ОРГАНИЗАЦИЯ ОБЪЕДИНЕННЫХ НАЦИЙ **E**

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КОМИССИЯ ПО ПРАВАМ ЧЕЛОВЕКА
Подкомиссия по поощрению и защите прав человека
Пятьдесят четвертая сессия
Пункт 3 предварительной повестки дня

ОТПРАВЛЕНИЕ ПРАВОСУДИЯ

Вопрос об отправлении правосудия военными трибуналами

Доклад, представленный г-ном Луи Жуане в соответствии с решением 2001/103 Подкомиссии* **

Резюме

В своем решении 2001/103 Подкомиссия по поощрению и защите прав человека, учитывая рекомендацию сессионной рабочей группы по вопросам отправления правосудия (E/CN.4/Sub.2/2001/7, пункт 39), постановила просить г-на Луи Жуане обновить без финансовых последствий его промежуточный доклад по вопросам отправления правосудия военными трибуналами (E/CN.4/Sub.2/2001/WG.1/CRP.3) с учетом замечаний, высказанных участниками в ходе пятьдесят третьей сессии

* Резюме настоящего доклада распространяется на всех официальных языках. Полный текст доклада прилагается к резюме в том виде, в каком он был представлен, только на языке оригинала и на английском языке.

** По причинам, не зависящим от желания Специального докладчика, доклад представлен после даты, установленной Генеральной Ассамблеей.

Подкомиссии, и представить обновленный вариант его доклада Подкомиссии на ее пятьдесят четвертой сессии. В настоящем документе предлагается рассмотреть вопрос об отправлении правосудия военными трибуналами на основе нижеследующих установленных фактов и анализов, которые соответствуют вопроснику, подготовленному г-ном Л. Жуане (E/CN.4/Sub.2/2001/WG.1/CRP.3, приложение).

Рассмотрение военными трибуналами дел гражданских лиц

Рассмотрению подлежат три характерных случая:

a) Рассмотрение дел гражданских лиц, которые связаны с армией (случаи гражданских лиц, которые следуют вместе с воинскими частями, и вольнонаемных). Эта категория будет проанализирована во второй части доклада, касающейся судебных гарантий, которыми должны обладать военнослужащие и приравненные к ним лица.

b) Рассмотрение дел гражданских лиц в связи с правонарушениями, совершенными совместно с военнослужащими. Необходимо различать четыре гипотезы: правонарушение носит строго военный характер (в подобном случае гражданские лица чаще всего обвиняются в качестве соучастников); правонарушение не носит строго военный характер и связано с нарушениями общего права; место, где было совершено правонарушение, относится к территориальной компетенции военных трибуналов; и, наконец, жертвой является военнослужащий (пассивная личная компетенция военных трибуналов).

c) Рассмотрение дел гражданских лиц, которые не имеют никакой функциональной связи с армией и не входят во вторую категорию, однако при этом подпадают под юрисдикцию военных трибуналов. Необходимо различать следующие варианты: жертвой правонарушения является военнослужащий (пассивная личная компетенция военных трибуналов); материальным объектом правонарушения является военное имущество или сооружение; место, где было совершено правонарушение, является военной территорией и относится к компетенции военных трибуналов (территориальная компетенция военных трибуналов). Следует отметить, что наиболее часто встречающимся случаем является предоставление полномочий военным трибуналам в отношении гражданских лиц в случае нарушений общего права, а именно правонарушений политического характера и связанных с ними других правонарушений (неповиновение властям, мятеж и т.д.).

Международные справочные нормы, рассмотренные в исследовании

1. Нормы конвенционного характера

Положения, касающиеся права на справедливое судебное разбирательство и судебные гарантии, предусмотренные в Международном пакте о гражданских и политических правах (статья 14), Американской конвенции о правах человека (статья 8), Европейской конвенции о правах человека (статья 6) и Африканской хартии прав человека и народов (статья 7), не имеют непосредственного отношения к военным трибуналам. Тем не менее договорные органы разработали ограничительное толкование данного вопроса.

