**UNITED NATIONS** **E**

# Economic and Social Council

Distr.
GENERAL

E/CN.4/Sub.2/2003/4
27 June 2003

ENGLISH
Original: FRENCH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on the Promotion and
Protection of Human Rights
Fifty-fifth session
Item 3 of the provisional agenda

## ADMINISTRATION OF JUSTICE

### Issue of the administration of justice through military tribunals

**Report submitted by Mr. Emmanuel Decaux pursuant to Sub-Commission decision 2002/103***

* In accordance with General Assembly resolution 53/208 B, paragraph 8, this document is submitted after the deadline so as to include the most up-to-date information.

GE.03-14901 (E) 060803 100803

## Executive summary

In its decision 2002/103, the Sub-Commission on the Promotion and Protection of Human Rights requested Mr. Emmanuel Decaux to submit to it, at its fifty-fifth session, an updated version of the report on the issue of the administration of justice through military tribunals prepared by Mr. Louis Joinet (E/CN.4/Sub.2/2002/4).

The present document is the updated version requested by the Sub-Commission. It takes account of the comments made by the participants at the fifty-fourth session of the Sub-Commission as well as recent developments and newly available information on the subject. It contains an analysis of the special jurisdictions of military tribunals and of the judicial guarantees inherent in the concept of an independent and impartial tribunal.

Taking into account the need to "ensure that such courts are an integral part of the general judicial system", as emphasized by the Commission on Human Rights in its resolution 2003/39 of 23 April 2003, the report concludes with a series of revised recommendations based on the trends observed in the report submitted by Mr. Joinet to the Commission at its fifty-fourth session (E/CN.4/Sub.2/2002/4, paras. 29-38).

The primary aim of the present update is to clarify the many issues contained in the study in order to structure the public debate that must be held. In this regard, the report recalls the recommendation formulated by Mr. Joinet in his interim report to the Sub-Commission at its fifty-third session, namely, "to consider, with a view to enriching the preparation of the final report, holding an expert seminar - which would include military experts - devoted to trends and, in particular, progress made, in the administration of justice through military tribunals" (E/CN.4/Sub.2/2001/WG.1/CRP.3, proposal 1, p. 10).

Regional seminars would undoubtedly also be useful for collecting information on the most diversified basis possible and for taking stock of recent developments on different continents, thereby making it possible to carry out an overall review of the issue in accordance with the comprehensive work plan submitted to the Sub-Commission at its fifty-third session, concerning the doctrine and case law of international, regional and national bodies (ibid., part II, p. 6).

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## Introduction

1. In its decision 2002/103, the Sub-Commission on the Promotion and Protection of Human Rights, noting with appreciation the updated version of the report on the issue of the administration of justice through military tribunals (E/CN.4/Sub.2/2002/4), submitted by Mr. Louis Joinet, thanked him for his important work and decided to request Mr. Emmanuel Decaux to supplement that document, taking into account the comments made by the participants at the fifty-fourth session, and to submit, with no financial implications, an updated version of the report to the Sub-Commission at its fifty-fifth session.

2. The present document is the updated version requested by the Sub-Commission. It examines the administration of justice through military tribunals based on the findings and analyses that correspond to the questionnaire prepared by Mr. Joinet and contained in his report to the Sub-Commission at its fifty-third session (E/CN.4/Sub.2/2001/WG.1/CRP.3, annex) and his updated report to the Sub-Commission at its fifty-fourth session (E/CN.4/Sub.2/2002/4), as well as recent developments and newly available information on the subject.

3. It is useful to recall, at the outset, the proposal made by Mr. Joinet in his interim report to the Sub-Commission at its fifty-third session, namely, "to consider, with a view to enriching the preparation of the final report, holding an expert seminar - which would include military experts - devoted to trends and, in particular, progress made, in the administration of justice through military tribunals. Bearing in mind its limited financial resources, the Office of the High Commissioner for Human Rights could sponsor this meeting, the initiative for which - as far as its organization is concerned - could be taken by non-governmental organizations in cooperation, if necessary, with interested Governments" (E/CN.4/Sub.2/2001/WG.1/CRP.3, proposal 1, p. 10). Mr. Joinet referred to this proposal in his report to the Sub-Commission at its fifty-fourth session (E/CN.4/Sub.2/2002/4, footnote, p. 8). At the current stage of the study, it has become essential to broaden the discussion by holding such expert seminars, using the updated version of this report as a background paper.

