联合国 E

经济及社会理事会

Distr.
GENERAL

E/CN.4/Sub.2/2002/4
9 July 2002
CHINESE
Original: FRENCH

人权委员会

增进和保护人权小组委员会

第五十四届会议

临时议程项目 3

司　法

通过军事法庭进行司法裁判问题

路易·儒瓦内先生根据小组委员会第 2001/103 号决定提出的报告* **

* 本报告摘要以所有正式语文分发。报告正文按原样附上，只有原文和英文。

** 本报告在大会确定的期限之后提交是因为特别报告员所无法控制的原因造成的。

GE. 02-14236 (C)　290702　300702

内容摘要

增进和保护人权小组委员会在其第 2001/103 号决定中考虑到司法裁判问题会期工作组的建议(E/CN.4/Sub.2/2001/7,第 39 段)，未经表决决定请路易·儒瓦内先生在不涉及经费的情况下更新其关于通过军事法庭进行司法裁判演变情况的临时报告(E/CN.4/Sub.2/2002/WG.1/CRP.3)，同时应考虑第五十三届会议的与会者提出的意见，并向小组委员会第五十四届会议提交其报告的更新本。本文件的宗旨是根据儒瓦内先生编制的调查问卷的调查结论和随后对其进行的分析(E/CN.4/Sub.2/2001/WG.1/CRP.3,附件)审议通过军事法庭进行司法裁判的问题。

由军事法庭审讯平民

将审议的三种情况如下：

(a) 审讯跟军队有联系的平民(随军人员和在军队中工作的文职人员)。本类型将在报告的第二部分中审议，该部分将讨论对军事人员和其附属人员的司法保障。

(b) 对平民因与武装部队成员共同犯下罪行而进行的审讯。这种情况包括四种不同的情形：犯罪严格地属于军事性质。(在这种情况下，最经常的是指控平民为共犯)；犯罪并不属于严格的军事性质并涉及到普通法的罪行；实施犯罪的地点属于军事法庭的属地管辖范围之内；或者被害人是武装部队的一名成员(军事法庭的被动个人权限)。

(c) 对于与军队没有职能上的联系并不属于第二种情况但是受军事法庭管辖的平民的审讯。必须进行以下的区分。犯罪的受害者是武装部队的一员(军事法庭被动个人权限)；犯罪涉及到军事财产或军事设施；实施犯罪的地点是属于军事法庭管辖的军事区域或其他区域(军事法庭的属地管辖范围)。然而，最经常发生的情况是将对平民犯有普通法罪行，特别是政治或类似罪行(叛乱、煽动闹事等等)的管辖权转交给军事法庭。

与本研究有关的国际参照标准

1. 条约涵盖的范围

《公民权利和政治权利国际公约》(第 14 条)、《美洲人权公约》(第 8 条)、《欧洲人权公约》(第 6 条)以及《非洲人权和人民权利宪章》(第 7 条)所载的得到

公正审判和司法保障的权利的条款并没有明确提到军事法庭。尽管如此，条约机构已经在这领域提出了一项限制性的解释。

2. 条约未涵盖的范围

除了 1983 年 6 月在加拿大魁北克通过的《世界司法独立宣言》以及 1985 年 9 月在意大利米兰通过的《关于司法人员独立性的基本原则》规定“人人有权接受普通法院或法庭按照业已确立的法律程序的审讯”(第 5 段)以外，应该特别考虑到人权委员会题为“司法系统的廉政”的第 2002/37 号决议，该决议“还重申人人有权接受采取应有公认法律程序的普通法院或法庭的审议，不应设立不采用这类程序的法庭以取代属于普通法院或法庭的司法管辖权”(第 2 段)。

条约机构的案例法

在开始时，人权事务委员会并不认为由军事法庭审讯平民本身违反了《公民权利和政治权利国际公约》，只要这种法庭的管辖权符合该公约第 14 条的规定(一般性意见 13,第 4 段)。然而，该委员会在其审议有关阿尔及利亚、哥伦比亚、摩洛哥、大韩民国和委内瑞拉的定期报告期间逐步开始批评这一种法庭。委员会随后日益明确地表明，对于喀麦隆、智利、埃及、科威特、黎巴嫩、波兰、俄罗斯联邦、斯洛伐克、叙利亚和乌兹别克斯坦，特别是秘鲁，其赞成限制军事法庭的权限，认为根据其一般性意见 13,由军事法庭审讯平民不符合进行公平、公正和独立的司法裁判。

在禁止酷刑委员会(埃及和秘鲁)、儿童权利委员会(秘鲁、刚果民主共和国和土耳其)和消除种族歧视委员会(尼日利亚)的结论性意见中可看到同样的立场变化。

人权委员会的机制

对于需要限制军事法庭的作用，甚至取消军事法庭有着日益扩大的共识。在这一方面，谨提请注意法官和律师独立问题特别报告员、任意拘留问题工作组、法外处决、即审即决或任意处决问题特别报告员以及人权委员会监测赤道几内亚境内人权情况特别代表的立场。

