



INTERNATIONAL
COMMISSION
OF JURISTS

Military jurisdiction and international law

Military courts
and gross human rights violations
(vol.1)

Federico Andreu-Guzmán

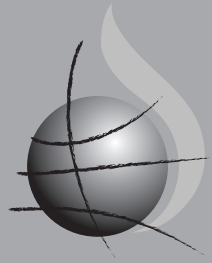
The question of 'military justice' transcends the judicial sphere and goes to the very heart of observance of the rule of law. In many countries, military jurisdiction and the esprit de corps that has characterized it have turned military courts into true instruments of military power that have been wielded against civilian power. Military courts often remove members of the armed forces and military institutions from the rule of law and the scrutiny of society. The wellknown quotation from French statesman Georges Clémenceau to the effect that "military justice is to justice what military music is to music" reflects the enormous controversy that military courts have always prompted.

The subject of military courts is vast and complex but also undoubtedly vital for the administration of justice. If there is to be proper administration of justice and full observance of the right to a fair trial and if impunity for gross human rights violations is to be eradicated, it is essential for military courts to be fairly and appropriately regulated in accordance with international human rights law.



INTERNATIONAL
COMMISSION
OF JURISTS

P.O. Box 216, 81A Avenue de Châtelaine
CH-1219 Châtelaine-Geneva, Switzerland
Tel. +41 (0)22 979 38 00 • Fax +41 (0)22 979 38 01
info@icj.org • www.icj.org



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INTERNATIONAL COMMISSION OF JURISTS
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Index

| | |
|--------------------|---|
| Introduction | 8 |
|--------------------|---|

Part I **Military Jurisdiction and International Law**

| | |
|---|----|
| Section I. The General Legal Framework | 17 |
| 1. International Law and Military Jurisdiction | 17 |
| 2. The State's Duty of Guarantee | 20 |
| 3. The Administration of Justice | 26 |
| 4. The Right to Judicial Protection or the Right to Justice | 29 |
| 5. The Obligation to Investigate | 33 |
| 6. The Obligation to Prosecute and Punish | 39 |
| 7. The Right to Reparation | 46 |
| 8. The Right to the Truth | 47 |
| 9. Impunity | 51 |
| 10. Military Jurisdiction | 56 |
| Section II. International Jurisprudence and Doctrine on Human Rights | 61 |
| A. The Universal System of Human Rights Protection | 61 |
| 1. Human Rights Treaty Monitoring Bodies | 61 |
| 1.1 The Human Rights Committee | 61 |
| 1.2 The Committee against Torture | 69 |
| 1.3 The Committee on the Rights of the Child | 71 |
| 2. The Commission on Human Rights | 72 |
| 2.1 The Special Rapporteur on extrajudicial, summary or arbitrary executions | 72 |
| 2.2 The Special Rapporteur on Torture | 82 |
| 2.3 The Working Group on Enforced or Involuntary Disappearances | 90 |

| | |
|--|-----|
| 2.4 The Special Rapporteur on the independence of judges and lawyers..... | 92 |
| 2.5 The Working Group on Arbitrary Detention..... | 95 |
| 2.6 The Special Representative on the situation of human rights defenders..... | 96 |
| 2.7 Country Mechanisms..... | 97 |
| 2.7.1 Guatemala | 97 |
| 2.7.2 Equatorial Guinea..... | 99 |
| 2.7.3 Somalia | 101 |
| 3. The Sub-Commission on the Promotion and Protection of Human Rights | 101 |
| 3.1 The Special Rapporteur on human rights and states of emergency | 102 |
| 3.2 Experts on the impunity of perpetrators of human rights violations | 103 |
| 3.3 The Expert on the right to reparation | 105 |
| 3.4 Special Rapporteurs on the right to a fair trial..... | 105 |
| 3.5 Special Rapporteur on the independence and impartiality of the judiciary | 106 |
| 3.6 The Sessional Working Group on the Administration of Justice | 106 |
| 4. Other Mechanisms | 107 |
| 4.1 ONUSAL..... | 107 |
| 4.2 MINUGUA | 108 |
| 4.3 OFACONU | 108 |
| B. The European System of Human Rights Protection | 110 |
| C. The Inter-American System of Human Rights Protection | 113 |
| 1. The Inter-American Court of Human Rights | 114 |
| 1.1 Military jurisdiction and human rights violations committed by military personnel | 114 |
| 1.2 Military jurisdiction and civilians | 118 |

