

A Petition
Filed Before the
Supreme Court of Nepal

Subject: Seeking settlement of constitutional and legal issue of grave importance by issuing certiorari, prohibition and any other appropriate order pursuant to Articles 46 and 133(2) of the Constitution of Nepal.

Writ Petitioner: Ms. Mina Katuwal, 25, resident of Kathmandu Metropolitan City, Ward No. 10, Thapathali, Kathmandu district, an authorized representative of Captain Saroj Regmi, with the Batch No. 4866, serving at and authorized on behalf of the Legal Department of the Nepal Army, Government of Nepal.

Versus

Respondents:

1. Office of the Prime Minister and Council of Ministers, Government of Nepal, Singha Durbar, Kathmandu.
2. Ministry of Peace and Reconstruction, Government of Nepal, Singha Durbar, Kathmandu.
3. Attorney General of Nepal, Office of the Attorney General, Ramshah Path, Kathmandu
4. High Court, Harihar Bhawan, Lalitpur.
5. Kavrepalanchowk District Court, Dhulikhel, Kavrepalanchowk.
6. Truth and Reconciliation Commission, Babar Mahal, Kathmandu.
7. Office of the District Government Attorney, Dhulikhel, Kavrepalanchowk.
8. District Police Office, Dhulikhel, Kavrepalanchowk.

9. Complainant Devi Sunuwar, approx 48, resident of the then Kharelthok Village Development Committee (VDC), Kavrepalanchowk district.

I, the petitioner, attaching Rs. 500 as the petition fee together, would request the following matters pursuant to Rule 32(1) of the Supreme Court Rules, 2017:

1. The Nepalese Army is a national security organ founded as per the Constitution for the independence, sovereignty, territorial integrity, autonomy and national unity of Nepal. To defend and secure the nation of Nepal is the principal liability, obligation and duty of Nepalese Army. It is both the concern and duty of Nepalese Army to maintain the operational prowess of the organization and to safeguard its interests by saving the Army from illegal losses. In order to retain the occupational valor of any agency, no individual loss or liability should be incurred for the acts done by its members in the course of discharging their professional duties and in occupational capacities. In recent years, the jurisdiction of military justice system of Nepal has been encroached by various judicial and governmental agencies in an unlawful manner resorting to the incidents of the past 10 year armed conflict which has resulted in the victimization of several military personnel. In case such events recur in future then it could seriously lead to the erosion of military operational capabilities. As there was no other alternative to check such unlawful activities, I have presented myself at this respected Court with this petition in accordance with Articles 46 and 133(2) of the Constitution of Nepal.
2. The Nepalese Army is an non-political, professional and disciplined organization running as per the norms of civilian supremacy and chain of command. Pursuant to its organizational nature, it has been obeying all the orders and decisions of legitimate and accountable government. Due to its professional and disciplined image, not only has it been safeguarding the state sovereignty but also has been serving in the peacekeeping missions abroad at the invitation of United Nations since a long time. Thus, it has been enhancing national esteem of the country, and

not only of the organization, by displaying its professional aptitude and discipline. It has full authority for defending the powers, interests and founding values of the organization.

3. During the 10 years armed conflict, the country suffered from apocalyptic loss of lives and property, the ill effects of which it has been witnessing even today. Though the country is now transitioning from the horrors of conflict to a peaceful journey, the impacts of conflict are still felt in the entire nation, its various agencies and down to the individual level. The hardships faced by the Nepalese Army and its members are even particularly more grievous. In conflict, the Nepalese Army had led the security forces which were mobilized for returning the country in a path of peace as per the decision of Government of Nepal. However, any war is an extraordinary situation which cannot remain within the preplanned confines. Thus, the rules applicable in normal times cannot govern such eventualities. Now, when the country has freed itself from the curses of war, to evaluate the then situation as per today's peaceful standards would not be judicious and practical at any cost. There is a separate philosophy guiding wars. Hence, the analysis of warlike circumstances should also be done on the basis of same philosophy and war science. The Nepalese Army has never held that all is fair and permitted in war. However, we should give a serious thinking to the fact that the rules and procedures of normal times could not address the extreme situations like war and conflict. The events of war should be assessed in the light of war science, war laws and philosophies. The accidental events which occurred during conflict even when the Nepalese Army was exercising due care and caution, those occurred due to the negligence and recklessness of army personnel, and those happened due to lapses in the observance of army discipline were investigated by forming Military Courts as per the then Army Act which also took the needful action. In order to address the issue of human rights abuses, a Human Rights Section was formed within the structure of Nepalese Army. It had perseveringly tried to hear the complaints and grievances, to address the incidents and mishaps,