国家标准

越来越多的宪法和基本法严格限制军事法庭的权限——德国(第 96 条)、希腊(第 96(4)条)、危地马拉(第 209 条)、海地(第 42 和 267(3)条)、洪都拉斯(第 90 条)、意大利(第 103 条)、墨西哥(第 13 条)、尼加拉瓜(第 93 条)、巴拉圭(第 174 条)、委内瑞拉(第 49 条)——或者在和平时期甚至将其废除(奥地利、丹麦、法国、几内亚、挪威和瑞典)。

军事法庭对被指控严重侵犯人权的军事人员的审讯

军事法庭对武装部队或警察成员中被指控严重侵犯人权构成犯罪的成员进行审讯在许多国家是一种通行的做法。这常常产生不受惩罚的现象。这种做法考验的是以下各项权利的有效性：得到有益补救的权利(《公民权利和政治权利国际公约》第 2 条第 3(a)款、由独立和公平的法庭进行公正审理的权利(该公约第 14 条第 1 款)以及得到法律平等保护的权利(该公约第 26 条)。

和本研究有关的国际参照标准

1. 条约涵盖的范围

大会 1992 年 12 月 18 日第 47/133 号决议所通过的《保护所有人不遭受强迫失踪宣言》规定，推定对强迫失踪负有责任的人员“只应在各国普通主管法院受审，不应在任何其他特别法庭特别是军事法庭受审”(第 16 条第 2 款)。《美洲被迫失踪人士公约》第九条载有类似的规定。

2. 条约未涵盖的范围

世界司法独立宣言规定，“军事法庭的管辖权应限于军事人员所犯军事罪行。此种法庭应始终拥有向法律上合格的上诉法院提出上诉的权利”(第 2.06 条)。在这一方面，谨提请注意两项标准草案：通过打击不受惩罚现象的行动保护和促进人权的整套原则(关于对军事法院管辖权的限制的原则 13)[见 E/CN.4/Sub.2/1997/20/Rev.1,annex II]以及关于[严重]侵犯人权和违反国际人道主义法行为之受害者赔偿权利的基本原则和准则(原则 25)[见 E/CN.4/1997/104,附录]。人们还应铭记委员会题为“民防部队”的第 1994/67 号决议，以及小组委员会有关同一主题的决

议，特别是第 1998/3 号决议，敦促各国确保由民事法庭对谋杀人权捍卫者进行调查和任何有关的诉讼。

条约机构的案例法

人权事务委员会在其审查定期报告的工作中已逐步作出了结论，军事法庭不应有权审议武装部队(或警察)成员犯下的严重侵犯人权的行为，这种行为应由普通法院来进行调查和提起公诉(玻利维亚、巴西、智利、哥伦比亚、克罗地亚、多米尼加共和国、厄瓜多尔、埃及、萨尔瓦多、危地马拉、几内亚、黎巴嫩、秘鲁和委内瑞拉)。在禁止酷刑委员会(哥伦比亚、危地马拉、约旦、秘鲁、葡萄牙和委内瑞拉)以及儿童权利委员会(哥伦比亚)的结论性意见中也可以见到同样的办法。

人权委员会的机制

对于需要将由武装部队(或警察)成员犯下的严重侵犯人权行为排除在军事法庭的管辖范围以外以及不将法外处决、酷刑和强迫失踪视为军事罪行或执行公务中进行的行为也形成了日益扩大的共识。这是法外处决、即决处决或任意处决问题特别报告员、酷刑问题特别报告员、法官和律师独立问题特别报告员、被强迫或非自愿失踪问题工作组、任意拘留问题工作组、负责人权维护者情况问题秘书长特别代表、秘书长萨尔瓦多特别代表、和危地马拉和索马里境内人权形势的独立专家，以及人权委员会监测赤道几内亚境内人权情况特别代表的立场。

国家标准

越来越多的国家正在通过立法排除军事法庭对武装部队(或警察)成员犯下的严重侵犯人权行为管辖权。在有些国家，宪法和基本法规定，只有民事法院才有权利审议对侵犯人权行为负责的军事人员，如玻利维亚(第 34 条)、海地(第 42(3)条)和委内瑞拉(第 29 条)的情况。在其他国家，是根据普通法或军事刑法作出这一项排除的：在哥伦比亚(军事刑法和关于种族灭绝、被强迫失踪、酷刑和人口非法流离失所的法案)、在危地马拉(1996 年第 41 号法令)以及在尼加拉瓜。

Annex

ADMINISTRATION OF JUSTICE

Issue of the administration of justice through military tribunals

Report submitted by Mr. Louis Joinet pursuant to Sub-Commission decision 2001/103

CONTENTS

Introduction

1. Since the 1960s, the Sub-Commission has played a pioneering role in drawing the attention of the Commission on Human Rights to the risks of human rights violations arising when the justice is administered by military tribunals. The Sub-Commission has considered three themes, which have taken the form of studies on:

(a) Equality in the administration of justice (see the report submitted in 1969 by Mr. Rannat: E/CN.4/Sub.2/296/Rev.1);

(b) Implications for human rights of situations known as states of siege or emergency (see the report of Ms. Questiaux: E/CN.4/Sub.2/1982/15);

(c) Human rights and states of emergency (see the document prepared by Mr. Despouy: E/CN.4/Sub.2/1985/19).

