INTERNATIONAL
COMMISSION
OF JURISTS

NEPAL: RECOMMENDATIONS FOR AMENDMENTS TO THE DRAFT ARMY ACT

September 2006

NEPAL: RECOMMENDATIONS FOR AMENDMENTS TO THE DRAFT ARMY ACT

SUMMARY

Since the restoration of Nepal's House of Representatives by public Proclamation of King Gyanendra on 24 April 2006, the new Government has had to act on many fronts, including beginning a formal peace process to end Nepal's 10-year armed conflict and re-establishing democratic institutions. One of its first priorities has been to remove the King as commander-in-chief of the armed forces and to bring greater democratic and civilian control and accountability to the former Royal Nepal Army (RNA) (now the Nepal Army).

In 2001, the RNA was mobilized for the first time in military operations within the territory of Nepal, in the armed conflict with the Communist Party of Nepal (Maoist) (the "Maoists"). While both the Maoists and government security forces throughout the conflict have been responsible for gross human rights violations, the involvement of the RNA between 2001 and early 2006 saw a sharp escalation in the scale and intensity of such violations. There is reliable and documented evidence that the RNA have been responsible for systematic and widespread violations such as torture, enforced disappearances, extrajudicial executions and prolonged arbitrary detention.

Impunity for gross human rights violations – the failure to bring perpetrators to justice – has been a feature of both parties to the conflict, including the RNA, has fuelled the conflict and will perpetuate cycles of violence and human rights violations in the future unless it is decisively addressed. As an integral part of creating a sustainable peace, the Government and the Parliament must confront the twin challenges of ensuring justice, truth and reparation for violations of the past and reforming law, policies and practices to prevent impunity in the future.

Carefully drafting and adopting a new Army Act is the very first step in this process. The ICJ has therefore carefully reviewed whether the "Bill to provide for the amendment and unification of the laws regarding Nepal Army" (the "Army Bill") introduced into Parliament in August will help to make the army more accountable to the Government, Parliament and the judiciary, remove some of the systemic causes of impunity and lead to fewer human rights violations. This includes reviewing the extent to which the Bill complies with Nepal's international human rights obligations and international standards relating to impunity and military justice that reflect the current international consensus and decades of experience with similar situations around the world.

The ICJ understands the desire to transfer effective control of the army to the Government and Parliament as swiftly as possible and welcomes several provisions in the Army Bill. However, it is deeply concerned first, that the Bill has serious human rights flaws and, secondly, that it is being rushed through Parliament with little transparency

and without broad and democratic consultations. On 23 August 2006 the ICJ wrote to the Speaker of the House of Representatives urging him to ensure the Army Bill is not adopted in its current form and that there is time for a considered revision to bring it into line with international standards and good practice. The Army Bill is of too great national importance for a poor text to be adopted in haste.

The ICJ has identified significant shortcomings in the Army Bill principally in two areas: (i) combating impunity for serious human rights violations; (ii) ensuring fair trials in proceedings of Courts Martial.

Impunity - The Bill enables the army to avoid accountability for human rights violations

The Army Bill fails to address some of the well-known causes of impunity in the army. The Bill grants members of the Nepal Army what in practice is a broad immunity from prosecution for human rights violations and creates a range of procedural rules that can be used to avoid prosecution for human rights crimes in civilian courts and even in military courts, known as Courts Martial.

Section 21 is the most problematic and objectionable provision of the Bill. It provides a statutory bar, or blanket immunity, from legal proceedings in any court, for acts carried out by a member of the Nepal Army in the "course of discharging his duties" that result in the death of, or loss to, any person. This provision will entrench impunity, cannot be improved by redrafting and should be deleted.

The history of Nepal and other countries shows that impunity is perpetuated if military courts, which are inherently not independent, try soldiers for human rights violations such as torture, enforced disappearances and extrajudicial executions. The ICJ therefore welcomes that the Army Bill initially seems to partially accept the internationally accepted rule that Courts Martial should only try a limited range of strictly military offences and that other crimes, implicitly including those amounting to human rights violations, must be tried in ordinary civilian courts using normal procedures.

However, several provisions in the Bill then allow the army to defeat this general principle and therefore to avoid accountability. Section 62 rightly prohibits a soldier from being tried a second time for the same facts or offence (rule against "double jeopardy"), but fails to recognise that the rule should not apply if the original trial was intended to shield the accused from responsibility or was unfair or was carried out by a tribunal that was not independent. The same section even blocks any criminal charges being laid against a soldier who has been the subject of only an internal, administrative ("departmental") action. Section 61 wrongly gives army officers the discretion to decide whether a military or civilian court should have jurisdiction if an act amounts to a crime in both jurisdictions. This is a legal matter that should be decided by the courts, and ultimately by the Supreme Court if necessary. Sections 61 and 62 should be amended.

To the extent that Courts Martial will deal with acts that amount to human rights violations, the Army Bill also perpetuates impunity by providing that Court Martial trials will be closed to the public (Section 71(2)), by allowing army officers to change a penalty imposed by a Court Martial (Section 107) and by failing to give Courts Martial the necessary attributes of independence, impartiality and competence.

Fair trial – The Bill fails to guarantee many procedural rights to a person arrested, detained and tried in the military justice system

The Bill creates the structures and procedures for Courts Martial that do not contain adequate safeguards to protect the right to a fair trial as required by Article 14 of the United Nations International Covenant on Civil and Political Rights (the "ICCPR"), which Nepal has ratified, and other UN standards.

The Bill does not ensure that judges in Courts Martial are legally qualified or have the necessary independence from the operational military hierarchy and are free from external interference in their judicial functions.

Any persons who are arrested, detained and then brought before a Court Martial will not have many of the fair trial guarantees required by international law, and that apply equally to military and civilian courts. In particular, detainees are not guaranteed a right to be brought promptly before a judicial authority after arrest; to challenge the legality of their detention in a civilian court (*habeas corpus*); and to have confidential access without delay after arrest and at all stages of the proceedings to independent lawyers (either military or civilian) of their choice. Disturbingly, the Bill seems to allow detainees to be held anywhere nominated by the Government, including "any portion of a residence or enclosed place" and not only in officially acknowledged and gazetted places of detention that are regularly inspected. This is especially important given the history of enforced disappearances in Nepal. Those tried by a Court Martial do not have a right of appeal to an independent, civilian court. The procedures for arrest, detention and trial before a Court Martial should be reviewed to bring them into line with international standards, especially those in the ICCPR.