| | |
|--|-----|
| 2. The Inter-American Commission on Human Rights | 121 |
| 2.1 General Considerations | 121 |
| 2.2 Military jurisdiction and human rights violations committed by military personnel | 126 |
| a. Brazil | 127 |
| b. Colombia | 128 |
| c. Chile | 131 |
| d. Ecuador | 135 |
| e. Guatemala | 136 |
| f. Paraguay | 137 |
| g. Peru | 138 |
| h. Suriname | 140 |
| 2.3 Jurisprudence developed by the Commission | 141 |

Part II

Military Jurisdiction and National Law

| | |
|--|-----|
| Section I. General Observations | 153 |
| 1. Introduction | 153 |
| 2. The difficulties in classifying military courts | 154 |
| 3. Developing trends | 158 |
| 4. Constitutions and military justice | 164 |
| Section II. Military Jurisdiction and Domestic Legislation | 169 |
| 1. Argentina | 169 |
| 2. Austria | 180 |
| 3. Belgium | 181 |
| 4. Cameroon | 185 |
| 5. Canada | 190 |
| 6. Central African Republic | 201 |
| 7. Chad | 203 |

| | |
|---------------------------------------|-----|
| 8. Chile | 206 |
| 9. China | 217 |
| 10. Colombia | 221 |
| 11. Congo (The Republic of the) | 247 |
| 12. Costa Rica | 249 |
| 13. Cuba | 250 |
| 14. Ecuador | 256 |
| 15. France | 263 |
| 16. Germany | 277 |
| 17. Iran | 281 |
| 18. Italy | 286 |
| 19. The Netherlands | 293 |
| 20. Norway | 295 |
| 21. Paraguay | 296 |
| 22. Peru | 300 |
| 23. Poland | 316 |
| 24. Romania | 318 |
| 25. Spain | 320 |
| 26. Switzerland | 334 |
| 27. United Kingdom | 341 |
| 28. United States of America | 351 |
| 29. Uruguay | 359 |
| 30. Venezuela | 367 |
| | |
| Bibliography | 379 |

Introduction

Let us be clear that, for human rights to have true legal protection, it is not enough - on the contrary, it is dangerous - simply to satisfy formal legal requirements [and] maintain a semblance of legal protection which reduces vigilance and, what is more, only gives the illusion of justice.

Dalmo De Abreu Dallari¹

The administration of justice plays a vitally important role in the safeguarding and protection of human rights. Having an independent and impartial judiciary that is free from interference and pressure from the other branches of government and which can guarantee the due process of law is crucial for the enjoyment and protection of human rights and a condition *sine qua non* for observance of the rule of law. In the words of the Inter-American Commission on Human Rights, “the independence of the judiciary is an essential requisite for the practical observance of human rights”.² The many different international human rights instruments, whether they be conventions or declarations, universal or regional, therefore contain numerous clauses relating to the administration of justice. The existence of independent and impartial courts and the observance of the norms of due process are basic requirements for the proper administration of justice established under international human rights law.

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- 1 Dalmo De Abreu Dallari, “*Jurisdicciones nacionales y derechos humanos*”, in “*Jornadas Internacionales contra la Impunidad*”, Comisión Internacional de Juristas y Comisión Nacional Consultiva de Derechos Humanos de Francia, Geneva, 1993, p.209. [Spanish original, free translation.]
 - 2 The Situation of Human Rights in Cuba: Seventh Report, document of the Organization of American States OEA/Ser.L/V/II.61, doc. 29, rev. 1, 1983, p.67, paragraph 2.

The wellknown quotation from French statesman Georges Clémenceau to the effect that “military justice is to justice what military music is to music” reflects the enormous controversy that military courts have always prompted. Many staunch defenders of military jurisdiction have traditionally brushed off any criticisms of it by claiming that the arguments used against it are anti-militarist. The question is not whether or not the existence of armies is justified. The crux of the matter is whether military justice can satisfy the requirements laid down in general principles and international standards that courts should be independent and impartial and guarantee due process as well as compliance with the State’s international obligations with regard to human rights.