2. In paragraph 140 of his study of equality in the administration of justice, Mr. Rannat noted that risks of violations arise "when military courts are given jurisdiction over civilians", which led him to wonder whether members of the armed forces are not tried, in many cases, if not in most judicial systems, in accordance with inferior forms of procedure. These are the two main themes of this study.

3. The desire to have specific laws and special jurisdictions for military personnel goes back to ancient times, when there was total confusion between the act of commanding and that of judging, which was denounced in Cicero's famous *Cedant arma togae*. The tendency to favour specific jurisdictions separate from the act of commanding began only in the third century.[1] This separation became the rule throughout the era of so-called "conventional" wars, that is, wars fought by regular armies. In this context, each military jurisdiction tried only its own personnel. It was essentially owing to the influence of colonial wars and, later, wars of independence associated, in Africa and Asia, with decolonization, and the proliferation of dictatorships under military influence in Latin America, that military justice gradually broadened its jurisdiction, trying not only its own soldiers but also combatants of the opposing side - who were called "rebels", "guerrillas", "freedom fighters" or other names - in order to emphasize that the persons involved were, if not "civilians", at least "non-military personnel". The consequences of these periods were numerous domestic conflicts of ideological, ethnic, religious or other origin.

4 During these last two phases, military justice was subjected to increasing criticism, with the recurrence of two major grievances:

(a) Its tendency to reinforce the impunity of military personnel, particularly high-ranking officers, responsible for human rights violations constituting serious crimes under international law (war crimes, crimes against humanity, or even genocide);

(b) Its tendency to broaden its jurisdiction with respect to peaceful civil society*.

I. TYPOLOGY OF THE COMPETENCE OF MILITARY TRIBUNALS AND ITS EVOLUTION

A. Trial of civilians by military tribunals

5. Three scenarios will be considered:

(a) Trial of civilians who have ties to the military (camp followers and civil servants working in the army);

(b) Trial of civilians for offences jointly committed by civilians and members of the armed forces. This scenario comprises four distinct situations: the offence is of a strictly military nature (in this case, civilians are generally prosecuted as accomplices); the offence is not of a strictly military nature and involves common law offences; the place where the offence was committed is under the territorial jurisdiction of military tribunals; or the victim is a member of the armed forces (passive personal competence of military tribunals);

(c) Trial of civilians who have no functional ties to the military and who do not fall within the second scenario but who are subject to military tribunals in the following situations: the victim of the offence is a member of the armed forces (passive personal competence of military tribunals); the offences involves military property or a military facility; or the place where the offence was committed is a military area (territorial jurisdiction of military tribunals).

These are the criteria for jurisdiction that are traditionally applied by countries that have military tribunals, particularly in peacetime.

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* Restrictions on the length of reports (maximum of 20 pages) has prevented the inclusion of three other issues that are closely related to the subject of this study, namely:

(a) Typology of the role and composition of the prosecution in the administration of military justice and its evolution;

(b) The administration of justice by courts of special jurisdiction other than military tribunals;

(c) Administration of justice during peacekeeping or peace-building operations conducted by armed forces under a mandate.

It is for the Sub-Commission to decide on how these aspects of the study are to be followed up. The study could make use of this report as a basic document for the expert seminar suggested when Mr. Joinet submitted his interim report to the Sub-Commission at its fifty-third session (E/CN.4/Sub.2/2001/WG.1/CRP.3; proposal 1, p.10) and which has to date not been held owing to insufficient resources.

6. Experience shows that the broad interpretation of the various criteria for jurisdiction, particularly when a state of war or emergency is declared, extends the jurisdiction of military tribunals. In this situation, their activities consist less and less of trying military personnel and more and more of initially trying armed opponents and then gradually civilians who demonstrate their opposition by peacefully exercising the rights recognized and guaranteed by international standards and procedures, particularly in the areas of freedom of expression, association and demonstration.

1. International reference standards of relevance to the study

(a) Covered by treaties

7. These include the provisions on the right to a fair trial and judicial guarantees contained in the International Covenant on Civil and Political Rights of 16 December 1966 (hereinafter referred to as "the Covenant") [art. 14], the American Convention on Human Rights of 22 November 1969 (art. 8), the European Convention on Human Rights of 4 November 1950 (art. 6), and the African Charter on Human and Peoples' Rights of 27 June 1981 (art. 7). It should be noted that, while these instruments do not make explicit reference to military tribunals, treaty bodies have gradually developed a restrictive interpretation of their jurisdiction.

