

## **Civis processados e julgados por cortes militares**

### **1 – Corte Interamericana de Direitos Humanos – rejeita de plano**

No caso *Castillo Pettruzi et al. v. Peru* esta corte condenou o Estado-respondente à violação do Artigo 8 (garantias judiciais) da Convenção Americana de Direitos Humanos, pelo fato de a vítima ter sido condenada por um tribunal militar, pelo crime de traição à pátria, *verbis* :

A Corte adverte que a jurisdição militar foi estabelecida em diversas legislações com o fim de manter a ordem e a disciplina dentro das forças armadas. Inclusive, esta jurisdição militar tem sua aplicação reservada aos militares que tenham incorrido em delito ou falta dentro do exercício das suas funções e sob certas circunstâncias (...) De fato, a jurisdição militar é naturalmente inaplicável a civis que carecem de funções militares e que, por isto, não podem incorrer em condutas contrárias a deveres funcionais de similar caráter.<sup>1</sup>

O mesmo entendimento é confirmado pela mesma corte no caso *Durand e Ugarte*, *verbis*:

Em um governo democrático, a jurisdição penal militar deve ter um escopo restrito e excepcional e deve proteger interesses jurídicos específicos, relacionados às funções exercidas pelas forças militares. Consequentemente, civis devem ser excluídos do âmbito da jurisdição militar e somente militares devem ser julgados pela comissão de crimes e ofensas que pela sua natureza própria atentem aos interesses protegidos pela ordem militar..<sup>2</sup>

### **2 - Comissão Africana dos Direitos Humanos e dos Povos**

#### **a) rejeição total de cortes militares para julgar civis**

#### **Media Rights Agenda v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 224/98 (2000).**

<http://www1.umn.edu/humanrts/africa/comcases/224-98.html>

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<sup>1</sup> CorteIDH, caso *Castillo Pettruzi v. Peru*, mérito, reparações e custas. Sentença de 30 de maio de 1999. Série C, No. 52, para 128.

<sup>2</sup> CorteIDH, caso *Durand and Ugarte v. Peru*, mérito. Sentença de 16 de agosto de 2000. Serie C, No. 68, para. 117.

62. It is fitting, in this regard, to cite the Commission's general position on the issue of trials of civilians by Military Tribunals. In its Resolution on the Right to Fair Trial and Legal Assistance in Africa, the Commission had, while adopting the Dakar Declaration and Recommendations noted thus:

*"In many African countries Military Courts and Special Tribunals exist alongside regular judicial institutions. The purpose of Military Courts is to determine offences of a pure military nature committed by military personnel. While exercising this function, Military Courts are required to respect fair trial standards."*

### **3 - Comitê de Direitos Humanos da ONU**

**- Este comitê não proíbe de plano, mas requer dos Estados uma justificativa da gravidade do caso e da extrema necessidade de julgar um civil num tribunal militar**

**Comentário Geral 32 – civis devem ser julgados em tribunais militares somente em situações excepcionais, devendo demonstrar o Estado razões sérias, justificadas e objetivas, quando as cortes civis não tiverem condições de julgar os civis em questão.**

<http://daccessdds.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>

22. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional,<sup>36</sup> i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and wherewith regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.

**Caso Madani v. Algeria, referência CCPR/C/89/D/1172/2003, 21 June 2007**

<http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/c99ab80923bab3a1c1257340003612e1?OpenDocument>

A vítima era um operário que foi preso por “atentar à segurança nacional” ao organizar uma greve geral.

Neste caso, a Argélia foi condenada à violação do Artigo 14 (direito a um julgamento justo) porque não conseguiu provar a excepcionalidade de julgar um civil na corte militar e não demonstrou uma alternativa civil para processar e julgar a vítima

8.7 As far as the alleged violation of article 14 of the Covenant is concerned, the Committee recalls its general comment No. 13, in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent on a State party that does try civilians before military courts to justify the practice. The Committee considers that the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable. The State party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14. In the present case the State party has not shown why recourse to a military court was required. **In commenting on the gravity of the charges against Abbassi Madani it has not indicated why the ordinary civilian courts or other alternative forms of civilian court were inadequate to the task of trying him. Nor does the mere invocation of domestic legal provisions for the trial by military court of certain categories of serious offences constitute an argument under the Covenant in support of recourse to such tribunals.** The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. The Committee concludes that the trial and sentence of Abbassi **Madani** by a military tribunal discloses a violation of article 14 of the Covenant.

----- Contudo, o mesmo comitê criticou duramente países que mantêm jurisdição militar contra civis

Veja: no relatório da Polônia (Concluding Observations of the Human Rights Committee: Poland, Doc. CCPR/C/79/ Add. 110, 29 July 1999, § 21).