The reality is that, on the whole, as far as ensuring that justice is dispensed independently and impartially is concerned, military courts do not adhere to general principles and international standards and their procedures are in breach of due process. In many countries, so-called ‘military justice’ is organizationally and operationally dependent on the executive. Military judges are often military personnel on active service who are subordinate to their respective commanders and subject to the principle of hierarchical obedience. The actions of ‘military justice’ are all too often responsible for numerous injustices and denying human rights. Whether military courts can observe the right to be tried and judged by an independent and impartial tribunal with full respect for judicial guarantees remains open to question. Military courts are often used to try civilians. On that subject, the United Nations Special Rapporteur on the independence of judges and lawyers concluded that “international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice”.³ In some countries, military courts try juveniles under 18 years of age. The right to conscientious objection to military service is often undermined, if not violated, as a result of the actions of ‘military justice’. In many countries, domestic legislation allows military courts to have such broad powers that any offence committed by a member of the military falls to their jurisdiction so that military privilege becomes a true class privilege.

The question of ‘military justice’ transcends the judicial sphere and goes to the very heart of observance of the rule of law. In many countries, military jurisdiction and the *esprit de corps* that has characterized it have turned military courts into true instruments of military power that have been wielded against civilian power. Military courts often remove members of the armed forces and military institutions from the rule of law and the scrutiny of society. In numerous countries, ‘military justice’ suffers from the same lack of

3 United Nations document E/CN.4/1998/39/Add.1, paragraph 78.

transparency as the military institutions. In 1979, Judge Advocate General John Gilissen noted that in several countries “the issue of military justice is shrouded in the secrecy that enshrouds the whole military organization”.⁴ This is still very much the case in several countries.

The administration of justice by military courts has been a matter of concern for the international systems of human rights protection. Early on in their existence, several United Nations mechanisms expressed their concern about ‘military justice’. For example, it is worth highlighting the work done by the Committee set up under the auspices of the Commission on Human Rights on the right of every individual not to be subjected to arbitrary arrest, detention or exile (1956-1962). In its final report, when noting the practice of granting military courts jurisdiction over civilians in times of emergency, the Committee recommended that the prison sentences imposed by such courts should conform to ordinary criminal procedures and that detainees should have the right to be tried by ordinary courts.⁵ Later on, the Sub-Commission on Prevention of Discrimination and Protection of Minorities commissioned a study into the question of equality in the administration of justice. In his final report in 1969, the Special Rapporteur in charge of the study, Mr. Mohammed Ahmed Abu Rannat, recommended that civilians accused of political offences should not be tried by military courts and that members of the military responsible for ordinary offences should be tried by the ordinary criminal courts.⁶ More recently, in 1999, the Inter-American Court of Human Rights stated that “[w]hen a military court takes jurisdiction over a matter that regular courts should hear, the individual’s right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts”.⁷

But one of the practices which has aroused greatest concern and criticism has been the use of military jurisdiction to try members of the armed forces and police who have committed gross human rights violations amounting to crimes. Experience has shown that this practice is one of the greatest sources

4 John Gilissen, «*Evolution actuelle de la justice militaire - Rapport général*», in Huitième Congrès International, Ankara, 11-15 octobre 1979, L’Evolution actuelle de la justice militaire, Recueils de la Société internationale de droit pénal militaire et de droit de la guerre, VIII, Volume 1, Brussels, 1981, p. 28 [French original, free translation.]

5 United Nations document E/CN.4/826/Rev.1, 1962, paragraphs 786 and 787.

6 United Nations document E/CN.4/Sub.2/296, 10 June 1969, paragraphs 538 and 552.

7 Inter-American Court of Human Rights, Judgment dated 30 May 1999, *Case of Castillo Petruzzi and others v. Peru*, in Series C: Decisions and Judgments No. 52, paragraph 128.

