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ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

Issue of the administration of justice through military tribunals

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∗ The footnotes are reproduced in the original language.

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Executive summary

In its resolution 2003/8, the Sub-Commission on the Promotion and Protection of Human Rights requested Mr. Emmanuel Decaux to submit to it, at its fifty-sixth session, an updated version of his report (E/CN.4/Sub.2/2003/4) and to continue his work on the development of principles governing the administration of justice through military tribunals.

The present document is the updated version requested by the Sub-Commission. It takes account of the comments made at its fifty-fifth session as well as recent developments and newly available information on the subject.

In this regard, the seminar of experts, including military experts, organized by the International Commission of Jurists in Geneva in January 2004 in accordance with the wish expressed by the Sub-Commission in its resolution 2003/8, made it possible to hold a very useful discussion of the recommendations contained in the report. It is to be hoped that another seminar of experts, organized by the International Commission of Jurists along the same lines, can be held in the course of the year under the auspices of the Office of the United Nations High Commissioner for Human Rights. 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; this would facilitate the conduct of 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 jurisprudence of international, regional and national bodies (E/CN.4/Sub.2/2001/WG.1/CRP.3).

Bearing in mind 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, which was made more specific in resolution 2004/32, the report presents a set of principles concerning the administration of justice through military tribunals. The principles are based on the recommendations contained in the report submitted by Mr. Joinet to the Sub-Commission at its fifty-fourth session (E/CN.4/Sub.2/2002/4, paras. 30 ff.); these recommendations were revised and supplemented in the report of Mr. Decaux to the fifty-fifth session (E/CN.4/Sub.2/2003/4). The principles, inherent in the notion of the proper administration of justice, concern the rules of jurisdiction as the procedural guarantees for administering military justice, which are dictated by the basic notion of "the unity of justice", in accordance with the analytical matrix developed in previous reports.

At the current stage of collective thinking, it would be very useful to hold the broadest possible consultation on these principles - with States, international organizations and non-governmental organizations, as well as with all stakeholders in the debate - in order to enable the rapporteur to take account of all relevant comments on the subject, with a view to transmitting a consolidated version, at the proper time, to the Commission on Human Rights.

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Introduction

1. In its resolution 2003/8, the Sub-Commission on the Promotion and Protection of Human Rights welcomed the report submitted by Mr. Emmanuel Decaux on the administration of justice through military tribunals and the recommendations contained therein (E/CN.4/Sub.2/2003/4), and requested Mr. Decaux to continue his work on the development of principles governing the administration of justice through military tribunals and to submit to it, at its fifty-sixth session, an updated report.

2. The present document is the updated version requested by the Sub-Commission. It is a continuation of the previous work on the administration of justice through military tribunals conducted on the basis of the questionnaire prepared by Mr. Louis 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 of Mr. Joinet's report to the fifty-fourth session (E/CN.4/Sub.2/2002/4) and Mr. Decaux's report to the fifty-fifth session (E/CN.4/Sub.2/2003/4), and takes account of recent developments and newly available information on the subject.

3. In this regard, in its resolution 2003/8, the Sub-Commission welcomed the initiative taken by the International Commission of Jurists to organize a seminar of experts in Geneva in 2003, pursuant to the proposal, made by Mr. Joinet in his report to the Sub-Commission at its fifty-third session, "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). Mr. Joinet reiterated this proposal in his report to the fifty-fourth session (E/CN.4/Sub.2/2002/4, para. 4, footnote) and Mr. Decaux also referred to it in his report to the fifty-fifth session (E/CN.4/Sub.2/2003/4, para. 3). The seminar, organized by the International Commission of Jurists from 26 to 28 January 2004 and entitled "Human rights and the administration of justice through military tribunals", was particularly useful; it brought together experts, lawyers and military personnel from all legal systems and from all parts of the world, as well as representatives of diplomatic missions and non-governmental organizations (NGOs) based in Geneva. In particular, the seminar enabled the rapporteur to take stock of very diverse experiences and hold a very open discussion on the formulation of the recommendations contained in his last report (E/CN.4/Sub.2/2003/4, paras. 74 ff.). The rapporteur wishes to express his gratitude to the International Commission of Jurists for its useful initiative.

4. It is to be hoped that, pursuant to the present report, another seminar of experts, organized along the same lines by the International Commission of Jurists under the auspices of the Office of the United Nations High Commissioner for Human Rights, will make it possible to hold an in-depth discussion of the revised principles contained in it. 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. As was pointed out in the previous report, 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 jurisprudence of international, regional and national bodies. Resolution 2003/8 invites Governments, the relevant United Nations bodies, specialized institutions, regional intergovernmental organizations and NGOs to provide information on the issue to Mr. Decaux.

5. The philosophy that inspires this study was recalled by the Commission in its resolution 2003/39, entitled "Integrity of the judicial system", in which the Commission "takes note … 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 to the Sub-Commission on the Promotion and Protection of Human Rights 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;
>
> "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."

6. In its resolution 2004/32, adopted without a vote on 19 April 2004, the Commission, "taking note of resolution 2003/8 of 13 August 2003 of the Sub-Commission" and "stressing that the integrity of the judicial system should be observed at all times" […] "takes note of the report of the Special Rapporteur on the independence of judges and lawyers (E/CN.4/2004/60 and Add.1) as well as the report submitted by Mr. Emmanuel Decaux to the Sub-Commission on the Promotion and Protection of Human Rights on the issue of the administration of justice through military tribunals (E/CN.4/Sub.2/2003/4)". The Commission uses its traditional formulation to call upon "States that have military courts or special criminal tribunals for trying criminal offenders to ensure that such courts, where required by applicable law, are an integral part of the general judicial system and that such courts apply due process procedures that are internationally recognized as guarantees of a fair trial, including the right to appeal a conviction and a sentence" (para. 7). The formulation loses the conciseness that it had in resolution 2003/39, in which the Commission "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" (para. 9). It is questionable whether the formulation used in resolution 2004/32 is any clearer, since the wording "where required by applicable law" does not seem to be any more precise in English than in French (*lorsque le droit applicable l'exige*). In conclusion, the Commission "requests Mr. Decaux to take account of the present resolution in his continuing work" (para. 9).