TABLE OF CONTENTS

NEPAL: RECOMMENDATIONS FOR AMENDMENTS TO THE DRAFT ARMY ACT

DEMOCRATIC AND HUMAN RIGHTS OBJECTIVES OF A NEW ARMY ACT

Since the restoration of Nepal's House of Representatives by public Proclamation of King Gyanendra on 24 April 2006, the new Government has had to act on many fronts, including beginning a formal peace process to end Nepal's 10-year armed conflict and re-establishing democratic institutions. One of its first priorities has been to remove the King as commander-in-chief of the armed forces and to bring greater democratic and civilian control and accountability to the former Royal Nepal Army (RNA) (now the Nepal Army).

In 2001, the RNA was mobilized for the first time in military operations within the territory of Nepal, in the armed conflict with the Communist Party of Nepal (Maoist) (the "Maoists"). While both the Maoists and government security forces throughout the conflict have been responsible for gross human rights violations, the involvement of the RNA between 2001 and early 2006 saw a sharp escalation in the scale and intensity of such violations. There is reliable and documented evidence that the RNA have been responsible for systematic and widespread violations such as torture, enforced disappearances, extrajudicial executions and prolonged arbitrary detention.

In March 2005 the ICJ said:

> "Since the armed forces were brought in to combat the Maoist insurgency in November 2001, Nepal has experienced an explosion of gross and serious violations of human rights. In addition to the more than one thousand reported cases of enforced disappearances, the incidence of unlawful killings has risen rapidly. The practice of torture continues to be both widespread and systematic. The Royal Nepalese Army has grown increasingly less accountable to civilian and judicial authority."[1]

Impunity for gross human rights violations – the failure to bring perpetrators to justice – has been a feature of both parties to the conflict, including the RNA, has fuelled the conflict and will perpetuate cycles of violence and human rights violations in the future unless it is decisively addressed. As an integral part of creating a sustainable peace, the Government and the Parliament must confront the twin challenges of ensuring justice,

---

The analysis in this document has been made using an unofficial translation of the Bill.

[1] *Nepal: Rule of Law Abandoned*, March 2005, p. 25

truth and reparation for violations of the past and reforming law, policies and practices to prevent impunity in the future.

Both the United Nations Special Rapporteur on torture and the Working Group on Enforced and Involuntary Disappearances expressed deep concern after their visits to Nepal in September 2005 and December 2004 respectively, about a "culture of impunity" prevailing in Nepal.[2]

Political oversight of the army has been chronically weak. The courts have been unable effectively to enforce remedies such as *habeas corpus* and to hold the army to account when it ignored orders of the court to release those arbitrarily detained. In the few cases that have been prosecuted – in military and not civilian courts – the charges have been inappropriate and relatively minor and the penalties inadequate given the gravity of the unlawful conduct involved.

In its March 2005 report, the ICJ concluded that "all of the denial of fundamental rights are enabled and exacerbated by a near total atmosphere of impunity for officials responsible for serious human rights violations" [3] and identified nine urgent measures to restore the rule of law and build confidence for peace in Nepal. Of these, at least six require the Government to redefine the role and accountability of the armed forces in responding to internal security and law and order in ways that maintain the protection of fundamental human rights and avoid impunity.

On May 18 2006, the newly-restored House of Representative issued a 9-point declaration that covered a broad range of issues to be addressed in the wake of the previous constitutional crisis and the assumption of direct power by the King between February 2005 and April 2006. The declaration identified the need for reform, *inter alia*, in the legislature, executive, Royal Council, Royal Palace, and in the army. Article 3 of the Declaration was directed at reform of the Army, which included changing its name, removing the authority of the monarchy over the army, and introducing a number of changes to provide for civilian control and oversight.

A parliamentary committee was formed to draft the Army Bill, which will repeal a number of earlier Acts governing the armed forces in Nepal, principally, the Army Act, 1959 (as amended).[4] The Bill was sent to the Parliamentary State Affairs Committee in the third week of August 2006 for discussion within the Committee. The Bill has provoked considerable debate within the House of Representatives where, on 28 August, 43 members of parliament registered separate proposals demanding major changes to the

[2] *Report of the Special Rapporteur on torture*, 9 January 2006, E/CN.4/2006/6/Add.5, para. 26 and *Report of the Working Group on Enforced and Involuntary Disappearances*, 28 January 2005, E/CN.4/2005/65/Add.1, para. 33, 34 and 35.
[3] *Nepal: Rule of Law Abandoned*, March 2005
[4] Section 135 repeals the Army Act, 2106 (1959); Act regarding handing over Army Authority, 2015; and Functions, duties, powers and terms of service of the Army Chief of Staff Act, 2016.

draft text. It has been reported that a six-member committee, headed by Brigadier General B.A. Kumar Sharma, has been formed to amend the draft.

A number of non-governmental organizations and independent observers, including the United Nations Office of the High Commissioner for Human Rights, have expressed their concern regarding certain features in the Bill, particularly those that fail to address systemic problems of immunity in the Nepal Army and procedural concerns regarding the lack of adequate time and transparency surrounding the consideration of the Bill.

The ICJ supports one of the principal objectives of the Bill to transfer effective control, supervision and oversight of the armed forces from the King to a democratically-elected civilian government. The ICJ therefore welcomes several provisions in the Bill, including that the Chief of Army Staff is appointed by and accountable to the Government, that the Public Service Commission will have a role in the appointment of officers in the Nepal Army and that the Government retains ultimate authority to dismiss any member of the army.

The Nepal Army will also be overseen by a National Defence Council, consisting only of government ministers, but which may invite the Chief of Army Staff or other officials or experts to its meetings. The National Defence Council can make recommendations to mobilize the army, though the actual decision is taken by the Government and must be ratified by a special Security Committee of the House of Representatives.

The Government and Parliament of Nepal bear a heavy responsibility, not only to bring the Nepal Army firmly under their civilian political control, but also to ensure the law is reformed so that it can never be interpreted in a way that will allow those responsible for human rights violations to evade accountability. The laws setting out criminal offences and procedure and regulating the Nepal Army should all be clear and progressive and enable perpetrators to be brought to justice and impunity ended in Nepal.

I. THE NEED TO END AND NOT ENTRENCH IMPUNITY FOR SERIOUS HUMAN RIGHTS VIOLATIONS

DISTINGUISHING BETWEEN MILITARY AND CIVILIAN JURISDICTIONS

As a general principle, responsibility and legal jurisdiction for the enforcement of law and order and the proper administration of justice rests with the civilian authorities through the institutions of the executive (the government including the ordinary police), parliament and the ordinary judiciary.

The jurisdiction of military courts should be limited to offences of a strictly internal, military nature committed by military personnel, which largely means internal disciplinary measures.[5]

In contrast, ordinary crimes, including those that amount to human rights violations, committed by members of the armed forces, should be tried in ordinary civilian courts using established procedures in line with international standards.[6] In particular, crimes involving serious violations of international human rights and humanitarian law, including rape and other forms of torture, extrajudicial executions and enforced disappearances, should be heard in the ordinary courts and not military tribunals. [7]

Principle 29 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity[8] (the "Impunity Principles") provides:

---

[5] Principle No. 7, Draft Principles Governing the Administration of Justice through Military Tribunals (the "Military Justice Principles"), adopted by the United Nations Sub-Commission on Human Rights and forwarded to the Human Rights Council, E/CN.4/2006/58.