and to prevent those untoward incidents. The Army had been persistently striving to not violate the human rights of either combatants or general citizens and to not breach the national and international laws. Still, in some occurrences during the armed conflict between the state and insurgents, some unprecedented incidents did happen. However, the Nepalese Army had not abstained from punishing its members responsible for such events as per the then prevailing laws. In the disputed incident of death of Maina Sunuwar, it was even decided to provide compensation to the victim.

4. Meanwhile, following the Comprehensive Peace Accord (CPA) signed between the Government and combatants on 21/11/2006, in the direct involvement of United Nations, the 10 year old conflict was ended and peace prevailed in the nation. The CPA, inter alia, has provided for several measures to normalize the conflict situation in Article 5.2. In Article 5.2.5 it was specified that “Both parties agree to constitute, with mutual understanding, a high level truth and reconciliation commission for finding out the truth about those who committed the gross violation of human rights and were involved in the crime against humanity in the course of armed conflict and for creating an environment of reconciliation in the society.” In order to grant that Agreement a constitutional status, it was included in Schedule 4 of the Interim Constitution of Nepal, 2007, as per Article 166(3). With a view to implement that provision of the CPA, the Legislature Parliament enacted an Act, which led to the establishment of the Truth and Reconciliation Commission and Commission for the Investigation of Disappeared Persons. It has been long time since these Commissions has started their functions. In order to complete the peace process, a separate Ministry by the name of Ministry of Peace and Reconstruction, one of the respondents, has been formed, which has been continuously discharging its duties.
5. In order to control the dreadful situation triggered by the then conflict, a state of emergency was declared as per Article 115 of the then Constitution of Kingdom of Nepal, 1990 from 26/11/2001. Consequently, the Nepalese Army was deployed as

per the recommendation of National Security Council pursuant to Article 118. The Ordinance for the Control of Terrorist and Destructive Activities, 2002 (which was later issued as an Act) empowered the Nepalese Army to arrest the persons engaged in terrorist and destructive activities, to investigate and detain them. Within the confines of the same Act, the Nepalese Army had discharged its mandate. The incident of the case CR-0203 of the year 2015, tried in the respondent Kavrepalanchowk District Court as per the report of respondent complainant Devi Sunuwar, had happened on 16/02/2005. It is evident from the notices published in the Nepal Gazette of 26/11/2001 and 04/04/2002 that the Nepalese Army was deployed as per the decision of then His Majesty's Government at that time period. Thus, the Army was being mobilized until 15/07/2006. Hence, the jurisdiction of regular courts will not be applicable to the offences committed by military personnel during combative engagement.

6. Now the situation is that various allegations are being hurled at the Nepalese Army in matters related to the conflict era cases, and complaints are being filed rampantly via the various associations and organizations against its members in the country and abroad. As a representative case of this trend, a verdict was rendered given by the Kavrepalanchowk District Court on 16/04/2017 in the murder case involving the Government of Nepal at the report of Devi Sunuwar vs. the then Colonel Bobby Khatri, et al, wherein the defendants Bobby Khatri, and the then Captains Sunil Adhikari and Amit Pun were convicted as per No. 13(3) of the Chapter on Homicide of National Code (*Muluki Ain*) and sentenced them to life imprisonment. However, a separate opinion was tendered under No. 188 of the Chapter on Court Proceedings, National Code to have them jailed for 5 years each whereas the then Captain Niranjan Basnet was cleared of the charges. Those defendants were already punished by the Military General Court duly constituted as per the Constitution and laws and they had duly served their sentences as well. Thus, the reinvestigation, re-prosecution, and re-judgment against the same defendants in the same case contravenes the constitution, laws, international

treaties to which Nepal is a party, and the principle against double jeopardy which constitutes one of the universally recognized principles of justice, as well as the legal precedents enunciated by the Supreme Court of Nepal in this regard.

