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Independence of judges and lawyers

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, in accordance with resolution 17/2 of the Human Rights Council.

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Report of the Special Rapporteur on the independence of judges and lawyers

Summary

The present report focuses on the administration of justice through military tribunals. In many countries, the use of military tribunals raises serious concerns in terms of access to justice, impunity for past human rights abuses perpetrated by military regimes, the independence and impartiality of the judiciary and respect for fair trial guarantees for the defendant.

The report focuses on four issues of concern, namely: (a) the independence and impartiality of military tribunals; (b) the personal jurisdiction of military tribunals, including the question of investigation and prosecution of civilians; (c) the subject-matter jurisdiction of military tribunals, including the question of investigation and prosecution of serious human rights violations allegedly perpetrated by military personnel; and (d) fair trial guarantees in proceedings before military tribunals.

The Special Rapporteur on the independence of judges and lawyers addresses these concerns and proposes a number of solutions that are premised on the view that the jurisdiction of military tribunals should be restricted to offences of a military nature committed by military personnel. States that establish military justice systems should aim to guarantee the independence and impartiality of military tribunals, as well as the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. The present report is based on an analysis of international and regional human rights instruments, the jurisprudence of international and regional human rights mechanisms and responses received to a questionnaire on military justice.

I. Introduction

1. The present report is submitted in accordance with resolution 17/2 of the Human Rights Council.

2. In its resolution 19/31 on the integrity of the judicial system, the Human Rights Council called upon States that have military courts or special tribunals for trying criminal offenders to ensure that such bodies are an integral part of the general judicial system and that such courts apply due process procedures that are recognized in international law as guarantees of a fair trial. In addition, the Council invited the Special Rapporteur on the independence of judges and lawyers to take full account of that resolution in the discharge of her mandate (see paras. 8 and 10).

3. Pursuant to resolution 19/31, the Special Rapporteur sent a note verbale to Member and observer States requesting responses to a set of questions related to the administration of justice through military tribunals. The Special Rapporteur wishes to thank all States that provided written responses to the questionnaire.[1]

4. The present report includes a brief outline of the activities undertaken by the Special Rapporteur in 2013 and a thematic section that focuses on the administration of justice through military tribunals and compliance with human rights law and internationally recognized standards. In particular, the following four issues are addressed: (a) the independence and impartiality of military tribunals; (b) the personal jurisdiction of military tribunals, including the question of investigation and prosecution of civilians; (c) the subject-matter jurisdiction of military tribunals, including the question of investigation and prosecution of serious human rights violations allegedly perpetrated by military personnel; and (d) the application of fair trial guarantees in proceedings before military tribunals.

II. Activities of the Special Rapporteur

5. Since she last reported to the General Assembly, the Special Rapporteur has responded to requests for official visits by Greece, the Holy See, Italy, Qatar, Swaziland, the United Arab Emirates, Ukraine and Zambia. In addition, she has sent reminders to Bangladesh, China, Fiji, Kenya, Myanmar, Nepal, the Philippines, the United States of America and Zimbabwe. The Special Rapporteur would like to thank the Government of Qatar for having invited her to visit the country.

6. The activities undertaken by the Special Rapporteur since the previous report to the General Assembly are listed in her report to the Human Rights Council (A/HRC/23/43 and Corr.1. Since then, she has participated in the activities set out below.

7. On 28 February and 1 March 2013, the Special Rapporteur attended the global thematic consultation on governance and the post-2015 development agenda organized by the United Nations Development Programme in Johannesburg, South Africa.

[1] Argentina, Austria, Belarus, Bulgaria, Burkina Faso, Colombia, the Czech Republic, Finland, France, Germany, Greece, Lebanon, Mexico, Montenegro, Peru, Romania, the Russian Federation, Spain, Switzerland, Tunisia, Ukraine and Uruguay.

8. From 15 to 25 April 2013, she undertook an official visit to the Russian Federation. A report on that visit will be presented to the Human Rights Council at its twenty-sixth session, in June 2014. The Special Rapporteur wishes to thank the Government of the Russian Federation for its cooperation.

9. From 5 to 9 May 2013, she participated in the sixty-second session of the General Assembly of the Latin American Federation of Judges and in the annual meeting of the Iberoamerican Group of the International Association of Judges, held in Santiago.

10. On 28 May 2013, the Special Rapporteur presented her annual thematic report to the Human Rights Council, which focused on legal aid (A/HRC/23/43 and Corr.1). She also presented reports on her official visits to El Salvador (A/HRC/23/43/Add.1), Pakistan (A/HRC/23/43/Add.2) and Maldives (A/HRC/23/43/Add.3), as well as on the subregional consultations on the independence of the judiciary in Central America that she convened in Panama (A/HRC/23/43/Add.4). During the twenty-third session of the Council, on 29 May, she participated as a panellist in a side event on the independence of the judiciary in the Russian Federation.

11. From 24 to 28 June 2013, the Special Rapporteur participated in the annual meeting of special procedures mandate holders and in a conference on advancing the protection of human rights, held in Vienna.

12. On 12 July 2013, she participated in several meetings of the Inter-American Commission on Human Rights, in Washington, D.C.

III. Military tribunals

13. Issues relating to the establishment and functioning of military tribunals lie at the core of the Special Rapporteur's mandate. Both the current Special Rapporteur and her predecessor, Leandro Despouy, have paid considerable attention to the question of the establishment and operation of military and special tribunals, in particular for the trial of terrorism-related cases (See A/HRC/8/4, A/HRC/11/41, A/HRC/20/19, E/CN.4/2004/60, E/CN.4/2005/60, A/61/384, A/62/207 and A/63/271).

14. The Special Rapporteur has observed that the administration of justice through military tribunals raises serious concerns in terms of access to justice, impunity for past human rights abuses, the independence and impartiality of military tribunals and respect for the fair trial rights of the accused.

15. In the present report, the Special Rapporteur addresses these concerns and proposes a number of solutions that are premised on the view that States that establish military tribunals should ensure that such tribunals are an integral part of the general judicial system and function with competence, independence and impartiality, guaranteeing the exercise and enjoyment of human rights, in particular the right to a fair trial and the right to an effective remedy. Also, their jurisdiction should be restricted to offences of a military nature committed by military personnel.