[6]The same rules apply whether a Nepali soldier is accused of committing a human rights violation within Nepal or while serving overseas. When the Nepal Army operates overseas in peace-keeping or similar international operations, its military personnel are subject to the laws of the country in which they serve and should be tried by the civilian courts in that country for crimes that are not internal military matters, including acts that amount to human rights violations. However, in most cases the jurisdiction of the local courts is excluded because of a Status of Forces Agreement setting up the peace-keeping operation, or under a similar agreement giving immunity to the foreign military personnel. If so, then the military personnel should be tried by the civilian courts in Nepal for such non-military crimes committed overseas, as they should be if the act was committed in Nepal.

[7] Principle No. 8, Military Justice Principles; also, Draft Convention on the Protection of All Persons from Enforced Disappearances, A/HRC/1/L.2; Also, Human Rights Committee (HRC) Concluding Observations on Peru, UN Doc.: CCPR/C/79/Add.8, 25 September 1992, para.8 ; UN Special Rapporteur on extrajudicial, summary or arbitrary executions surveyed a number of states where trials before military courts allowed accused to evade punishment because of 'an ill-conceived *espirit de corps* which generally results in impunity , UN Doc.: A/51/457, at para 125, & October 1996.

[8] These principles are referred to extensively in this document as they are the most up-to-date statement of international standards and thinking on how governments should prevent and end impunity. The principles

> "The jurisdiction of military courts must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court."

Only civilian courts using accepted procedures provide the necessary independence and impartiality to ensure civilians are protected and the armed forces are accountable. The United Nations Human Rights Committee, a group of 18 experts that oversees implementation of the International Covenant on Civil and Political Rights (ICCPR), has frequently reiterated that the "wide jurisdiction of the military courts to hear all cases involving the trial of military personnel and their powers to decide cases that belong to the ordinary courts contribute to the impunity enjoyed by such personnel and prevent their punishment for serious human rights violations".[9] The UN Working Group on Enforced or Involuntary Disappearances (the "WGEID") has also said that once criminal jurisdiction has been assumed by the armed forces the risk of impunity for serious human rights abuses increases markedly.[10] After its mission to Nepal in December 2004 the WGEID recommended that the former Army Act be amended to ensure that security force personnel accused of enforced disappearances against civilians are tried only in civilians courts[11].

The European Court of Human Rights, as well as the Inter-American Commission on Human Rights, have both said that military judges cannot be considered independent and impartial because they are part of the hierarchy of the army.[12] The UN Working Group on Arbitrary Detention laid down clear rules on military tribunals, when it concluded that "if some form of military justice is to continue to exist, it should observe four rules:

- It should be incompetent to try civilians;
- It should be incompetent to try military personnel if the victims include civilians;
- It should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime;

---

were produced by an expert of the former United Nations Commission on Human Rights and were approved by the Commission in 2005. The Principles can be found in Addendum to the Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, to the United Nations Commission on Human Rights, 61st session, E/CN.4/2005/102/Add.1, 8 February 2005.

[9] Concluding observations on Guatemala, UN Doc.: CCPR/CO/72/GTM, 27 August 2001, para 10.

[10] *Report of the UN Working Group on Enforced or Involuntary Disappearance,* UN Doc.: E/CN.4/1992/18, para. 367.

[11] *Report of the UN Working Group on Enforced or Involuntary Disappearance,* UN Doc., E/CN.4/1992/18, para. 34.

[12] European Court of Human Rights, see *Findlay v. The United Kingdom*, judgment of the European Court of Human Rights of 25 February 1997, Series 1997-I and *Incal v. Turkey*, judgment of 9 June 1998, Series 1998-IV. Re Inter-American system, see *Annual Report of Inter-American Commission on Human Rights – 1997*, OAS document OEA/Ser.L/V/II.98, Doc.6, Chapter VII, Recommendation 1.

- It should be prohibited from imposing the death penalty under any circumstances".[13]

The ICJ welcomes the distinction made in principle in the Army Bill between military offences that are tried in a Court Martial and other crimes, some of which would amount to human rights violations, which can be tried in a civilian court. In particular, Section 58 provides that crimes committed by soldiers that are defined as an offence under prevailing Nepali laws shall fall under the jurisdiction of other courts. This wording initially suggests that acts that amount to human rights violations against civilians, including violent acts that are now, or should become, crimes under Nepali criminal law, such as rape or other torture, enforced disappearances and extrajudicial executions, would be tried in a civilian court. The Bill anticipates this in Section 66(4), which provides a procedure by which members of the armed forces can detained, if required, and then handed over to the ordinary courts to face ordinary criminal charges.

However, several provisions in the Bill defeat these initially promising provisions and provide members of the Nepal Army with absolute or partial immunity from prosecution. The Army Bill, in its current form, would reinforce and not eradicate impunity.

The apparent demarcation between the jurisdiction within the Nepal Army (to hear criminal matters arising from internal discipline) and that of the ordinary civilian courts (to hear all other criminal and civil matters) can be defeated in three ways:

1. Section 21 provides an absolute immunity from prosecution (or civil suit) in the ordinary courts of any person covered by the Bill who, in the course of discharging his duties, has caused the death of or loss to any person. Section 22 also provides limited immunity from arrest for anyone attending a Court Martial.
2. Section 61 gives army officers the sole discretion to determine in which court a soldier should be tried when the offence falls within both the military and civilian jurisdictions.
3. Section 62 prevents members of the armed forces who have been acquitted or convicted under one jurisdiction from being retried for similar offences under either jurisdiction.

Each issue raises serious concerns relating to impunity and will be dealt with in turn.

SECTION 21 - IMMUNITY FROM PROSECUTION

Section 21 is the most problematic and objectionable provision in the Army Bill. It provides a statutory bar, or blanket immunity, from legal proceedings in any court, when a member of the Nepal Army has carried out an act in the course of discharging his duties

[13] *Report of the Working Group on Arbitrary Detention*, UN Doc.: E/CN.4/1999/63, para. 80.

that results in death or other loss. If allowed to stand, the provision will erode significantly efforts to bring greater accountability to the army and to combat impunity.