7. Section 61 of the then Army Act, 1959 provided as follows as to the offences that could not be tried by the Military Court:

In case a person on whom this Act applies, murders or rapes a person on whom this Act shall not apply, then those offences will not be deemed to be under this Act and they shall not be heard by the Military Court. However, the Military Court may take action of those offences were perpetuated under the following circumstances:

- a) *In case those offences were perpetuated during combat missions, or*
- b) *In case those offences were perpetuated abroad, or*
- c) *In case those offences were perpetuated at a border post designated by the Government of Nepal through its notification.*

Thus, there was an express legal provision that in the above 3 circumstances, even in the offences against the persons on whom Army Act would not apply, the Military Court could assume jurisdiction. Section 139 of the Army Act, 1959 had recognized the actions of Military Court on par with regular court proceedings. Pursuant to Section 61(a) of the same Act, in case a person on whom that Act would not apply, was killed during military action then a General Military Court formed as per Section 107 of the Act had the jurisdiction to try and hear such cases. As such, a Military Court was constituted as per Section 101 and it was well authorized by law to try and hear such cases pursuant to Section 104. Thus, in the case involving the death of Maina Sunuwar, as that crime fell within the purview of then Army Act, a General Military Court was constituted which decided to punish the then Colonel Bobby Khatri; and the then Captains Sunil Adhikari and Amit Pun, which they had duly discharged. Further, it was also ordered to offer compensation to the kin of victim.

8. The Military Court is also a court within the legal regime of the State. Unless repealed by the competent authority, its verdicts are as legitimate as that of verdicts of other regular courts. As regards the defendants who were sentenced by the Kavrepalanchowk District Court on 16/04/2017, those persons were already sentenced by the verdict of General Military Court on 08/09/2005. At that time, the Constitution of Kingdom of Nepal, 1990 and the Army Act, 1959 were in force. There is neither a claim nor a ruling that the then verdict of General Military Court was against the then Constitution or laws. Hence, under a same national legal system, when two verdicts are made by two different courts on the same issue, both of them shall not be valid.
9. A state is a legal system in itself. Hence, two types of courts cannot overlap over the jurisdiction of a particular subject matter. Neither the Constitution nor the laws have overlapped as such. Even if overlapping is caused by any reason, the jurisdiction of special courts shall prevail. The respondent Kavrepalanchowk District Court has handed its verdict pursuant to No. 29 of the Chapter on Court Proceedings of the National Code. However, the respondent seems to have completely ignored No. 4 of the Initial Statement of the Code. The Military Court is not a regular court that would exercise general jurisdiction, but rather a specialized court for implementing the laws on exclusive service class like the military personnel. Such types of specialized courts are the courts under the Constitution itself. This fact is corroborated by the provisions of Articles 84 and 85(2) of the Constitution of Kingdom of Nepal, 1990; Articles 100 and 101(2) of the Interim Constitution of Nepal, 2007; as well as Articles 126 and 127 (2) of the present Constitution. Moreover, Article 152 of the present Constitution, Section 139 of the then Army Act, 1959 and Section 98 of the present Army Act, 2006 all have explicitly established Military Courts as recognized judicial bodies. Hence, instead of setting the charge sheet aside, as per No. 35 and 180 of the Chapter on Court Proceedings, National Code on the basis of above constitutional and statutory provisions, the respondent Kavrepalanchowk District Court has issued a

verdict on the case which runs aground the said constitutional and statutory provisions.