7. It is in this spirit that "applicable law" should be studied. It is important to situate the development of "military justice" within the framework of the general principles for the proper administration of justice. The principles contained in the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, as well as in regional conventions or other relevant instruments are unambiguous with regard to justice. The provisions concerning the proper administration of justice have a general scope. In other words, military justice must be "an integral part of the general judicial system", to use the Commission's words. This option implies the rejection of two extreme positions, both of which tend to make military justice a separate - expedient and expeditious - form of justice, outside the scope of ordinary law, whether military justice is "sanctified" and placed above the basic principles of the rule of law, or "demonized" on the basis of the historical experiences of an all too recent past on many continents. The alternative is simple: either military justice conforms to the principles of the proper administration of justice and becomes a form of justice like any other, or it constitutes "exceptional justice", a separate system, outside the rules, without checks or balances, which opens the door to all kinds of abuse, and which is "justice" in name only … Between the extremes of sanctification and demonization lies the path of normalization - the process of "civilizing" military justice - which underlies the current process.

8. After attempting to clarify in his previous report (E/CN.4/Sub.2/2003/4) the many issues contained in the study in order to structure the public debate that must be held, the rapporteur considers that it is possible to proceed, in accordance with Sub-Commission resolution 2003/8, to the "development of principles governing the administration of justice through military tribunals". These principles are based on the recommendations contained in Mr. Joinet's last report (E/CN.4/Sub.2/2002/4, paras. 29 ff.) and which were further developed in the report submitted to the fifty-fifth session (E/CN.4/Sub.2/2003/4). The principles have been revised in the light of the comments made by experts, particularly military experts, at the international seminar organized by the International Commission of Jurists in January 2004. These principles are listed below with a brief description defining their content and scope.

9. At the current stage of collective thinking, it would be very useful to hold the broadest possible consultation on these principles - with States, international organizations and NGOs as well as with all stakeholders in the debate - in order to enable the rapporteur to take account of all relevant comments on the subject, with a view to transmitting a consolidated version, at the proper time, to the Commission on Human Rights.

I. PRINCIPLES GOVERNING THE ADMINISTRATION OF JUSTICE THROUGH MILITARY TRIBUNALS

PRINCIPLE No. 1

Establishment of military tribunals by the constitution or the law

Military jurisdictions, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. Military tribunals should be an integral part of the general judicial system and apply due process procedures that are internationally recognized as guarantees of a fair trial.

10. The Basic Principles on the Independence of the Judiciary, adopted in 1985, stipulate 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 by the law, avoiding any interference of the executive branch or the military in the administration of justice.

11. The doctrinal issue of the legitimacy of military courts will not be decided here, as indicated in our previous report (E/CN.4/Sub.2/2003/4, para. 71), pursuant to the report of Mr. Joinet (E/CN.4/Sub.2/2002/4, para. 29). The matter at hand is the legality of military justice. In this regard, the "constitutionalization" of military tribunals that exists in a number of countries should not place them outside the scope of ordinary law or above the law but, on the contrary, should include them in the principles of the rule of law, beginning with those concerning the separation of powers and the hierarchy of norms. In this regard, this first principle is inseparable from all the principles that follow. Emphasis must be placed on the unity of justice. As Mr. Stanislav Chernenko and Mr. William Treat state in their final report to the Sub-Commission on the right to a fair trial, submitted in 1994, "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" and that "a court shall be independent from the executive branch. The executive branch in a State shall not be able to interfere in a court's proceedings and a court shall not act as an agent for the executive against an individual citizen".[1]

12. *A contrario*, the issue of the applicability of the guarantees of military justice to military tribunals established by the executive branch remains in its entirety. In fact, the issue concerns minimum guarantees; even in times of crisis, particularly as regards the provisions of article 4 of the International Covenant on Civil and Political Rights, State parties' derogations from ordinary law should not be "inconsistent with their other obligations under international law" nor involve "discrimination solely on the ground of race, colour, sex, language, religion or social origin". If article 14 does not explicitly figure in the "hard core" of non-derogable rights, the existence of effective judicial guarantees constitutes an intrinsic element of respect for the principles contained in the Covenant, and particularly the provisions of article 4, as the Human Rights Committee emphasizes in its General Comment No. 29 (2001).[2] Without such basic guarantees, we would be faced with a denial of justice, pure and simple.

13. It should also be recalled that international humanitarian law establishes minimum guarantees in judicial matters.[3] Article 75, paragraph 4, of Protocol I to the Geneva Conventions provides the fundamental guarantees in judicial matters that must be respected even during international conflicts, referring to an "impartial and regularly constituted court", which, as the International Committee of the Red Cross (ICRC) has stated, "emphasizes the need for administering justice as impartially as possible, even in the extreme circumstances of armed conflict, when the value of human life is sometimes small".[4] Article 6, paragraph 2, of Protocol II refers to a "court offering the essential guarantees of independence and impartiality". According to ICRC, "this sentence reaffirms the principle that anyone accused of having committed an offence related to the conflict is entitled to a fair trial. This right can only be effective if the judgement is given by 'a court offering the essential guarantees of independence

and impartiality'".[5] If respect for these judicial guarantees is compulsory during armed conflicts, it is not clear how such guarantees could not be absolutely respected in the absence of armed conflict. The protection of rights in peacetime should be greater if not equal to that recognized in wartime.

