

Military Justice in Difficult Circumstance: South Asian Countries



Military Force in South Asia

	Army	Air Force	Navy
Bangladesh	126,000	14,500	16,000
India	1,100,000	120,000	55,000
Nepal	69,000	650 (Army-Air Wing)	
Pakistan	550,000	45,000	22,000
Sri Lanka	200,000*	18,000	15,000

- **Voluntary induction in the armed forces.**
- **Women are working in all non-combat arms.**
- **38% of the soldiers in UN Peacekeeping.**
- * Norwegian newspaper *Aftenposten*: 400,000 (2015).

Ratification of Human Rights Treaties

Treaty	Bangladesh	India	Nepal	Pakistan	Sri Lanka
ICCPR/ICESCR	✓	✓	✓	✓	✓
CRC	✓	✓	✓	✓	✓
OP to CRC Child Soldier	✓	✓	✓	SNR	✓
CEDAW	✓	✓	✓	✓	✓
CAT	✓	SNR	✓	✓	✓
Enforced Disappearance	X	SNR	X	X	X

SNR: Signed but not ratified

Ratification of IHL Treaties

<u>COUNTRY</u>	Geneva Conv. I-IV	AP I of 1977	AP II of 1977	Statute of ICC	Ottawa Treaty APM
Bangladesh	✓	✓	✓	✓	✓
India	✓	X	X	X	X
Nepal	✓	X	X	X	X
Pakistan	✓	X	X	X	X
Sri Lanka	✓	X	X	X	X

- 1. SA Military Justice System**
- 2. Security laws giving special powers to armed forces.**
- 3. Allegations of excesses and impunity.**
- 4. Judicial interventions.**
- 5. Recommendations.**

1. Military Justice System: SA Countries

- **The British military law of 1911 is the progenitor of the SA military justice systems.**
- **Fundamental rights of the armed forces-- restricted by the Constitutions.**
- **Each wing of the military has independent Act.**
- **Action against military offender is by way of summary trial and ad hoc military tribunals or court martial.**

A. Summary Trials

- **The officers up to the rank of Major, and below can be summarily tried.**
- **Accused is not entitled to legal help during a summary trial.**
- **Law of evidence does not apply and proceedings are not open to public.**

- **An accused has no right to demand his trial by a court martial--Except where the commander wishes to award punishment affecting future service, accused (Major & below), has the right to trial by court martial.**
- **In Sri Lanka, an accused may demand that evidence against him to be taken on oath.**
- **No right to appeal against punishments awarded in a summary trial.**

Summary punishments (Officers and JCOs):

- Forfeiture of service/seniority up to 12 months;
- Stoppage of pay & allowances;
- Reprimand.

Personnel below JCO rank:

- Imprisonment and detention up to 28 (42) days;
- Field Punishment ;
- Extra duties;
- Fine, deprivation of rank;
- Reprimand.

Rope around post only



Bangladesh
Indian AF
Pakistan

Method of tying feet

Field Punishment Number One

B. Court Martial

	General Court Martial	District Court Martial	Summary/Field General Court Martial	Summary Court Martial
Bangladesh	✓	✓	✓	✓
India	✓	✓	✓	✓
Nepal	✓	✓	✓	✓
Pakistan	✓	✓	✓	✓
Sri Lanka	✓	✓	✓	X

- In Bangladesh, India, Pakistan and Sri Lanka, a **General and Summary General Court Martial** can award death sentence.
- In Pakistan a military offender can be stoned to death: AA s 60 (a)/70/ 80.
- In Nepal a GCM may award **life imprisonment and confiscation of the entire share of the ancestral property** (offences relating to the enemy, mutiny and desertion).

Other punishments in descending order:

- **Amputation of hand, foot or both (in Pakistan);**
- **Life imprisonment;**
- **Rigorous or simple Imprisonment up to 14 years;**
- **Whipping (in Pakistan);**
- **Cashiering in the case of officers;**
- **Dismissal;**
- **Field punishment;**
- **Reduction to ranks and forfeiture of service;**
- **Stoppage of pay & allowances;**
- **Reprimand.**

Trial in GCM and DCM

- **Ad hoc military tribunals;**
- **The members of court martial (officers) are detailed by convening authority;**
- **Judge Advocate must only in a GCM;**
- **In Sri Lanka prosecution as well as the defence is entitled to be represented by a counsel;**
- **Findings of court and sentence are subject to confirmation by convening authority.**

