DECAUX PRINCIPLES WORKSHOP

THE YALE DRAFT

The following document – The Yale Draft – is the result of a workshop held at Yale Law School on March 23-24, 2018 with generous financial support from the Oscar M. Ruebhausen Fund. Participants attended in their personal capacities only and proceedings were conducted on the understanding that speakers' comments would not be attributed to any particular individual or institution. The participants are listed below. Affiliations are shown solely for the purpose of identification. Participation in the workshop does not imply endorsement of the draft.

The Yale Draft should not be understood to represent the opinion or position of any particular individual or institution, government, or international or non-governmental organization. The document is not by any means intended as the final word on the administration of justice through military tribunals, but we hope it will be helpful in connection with further consideration of the principles that govern this important subject.

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Yale Law School students Pilar Brito and Tomo Takaki were the Research Assistants for the Decaux Principles Workshop. Event coordination services were provided by Renee DeMatteo and Barbara Corcoran. Lionel Niyange provided audio-visual assistance. Rebekah Doyle provided invaluable administrative support for the workshop and preparation of this report.

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Introduction

1. At its sixty-first session, the former Commission on Human Rights referred to the continuing study on the issue of the administration of justice through military tribunals in two mutually complementary resolutions, 2005/30 and 2005/33, both adopted on 19 April 2005.

2. In resolution 2005/30, "Integrity of the judicial system", adopted by a recorded vote of 52 votes to none, with 1 abstention – the United States of America, which had requested the vote – the Commission, noting resolution 2004/27 of 12 August 2004, of the former Sub-Commission on the Promotion and Protection of Human Rights, took note of "the report submitted by the Special Rapporteur of 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.2/2004/7)" (para. 1) and requested "the Special Rapporteur of the Sub-Commission on the issue of the administration of justice through military tribunals to continue to take account of the present resolution in his ongoing work" (para. 10).

3. That resolution contained highly important provisions relating to earlier Commission resolutions on the same subject, notably resolution 2004/32 of 19 April 2004. In it, the Commission reaffirmed that "according to paragraph 5 of the Basic Principles on the Independence of the Judiciary, 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" (para. 3). It "calls upon States that have military courts or special criminal tribunals for trying criminal offenders to ensure that such courts are an integral part of the general judicial system and that such courts apply due process 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).

4. The second reference to the study appeared in resolution 2005/33, "Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers", which was adopted without a vote. This was still more specific, taking note "of the report submitted by Mr. Emmanuel Decaux to the Sub-Commission on the Promotion and Protection of Human Rights on the administration of justice through military tribunals (E/CN.4/Sub.2/2004/7), which includes draft principles governing the administration of justice through military tribunals" (para. 11) and noting "that the report of Mr. Decaux containing an updated version of the draft principles will be submitted to [it] at its sixty-second session for its consideration" (para. 12).

5. The Commission thus established both the conceptual framework and the schedule for the study, specifying that the updated version should be transmitted to it in 2006. The submission of the updated version was intended to mark the end of an undertaking in which the Sub-Commission was engaged for several years, beginning with the questionnaire drawn up by Mr. Louis Joinet for his report to the Sub-Commission at its fifty-third session (E/CN.4/Sub.2/2001/WG.1/CRP.3, annex), followed by his report to the fifty-fourth session (E/CN.4/Sub.2/2002/4), and the reports by Mr. Decaux to the fifty-fifth session (E/CN.4/Sub.2/2003/4), fifty-sixth session (E/CN.4/Sub.2/2004/7) and fifty-seventh session (E/CN.4/Sub.2/2005/9). Following its decision 2002/103 of 12 August 2002, the Sub-Commission itself discussed the issue in depth, adopting resolutions 2003/8, 2004/27 and 2005/15, in each case without a vote.

6. At its fifty-seventh session, the Sub-Commission, after an in-depth discussion, welcomed the report submitted by Mr. Decaux (E/CN.4/Sub.2/2005/9) and on 10 August 2005 adopted, without a vote, resolution 2005/15, in which it decided "to transmit the updated draft principles to the Commission on Human Rights for its consideration, together with the comments of the Sub-Commission during the present session" (para. 4). To that end, the Sub-Commission requested Mr. Decaux to revise the draft principles, taking into account the comments and observations of the Sub-Commission, in order to facilitate the examination by the Commission of the draft principles (para. 5). That document was submitted to the Commission, together with the comments and observations of the members of the Sub-Commission mentioned below.