2. Нормы неконвенционного характера

Помимо Всеобщей декларации о независимости правосудия, принятой в Квебеке (Канада) в июне 1983 года, а также Основных принципов независимости судебных органов, принятых в Милане (Италия), в сентябре 1985 года, в которых говорится о том, что "каждый человек имеет право на судебное разбирательство в обычных судах или трибуналах, применяющих установленные юридические процедуры" (пункт 5), следует также отметить резолюцию 2002/37 Комиссии по правам человека, озаглавленную "Целостность судебной системы", в пункте 2 которой Комиссия "вновь заявляет, что каждый человек имеет право на судебное разбирательство в обычных судах или трибуналах, применяющих установленные нормы процессуального права, и что суды, не использующие такие нормы, не должны создаваться в целях подмены компетенции обычных судов или трибуналов".

Судебная практика договорных органов

Первоначально Комитет по правам человека не считал несовместимым с Международным пактом о гражданских и политических правах само по себе рассмотрение военными трибуналами дел гражданских лиц при том условии, что эти полномочия соответствуют положениям статьи 14 Пакта (пункт 4 Замечания общего порядка 13). С течением времени Комитет стал выражать критические замечания при рассмотрении периодических докладов, касающихся Алжира, Колумбии, Марокко, Республики Кореи и Венесуэлы, а затем он стал все более однозначно высказываться в пользу ограничения компетенции военных трибуналов в ходе рассмотрения докладов, касающихся Камеруна, Чили, Египта, Российской Федерации, Кувейта, Ливана, Узбекистана, Польши, Словакии и Сирии, и особенно Перу, и утверждать, что в соответствии со своим Замечанием общего порядка 13 рассмотрение военными

трибуналами дел гражданских лиц не совместимо с принципом отправления справедливого, беспристрастного и независимого правосудия.

Аналогичная эволюция прослеживается в заключительных замечаниях Комитета против пыток (Египет и Перу), Комитета по правам ребенка (Перу, Демократическая Республика Конго и Турция) и Комитета по ликвидации расовой дискриминации (Нигерия).

Механизмы Комиссии по правам человека

Формируется консенсус относительно необходимости ограничения роли военных трибуналов и даже их ликвидации. В этой связи необходимо отметить позиции Специального докладчика по вопросу о независимости судей и адвокатов, Рабочей группы по произвольным задержаниям, Специального докладчика по вопросу о внесудебных казнях, казнях без надлежащего судебного разбирательства и произвольных казнях и Специального представителя Комиссии по правам человека по вопросу о положении в области прав человека в Экваториальной Гвинее.

Национальные нормы

Все более многочисленными становятся конституции и основные законы, которые строго ограничивают их компетенцию: Венесуэла (статья 49), Гаити (статьи 42 и 267; 3), Гватемала (статья 209), Германия (статья 96), Гондурас (статья 90), Греция (статья 96,4), Италия (статья 103), Колумбия (статья 213), Мексика (статья 13), Никарагуа (статья 93), Парагвай (статья 174), и даже предусматривают их ликвидацию в мирное время (Австрия, Гвинея, Дания, Норвегия, Франция и Швеция).

Рассмотрение военными трибуналами дел военнослужащих, совершивших серьезные нарушения прав человека

Рассмотрение военными трибуналами дел военнослужащих и даже полицейских, совершивших серьезные нарушения прав человека на уровне преступлений, является текущей практикой во многих странах. Подобная практика нередко приводит к безнаказанности. Она ставит под сомнение действенность права на эффективное средство правовой защиты (подпункт a) пункта 3 статьи 2 Международного пакта о гражданских и политических правах), права на справедливое рассмотрение независимым и беспристрастным судом (пункт 1 статьи 14 Пакта) и права на равную защиту закона (статья 26 Пакта).

Международные справочные нормы, рассмотренные в исследовании

1. Нормы конвенционного характера

В Декларации о защите всех лиц от насильственных исчезновений, принятой резолюцией 47/133 Генеральной Ассамблеи 18 декабря 1992 года, предусматривается (пункт 2 статьи 16), что дела лиц, ответственных за насильственные исчезновения, "рассматриваются только в компетентных обычных судах каждого государства, а не в каких-либо других специальных трибуналах, в частности в военных судах". Аналогичное положение содержится в статье IX Межамериканской конвенции о насильственных исчезновениях лиц.