4. Similarly, regional seminars would undoubtedly also be useful for collecting information on the most diversified basis possible and for taking stock of recent developments on different continents. In this regard, mention should be made of the work being carried out by the Council of Europe's Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR) on judicial proceedings before military tribunals in member States (DH-PR (2002) 009 rev. of 10 September 2002), which contains official replies from the following countries: Austria, Belgium, Croatia, the Czech Republic, Denmark, France, the Netherlands, the Russian Federation, Slovakia and Switzerland. An updated version will include replies from Hungary, Ireland, Portugal and Turkey. Much information is also to be found in the work of Federico Andreu-Guzmán, *Fuero militar y derecho internacional* [Military jurisdiction and international law], published in Spanish by the International Commission of Jurists (Bogotá 2003) and in the proceedings of the international seminar on military jurisdiction held in Rhodes in October 2001 and published by the International Society for Military Law and the Law of War (Brussels, 2003). The Society's documentation centre also publishes regular updates on the status of national legislation: Australia, Belgium, China, Denmark, Germany, Hungary, Norway, Sweden, Switzerland and the United States of America.[1] Regional syntheses

concerning Africa and Asia would be particularly useful and would make it possible to carry out an overall review of the issue in accordance with the comprehensive work plan submitted to the Sub-Commission at its fifty-third session, concerning the doctrine and case law of international, regional and national bodies (E/CN.4/Sub.2/2001/WG.1/CRP.3, part II, p. 6).

5. The primary aim of the present update is to clarify the many issues contained in the study in order to structure the public debate that must be held.

6. In its resolution 2003/39 on the integrity of the judicial system, the Commission on Human Rights takes note of the report submitted by Mr. Louis Joinet to the Sub-Commission at its fifty-fourth session and stresses that "the integrity of the judicial system should be observed at all times". In this regard, 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 established by law, in the determination of his/her rights and obligations and of any criminal charge against him/her;
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> "2. *Also reiterates* that everyone has the right to be tried by ordinary courts or tribunals using established legal procedures and that tribunals that do not use such duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals;
>
> […]
>
> "9. *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."

7. The development of "military justice" must be situated within the framework of the general principles governing the proper administration of justice. While there is no need at this point to review the historical reasons for this phenomenon, which have been examined in the preceding reports, it is important to draw attention to their legal consequences in the light of international human rights law. The principles contained in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as regional conventions or other relevant local instruments, are unambiguous in the matter of justice. The provisions concerning the proper administration of justice have broad application. In other words, military justice should be "an integral part of the general judicial system", as the Commission has stated.

8. This generalizing principle has long been opposed by the logic of exceptions, which has often been used to justify the establishment of military courts. The work of the Sub-Commission on situations known as "states of siege or emergency" and on human rights and states of emergency have made it possible to measure the extent of this phenomenon and to draw attention to 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"
(E/CN.4/Sub.2/2002/4, para. 4).

9. In the light of this situation, two solutions are possible, without being incompatible: one can recommend the abolition, pure and simple, of military tribunals within a more or less short term, as emphasized in the preceding report, which pointed out that "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", while making recommendations that "tend, for the time being, to improve procedural due process and the rules governing the competence of such jurisdictions" (ibid., para. 29).

10. This overview would be incomplete if it did not take into consideration a new trend mentioned in the preceding report as an area for future research, namely, the administration of justice by courts of special jurisdiction other than military tribunals and the administration of justice during peacekeeping or peace-building operations conducted by armed forces under a mandate ("without a mandate" might also be added). This important aspect of the subject should be dealt with in part by the working paper prepared by Ms. Françoise Hampson, pursuant to Sub-Commission decision 2002/104, on the scope of the activities and accountability of armed forces, United Nations civilian police, international civil servants and experts taking part in peace support operations. The recent interim report prepared by the Special Rapporteur, Ms. Kalliopi Koufa, on terrorism and human rights, pursuant to Sub-Commission resolution 2002/24 should also be taken fully into account.

11. In this new context, the risk is not so much the militarization of justice than the denial of justice. Between the demilitarization of justice, which would be out of reach for some, and exceptional justice, which rejects the principles of ordinary law, consideration should be given to the specific character of the administration of justice through military tribunals as an integral part of the general judicial system. It is therefore not a question of comparing the norm to the exception or the exception to the norm but rather one of integrating the exception into the norm, with full respect for the principles governing the proper administration of justice.

12. It is important, first of all, to ascertain the precise extent of the phenomenon by examining the jurisdiction of military tribunals and the limits to such jurisdiction (chap. I), and then to ensure the observance of guarantees of a fair trial in the administration of justice through military tribunals (chap. II).

## I. JURISDICTION OF MILITARY TRIBUNALS

13. The preceding report focused principally on the types of jurisdiction of military tribunals, placing emphasis on jurisdiction *ratione personae*, distinguishing the trial of civilians and the trial of military personnel accused of serious human rights violations and echoing the two major grievances cited above. This basic distinction can be usefully supplemented by the consideration of situations, particularly the contrasting situations of peacetime and wartime, and also the distinction between the various criminal offences, even if these distinctions necessarily intersect.