States are required to adopt domestic laws and safeguards that prevent the use of legal rules in a way that shields from justice the perpetrators of serious human rights violations. Principle 22 of the Impunity Principles stipulates that states must prevent the use of (otherwise neutral) rules relating to:

> "prescription, amnesty, ... *non bis in idem*, due obedience, official immunities, repentance, the jurisdiction of military tribunals … that fosters or contributes to impunity".[14]

It is worth quoting in full Section 21 of the Army Bill:

> "Saving the acts performed during the discharge of duties: Notwithstanding anything contained in current law, no case may be filed in any court against a person under the jurisdiction of this Act who commits any act, in the course of discharging his duties, resulting in the death of or loss suffered by any person".

In the opinion of the ICJ the provision is fundamentally flawed, could not be improved through redrafting and should be deleted.

- *Breadth and vagueness of categories of persons enjoying immunity.*

The range of persons falling "under the jurisdiction of this Act", and therefore entitled to immunity under Section 21, is broad and unclear. For example, Section 3 of the Bill, which defines who is "under the jurisdiction of the Act", includes the vague and imprecise Sub-section 3(1)(b), which could bring under the Act not only members of the regular armed forces, but also paramilitary groups, civilians and other individuals who are "assigned some acts by ... the Nepal Army ... are staying in an area declared … as a military operation zone ..." and/or civilians who "follow or walk with the Nepal Army." Given that such persons would enjoy absolute immunity from any suit when they are discharging their duties and cause loss, this broad and unclear definition is quite untenable.

- *Section 21 creates a vacuum where lawful prosecutions for serious criminal offences and civil law suits cannot proceed in any court of competent jurisdiction*

While acts that may constitute serious criminal offences or be susceptible to civil law suit under the ordinary law would be blocked under the immunity provision, the Army Bill does not criminalise those same acts under Chapters 6 (prescribed offences), 8 (prescribed procedure for investigation and enquiry) and 10 (prescribed penalties).

[14] In addition, Principle 27 of the Impunity Principles provides that the perpetrators of serious human rights violations cannot use as a shield against prosecution a range of justifications for action such as due obedience to superior orders, superior responsibility for the actions of subordinates, and their official status.

- *Range of acts covered by immunity would include unlawful and serious violations of human rights and humanitarian law committed in Nepal*

The immunity extends to *any* acts by persons covered by Section 3 (persons under the jurisdiction of this Act), provided that the death of, or loss by, any person is caused by a member of the armed forces in the course of discharging his duties. The immunity would cover crimes that amount to gross human rights violations, thereby further entrenching impunity. The fact that a soldier was "discharging his duties", can never be used as an excuse not to prosecute or to acquit. At most, a court can take into account all the circumstances surrounding the crime when it decides on the punishment of an accused found guilty. The immunity would also cover acts carried out in the territory of Nepal, as the explanatory note in Section 21 expressly states that acts committed in the context of maintaining 'internal security' or 'self-defence' within Nepal, are covered by the immunity.

- *Range of injuries/loss suffered by victims covers any conceivable damage to person or property*

Section 21 would protect against legal proceedings for almost any form of loss to a victim, ranging from loss of life through torture, enforced disappearance or extrajudicial execution, to minor damage to property or pecuniary loss, irrespective of whether the acts were unlawful under national or international law.

SECTION 61 AND CHAPTER 6 – RESOLVING JURISDICTIONAL OVERLAP BETWEEN COURTS MARTIAL AND CIVILIAN COURTS

Section 61 of the Bill provides that if there is any overlap between the criminal jurisdiction of the Courts Martial to investigate and try any offences under Chapter 6 of the Bill and the jurisdiction of "any other court", army officers have the sole discretion to decide in which court a case should be filed. [15]

The Bill envisages that when there is such an overlap, the relevant Commanding Officer in the army decides which court should have jurisdiction. In other words, the army is able to 'trump' the jurisdiction of the ordinary courts in cases where the offences or, arguably, their subject matter, are the same or even similar.

[15] Section 61 is designed to address the difficulties under Sections 60 and 61 of the Army Act, 1959, which allowed for military jurisdiction over ordinary crimes committed by the armed forces (except for murder and rape). However, for the reasons given in this paper, the new Section 61 does not provide adequate safeguards against impunity.

Which court has jurisdiction is a legal question. A military or civilian prosecutor may decide to prosecute a soldier in their jurisdiction, but in the end, if there is a dispute or conflict, an independent and competent court (that is, a judicial body) must adjudicate which court has jurisdiction. This is not a decision to be taken by a Commanding Officer who is part of the army hierarchy. In the first instance, the court in which a case has been filed should decide if it has jurisdiction, but this should be able to be appealed through the civilian courts only, right up to the Supreme Court. Furthermore, because military justice is a specialist jurisdiction dealing with very specific military offences, the courts deciding jurisdiction should also apply a presumption that the civilian courts have jurisdiction unless the offence falls clearly within the military jurisdiction.

The problem is compounded by vagueness in the wording of some offences in Chapter 6, which increases the possibility of a conflict or overlap of jurisdictions. It should be possible to determine from the wording of offences in the law whether a person must be tried in a Court Martial or civilian court. However, a number of the 'military' disciplinary offences under Chapter 6 of the Bill are couched in such broad language that they could overlap with criminal or civil proceedings in the ordinary courts.

For example, Section 40(b) of the Bill creates an offence of:

> "(…) using force or attacking any person in whose legal custody he has been placed according to the law(…)"

A military person accused of having committed serious human rights violations, such as torture, extrajudicial executions or enforced disappearances, would be liable to prosecution *both* under section 40(b) of the Bill and in the ordinary criminal courts.

Section 55(1)(e) is a slightly different, but also problematic, 'catch-all' provision that excludes from the jurisdiction of civilian courts the commission of "any offence relating to the person or property of a citizen or inhabitant of the country where he is serving." This could be used to prevent Nepali soldiers accused of crimes against civilians in a foreign country (eg while serving in a peacekeeping operation) being tried by ordinary courts either in that country or back in Nepal.[16]

The ICJ considers that Section 61 could be used by the military to avoid attempts by the Nepal law enforcement authorities and the civilian judiciary to investigate, prosecute and hear offences that relate to serious human rights violations, including torture, extrajudicial executions and enforced disappearances.

[16] See footnote 6 above.

SECTION 62 – DOUBLE JEOPARDY AND ACCOUNTABILITY

The problems arising from Section 61 are compounded by the operation in practice of Section 62 (provision against double jeopardy also known as the *ne bis in idem* rule). Section 62 provides:

> "No double jeopardy: Any person under the jurisdiction of this Act, after being subjected to trial, hearing and adjudication of a case from the Court Martial or from another court, or after being subjected to departmental action, shall not be subjected to action again for the same offence."

The rules against double jeopardy are well established in international law[17] and are important principles of a fair trial. They prevent abuse of the courts and protect a person whose guilt or innocence has been fairly adjudicated from being retried on the basis of similar facts and offences. However, it is also clear under international law, that procedural devices such as double jeopardy should not be used as a shield to deflect criminal responsibility for the perpetrators of serious violations of international human rights or humanitarian law. Principle 22 of the Impunity Principles says that states should prevent "abuse" of *non bis in idem* that "fosters or contributes to impunity".