“military courts should not have the faculty to try cases which do not refer to offences committed by members of the armed forces in the course of their duties”.

O comitê pediu mais informações “concerned at information about the extent to which military courts have jurisdiction to try civilians; despite recent limitations on this procedure, the Committee does not accept that this practice is justified by the convenience of the military court dealing with every person who may have taken some part in an offence primarily committed by a member of the armed forces”

Mesmo com o relatório da Eslováquia: Concluding Observations of the Human Rights Committee: Slovakia, Doc. CCPR/C/79/Add. 79, 4 August 1997, § 20).

## 4 – Comitê contra a Tortura da ONU (CAT)

### O Comitê proíbe de plano:

Os tribunais militares devem abster-se de processarem civis, restringindo sua jurisdição a ofensas militares, ao introduzir as mudanças constitucionais e legislativas apropriadas.<sup>3</sup>

## 5 – Corte Europeia de Direitos Humanos

### Rejeita também

Há inúmeros casos, o mais relevante parecer ser este abaixo:

#### CASE OF ERGIN v. TURKEY (No. 6)

*(Application no. 47533/99)*

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%22military%20jurisdiction%22&sessionid=11793664&skin=hudoc-en>

49. Lastly, situations in which a military court has jurisdiction to try a civilian for acts against the armed forces may give rise to reasonable doubts about such a court's **objective impartiality**. A judicial system in which a military court is empowered to try a person who is not a member of the armed forces may easily be perceived as reducing to nothing the distance which should exist between the court and the parties to criminal proceedings, even if there are sufficient safeguards to guarantee that court's independence.

**Há outros casos em que a Corte Europeia enfatizou “que o fato de um civil ter que se apresentar ante corte composta, mesmo que parcialmente, por membros das forças armadas, diminui consideravelmente a confiança que as cortes devem inspirar numa sociedade democrática** - (see, most recently, *Öcalan v. Turkey* [GC], no. 46221/99, § 116, ECHR 2005, and *Şahiner v. Turkey*, no. 29279/95, § 45, ECHR 2001-IX). Veja também - *Canevi and Others v. Turkey*, no. 40395/98, § 33, 10 November 2004).

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<sup>3</sup> CAT: Observações Conclusivas relativas ao Peru. Doc. ONU A/50/44, 26 de julho de 1995, para. 69.

## **6 - Há um projeto sobre os Princípios da Administração da Justiça por tribunais militares, vale a pena ler:**

### **DRAFT PRINCIPLES GOVERNING THE ADMINISTRATION OF JUSTICE THROUGH MILITARY TRIBUNALS**

#### **Principle No. 1**

##### **Establishment of military tribunals by the constitution or the law**

Military tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of the general judicial system.

13. The Basic Principles on the Independence of the Judiciary, adopted by the General Assembly 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 by the executive or the military in the administration of justice.

14. The doctrinal issue of the legitimacy of military courts will not be decided here, as indicated in previous reports (E/CN.4/Sub.2/2003/4, para. 71, E/CN.4/Sub.2/2004/7, para. 11 and E/CN.4/Sub.2/2005/9, para. 11), 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 “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”.<sup>1</sup>

#### **Principle No. 2**

##### **Respect for the standards of international law**

Military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.

15. Military tribunals, when they exist, must in all circumstances respect the principles of international law relating to a fair trial. This is a matter of 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 of the Covenant 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. 29.2 Without such basic guarantees, we would be faced with a denial of justice, pure and simple. These guarantees are made explicit in the principles below.

### **Principle No. 3**

#### **Application of martial law**

In times of crisis, recourse to martial law or special regimes should not compromise the guarantees of a fair trial. Any derogations "strictly required by the exigencies of the situation" should be consistent with the principles of the proper administration of justice. In particular, military tribunals should not be substituted for ordinary courts, in derogation from ordinary law.

16. This new principle was introduced pursuant to the fifty-seventh session of the Sub-Commission, at the suggestion of Ms. Francoise Hampson. Its purpose is to take account of situations of internal crisis arising in the aftermath of a natural disaster or a "public emergency" within the meaning of article 4 of the International Covenant on Civil and Political Rights, when martial law or similar exceptional regimes, such as a state of siege or emergency, are declared. This is a grey area, in which serious derogations may be made from the normal guarantees associated with the rule of law yet the safeguards provided under international humanitarian law do not necessarily apply. As the Human Rights Committee has emphasized in general comment No. 29, referred to above, "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. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency" (para. 16). Any derogations "strictly required by the exigencies of the situation" should be consistent with the principles of the proper administration of justice. Consequently, all the principles relating to the administration of justice by military tribunals should continue to apply in full. In particular, military tribunals should not be substituted for ordinary courts, in derogation from ordinary law, by being given jurisdiction to try civilians.