## A. Jurisdiction *ratione personae*

### 1. Trial of civilians by military tribunals

14. A number of situations will be considered:

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

(b) Trial of civilians who have no functional ties to the military for offences committed against a member of the armed forces (passive personal competence of military tribunals);

(c) Trial of civilians who have no functional ties to the military for offences involving military property or a military facility or because the place where the offence was committed is a military area (territorial jurisdiction of military tribunals);

(d) Trial of civilians for offences jointly committed by civilians and members of the armed forces: either the offence is of a strictly military nature (in this case, civilians are generally prosecuted as accomplices), or the offence is not of a strictly military nature and involves an offence under ordinary law;

(e) Trial of civilians for offences under ordinary law. With regard, in particular, to so-called "political" offences, a broad interpretation of this jurisdiction can infringe on the freedoms of expression, association and peaceful demonstration.

15. The dominant feature of all these situations, which have already been discussed in previous reports, is the attraction of the civil by the military, that is, the individual is removed from his "normal judge", the ordinary courts, and subjected to a special jurisdiction: the military courts. Consequently, the equality of arms between the parties to the proceedings cannot be observed, nor can the principle of the impartiality of the tribunal be established.

16. In its general comment No. 13 adopted on 12 April 1984 concerning article 14 of the International Covenant on Civil and Political Rights, the Committee on Human Rights drew attention to risks involved in such cases:

> "4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special tribunals which try civilians. This could present problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in

> accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14."

17. In 1998, 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".[2] For its part, the Working Group on Arbitrary Detention was of the opinion that, "if some form of military justice is to continue to exist, it should observe" a rule whereby "it should be incompetent to try civilians …".[3]

18. The European and inter-American regional jurisdictions, which were cited at length in the preceding report, tend to come to the same conclusion. In its judgement of 26 November 1997 in the case of *Sakik and others v. Turkey*, the European Court of Human Rights attached importance to the fact that a civilian had to appear before a court composed, even only in part, of military personnel. In the field of domestic law, there is, the exemplary case of the Mexican Constitution which, since 1917, provides that "in no case will military tribunals extend their jurisdiction to persons who do not belong to the armed forces" (art. 13).

19. Minors constitute a special case, whether child soldiers or minors arrested during an armed conflict. The importance of the protective rules of the Convention on the Rights of the Child, particularly its articles 38 to 40, as well as the international rules on juvenile justice must be emphasized. A number of special rapporteurs of the Commission have drawn attention to flagrant violations in this area, particularly when the death sentence is handed down by a military court, without any possibility of appeal and without taking into account the age of the minors sentenced (cf. the urgent appeal sent to the Government of the Democratic Republic of the Congo by Ms. Asma Jahangir, Special Rapporteur on extrajudicial, summary or arbitrary executions [E/CN.4/2002/74, para. 108]). Mr. John Dugard, Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967, refers to the fate of minors arrested "on suspicion of throwing stones at Israeli soldiers" and tried by an ordinary military court, without taking age into consideration (E/CN.4/2002/32, para. 49). A fortiori, one can only wonder about the fate of children held incommunicado at Guantánamo Bay.[4]

### 2. Trial of military personnel by military tribunals

20. Here too, several situations may be distinguished. However, two borderline situations appear to be particularly sensitive.

21. Such is the case, first of all, when military personnel are tried for their liability under ordinary law, whether liability for misconduct or for risk, when the victim(s) is a(are) civilian(s). For example, this occurs when a member of the armed forces causes an accident, particularly abroad, since the jurisdiction of a military court excludes that person from the jurisdiction of the ordinary territorial courts. The Working Group on Arbitrary Detention, in its above-mentioned opinion (see paragraph 17), also stressed the need to subject military justice to the principle whereby "it should be incompetent to try military personnel if the victims include civilians".

22. A fortiori, this is also the case in the trial, by military tribunals, of military personnel accused of committing human rights violations that constitute serious crimes, which continues to be one of the main causes of impunity. This practice tends to violate the right, guaranteed by the International Covenant on Civil and Political Rights, of any person to an effective remedy (art. 2, para. 3 (a)), to a fair hearing by an independent and impartial tribunal (art. 14, para. 1) and to the equal protection of the law, without discrimination (art. 26). Here too, a consensus is taking shape, as was pointed out in the preceding report, with regard to 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 the need to ensure that extrajudicial executions, torture and enforced disappearances are not considered as military offences or acts performed in the line of duty (see below).

23. A limited area of justification would remain in which military courts would be competent to try cases involving military personnel or relations between military personnel and the public authorities. However, there must be limits here too, depending on the matters concerned.

## B. Jurisdiction *ratione temporis*

24. The fundamental distinction between the administration of justice through military tribunals in peacetime and wartime served as the basis for the questionnaire contained in the interim report (E/CN.4/Sub.2/2001/WG.1/CRP.3).