7. An interactive dialogue held on 28 July 2005 following the introduction of the report was constructive and lively. A number of members (Ms. Hampson, Mr. Salama, Mr. Rivkin, Ms. Motoc, Ms. Koufa, Ms. Sardenberg, Mr. Cherif, Mr. Alfredsson and Mr. Yokota) and several non-governmental organizations (NGOs) took an active part in the discussion. Ms. Hampson stressed the need to include in the set of principles one dealing specifically with the application of martial law in exceptional circumstances, allowing civilians to be tried under military law, which is preferable to no justice at all. Recourse to martial law should continue to be quite exceptional, provide guarantees of a fair trial and preclude the imposition of the death penalty. Mr. Rivkin was of the opinion that military justice could be equal, or even superior, to civilian justice, insofar as it is administered by competent individuals who have seen or been trained in combat and have a better understanding of what happens in wartime. He also defended the setting up of ad hoc courts alongside the ordinary courts. Lastly, he said he did not agree with Ms. Hampson's suggestion regarding non-application of the death penalty to civilians, since in his view death could be an appropriate punishment. Ms. Hampson emphasized that the issue was not capital punishment but a fair trial. She recalled numerous cases showing that insufficient guarantees of a fair trial were provided by military tribunals.

8. Many members of the Sub-Commission congratulated Mr. Decaux on his report: Ms. Koufa described it as an excellent and exemplary piece of work which set a new standard for the Sub-Commission. Ms. Motoc said she found the principles extremely useful but wondered about their application in failed States where the ordinary courts had ceased to function. In the Democratic Republic of the Congo, justice reform had begun with a reform of military justice. Mr. Yokota said that, based on his experience as Special Rapporteur on the situation of human rights in Myanmar, he considered that military tribunals did not offer a fair system of justice. He wondered whether human rights violations committed by soldiers should fall within the jurisdiction of military courts. Mr. Alfredsson pointed out that military tribunals must comply with the rules of international human rights law not only in respect of civilians but also in respect of military operations. Lastly, Mr. Salama said he shared Mr. Decaux's view that it was better to civilize military tribunals than to demonize them.

9. Mr. Decaux took account of recent developments and newly available information on the subject. In this regard, a seminar organized by the International Commission of Jurists (ICJ) in Geneva from 26 to 28 January 2004, 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 NGOs based in Geneva. This was followed up by another ICJ seminar early in 2006 to discuss the revised principles set out in E/CN.4/2006/58, as requested by the Sub-

Commission, which, in its resolution 2005/15, expressed the wish that "under the auspices of the Office of the United Nations High Commissioner for Human Rights, a second seminar of military and other experts on the issue of the administration of justice through military tribunals be organized and [encouraged] other such initiatives" (para. 6). In that regard, Mr. Decaux hoped that the draft principles would continue to be the subject of frank and open discussions with all concerned individuals and institutions.

10. The philosophy that inspired this study was recalled by the Commission in the resolutions mentioned above, in particular in the Commission's emphasis that "the integrity of the judicial system should be observed at all times" (resolutions 2004/32 and 2005/30). Hence 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 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 recurrent expression. At the same time, what follows is a minimum system of universally applicable rules, leaving scope for stricter standards to be defined under domestic law. Although the Commission itself refers to "special criminal tribunals" this report deals only with the issue of military tribunals, leaving the other, nonetheless vital, issue – and the yet broader question of special courts – for a later study.

11. The approach selected for this study on the administration of justice through military tribunals 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 without checks or balances, which opens the door to all kinds of abuse and 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.

12. This approach led to the development of "principles governing the administration of justice through military tribunals" as called for in Sub-Commission resolution 2003/8, principles based on the recommendations contained in Mr. Joinet's last report (E/CN.4/Sub.2/2002/4, para. 29 ff.). They were added to, extended and revised in successive reports, growing in number from 13 to 17, 19, and, finally, 20 principles. The explanatory commentary was trimmed so as not to unnecessarily repeat material appearing in earlier reports such as E/CN.4/Sub.2/2004/7 and E/CN.4/Sub.2/2005/9. The resulting version was thus intended as a response to the Commission, which noted that "the report of Mr. Decaux containing an updated version of the draft principles [would] be submitted to the Commission at its sixty-second session for its consideration" (resolution 2005/33).