International judicial and quasi-judicial bodies have reaffirmed that the double jeopardy rule does not prevent a retrial if the original trial was not carried out by a competent, independent and impartial tribunal in which the judicial guarantees and rights due to the accused, the victims and their relatives have been fully respected. The Human Rights Committee has concluded that a person who was convicted after an unfair trial, should be retried or released.[18] On the other hand, a retrial is also necessary if otherwise the original trial was conducted so that it shielded the accused from criminal responsibility. Principle 26(b) of the Impunity Principles explains that a person who has already been tried for a serious crime under international law could be retried:

> " … if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."[19]

---

[17] Article 14 (7) of the UN International Covenant on Civil and Political Rights (ICCPR): Also known as the principle of *ne bis in idem,* it provides that "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." Also Principle 22 of Draft Impunity Principles

[18] Human Rights Committee, decision dated 6 November 1997, Communication No.577/1994, *Polay Campos* (Peru), UN Doc.: CCPR/C/61/D/577/1994.

[19] See also Article 20 of the Rome Statute of the International Criminal Court (ICC), which uses similar terms to describe the situations in which a person can be tried in the ICC once they have already been tried another court.

If the Army were to opt for its own jurisdiction under Section 61 (to the exclusion of the ordinary courts) and then fail to institute proceedings that are independent or impartial or which involve serious procedural flaws affecting the fairness of the trial, then Section 62 would prevent any conviction or acquittal being reopened by the ordinary courts. Furthermore, the double jeopardy rule should definitely not be used to protect a person from being prosecuted for a criminal offence in a court of law if he has only been subject to administrative or "departmental" action, as Section 62 currently provides.[20]

ENTRENCHING IMPUNITY

The combined effect of Sections 21, 61 and 62 and parts of Chapter 6, is to limit, and often preclude, any effective investigation, prosecution of serious human rights violations and other breaches of international law committed by the armed forces.

In addition, certain provisions discussed below relating to fair trials, could be used to prevent the successful prosecution and punishment of military personnel for human rights violations by Courts Martial, specifically: the lack of independence of Courts Martial, the presumption that trials in Courts Martial will be closed to the public (Section 71(2)), and the ability of army officers to change the penalty imposed by a Court Martial (Section 107).

The ICJ believes that these sections would represent a significant step backwards in the Government's efforts to combat impunity, assert civilian control of the armed forces, restore public (and international) confidence in those forces and in the administration of justice in Nepal. The criticism is even more serious given the reliable reports implicating members of the armed forces in serious human rights violations in Nepal's recent past.

Recommendations relating to impunity

1. Section 21, which gives members of the army immunity from prosecution when they cause loss while discharging their duties, is a fundamentally flawed provision and should be deleted from the Bill.
2. The ordinary civilian courts should be preserved expressly as the jurisdiction in which to determine the guilt or innocence of military personnel who are accused of serious criminal offences, particularly those that involve violations of international human rights or humanitarian law, such as extrajudicial executions, rape and other torture, enforced disappearances and arbitrary detention.

[20] The UN Special Rapporteur on torture, after his mission to Nepal in September 2005, described the sanction of "departmental action" in a different Act, but against perpetrators of torture, as "so grossly inadequate that any preventive or deterrent effect envisaged … is meaningless in practice".

3. Section 61 should be amended to ensure that any conflict over whether a military or civilian court has jurisdiction over an offence should be determined by the judges in the relevant court, with appeal through the civilian court structure up to the Supreme Court if necessary.
4. Section 62 should be amended so it does not prevent court proceedings against a member of the Nepal Army who has already been "subjected to departmental action". Section 62 should also be amended so it does not protect against double jeopardy if the previous court proceedings were intended to shield the person from criminal responsibility or were not conducted independently or impartially in accordance with international standards.
5. The offences in Chapter 6 should be carefully reviewed to ensure they are limited strictly to matters of a military nature, mainly, international army discipline, and do not include offences against civilians, which should fall within the jurisdiction of the civilian courts. Offences that involve, either explicitly or implicitly, serious violations of human rights and humanitarian law should be excluded from the jurisdiction of the Courts Martial and heard exclusively in the ordinary courts.

The offences in Chapter 6 should be carefully reviewed to ensure they are limited strictly to matters of a military nature, mainly, internal army discipline, and do not include criminal offences against civilians, which should fall within the jurisdiction of the civilian courts. Offences that involve, either explicitly or implicitly, serious violations of human rights and humanitarian law should be excluded from the jurisdiction of the Courts Martial and heard exclusively in the ordinary courts.

DUTY TO COOPERATE WITH CIVILIAN JUDICIAL AND QUASI-JUDICIAL BODIES IN THE ADMINISTRATION OF JUSTICE

In the past the RNA regularly refused to hand over civilian detainees to police custody and failed to comply with a significant number of court orders, especially orders for the release of detainees being arbitrarily held by the army.

The Bill goes a limited way towards requiring the Nepal Army to cooperate with other state institutions in the administration of justice. If a person covered by the Bill is prosecuted in a civilian court and it is decided that he or she should be tried in that court and not under the military jurisdiction, then Section 66(4) requires the army to hand over the suspect to that civilian court. Chapter 8 of the Bill also includes others provisions where the army and civilian authorities (police and ordinary courts) need to cooperate in the arrest, detention and transfer of people accused under either, or both, jurisdictions.

However, in light of recent history, the ICJ recommends strengthening the Bill by including a broader and express duty of the Nepal Army to cooperate with civilian judicial authorities. The Bill should be require that all members of the armed forces have a duty to cooperate with civilian police and judicial authorities in their investigations, arrests, prosecutions and trials that relate to army personnel. Such cooperation should

include the transfer of suspects, furnishing material evidence, making witnesses available as required and complying with orders made by the civilian courts.

In relation to quasi-judicial bodies the ICJ welcomes the provision which affirms that the Nepal Army, like any other institution of the State, can be the subject of a Commission of Inquiry (Section 131) with powers to "inquire into a matter of public importance in which a person to whom this Act (sic.) is applicable is engaged". The ICJ would recommend, however, including in the broader duty of cooperation with civilian authorities, an express duty to cooperate fully with such Commissions of Inquiry, including making available evidence and witnesses and complying with the Commission's orders.

Recommendations on cooperation with civilian judicial/quasi-judicial bodies

The Army Bill should explicitly require the Nepal Army to cooperate with the Nepali police, prosecution and judicial authorities, as well as with quasi-judicial bodies such as Commissions of Inquiry, including releasing relevant documents, records or other evidence, providing witnesses, transferring suspects to the custody of the civilian authorities and complying scrupulously with all civilian court orders.