### 1. The distinction between wartime and peacetime

25. The tendency to abolish military tribunals in peacetime has already been mentioned. Thus, according to article 84 of the Austrian Federal Constitution, “military jurisdiction - except in time of war - is repealed”. The 1970 Military Penal Code is applied by the ordinary courts. Moreover, some military disciplinary tribunals still apply the 1994 Code of Military Discipline. Article 213 of the Portuguese Constitution stipulates that “during a state of war, courts martial shall be established that have jurisdiction to hear crimes of a strictly military nature”.
A contrario, the abolition of military tribunals in peacetime was envisaged in the 1997 revision of the Constitution; however, military tribunals will continue to function until the adoption of legislation on the transfer of their jurisdiction, in accordance with article 211, paragraph 3, of the Constitution: “One or more military judges shall be included in the composition of tribunals at any instance that hear crimes of a strictly military nature, in accordance with the law.”

26. The principal distinction between a situation of peace and a situation of war is often doubled by a distinction *ratione loci*, that is, between the sanctuarization of the national territory, which is subject to the civil courts, and military operations abroad. Thus, under article 96 of the Constitution of the Federal Republic of Germany:

> “2. The Federation may establish military criminal courts for the armed forces as federal courts. They may exercise criminal jurisdiction only while a state of defence exists, and otherwise only over members of the armed forces serving abroad or on board warships. Details are regulated by a federal statute. These courts are within the competence of the Minister of Justice. Their full-time judges are persons qualified to hold judicial office.

"3. The highest court of justice for appeals from the courts mentioned in paragraphs 1 and 2 is the Federal Court of Justice."

27. This is also the case of article 1 of the French Code of Military Justice:

"Military justice is dispensed under the supervision of the Court of Cassation:

"– In peacetime and for offences committed outside the territory of the Republic, by the Paris Military Court and, in cases of appeal, by the Paris Court of Appeal;

"– In wartime, by the territorial tribunals of the armed forces and by military tribunals …".

28. The distinction is also to be found in article 103, third paragraph, of the Italian Constitution:

"Military courts in time of war have the jurisdiction vested in them by law. In time of peace, they have jurisdiction only over military offences committed by members of the armed forces."

### 2. Differentiation of crisis situations

29. With regard to crisis situations, a number of very different situations must be distinguished.

30. On the one hand, there are situations that fall within the scope of international humanitarian law, such as international armed conflicts or non-international armed conflicts in the meaning of the Protocols to the Geneva Conventions. It is useful to recall article 84 of the Geneva Convention relative to the Treatment of Prisoners of War:

"A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

"In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in article 105."

31. All the provisions of the Convention seek to ensure strict equality of treatment, guaranteed "by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power" (art. 102), while providing for specific means of protection appropriate to the situation of prisoners of war. Finally, should there be any doubt concerning the categorization of prisoners of war: "persons, having committed a belligerent act and having fallen into the hands of the enemy, … shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal" (art. 5).

32. On the other hand, there are international peacemaking and peacekeeping operations, under international mandate. These situations determine not only the jurisdictions appropriate for periods of crisis, but also involve distinctions *ratione personae*, military personnel of one's own army or of allied armies, enemy soldiers or civilian populations, and *ratione loci*, which concerns the question of extraterritorial jurisdiction. Ms. Hampson's study should help to clarify distinctions that current crises have blurred.

33. Finally, special attention should be given to domestic emergency situations which, strictly speaking, do not fall within the scope of international humanitarian law but during which rules that derogate from ordinary law are applied. If one refers to article 4 of the International Covenant on Civil and Political Rights:

> "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

34. Moreover, article 4, paragraph 2, specifies that no derogation from the provisions of the Covenant may be made. Today it is widely recognized that the right to a remedy is part of this "hard core" of rights from which no derogation is permitted, in the case of the principle of non-discrimination, under any circumstances. The guarantees of a fair trial before an independent and impartial tribunal may not be called into question. Emergency legislation must be envisaged in the light of these principles, in particular legislation that has been adopted to respond to the threat of terrorism. This important question is the subject of the report of Ms. Koufa, Special Rapporteur.

## C. Jurisdiction *ratione materiae*

### 1. Military criminal offences

35. The first difficulty with regard to the subject-matter jurisdiction of military courts is to define the very concept of "military offence". This question does not arise only at the domestic level, since the concept is also the subject of international treaties, such as extradition agreements.

36. Such is the case of the Treaty on International Procedural Law adopted in Montevideo in 1940, a treaty of the Organization of American States (OAS), which refers to essentially military offences, to the exclusion of those falling within the scope of ordinary law (art. 20), or the 1957 European Convention on Extradition, article 4 of which deals with "offences under military law" and provides that "extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of this Convention".

The same holds true for the United Nations Model Treaty on Extradition (art. 3 (c)). In all three cases, the objective of this provision is to exclude extradition. At the bilateral level, there is the 1996 Extradition Treaty between the United States of America and France; article 5 of the Treaty, which deals with military offences, provides that extradition shall not be granted if the offence for which it is requested is an exclusively military offence.