13. On 13 January 2006, Mr. Decaux's report, including the 20 draft principles, was submitted to the Commission for consideration (E/CN.4/2006/58). (On 15 March 2006, the Commission

was replaced by the Human Rights Council (A/RES/60/251).) The revised draft principles were the subject of a meeting of experts convened in Geneva by the Office of the High Commissioner for Human Rights in cooperation with the International Commission of Jurists later in 2006. *See* Robert Husbands, *Human Rights Applicable to Military Justice, and in Particular the Potential Role of the Draft Principles on the Administration of Justice by Military Tribunals* (2011), in Int'l Soc'y for Mil. L. & the Law of War, *Receuils, Military Jurisdiction* 465, 467 (Stanislas Horvat, Ilja Van Hespen & Veerle Van Gijsegem eds. 2013). A second meeting jointly organized by the Office of the High Commissioner for Human Rights and the Brazilian Superior Military Tribunal and Ministry of Foreign Affairs was conducted in 2007 in Brasilia. Twenty-one experts participated. A detailed report was prepared by the Office of the High Commissioner for Human Rights, titled "Report on the Expert Meeting on Human Rights and the Administration of Justice by Military Tribunals, held in Brasilia, 27 to 29 November 2007". The purpose of the 2006 and 2007 meetings "was to identify issues in the Draft Principles that were the subject of disagreement by experienced and informed experts, so that the UN secretariat would be in a better position to assist the Human Rights Council when it took up the Draft Principles in the course of its work, an event which to date has not occurred". Husbands, *supra*, at 467. "[T]here is always the possibility that the Council will simply decide not to take any official action on the Draft Principles or that it may ask that revisions be made to certain of the Draft Principles". *Ibid*. at 472. As will be explained, it did neither.

14. The draft principles have been examined and referred to in relevant human rights and military justice literature, *e.g*., Evelyne Schmid, *A Few Comments on a Comment: The UN Human Rights Committee's General Comment No. 32 on Article 14 of the ICCPR and the Question of Civilians Tried by Military Courts*, 14 Int'l J. Hum. Rgts. 1058, 1065-66 & nn.59, 63-64 (2010); Michael R. Gibson, *International Human Rights Law and the Administration of Justice Through Military Tribunals: Preserving Utility While Precluding Impunity*, 4 J. Int'l L. & Int'l Relns. 1 (2008); Eugene R. Fidell, *International Developments in Military Law*, 17 Can. Crim. L. Rev. 83, 89-90 (2013); Eugene R. Fidell, *Military Justice: A Very Short Introduction*, Oxford University Press, 15-16, 71 (2016); Gilles Létourneau and Michel W. Drapeau, *Military Justice in Action: Annotated National Defence Legislation*, 69 (2d ed. 2015); decisions of the Human Rights Committee, *e.g*., Communication No. 1548/2007, *Kholodova v. Russian Federation*, Views adopted on 1 November 2012, para. 10.5 & n.13 (CCPR/C/106/D/1548/2007); the European Court of Human Rights, *e.g., Ergin v. Turkey* (No. 6), Application No. 47533/99, Judgement of 4 May 2006, para. 24; *Maszni v. Romania*, Application No. 59892/00, Judgement of 21 September 2006, para. 31; *Mikhno v. Ukraine*, Application No. 32514/12, Judgement of 30 January 2017, para. 106; *Atamanyuk v. Ukraine*, Application Nos. 36314/06, 36285/06, 36290/06 & 36311/06, Judgement of 1 September 2016, para. 108; at least one national court, *Déry v. H.M. The Queen*, 2017 CMAC 2 (Can. Ct. Martial App. Ct.), paras. 67-71 (Cournoyer and Gleason, JJ.A.), and, most recently, the House of Lords, 785 Parl. Deb. HL (5th ser.) (2017) col. 767 (UK) (Lord Thomas of Gresford). In 2010, the Geneva Centre for the Democratic Control of Armed Forces included English and Arabic versions of the draft principles as an "international standard" in its toolkit of publications on legislating for the security sector. The draft principles have also been a focus of attention in connection with national military justice reform discussions, including a draft internal (or interim) report on Court Martial Comprehensive Review that was prepared within the office of the Judge Advocate General of the Canadian Armed Forces and made available to the public in early 2018. *See* Canadian Armed Forces, Judge Advocate General, *Draft Internal Report*

– *Court Martial Comprehensive Review*, 17 January 2018, http://www.forces.gc.ca/assets/FORCES_Internet/docs/en/jag/court-martial-comprehensive-review-interim-report-21july2017.pdf (paras. 3.5.3-3.5.3).

