteed.

A soldier who is to be tried by court-martial must have the right to reject the services of a military attorney in whom he does not have confidence, and either defend himself or make other arrangements for his defence. Civilian public defenders should be made available for free to military defendants who reject assigned military defense counsel and are too poor to hire a private attorney.

16. Decaux Principle 16 confers important rights on victims of crime in courts-martial. These include the right to report criminal acts and initiate court-martial proceedings; the right to intervene and participate in the court-martial, including access to the evidence; the right to challenge court-martial rulings that are contrary to their interests; and the right to protection from reprisal and intimidation. Nepalese military law does not currently afford these rights to victims and their successors. Courts-martial serve at least some functions that civilian courts do not, and at least parts of what this Principle suggests by way of assistance to victims may be unworkable. Nonetheless, to the extent feasible, the victims of crimes that are tried by court-martial should have the same right to participate as they would in a Nepalese civilian criminal prosecution.

17. Decaux Principle 17 provides: “In all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts. In all situations, disputes concerning legality should be settled by the highest civil court. Conflicts of authority and jurisdiction between military tribunals and ordinary courts must be resolved by a higher judicial body, such as a supreme court or constitutional court, that forms part of the system of ordinary courts and is composed of independent, impartial and competent judges.” Under this Princi-

ple, Nepal would need to dispense with the Special Court-Martial and Appellate Hearing Committee and leave appellate and collateral review entirely in the hands of the regular civilian appellate courts. Provision would have to be made for appeals from all courts-martial to reach the Supreme Court, at least as to issues of law. Article 102(2) of the Interim Constitution appears to give this Honorable Court jurisdiction to review all courts-martial. Issues regarding which court system—civilian or military—should try a particular case should be resolved by the civilian appellate courts, not the military courts.

18. Decaux Principle 18 provides, in effect, that obedience to orders is not a defense to charges involving "serious violations of human rights, such as extrajudicial executions, enforced disappearances and torture, war crimes or crimes against humanity." Conversely, commanders are not relieved of responsibility when such offenses are committed by their subordinates "if they failed to exercise the powers vested in them, to prevent or halt their commission," provided they knew or had reason to know the crime was being or was about to be committed and they failed to take action within their power to prevent such violations or restrain the perpetrators. These matters may be addressed by statute or subsidiary legislation such as a *Manual of Service Law*. If Nepalese military law does not currently cover these questions, it should as part of any reform.

* * *

20. Finally, Decaux Principle 20 calls for periodic, systematic, transparent, and independent review of codes of military justice. Nepalese law currently makes no provision for such review. The basis for Principle 20 is the notion that courts-martial should be confined to what—*if anything*—is strictly necessary. The ICJ and NIMJ take no position in this brief as to whether the end-goal for the Nepalese Government should be abolition or retention of courts-martial, but periodic review of the kind suggested by Principle 20 is a worthwhile concept in any event and should be made part of any comprehensive reform program.

II

Courts-Martial are "Courts" and "Tribunals" Within the Meaning of the Interim Constitution and International Standards

Courts-martial serve purposes other than simply the punishment of crime; they also are intended to ensure good order and discipline within an armed force and thereby contribute to the successful accomplishment of the military's mission, whether that be success in the use of force in a military operation or simply as a deterrent. Many countries' legal systems have grappled with whether courts-martial are even properly thought of as courts. In the United States, for example, the Supreme Court long ago held that courts-martial do not exercise the "judicial power of the United States" within the meaning of Article III of the U.S. Constitution.[11] That court later held that the lowest level of court-martial—the one-officer summary court-martial—does not qualify as a criminal prosecution and therefore need not comply with the important constitutional protection of the right to counsel.[12]

In the last century, courts-martial came increasingly to resemble regular courts of law. Provision was widely made for legal issues to be ruled on by judges trained in the law, and for legally-trained military prosecutors and defense counsel. The rules of evidence also came increasingly to resemble those applied in civilian criminal courts, and in a number of countries civilian appellate courts were created to hear appeals from courts-martial, with eventual review by the highest civilian court.

At times, these efforts to judicialize military justice ran into problems, as recently occurred in Australia, where the High Court found that, in labeling the new Australian Military Court a court of record, Parliament had impermissibly conferred on it power that only courts organized under Ch. III of the Australian Constitution could exercise.[13]

---

[11] *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857).

[12] *Middendorf v. Henry*, 425 U.S. 25 (1976).

[13] *Lane v. Morrison* [2009] HCA 29, (2009) C.L.R. 230.

Despite the additional purposes courts-martial serve beyond simply the punishment and deterrence of crime and the fact that the pace, process and success of the judicialization of military justice have been uneven around the world, there is little question today that courts-martial are courts in every sense. Article 101(2) of the Interim Constitution specifically authorizes the creation of "special types of courts," a phrase that is certainly broad enough to include courts-martial. The Army Act itself, in section 98, explicitly treats courts-martial as courts. The proviso to Article 101 provides that "no court . . . shall be constituted for the purpose of hearing a particular case." Because this language precludes *ad hoc* courts-martial, they must be standing bodies.