### **Principle No. 4**

#### **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.

17. International humanitarian law also establishes minimum guarantees in judicial matters. Article 75, paragraph 4, of Protocol I to the Geneva Conventions of 12 August 1949 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”.<sup>3</sup> 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’”.<sup>4</sup> 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 than, if not equal to, that recognized in wartime.

18. Article 84 of the Geneva Convention relative to the Treatment of Prisoners of War 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).

19. Moreover, under the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, in situations of military occupation, “in case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country (art. 66). The Convention stipulates that “the court shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence” (art. 67). The

reference to “general principles of law”, even in the application of *lex specialis*, is worthy of particular note.<sup>5</sup>

## **Principle No. 5**

### **Jurisdiction of military courts to try civilians**

Military courts should, in principle, have no jurisdiction 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.

20. In paragraph 4 of its general comment No. 13 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 serious 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”.

21. The Human Rights 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 authority 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 is unanimous on this point.<sup>6</sup> As the Basic Principles on the Independence of the Judiciary put it, “everyone has 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” (para. 5).

## **Principle No. 6**

### **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.

22. As the Commission on 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.

23. 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.<sup>7</sup> The Human Rights Committee has very clearly linked conscientious objection to the principle of freedom of conscience enshrined in article 18 of the Covenant.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

24. 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.

25. In resolution 2004/35 on conscientious objection to military service, adopted without a vote on 19 April 2004, the Commission, “recalling all its previous resolutions on the subject, in particular resolution 1998/77 of 22 April 1998, in which the Commission recognized the right of everyone to have conscientious objection to military service as a legitimate exercise of the right to freedom of thought, conscience and religion, as laid down in article 18 of the Universal Declaration of Human Rights and article 18 of the International Covenant on Civil and Political Rights and general comment No. 22 (1993) of the Human Rights Committee”, took note of “the compilation and analysis of best practices” in the report of the Office of the United Nations High Commissioner for Human Rights (E/CN.4/2004/55) and called “upon States that have not yet done so to review their current laws and practices in relation to conscientious objection to military service in the light of its resolution 1998/77, taking account of the information contained in the report” (para. 3). It also encouraged States, “as part of post-conflict peace-building, to consider granting, and effectively implementing, amnesties and restitution of rights, in law and practice, for those who have refused to undertake military service on grounds of conscientious objection” (para. 4).

## **Principle No. 7**

### **Jurisdiction of military tribunals to try 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) should govern the prosecution and punishment of minors, who fall within the category of vulnerable persons.<sup>11</sup> In no case, therefore, should minors be placed under the jurisdiction of military courts.

26. Articles 40 and 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 minors.

27. Young volunteers represent a borderline case, given that article 38, paragraph 3, of the Convention allows the recruitment of minors aged between 15 and 18 if States have not ratified the Optional Protocol on the involvement of children in armed conflicts. 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.

28. 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 keeping with the purposes of the Convention. The Committee on the Rights of the Child has adopted a very clear position of principle when making its concluding observations on country reports.

## **Principle No. 8**

### **Functional authority of military courts**

The jurisdiction of military courts 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.

29. The jurisdiction 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 jurisdiction 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 active or passive jurisdiction for practical reasons arising from the remoteness of the action, while the local court that would be territorially competent is confronted with jurisdictional immunities.

30. The distinction between combatants and non-combatants and the protection of civilian persons in time of war both require special attention in the light of the 1949 Geneva Conventions and their two Additional Protocols of 1977 (cf. supra).

31. Similarly, thought needs to be given to the situation of military and assimilated personnel, including civilian police taking part in peacekeeping operations and paramilitaries or private contractors taking part in international occupation arrangements.

## **Principle No. 9**

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

In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.

32. 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 cases by questioning the appropriateness of prosecutions, tending to file cases with no action taken or manipulating “guilty pleas” to victims’ detriment. Civilian courts must therefore be able, from the outset, to conduct inquiries and prosecute and try those charged with such violations. The initiation by a civilian judge of a preliminary inquiry is a decisive step towards avoiding all forms of impunity. The authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings.