of impunity in the world. In cases of extrajudicial execution, torture and enforced disappearance of civilians committed by members of the military or police, military courts deny the victims and their relatives the right to an effective remedy and the right to know the truth. This constitutes a breach of the State's obligation to investigate, punish and provide reparation for gross human rights violations. For several decades the international community has been expressing its concern about this practice and stressing the need for the ordinary courts to try such offences and bring the perpetrators to justice. For example, it is worth mentioning the Meeting of Experts held in 1979, in preparation for the IV United Nations Congress on Crime Prevention and Treatment of Offenders held in 1981, which pointed to the need to retain civilian jurisdiction for the punishment of abuses of power. The human rights treaty bodies and mechanisms of the United Nations Commission on Human Rights, as well as the Inter-American Court and Commission on Human Rights, have unanimously found this practice to be incompatible with international human rights law. They have also taken the view that gross human rights violations - such as extrajudicial executions, torture and enforced disappearance - carried out by members of the military or police cannot be considered to be military offences, service-related acts or offences committed in the line of duty (*delitos de función*). As Dalmo De Abreu Dallari pointed out, "there is no valid reason, from the moral or legal point of view, to remove from the jurisdiction of the ordinary courts a member of the military who has committed an offence defined as such under ordinary criminal legislation".⁸

This study does not try to address all the questions raised as a result of the administration of justice by military courts. It focuses on the practice of using military courts to try members of the military or police who have carried out, or aided and abetted the carrying out of, human rights violations. There has certainly been a lack of regulation on this issue on the part of international human rights instruments. So far only two instruments contain specific restrictions on military jurisdiction with regard to gross human rights violations. They are the United Nations Declaration on the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on Forced Disappearance of Persons. However, the issue should be approached from the perspective of whether or not military jurisdiction is compatible with the obligations incumbent under international human rights law with regard to both the administration of justice and gross violations of human rights. The gap in terms of regulation has also been filled by the jurisprudence and doctrine developed by the bodies and mechanisms of the inter-governmental human rights systems.

8 Dalmo De Abreu Dallari, *op. cit.*, p. 213.

Military jurisdiction exists in many States. Some countries even place members of their police forces under the jurisdiction of military courts or have special courts (police jurisdiction) for these public servants. However, the idea that “where there is an army, there is military justice” is not true and an increasing number of countries with military forces have abolished military jurisdiction either completely or at least in peacetime. It is often said that ‘military justice’ has been with us ever since armies came into being but, in the light of developments in historical research, this assertion does not appear to be quite correct. Looked at from the point of view of domestic legislation, military jurisdiction as an institution presents a rich and heterogeneous panorama. In terms of personal, territorial, temporal and subject-matter jurisdiction, national legislation regulates military justice in a wide variety of ways. Military jurisdiction varies in terms of functions, composition and operation from one country to another. The position of military courts within the structures of the state and their relationship to the judiciary also vary.

The study is divided into two main parts. Part I looks at military jurisdiction in the light of international human rights law. It examines whether the practice of trying members of the military and police who have perpetrated or aided and abetted the carrying out of gross human rights violations in military courts is compatible with the requirements of international human rights law (Section I, Part I). It also gives a systematic description of the jurisprudence and doctrine developed by the various universal and regional systems of human rights protection (Section II, Part I). Part II looks at how different countries regulate military jurisdiction through their domestic legislation. First of all, it examines certain aspects of constitutional regulation and trends in the evolution of ‘military justice’ (Section I, Part II). Secondly, it looks at the history and current situation of several national ‘military justice’ systems (Section II, Part II).

The subject of military courts is vast and complex but also undoubtedly vital for the administration of justice. If there is to be proper administration of justice and full observance of the right to a fair trial and if impunity for gross human rights violations is to be eradicated, it is essential for military courts to be fairly and appropriately regulated in accordance with international human rights law. In this sense the growing number of countries in which military jurisdiction is being reformed is encouraging. Many countries have abolished military courts in peacetime. Other countries have introduced safeguards into their constitutions or legislation in order to ensure that gross human rights violations and the trial of civilians are removed from military jurisdiction. Several countries have amended their laws to ensure that members of the military who commit military offences enjoy the safeguards that are necessary for a fair trial. Lastly, it is important to mention the work being done on the

question of the administration of justice through military tribunals by the United Nations Sub-Commission on Promotion and Protection of Human Rights which is expected to conclude with the drafting of international standards on military jurisdiction.

Lastly, the author would like to thank Amanda Roelofsen for her contribution to the research on military courts in the United States of America and the United Kingdom as well as on the jurisprudence of the European Court of Human Rights. The author would also like to give special thanks to Sergio Polifroni, a lawyer working with the International Commission of Jurists, for the constant and invaluable help he has provided in the carrying out of this study.