A. International legal standards

16. Article 14 of the International Covenant on Civil and Political Rights states that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. A number of regional human rights instruments include similar provisions.[2] As the Human Rights Committee stated in its general comment No. 32, the provisions of article 14 of the Covenant apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military.

17. Explicit references to military tribunals are found in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (sect. A, principles 2 (a) and 4 (e), and sect. L) and in the updated set of principles for the protection and promotion of human rights through action to combat impunity (see E/CN.4/2005/102/Add.1, principle 29). It is thus commonly understood that human rights standards and principles relating to the administration of justice — such as the principle of equality before courts and tribunals, the right to be tried by a competent and regularly constituted court using established legal procedures, the right to an effective remedy, the principle of legality and the right to a fair trial — fully apply to military courts.

18. In 2006, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, elaborated a set of draft principles governing the administration of justice through military tribunals (see E/CN.4/2006/58). The aim of those principles was to establish a minimum system of universally applicable rules to regulate military justice (para. 10). They were developed in consultation with human rights experts, jurists and military personnel from throughout the world, and include specific provisions relating to the establishment and functioning of military tribunals. The principles are based on the idea that military justice should be an integral part of the general judicial system (see principles 1 and 17). The principles have been positively cited in jurisprudence of the European Court of Human Rights.[3]

19. An important body of international jurisprudence has been developed on the basis of general human rights principles relating to the administration of justice. Human rights treaty bodies, regional human rights mechanisms and a number of special procedures mandate holders have highlighted the significant challenges that the establishment and functioning of military tribunals may pose to the full and effective realization of human rights, as set out in the International Covenant on Civil and Political Rights and other international and regional human rights instruments.

B. Nature and objectives of military tribunals

20. Over time, there has been an increasing tendency to curb the jurisdiction of military tribunals. The traditional model of military justice, according to which the person who gives the orders sits in judgement, has progressively undergone

[2] See the European Convention on Human Rights (art. 6), the American Convention on Human Rights (art. 8), the African Charter of Human and People's Rights (art. 7) and the Arab Charter on Human Rights (arts. 12 and 13).

[3] See, for example, *Ergin v. Turkey* (No. 6), Application No. 47533/99, Judgement of 4 May 2006.

important changes, with the result that military tribunals have increasingly been incorporated, as a specialized branch, into the general justice system. Several countries have abolished the operation of military tribunals in peace time altogether and transferred the responsibility for adjudicating alleged wrongdoings by military personnel to the ordinary courts and/or disciplinary bodies.

21. In some countries, military justice systems take the form of ad hoc, special or exceptional courts, but definitions of these types of tribunals are still to be established. The nature of these tribunals should be clearly understood so as to allow for the formulation of precise definitions, thus avoiding confusion and mischaracterization. Military tribunals take various forms in different States, which makes any attempt to classify such types of military jurisdiction very difficult.[4]

22. In many military justice systems, in particular those that have evolved from the British model, a distinction exists between summary jurisdictions and more formal court-martial systems. In summary jurisdictions, commissioned officers are authorized to make a determination regarding allegations of breaches of military discipline against personnel within their chain of command either through some form of summary trial or through non-judicial procedures. In more formal court-martial systems, proceedings are presided by a military judge, have more elaborate procedural and evidentiary rules and exercise jurisdiction over more serious offences. In many national systems, an accused person can choose between a summary trial and a court martial for certain offences. A distinction can also be drawn between Anglo-American systems, which are based on courts martial convened on an ad hoc basis for individual cases, and continental European systems, which are characterized by standing courts.[5]

23. In some countries, the fundamental aim of military tribunals is to allow the armed forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. According to an emblematic decision on the need for a separate military justice system,[6] the military must be in a position to enforce internal discipline effectively and efficiently in order to maintain the armed forces in a state of readiness.[7]

24. The need for separate tribunals to enforce special disciplinary standards in the military is not, however, universally recognized. In many States, the primary purpose of military tribunals continues to be that of serving the interests of the military, rather than those of society, and military tribunals end up constituting a weapon for combating the so-called “enemy within” rather than being a tool for disciplining the troops.[4] Indeed, recent history provides several examples of abusive military regimes that have used military tribunals as an instrument to victimize their own population and grant themselves amnesties to avoid accountability for their actions (see A/61/384).

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[4] Federico Andreu-Guzmán, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations*, vol. 1 (International Commission of Jurists, Geneva, 2004), pp. 154-157.

[5] Michael Gibson, “Military tribunals”, in *Max Planck Encyclopaedia of Public International Law*, Vol. VII (Oxford University Press, 2013).

[6] Supreme Court of Canada, *R. v. Généreux*, decision No. 22103 of 13 February 1992.

[7] Michael Gibson, “International human rights law and the administration of justice through military tribunals: preserving utility while precluding impunity”, in *Journal of International Law and International Relations*, vol. 4, No. 1 (2008), pp. 1-48.

25. Military tribunals must be established by law and form part of the regularly constituted justice system of the State. In the present report, the term “military tribunal” is used restrictively, to refer to a court martial. Nevertheless, some of the considerations made in this report will also apply, mutatis mutandis, to other judicial and quasi-judicial bodies established to try military personnel and civilians.

Position of military tribunals within the structures of the State

26. The position of military tribunals within the structures of the State and their relationship with the “ordinary” judiciary vary from one country to another. In many countries, military tribunals form part of the judiciary, of which they sometimes constitute a specialized branch. In other countries, military tribunals fall outside the scope of ordinary jurisdiction, and are attached to the executive branch, often to the ministry of defence. In several countries, the ordinary judiciary retains the authority to review decisions delivered by military tribunals. To this effect, some countries establish a special military division within the supreme court or supplement regular judges with military personnel.

Composition of military tribunals

27. State practice is also heterogeneous with regard to the composition of military tribunals. In several countries, military tribunals are composed solely of active or retired members of the armed forces who have the appropriate training or law-related qualifications. In some cases, military judges are not required to have undergone any legal training. In other countries, military tribunals are made up of professional judges, who are either military or civilian judges and have military experience and knowledge of the operations of armed forces.

28. National legislation usually states that military judges should possess the same legal education and training required of civilian judges. In countries where military tribunals are administered by the ordinary justice system, civilian judges may be assisted by military personnel.