II. FAIR TRIALS IN PROCEEDINGS OF COURTS MARTIAL (MILITARY TRIBUNALS)

COMPETENCE, INDEPENDENCE AND IMPARTIALITY OF COURTS MARTIAL

The ICJ is concerned that although Courts Martial (military tribunals) under the Bill have jurisdiction to consider criminal offences, whether of a military nature of not, they do not have the requisite characteristics of a judicial body: competence, independence and impartiality.[21] These shortcomings undermine the possibility that any trial will be fair according to international standards.

Article 14(1) of the ICCPR provides:

> "In the determination of any criminal charge against him, or his rights and duties and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

A system of military justice must be situated within the framework of the general principles for the administration of justice. It "must be an integral part of the general judicial system".[22] Military tribunals must in all circumstances apply internationally guaranteed fair trial procedures, including the rules of international humanitarian law where they apply during a conflict.[23] Military tribunals, such as the Courts Martial contemplated by the Bill, are subject to the same international standards of independence, competence and impartiality as those required of ordinary courts.

The core elements of the right to fair trial, including the independence of the court, are not capable of derogation or restriction even in times of public emergency and during times of internal armed conflict. As these are both times in which Nepal's armed forces are most likely to be engaged in 'military operations', the provisions are particularly apposite and important.

---

[21] See generally pp. 1-62 of International Commission of Jurists *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors,* ICJ Practitioners' Guide, Series No. 1, Geneva 2004, and see the UN Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[22] Principle No. 1, Military Justice Principles.

[23] Principle No. 2 and No. 4, Military Justice Principles; see also art. 6(2) of the Second Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts and Article 3 common to all four Geneva Conventions.

In the context of the present Bill, the principal issues in assessing the competence, independence and impartiality of the Courts Martial are whether those appointed (i) have suitable legal experience and training to carry out their judicial functions; and (ii) are able to exercise their judicial functions independently, without interference by their military superiors or the executive.

The ICJ's primary concerns are that:

(i) As a military tribunal, the functions of a Court Martial are not sufficiently clearly defined as a judicial body with all the attendant responsibilities and standards provided by international law, including independence from the operational hierarchy of the army and the executive, and impartiality. [24]

(ii) The Bill does not guarantee that officers appointed to Courts Martial are legally qualified, experienced and competent to discharge judicial functions. It also does not guarantee appointees any tenure of office to avoid interference from their military superiors or, indeed, the government. [25]

(iii) The rules of procedure for convening and constituting a Court Martial are unduly vague on matters of such importance as judicial autonomy. Pursuant to Section 65 (3) "the authority can lay down conditions as needed" without any executive, judicial or parliamentary oversight.

(iv) Decisions to convene, or not convene, a Court Martial rests only with army officers (Section 65(1)) unless the Government orders it. Courts Martial can be constituted on an *ad hoc* basis at the discretion of a number of military officers, including officers who may have been involved "in a military operation" and, indeed, who may have been involved in issues that will be considered in the Court Martial itself (section 65(b)(iii)). The Courts Martial should also be able to convene if a military prosecutor charges an accused and submits the case to the Court Martial for trial.

The combined effect of these structural deficiencies is that Courts Martial convened under the Bill will lack the necessary independence, impartiality and competence to function as judicial bodies as required by international law. As such, the rights of those appearing before them will be compromised.

[24] Section 90 of the Bill goes some way to recognising this judicial character but other parts of the Bill, particularly those constituting the Court Martial, show that the Court is still be too closely linked to the army hierarchy.

[25] See Report of UN Special Rapporteur on the independence of judges and lawyers who noted that the highly hierarchical structure of the armed forces and the lack of legal training for many officers on military tribunals makes it unlikely they will be independent and impartial. UN Doc.: E/CN.4/1998/Add.2,30 March 1998, para 130.

Recommendations on independence and judicial character of Courts Martial

1. The Bill should be amended to state that Courts Martial are constituted as judicial bodies that are independent and impartial and that all procedures, rules and regulations as to the jurisdiction, composition and functions of the Court must be compatible with the Nepali Constitution and with Nepal's international human rights obligations, notably Article 14 of the ICCPR.
2. The Bill should be amended to record that the judges in all Courts Martial must have the necessary qualifications, skill, experience and security of tenure to discharge those judicial functions and be free from all forms of external interference, including from those in the military hierarchy.
3. Decisions of Courts Martial should be subject to appeal or review by superior judicial bodies within the ordinary civilian system for the administration of justice.

RIGHTS OF AN ACCUSED BEFORE TRIAL

The Bill does not guarantee the minimum standards of treatment for those held in military detention, nor their rights to challenge their detention (*habeas corpus*) and to have access to the outside world, including their lawyers, families and independent monitoring bodies.

International human rights law prescribes clear rules governing the treatment of any person who is detained in the course of a criminal investigation. Briefly, these rights are set out in Article 9(1)-(5) of the ICCPR[26] and elaborated in other standards, and include:

(i) Arrests and detention can only be carried out by authorised personnel;[27]
(ii) Detainees must be informed promptly of the reasons for their detention and any charges faced;[28]
(iii) Detainees must be brought promptly before a judge after arrest;
(iv) Detainees must be given an opportunity without delay to obtain legal advice and representation[29] and to have regular contact with the outside world, especially family and doctors;[30]
(v) Detainees must also be given an effective opportunity to challenge the lawfulness of the detention through *habeas corpus* proceedings before a competent judicial authority;[31]

[26] See generally, HRC General Comment 8.
[27] Principles 2 and 9, Body of Principles for the Protection of all persons under any form of Detention or Imprisonment ('Body of Principles'), UNGA 43/173, 9 December 1988.
[28] Art 9(2) and 14(3)(a) ICCPR; Principles 10,11, 13 and 14 Body of Principles;.
[29] Principle 17(2), Body of Principles; and generally, Basic Principles on the Role of Lawyers, UN Congress on the Prevention of Crime and the Treatment of Lawyers, Cuba 1990; HRC General Comment 20 para. 11; *Report of the UN Special Rapporteur on torture*, E/CN./4/1992/17, 17 December 1991, para 284.
[30] Also, Principles 16 and 19, Body of Principles.

(vi) In the course of detention all detainees are entitled to be treated humanely and in accordance with minimum standards; [32]

(vii) All places of detention must be officially recognised and the detaining authority must keep an accurate log of the place and identity of all detainees[33]. Incommunicado and detention in unacknowledged or secret places of detention put detainees at particular risk of torture and enforced disappearances and must be prevented; [34]

(viii) All detention facilities should be available for inspection by relevant national and international bodies.