Federico Andreu-Guzmán

Senior Legal Adviser

International Commission of Jurists

PART I
**MILITARY JURISDICTION
AND INTERNATIONAL LAW**

Section I

The General Framework

1. International Law and Military Jurisdiction

With the exception of the Declaration on the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on Forced Disappearance of Persons, there are no specific norms, of either a treaty-based or declaratory nature, within international human rights law relating to military offences, military jurisdiction or military “justice”. Other fields of international law do contain provisions on military jurisdiction, most of them relating to aspects of international, military¹ or judicial cooperation, or extradition. In the case of extradition, several treaties talk about the notion of a “purely military offence”² or “essentially military crimes”³ while others talk about “offences under military law which are not offences under ordinary criminal law”.⁴ While in multi-lateral treaties extradition does not apply in principle to military offences⁵, this principle has become somewhat tempered

1 For example, the London Convention of 19 June 1951 between the Parties to the North Atlantic Treaty regarding the Status of their Forces.

2 For example, article 3 of the Extradition Convention adopted in Montevideo in 1933, article 7.1 (c) of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, article 11 (d) of the European Convention on the Transfer of Proceedings in Criminal Matters, and article 6 (b) of the European Convention on the International Validity of Criminal Judgements.

3 For example, Article 20 of the Treaty on International Law, adopted in Montevideo in 1940.

4 Article 4 of the 1957 European Convention on Extradition. The United Nations Model Treaty on Extradition (article 3 (c)) contains a similar clause. It is also worth mentioning the 1940 Montevideo Treaty on International Law, article 20 of which refers to «essentially military offences, exclusive of those governed by the common law».

5 For example, the 1957 European Convention on Extradition, the United Nations Model Treaty on Extradition and the 1940 Montevideo Treaty on International Law.

with the emergence of a large number of bilateral⁶ and multi-lateral⁷ treaties which include military offences on the list of extraditable offences. The same can be said for judicial cooperation where all texts remit to domestic legislation whenever the treaty in question does not define what is to be understood by a “military offence”.⁸

The starting point for addressing the practice of trying military or police personnel who have committed human rights violations in military courts should therefore be the international principles and standards which apply to the international obligations States have with regard to human rights matters. This means analyzing military jurisdiction in the light of their international obligations with regard to the administration of justice as well as the obligations which come into play whenever human rights are violated. The latter concern the State’s legal duty to investigate human rights violations, bring to trial and punish the perpetrators, award compensation and provide the victims and their families with an effective remedy and the right to know the truth. Overall these obligations with which the State must comply where human rights are concerned constitute what jurisprudence and doctrine call the State’s duty of guarantee. There is therefore a direct correlation between, on the one hand, the phenomenon of military jurisdiction and human rights violations committed by members of the military and police and, on the other, the principles, norms and standards relating to the right to a fair trial by an independent and impartial court, the right to judicial protection and an effective remedy, the obligation to prosecute and punish those responsible for human rights violations, the rights of the victims of human rights violations, especially the right to reparation and the right to know the truth, and the impunity of those responsible for human rights violations.

The issue of military jurisdiction and human rights violations also pertains to the criminal sphere and therefore the notion of “gross human rights violations”. Under international law, torture, summary, extra-legal or arbitrary executions and enforced disappearances, among others, are deemed to be

6 André Huet and Renée Koering-Joulin, Droit pénal international, Presses universitaires de France, Paris, 1993, p.365.

7 For example, the Caracas Agreement on Extradition, adopted by Ecuador, Bolivia, Peru, Colombia and Venezuela in 1911, article 2.22 (e) of which lists desertion from the Navy or Army while at sea as an extraditable offence.