Jurisdictional powers

29. In terms of personal (*ratione personae*), territorial, temporal and subject-matter (*ratione materiae*) jurisdiction, national legislations regulate military tribunals in different ways.

30. In many countries, the personal jurisdiction of military tribunals is limited to criminal offences and breaches of military discipline allegedly committed by active members of the armed forces. In some cases, the constitution expressly prohibits military tribunals from exercising jurisdiction over persons who do not belong to the armed forces and states that such cases can only be adjudicated by ordinary courts. For instance, the Supreme Court of Justice of Colombia held, in its decision No. 20 of 5 March 1987, that the trial of civilians before military tribunals was unconstitutional.

31. Sometimes, the personal jurisdiction of military tribunals extends to include civilians who are assimilated to military personnel by virtue of their function and/or geographical presence or the nature of the alleged offence. These may include civilians who are employed by the armed forces or are stationed at or in proximity of a military installation, persons who have committed crimes that are treated as

military offences and persons who have committed crimes in complicity with military personnel. In some countries, cases concerning terrorism and other serious crimes against the State are also referred to military tribunals.

32. There is no consistency between different military legal systems with regard to what is meant by the term "military offence".[4] Depending on the nature of the offence committed and the juridical right or interest protected under the law, the following offences are criminalized in military codes:

(a) Military offences sensu stricto: offences that by their nature relate exclusively to legally protected interests of military order, such as desertion, insubordination or abandonment of post or command;

(b) Military offences sensu lato: offences that violate both ordinary and military juridical rights or interests, but in which the military juridical right or interest is deemed to be the overriding one;

(c) "Assimilated" ordinary offences: offences under the ordinary criminal law that are treated as military offences owing to the circumstances in which they were committed (service-related acts), such as theft of military property by a civilian employed by the military.

33. In most countries, military tribunals simultaneously exercise judicial functions and disciplinary authority and are competent to try both criminal offences and minor breaches of discipline committed by armed forces personnel. In other countries, military tribunals are only competent to dispose of disciplinary matters, while criminal matters fall under the jurisdiction of ordinary courts. Many military justice systems are based on the concept of "service-related acts", which allows military tribunals to establish jurisdiction not only over purely military offences, but also over criminal offences that have a disciplinary impact. Others restrict the jurisdiction of military tribunals to offences of a strictly military nature committed by military personnel.

34. Irrespective of the peculiarities of each national justice system, the Special Rapporteur wishes to highlight that the only purpose of military tribunals should be to investigate, prosecute and try matters of a purely military nature committed by military personnel.

IV. Challenges concerning military tribunals

A. Independence and impartiality of military tribunals

35. The concept of the independence of the judiciary is derived from the basic principles that substantiate the rule of law, in particular the principle of the separation of powers, which constitutes the cornerstone of an independent and impartial justice system. In paragraphs 18 and 19 of its general comment No. 32, the Human Rights Committee considered that the notion of a competent, independent and impartial tribunal established by law set out in article 14, paragraph 1, of the International Covenant on Civil and Political Rights designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. The Committee

underscored that the requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception.

36. The independence of military tribunals must be legally guaranteed at the highest possible level. In line with the Basic Principles on the Independence of the Judiciary, principle 1 of the draft principles governing the administration of justice through military tribunals stipulates that military tribunals, when they exist, may be established only by the Constitution or the law, respecting the principle of the separation of powers. Even when guaranteed in the constitution, the independence of the judiciary must also be ensured at the legislative level. Therefore, domestic legislation must always be in compliance with this principle (see A/HRC/11/41, para. 22).

37. In a number of countries, the constitution contains provisions concerning military tribunals. The content of those provisions, however, is heterogeneous. Some provisions simply defer the establishment and functioning of military tribunals to the ordinary law. Other provisions are more specific, seeking to regulate the jurisdictional powers of military tribunals, as well as their composition and independence.

38. The principle of the separation of powers requires that military tribunals be institutionally separate from the executive and the legislative branches of power so as to avoid any interference, including by the military, in the administration of justice. In this regard, principle 13 of the draft principles governing the administration of justice through military tribunals states that military judges should have a status guaranteeing their independence and impartiality, in particular in respect of the military hierarchy. In the commentary to this principle, it is noted that the statutory independence of military judges vis-à-vis the military hierarchy must be strictly protected, avoiding any direct or indirect subordination, whether in the organization and operation of the system of justice itself or in terms of career development for military judges (E/CN.4/2006/58, para. 46).

39. In most countries, the independence of military judges, the modalities for their selection and appointment and their terms of office, adequate remuneration, conditions of service, pensions and age of retirement are regulated by ordinary laws. The modalities for the selection and appointment of military judges vary from one country to another. In some countries, military judges are selected from a list of qualified candidates released from military service and appointed by a judicial council or the ordinary courts. In other countries, they are selected through a competitive examination. In some cases, military judges are selected and appointed by the executive branch. State practice is also diverse regarding the tenure of military judges. In some countries, such judges are appointed for a limited period of time.

40. The Human Rights Committee has stated, in its general comment No. 32, that the requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees concerning their security of tenure, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. International and regional judicial bodies have ruled in a large number of cases on military tribunals, thereby generating jurisprudence on the compliance of such tribunals with the necessary requirements of independence and impartiality.

41. In *Martin v. the United Kingdom*, the European Court of Human Rights held that in order to establish whether a tribunal can be considered independent, regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question of whether the body presents an appearance of independence. In that case, the Court concluded that while the participation of civilians as ordinary members of the court martial may have contributed somewhat to its independence, they did not have sufficient influence over the proceedings as a whole, including over the military members of the court martial, to satisfy the independence and impartiality requirements of article 6 of the European Convention on Human Rights.[8] In this judgement, the Court makes reference to *Findlay v. the United Kingdom*, with respect to which the Court considered that there were fundamental flaws in the court-martial system in the United Kingdom of Great Britain and Northern Ireland because of the role of the convening military officer.[9]

42. With regard to convening officers, the Special Rapporteur notes that, depending on their role and function, they can have a considerable impact on the independence and impartiality of military tribunals, for example in cases where the convening authority has the power to dissolve a tribunal or otherwise influence the outcome of a trial. The role and functions of convening officers, and safeguards against any such interference, must be clearly defined by legislation so that, on the one hand, convening officers can act independently from external pressure and, on the other hand, they are prevented from acting in ways that might hinder the independent and impartial administration of justice.