(b) Not covered by treaties

8. The issue of the administration of justice through military tribunals is, however, explicitly addressed by certain standards of a non-treaty nature. Article 5 of the draft declaration on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, referred to as the "Singhvi declaration" (E/CN.4/Sub.2/1988/20/Add.1 and Add.1/Corr.1), provides that the jurisdiction of military tribunals should be confined exclusively to "military offences". Article 5 reads as follows:

> "[…]
>
> "(b) No ad hoc tribunals shall be established to displace jurisdiction properly vested in the courts;
>
> "[…]
>
> "(e) In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts […];
>
> "(f) The jurisdiction of military tribunals shall be confined to military offences. There shall always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or a remedy by way of an application for annulment;
>
> "[…]."

Although the Singhvi declaration has not been adopted by the Commission on Human Rights, the Commission, in its resolution 1989/32 of 6 March 1989, "invites Governments to take into account the principles set forth in the draft declaration".

9. Paragraph 5 of the Basic Principles on the Independence of the Judiciary, adopted at Milan, Italy, in September 1985, provides that "everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures".

10. On 22 April 2002, the Commission on Human Rights adopted resolution 2002/37, entitled "Integrity of the judicial system". In this particularly important resolution, the Commission:

> "[…]
>
> "1. *Reiterates* that every person is entitled, in full equality, to a fair and public hearing by a competent, independent and impartial tribunal, in the determination of his/her rights and obligations and of any criminal charge against him/her;
>
> "2. *Also reiterates* that everyone has the right to be tried by ordinary courts or tribunals using duly established legal procedures and that tribunals that do not use such procedures should not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals;
>
> "[…]
>
> "5. *Underlines* that any court trying a person charged with a criminal offence must be based on the principles of independence and impartiality;
>
> "[…]
>
> "8. *Calls upon* States that have military courts for trying criminal offenders to ensure that such courts are an integral part of the general judicial system and use the duly established legal proceedings;
>
> "[…]."

11. The World Conference on the Independence of Justice, held in Montreal, Canada, in June 1983, adopted the Universal Declaration on the Independence of Justice (E/CN.4/Sub.2/1985/18/Add.6, annex IV), paragraph 2.06 (e) of which provides that:

> "The jurisdiction of military tribunals shall be confined to military offences committed by military personnel. There shall always be a right of appeal from such tribunals to a legally qualified appellate court."

2. Case law of treaty bodies

12. Initially, the Human Rights Committee did not consider that the trial of civilians by military courts was, per se, incompatible with the Covenant, provided that the jurisdiction of such courts was in keeping with the provisions of article 14 of the Covenant (General Comment No. 13, para. 4). However, the Committee gradually began to take a more critical approach during its consideration of the periodic reports submitted by Algeria,[2] Colombia,[3] Morocco,[4] the Republic of Korea[5] and Venezuela[6]. The Committee subsequently made it increasingly clear that it was in favour of limiting the jurisdiction of military tribunals in its consideration of reports submitted by Chile,[7] Egypt,[8] Kuwait,[9] Lebanon,[10] Poland,[11] the Russian Federation,[12] Slovakia,[13] the Syrian Arab Republic[14] and Uzbekistan,[15] and particularly Peru.[16] In the light of its General Comment No. 13, the Committee considered that the trial of civilians by military tribunals was irreconcilable with the administration of fair, impartial and independent justice. Even more explicitly, it noted that, in the aforementioned cases of Chile, Kuwait and the Syrian Arab Republic, the trial of civilians by military tribunals was incompatible with article 14 of the Covenant. The Committee therefore repeatedly recommended that States amend their legislation to ensure that civilians were tried only by civil courts. The same change in position can also be seen in the concluding observations of the Committee against Torture (Egypt[17] and Peru[18]), the Committee on the Rights of the Child (Peru,[19] Democratic Republic of the Congo[20] and Turkey[21]) and the Committee on the Elimination of Racial Discrimination (Nigeria[22]).

3. Position of the mechanisms of the Commission on Human Rights

13. There is a growing consensus on the need to limit the role of military jurisdictions, or even abolish them. In this regard, the following positions should be considered. The Special Rapporteur on the independence of judges and lawyers considered that, "in regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice".[23] For its part, the Working Group on Arbitrary Detention is of the opinion that, "if some form of military justice is to continue to exist, it should observe four rules: (a) it should be incompetent to try civilians; (b) it should be incompetent to try military personnel if the victims include civilians; (c) 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; and (d) it should be prohibited imposing the death penalty under any circumstances".[24] In his report on his mission to Peru in 1993, the Special Rapporteur on extrajudicial, summary or arbitrary executions considered that the trial of civilians by military courts were "restrictions of fair trial guarantees".[25] The Special Representative of the Commission on Human Rights to monitor the situation of human rights in Equatorial Guinea recommended on a number of occasions that the authorities of that country should amend its legislation in order to ensure that military tribunals were no longer competent to try civilians.