Summary/Field General Court Martial

- **Can be convened on active service or during peace;**
- **Composition: three officers with one year service;**
- **Judge advocate not a must;**
- **Statement of offence may be made briefly to disclose an offence;**
- **Can try any individual and award punishment up to death (with concurrence of all members).**

Summary Court Martial (SCM)

- **The origin of SCM is traceable to the mutiny which occurred in 1857 in India.**
- **Introduced in 1869, with the purpose of prompt and swift award of punishment to 'native' soldiers.**
- **The commanding officer should have absolute power to deal promptly and effectively with all military offenders.**

- **The CO alone conducts the trial and can award 1-year imprisonment and dismissal from service.**
- **The trial procedure is brief and accused (up to senior NCOs) has no right to counsel or defending officer.**
- **No provision for review of punishment (except in India since 2009).**

Confirmation, Revision, and Appeal

- The findings and sentence of a GCM, DCM or SGCM is not valid unless confirmed.
- **Pre and post-confirmation petition by accused to confirming authority--but no right to participate.**
- **Finding and sentence may be once revised by order of confirming authority.**
- **No right to appeal (now available in India and Nepal).**

Role of Judge Advocate General

- **JAG is a military executive appointed by the chief of the staff—he has no functions of an **advocate** or of a **judge**.**
- **Remains under the functional control of the convening authority.**
- **They are not independent and cannot be expected to give a fair and just opinion.**

C. Powers of Convening Authority

- (i) Who shall be tried;
- (ii) The *prima facie* sufficiency of proof;
- (iii) The sufficiency of charges;
- (iv) The composition of the court;
- (v) Confirms finding and sentence;
- (vi) Can send the proceedings back for revision;
- (vii) Final decision on post-confirmation petitions.

There is **NO RIGHT** to appeal against his decision.

Appeal: 1. Special Court Martial in Nepal

- **The Court consists of a judge (Chairman), Secretary Ministry of Defence and Chief Judge Advocate.**
- **It has original jurisdiction to proceed with and adjudicate the case.**
- **An appeal against its decision may be lodged with the Supreme Court within 35 days.**

Appeal: 2. The Armed Forces Tribunal in India

- **The Armed Forces Tribunal and its Benches (judicial and administrative member one each), are functioning since August 2009.**
- **It has original jurisdiction over service matters and appellate jurisdiction over court martial.**
- **Decided 5500 cases in the last 5yrs.**

- **Lacuna: The Tribunal cannot get its orders executed by way of civil contempt.**
- **An appeal against order of the Tribunal can be filed in the Supreme Court of India.**
- **An amendment to the AFT Act 2007, to give civil contempt power—resented by the armed forces in 2012.**

The Right to Fair Trial

- **ICCPR: Article 14**
- **Decaux Principles (2006): administration of justice through military tribunals.**
- **The right to counsel, equality before court, independent and impartial tribunal, reasoned judgment, and the right to appeal: missing in the case of SA countries.**

2. Security and Anti-terrorism Laws: South Asian Countries



- **Bangladesh: The Armed Forces (Special Powers) Ordinance, 1942.**
- **India: The Armed Forces (Special Powers) Act.**
- **Nepal: The Terrorists and Disruptive Activities (Control & Punishment) Ordinance.**
- **Pakistan: Suppression of Terrorists Activities (Special Court) Act and Special Military Court during Martial Law regime.**
- **Sri Lanka: Public Security Ordinance and Prevention of Terrorism Act.**

- **The armed forces in the SA countries have been deployed in ‘aid to civil power’ to deal with terrorism and militancy.**
- **They have been accused of certain violations:**

- **Enforced disappearances / extra-judicial executions.**
- **Illegal imposition of curfew.**
- **Rape, molestation and sexual harassment.**
- **Killing of protected persons including women and children.**
- **Arbitrary detention and torture.**

Military Justice in Difficult Circumstance

Bangladesh

- **The issues of concern are extrajudicial killings, tortures, and arbitrary and illegal arrests--for maintaining public security.**
- **The Rapid Action Battalion (RAB), a special police force with close links to the army has been responsible for these violations.**
- **Many of the RAB commanders are officers seconded from the army.**

- **The Bangladesh army is politically a very influential institution in the country.**
- **It has not taken any action against human rights violations committed by the officials of RAB.**
- **Human Rights Commission does not have any mandate to take action against “discipline” forces.**