PRINCIPLE No. 2

Functional authority of military courts

Military courts should, in principle, not have competence to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts. The jurisdiction of military tribunals should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.

14. In paragraph 4 of its General Comment No. 13 (1984) on article 14 of the International Covenant on Civil and Political Rights, the Human Rights Committee noted "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's practice over the past 20 years, particularly in its views concerning individual communications or its concluding observations on national reports, has only increased its vigilance, in order to ensure that the jurisdiction of military tribunals is restricted to offences of a strictly military nature committed by military personnel. Many thematic or country rapporteurs have also taken a very strong position in favour of military tribunals' lack of competence to try civilians. Similarly, the jurisprudence of the European Court of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights are unanimous on this point.[6]

15. Conversely, the competence of military tribunals to try military personnel or personnel treated as military personnel should not constitute a derogation in principle from ordinary law, corresponding to a jurisdictional privilege or a form of justice by one's peers. Such competence should remain exceptional and apply only to the requirements of military service. This concept constitutes the "nexus" of military justice, particularly as regards field operations, when the territorial court cannot exercise its jurisdiction. Only such a functional necessity can justify the limited but irreducible existence of military justice. The national court is prevented from exercising its personal active or passive competence for practical reasons arising from the remoteness of the action, while the local court that would be territorially competent is confronted with jurisdictional immunities.

16. In this operational context, there is no doubt a grey area that deserves further investigation in order to clarify the meaning of "personnel treated as military personnel" (*personnels assimilés*). The work currently being conducted by the Sub-Commission pursuant to

the study by Ms. Françoise Hampson 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 will undoubtedly contribute to the definition of these terms. Similarly, the increasing participation of paramilitary forces or private contracting parties in international occupation arrangements or peacekeeping operations should raise, with renewed acuity, the issue of the legal status and accountability of such personnel.

PRINCIPLE No. 3

Trial of persons accused of serious human rights violations

In all circumstances, the jurisdiction of military courts should be abolished 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.

17. Contrary to the functional concept of the jurisdiction of military tribunals, there is today a growing tendency to consider that persons accused of serious human rights violations cannot be tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons. Moreover, the military authorities might be tempted to cover up such incidents. It is therefore important that civilian courts be able, from the very beginning, to conduct an inquiry and prosecute and try persons charged with such violations. The ex officio initiation of the preliminary inquiry by a civilian judge is a decisive step for avoiding all forms of impunity. The competence of the civilian judge should also make it possible to take the rights of the victims fully into account, at all stages of the proceedings.

18. This solution was favoured by the General Assembly when it adopted the Declaration on the Protection of All Persons from Enforced Disappearances, which stipulates that persons presumed responsible for such crimes "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts".[7] The constituent parts of the crime of disappearance cannot be considered to have been committed in the performance of military duties. Both the Sub-Commission[8] and the Commission[9] have adopted several resolutions that reaffirm this principle, which is enshrined in the practice of treaty monitoring bodies.[10] In her study on impunity commissioned by the Commission on Human Rights,[11] the independent expert, Ms. Diane Orentlicher, referred to this principle and noted that several countries had made progress in complying with this norm.[12]

19. In addition to the serious violations associated with certain military or authoritarian regimes, such as enforced disappearances, extrajudicial executions and systematic torture, it may be useful to consider the limit that should be placed on the concept of human rights violations. In this endeavour, the best guide should be the requirement of ensuring a fair trial before an independent and impartial tribunal and to guarantee fully the rights of the victims: even when an isolated act is involved, one may question the willingness of the military hierarchy to shed full light on an incident that is likely to damage the army's reputation and esprit de corps.

PRINCIPLE No. 4

Limitations on military secrecy

The rules that make it possible to invoke the secrecy of military information should not be diverted from their original purpose in order to obstruct the course of justice nor to violate human rights. Military secrecy may be invoked, under the supervision of independent monitoring bodies, when it is strictly necessary to protect information concerning national defence. Military secrecy may not be invoked:

(a) Where measures involving deprivation of liberty are concerned, which should not, under any circumstances, be kept secret, whether this involves the identity or whereabouts of persons deprived of their liberty;

(b) In order to obstruct the initiation or conduct of inquiries, proceedings or trials, whether they are of a criminal or disciplinary nature, or to ignore them;

(c) To deny judges and authorities delegated by law to exercise judicial activities access to documents and areas classified or restricted for reasons of national security;

(d) To obstruct the publication of court sentences;

(e) To obstruct the effective exercise of habeas corpus and other similar judicial remedies.

20. This principle speaks for itself. The invocation of military secrecy should not lead to the holding incommunicado of a person who is the subject of judicial proceedings, or who has already been sentenced or subjected to any degree of deprivation of liberty. The Human Rights Committee, in its General Comment No. 29 concerning states of emergency (article 4 of the Covenant) considered that "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages […], through arbitrary deprivations of liberty […]"[13] and that "the prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law".[14]

21. The exercise of the rights of the defence implies that any person who has been charged with an offence has the right to "communicate with counsel of his own choosing", in accordance with article 14, paragraph 3 (b), of the International Covenant on Civil and Political Rights, but also, in accordance with the principle of humanity and in order to ensure the effectiveness of the aforementioned obligation, with his family and relatives. Similarly, article 9, paragraph 4, of the Covenant attains its full scope only when the rights of the defence are respected, beginning with free access to counsel of one's own choosing. More generally, article 17, paragraph 1, of the Covenant provides that "no one shall be subjected to arbitrary or unlawful interference with his […] correspondence", which leaves open the possibility for the detainee to maintain contact with his family, his relatives or his lawyer. Several international norms emphasize the obligation to inform the families, as well as the lawyer, of persons deprived of their liberty of their arrest

or transfer.[15] The Human Rights Committee,[16] the Committee against Torture[17] and the Working Group on Enforced or Involuntary Disappearances[18] have on several occasions emphasized the importance of this obligation. In its General Comment No. 20 (1992), the Human Rights Committee stressed that "to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends". The Committee adds that "provisions should also be made against incommunicado detention" (para. 11).