10. On the other hand, the incident which has drawn the said decision had occurred during the period and course of conflict, a fact conceded even by the respondent Kavrepalanchowk District Court. Article 5.2 of the Comprehensive Peace Accord, which had been an integral part of the Constitution has clearly arranged for addressing the incidents that occurred during conflict era. Out of the several measures stipulated by Article 5.2, a Truth and Reconciliation Commission has already been established as envisaged by the Article 5.2.5 of the CPA, which has also started its operations. The CPA has provided for dealing with all incidents that had transpired during the period and course of conflict. Any type of events that had occurred during the period and course of conflict are neither secluded by the CPA not put under the jurisdiction of general laws. On the one hand, the CPA was held as an integral part of the Constitution, and on the other, Article 33(r) of the Interim Constitution had created a state obligation to settle those cases by means of finding truth and promoting reconciliation. Thus, the verdict of respondent is ultra vires.
11. There is no discord on the fact that Maina Sunuwar died in the course of investigation. At that time, Constitution of Kingdom of Nepal, 1990 was in effect. Pursuant to Article 88(2) of that Constitution, *the Supreme Court shall not be deemed to have power under this clause to interfere with the proceedings and decisions of the Military Court except on the ground of absence of jurisdiction or on the ground that a proceeding has been initiated against, or punishment given to, a non-military person for an act other than an offence relating to the Army.* This provision had granted a constitutional recognition to the jurisdiction of the Military Court. Thus, when the verdict of a General Military Court, also recognized by the Constitution was still sustaining, case was filed again for the same offence as if no action was taken by any court. In fact, there is no any legal basis or precedent for making another decision by ignoring a legitimate decision

when a decision on the case was made previously and the sentences were also duly served.

12. There is no discord on the fact that Maina Sunuwar died in the course of investigation on whether she was involved in a criminal act or not. The provision of a Military Court assuming its jurisdiction and instituting action against the officials of its organization responsible for causing such mishaps, as per the military laws, had been clearly laid down by Section 61 of the Army Act, 1959. Moreover, Section 1(3)(b) and (d) of the Army Act, 1959 had further provided that during the time of military action, even certain types of non-military personnel are also subject to the Act. It is a unanimous issue that the Military Court is entitled to take action against anyone on whom the Army Act could be applied. This mishap occurred while discharging duties as prescribed by the service. Pursuant to the military doctrines, such types of incidents are not assigned to the jurisdiction of regular courts but of the military courts, as per the principle of service-connected acts.
13. Devi Sunuwar, the mother of victim Maina Sunuwar had already filed an application before the Truth and Reconciliation Commission duly established as per Article 33(r) of the Interim Constitution of Nepal, 2007. This fact is revealed from her writ petition no. 073-WO-0257 filed by her at this respected Court. Thus, on one hand whereas the defendants have already completed the punishment imposed by the authorized General Military Court as per its verdict, on the other, even the family of victim itself has applied before the Truth and Reconciliation Commission. In such a scenario, the respondent Court is not at liberty to undermine all these facts and make another verdict that would chip in the jurisdiction of Military Court in a manner that would affect the earlier verdict under which even the punishments have already been discharged.
14. The prosecutor, i.e. the respondent District Government Attorney Office has exercised the delegated power assigned to the Attorney General by the Constitution. As this incident occurred during the period and course of conflict

and is a matter under the CPA that falls well within the jurisdiction of Truth and Reconciliation Commission as per Article 33(r) of the Interim Constitution and an offence to be tried under the Army Act; and as the respondent also knew of this matter in time, it is not entitled to prosecute this case in contravention of all those provisions.