37. At the domestic level, a comparative law study of the different codes of military justice would be very useful, regardless of whether the code is applied by an ordinary or a specialized court. In particular, the concept of "military offence (or crime)" should be defined with care being taken that it does not unjustifiably implicate civilians, and a distinction should be made between military criminal offences *stricto sensu* and disciplinary offences or misconduct.

38. A contrario, certain offences should be excluded from military jurisdiction. Such is the case of conscientious objection insofar as, in its resolution 1998/77, the Commission on Human Rights calls upon States to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held. By definition, military tribunals would be both judges and parties in such cases. Conscientious objectors are civilians, who should be subject to civil proceedings. When the right to conscientious objection, which is an integral part of the right to freedom of thought, conscience and religion as contained in the Universal Declaration of Human Rights, is not recognized by the law, the conscientious objector is treated as a deserter and the military criminal code is applied.

39. At the very least, as stipulated in recommendation No. R (87) 8 of the Committee of Ministers of the Council of Europe regarding the procedure for recognizing the status of conscientious objector:

> "5. Consideration of the application should contain all the guarantees necessary for a fair trial;
>
> "6. The applicant must be able to appeal the first-instance decision;
>
> "7. The appeals body should be separate from the military administration and its composition should ensure its independence."[5]

## 2. Human rights violations

40. In the face of the definition of purely military offences, the idea that perpetrators of human rights violations cannot be tried before military tribunals is becoming increasingly accepted today, as if there was some kind of distortion by which military personnel lose their exemption from jurisdiction so that the rights of victims can be taken fully into account.

41. Article 16, paragraph 2, of the Declaration on the Protection of All Persons from Enforced Disappearances, proclaimed by the General Assembly in its resolution 47/133 of 18 December 1992, stipulates that persons responsible for enforced disappearances "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts".

42. This principle is echoed in the 1994 Inter-American Convention on Forced Disappearance of Persons, article IX of which states that:

> "Persons alleged to be responsible for the acts constituting the offence of forced disappearance of persons 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.
>
> "The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties."

43. The scope of this principle has been generalized in the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law which, in its principle 25 (i) refers to:

> "Preventing the recurrence of violations by such means as:
>
> […]
>
> "(ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces".

44. Similarly, the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (E/CN.4/Sub.2/1997/20/Rev.1, annex II) contains a principle 31, entitled "Restrictions on the jurisdiction of military courts", which stipulates:

> "In order to avoid military courts, in those countries where they have not yet been abolished, helping to perpetuate impunity owing to a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction 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, that of an international criminal court."

## II. GUARANTEES OF A FAIR TRIAL

45. If it is accepted that military courts are, in their specific sphere of competence, "an integral part of the general judicial system", it is important to draw all the consequences as regards their status, their organization and their operation.

### A. Legality of military tribunals

#### 1. Establishment of military tribunals by the constitution or the law

46. The Basic Principles on the Independence of the Judiciary, adopted in 1985, specify that "the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary" (para. 1). The principle of the separation of powers goes together with the requirement of statutory guarantees provided at the highest

level of the hierarchy of norms, by the constitution or the law. Moreover, "everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. 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" (art. 5).

47. The States members of the Organization for Security and Cooperation in Europe have echoed these principles by declaring, in the document of the 1991 Moscow Meeting of the Conference on the Human Dimension, that they:

> "(19.1) will respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including, inter alia, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;
>
> "(19.2) will, in implementing the relevant standards and commitments, ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary, which, inter alia, provide for
>
> " (i) prohibiting improper influence on judges;
>
> "(ii) preventing revision of judicial decisions by administrative authorities, except for the rights of the competent authorities to mitigate or commute sentences imposed by judges, in conformity with the law;"

48. These principles clearly imply that military courts or other special courts cannot be established by a decision of the executive or the military authority alone.

49. According to article I, section 8, of the Constitution of the United States of America, the Congress has the power "to constitute tribunals inferior to the Supreme Court". Article III, section 1, stipulates that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish (…)". In the light of these provisions, one must question the military decree signed by the President of the United States of America on 13 November 2001 entitled "Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism". The order provides for the establishment of special military commissions to try foreign nationals linked with the "organization known as al-Qa'idah" or suspected of terrorist activities. The Secretary of Defence himself signed, on 21 March 2002, Military Commission Order No. 1 on the organization of such a "military commission".[6]

50. It is noteworthy that the two agreements signed between the United States of America and the European Union concerning extradition and mutual legal assistance contain in their preamble the following two paragraphs:

> "Having due regard for the rights of individuals and the rule of law,
>
> "Mindful of the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person, including the right to adjudication by an impartial tribunal established pursuant to law".