22. In times of crisis, humanitarian law provides for the possibility of communication with the outside world, in accordance with section V of the Geneva Convention relative to the Treatment of Prisoners of War. It is important to recall that article 32 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) posits, as a general principle concerning missing and dead persons, "the right of families to know the fate of their relatives". This right was reaffirmed by the General Assembly in many resolutions concerning enforced disappearances. In his bulletin on observance by United Nations forces of international humanitarian law, the Secretary-General reaffirmed this right.[19]

23. It should also be stressed that persons deprived of their liberty should be held in official places of detention and the authorities should keep a register of detained persons.[20] As far as communication between persons deprived of their liberty and their lawyers is concerned, it should be recalled that the Basic Principles on the Role of Lawyers stipulate that "all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials".[21]

24. Without such fundamental guarantees, there is a great risk of a situation of enforced disappearance or arbitrary detention, without any possibility of an effective remedy at either the domestic or international level. In such cases, secrecy is merely a mask for the denial of justice.

PRINCIPLE No. 5

Guarantee of habeas corpus

In all circumstances, anyone who is deprived of his or her liberty shall be entitled to take proceedings, such as habeas corpus proceedings, before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The right to petition for a writ of habeas corpus or other remedy should be considered as a personal right, the guarantee of which should, in all circumstances, fall within the exclusive competence of the ordinary courts. In all circumstances, the judge must be able to have access to any place where the detainee may be held.

25. What has been said concerning access to independent counsel applies, mutatis mutandis, to access to a judge, by means of a habeas corpus application. The right of access to justice - the "right to the law" - is one of the foundations of the rule of law. In the words of article 9, paragraph 4, of the International Covenant on Civil and Political Rights: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." In wartime, the guarantees under humanitarian law, including the Fourth Geneva Convention, apply in full.

26. Habeas corpus is also related to article 2, paragraph 3, of the Covenant. In its General Comment No. 29 on states of emergency (art. 4 of the Covenant), the Human Rights Committee stated that "article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant, to provide a remedy that is effective. […] The Committee is of the opinion that [these] principles" and the provision relating to effective remedies "require that fundamental requirements of fair trial must be respected during a state of emergency". The same principle states that, "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State party's decision to derogate from the Covenant".[22]

27. The non-derogable nature of habeas corpus is also recognized in a number of declaratory international norms.[23] In resolution 1992/35, entitled "Habeas corpus", the Commission on Human Rights urged States to maintain the right to habeas corpus even during states of emergency. The Inter-American Court of Human Rights considered that judicial remedies for the protection of rights such as habeas corpus are not subject to derogation.[24]

PRINCIPLE No. 6

Right to a competent, independent and impartial tribunal

Where military tribunals exist, their organization and operation should fully ensure the right of everyone to a competent, independent and impartial tribunal, in particular with guarantees of the statutory independence of judges vis-à-vis the military hierarchy. The persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. The presence of civilian judges in the composition of military tribunals can only reinforce the impartiality of these jurisdictions.

28. This fundamental right is set out in article 10 of the Universal Declaration of Human Rights: "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." Article 14 of the International Covenant on Civil and Political

Rights, like the regional conventions, provides details of its practical scope. Regarding the concept of an independent and impartial tribunal, a large body of case law has spelled out the subjective as well as the objective content of independence and impartiality. Particular emphasis has been placed on the English adage that "justice should not only be done but should be seen to be done". It is also important to emphasize that the Human Rights Committee has stated that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception".[25]

29. The statutory independence of 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. The concept of impartiality is still more complex in the light of the above-mentioned English adage, as the parties have good reason to view the military judge as an officer who is capable of being "judge in his own cause" in any case involving the armed forces as an institution, rather than a specialist judge on the same footing as any other.

30. Emphasis should also be placed on the requirement that judges called on to sit in military courts should be competent, in particular in terms of the same legal training as that required of professional judges. The legal competence and ethical standards of military judges, as judges who are fully aware of their duties and responsibilities, form an intrinsic part of their independence and impartiality.

PRINCIPLE No. 7

Public nature of hearings

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

31. The instruments referred to above state that "everyone shall be entitled to a fair and public hearing". Public hearings are one of the fundamental elements of a fair trial. The only restrictions on this principle are those laid down in ordinary law, in keeping with article 14, paragraph 1, of the International Covenant on Civil and Political Rights: "The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice …". All these grounds must be strictly interpreted, particularly when "national security" is invoked, and must be applied only where necessary in "a democratic society".

32. The Covenant also states that "any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires …" (art. 14, para. 1). This is not the case, at least in principle, where proceedings in military courts are concerned. Here too, a statement of the grounds for a court ruling is a sine qua non for any possibility of a remedy and any effective supervision.

PRINCIPLE No. 8

Guaranteeing the rights of the defence and the right to a just and fair trial

The exercise of the rights of the defence must be fully guaranteed in military courts. All judicial procedures in military courts must contain the following guarantees:

(a) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law;

(b) Every accused person must be informed promptly of the details of the offence with which he or she is charged and, before and during the trial, must be guaranteed all the rights and facilities necessary for his or her defence;

(c) No one shall be punished for an offence except on the basis of individual criminal responsibility;

(d) Everyone charged with a criminal offence shall have the right to be tried without undue delay and in his or her presence;

(e) Everyone charged with a criminal offence shall have the right to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(f) No one may be compelled to testify against himself or herself or to confess guilt;

(g) Everyone charged with a criminal offence shall have the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(h) Everyone convicted of a crime shall have the right to his or her conviction and sentence being reviewed by a higher tribunal according to law;

(i) Every person found guilty shall be informed, at the time of conviction, of his or her rights to judicial and other remedies and of the time limits for the exercise of those rights.