15. The principle against double jeopardy is one of the principles among the universally recognized fundamental principles of criminal justice. In course of executing this principle, the following legal arrangements have been made in the national and international instruments:

- a) Article 20(6) of the Constitution of Nepal: *No person shall be tried and punished for the same offence in a court more than once.*
- b) Article 14(7) of the International Covenant on Civil and Political Rights: *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.*
- c) Section 110 of the Army Act, 1959: *Once a person on whom this Act applies is convicted or exonerated by the Military Court or any other criminal court, or if the same courts have taken action under any of the Sections of 69, 72, 73 and 74; the Military Court or any other criminal court shall not take another action against the same person on the same offence, and pursuant to the similar Sections.*
- d) No. 85 of the Chapter on Court Proceedings, National Code: *After a case is filed in and adjudged by the office, a complaint in the same case against the same litigant shall not be received and tried, if it is not an appeal against the judgment in accordance with law. Even though it is received, it shall be revoked.*

16. Thus, contrary to the provisions of Constitution, statutes, international treaties to which Nepal is a party and which apply on par with Nepali laws, as well as the principle against double jeopardy that remains as one of the universally recognized

principles of criminal justice, reinvestigating a case in which the Military Court has duly issued its verdict, imposed punishment that has already been implemented, is not permitted on the grounds of national and international laws as well as legal precedents. In case any of the cases relating to conflict era incidents are not tried by the Military Court, even then, such matters will be external to the jurisdiction of regular courts. This matter is to be settled as per the mechanisms created by the combatant sides for defusing conflict. Even more, this dispute has been investigated and adjudged by the authorized Military Court and the punishment of which has also been enforced. Thus, another court lacking jurisdiction to look into such matters cannot try or hear this case as if the verdict of Military Court were repealed.

17. The standard practice across Nepal and almost all other nations of the world has been to investigate, prosecute and try cases as per the Military Act only in matters pertaining to military service and action. Moreover, in case of violations of international human rights and humanitarian law as well as of Common Article 3 of the Geneva Convention, a case may be filed at the court only if investigation by transitional justice mechanisms holds someone guilty of those acts, which has been an international norm and practice.
18. The verdict of Kavrepalanchowk District Court on 16/04/2017 as regards the incident of death of Maina Sunuwar seems to be based on the investigation report, statements of military personnel recorded at the General Military Court and the verdict of same court. Similarly, point no 14 of that verdict further states that the photocopies of statements of the same defendants in the same case has been received and enclosed in the court case file. Thus, the verdict of respected Court also seems to have conceded that the incident is the same and that it has been already decided by the Military Court.
19. In regard to that incident, the verdict of Kavrepalanchowk District Court, in point no 56, mentions that: *As Section 61 of the Army Act, 1959 has provided that in case a military personnel kills a person on whom the Act shall not apply, then such*

offence shall not be heard by the Military Court, this offence will not fall under the purview of Military Court. Thus, on the one hand, whereas the fact is totally ignored that in case such an offence is committed in course of military action then it may be tried by the Military Court as per Section 61(a) of the same Act; on the other, respondent District Court is not a competent authority to examine the legitimacy of Military Court's verdict. Hence, the verdict of respondent District Court has on one hand, quoted the legal provisions of a single section only in part; and on the other, it has been established that it has trespassed its jurisdiction.

20. Point no. 66 of that verdict reads that: *As per nature of the then state system, in the conflict between the state and insurgents, it had mobilized various security agencies to contain the activities of belligerents. At this context, Maina Sunuwar seems to have died in course of interrogation upon arrest. The defendants lack the planning and prior animus to kill the deceased altogether. With a view to extract any organizational information of the rebel side, they inflicted excessive torture in course of questioning which deteriorated her condition. Then as she was moved to an airy location for food and rest, she happened to die there which speaks of the absence of a murderous motive in the defendants. Because of stringent torture, the condition of deceased worsened and after her death, with intent to conceal the body, her corpse was buried in a jungle within the security perimeter. This aggravates the gravity of defenders' offence. At the end, since this fateful event took place while discharging the orders of State side, and Maina Sunuwar died because of neglecting a phenomenon as natural as human life, I, thinking as a justice dispenser doubt as if the incident was an accident and that would bode costly for the defendants to serve the full length of a life term. Hence, considering that it would be judicious to sentence the defendants Sunil Prasad Adhikari, Amit Pun and Bobby Khatri each to 5 years of incarceration, I have tendered my separate opinion as per No. 188 of the Chapter on Court Proceedings.* From this opinion also, the extreme situation of army mobilization and combat mission prevailing then has been acknowledged. In that judgment, on the one hand