15. Even before the Decaux Principles were drafted, a number of trends could be discerned around the world in the field of military justice. These have continued in the ensuing years, and include—

- broad recognition that military justice is an exceptional jurisdiction, to be employed narrowly rather than broadly, that its goals include the achievement of good order and military discipline as well as justice, and that human rights standards apply to military courts
- resort to military courts where the ordinary court system has become dysfunctional or as a tool for the suppression of dissent
- in some regions, increased reliance on civilian courts for the prosecution of serious human rights violations by military personnel
- the abolition or abandonment of military justice systems, especially in peacetime and, for surviving systems, a shift from ad hoc courts to permanent tribunals
- increased reliance on judges with legal qualifications, including the use of civilian judges
- increased recognition that, even where military courts' subject matter jurisdiction is broad, an ordinary criminal law offence should in practice be prosecuted in military courts if it has a substantial service nexus
- heightened attention in general to the need to foster public confidence in the administration of justice through military courts
- increased concern about impunity, especially with regard to human rights violations
- increased attention to the interests of victims, including meaningful ways to involve them in the process
- with a few persistent exceptions, there is broad hostility to the use of capital punishment in military courts

16. On 7 August 2013, the Secretary-General transmitted to the General Assembly a thematic report by Gabriela Knaul (Mr. Decaux's immediate successor as Special Rapporteur on the independence of judges and lawyers) on military tribunals in accordance with resolution 17/2 of the Human Rights Council (A/68/285). She recommended, *inter alia*, that "[t]he draft principles governing the administration of justice through military tribunals should be promptly considered and adopted by the Human Rights Council and endorsed by the General Assembly" (para. 92). She also noted that "[t]he principles have been positively cited in jurisprudence of the European Court of Human Rights" (para. 19 & n.3, citing *Ergin, supra*). The Human Rights Council by resolution adopted by a vote of 27 to 1, with 19 abstentions, took note of her report on 27 March 2014, including in particular her conclusion (para. 88) "that military tribunals, when they exist, must be an integral part of the general justice system and operate in accordance with human rights standards, including the right to a fair trial and due process of law guarantees". A/HRC/RES/25/4 paras. 1-2. The Council requested the High Commissioner for Human Rights to convene an expert consultation "for an exchange of views on human rights considerations relating to the issues of administration of justice through military tribunals and the role of the integral judicial system in

combating human rights violations." *Ibid*. para. 12.

17. In response to the Human Rights Council's request, on 24 November 2014, the High Commissioner for Human Rights convened another expert consultation in Geneva, involving presentations by numerous experts (including Mr. Decaux and Ms. Knaul), and on 29 January 2015 submitted a report. A/HRC/28/32. Ms. Knaul reiterated her endorsement of the draft principles and encouraged UN member States to promptly consider adopting them. The report's main observations and recommendations were as follows:

> 73. The importance of the independence, impartiality and competence of the judiciary in military justice was recognized by all experts and participants. In a number of presentations, it was noted that, in some States, issues of command interference and lack of institutional independence were still a source of concern. In States where these issues were present, appropriate legislative and institutional reform should be undertaken.
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> 74. The experts' presentations showed that, in some States, there were significant gaps in implementing the right to a fair trial. Questions were raised concerning the practice of summary proceedings for lesser offences, which in some States did not allow for the presence of legal counsel or the right of appeal. States were invited to take appropriate measures to ensure that the right to fair trial in military tribunals was in full conformity with the International Covenant on Civil and Political Rights.
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> 75. Concerning personal jurisdiction of military tribunals, the Human Rights Committee had addressed this subject in its general comment No. 32, in which it stated that civilians should not be subject to the jurisdiction of military courts except in exceptional circumstances. The European Court of Human Rights had taken a similar position. It was also noted that international humanitarian law also provided limited circumstances for the trial of civilians in military courts. In some presentations, it was noted that some States tried civilians accompanying the military on overseas deployments, although it often depended on the specific situation.
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> 76. With regard to subject matter jurisdiction, there was a difference of views among the experts. Some argued that military jurisdiction should be set aside in favour of civilian courts in cases where allegations of serious human rights violations were made against military personnel and that military jurisdiction should be limited to military offences, citing recommendations made by the Human Rights Committee and some special procedures. This view was, however, challenged by others at the expert consultation, who argued that, if a military tribunal was independent, impartial and competent, such crimes could be judged.
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> 77. Given the detailed nature of the subject of military justice, and how human rights concerns could arise relative to many aspects of military jurisdiction, States were invited to request technical assistance and advisory services from OHCHR.