4. Case law of the regional courts

The European Court of Human Rights

14. The European Court of Human Rights ruled (case *Incal v. Turkey*) that "the presence of a military judge in the State Security Court was contrary to the principles of independence and

impartiality, which are essential prerequisites for a fair trial".[26] In the case *Findlay v. the United Kingdom*, the Court considered that the court martial that had tried the applicant had been neither independent nor impartial because its members had been subordinate to the officer who served as the prosecuting authority and the sentence could be altered by that officer.[27] Following that judgement, the United Kingdom amended its legislation on the subject (see below, chap. II, para. B).

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights

15. The Inter-American Court of Human Rights, in a case relating to civilians tried for acts of terrorism by a military tribunal, considered that the trial of civilians by a military tribunal was contrary to the right to a fair and just trial and the principle of the "natural judge".[28] For its part, the Inter-American Commission on Human Rights has always considered that military tribunals do not meet the conditions of independence and impartiality required by the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.[29] For example, it considered that a special military court was not an independent and impartial tribunal because it was subordinate to the Ministry of Defence and, therefore, to the executive.[30] It also considered that the trial of civilians, particularly for political offences, by military tribunals violated the right to an independent and impartial tribunal.[31] Recently, in its resolution entitled "Terrorism and human rights" of 12 December 2001, the Inter-American Commission affirmed that "military courts may not try civilians, except when no civilian courts exist or where trial by such courts is materially impossible. Even under such circumstances, the Commission has pointed out that the trial must respect the minimum guarantees established under international law, which include non-discrimination between citizens, […], the right to an impartial judge, respect for the rights of the defence, particularly the right to be assisted by freely chosen counsel, and access by defendants to evidence brought against them with the opportunity to contest it".[32]

5. Evolution of national standards

16. More and more constitutions and fundamental laws strictly limit the military jurisdictions [Colombia (art. 213), Greece (art. 96.4), Guatemala (art. 209), Haiti (arts. 42 and 267.3), Honduras (art. 90), Italy (art. 103), Mexico (art. 13), Nicaragua (art. 93), Paraguay (art. 174) and Venezuela (art. 49)] or even abolish them in peacetime (Austria, Denmark, France, Germany, Norway and Sweden).

B. Trial, by military tribunals, of military personnel accused of serious human rights violations

17. In many countries, military personnel accused of serious human rights violations continue to be tried by military tribunals. This practice, which is one of the main causes of impunity, tends to violate the right, guaranteed by the Covenant, of every person to effective remedy (art. 2, para. 3 (a)), to a fair hearing by an independent and impartial tribunal (art. 14, para. 1) and to the protection of the law (art. 26). In this regard, in a highly publicized

precedent-setting decision, handed down on 29 March 2001, the High Court of South Africa declared that the act establishing military courts was incompatible with the new Constitution. The High Court took a position that left no room for ambiguity.[33]

International reference standards of relevance to the study

(a) Covered by treaties

18. The Inter-American Convention on Forced Disappearance of Persons contains a provision (art. IX) according to which the perpetrators of forced disappearances "may be tried only in the competent jurisdictions of ordinary law in each State, to the exclusion of all other special jurisdictions, particularly military jurisdictions".

(b) Not covered by treaties

19. The Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly in its resolution 47/133 of 18 December 1992 contains a similar provision (art. 16, para. 2), as does the Universal Declaration on the Independence of Justice (see above, para. 11).

20. Other indications of such trends are two standards, currently in the drafting process, which deal explicitly with the problem of military tribunals and human rights violations. The two standards are: the set of principles for the promotion and protection of human rights through action to combat impunity (principle 31) [see E/CN.4/Sub.2/1997/20/Rev.1, annex II] and the basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and international humanitarian law (principle 25) [see E/CN.4/1997/104, appendix]. It should also be noted that, in its resolution 1994/67, entitled "Civil defence forces", the Commission on Human Rights states that "offences involving human rights violations by such forces shall be subject to the jurisdiction of the civilian courts". The Sub-Commission has urged States to ensure that inquiries into murders of human rights defenders, as well as any related proceedings, are conducted by civil tribunals (see, in particular, Sub-Commission resolution 1998/3).

2. Case law of treaty bodies

21. In its consideration of the periodic reports of certain countries (Bolivia, Brazil, Chile, Colombia, Croatia, Dominican Republic, Ecuador, Egypt, El Salvador, Guatemala, Guinea, Lebanon, Peru and Venezuela), the Human Rights Committee has gradually come to the conclusion that military tribunals should not be competent to try serious human rights violations committed by members of the armed forces or the police, and that such acts should be investigated and prosecuted by the ordinary courts. The same approach is to be found in the concluding observations of the Committee against Torture (Colombia, Guatemala, Jordan, Peru, Portugal and Venezuela) and the Committee on the Rights of the Child (Colombia).