43. In *Palamara Iribarne v. Chile*, the Inter-American Court of Human Rights held that that the organic structure and composition of military tribunals in Chile implies that they are made up of active-duty military members who are hierarchically subordinate to higher-ranked officers through the chain of command, that their designation does not depend on their professional skills and qualifications to exercise judicial functions, that they do not have sufficient guarantees that they will not be removed and that they have not received the legal education required to sit as judges or serve as prosecutors. All this implies that said courts lack independence and impartiality.[10] In *Castillo Petruzzi v. Peru*, the Court noted that the fact that members of the Supreme Court of Military Justice, the highest body in the military judiciary in Peru, were appointed by the minister of the pertinent sector was enough to call the independence of the military judges into serious question.[11]

44. While the independence of the judiciary encompasses institutional and individual aspects, the requirement of impartiality relates mainly to the latter, namely to the specific conduct of the judge. The requirement of impartiality has two aspects. Firstly, judges should perform their judicial duties without bias or prejudice and should not harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Secondly, judges must appear to a reasonable observer to be impartial,

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[8] *Martin v. the United Kingdom*, application No. 40426/98, Judgement of 24 October 2006, paras. 41 and 51.

[9] *Findlay v. the United Kingdom*, application No. 22107/93, Judgement of 25 February 1997.

[10] *Palamara Iribarne v. Chile*, Judgement of 22 November 2005, Series C No. 135.

[11] *Castillo Petruzzi et al. v. Peru*, Judgement of 30 May 1999, Series C No. 52.

and act in such a way as to maintain and enhance the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.[12]

45. In *Ergin v. Turkey*, in which a newspaper editor was tried by a military tribunal for inciting the evasion of military service, the European Court of Human Rights held that situations in which a military tribunal has jurisdiction to try a civilian for acts against the armed forces may give rise to reasonable doubts about such a court's objective impartiality. The Court considered that a judicial system in which a military tribunal is empowered to try a person who is not a member of the armed forces may easily be perceived as reducing to nothing the distance that should exist between the court and the parties to criminal proceedings, even if there are sufficient safeguards to guarantee that court's independence.[3]

B. Trial of civilians by military tribunals

46. The Special Rapporteur on the independence of judges and lawyers has stated on several occasions that using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism is a regrettably common practice that runs counter to all international and regional standards and established case law (see, for example, E/CN.4/2004/60, para. 60). This observation is also reflected in the findings of other special procedures mandate holders.[13]

47. International human rights treaties do not address the trial of civilians by military tribunals explicitly. Nevertheless, a number of soft law instruments and the jurisprudence of international and regional mechanisms show that there is a strong trend against extending the criminal jurisdiction of military tribunals over civilians.

48. The Basic Principles on the Independence of the Judiciary stipulate that everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures and that tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals (principle 5).

49. In line with this position, principle 5 of the draft principles governing the administration of justice through military tribunals states that military courts should, in principle, have no jurisdiction to try civilians and that, in all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts. In the commentary to that principle, it is noted that the practice of trying civilians in military tribunals presents serious problems as far as the equitable, impartial and independent administration of justice is concerned, and is often justified by the need to enable exceptional procedures that do not comply with normal standards of justice (see E/CN.4/2006/58, para. 20).

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[12] See value 2 of the Bangalore Principles of Judicial Conduct (E/CN.4/2003/65, annex).

[13] Alex Conte, "Approaches and responses of the UN human rights mechanisms to exceptional courts and human rights commissions", in *Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective*, Fionnuala Ní Aoláin and Oren Gross, eds. (Cambridge University Press, 2013).

50. A number of other international instruments also recommend that States restrict the jurisdiction of military tribunals over civilians in favour of ordinary jurisdiction.[14]

51. In paragraph 22 of its general comment No. 32, the Human Rights Committee noted that while the International Covenant on Civil and Political Rights does not prohibit the trial of civilians in military or special courts, it nonetheless requires that such trials be in full conformity with the requirements of article 14 of the Covenant and that its guarantees be not limited or modified because of the military or special character of the court concerned. Furthermore, the Committee clarified that trials of civilians by military or special courts should be exceptional, in other words they should be limited to cases where the State party to the Covenant can show that resorting to such trials is necessary and justified by objective and serious reasons and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials. It is therefore incumbent on the State party resorting to military tribunals to try civilians to demonstrate, with regard to a specific class of individuals, the following: (a) that the regular civilian courts are unable to undertake the trials; (b) that other, alternative, forms of special or high-security civilian courts are inadequate for the task; and (c) that recourse to military tribunals ensures that the rights of the accused are fully protected pursuant to article 14 of the Covenant. In its concluding observations on reports submitted by States parties under article 40 of the Covenant, the Committee has gone further still by calling on Governments in several countries to prohibit the trial of civilians before military tribunals.[15]

52. The jurisprudence of the Human Rights Committee shows that the mere invocation of domestic legal provisions for the trial by military tribunal of certain categories of serious offences does not constitute an argument under the Covenant to justify recourse to such courts. In the absence of a specific justification as to the necessity of trying a specific class of civilians in military tribunals, the Committee has invariably found that such trials are inconsistent with the guarantees set out in article 14 of the Covenant.[16]

53. Indeed, State practice shows a tendency towards limiting the personal jurisdiction of military tribunals to criminal offences and breaches of discipline allegedly committed by active members of the armed forces. Exceptions with regard to civilians who are assimilated to military personnel tend to be crafted and interpreted narrowly (see A/63/223, para. 26).

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[14] See, for example, the updated set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1, principle 29), the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (section L, para. (c)), the report of the Working Group on Arbitrary Detention (E/CN.4/2000/4, paras. 67 and 68) and Human Rights Council resolution 19/31.

[15] See, for example, the concluding observations on the reports submitted by Slovakia (CCPR/C/79/Add.79, para. 20), Lebanon (CCPR/C/79/Add.78, para. 14), Chile (CCPR/C/CHL/CO/5, para. 12), Tajikistan (CCPR/CO/84/TJK, para. 18) and Ecuador (CCPR/C/ECU/CO/5, para. 5).