whereas it is stated that the *mens rea* was lacking in the defendants that is so imperative to impose criminal liability in a murder case, and a faint doubt of accidental death is also raised; and on the other, they were held guilty in murder crime and sentenced as per No. 13(3) of the Chapter on Murder of National Code. This act is *prima facie* flawed by law. In case that judgment is to sustain, then the provision of specialized courts enshrined in Article 152 of the Constitution of Nepal will become inoperative. Further, it would also lead to the dissolution of existence of Military Court as well, which has been duly constituted as per the Army Act subject to that provision. This scenario will ultimately lead to a dysfunctional military organization.

21. The present writ petition involves some pressing constitutional and legal questions which also have been matters of direct concern to the organization of Army, namely: Whether the then Army Act, 1959 or the Chapter on Murder of National Code - a general law- is to apply for that period when Army was mobilized as per the then existing laws? Whether the conviction verdict made by the respondent Kavrepalanchowk District Court even after conviction by General Military Court for an incident that occurred at the time of Army deployment is allowable or not, in the light of principle against double jeopardy as incorporated in Article 20(6) of the Constitution of Nepal? Whether the trial court of general nature may make a judgment that would be tantamount to the reversal of Military Court decision, even when the verdict of Military Court is not lawfully overruled by any other agency? As the authority to decide all these issues lies with this respected Court as per Article 133(2) of the Constitution of Nepal, thus I have presented myself here with this petition.
22. Hence, in a case that is duly disposed from court proceedings in accordance with the law, in the murder case involving the Government of Nepal at the report of Devi Sunuwar vs. the then Colonel Bobby Khatri, et al, the reinvestigation, re-prosecution, and re-judgment against the same defendants in the same case contravenes the constitution, laws, international treaties to which Nepal is a party,

and the principle against double jeopardy which constitutes one of the universally recognized principles of justice, as well as the legal precedents enunciated by the Supreme Court of Nepal in this regard, as well as lacks effective jurisdiction. Hence, I pray before this Court that the verdict of respondent Kavrepalanchowk District Court of 16/04/2017 be set aside by an order of certiorari and that an order of prohibition and/or any other appropriate order be issued in the name of respondents barring them from investigation, prosecution and trial in other matters of similar nature also.

23. Moreover, since the verdict of respondent Kavrepalanchowk District Court of 16/04/2017 has been referred to the Patan High Court for confirmation purposes, and in case that verdict is to be implemented, the rationale of this petition shall also be extinguished. Further, in that event, it would also be futile for the Nepal Army to enter into the respected Court which has been the final authority of interpreting the Constitution and laws so as to prevent serious deviation looming before the Army organization which has been the vanguard of State sovereignty. As such, I also pray that pending the settlement of grave constitutional and legal issues raised in this petition, let an interim order be issued in the name of respondents, pursuant to Rule 49(1) of the Supreme Court Rules, 2017 to not enforce the verdict of respondent Kavrepalanchowk District Court by any means, and to maintain status quo in that case.

24. I have enclosed the following documents along with this writ petition:

- a) A set of photocopies of verdict of General Military Court of 08/09/2005 together with charge sheet amounting to 15 pages.
- b) A set of photocopies of verdict of Kavrepalanchowk District Court of 16/04/2017 amounting to 24 pages.
- c) A set of photocopies of notifications published in Nepal Gazette of various dates which includes the decision of Army mobilization amounting to 2 pages.

25. I have not appointed any legal counsel as of now. Let the submissions of the legal counsels to be appointed later, be considered as an integral part of this petition.

26. I have not lodged any application elsewhere in this matter. The above matters are correct and true, failing which I am ready to face the consequences of law.

Petitioner

Authorized Representative Mina Katuwal

[Done on Friday, 01/09/2017]