18. In parallel with the work of the Special Rapporteur on the independence of judges and lawyers, the Working Group on Arbitrary Detention also concerned itself with the draft principles. On 30 June 2014, the Chair-Rapporteur of that body, Mr. Mads Andenas, submitted a report to the 27th session of the Human Rights Council, making a number of specific suggestions relating to the administration of justice through military tribunals. A/HRC/27/48, paras. 66-71. The

Working Group identified five minimum guarantees that military justice must respect (para. 69) and an equal number of categories of arbitrariness that it had identified in the course of its work regarding military courts (para. 70). It "recall[ed]" the draft principles and "request[ed]" the Council "to proceed to their consideration with a view to adopting a set of principles to be applied to military courts" (para. 71).

19. On 9 June 2017, Mr. Diego García-Sayán, who had succeeded Dean Mónica Pinto as Special Rapporteur on the independence of judges and lawyers in 2016, submitted his first annual report to the Human Rights Council pursuant to resolution 26/7. A/HRC/35/31. His comments on military justice and the right to a fair trial were as follows:

> 100. Military courts tend to be structured within a hierarchical system of command and control. This creates a difficulty in conducting a fair and impartial trial. Military procedures carried out or influenced by corrupt officers create a general distrust in military courts on the part of civilian populations, as stated by Arne Willy Dahl at an expert consultation organized by the Office of the United Nations High Commissioner for Human Rights in 2014 (A/HRC/28/32). Such situations of bias and corruption result in a violation of article 14 of the International Covenant, which stipulates that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
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> 101. The Special Rapporteur calls on States to adopt specific norms that expressly exclude civilians from investigation and prosecution by military tribunals, ensure that their jurisdiction is limited to military offences committed by active members of the military and protect the rights to fair trial and due process.

20. Mr. García-Sayán's 2017 report noted that "[i]ssues relating to the establishment and functioning of military courts lie at the core of the mandate of the Special Rapporteur on the independence of judges and lawyers" (para. 112) and "encourage[d] civil society organizations, academia and other relevant stakeholders to submit information and to participate in relevant activities with a view to contributing to the fulfilment of his mandate" (para. 125). In keeping with these observations, a "Workshop on the Decaux Principles" was conducted on 23-24 March 2018 at Yale Law School to examine the 2006 version of the draft principles and determine whether any changes should be made in them in the interest of (a) resolving the few contentious issues, (b) taking account of intervening developments, and (c) in general clearing the path to formal approval by the Human Rights Council and the General Assembly. Mr. García-Sayán attended the workshop, along with experts from several national legal systems who spoke in their personal capacities, either in person or remotely. The workshop was supported by a generous grant from the Oscar M. Ruebhausen Fund. The version of the draft principles set out below updates some of the references in the 2006 version (such as the issuance of general comment No. 32 in 2007, CCPR/C/GC/32) and reflects the deliberations of the workshop. This summary is provided for the convenience of the Special Rapporteur and on the understanding that he is free to accept, reject, or modify it and the recommended revision.

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.

21. 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.

22. 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 stated 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".[1]

Principle No. 2

Compliance with international standards for due process and fair trials

Military tribunals must in all circumstances afford the fair trial rights guaranteed by the *International Covenant on Civil and Political Rights*, including Article 14, and apply any other standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.

23. 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

Functional authority of military courts

In a state that has separate civilian and military courts, the civilian court has primary jurisdiction over all criminal offenses committed by persons subject to military jurisdiction. The purpose of military courts is to contribute to the maintenance of military discipline inside the rule of law through the fair administration of justice. Military courts should only try cases that have a direct and substantial connection with that purpose, unless the accused is deployed overseas and it would not be appropriate to subject him or her to the jurisdiction of the ordinary courts of the sending or receiving States.

24. In determining whether there is a "direct and substantial connection" between an alleged offence and the purpose of military justice systems, the following principles should be applied:

(a) If the alleged offence is of a type which is prevalent in civil life and which is alleged to have been committed by a member of the armed forces in his or her capacity as an individual citizen, or if the alleged offence is likely to have affected the community at large in the same degree whether it was committed by a member of the armed forces or a civilian, then the allegation should be investigated and tried in the civilian criminal justice system.