BDR Mutiny

- **In February 2009, Bangladesh Rifles (BDR), a paramilitary force on a two-day mutiny killed 74 people (57 army officers) and committed rapes.**
- **Many of the murder victims were dumped in sewers and shallow graves.**
- **Bangladeshi President had asked the Supreme Court whether the accused could be tried under the Army Act; the Court ruled against military trials.**

- **A special court has awarded 152 death sentences, 161 life sentences and 262 sentences of 3-10 years imprisonment; two tier appeal process.**
- **Reasons of mutiny: low pay, no perks, no participation in UN peacekeeping.**
- **The BDR has been renamed Border Guard Bangladesh (BGB).**

Nepal

- **The military justice system falls under the jurisdiction of the Supreme Court.**
- **Cases of murder and rape by military personnel to be tried by regular courts (AA s 66 and 68).**
- **Cases of corruption, theft, torture and enforced disappearances are to be tried by the Special Court Martial– (AA s 62 and 119).**

- The 2013 Ordinance '**On the Investigation of Disappeared Persons, Truth and Reconciliation Commission**' has been struck down by the Supreme Court.
- **Torture and enforced disappearance have not been criminalized despite a Supreme Court order of June 2007.**
- **No military person has been prosecuted in Nepal for human rights abuses committed during conflict which lasted for 10 years.**

- **In January 2013, Colonel Lama of Nepal Army, deputed to UN peacekeeping was arrested by the police in London during his visit to the UK.**
- **He is accused of intentionally “inflicting severe pain or suffering” as a public official on two individuals in Nepal (April-May 2005).**
- **He has been charged under sec 134 of the British Criminal Justice Act, a law that defines torture as a “universal jurisdiction” crime.**

Nepal Army Act 2006:

- It allows for soldiers accused of murder and rape to be tried by civilian courts.
- However, sec 22 provides immunity for these offences if committed on duty: “in the course of discharging duties in good faith.”
- In June 2011 Supreme Court ordered the Government to review the Army Act --to ensure its compliance with Nepal’s human rights obligations.

India

- **In the last five decades India has witnessed an increase in instances of violent conflicts in certain territories--terrorism, insurgency or militancy.**
- **The Armed Forces Special Powers Act (AFSPA) has been applicable in certain part of the Northeast India and Jammu and Kashmir since 1958 and 1990 respectively.**

- **In *People's Union for Civil Liberties v State*, the Supreme Court (23 Sept 2014) has issued guidelines which must be followed in cases of police encounters resulting in the death and grievous injury.**
- **An independent investigation to be conducted by the criminal investigations department under the supervision of a senior officer.**

- **The recent Criminal Law (Amendment) Act, 2013 has made several significant changes to the Indian Penal Code s. 375, which defines the term rape.**
- **A member of armed forces, if commits rape, may be imprisoned for at least 10 years, which may be extended to life imprisonment.**

- **In 2007, a PIL was filed in the Supreme Court, alleging few military officers have sold their private weapons contrary to Army instructions.**
- **On the direction of the Supreme Court, the Army held court martial / administrative action against 71 officers and JCOs.**

Considering that the punishments awarded were minor, the Court has asked (on 17 Sept 14) for fresh proceedings, though barred under the Army Act and the Constitution.


NATION

THE TIMES OF INDIA, NEW DELHI / NOIDA / GHAZIABAD
WEDNESDAY, SEPTEMBER 17, 2014

Won't let army officers guilty of gunrunning get away easily: SC

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New Delhi: The apex court on Wednesday said it was its duty to protect the institutional integrity of Indian Army and not remit a few officers found guilty of illegally selling non-vice weapons to arms dealers and civilians to get away with lenient sentences like a fine or a reprimand. Attorney general Mukul Dattaji argued that the conviction of 71 officers and i-



awarded to them in 2011 had become final and it could not be reopened without breaching the

“ The ordinary citizen says if he steals Rs 10, he lands up in jail. But here you let off army officers who sell their guns illegally. The common man will ask whose crime is more serious? ”

SC BENCH

mar Sharma, who had in 2007 brought to the court's notice il-

statement of an army personnel who was dismissed after being found dead drunk on the street. For drinking indiscipline, you dismissed the personnel but for gun running you are letting off the officers with a reprimand or a meagre fine after they pleaded guilty?