51. If the absence of any explicit reference to international human rights law in the first paragraph is to be regretted, the content of this law is fully covered in the second paragraph: "the right to adjudication by an impartial tribunal established pursuant to law". In this regard, the two agreements exclude from their scope any court "dependent" on the executive, particularly special courts.

### 2. Compatibility with the principles of the rule of law

52. Certain supreme courts have ruled that the existence of a military court in itself is not compatible with constitutional principles, and have tended to be in favour of the abolition, pure and simple, of military courts. Others, on the contrary, have sought to determine whether or not the organization and operation of military courts provided the necessary guarantees.

53. Thus, the High Court of South Africa considered in its judgement of 1 March 2001 that military tribunals were unconstitutional because they violated the right of military personnel to equality before the courts. Many countries, such as Austria, Denmark, France, Germany, Guinea, Japan, the Netherlands, Norway, Senegal and Sweden, have abolished all military tribunals in peacetime, either entirely or permitting a few rare exceptions. Similarly, a number of re-established democracies have decided to abolish military tribunals. Hungary abolished such tribunals in 1991, the Czech Republic in 1993 (Act No. 284/1993), Croatia (which in 1996 challenged article 101 of the Constitution), Estonia and Slovenia. Radical reforms are being planned in Portugal and Belgium.

54. The Canadian Charter of Rights and Freedoms, which is the first part of the 1982 Constitution Act, specifies the legal guarantees of any person charged with an offence, mentioning only one derogation from ordinary law concerning military justice. Article 11 of the Charter reads as follows:

> "Any person charged with an offence has the right:
>
> "(a) To be informed without unreasonable delay of the specific offence;
>
> "(b) To be tried within a reasonable time;
>
> "(c) Not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> "(d) To be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal;
>
> "(e) Not to be denied reasonable bail without cause;
>
> "(f) Except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

> "(g) Not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations" (…).

55. In the case *R. v. Généreux* tried on 13 February 1992, the Supreme Court of Canada was able to rule that the organization of military tribunals was in contradiction with constitutional principles, particularly with regard to guarantees of independence, without challenging, in this instance, the very principle of military justice. Speaking on behalf of the majority, Judge Lamer said: "To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently … Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military" (No. 22103, p. 293). In its judgement *Morris v. the United Kingdom* of 26 February 2002, the European Court of Human Rights referred, quite exceptionally, to the case law *R. v. Généreux.*

56. In addition to the discussions concerning the principle of the legality, or even legitimacy, of military courts, the legal issues concern their organization and operation.

## B. Organization of military tribunals

57. The organization of military tribunals must fully guarantee their independence and their impartiality, in the same way as the ordinary courts. This concerns both the structure of the different degrees of jurisdiction and the organization of trial benches and the statutory guarantees of judges.[7]

### 1. Types of military courts

58. In a number of countries, the national constitution provides for the specific organization of military courts from the bottom up. Such is the case, for example, of Brazil, with its Higher Military Court, or Turkey, with its High Military Court of Appeal. This is also the case of Switzerland, whose three degrees of jurisdiction, which are identical in peacetime and wartime, are composed of military personnel (first instance, appeal and cassation); it should be noted, however, that 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 a specialized 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, military courts continue to exist, 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.

59. Such developments are taking place in many countries, with a twofold effect: on the one hand, first-degree military courts have been subordinated to higher ordinary courts and, on the other, civilian judges participate, in a sort of "mixing" of jurisdictions in military courts. Such is the case of the United Kingdom, where each of the three branches of the armed forces (air, land and sea) has its own first-degree military courts. The courts, which are not permanent, are composed of military personnel assisted, in the capacity of *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 Discipline 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 the ordinary courts, the highest competent court being the House of Lords.

60. Article 96, paragraph 5, of the Greek Constitution deals with military tribunals and provides that they "shall be composed in majority of members of the judicial branch of the armed forces, invested with the guarantees of functional and personal independence specified in article 87, paragraph 1, of this Constitution", that is, those guarantees that apply to "regular judges".

61. Finally, there are the civil courts. In France, since the abolition in 1982 of military tribunals in peacetime, infractions of military laws, including infractions of ordinary law, committed by members of the armed forces in the performance of their duties, 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 the country's other jurisdictions. 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 criminal tribunals exist only in wartime, and it should be emphasized that their decisions also remain subject to review by the Federal Court of Justice, which is composed of civilian judges.

### 2. Guarantees of the independence and impartiality of military judges

62. A comparative legal study should also be carried out in this area, examining the status of military judges, particularly their relations with the military hierarchy, with a view to determining in what conditions military judges are not "judges and parties" in the cases submitted to them. One aspect of the comparative study should deal with the privileged position of the military prosecutor's office with regard to rights of the defence.