(b) If the alleged offence is of a type which is of particular concern to the discipline or efficiency of the armed forces (e.g. an offence by one member of the armed forces against another) or is alleged to have been committed in a defence establishment or in relation to military property, the allegation should be investigated and tried in the military justice system.

25. The issue of military jurisdiction over serious human rights violations is addressed in Principle 9.

Principle No. 4

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.

26. 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".[3]

27. Unlawful command influence, whether real or apparent, has been called the "mortal enemy of military justice," *e.g., United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986), because it compromises public confidence in the administration of justice. Commanders, senior military and civilian officials (including legislators) should not seek to influence the administration of justice in particular cases directly or indirectly. Attempts to do so should expose them to criminal sanctions and possible removal from office. Military courts should scrupulously police and rectify any instance of unlawful influence.

28. 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. Charging decisions for proceedings in military courts should be made by legally-trained prosecutors independent of the chain of command and in accordance with established criteria comparable to those applied by civilian prosecution. Military commanders should not have power to decide who is prosecuted for what, although they may communicate their views in writing to the official responsible for charging decisions if those views are simultaneously provided to the accused and victim. In States that employ a form of jury trial for military courts, jurors should be selected by an official independent of the chain of command.

29. A military court must be presided over by a legally qualified judge. 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.

30. 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.[4]

Principle No. 5

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.

31. 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".[5] 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'".[6] 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.

32. 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).

33. 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.[7]

Principle No. 6

Jurisdiction of military courts to try civilians

Military courts have no jurisdiction to try civilians except where there are very exceptional circumstances and compelling reasons based on a clear and foreseeable legal basis, made as a matter of record, justifying such a military trial. Those circumstances only exist, where:

(a) Such a trial is explicitly permitted or required by international humanitarian law;

(b) The civilian is serving with or accompanying a force deployed outside the territory of the sending State and there is no appropriate civilian court available; or

(c) The civilian who is no longer subject to military law is to be tried in respect of an offence allegedly committed while he or she was serving as a uniformed member of the armed forces or he or she was a civilian subject to military law under paragraph (b).

34. There is a tendency in the decisions of international and regional courts and human rights bodies, as well as the law of many States, to disapprove of the trial of civilians by military courts in any circumstances. However, such trials are permitted by international law in exceptional circumstances, provided that the military court affords all the rights guaranteed by the International Covenant on Civil and Political Rights, including Article 14.

35. Under Article 84 of the Third Geneva Convention (GCIII), prisoners of war (PW) 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 PW. Civilians may be accorded PW status under Article 4 of GCIII if they are:

(a) Accompanying the armed forces of a belligerent;
(b) Crew members of merchant ships or civil aircraft flagged or registered to a belligerent;
(c) Party to a *levée en masse*; or
(d) Former members of the armed forces who have been interned by the opposing belligerent for security reasons.

36. Under Article 64 of the Fourth Geneva Convention (GCIV), an Occupying Power may subject the population of an occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under GCIV, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them. Under Article 66 of GCIV, if it is alleged that a civilian has breached one of the penal provisions mentioned above, 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 should also preferably sit in the occupied country.

37. In many circumstances it will be impossible or inappropriate for civilians accompanying a force on deployment to be subjected to the law of the receiving State, for example if that State's judicial system has ceased to function or does not meet international human rights law standards, or if the force is a peacekeeping force which must remain impartial as between the government of the receiving State and opposing forces. Other examples may arise from status of forces agreements between the sending and receiving States. In such circumstances, it may be necessary for such civilians to be tried in a military court. The following are the types of civilians which may accompany a force deployed outside the territory of the sending State:

(a) Family members and other dependents of members of the armed forces; and
(b) Government employees and contractors accompanying the armed forces.

38. States should consider extending the jurisdiction of their civilian courts to offences allegedly committed by civilians accompanying a force outside their national territory and ensuring that their civilian courts have the capacity to fulfill this role. If a State does try civilians in military courts, the circumstances in which this is permitted must be prescribed in national law. The State has the burden of proving that the circumstances are exceptional in the sense of this principle, both in general terms and in each specific case.

Principle No. 7

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.

39. 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.

40. 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.[8] The Human Rights Committee has very clearly linked conscientious objection to the principle of freedom of conscience enshrined in article 18 of the Covenant.[9] 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.[10] 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.[11]

41. 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.

42. 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. 8

Special care and additional protection for minors

Strict respect for the guarantees provided in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the International Covenant on Civil and Political Rights should govern the prosecution and punishment of minors, who fall within the category of vulnerable persons.[12]

43. 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.