3. Position of the mechanisms of the Commission on Human Rights

22. There is also a growing consensus on the need to exclude serious human rights violations committed by members of the armed forces or the police from the jurisdiction of military tribunals, and not to consider extrajudicial executions, torture and enforced disappearances as military offences or acts performed in the line of duty. This is the position of the persons responsible for the following special procedures: the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on torture, the Special Rapporteur on the independence of judges and lawyers, the Special Representative of the Secretary-General for El Salvador, the Working Group on Enforced or Involuntary Disappearances, the Working Group on Arbitrary Detention, the Special Representative of the Secretary-General on the situation of human rights defenders, the Special Representative of the Commission on Human Rights to monitor the situation of human rights in Equatorial Guinea, and the independent experts on the situation of human rights in Guatemala and Somalia.

4. Evolution of national standards

23. More and more countries are adopting legislation that excludes the jurisdiction of military tribunals over serious human rights violations committed by members of the armed forces or the police. In some countries, the constitution and the fundamental law provide that only civil courts are competent to try military personnel responsible for human rights violations: Bolivia (art. 34), Haiti (art. 42.3) and Venezuela (art. 29). In other countries, this exclusion is made under ordinary or military penal law: Colombia (Military Penal Code and the Act on Genocide, Enforced Disappearance, Torture and Illicit Displacement of Populations), Guatemala (Decree No. 41 of 1996) and Nicaragua.

II. TYPOLOGY OF THE COMPOSITION OF MILITARY TRIBUNALS AND ITS EVOLUTION

24. The study of developments in this field was based on a comparative analysis conducted with reference to the questionnaire annexed to the interim report submitted by Mr. Joinet to the Sub-Commission at its fifty-third session (E/CN.4/Sub.2/2001/WG.1/CRP.3), taking a sample of European countries (France, Germany, Italy, Spain, Switzerland and the United Kingdom) that have recently carried out reforms in this area.

A. Predominantly military jurisdictions

25. Such is the case of Switzerland, whose three degrees of jurisdiction (identical in peacetime and wartime) are composed of military personnel (first instance, appeal and cassation). It should, however, be stressed that these tribunals are “quasi-civil” since the Swiss army is composed almost exclusively of civilians who perform their military service in several stages. On the other hand, the president and members of the military court of cassation are not appointed by the Minister of Defence but are elected to a four-year term by the Federal Assembly. In Spain, the military courts, which are identical in peacetime and wartime, are composed of military personnel appointed by the Minister of Defence. Since 1987, the jurisdiction of the last degree has been the Military Chamber of the Supreme Court, composed of four civilian judges (including the president) and four military judges who, in order to ensure their independence, are

given legal status similar to that of retirement and can no longer be reinstated in the armed forces. In Italy, where jurisdictions in peacetime and wartime are not the same, the dominant position of the military persists except at the highest level since, in 1987, a reform abolished the review of legality by the supreme military tribunal and gave competence to the Court of Cassation.

B. Jurisdictions tending towards a mixed composition of civilians and military personnel

26. Such is the case in the United Kingdom, whose military courts (except in emergency situations) is identical in peacetime and wartime. Each of the three branches of the armed forces (air, land and sea) has its own first-degree military jurisdictions. The jurisdictions, which are not permanent, are composed of military personnel assisted, as an *amicus curiae*, by a civilian judge who does not participate in the deliberations. On the other hand, since the entry into force, on 2 October 2000, of the Armed Forces Disciplinary Act, the aim of which was to take account of the European Convention on Human Rights, military justice is handed down, beginning with the second degree, by professional judges from ordinary jurisdictions, the supreme competent jurisdiction being the House of Lords.

C. Predominantly civil jurisdictions

27. In France, since the abolition, in 1982, of military tribunals in peacetime, infractions of military laws, including common law offences committed by military personnel in the line of duty, fall within the competence of the ordinary criminal courts composed exclusively of civilian judges. Review of legality is ensured by the Court of Cassation, as for all of the country's other jurisdictions. Military jurisdiction exists only for military personnel serving abroad and in time of war. The same trend is to be noted in Germany, where persons who commit military offences are tried, in peacetime, by the ordinary criminal courts. Constitutional review is carried out by the Federal Court of Justice and no longer by the Supreme Military Court. Thus, military penal tribunals exist only in time of war, and it should be stressed that their decisions also remain subject to review by the Federal Court of Justice, which is composed of civilian judges.

III. CONCLUSIONS

28. The study demonstrates that the administration of justice by military tribunals is being gradually "demilitarized". This is taking the form of increasing restrictions on the jurisdiction of such tribunals and changes in their composition. The most frequently encountered stages in this process are, successively:

(a) Inclusion of judges in the composition of military jurisdictions;

(b) Increasing use (in some cases, exclusive use) of civilian lawyers;

(c) Transfer of appeals to the ordinary courts, particularly appeals regarding legality, which is increasingly ensured by the ordinary supreme courts;

(d) Abolition of military tribunals in peacetime;

(e) Strengthening of guarantees of the right to a fair trial by military tribunals in time of war;

(f) Increasing limitation of trials, by military tribunals, of members of the armed forces accused of serious human rights violations, particularly when such violations constitute serious crimes under international law. This is made possible either by assigning competence to the ordinary national courts or by establishing international ad hoc criminal tribunals (and, soon, the International Criminal Court), courts which unlike their predecessors, the Nuremberg International Military Tribunal and the Tokyo Tribunal, do not have any attributes of military tribunals.