## C. Operation of military tribunals

### 1. Internal dimension of the right to a fair trial

63. There is no need to emphasize the importance of the full observance of the international rules relating to the administration of justice in the operation of military tribunals. It is necessary to ensure, in accordance with article 10 of the Universal Declaration of Human Rights, that:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

And that, in accordance with article 11, paragraph 1:

> "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

64. The interest of these essential guarantees concerning the operation of any court worthy of the name is obvious. It is necessary to ensure respect for everyone's basic rights, "in full equality", without any discrimination based on the "situation". In this regard, military personnel and persons treated as such should be neither second-zone citizens, who lack the elementary rights of proper administration of justice, nor "privileged" bodies placed above ordinary law and which have some form of impunity. As far as the organization of military tribunals is concerned, if parallel judicial structures are established for functional reasons, they must guarantee the same rights to the persons concerned as are guaranteed by the military tribunals themselves.

65. The connection with ordinary law is well illustrated in article 96, paragraph 5, of the Greek Constitution which, with reference to "military, naval and air force tribunals", provides that "the provisions of paragraphs 2 to 4 of article 93 shall be applicable to the sittings and rulings of these courts". This also applies to provisions concerning the public nature of hearings and the statement of reasons on which decisions are based.

66. Similarly, the Code of Criminal Procedure of the Russian Federation, which entered into force on 1 July 2002, governs proceedings before military tribunals as well as all preliminary investigation procedures or proceedings initiated by the military procurator. All the guarantees provided for in the Code apply without exception to the accused and persons involved in criminal cases falling within the competence of military tribunals.[8] However, the notion of "secret" at times appears to remain prevalent (see, for example, the statistics on the criminal sentences handed down by the Office of the Military Procurator-General).[9]

### 2. International significance of the right to a fair trial

67. Moreover, these guarantees are necessary for the smooth functioning of international cooperation in criminal matters. Thus, article 17, paragraph 2, of the Rome Statute of the International Criminal Court concerning issues of admissibility stipulates:

> "In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> "(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

"(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

"(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."

68. In order to ensure the application of the principle of complementarity referred to in article 17, paragraph 1, it is important to guarantee the observance of the "principles of due process recognized by international law". Oddly enough, the Rome Statute of the International Criminal Court provides only a series of hypotheses, presupposing the State's "unwillingness" to take criminal action but not the inverse situation, in which the rights of the defence are flouted by the national courts.

69. Within the framework of national law, it should also be pointed out that the 1993 draft revision of Belgium's "universal jurisdiction" law, limits the possibility of registering a complaint to a double condition: if there is a clear connecting factor with Belgium and if the alleged perpetrator of the offence is a national of a country that does not categorize the act in question as an offence or does not guarantee a fair trial.

70. More generally, the concept of "fair trial" is basic for the effective implementation of the principle *non bis in idem* and for the smooth functioning of extradition agreements. The establishment of international, regional and national standards, to which the present report seeks to contribute, is therefore particularly important with regard to the administration of justice through military tribunals.

## III. CONCLUSIONS AND RECOMMENDATIONS

71. **The present report demonstrates that the administration of justice through military tribunals is being gradually "demilitarized" in a twofold process involving the limitation of their jurisdiction and the strengthening of guarantees of a fair trial with a view to making them an "integral part of the general judicial system".**

72. **This process is characterized by the following major trends:**

**(a) Limitation of the jurisdiction of military tribunals to military personnel and persons treated as such and, a contrario, such tribunals' lack of competence to try civilians;**

**(b) Distinction between ordinary offence (or crime), military offence (or crime) (military criminal offence) and disciplinary offence (or misconduct);**

**(c) Abolition of military tribunals in peacetime, giving competence to the ordinary courts or, residually, to disciplinary courts;**

**(d) Strengthening of guarantees of the independence and impartiality of military courts;**

**(e) Inclusion of civilian judges in the composition of military courts;**

**(f) Strengthening of the rights of the defence and presence of lawyers freely chosen by the accused;**

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

**(h) Increasingly frequent 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;**

**(i) Adaptation of military courts to recent developments in international criminal law, particularly the establishment of the International Criminal Court.**

73. **The above-mentioned developments lead me to propose the following revised recommendations with a view to improving the rules governing the competence of, and procedural safeguards for, such jurisdictions. These concrete improvements have the advantage that they can be taken into consideration regardless of the type, composition or competence of the military tribunals concerned, and they do not prejudge the conclusions of the debate of principle on the very existence of military tribunals, whether in peacetime or wartime.**

## RECOMMENDATION No. 1

### Lack of competence of military courts to try civilians

74. **When their existence is provided for by the constitution or the law, military courts should, in principle, not have competence to try civilians, and their competence should be limited with regard to military personnel and persons treated as such.**

## RECOMMENDATION No. 2

### Trial of persons accused of serious human rights violations

75. **In all circumstances, the competence of military courts should be abolished in favour of the competence of the ordinary courts to try persons accused of serious human rights violations, such as extrajudicial executions, enforced disappearances, torture and so on.**