33. In paragraph 4 of its General Comment No. 13 (1984), the Human Rights Committee stated that “the provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized”. In its jurisprudence and in its

General Comment No. 29, the Human Rights Committee considered that a number of procedural rights and judicial guarantees set out in article 14 of the International Covenant on Civil and Political Rights are not subject to derogation. At its eightieth session, held from 16 March to 3 April 2004, the Committee decided to draft a new General Comment on article 14 of the Covenant, particularly with a view to updating General Comment No. 13.

34. International humanitarian law establishes minimum guarantees in judicial matters.[26] Article 75, paragraph 4, of Protocol I to the Geneva Conventions reiterates the judicial guarantees set out in article 14, paragraphs 2 and 3, of the Covenant, and also those mentioned in article 15 of the Covenant. This article is not subject to derogation by virtue of article 4, paragraph 2, of the Covenant. It should be emphasized that, in paragraph 16 of its General Comment No. 29, the Human Rights Committee stated that "as certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations".

35. The provisions of article 14, paragraph 3 (d), of the Covenant should apply in full: "Everyone charged with a criminal offence shall have the right … to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." Similarly, the Basic Principles on the Role of Lawyers provide that "all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings" and that "governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence".[27]

36. The provision of legal assistance by military lawyers, particularly when they are officially appointed, has been challenged as inconsistent with respect for the rights of the defence. Simply in the light of the adage that "justice should not only be done but should be seen to be done", the presence of military lawyers damages the credibility of these jurisdictions. Yet experience shows that the trend towards the strict independence of military lawyers - if it proves to be genuine despite the fundamental ambiguity in the title - helps to guarantee to accused persons an effective defence that is adapted to the functional constraints involved in military justice, particularly when it is applied extraterritorially. Nevertheless, the principle of free choice of defence counsel should be maintained, and accused persons should be able to call on lawyers of their own choosing if they do not wish to avail themselves of the assistance of a military lawyer. For this reason, rather than advocating the simple abolition of the post of military lawyers, it seemed preferable to note the current trend, subject to two conditions: that the principle of free choice of defence counsel by the accused is safeguarded, and that the strict independence of the military lawyer is guaranteed.

PRINCIPLE No. 9

Access of victims to proceedings

Without prejudice to principle No. 3 relating to the jurisdiction of military courts, such courts should not exclude the victims of crimes or their successors from the judicial proceedings. The judicial proceedings of military courts should ensure that the rights of the victims of crimes - or their successors - are effectively respected, by guaranteeing that they:

(a) Have the right to report criminal acts and bring an action in the military courts so that judicial proceedings can be initiated;

(b) Have a broad right to intervene in judicial proceedings and are able to participate in such proceedings as a party to the case, a claimant for criminal indemnification, an amicus curiae or a party bringing a private action;

(c) Have access to judicial remedies to challenge the decisions and rulings of military courts that rule against them;

(d) Are protected against any ill-treatment and any act of intimidation or reprisal that might arise from the complaint or from their participation in the judicial proceedings.

37. 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 or his or her successors 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.

PRINCIPLE No. 10

Recourse procedures in the ordinary courts

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.

Conflicts of competence and jurisdiction between military courts and ordinary courts must be resolved by a higher judicial body, such as a supreme court or constitutional court, that forms part of the system of ordinary courts and is composed of independent, impartial and competent judges.

38. While the residual maintenance of first-degree military courts may be justified by their functions, there would seem to be no justification for the existence of a parallel hierarchy of military courts separate from ordinary law. Indeed, the requirements of proper administration of justice by military courts dictate that remedies are heard in civil courts, especially those

involving challenges to legality. In this way, at the appeal stage or, at the very least, the cassation stage, military courts would form "an integral part of the general judicial system". Such recourse procedures should be available to the accused and the victims, which presupposes that the victims are allowed to participate in the proceedings, particularly during the trial stage.

39. Similarly, an impartial judicial mechanism for resolving conflicts of jurisdiction or competence should be established. This principle is vital, because it guarantees that military courts do not constitute a parallel system of justice outside the control of the judicial authorities. It is interesting to note that this was recommended by the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions.[28]

PRINCIPLE No. 11

Due obedience and responsibility of the superior

Without prejudice to principle No. 3 relating to the jurisdiction of military courts:

(a) Due obedience may not be invoked to relieve a member of the military of the individual criminal responsibility that he or she incurs as a result of the commission of serious violations of human rights, such as extrajudicial executions, enforced disappearances and torture, war crimes or crimes against humanity;

(b) The fact that serious violations of human rights, such as extrajudicial executions, enforced disappearances and torture, war crimes or crimes against humanity have been committed by a subordinate does not relieve his or her superiors of criminal responsibility if they failed to exercise the powers vested in them to prevent or halt their commission, if they were in possession of information that enabled them to know that the crime was being or was about to be committed.

40. The principle of due obedience, often invoked in courts and tribunals, particularly military tribunals, should, in the framework of this review, be subject to the following limitations: the fact that the person allegedly responsible for a violation acted on the order of a superior should not relieve him or her of criminal responsibility. At most, this circumstance could be considered as grounds not for "extenuating circumstances" but for a reduced sentence. On the other hand, violations committed by a subordinate do not relieve his or her hierarchical superiors of their criminal responsibility 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.