2. Нормы неконвенционного характера

В Всеобщей декларации о независимости правосудия предусматривается (статья 2.06), что "юрисдикция военных трибуналов ограничивается воинскими правонарушениями, совершенными военнослужащими. Во всех случаях обеспечивается право подачи апелляции на решения таких трибуналов в правомочный апелляционный суд" (E/CN.4/Sub.2/1985/18/Add.6, приложение IV). Кроме того, важно отметить два существующих проекта норм: свод принципов защиты и поощрения прав человека посредством борьбы с безнаказанностью (принцип 31) [см. E/CN.4/Sub.2/1997/20/Rev.1, приложение II] и основные принципы и руководящие положения, касающиеся права на возмещение жертвам [грубых] нарушений прав человека и международного гуманитарного права (принцип 25) [см. E/CN.4/1997/104, приложение]. Необходимо отметить также резолюцию 1994/67 Комиссии, озаглавленную "Силы гражданской обороны", в подпункте f) пункта 2 которой говорится, что "преступления, связанные с нарушениями прав человека, совершаемые такими силами, должны подпадать под компетенцию гражданских судов", а также резолюции Подкомиссии, в которых фигурируют аналогичные положения, а именно резолюцию 1998/3, призывающую государства обеспечивать, чтобы в компетенцию гражданских судов входили расследования, проводимые в случае предумышленных убийств защитников прав человека, а также предпринимаемые процессуальные действия.

Судебная практика договорных органов

При рассмотрении периодических докладов Комитет по правам человека постепенно убеждался во мнении, что в компетенцию военных трибуналов не должно входить рассмотрение дел, связанных с серьезными нарушениями прав человека, совершенными военнослужащими (или сотрудниками полиции), и что подобные акты должны являться предметом расследований и процессуальных действий, осуществляемых обычными

судами (Боливия, Бразилия, Венесуэла, Гватемала, Гвинея, Доминиканская Республика, Египет, Колумбия, Ливан, Перу, Сальвадор, Хорватия, Чили, Эквадор). Таким же подходом характеризуются заключительные замечания Комитета против пыток (Венесуэла, Гватемала, Иордания, Колумбия, Перу, Португалия) и Комитета по правам ребенка (Колумбия).

Механизмы Комиссии по правам человека

Формируется также консенсус относительно необходимости исключить из сферы компетенции военных трибуналов серьезные нарушения прав человека, совершенные военнослужащими (или сотрудниками полиции), и не рассматривать внесудебные казни, пытки и насильственные исчезновения в качестве военных правонарушений или актов, совершаемых "при исполнении служебного долга ". Такую же позицию заняли Специальный докладчик по вопросу о внесудебных казнях, казнях без надлежащего судебного разбирательства или произвольных казнях, Специальный докладчик по вопросу о пытках, Специальный докладчик по вопросу о независимости судей и адвокатов, Рабочая группа по насильственным или недобровольным исчезновениям, Рабочая группа по произвольным задержаниям, Специальный представитель Генерального секретаря по вопросу о положении правозащитников, Специальный представитель Генерального секретаря по вопросу о положении в области прав человека в Сальвадоре, а также независимые эксперты по вопросу о положении в области прав человека в Гватемале и Сомали и Специальный представитель Комиссии по правам человека по вопросу о положении в области прав человека в Экваториальной Гвинее.

Национальные нормы

Увеличивается количество стран, которые в своем законодательстве исключили из сферы компетенции военных трибуналов серьезные нарушения прав человека, совершенные военнослужащими (или сотрудниками полиции). В некоторых странах конституциями и основными законами предусматривается, что только гражданские суды компетентны рассматривать дела военнослужащих, ответственных за нарушения прав человека, как это имеет место в Боливии (статья 34), Гаити (статья 42; 3) и Венесуэле (статья 29). В других странах подобное исключение предусматривается обыкновенным уголовным законодательством или законом о прохождении воинской службы: в Колумбии (Кодекс военной юстиции и Закон о геноциде, насильственных исчезновениях, пытках и незаконном перемещении населения), в Гватемале (декрет 41 1996 года) и в Никарагуа.

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).