**RECOMMENDATION No. 3**

**Limitations on military secrecy**

76. **The rules that make it possible to invoke the secrecy of military information should not be diverted from their original purpose in order to hinder the course of justice. Military secrecy may certainly be invoked, under the supervision of independent monitoring bodies, when it is necessary to protect information that may be of interest to foreign intelligence services. It should, however, be dispensed with where measures involving deprivation of liberty are concerned, which should not, under any circumstances, be kept secret, whether this involves the identity or location of persons being held incommunicado.**

**RECOMMENDATION No. 4**

**Guarantees of habeas corpus**

77. **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. Similarly, 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. 5**

**Right to an independent and impartial tribunal**

78. **Where military tribunals exist, their organization and operation should fully ensure the right of everyone to an independent and impartial tribunal, in particular with guarantees of the statutory independence of judges vis-à-vis the military hierarchy. The presence of civilian judges in the composition of military tribunals can only reinforce the impartiality of these jurisdictions.**

**RECOMMENDATION No. 6**

**Publicity of hearings**

79. **As in matters of ordinary law, public hearings must be the rule, and in camera sessions should be held on a quite exceptional basis and be authorized by a specific, well-grounded decision the legality of which is subject to review.**

**RECOMMENDATION No. 7**

**Strengthening of the rights of the defence, particularly through the abolition of the post of military lawyer**

80. **The provision of legal assistance by military lawyers, particularly when they are officially appointed, is not in keeping with the observance of the rights of the defence. From the simple point of view of the so-called theory of "appearances", the presence of military lawyers damages the credibility of these jurisdictions. The post of military lawyer should be abolished, and the accused should be guaranteed the right to the free choice of his or her lawyer.**

**RECOMMENDATION No. 8**

**Access of victims to proceedings**

81. **In many countries, the victim is excluded from the investigation when a military court is competent. Such blatant inequality before the law should be abolished or, pending this, strictly limited. The presence of the victim should be obligatory, or the victim should be represented whenever he or she so requests, at the very least during the reading of the judgement, with prior access to all the evidence in the file.**

**RECOMMENDATION No. 9**

**Recourse procedures in the ordinary courts**

82. **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 settled by the highest civil court. Such recourse procedures should also be available to the victims, which presupposes that the victims are allowed to participate in the proceedings, particularly during the trial stage.**

**RECOMMENDATION No. 10**

**Restrictive interpretation of the principle of due obedience**

83. **The principle of due obedience, often invoked in courts and tribunals, particularly military tribunals, should in all cases be reviewed by the highest civil court 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 or her from his or her 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 or her hierarchical superiors from their criminal liability if they knew or had reasons to know that their subordinate committed, or was about to commit, such violations, and if they took no measures within their power to prevent such violations or restrain their perpetrator.**

## RECOMMENDATION No. 11

### Conscientious objection to military service

84. **Conscientious objector status should be determined under the supervision of an independent and impartial civil court when the "conscientious objectors" are civilians. When an application for conscientious objector status is made during the course of military service, it should not be punished as an act of insubordination or desertion but considered in accordance with the same procedure.**

## RECOMMENDATION No. 12

### Abolition of the competence of military tribunals to try children and minors under the age of 18

85. **Minors, who fall within the category of vulnerable persons, should be prosecuted and tried with strict respect for the guarantees provided in the Convention on the Rights of the Child and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules). They should not, therefore, be subjected to the competence of military tribunals.**

## RECOMMENDATION No. 13

### Abolition of the death penalty, particularly with regard to minors

86. **The trend in favour of the gradual abolition of capital punishment, including in cases of international crimes, should be extended to military courts, which provide fewer guarantees than those provided by the ordinary courts, since, owing to the nature of the sentence, judicial error in this instance is irreversible. In particular, the abolition of the death penalty with regard to vulnerable persons, particularly minors, should be observed in all circumstances.**

## Notes

[1] Internet address of the International Society for Military Law and the Law of War: www.soc-mil-law.org.

[2] E/CN.4/1998/39/Add.1, para. 78.

[3] E/CN.4/1999/63, para. 80.

[4] *Sunday Times*, 22 June 2003.

[5] Report by Mr. Dick Marty, entitled "Exercise of the right of conscientious objection to military service in Council of Europe member States", Parliamentary Assembly of the Council of Europe, document 8809, 13 July 2000.

[6] See the report of Kevin McNamara, "Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay", Parliamentary Assembly of the Council of Europe, document 9817, 26 May 2003.

[7] This comparative analysis is based essentially on the aforementioned study by the Council of Europe [DH-PR (2002) 009 rev.] and should be broadened to include other continents.

[8] DH-PR (2002) 009 rev., p. 35.

[9] *Le Figaro*, 14-15 June 2003.

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