The study has shown that most of these changes have been greatly facilitated by reference to the relevant international standards, particularly under the influence of the *lato sensu* case law of the mechanisms and special procedures examined above.

IV. RECOMMENDATIONS

29. The above-mentioned developments lead me to propose the following recommendations. If the long-term objective is to abolish military tribunals and, as a first measure, military tribunals that are competent in peacetime, by transferring their cases to the ordinary courts, the recommendations that follow tend, for the time being, to improve procedural due process and the rules governing the competence of such jurisdictions. These improvements can be taken into consideration regardless of the typological composition or the competence of the military tribunals concerned.

RECOMMENDATION No. 1:
Trial of persons accused of serious human rights violations

30. In all circumstances, the competence of military tribunals should be abolished in favour of those of the ordinary courts, for trying persons responsible for serious human rights violations, such as extrajudicial executions, enforced disappearances, torture and so on.

RECOMMENDATION No. 2:
Limitations on military secrecy

31. Too often, the regulations that make it possible to invoke the secrecy of military information are diverted from their original purpose and are used to impede the course of justice. Military secrecy is certainly justifiable when it is necessary to protect the secrecy of information that may be of interest to foreign intelligence services. It should, however, be dispensed with where measures involving deprivation of liberty are concerned; under no circumstances should such measures be kept secret. From this point of view, the right to petition for a writ of habeas corpus or a remedy of amparo should be considered as a personal right, the guarantee of which should, in all circumstances, fall within the exclusive competence of the ordinary courts.

Military secrecy should therefore not be invoked when such a petition is made, either in peacetime or wartime. As another consequence of this non-invocability of military secrecy, the judge must be able to have access to the place where the detainee is being held, and there should be no possibility of invoking military secrecy on the grounds that military facilities are concerned.

RECOMMENDATION No. 3:
Publicity hearings must be the rule, not the exception

32. Another limitation that is required to lift the atmosphere of secrecy that too often shrouds the workings of the military justice system is that public hearings must be the rule, and in camera sessions should be held on an exceptional basis and be authorized by a specific, well-grounded decision the legality of which is subject to review.

RECOMMENDATION No. 4:
Access of victims to proceedings

33. In many countries, the victim is excluded from the investigation and hearings when a military jurisdiction is competent. This is a blatant case of inequality before the law. It should be abolished or, pending this, strictly limited. The presence of the victim should be compulsory, or the victim should be represented whenever he or she so requests, at the very least during the hearings, with prior access to all the evidence of the case.

RECOMMENDATION No. 5:
Strengthening of the rights to defence, particularly through the abolition of military lawyers

34. Since respect for the right to defence plays a crucial role in preventing human rights violations, the practice of providing legal assistance by recourse to military lawyers, particularly when they are appointed by the court, gives rise to doubts, perhaps unjustified, about the effectiveness of the guarantees that they can offer, if only because of the so-called theory of "appearances". From this point of view, the presence of military lawyers seems more open to criticism than that of military judges since it obviously damages the credibility of these jurisdictions. The post of military lawyer should therefore be abolished.

RECOMMENDATION No. 6:
Recourse procedures in the ordinary courts

35. In all cases where military tribunals exist, their competence should be limited to the first degree of jurisdiction. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts. In all situations, disputes concerning legality should be ensured by the supreme civil courts, in keeping with the developments that have been noted. Such recourse procedures should also be available to the victims, which presupposes that the victims are allowed to participate in the proceedings (see above, paragraph 27), particularly during the trial stage.

RECOMMENDATION No. 7:
Strict interpretation of the so-called principle of "due obedience"

36. Since the military is by nature rigidly hierarchized, the principle of due obedience, often invoked in courts and tribunals, particularly military tribunals, should in all cases be reviewed by the supreme civil courts, and should be subject to the following limitations:

(a) On the one hand, the fact that the person allegedly responsible for a violation acted on the order of a superior should not exonerate him from his criminal liability. At most, this circumstance could be considered as grounds, not for "extenuating circumstances", but for a reduced sentence;

(b) On the other hand, violations committed by a subordinate do not exonerate his hierarchical superiors from their criminal liability if they knew or had reasons to know that their subordinate committed, or was about to commit, serious violations, and if they took no measures within their power to prevent such violations or subdue their perpetrator.