33. This was the solution 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”.<sup>12</sup> The constituent parts of the crime of enforced disappearance cannot be considered to have been committed in the performance of military duties. The Working Group on Enforced or Involuntary Disappearances mentioned this principle in its most recent report, referring to the need to have recourse to a “competent civilian court”.<sup>13</sup> The 1994 Inter-American Convention on Forced Disappearance of Persons establishes the same principle in article IX. It is noteworthy, however, that the draft international convention on the protection of all persons from enforced disappearance avoids the question, stipulating only in article 11, paragraph 3, that “any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law”<sup>14</sup>

34. The scope of the principle has been extended in the updated Set of principles for the promotion and protection of human rights through action to combat impunity: “The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations,

which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.”<sup>15</sup>

35. Above all, it must be observed that the doctrine and jurisprudence of the Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child, the African Commission on Human and Peoples’ Rights, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights and the country-specific and thematic procedures of the United Nations Commission on Human Rights, are unanimous: military tribunals are not competent to try military personnel responsible for serious human rights violations against civilians.<sup>16</sup>

## **Principle No. 10**

### **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 or 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 the 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 a 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.

36. 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 [...]” (para. 11), and “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” (para. 13).

37. In its general comment No. 20, 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).

38. 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, of 12 August 1949. The European Court of Human Rights has described the situation of families lacking information on the fate of their near and dear ones as “inhuman treatment” within the meaning of article 3 of the European Convention on Human Rights, in *Cyprus v. Turkey*, 2001.<sup>17</sup> The Human Rights Committee and the Inter-American Court of Human Rights and Inter-American Commission on Human Rights have followed the same approach. 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”.

39. 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.<sup>18</sup> 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”.<sup>19</sup>

## **Principle No. 11**

### **Military prison regime**

Military prisons must comply with international standards, including the Standard Minimum Rules for the Treatment of Prisoners, the Basic Principles for the Treatment of Prisoners, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and must be accessible to domestic and international inspection bodies.

40. Military prisons must comply with international standards in ordinary law, subject to effective supervision by domestic and international inspection bodies. In the same way that military justice must conform to the principles of the proper administration of justice, military prisons must not depart from international standards for the protection of individuals subject to detention or imprisonment. In keeping with the preceding principles and pursuant to the principle of “separation of categories” cited in the Standard Minimum Rules for the Treatment of Prisoners, it should not be possible for a civilian to be held in a military prison. This applies to disciplinary blocks as well as military prisons or other internment camps under military supervision, and to all prisoners, whether in pretrial detention or serving sentence after conviction for a military offence.

41. 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. Article 4, paragraph 2 of the Protocol stipulates that “deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority”.

## **Principle No. 12**

### **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 jurisdiction of the ordinary courts. In all circumstances, the judge must be able to have access to any place where the detainee may be held.

42. 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 Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, apply in full.

43. Habeas corpus is also related to article 2, paragraph 3, of the Covenant. In its general comment No. 29 on states of emergency (article 4 of the Covenant), the Human Rights Committee stated (paras. 14 and 16) 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”. It follows from the same principle 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”.

44. The non-derogable nature of habeas corpus is also recognized in a number of declaratory international norms.<sup>20</sup> 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.<sup>21</sup>

## **Principle No. 13**

### **Right to a competent, independent and impartial tribunal**

The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. 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. Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy. In no circumstances should military courts be allowed to resort to procedures involving anonymous or “faceless” judges and prosecutors.

45. 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”.<sup>22</sup>

46. 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. The presence of civilian judges in the composition of military tribunals can only reinforce the impartiality of such tribunals.

47. Emphasis should also be placed on the requirement that judges called on to sit in military courts should be competent, having undergone 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.

48. The system of anonymous or “faceless” military judges and prosecutors has been heavily criticized by the Human Rights Committee, the Committee against Torture, the Special Rapporteur on the independence of judges and lawyers, and others. The

Human Rights Committee has ruled that in a system of trial by “faceless judges”, neither the independence nor the impartiality of the judges is guaranteed, and such a system also fails to safeguard the presumption of innocence.<sup>23</sup>

## **Principle No. 14**

### **Public nature of hearings**

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

49. 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”.

50. 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 ...”. 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 condition sine qua non for any possibility of a remedy and any effective supervision.

## **Principle No. 15**

### **Guarantee of 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 under all circumstances. All judicial proceedings in military courts must offer the following guarantees:

- (a) Everyone charged with a criminal offence shall 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) No statement or item of evidence which is established to have been obtained through torture, cruel, inhuman or degrading treatment or other serious violations of human rights or by illicit means may be invoked as evidence in the proceedings;

(i) No one may be convicted of a crime on the strength of anonymous testimony or secret evidence;

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

(k) 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.

51. In paragraph 4 of its general comment No. 13, the Human Rights Committee stated that “the provisions of article 14 [of the International Covenant on Civil and Political Rights] 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 Committee considered that a number of procedural rights and judicial guarantees set out in article 14 of the Covenant are not subject to derogation. At its eightieth session, in 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.