“The ordinary citizen says if he steals Rs 10, he lands up in jail. But here you let off army officers who sell their guns illegally. The common man will come to the court and ask

Pakistan

- **The Protection of Pakistan Ordinance IX of 2013 (Amended in 2014)** to strengthen Pakistan's efforts to fight insurgencies and terrorism.
- **Section 9, authorizes secret and unacknowledged detention, as well as the nondisclosure of grounds for detention.**
- **Section 10, allows for exclusion of the public from hearings on the ground of "public safety"..**

- **Sections 15 and 5(5) reverses the burden of proof on the accused-- inconsistent with presumption of innocence.**
- **Section 20 confers blanket immunity from prosecution for actions done in good faith.**
- **Trials in **Special Courts** that do not meet the condition of trial by a competent, independent and impartial tribunal (Art 14, ICCPR).**

- **During 2012-2013, Pak Army had removed 35 detainees from an internment centre and their whereabouts are not known.**
- **In December 2013, the Supreme Court held that their removal amounted to enforced disappearance; and directed strict action against the army personnel.**

- **In March 2014, the defence minister lodged FIRs under the Penal Code for wrongful confinement against suspected army officers.**
- **The Supreme Court constituted a 5-member Bench to consider the scope of civilian courts' jurisdiction to try military members under the Penal Code.**
- **Military has refused to cooperate with the Supreme Court stating that its personnel can only be tried by a military court.**

Sri Lanka

- **The Emergency Regulations 2006 and other emergency laws severely limited the accountability of military authorities and perpetuated the culture of impunity.**
- **Over 30,000 people were killed towards the end of the ethnic conflict in 2009 when the LTTE was finally crushed.**

- **The UNHRC resolution has alleged war crimes blamed on both government troops and LTTE rebels during the final phase of the three-decade civil war.**
- **Sri Lanka claims that it has the backing of 22 nations in its battle against the UN's war crimes probe into its brutal civil war.**

- **These countries have termed the UN Human Rights Council (UNHRC) resolution (March 2013), an intrusive mandate and unwarranted in the context of Sri Lanka's own local investigation.**
- **However, no action has been initiated against military persons for alleged violations, so far.**

Problems in the SA Countries

- **The military justice systems (except Bangladesh), do not include war crimes as defined under the Rome Statute.**
- **The concept of command responsibility has not been incorporated.**
- **The right to a fair trial (Art 14 ICCPR) not available to a military accused.**
- **There are no Manuals on the laws of war.**
- **Civil society doubts fairness of a military trial.**

Offence under the Army Act, 1950

Breaches of IHL

Max Punishment

Breaking into house or plunder, S. 36 (b)

Appropriation of property

14/7 years RI

Unbecoming conduct, S. 45

Perfidious use of protective emblem

Cashiering/ dismissal

Disgraceful conduct/ cruelty, S. 46

Inhuman Treatment

7 years RI

Extortion and corruption, S. 53

Taking of hostages

10 years RI

Defiling places of worship, S. 64 (b)

Destruction of places of worship

7 Years RI

Offence against property / country in which serving, S. 64 (f)

Destroying historic monuments

7 years RI

Murder, Rape, S. 70

Murder, Rape etc.

Death

Act prejudicial to good order & military discipline, S. 63

Torture, inhuman treatment

7 Years RI

Problems in the SA Countries:

- The military justice systems (except Bangladesh), do not include war crimes as defined under the Rome Statute.
- **The concept of command responsibility has not been incorporated in service Acts.**
- **The right to a fair trial (Art 14 ICCPR) not available to a military accused.**
- **There are no Manuals on the Laws of War.**
- **Civil society doubts fairness of a military trial.**

5. Recommendations:

a. Summary courts (SGCM and SCM) must be abolished.

b. The power of convening authority to be rationalized and divided.

c. JAG needs to be insulated from the military chain of command.

d. Court members not be associated with the award of the sentence.

e. Punishments need to be rationalized-degrading and humiliating must be abolished.

f. Effective legal aid to accused during trial and appeal (Art 14, ICCPR).

g. Appeal courts must be established.

h. Crimes contained in Rome statute and the concept of command responsibility must be a part of military justice system.

ROADBLOCK

“There was only one thing more difficult than getting a new idea into military mind and that was getting an old idea out.”

-Sir Basil Liddell Hart, a military thinker and a soldier.

“.....modernization will come to South Asia, but only at the pace tolerated by the military.”

- Cohen, Stephen P. (2001) ***“The Indian Army: Its Contributions to the Development of a Nation.”***



Thank you