41. It is important to emphasize that, where criminal proceedings and criminal responsibility are concerned, the order given by a hierarchical superior or a public authority cannot be invoked to justify extrajudicial executions, enforced disappearances, acts of torture, war crimes or crimes against humanity, nor to relieve the perpetrators of their individual criminal responsibility. This principle is set out in many international instruments.[29] At the national level, legislation in several countries expressly incorporates this prohibition, and a number of courts have rejected "due obedience" as a ground for relieving accused persons of criminal responsibility. In the field

of military criminal law, as one writer has stated, "the duty to obey is not an absolute one […] the principle of passive, blind obedience has lost its force in military criminal law [and, as regards the execution of orders which clearly involve the commission of a criminal offence] … the duty to obey is replaced by a duty to disobey".[30]

42. International law establishes the rule that the hierarchical superior bears criminal responsibility for serious violations of human rights, war crimes and crimes against humanity committed by personnel under his or her effective authority and/or control. The principle of the criminal responsibility of the negligent commanding officer is recognized in many international instruments, international case law and the legislation of a number of countries.

43. The Sub-Commission expressly adopted these two principles in article 9 of the draft international convention on the protection of all persons from forced disappearance (art. 9).[31]

PRINCIPLE No. 12

Conscientious objection to military service

Conscientious objector status should be determined under the supervision of an independent and impartial civil court, providing all the guarantees of a fair trial, irrespective of the stage of military life at which it is invoked.

44. As the Commission of Human Rights stated in its resolution 1998/77, it is incumbent on States to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held. By definition, in such cases military tribunals would be judges in their own cause. Conscientious objectors are civilians who should be tried in civil courts, under the supervision of ordinary judges.

45. When the right to conscientious objection is not recognized by the law, the conscientious objector is treated as a deserter and the military criminal code is applied to him or her. The United Nations has recognized the existence of conscientious objection to military service as a legitimate exercise of the right to freedom of thought, conscience and religion, as laid down in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[32] The Covenant ignores this subject, confining itself to stating that "the term 'forced or compulsory labour' shall not include … any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors" (art. 8, para. 3 (c) (*ii*)). The Covenant contains no provisions on the manner of granting this legal status, still less on how to decide the fate of objectors outside the arrangements laid down by law. But the Human Rights Committee has very clearly linked conscientious objection to the principle of freedom of conscience enshrined in article 18 of the Covenant.[33] It has expressed its concern on several occasions recently at the fact that military courts have punished conscientious objectors for failing to perform military service.[34] It considers that a person may invoke the right to conscientious objection not only before entering military service or joining the armed forces but also once he or she is in the service or even afterwards.[35]

46. In 1985, following an exhaustive study of the practice prepared for the Sub-Commission, Asbjørn Eide and Chama Mubanga-Chipoya made specific recommendations on this subject: "2 (a) States should maintain or establish independent decision-making bodies to determine whether a conscientious objection is valid under national law in any specific case. There should always be a right of appeal to an independent, civilian judicial body. (b) Applicants should be granted a hearing and be entitled to be represented by legal counsel and to call witnesses."[36]

47. At the very least, the following stipulations should be respected, in keeping with recommendation No. R (87) 8 of the Committee of Ministers of the Council of Europe:

> "Consideration of the application should contain all the guarantees necessary for a fair trial.
>
> "The applicant must be able to appeal the first-instance decision.
>
> "The appeals body should be separate from the military administration and its composition should ensure its independence."[37]

48. When the application for conscientious objector status is lodged before entry into military service, there should be no bar to the jurisdiction of an independent body under the control of a civilian judge under the ordinary law. The matter may appear more complicated when the application is lodged in the course of military service, when the objector is already in uniform and subject to military justice. Yet such an application should not be punished ipso facto as an act of insubordination or desertion, independently of any consideration of its substance, but should be examined in accordance with the same procedure by an independent body that offers all the guarantees of a fair trial. In the words of Mr. Dumitru Mazilu in his final report to the Sub-Commission on human rights and youth: "Conscripts should have the right to claim conscientious objector status at any time, since the claim is an exercise of the fundamental right to freedom of thought, conscience and religion."[38] This reasoning may be transposed to anyone performing military service - conscript or volunteer - who as a citizen in uniform must be able to preserve his or her most fundamental rights, beginning with freedom of conscience.[39]

PRINCIPLE No. 13

Incompetence of military tribunals to try children and minors under the age of 18

Strict respect for the guarantees provided in the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)[40] should govern the prosecution and punishment of minors, who fall within the category of vulnerable persons. In no case, therefore, should they be placed under the jurisdiction of military courts.

49. Article 40 and article 37 (*d*) of the Convention on the Rights of the Child list the specific safeguards applicable to minors under 18, on the basis of their age, in addition to the safeguards under ordinary law that have already been mentioned. These provisions allow for the ordinary

courts to be bypassed in favour of institutions or procedures better suited to the protection of children. A fortiori, these protective arrangements rule out the jurisdiction of military courts, in the case of persons who are both civilians and minors.

50. Young volunteers represent a borderline case, given that article 38, paragraph 3, allows the recruitment of minors aged between 15 and 18. In peacetime, the general provisions of the Convention on the Rights of the Child should be applicable. In the event of armed conflict, article 38 provides that the principles of international humanitarian law should apply. In this regard, special attention should be paid to the situation of child soldiers in the case of war crimes or large-scale violations of human rights. Only civilian courts would appear to be well placed to take into account all the requirements of the proper administration of justice in such circumstances, in the light of principle No. 3, and in keeping with the purposes of the Convention on the Rights of the Child.

51. The Committee on the Rights of the Child has adopted a very clear position of principle when making its concluding observations on country reports. In the case of one State party, the Committee noted with concern that "even children between 11 and 14 may not be subject to the Juvenile Courts Law if they are accused of having committed a crime falling under the jurisdiction of State security courts or military courts or if they live in areas under a state of emergency".[41] In another case, the Committee urged the State party, "in keeping with its ban on the recruitment of children as soldiers, to ensure that no child is tried by a military tribunal".[42] Clearly such situations are unacceptable, both in terms of the general principles governing the proper administration of justice and in terms of the specific requirements relating to protection of the rights of children.