8 In some treaties such referral is implicit while in others it is explicit. For example, Article 20 of the 1940 Montevideo Treaty on International Penal Law expressly remits to domestic law and states that “the determination of the character of the offences involved appertains exclusively to the authorities of the requested State”. Article 4 of the 1933 Montevideo Convention on Extradition contains an identical clause.

gross human rights violations. The United Nations General Assembly has repeatedly pointed out that extrajudicial, summary or arbitrary executions and torture constitute gross human rights violations.⁹ The Declaration on the Protection of All Persons from Enforced Disappearance reiterates that enforced disappearance is a gross human rights violation.¹⁰ The jurisprudence developed by international human rights protection bodies is in agreement on this issue. The United Nations Human Rights Committee has repeatedly stated that torture, extrajudicial execution and enforced disappearance constitute gross human rights violations.¹¹ Doctrine also concurs with this, even though it has indiscriminately used “blatant” or “flagrant” as synonyms for “gross”. For example, the conclusions of the 1992 “Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms” state that “the notion of gross violations of human rights and fundamental freedoms includes at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention, and systematic discrimination.”¹²

One of the criteria for determining whether violations can be deemed to be gross is whether or not the human rights in question are non-derogable. For example, the Inter-American Court of Human Rights stated that “[acts] such

9 See, for example, Resolutions N° 53/147 of 9 December 1998 on “extrajudicial, summary or arbitrary executions” and N° 55/89 of 22 February 2001 on “torture and other cruel, inhuman or degrading treatment”. For several decades, numerous United Nations bodies have been making similar rulings. For example, with regard to torture, the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its Resolution 7 (XXVII) of 20 August 1974.

10 Article 1 (1) of the Declaration on the Protection of All Persons from Enforced Disappearance.

11 See, for example, the decision dated 29 March 1982, Communication N° 30/1978, in the case of *Bleier Lewhoff and Valiño de Bleier v. Uruguay*; the decision dated 31 March 1982, Communication N° 45/1979, in the case of *Pedro Pablo Carmargo v. Colombia*; and the Concluding Observations of the Human Rights Committee - Burundi of 3 August 1994, in United Nations document CCPR/C/79/Add.41, paragraph 9. Mr Theo van Boven, Special Rapporteur on the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities also described them in this way when developing the draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and international humanitarian law (See United Nations documents E/CN.4/1997/104, E/CN.4/Sub.2/1996/17 and E/CN.4/Sub.2/1993/8).

12 Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, held at the Netherlands Institute of Human Rights - Studie-en Informatiecentrum Menserechten, (SIM), Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, University of Limburg, Maastricht, special SIM publication, N° 12, p. 17.

as torture, summary, extra-legal or arbitrary executions and forced disappearances, all of which are prohibited since they contravene non-derogable rights recognized by international human rights law”¹³ were gross violations of human rights. As stressed by the Human Rights Committee in General Comment N° 29, “States parties may in no circumstances invoke article 4 of the [International] Covenant [on Civil and Political Rights] as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence”¹⁴. In the same Comment, the Committee pointed out that under no circumstances can acts such as abduction, unacknowledged detention, deportation or forcible transfer of population without grounds permitted under international law, or advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence, be committed.¹⁵ Given that they involve non-derogable human rights, such acts constitute gross violations of human rights and must therefore be prosecuted and punished in a court of law.

2. The State’s Duty of Guarantee

In the international sphere, from the moment that the human being was deemed to be a “legal person, endowed with the capacity to have rights and to make use of them before the authorities”¹⁶, the notion that a duty of guarantee was incumbent on the State – as a full international legal person – began to emerge. Dating back to the precedents set by the Treaty of Los Olivos in 1660 and later on the various conventions agreed between States in order to protect their subjects when on foreign territory,¹⁷ each human being is nowadays recognized under international law as a legal person¹⁸. In the branch of

13 Inter-American Court of Human Rights, Judgment of 14 March 2001, *Case of Barrios Altos (Chumbipuma Aguirre and others v. Peru)*, paragraph 41.

14 *General Comment N° 29, “States of Emergency (Article 4)”*, adopted on 24 July 2001 during the 1950th meeting, paragraph 11.

15 *Ibid.*, paragraph 13 (b), (d) and (e).

16 Loschack, D., «*Mutation des droits de l’homme et mutation du droit*», in *Revue interdisciplinaire de droit comparé*, Vol. 13, p.55, 1984. [French original, free translation.]