44. 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.

Principle No. 9

Trial of persons accused of serious human rights violations

With the exception of circumstances permitted by international humanitarian law, 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.

45. 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.

46. 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".[13] 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 2005 report, referring to the need to have recourse to a "competent civilian court".[14] The 1994 Inter-American Convention on Forced Disappearance of Persons establishes the same principle in article IX. It is noteworthy, however, that the International Convention on the Protection of All Persons from Enforced Disappearance, which entered into force on 23 December 2010, 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".

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.

47. While maintaining the secrecy of government information that merits such treatment is entirely proper, military courts should ensure that only information that in fact qualifies for such treatment is kept secret. 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).

48. 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).

49. 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.[15] 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".

50. 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.[16] 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".[17]

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.

51. Civilians convicted by military courts should in all cases be confined in civilian prisons. 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.

52. 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.

53. 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.

54. 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".

55. The non-derogable nature of habeas corpus is also recognized in a number of declaratory international norms.[18] 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.[19]

Principle No. 13

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.

56. Transparency is essential to public confidence in the administration of military justice. Case information, including charges, pleadings, transcripts, and court decisions should be made public promptly and in any event at least as quickly as comparable civilian court documents. Court dockets should be made available and maintained on a current basis on the internet and by other means so the public can attend proceedings and the news media can perform their function, which is central to democratic societies. Name suppression should be directed in military cases according to the same standards the State's civilian criminal courts apply.

57. 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".

58. 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. 14

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) Every accused person must have access to all materials that the prosecution plans to offer in court against the accused or that are exculpatory.

(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.

59. In paragraph 4 of its general comment No. 13, the Human Rights Committee had 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. The result was general comment No. 32, which the Committee approved on 23 August 2007.

Paragraph 22 of general comment No. 32 is more specific than the corresponding language of paragraph 4 of general comment No. 13. It states: "The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, *civilian or military*" (emphasis added).

60. International humanitarian law establishes minimum guarantees in judicial matters.[20] 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".

61. The accused should be represented by defence counsel who are competent and independent, whether they are civilian or military. Measures to protect the independence of military lawyers can help allay potential concerns of accused persons and foster public confidence in the administration of justice. Even in cases tried extraterritorially, the principle of free choice of defence counsel should be maintained.

Principle No. 15

Summary proceedings

Summary proceedings may be conducted by or on behalf of commanders in order to ensure the commander's ability to carry out his or her obligation to discipline the forces. Such proceedings should respect the human rights of the accused, and should not be used as a means to achieve impunity if criminal prosecution is warranted.

62. A summary proceeding is not a criminal trial. Summary proceedings must never be used to shield military personnel from criminal prosecution for serious offenses. If a commander is uncertain whether an offense should be dealt with summarily or by criminal prosecution, the matter should be referred to the military prosecution authority, which shall have the right of first refusal.

Principle No. 16

Access of victims to proceedings

Military courts and prosecuting authorities should take all practicable steps to ensure that victims and their families:

a. Have the right to report alleged offences by persons subject to the jurisdiction of the military court;

b. Are kept informed of military judicial proceedings which relate to the alleged offence against the victim; and

c. 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.

Military courts should ensure that the views of the victim are heard on such questions as the disposition of charges, impact of the offense on the victim and the making of compensation or reparation orders. Military courts should afford victims the same rights that they enjoy before relevant ordinary criminal courts.

63. 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. Access to the State's highest court with jurisdiction over criminal cases should be available to persons convicted by military courts on an equal footing with persons convicted by civilian courts.

64. 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).

65. While the residual maintenance of first-instance 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.

66. 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.[21]

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.

67. 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 not as "extenuating circumstances" but as grounds 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.

68. 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.

69. 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. A commander's duty to punish serious violations of human rights, war crimes, and crimes against humanity is satisfied by referring such offences to a legally-trained prosecutor who is independent of the chain of command to determine if prosecution is warranted. The referral of charges to a court that is not independent and impartial either structurally or in fact does not fulfill this duty.

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; or

(c) on persons suffering from any mental or intellectual disabilities.

70. The trend towards the gradual abolition of capital punishment should be extended to military justice, especially if there are fewer guarantees of fairness than in the State's ordinary courts.

71. Although the death penalty is not prohibited under international law, international human rights instruments clearly lean towards abolition.[22] 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)).

72. 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 principle 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.

73. 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.