PRINCIPLE No. 14

Military prison regime

Military prisons must comply with international standards and must be accessible to domestic and international inspection bodies.

52. Military prisons must comply with international standards in ordinary law, subject to effective supervision by domestic and international inspection bodies. In this regard, States should be encouraged to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible.

PRINCIPLE No. 15

Application of humanitarian law

In time of armed conflict, the principles of humanitarian law, and in particular the provisions of the Geneva Convention relative to the Treatment of Prisoners of War, are fully applicable to military courts.

53. Article 84 of the third Geneva Convention of 1949 reads: "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." All the provisions of the Convention are designed to guarantee strict equality of treatment "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). Should any doubt arise as to whether "persons having committed a belligerent act and having fallen into the hands of the enemy" are prisoners of war, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal" (art. 5).

PRINCIPLE No. 16

Non-imposition of the death penalty

Codes of military justice should reflect the international trend towards the gradual abolition of the death penalty, in both peacetime and wartime. In no circumstances shall the death penalty be imposed:

(a) For offences committed by persons aged under 18;

(b) On a pregnant woman;

(c) On the mother of a young child;

(d) On a person suffering from a mental disorder.

54. The trend towards 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.

55. In particular, the abolition of the death penalty with regard to vulnerable persons, particularly minors, should be observed in all circumstances, in keeping with article 6, paragraph 5, of the International Covenant on Civil and Political Rights, which provides that "sentence of death shall not be imposed for crimes committed by persons below 18 years of age …".

PRINCIPLE No. 17

Review of codes of military justice

Codes of military justice should be subject to periodic systematic review, conducted in an independent and transparent manner, so as to ensure that the jurisdiction of military courts corresponds to strict functional necessity, without encroaching on the jurisdiction that can and should belong to ordinary civil courts.

56. Since the sole justification for the existence of military courts is linked with practical eventualities, such as those related to peacekeeping operations or extraterritorial situations, there is a need to check periodically whether this functional requirement still prevails.

57. Each such review of codes of military justice should be carried out by an independent body, which should recommend legislative reforms designed to limit any residual jurisdiction which is unjustified and thus return, to the greatest extent possible, to the jurisdiction of the civil courts under ordinary law, while seeking to avoid double jeopardy.

58. More generally, this periodic review should ensure that military justice is appropriate and effective in terms of its practical justifications. It would also embody the fully democratic nature of an institution that must be accountable for its operations to the authorities and all citizens. In this way, the fundamental discussion concerning the existence of military justice as such can be conducted in a completely transparent way in a democratic society.

II. RECOMMENDATIONS

59. **As the rapporteur has already emphasized, it would be very useful to hold very broad consultations with States, international organizations, national organizations for the promotion and protection of human rights and NGOs, so that all those involved can examine in depth the draft set of principles on the administration of justice through military tribunals.**

60. **Similarly, in view of the fact that the Human Rights Committee decided, at its eightieth session, held from 16 March to 3 April 2004, to prepare a new General Comment concerning article 14 of the International Covenant on Civil and Political Rights, the rapporteur suggests that the present report should be forwarded to the Committee as a useful contribution to work on this new General Comment.**

61. **A second seminar of experts, including military experts (see paragraphs 4 and 10 above), should be organized by the International Commission of Jurists, under the auspices of the Office of the United Nations High Commissioner for Human Rights. Certain aspects deserve to be further explored, such as the scope of the principle of *non bis in idem* and of the overt conflicts of jurisdiction between military and ordinary courts; the distinction between disciplinary offences and offences and crimes under military law, and the list of offences in the codes of military justice, including cases where the codes are applied by the ordinary courts; powers of investigation and prosecution under the supervision of military justice and the role of the military police, prior to prosecution before military courts; the legal regime applying to military prisons and their place in the system of military justice as a whole; and the concept of "personnel treated as military personnel" (*personnels assimilés*) and the participation of paramilitary forces or private contracting parties in international occupation arrangements or peacekeeping operations.[43]**

Notes

[1] E/CN.4/Sub.2/1994/24, annexe II, principes 17 et 19.

[2] Observation générale n° 29, par. 16. Voir aussi la communication n° 263/1987, *González del Río* c. *Pérou*, décision du 20 novembre 1992, CCPR/C/46/D/263/1987, par. 5.2.

[3] Voir, notamment, le paragraphe 4 de l'article 75 du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I) et le paragraphe 2 de l'article 6 du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II).

[4] CICR, Commentaires du paragraphe 4 de l'article 75 du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), par. 3084.

[5] Ibid., Commentaires du paragraphe 2 de l'article 6 du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II), par. 4601.

[6] Voir les nombreux exemples cités par Federico Andreu-Guzman, *Military jurisdiction and international law, Military courts and civilians,* vol. II, Commission internationale de juristes (à paraître).

[7] Résolution 47/133 du 18 décembre 1992, art. 16, par. 2.

[8] Voir, par exemple, la résolution 1998/3 du 20 août 1998.

[9] Résolutions 2003/72 du 25 avril 2003, par. 14, et 2004/72 du 21 avril 2004, par. 16.

[10] Voir les nombreux exemples cités par Federico Andreu-Guzman, *Military jurisdiction and international law, Military courts and gross human rights violations*, vol. I, Commission internationale de juristes, Genève, 2004.

[11] Résolution 2003/72, par. 16.

[12] E/CN.4/2004/88, par. 42.

[13] CCPR/C/21/Rev.1/Add.11, 31 août 2001, par. 11.