RECOMMENDATION No. 8:
Abolition of the competence of military tribunals to try children and minors under the age of 18

37. This concerns either child soldiers (see the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: E/CN.4/2002/74, paragraph 108), children who are members of armed opposition groups (see the report of the Special Representative of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia: E/CN.4/2002/41) or, lastly, children who have the legal status of civilians (see the report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967: E/CN.4/2002/32; and the report of the Special Representative of the Commission to monitor the human rights situation in Equatorial Guinea: E/CN.4/2002/40). Minors, who fall within the category of vulnerable persons, should be prosecuted and tried with strict respect for the guarantees provided by the Convention on the Rights of the Child and by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) [see General Assembly resolution 40/33 of 29 November 1985, annex]. They should not, therefore, be subject to the competence of military tribunals.

RECOMMENDATION No. 9:
Abolition of the death penalty and, as a transitional measure, suspension of its execution

38. The trend in favour of the gradual abolition of capital punishment should be extended, in all circumstances, to military courts, especially since such courts provide fewer guarantees than those of ordinary courts when, by nature, judicial error is, in this instance, irreversible. As a transitional measure, the execution of the death penalty should be suspended, particularly with respect to vulnerable persons, which includes minors.

Notes

[1] See the records of the seminar entitled “Penal law and defence”, held in Paris on 27 and 28 March 2001 by the Ministry of Defence, particularly the intervention of Ms. S. Apik concerning “The history of military justice”, available on the Internet at web site www.defense.gouv.fr.

[2] CCPR/C/79/Add.1, para. 5 (25 September 1992).

[3] CCPR/C/79/Add.2, para. 5 (25 September 1992).

[4] A/47/40, para. 58 (23 October 1991).

[5] A/47/40, paras. 482 and 497 (15 July 1992).

[6] CCPR/C/79/Add.13, para. 8 (28 December 1992).

[7] CCPR/C/79/Add.104, para. 9 (30 March 1999).

[8] CCPR/C/79/Add.23, para. 9 (9 August 1993).

[9] CCPR/CO/69/KWT, para. 10 (27 July 2000).

[10] CCPR/C/79/Add.78, para. 14 (5 May 1997).

[11] CCPR/C/79/Add.110, para. 21 (29 July 1999).

[12] CCPR/C/79/Add.54, para. 25 (26 July 1995).

[13] CCPR/C/79/Add.79, para. 20 (4 August 1997).

[14] CCPR/CO/71/SYR and Add.1, para. 17 (24 April 2001 and 28 May 2002).

[15] CCPR/CO/71/UZB, para. 15 (26 April 2001).

[16] CCPR/C/79/Add. 67, para. 12 (25 July 1996).

[17] A/49/44, para. 88 (1994).

[18] A/55/44, para. 62 (1999).

[19] CRC/C/15/Add.120, para. 11 (22 February 2000).

[20] CRC/C/15/Add.153, para. 74 (9 July 2001).

[21] CRC/C/15/Add.152, para. 65 (9 July 2001).

[22] A/48/18, para. 313 (15 September 1993).

[23] E/CN.4/1998/39/Add.1, para. 78 (19 February 1998).

[24] E/CN.4/1999/63, para. 80 (18 December 1998).

[25] E/CN.4/1994/7/Add.2, para. 98 (15 November 1993).

[26] Quoted in Opinion No. 35/1999 (Turkey) of the Working Group on Arbitrary Detention concerning the Abdullah Öcalan case [E/CN.4/2001/14/Add.1, para. 5 (f) (9 November 2000)].

[27] European Court of Human Rights, 1997.I, vol. 30, *judgement of 25 February 1997* (Registry of the Court, Council of Europe, Strasbourg, 1997), paras. 74-77.

[28] Judgement of 30 May 1999, *Castrillo Petruzzi et al. v. Peru*. See also the judgement of 17 September 1997, *Loayza v. Peru*, Series C, No. 33, para. 61.

[29] Quoted in E/CN.4/Sub.2/1992/Add.2, para. 103.

[30] See the annual report of the Inter-American Commission on Human Rights for 1994 (OAS/Ser.L/V/II.88, doc. 9 rev., 1995).

[31] See the reports of the Inter-American Commission on Human Rights on the situation of human rights in Nicaragua (OAS/Ser.L/V/II.53, doc. 25, 1981, paras. 18 ff.; in Colombia (OAS/Ser.L/II.106, doc. 59 rev., 2000, paras. 210 ff.; in Guatemala (OAS/Ser.L/V/II.61, doc. 47, 1983, paras. 31 ff.; in Chile (OAS/Ser.L/V/II.66, doc. 17, 1985); in Uruguay (OAS/Ser.L/V/II.43, doc. 10, corr.1, 1978, chap. VI); and in Argentina (OAS/Ser.L/V/II.49, doc. 19, 1980, chap. VI).

[32] See www.cidh.oas.org/res.terrorism/htm.

[33] Andries Diphapang Potsane/Minister of Defence: "There has been a radical break with the past […] The military is not immunized from the democratic change. Maintaining discipline in the defence force does not justify the infringement of the rights of soldiers, by enforcing such military discipline through an unconstitutional prosecuting structure" (para. 14.6).