[16] See: *Ebenezer Derek Mbongo Akwanga v. Cameroon*, CCPR/C/101/D/1813/2008, 19 May 2011; *Abdelhamid Benhadj v. Algeria*, CCPR/C/90/D/1173/2003, 26 September 2007; *Salim Abbassi v. Algeria*, CCPR/C/89/D/1172/2003, 28 March 2007; and *Kurbanova v. Tajikistan*, CCPR/C/79/D/1096/2002, 6 November 2003.

54. The Special Rapporteur would like to highlight that the trial of civilians by military or special courts has raised serious issues in relation to the independent administration of justice through military tribunals and respect for the guarantees stipulated in article 14 of the Covenant. She therefore believes that the jurisdiction of military tribunals should be restricted to offences of a strictly military nature committed by military personnel.

55. The Special Rapporteur also believes that the concept of "necessity" identified by the Human Rights Committee to justify the resort to military tribunals to try civilians presupposes that ordinary courts are unable to exercise jurisdiction vis-à-vis certain categories of individuals, such as civilian dependants of military personnel posted abroad and civilian persons accompanying the armed forces, such as contractors, cooks and translators.[17] In such cases, she considers that the existence of such jurisdiction may be required to prevent situations of de facto impunity arising in cases where civilians accompany the armed forces on extraterritorial deployments in States with weak or dysfunctional legal systems.[7] Nevertheless, the burden of proving the existence of exceptional circumstances requiring the trial of civilians in a military court rests with the sending State.

56. Moreover, the Special Rapporteur strongly believes that the State has the obligation to guarantee the independence, impartiality, competence and accountability of the ordinary courts in order to enable them to adhere fully to applicable human rights law and standards, including fair trial and due process guarantees. Failure to do so cannot be used as a justification for the use of military or special tribunals to try civilians under exceptional circumstances. Therefore, in no case should a military tribunal established within the territory of the State exercise jurisdiction over civilians accused of having committed a criminal offence in that same territory.

C. Nature of offences under the jurisdiction of military tribunals

57. One of the most complex aspect of military tribunals relates to the subject-matter jurisdiction of such tribunals, in other words to the types of offences that fall under their jurisdiction. As is the case with personal jurisdiction, international human rights treaties do not define the scope of the *ratione materiae* jurisdiction of military tribunals, nor do they provide a definition of what constitutes a military offence or prescribe the kinds of criminal offences or breaches of military discipline that should fall within military jurisdiction.

58. The following international and regional instruments, among others, contain references to the subject-matter jurisdiction of military tribunals: the International Convention for the Protection of All Persons from Enforced Disappearance, the Declaration on the Protection of All Persons from Enforced Disappearance, the updated set of principles for the protection and promotion of human rights through action to combat impunity, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and the draft principles governing the administration

[17] The Special Rapporteur notes that the legal status of this category of individuals is usually governed by a status-of-forces agreement, which addresses, inter alia, the question of which State would assume primary and secondary jurisdiction in relation to criminal and other offences allegedly committed by civilians accompanying the armed forces in the territory of the receiving State.

of justice through military tribunals. In particular, the latter establish that the jurisdiction of military tribunals should be limited to offences of a strictly military nature committed by military personnel (principle 8).

59. In the commentary to the draft principles governing the administration of justice through military tribunals it is noted that such jurisdiction should not constitute derogation in principle from ordinary law, corresponding to a jurisdictional privilege or a form of justice by one's peers. Rather, it should remain exceptional and apply only to the requirements of military service, in other words to situations where national courts are prevented from exercising jurisdiction for practical reasons (e.g. remoteness of the action), while the local court that would be territorially competent is confronted with jurisdictional immunities (E/CN.4/2006/58, para. 29).

60. The jurisprudence of human rights treaty bodies, special procedures mandate holders and regional human rights mechanisms on this issue tends to confine the jurisdiction of military tribunals to purely disciplinary types of military offences, rather than to offences of a criminal nature.[4] In particular, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have developed the so-called "principle of functionality", which limits military jurisdiction to offences committed in relation to the military functions, thereby limiting it to military offences committed by members of the armed forces (see A/61/384, para. 26).

61. Military practitioners note, however, that a criminal offence (a rape or a theft, for example) committed by a soldier is no less a breach of discipline than a purely military offence such as insubordination or disobedience. Hence, many military justice systems do not make any distinction between a criminal offence and a breach of discipline. In these systems, which are based on the concept of "service offence", military tribunals simultaneously exercise judicial functions and disciplinary authority over military personnel.[5]

62. An analysis of State practice also shows a trend towards restricting the *ratione materiae* jurisdiction of military tribunals to criminal offences and breaches of military discipline committed by military personnel. Military tribunals in Argentina can exercise jurisdiction only in relation to "strictly military crimes" committed by military personnel in the discharge of their duties, and only in exceptional circumstances, for example when civilian courts are unable to undertake the trial, which constitutes a good practice that should be highlighted.

Trial of military personnel accused of serious human rights violations

63. With regard to the *ratione materiae* jurisdiction of military tribunals, an essential issue that is the subject of disagreement among human rights and military practitioners concerns the competence of military tribunals to try military personnel accused of offences involving serious human rights violations.

64. A few human rights instruments include specific provisions on this issue. The updated set of principles for the protection and promotion of human rights through action to combat impunity establishes that the jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of

serious crimes under international law, of an international or internationalized criminal court (principle 29).

65. The Inter-American Convention on Forced Disappearance of Persons, in its article IX, and the Declaration on the Protection of All Persons from Enforced Disappearance, in its article 16, both require that persons allegedly responsible for enforced disappearance be tried by ordinary courts, to the exclusion of all other special jurisdictions, in particular military tribunals. The Committee against Torture and the Special Rapporteur on torture have also reaffirmed that individuals accused of torture should not be tried before military tribunals (see A/56/156, para. 39 (j), and CAT/C/PER/CO/4, para. 16 (a)).

66. According to principle 9 of the draft principles governing the administration of justice through military tribunals, in all circumstances, the jurisdiction of military tribunals should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.