These minimum requirements are central to states' efforts to prevent serious human rights violations such as torture, enforced disappearances, extrajudicial executions and arbitrary detention and to ensure the suspect is treated fairly at every stage of the proceedings. They are also reflected in the Military Justice Principles (Principle 11), as applicable to all military tribunals. In particular, Principle 12 of the Military Justice Principles states that the right of *habeas corpus* "should, in all circumstances, fall within the exclusive jurisdiction of the ordinary courts."

Chapter 8 of the Bill includes a number of provisions relating to the detention of an accused. They define which army officials have the power of arrest (sections 67-70); the applicable procedures (sections 67 and 68); and the time limits for periodic reviews of any detention decisions taken by the army. All reviews are undertaken within the army hierarchy itself (section 67). Section 127 allows the Government to declare any place as a place of detention for convicted prisoners.

Significantly, the Bill does not provide many of the guarantees set out (i) to (viii) above. The ICJ is concerned that the treatment of detainees under these circumstances would not meet the minimum standards identified above.

Recommendations on pre-trial detention

The Bill, or subsidiary rules promulgated under it, should ensure the following:

1. The Bill should be amended to guarantee detainees all the rights provided by international law and standards relating to arrest and detention, including the right to be brought promptly before a judge after arrest, the right to challenge in a civilian court the legality of the detention (*habeas corpus*) and the right to consult a lawyer without delay after the arrest.

---

[31] Article 9(3) and (4) ICCPR; Principle 32, Body of Principles.

[32] ICCPR, Article 10(1); Standard Minimum Rules for the Treatment of Prisoners ('Standard Minimum Rules'), adopted by the UN Congress on the Prevention of Crime and Treatment of Offenders, ECOSOC 663C (XXIV) 31 July 1957 and 2976 (LXII) 13 May 1977.

[33] Principles 11(2) and 20, Body of Principles; Rules 7(2) and 12 Standard Minimum Rules; Article 17 International Convention for the Protection of all Persons from Enforced Disappearances (23 September 2005), E/CN.4/2005/WG.22.WP.1REV.4.

[34] HRC General Comment 20, para 11.

2. A review of military arrest and detention procedures should be undertaken to ensure full compatibility with international standards.
3. Section 127 should be amended to the effect that convicted prisoners can only be detained at proper places of detention that are properly gazetted, accessible to inspection and meet the minimum standards prescribed by the UN Minimum Standard Rules for the Treatment of Prisoners.

HUMAN RIGHTS ISSUES DURING COURTS MARTIAL

The Bill does not provide adequate procedural safeguards to ensure fairness and transparency during the proceedings of a Court Martial.

Right to a public hearing

Transparency of court proceedings lies at core of the right to a fair trial and is the first line of defence against impunity. Secret or closed trials of serious criminal offences tend to shield the accused from proper accountability. This has also been the case in Nepal.

Article 14 of the ICCPR provides that all hearings should be in public unless they come within the prescribed exceptions of article 14(1). [35]

Principle 14 of the Military Justice Principles reaffirms this principle in the context of military tribunals and stipulates that "as in matters of ordinary law, public hearings must be the rule, and the holding of sessions *in camera* should be altogether exceptional and be authorised by a specific, well-grounded decision the legality of which is subject to review."[36]

Section 71(2) of the Bill reverses that basic principle by providing that military proceedings "shall be in closed session" unless the Court, in what appears to be its unfettered discretion, orders otherwise. This is a new and unwelcome restriction that does not appear explicitly in Chapter 11 of the old Army Act, 1959.

Given that many of the offences in the Bill are not minor matters of internal military discipline, but relate to serious breaches of international human rights and humanitarian law, it is clearly in the public interest that such trials should, as general rule, be open to public scrutiny and be another guarantor of fairness for the accused. This is even more imperative given the concerns expressed above about continuing impunity in Nepal.

[35] Article 14(1) provides that '…the press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice…'.

[36] See also, Case 9755,Chile, Inter-American Commission, 132, 137, OEA/Ser.L/V/11.84,doc 39, 1993, p.249. where a secret trial of army personnel denied the victims access to evidence and allowed the military tribunal to control the evidence submitted in a completely opaque process.

Recommendation on public trials

As it is presently framed, Section 71(2) is incompatible with Nepal's obligations under Article 14(1) of the ICCPR. It should be reversed to ensure that all trials are public unless, exceptionally, a closed session is required under the strict criteria of ICCPR article 14(1). The law should also provide a right of review to a superior judicial and civilian body.

Right to legal representation at all stages

The Bill does not provide an accused person with an adequate opportunity to receive independent legal advice and to be independently represented during any Court Martial and through any appeal process.

Article 14(3)(d) of the ICCPR and Principle 15(e) of the Military Justice Principles provide that everyone charged with a criminal offence is entitled to legal representation, generally of their choice and free of charge if the accused is otherwise unable to afford representation. The right to legal assistance applies at all stages of the criminal proceedings, including any investigative process before trial. It also requires that appointed counsel have full and private access to the accused and proper access to all evidence on which a charge is based.[37]

An accused must be afforded a genuine choice of qualified lawyers who are independent of both the court and the prosecuting authority. The United Nations Human Rights Committee has found that a military court that limited choice to two appointed attorneys was a violation of article 14(3)(d) of the ICCPR, [38] as was a situation when an accused was forced to choose from a list of military lawyers when a civilian lawyer was prepared to represent him. [39]

Section 73(2) of the Bill gives the accused right to submit a request for his defence to a designated Army official (*Prod Viwak*) who may assign him a (*Prod*) officer. In ICJ's opinion, the provision is not compatible with Article 14(3)(d) in that:

(i) the right to representation is not guaranteed but at the discretion of an army officer;
(ii) there may not be any genuine choice of counsel;
(iii) it is ambiguous as to whether counsel is available prior to formal charges being laid, during the investigative process under Chapter 8 of the Bill.
(iv) the *Prod* may not enjoy sufficient independence from the military (prosecuting) hierarchy to represent the accused effectively;

[37] See also Principle 18, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and Article 14(3)(b) ICCPR.
[38] *Estrella v Uruguay* (74/1980), 29 March 1983, 2 Sel.Dec.93, at 95.
[39] *Burgos v Uruguay* (R.12/52), 29 July 1981, Report of HRC, (A/36/40), at 176.

(v) the experience and qualifications of the *Prod* may not be adequate for the gravity of the offence.

Recommendations on legal representation

Section 73(2) should be amended to ensure its conformity with Article 14(3)(a) and 14(3)(d) of the ICCPR and Principle 18 of the United Nations Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment. In particular, all those suspected of offences under the Bill shall have regular and confidential access to qualified, independent legal counsel of their choice (whether military or civilian) at all relevant stages of the investigation, prosecution and trial process, including any appeal or review. Legal aid should be provided if representation is otherwise impossible.