52. International humanitarian law establishes minimum guarantees in judicial matters.<sup>24</sup> 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 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”.

53. 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 lawyer, 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. 16**

### **Access of victims to proceedings**

Without prejudice to the principles relating to the jurisdiction of military courts, such courts should not exclude the victims of crimes or their successors from judicial proceedings, including inquiries. 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, e.g. a claimant for criminal indemnification, an amicus curiae or a party bringing a private action;
- (c) Have access to judicial remedies to challenge decisions and rulings by military courts against their rights and interests;
- (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.

54. All too often, victims are still excluded from investigations when a military court has jurisdiction; this makes it easy to file cases without taking action on grounds of expediency, or to make deals or come to amicable arrangements that flout victims' rights and interests. 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 all stages of the investigation and at the reading of the judgement, with prior access to all the evidence in the file.

## **Principle No. 17**

### **Recourse procedures in the ordinary courts**

In all cases where military tribunals exist, their authority should be limited to ruling in first instance. 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 authority and jurisdiction between military tribunals 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.

55. In resolution 2005/30, "Integrity of the judicial system", the Commission on Human Rights highlighted this issue with a reference to "procedures that are recognized according to international law as guarantees of a fair trial, including the

right to appeal a conviction and a sentence” (para. 8).

56. While the residual maintenance of first-degree military courts may be justified by their functional authority, there would seem to be no justification for the existence of a parallel hierarchy of military tribunals separate from ordinary law. Indeed, the requirements of proper administration of justice by military courts dictate that remedies, especially those involving challenges to legality, are heard in civil courts. In this way, at the appeal stage or, at the very least, the cassation stage, military tribunals would form “an integral part of the general judicial system”. Such recourse procedures should be available to the accused and the victims; this presupposes that victims are allowed to participate in the proceedings, particularly during the trial stage.

57. Similarly, an impartial judicial mechanism for resolving conflicts of jurisdiction or authority should be established. This principle is vital, because it guarantees that military tribunals 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.<sup>25</sup>

## **Principle No. 18**

### **Due obedience and responsibility of the superior**

Without prejudice to the principles relating to the jurisdiction of military tribunals:

(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 a serious violation of human rights, such as an extrajudicial execution, an enforced disappearance, torture, a war crime or a crime against humanity has 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.

58. 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.

Conversely, violations committed by a subordinate do not relieve his or her hierarchical superiors of their criminal responsibility if they knew or had reason to know that their subordinate was committing, or was about to commit, such violations, and they did not take the action within their power to prevent such violations or restrain their perpetrator.

59. 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, 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.

60. 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.

## **Principle No. 19**

### **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 or carried out:

- (a) For offences committed by persons aged under 18;
- (b) On pregnant women or mothers with young children;
- (c) On persons suffering from any mental or intellectual disabilities.

61. The trend towards the gradual abolition of capital punishment, including in cases of international crimes, should be extended to military justice, which provides fewer guarantees than the ordinary courts since, owing to the nature of the sentence, judicial error in this instance is irreversible.

62. Although the death penalty is not prohibited under international law, international human rights instruments clearly lean towards abolition.<sup>26</sup> In particular, the application of the death penalty to vulnerable persons, particularly minors, should be avoided 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 ...”. Imposition of the death penalty on pregnant women, mothers with young children and people with mental or intellectual disabilities is also prohibited, as stated in Commission resolution 2005/59 on the question of the death penalty (para. 7 (a), (b) and (c)).

63. In the same resolution, the Commission “urges all States that still maintain the death penalty ... to ensure that all legal proceedings, including those before special tribunals or jurisdictions, and particularly those related to capital offences, conform to the minimum procedural guarantees contained in article 14 of the International Covenant on Civil and Political Rights” (para. 7 (e)). Sub-Commission resolution 2004/25 recommends that the death penalty should not be imposed on civilians tried by military tribunals or by courts in which one or more of the judges is a member of the armed forces. The same should apply to conscientious objectors on trial for

desertion before military tribunals.

## **Principle No. 20**

### **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 authority of military tribunals corresponds to strict functional necessity, without encroaching on the jurisdiction that can and should belong to ordinary civil courts.

64. Since the sole justification for the existence of military tribunals has to do 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.

65. 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 unjustified residual authority and thus return, to the greatest extent possible, to the jurisdiction of the civil courts under ordinary law, while seeking to avoid double jeopardy.

66. More generally, this periodic review should ensure that military justice is appropriate and effective in relation to its practical justification. 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.

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