74. Each such review of codes of military justice should be carried out by an independent body, which should recommend legislative and administrative 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. Periodic reviews of codes of military justice should be carried out in public by the legislature or some entity designated by it, with input from the armed forces and ministry of defence as well as other stakeholders.

75. 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. Each review should include an appraisal of intervening developments in human rights law, international humanitarian law, comparative military law, as well as domestic constitutional and criminal law.

Notes

[1] E/CN.4/Sub.2/1994/24, annex II, principles 17 and 19.

[2] General comment no 29, par. 16. See also *Miguel González del Río v. Peru*, communication no 263/1987, judgment of 20 November 1992, CCPR/C/46/D/263/1987 28 October 1992, para. 5.2.

[3] Case of *Miguel González del Río* v. *Peru*, communication n° 263/1987, judgment of 20 November 1992, CCPR/C/46/D/263/1987 from 28 October 1992, para. 5.2.

[4] Case of *Víctor Alfredo Polay Campos* v. *Peru*, communication n° 577/1994, judgment of 6 November 1997, CCPR/C/61/D/577/1994 from 9 January 1998, para. 8.8.

[5] ICRC, Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, par. 3084. See also ICRC, *Customary International Humanitarian Law*, vol. I, Rules (supervised by J.-M. Henckaerts and L. Diswald-Beck) rule 100, Cambridge University Press, 2005, p. 356.

[6] ICRC, Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, para. 4601.

[7] ICRC, *Customary International Humanitarian Law*, vol. I, *Rules* (supervised by J.-M. Henckaerts and L. Doswald-Beck), rule 100, Cambridge University Press, 2005, p. 356.

[8] General Assembly, resolution 33/165 of 20 December 1978; Commission on Human Rights, resolutions 38 (XXXVI) of 1980, 1987/46 of 1987, 1989/59 of 1989, 1993/84 of 1993, 1995/83 of 1995 and 1998/77 of 1998; Human Rights Committee, general comment n° 22 (1993); decisions of the Human Rights Committee relating to communications n°s 446/1991 (para. 4.2), 483/1991 (para. 4.2) and 402/1990 (case of *Henricus Antonius Godefriedus Maria Brinkof* v. *Basque Country*).

[9] General comment n° 22 (1993).

[10] Concluding Observations of the Human Rights Committee: Armenia, 19 November 1998, CCPR/C/79/Add.100, para. 18, and Concluding Observations of the Human Rights Committee: Israel, 21 August 2003, CCPR/CO/78/ISR, para. 24.

[11] Concluding Observations of the Human Rights Committee: France, 4 August 1997, CCPR/C/79/Add.80, para. 19, Concluding Observations of the Human Rights Committee: Spain, 3 April 1996, CCPR/C/79/Add.61, para. 15.

[12] See, especially, article 7 (para 2(b)) of the International Covenant on Civil and Political Rights.

[13] Resolution 47/133 by the General Assembly of 18 December 1992, art. 16, para. 2.

[14] E/CN.4/2005/65, para. 375.

[15] European Court of Human Rights, judgment of 10 May 2001, paras. 156 to 158.

[16] Declaration on the Protection of All Persons from Enforced Disappearances, art. 10 (para. 1); Standard Minimum Rules for the Treatment of Prisoners, rule 7; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 20 and 29; European Prison Rules, rules 7 and 8.

[17] Principle 8 of the Basic Principles on the Role of Lawyers, adopted by the eighth United Nations Congress on Crime Prevention and Criminal Justice which took place in Havana (Cuba) from 27 August to 7 September 1990.

[18] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 32, and Declaration on the Protection of All Persons from Enforced Disappearances, art. 9.

[19] Advisory opinions OC-8/87, "*Habeas corpus* in states of emergency," from 30 January 1987

and OC-9/87, "Judicial guarantees in states of emergency," from 6 October 1987.

[20] See, especially, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 75, para. 4, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), art. 6.

[21] Joint report of the Special Rapporteur on Torture, Nigel Rodley, and of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Bacre Waly Ndiaye: Special Rapporteur visit to Colombia (17-26 October 1994), E/CN.4/1995/111, para. 120.

[22] See, especially, article 6 (paras. 2 and 6) of the International Covenant on Civil and Political Rights, article 4 (para. 2) of the American Convention on Human Rights, article 1 of Safeguards Guaranteeing Protection of those Facing the Death Penalty, general comment of the Human Rights Committee n^{o} 6 (para. 6).