OTHER BASIC RIGHTS OF DUE PROCESS

Article 14 of the ICCPR prescribes a number of other important safeguards to secure a fair trial. These include the presumption of innocence (ICCPR, Article 14(2)); the right to be informed promptly of the charges; an adequate opportunity for the accused and counsel to confer in private without threat of intimidation, to examine the evidence against the accused and to prepare and conduct a defence, to call and question witnesses; and to have a prompt trial (ICCPR, Article 14(3)(a)-(g)).[40] In particular, no-one should be convicted on the strength of anonymous testimony or secret evidence.[41]

These basic rights are applicable to all judicial proceedings and should be protected in the rules of procedure of military tribunals such as Courts Martial.

The procedures adopted by the Courts Martial are prescribed in Chapter 9 and expressly incorporate the Evidence Act, 1974. However, it is not clear from the various provisions in sections 74 to 83, whether all the rights defined by Article 14 of the ICCPR have been incorporated and protected.

In particular, the ICJ is concerned that an accused may not be fully informed of the offence(s) and evidence against him/her and that the rules relating to army secrecy could be invoked to obstruct the course of justice. In principle, military secrecy may be invoked during proceedings, under the supervision of independent monitoring bodies, when it is strictly necessary to protect information concerning national defence, but not:

---

[40] Similar provisions are contained in Principle 15 of the Military Justice Principles and the UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

[41] Principle 15 (i), Military Justice Principles.

(i) to withhold information about the identity or whereabouts of a detainee;
(ii) to obstruct any enquiries or proceedings of a criminal or disciplinary nature;
(iii) to deny judges access to documents and evidence they need to carry out their judicial duties;
(iv) to obstruct the publication of court sentences;
(v) to obstruct the effective exercise of *habeas corpus* and similar remedies.[42]

A number of significant procedural issues are not properly addressed in the Bill. These will, no doubt, be defined in due course by the Government of Nepal through rules pursuant to section 134 of the Bill. Rules relating to routine army matters (such as pensions, working conditions and general army administration) can properly be promulgated by the executive, in consultation, no doubt, with the army. However, the ICJ expresses serious doubt whether the Government alone should be able to make rules on sensitive issues such as immunities [sections 2(b)]; investigations, enquiries, detention and registration of cases [sections 2(d)]; and the proper conduct of cases throughout the judicial process of a court martial [sections 2(e)].

Given Nepal's recent history, the ICJ believes that further rules that touch upon questions of accountability and the fairness and transparency of trials, should be introduced into and passed by Parliament, following a wide and appropriate period of consultation.

Recommendations on fair trial standards of Courts Martial

1. Chapter 9, and any subsidiary rules and regulations issued under the Bill pursuant to section 134(1) and (2)(a)-(cc), should be carefully reviewed to ensure that all rights contained in article 14 of the ICCPR are fully protected and that the defence of military secrecy is not used as a shield to permit impunity for serious human rights violations or jeopardize the rights of the accused to a fair trial.
2. In addition, rules under Section 134 that affect the basic rights of both accused and victims of serious human rights violations should be passed by Parliament, and only following a wide and inclusive process of consultation with civil society and human rights experts.
3. The Bill should stipulate that all codes, laws and rules of procedure relating to military justice be subject to periodic and systematic review, in an independent and transparent manner, to ensure that Nepal's Courts Martial reflect best international practices and do not in practice encroach "on the jurisdiction that can and should belong to ordinary civil courts."[43]

[42] Principle 10 (a)-(e), Military Justice Principles.
[43] Principle 20, Military Justice Principles

PUNISHMENTS AND PENALTIES

Chapter 10 of the Bill provides a broad range of penalties for military offences prescribed in Chapter 6. The relevant Court Martial has power to fix an appropriate penalty but it does not come into force [44] until it has been endorsed by either the Nepal Government or "the officer authorised by the Nepal Government" (Section 100) for more serious offences, or by designated army personnel in the case of lesser offences (Sections 101-102). The endorsing authority has power to reduce penalties (section 104) or order the Court Martial to reconsider the penalty or rehear a case (Section 105). The endorsing authority also has power to "issue a new penalty as he thinks reasonable" (Section 107(2)).

The ICJ is concerned that decisions and penalties imposed by a properly constituted Court Martial (provided it has all the qualities of an independent judicial body) should not be subject to review by either the executive or the army. These are judicial functions that cannot be usurped in the manner prescribed by the Bill.

Recommendation on penalties

The Bill should provide that a Court Martial, as an independent judicial body, is free from interference by the army or executive in determining the appropriate penalty for a prescribed offence under the Bill. The provisions that allow executive (government) or military authorities to alter a decision or penalty imposed by an independent military tribunal should be confined to administrative penalties. Appeal against the penalty should be to ordinary civilian courts.

RIGHT OF APPEAL

The ICJ is concerned that the appeal rights fall well short of the international standards described above in that they do not afford a genuine and informed review by an independent, superior and civilian judicial body.

With limited exceptions, all judicial decisions should be made public and should contain sufficient reasons to be transparent and allow anyone affected to consider their prospects for appeal. [45] Anyone convicted of a criminal offence has the right to a review of that decision by a higher tribunal.[46] The appeal must be a genuine arms-length review of the

[44] Section 108, Army Bill.

[45] Article 14(1) ICCPR; General Comment 13 (13) UN Human Rights Committee established by the ICCPR; Article 74(5) Statute of International Criminal Court.

[46] Confirmation of judgment by the original decision-maker is not sufficient*; Salgar de Montejo* v *Colombia* (64/1919), 24 March 1982, 1 Sel. Dec.127 at 129-130

issues of the case[47] by a different and superior judicial authority that guarantees the same rights of due process as the body at first instance.[48] The Military Justice Principles stipulate that the authority of military tribunals should be limited to ruling in first instance and that "recourse procedures, particularly appeals, should be brought before the civil courts."[49]

Section 110(2) of the Bill provides a right of appeal against a decision or penalty imposed by the Court Martial to the Nepal Government or to designated superior officers in the army hierarchy. The appeal authority can substitute its own 'reasonable order' if it finds that the order of the Court Martial is 'illegal or unjust.'

Recommendation on appeal and review rights

The Bill should be amended to ensure that everyone convicted of a criminal offence and penalised by a Court Martial, or through a revised penalty imposed by an endorsing authority under Chapter 11, has the right to appeal to an ordinary, civilian court.

[47] Inter-American Commission, Report on the Situation of Human Rights in Panama, OEA/Ser.L/V/11.44,doc 38, rev.1, 1978.
[48] Article 14(5) ICCPR; General Comment 13 para. 17, UN Human Rights Committee.
[49] Principle 17, Military Justice Principles