67. In the commentary to principle 9, it is explained that the rationale for this provision is twofold. Firstly, the commission of human rights violations is outside the scope of the duties performed by military personnel (A/61/384). Secondly, military tribunals cannot be trusted to try such grave offences properly since they may be tempted to shield military perpetrators of serious human rights abuses, in particular senior military officers. Also according to the commentary, a reserve of jurisdiction in favour of ordinary courts would constitute a decisive step towards avoiding all forms of impunity and enable the rights of victims to be taken fully into account at all stages of the proceedings (E/CN.4/2006/58, para. 32).

68. The doctrine and jurisprudence of human rights treaty bodies support this principle. In its concluding observations on the report submitted by Colombia, for example, the Human Rights Committee noted with concern that the military justice system continued to assume jurisdiction in cases of extrajudicial executions allegedly perpetrated by members of the security forces and requested the Government of Colombia to ensure that serious human rights violations be impartially investigated by the regular justice system and remain clearly and effectively outside the jurisdiction of military tribunals (CCPR/C/COL/CO/6, para. 14). The Committee has made similar recommendations in its concluding observations on reports submitted by Peru (CCPR/C/PER/CO/5, para. 17), Mexico (CCPR/C/MEX/CO/5, para. 11), the Russian Federation (CCPR/C/RUS/CO/6, para. 14) and the Central African Republic (CCPR/C/CAF/CO/2, para. 12), among others. In a recent case, the Committee restated that military criminal jurisdictions should have a restrictive and exceptional scope, and referred to principle 9 of the draft principles governing the administration of justice through military tribunals to support its reasoning.[18]

69. Similarly, the former Special Rapporteur on the independence of judges and lawyers noted that military jurisdiction over offences involving allegations of human rights violations constitutes a serious obstacle for many victims of human rights violations in their quest for justice (A/61/384, para. 18). A number of other

[18] *Kholodova v. Russian Federation*, CCPR/106/D/1548/2007, 11 December 2012.

special procedures mandate holders have reached similar conclusions (see E/CN.4/2005/65, para. 375, E/CN.4/1998/38/Add.2 and A/HRC/16/51/Add.3).

70. Military practitioners, however, contend that while it is certainly true that the commission of human rights violations would not properly fall within the scope of the duties of military personnel, neither is the commission of such ordinary crimes as murder, rape, fraud or theft properly within the scope of military duties.[5] They contend that offences concerning serious human rights violations constitute at the same time crimes and breaches of discipline and should therefore be susceptible to being tried by a military tribunal, since the raison d'être of military justice is to enforce disciplinary standards in the military.

71. Notwithstanding this view, the widespread human rights abuses perpetrated by military juntas in Latin American countries have led many countries in the region to curb the competence of military tribunals to try military personnel who have committed human rights violations. The Special Rapporteur wishes to highlight two examples, from Colombia and Mexico, which she considers to be good practices: in Colombia, article 221 of the Constitution was amended to exclude serious human rights violations such as genocide, forced disappearance, extrajudicial execution, sexual violence, torture and forced displacement from military jurisdiction; in Mexico, the Supreme Court issued a historic ruling in August 2012 limiting the use of the military justice system for trying cases involving alleged human rights abuses.[19]

D. Fair trial guarantees in proceedings before military tribunals

72. The draft principles governing the administration of justice through military tribunals contain a number of provisions on fair trial guarantees in proceedings before military tribunals. According to principle 2, military tribunals must in all circumstances respect and apply the principles of international law relating to a fair trial, as codified in article 14 of the International Covenant on Civil and Political Rights and corresponding provisions of regional human rights treaties. Other principles make reference to the right to a competent, independent and impartial tribunal (principle 13), the right to a public hearing (principle 14), the right of the defence and the right to a just and fair trial (principle 15) and the right of appeal before civilian courts (principle 17).

73. Human rights mechanisms have often expressed concern about violations of or the lack of sufficient fair trial guarantees in proceedings before military tribunals. For instance, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has expressed concern

[19] The Supreme Court of Justice of Mexico declared article 57, section II, paragraph (a), of the Code of Military Justice to be non-compliant, as it considered it to be inconsistent with the provisions of articles 2 and 8 (1) of the American Convention on Human Rights, since, following the jurisprudence of the Inter-American Court of Human Rights, the bodies or courts competent to hear and punish those responsible for the crimes committed by the military, in the exercise of their functions or on the grounds of them, to the detriment of civilians, are the ordinary criminal courts and not the courts of the military jurisdiction, thereby also giving legitimacy to the victim and family members to petition for *amparo* or challenge the decisions of military courts that unduly deemed themselves competent. Thus, the military jurisdiction was narrowed down to cases involving offences against military discipline not involving a civilian.

about the lower fair trial guarantees that often characterize military and special courts in practice owing to prolonged periods of pre-charge and pretrial detention, with inadequate access to counsel, intrusion into the attorney-client confidentiality and strict limitations on the right to appeal and bail (A/63/223, para. 27).

Right to defence

74. The right of the accused to legal representation of his or her choice assumes particular relevance with regard to proceedings before military tribunals. In line with the International Covenant on Civil and Political Rights, principle 15 (e) of the draft principles governing the administration of justice through military tribunals states that everyone charged with a criminal offence has the right to defend himself or herself in person or through legal assistance of his or her own choosing and the right to be informed of the right to counsel and to receive legal assistance if he or she does not have sufficient means and the interests of justice so require.

75. In the commentary to principle 15, it is noted that the principle of free choice of defence counsel includes the right of accused persons to call on lawyers of their own choosing if they do not wish to avail themselves of the assistance of a military lawyer (E/CN.4/2006/58, para. 53). It has been observed, however, that the ability of accused persons to engage legal counsel of their choosing has been limited or excluded in some circumstances, for example when a military tribunal exercises jurisdiction extraterritorially.[20] In this regard, the Special Rapporteur wishes to underline that the free choice of defence counsel must be guaranteed in all circumstances and any kind of restriction of this right should be extremely exceptional, so as not to hamper the credibility of the military justice system.