III

International Trends in Military Justice Systems

Several international trends may be seen in contemporary military justice. One, particularly apparent in Northern Europe, is the abandonment of military justice in favor of reliance on either administrative sanctions or the regular civilian courts to secure good order and discipline and punish criminal conduct by military personnel.[14]

Another trend is to whittle down the jurisdiction of courts-martial either as to who is subject to it or as to what offenses may be tried by courts-martial (and correspondingly, which types of offenses must be tried in the civilian courts).

A third trend is manifest in English-speaking countries other than the United States. In these countries, the military justice system has been dramatically altered by shrinking the powers vested in commanders with respect to the administration of justice. This trend, heavily influenced by a series of decisions of the European Court of Human Rights,[15] has led to reforms not only in the United Kingdom and Ireland, but also in Canada, Australia, and New

[14] *See generally* Arne Willy Dahl, *International Trends in Military Justice,* Remarks Presented at Garmisch, Germany (January 2008). General Dahl is Judge Advocate General of Norway and President of the International Society for Military Law and the Law of War. A copy of his paper is attached for the convenience of the Court.

[15] *E.g., Findlay v. United Kingdom* [1997] ECHR 8, 24 EHRR 221.

Zealand. The commander's power over such critical questions as who shall be charged with what offenses, who shall serve on the military equivalent of the jury, and what sentence shall be approved, has been materially diminished.

A central theme in many countries' developing law of military justice has been judicial independence. Some have turned to security of tenure as a key characteristic of judicial independence. This, indeed, has been Canada's proudest contribution to the process of global military justice reform.[16]

IV

The Public Interest is Served by Protecting the Independence and Impartiality of Courts-Martial Just as it is for Civilian Courts

Although there is some truth to the notion that the military is separate and distinct from civilian society,[17] that separation has receded in recent decades, even where conscription has been abandoned in favor of career, professional military workforces. Young people who enter the military today expect that they will be treated fairly and that the rights to which they are accustomed in civilian life will *largely*, if not completely, be honored while they are in uniform.

Increasing attention has been paid to the rights of military personnel both by scholars[18] and the European Court of Human Rights and other human rights bodies.[19] In democratic societies, people have come to expect that military courts will by and large dispense justice in ways and according to standards that resemble what they are accustomed to in the administration of criminal justice generally. It may be frustrating for military leaders to have to

---

[16] *See R. v. Généreux* [1992] 1 S.C.R. 259; *see* National Defence Act art. 165.21(2) (Can.) (renewable 5-year terms of office).

[17] *E.g., Parker v. Levy*, 417 U.S. 733 (1974).

[18] *E.g.*, PETER ROWE, THE IMPACT OF HUMAN RIGHTS LAW ON ARMED FORCES ch. 1-2 (2006); ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, OFF. FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, HANDBOOK ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF ARMED FORCES PERSONNEL (2008); INT'L COMM'N OF JURISTS, FEDERICO ANDREU-GUZMÁN, MILITARY JURISDICTION AND INTERNATIONAL LAW: MILITARY COURTS AND GROSS HUMAN RIGHTS VIOLATIONS (2004).

[19] *E.g., Engel v. The Netherlands* [1976] ECHR 3, [1976] EHRR 647.

deal with these rising expectations of fairness, but we know of no situation in which the achievement of human rights for military personnel has come at the expense of military readiness.

Unfairness in the administration of military justice can discourage recruitment and retention of military personnel, particularly if there is no conscription. That is a negative incentive for countries to establish and maintain credible and fair military justice systems. Beyond this, however, maintaining a fair military justice system can be a positive good for a military force. Soldiers who feel they are being treated fairly will have confidence in the military and will perform better and have higher morale than soldiers who live in fear of unfair or arbitrary punishment.

V

A Number of Changes are Needed to Ensure Court-Martial Independence and Impartiality

As long as nations rely on military forces, commanders will need to demonstrate physical and moral courage as well as leadership and fairness. This personal touch is integral to any successful military unit. In today's militaries, however, important aspects of discipline have been seen to be better handled, especially in the most serious cases (where summary discipline is inappropriate), by professionals: legally trained judges, prosecutors and defense counsel. To ensure the independence and impartiality of military justice two things are required above all: first, a structure that will discourage improper tampering with the administration of justice, and second, a culture among commanders that respects the military justice system and permits it to function without improper influence. The second of these is the more elusive and does not lend itself to legislative enactment as much as old-fashioned leadership from both senior officers and the civilian leadership of the Ministry of Defence. The ICJ and NIMJ believe that public and military confidence in the administration of Nepalese military justice will be strengthened if the Court addresses the following matters:

1. At the trial level, the *ad hoc* nature of courts-martial under the current Army Act prevents judicial independence. Standing courts-martial are a way to achieve judicial independence. The current range of courts-martial is unduly complicated, and a simpler system with a single level of trial court would make sense.
2. The current trial-level courts-martial are deficient because persons without legal training are called upon to decide legal issues. Courts-martial should be presided over by military judges who are qualified attorneys. Non-lawyers who serve on courts-martial should not have the power to overturn the rulings of military judges on issues of law.
3. As presently constituted, courts-martial lack independence because of the ability of the military commander to select members of the court, decide on charges, and approve the proceedings. Commanders should be removed from the process of convening, staffing and (other than for purposes of clemency) reviewing courts-martial.
4. Current Law improperly asserts the jurisdiction of Courts-Martial over cases of torture, disappearances and other types of serious human rights violations. All provisions providing for the prosecution of serious human rights violations in Courts-Martial must be invalidated.
5. Current law violates the constitutional right to counsel because the accused cannot bring his or her own attorney to trial and the Defence Section of the Prad Viwak lacks structural independence. Persons accused before courts-martial must have the right to lawyer counsel of their own choice. The chain of command should have no control over defence counsel.
6. The Prad Viwak is not currently independent of the chain of command. Steps must be taken to ensure the professional independence of military prosecutors and

to create an independent Director of Military Prosecutions with appropriate seniority. The Director should be subject to supervision by the Attorney General.

7. Under current rules, courts-martial may be closed to the public or conducted in places that are inaccessible to the public. The public (including the news media) has a right of access to all trials except for those portions of trials in which classified information would be disclosed or where the charges involve a sexual offense against a minor.
8. The current appeal structure does not provide an independent and impartial tribunal because the members lack a fixed term of office and two members are associated with the government. The alternatives are either (a) a single, standing, independent civilian Court of Military Appeals to hear all court-martial appeals, or (b) conferring jurisdiction on the Court of Appeal to hear all such appeals. In either event, the decision on appeal should be subject to review by the Supreme Court. The Appellate Committee should be abolished. Appellate hearings should be open to the public on the same terms as courts-martial.
9. Chain-of-command and Government review of courts-martial for purposes other than clemency violate the right to an independent and impartial judicial decision. Post-trial review of courts-martial by military authorities and Government should be confined to the exercise of clemency.
10. Protection against unlawful command influence and retaliation are key ingredients of judicial independence, but are not currently provided by law. This protection should include criminal sanctions for violations.
11. The current requirement of Court-Martial Regulation rule 5(4) that a statement be obtained from the suspect violates the constitutional protection against self-incrimination. The Supreme Court should make clear that all suspects who are in-

terrogated are informed that they have no duty to make a statement, that any statement they make may be held against them, and that they have a right to remain silent and to consult with counsel before deciding whether to make a statement.

12. Section 72 of the current statute permits the exercise of court-martial jurisdiction over persons who once were, but no longer are, soldiers. The exercise of court-martial jurisdiction over such persons, who are civilians, is contrary to the Decaux Principles, although it must be acknowledged as a matter of candor to this Court that some countries permit such carryover jurisdiction.

13. The current provision of Section 87 of the Army Act for sealed questionnaires to witnesses violates the constitutional right to a fair trial because evidence might in some circumstances be adduced at trial without affording the accused an opportunity to examine the witness. Sealed questionnaires should be permitted only if the accused or his or her attorney is present during the completion of the questionnaire.[20]

Conclusion

For the foregoing reasons, the ICJ and NIMJ respectfully ask that this brief as *amici curiae* be accepted, and counsel for the ICJ and NIMJ respectfully ask that they be permitted to appear *pro hac vice*. The Court should enter judgment (a) specifically setting aside the court-martial conviction of petitioner Shah and (b) generically declaring the current military justice provisions of the Army Act, 2063 (2006) and the Court-Martial Regulation, 2064 (2007) invalid under both the Constitution and applicable international norms, and direct re-

[20] In reviewing the Army Act we identified certain other provisions that should be reevaluated in light of evolving international standards. For example, ch. 4 of the Court-Martial Regulation permits such human rights offenses as torture and "disappearance" to be tried in the Special Court-Martial. Contemporary standards, however, call for such offenses to be tried in civilian courts. We also wonder whether the Court of Enquiry process prescribed in ch. 2 of the Court-Martial Regulation is more cumbersome than it needs to be. That issue goes beyond the questions presented in this litigation, but would certainly be a matter the responsible officials could usefully review.

spondents to take prompt remedial action. To minimize any adverse impact on good order and discipline during the transition to a reformed military justice system, the Court may wish to suspend the operation of its generic judgement for 180 days or such other period as may, in the circumstances, be just and proper.

We appreciate the opportunity to submit this brief for the Court's consideration.

Respectfully submitted,

Eugene R. Fidell
127 Wall Street
New Haven, Connecticut 06511 USA
eugene.fidell@yale.edu
(203) 432-4852 (office)
(202) 256-8675 (cell)

Douglass C. McCrae
Nepal Country Representative
International Commission of Jurists
Nepal Bar Association Building, 4th Floor
Ramshapath, Kathmandu, Nepal
douglass.mccrae@icj.org
+977 9849656781

Attorneys for the International Commission of Jurists and the National Institute of Military Justice

November 25, 2010

Certificate of Service

I declare under penalty of perjury that a copy of the foregoing was delivered to counsel for the Respondents on November 25, 2010.

Douglass C. MacCrae