[14] Ibid., par. 13.

[15] Ensemble de principes pour la protection de toutes les personnes soumises à une forme quelconque de détention ou d'emprisonnement, principes 16, 18 et 19; Déclaration sur la protection de toutes les personnes contre les disparitions forcées, art. 10, par. 2; Ensemble de règles minima pour le traitement des détenus, règle 92. Dans le même sens, voir les articles 137 et 138 de la quatrième Convention de Genève.

[16] Voir, notamment, CCPR/C/79/Add.43, par. 15, CCPR/C/79/Add.95, par. 12, et CCPR/C/79/Add.81, par. 23.

[17] Voir, notamment, A/54/44, par. 88 à 105.

[18] E/CN.4/1997/34, par. 26 et 30.

[19] ST/SGB/1999/13 du 6 août 1999.

[20] Déclaration sur la protection de toutes les personnes contre les disparitions forcées, art. 10, par. 1; Ensemble de règles minima pour le traitement des détenus, règle 7; Ensemble de principes pour la protection de toutes les personnes soumises à une forme quelconque de détention ou d'emprisonnement, principes 20 et 29; Règles pénitentiaires européennes, règles 7 et 8.

[21] Principe 8 des Principes de base relatifs au rôle du barreau, adoptés par le huitième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants (La Havane, 27 août-7 septembre 1990).

[22] CCPR/C/21/Rev.1/Add.11, par. 14 et 16.

[23] Ensemble de principes pour la protection de toutes les personnes soumises à une forme quelconque de détention ou d'emprisonnement, principe 32; Déclaration sur la protection de toutes les personnes contre les disparitions forcées, art. 9.

[24] Avis consultatifs OC-8/87, «*L'habeas corpus dans les situations d'urgence*», du 30 janvier 1987, et OC-9/87, «*Garanties judiciaires dans les états d'urgence*», du 6 octobre 1987.

[25] Communication n° 263/1987, *González del Río* c. *Pérou*, décision du 20 novembre 1992, CCPR/C/46/D/263/1987, par. 5.2.

[26] Voir, notamment, le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), art. 75, par. 4, et le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II), art. 6.

[27] Principes 1 et 5 des Principes relatifs au rôle du barreau, adoptés par le huitième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants (La Havane, 27 août-7 septembre 1990).

[28] E/CN.4/1995/111, par. 120.

[29] Déclaration sur la protection de toutes les personnes contre les disparitions forcées, art. 6, par. 1; Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, art. 2, par. 3; Code de conduite pour les responsables de l'application des lois, art. 5; Statut du Tribunal pénal international pour l'ex-Yougoslavie (art. 7.4); Statut du Tribunal pénal international pour le Rwanda (art. 6.4); Statut de Rome de la Cour pénale internationale (art. 33).

[30] S. Erman, «Rapport général: l'obéissance militaire au regard des droits pénaux internes et du droit de la guerre», *in Cinquième Congrès international, Dublin, 25-30 mai 1970, L'obéissance militaire au regard des droits pénaux internes et du droit de la guerre*, Recueils de la Société internationale de droit pénal militaire et de droit de la guerre, vol. 1, Strasbourg, 1971, p. 357.

[31] E/CN.4/Sub.2/1998/19, annexe.

[32] Assemblée générale, résolution 33/165 du 20 décembre 1978; Commission des droits de l'homme, résolution 38 (XXXVI) de 1980, 1987/46 de 1987, 1989/59 de 1989, 1993/84 de 1993, 1995/83 de 1995 et 1998/77 de 1998; Comité des droits de l'homme, observation générale n° 22 (1993); décisions du Comité des droits de l'homme relatives aux communications nos 446/1991 (par. 4.2), 483/1991 (par. 4.2) et 402/1990 (affaire *Henricus Antonius Godefriedus Maria Brinkof* c. *Pays-Bas*).

[33] Observation générale n° 22 (1993).

[34] Observations finales du Comité des droits de l'homme: Arménie, 19 novembre 1998, CCPR/C/79/Add.100, par. 18, et Observations finales du Comité des droits de l'homme: Israël, 21 août 2003, CCPR/CO/78/ISR, par. 24.

[35] Observations finales du Comité des droits de l'homme: France, CCPR/C/79/Add.80, 4 août 1997, par. 19, et Observations finales du Comité des droits de l'homme: Espagne, CCPR/C/79/Add.61, 3 avril 1996, par. 15.

[36] Publication des Nations Unies, numéro de vente: E.85.XIV.1.

[37] Recommandation n° R (87) 8 relative à l'objection de conscience au service militaire obligatoire, adoptée par le Comité des ministres le 9 avril 1987. Voir aussi le rapport de M. Dick Marty, *Exercice du droit à l'objection de conscience au service militaire dans les États membres du Conseil de l'Europe*, APCE, Doc. 8809 du 13 juillet 2000.

[38] E/CN.4/Sub.2/1992/36, par. 104.

[39] Voir aussi la résolution 2004/35 sur l'objection de conscience au service militaire adoptée par la Commission des droits de l'homme le 19 avril 2004.

[40] Adopté par l'Assemblée générale dans sa résolution 40/33 du 29 novembre 1985.

[41] Observations finales du Comité des droits de l'enfant: Turquie, 9 juillet 2001, CRC/C/15/Add.152, par. 65.

[42] Observations finales du Comité des droits de l'enfant: République démocratique du Congo, 9 juillet 2001, par. 75.

[43] Les travaux de la Sous-Commission à la suite de l'étude de Mme Françoise Hampson sur le champ des activités et de la responsabilité des forces armées, de la police civile des Nations Unies, des fonctionnaires internationaux et des experts participant à des opérations de soutien à la paix contribueront également à préciser ces questions importantes.