76. In some countries, persons charged with a military criminal offence have the right to choose whether to be defended by a civilian or a military lawyer. In many States, however, there are no military lawyers. In Finland, for example, a member of the armed forces cannot serve as defence lawyer, since Government officials cannot hold positions or act in a manner that might result in a conflict of interest. In some States, the right to opt for a legal counsel of one's choosing may de facto be limited or excluded in exceptional circumstances, for example when the alleged crime is committed and the trial takes place outside the territory of the State. In these cases, the defence of the accused person may need to be assumed by a competent and independent military lawyer. Furthermore, the right to be assisted by a lawyer may be excluded in the case of summary trials to try minor disciplinary-type offences that are not of a criminal nature within the meaning of article 14, paragraph 3, of the International Covenant on Civil and Political Rights.

77. The Special Rapporteur stresses, in accordance with the commentary on principle 15 of the draft principles governing the administration of justice through military tribunals, that even if a military lawyer is provided to the person facing charges before a military tribunal, the possibility for the defendant to opt for a civilian lawyer must be fully guaranteed. Moreover, when the person accepts a military lawyer as counsel, the same safeguards and guarantees provided to the civilian legal profession must be ensured so as to allow the military lawyer to act

[20] See, for example, *Artico v. Italy* (1980) European Court of Human Rights 4, para. 33; *Imbrioscia v. Switzerland* (1993) European Court of Human Rights 56, para. 38; and *Daud v. Portugal* (1998) European Court of Human Rights 27, para. 38.

with objectivity, efficiency and independence, thus providing adequate and unbiased counsel.

78. Furthermore, the right to communicate with one's counsel requires that the accused be granted prompt access to counsel, that counsel be available at all stages of proceedings, including during interrogations and prior to appearance in court, that communications with counsel be confidential and privileged and that an interpreter be provided whenever necessary. In most countries, the accused person has right of access to legal counsel immediately after being arrested. In others, the right of the accused to meet with his or her lawyer in private can only be exercised when the person is brought before the judge. In this regard, the Special Rapporteur wishes to recall principle 7 of the Basic Principles on the Role of Lawyers, according to which Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than 48 hours from the time of arrest or detention.

Equality of arms

79. For a criminal trial to be fair, it is important that the principle of equality of arms between the prosecutor and the defence be respected. Thus, every party must be given the opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds. Where distinctions apply, they must be proportional and sufficiently counterbalanced to ensure that the accused receives a fair trial, and must not entail actual disadvantage or other unfairness to the defendant (see Human Rights Committee general comment No. 32, para. 13).

80. In criminal proceedings before military tribunals, violations of this principle may occur, for example, when the prosecution fails to disclose to the defence all material evidence in its possession for or against the defendant on account of the classified character of such information. In this regard, the draft principles governing the administration of justice through military tribunals provide for military secrecy to be invoked only when it is strictly necessary to protect information concerning national defence and never in order to obstruct the course of justice or violate human rights (principle 10).

81. The Special Rapporteur would like to point out that the lack of disclosure may affect the overall fairness of the trial. The necessity of non-disclosure should be decided by a court rather than the prosecution, so as to ensure respect for the principle of equality of arms and the right to prepare one's defence.[21] The authorities and the courts must also keep under review, throughout the proceedings, the appropriateness of non-disclosure in the light of the significance of the

[21] See *Rowe and Davis v. United Kingdom* (28901/95), Grand Chamber of the European Court of Human Rights (2000), sects. 53-67; *McKeown v. United Kingdom* (6684/05), European Court of Human Rights (2011), sect. 45-55; *Myrna Mack Chang v. Guatemala*, Inter-American Court of Human Rights (2003), sect. 179; *Jasper v. United Kingdom* (27052/95), Grand Chamber of the European Court of Human Rights (2000), sects. 42-58; and *Botmeh and Alami v. United Kingdom* (15187/03), European Court of Human Rights (2007), sects. 41-45.

information, the adequacy of the safeguards and the impact on the fairness of the proceedings as a whole.[22]

Right of appeal

82. Article 14, paragraph 5, of the International Covenant on Civil and Political Rights stipulates that anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. In its general comment No. 32, the Human Rights Committee delineated the essential features of this right: substantive review of conviction and sentence and effective access to the appellate system. In paragraph 45 of the general comment, the Committee held that the term "according to law" relates to the determination of the modalities by which the review by a higher tribunal is to be carried out, as well as which court is responsible for carrying out a review in accordance with the Covenant.

83. The right of appeal should be available to all persons convicted of a crime, including those who have been convicted by military tribunals. In *Mansaraj et al. v. Sierra Leone*, the Human Rights Committee held that the execution of 12 former members of the armed forces of Sierra Leone only one week after their conviction by a court martial, without any right of appeal and disregarding the Committee's order of interim measures, constituted a serious and blatant violation of the right of appeal (see CCPR/C/72/D/839/1998).

84. According to the draft principles governing the administration of justice through military tribunals, the authority of military tribunals should be limited to ruling in first instance and recourse procedures, in particular appeals, should be brought before the civil courts (principle 17). The rationale of this provision is to ensure that military tribunals are integrated in the general justice system, so as to avoid a parallel hierarchy of military tribunals separate from ordinary law (see E/CN.4/2006/58, para. 56).

85. In most countries where a military justice system exists, persons convicted of a military crime have the right to appeal the conviction before a higher tribunal, either a military or a civilian court of appeal. Sentences handed down by courts of second instance may be appealed further before the supreme court, which is in some cases integrated by military personnel. In some countries, the decisions of military tribunals cannot be appealed and the only remedy available is recourse to a court of cassation, where there is one.

V. Conclusions

86. **The integrity of the justice system is a precondition for democracy and the rule of law. The justice system must be structured on the pillars of independence, impartiality, competence and accountability in order for the**

[22] See *Rowe and Davis v. United Kingdom* (28901/95), Grand Chamber of the European Court of Human Rights (2000), sects. 60-67. See also rules 81 to 84 of the International Criminal Court Rules of Procedure and Evidence; *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-475), International Criminal Court Appeals Chamber, Judgement on the appeal of the Prosecutor against the decision of Pretrial Chamber I entitled "First decision on the prosecution request for authorization to redact witness statements" (13 May 2008), sects. 60-73.

principles of independence of the judiciary and the separation of powers can be duly respected.

87. **Jurisprudence of the Human Rights Committee and of international and regional human rights mechanisms in relation to military tribunals has pointed to several serious challenges presented by military tribunals with regard to their independence and impartiality, the trial of civilians, the trial of military personnel accused of serious human rights violations and fair trial guarantees.**

88. **Military tribunals, when they exist, must be an integral part of the general justice system and operate in accordance with human rights standards, including by respecting the right to a fair trial and the due process guarantees set out, inter alia, in articles 9 and 14 of the International Covenant on Civil and Political Rights.**

89. **Because they have the distinct objective of dealing with matters related to military service, military tribunals should have jurisdiction only over military personnel who commit military offences or breaches of military discipline, and then only when those offences or breaches do not amount to serious human rights violations. Exceptions are to be made only in exceptional circumstances and be limited to civilians abroad and assimilated to military personnel.**

90. **In order to ensure the independence and integrity of the justice system, States have the obligation to guarantee that ordinary tribunals are independent, impartial, competent and accountable and therefore able to combat impunity. Failure to do so cannot be used as a justification for the use of military or special tribunals to try civilians.**

VI. Recommendations

91. **The Special Rapporteur wishes to make the following recommendations with the aim of assisting States in ensuring that, where military justice systems exist, military tribunals administer justice in a manner that is fully compliant with international human rights law and standards.**

A. Administration of justice through military tribunals

92. **The draft principles governing the administration of justice through military tribunals should be promptly considered and adopted by the Human Rights Council and endorsed by the General Assembly.**

B. Independence and impartiality of military tribunals

93. **The independence of military tribunals must be legally guaranteed at the highest possible level. In line with the Basic Principles on the Independence of the Judiciary and the draft principles governing the administration of justice through military tribunals, the independence of military tribunals and their inclusion within the general administration of justice system of the State must be guaranteed in the constitution or a fundamental law when the State has no written constitution.**

94. **Domestic legislation should include specific guarantees to protect the statutory independence of military judges vis-à-vis the executive branch and the military hierarchy and to enhance, in line with the Bangalore Principles of Judicial Conduct, the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.**

95. **In order to safeguard the independence of military judges, their status, including their security of tenure, adequate remuneration, conditions of service, pensions and the age of retirement, should be determined by law. In particular, military judges should have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exist. Also, they should be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity, transparency and impartiality set out in the constitution or the law.**

96. **The role and functions of convening officers and safeguards protecting the independence and impartiality of military tribunals must be clearly defined by legislation so that convening officers can, on the one hand, act independently from external pressure and, on the other hand, be prevented from acting in ways that might hinder the independent and impartial administration of justice.**

97. **Domestic law should identify objective criteria for the selection of military judges. Military judges should be selected on the basis of their integrity, ability, qualifications and training. Any method used to select judges should include safeguards against judicial appointments for improper motives. In this regard, States should consider establishing an independent authority charged with the selection of military judges. Competitive examinations conducted at least partly in a written and anonymous manner can serve as an important tool in the selection process.**

C. Nature of offences under the jurisdiction of military tribunals

98. **As a specialized jurisdiction aimed at serving the particular disciplinary needs of the military, the *ratione materiae* jurisdiction of military tribunals should be limited to criminal offences of a strictly military nature, in other words to offences that by their own nature relate exclusively to legally protected interests of military order, such as desertion, insubordination or abandonment of post or command.**

99. **States should not resort to the concept of service-related acts to displace the jurisdiction belonging to the ordinary courts in favour of military tribunals. Ordinary criminal offences committed by military personnel should be tried in ordinary courts, unless regular courts are unable to exercise jurisdiction owing to the particular circumstances in which the crime was committed (i.e. exclusively in cases of crimes committed outside the territory of the State). Such cases should be expressly provided for by the law.**

D. Trial of civilians in military courts

100. **Military tribunals, when they exist, should only try military personnel accused of military offences or breaches of military discipline.**

101. **The trial of civilians by military tribunals should be prohibited, subject only to the narrow exception identified in paragraph 102 below. In no case should a military tribunal established within the territory of the State exercise jurisdiction over civilians accused of having committed a criminal offence in that same territory.**

102. **The trial of civilians in military courts should be limited strictly to exceptional cases concerning civilians assimilated to military personnel by virtue of their function and/or geographical presence who have allegedly perpetrated an offence outside the territory of the State and where regular courts, whether local or those of the State of origin, are unable to undertake the trial.**

103. **The burden of proving the existence of such exceptional circumstances rests with the State. Such reasons must be substantiated in each specific case, since it is not sufficient for the national legislation to allocate certain categories of offence to military tribunals *in abstracto*. Such exceptional cases should be expressly provided for by the law.**

104. **States have the duty to ensure that ordinary courts are able to combat impunity. When they fail to do so, this cannot justify the existence of exceptional circumstances requiring the trial of civilians in a military court.**

105. **In all cases before military tribunals, the State must take all necessary measures to ensure that the proceedings are in full conformity with international human rights law and standards and with the requirements for ensuring fair trial and due process guarantees, in particular those set out in articles 9 and 14 of the International Covenant on Civil and Political Rights.**

E. Trial of persons accused of serious human rights violations

106. **The jurisdiction of ordinary courts should prevail over that of military courts to conduct inquiries into alleged offences involving serious human rights violations and to prosecute and try persons accused of such crimes, in all circumstances, including when the alleged acts were committed by military personnel.**

F. Fair trial and due process guarantees in proceedings before military tribunals

107. **Military tribunals and the proceedings before them should, in all circumstances, respect and apply the principles of international law relating to a fair trial. Any restrictions to fair trial requirements and due process guarantees must be provided for by the law, justified by objective reasons, be proportional and never undermine the overall right to a fair trial.**

108. **States should adopt all appropriate measures to ensure that military lawyers, especially when they are officially appointed by a military tribunal or the executive branch, meet the necessary requirements of independence and competence set out in the Basic Principles on the Role of Lawyers.**

109. **Proceedings before military tribunals should be carried out in accordance with the principle of equality of arms. States should adopt all appropriate measures to ensure that the same procedural rights are provided to all parties, unless distinctions are based on law and can be justified on objective and reasonable grounds, and that they do not entail actual disadvantage or other unfairness to the defendant.**

110. **All persons convicted by a military tribunal have the right to have their conviction and sentence reviewed by a higher civilian tribunal. States should determine the modalities by which such review is to be carried out, as well as which court should be responsible.**