17 These kinds of treaties gave rise to what is known today as diplomatic protection.

18 Permanent International Court of Justice, *Judgment of 3 March 1928, on the matter relating to the Competence of the Dantzig Tribunals*, Series B. N° 15, p. 17.

international law that deals with human rights, the individual is the quintessential legal person in respect of whom the State has legal obligations of an international nature as well as an acknowledged, though limited, ability to take action at an international level.¹⁹ One of the precedents which have made it possible for the individual to act as a legal person at the international level, from the Americas, was the Washington Convention of 20 December 1907, which led to the setting up of the short-lived Central American Court of Justice. International human rights law recognizes that individuals have rights and at the same time places “correlative obligations on States”²⁰. According to the International Court of Justice, this relationship is not subject to the principle of reciprocity as is usually the case in international law.²¹ In the view of the European Commission of Human Rights, this is due to the essentially objective nature of human rights: “the obligations to which the States parties have subscribed in the [European] Convention [on Human Rights] are of an essentially objective nature in that they seek to protect the fundamental rights of individuals against transgressions on the part of the States parties rather than to establish subjective rights between States parties.”²² The purpose of human rights treaties, as the Inter-American Court of Human Rights has pointed out, is “to guarantee the enjoyment of individual human beings of those rights and freedoms rather than to establish reciprocal relations between States”²³.

Broadly speaking, international human rights law places two types of obligation on the State: firstly, the duty to refrain from violating human rights and, secondly, the duty to guarantee that those same rights are respected. The first comprises that set of obligations which is directly connected with the State’s duty to refrain from violating human rights (whether by act or omission) and which also involves ensuring that, by adopting the necessary measures, such rights are actively enjoyed. The second, on the other hand, concerns the

19 Sudre, Frédéric, Drroit international et européen des droits de l’homme, Presses universitaires de France, Paris 1989, paragraph 45 and following.

20 Dupuy, Pierre-Marie, Drroit international public, Ed. Dalloz, Paris 1992, paragraph 193. [French original, free translation.]

21 International Court of Justice, Advisory Opinion of 21 June 1971, “Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (1970-1971)”, in Recueil des arrêts, avis consultatifs et ordonnances, p. 55, paragraph 122.

22 European Commission of Human Rights, Communication No 788/60, Anuario de la Comisión Europea de Derechos Humanos, volume 4, p. 139 and following. [French original, free translation.]

23 Inter-American Court of Human Rights, Advisory Opinion OC-1/82, 24 September 1982, “*Other Treaties*” *Subject to the Consultative Jurisdiction of the Court*, in Series A: Judgments and Opinions - N°1, paragraph 24.

State's obligation to prevent violations, investigate them, bring to justice and punish their perpetrators and provide reparation for any damage caused. The State therefore takes on a legal role as the guarantor of human rights and, as such, has a fundamental obligation to protect and safeguard those rights. It is on this basis that jurisprudence and doctrine have developed the concept of a duty of guarantee as the core notion on which the State's legal role with regard to human rights is founded. The legal relationship between individual and State, as far as human rights are concerned, is a complex one in which the former is the holder of the right and the latter the holder of the obligations. The State is legally bound to refrain from violating the rights of the individual, to ensure that, by adopting the necessary measures, such rights can be actively enjoyed and to safeguard those same rights, which means that it must prevent violations from occurring, investigate them, punish those responsible and provide reparation for any damage caused. The State is therefore placed in the legal position of being the guarantor of human rights and, as such, has a fundamental obligation to protect and safeguard those rights. Consequently, the State is the guarantor that individuals will be able to fully enjoy those rights and as such must comply with its international obligations, whether they be treaty-based or customary.

The notion of a duty of guarantee has become an essential referent for the human rights monitoring work carried out by United Nations missions in different countries of the world. For example, the United Nations Observer Mission in El Salvador (ONUSAL) summarized the duty of guarantee as a set of "obligations to guarantee or protect human rights... consist[ing] of the duty to prevent conduct that is against the law and, should it occur, to investigate it, bring to justice and punish those responsible and compensate the victims"²⁴. The jurisprudence developed by international human rights tribunals as well as by quasi-jurisdictional human rights bodies, such as the United Nations Human Rights Committee and the Inter-American Commission on Human Rights, concurs in seeing this duty of guarantee as consisting of five basic obligations which the State must honour: the obligation to investigate, the obligation to bring to justice and punish those responsible, the obligation to provide an effective remedy for the victims of human rights violations, the obligation to provide fair and adequate compensation to the victims and their relatives, and the obligation to establish the truth about what happened.

24 United Nations Observer Mission in El Salvador, ONUSAL, Report of 19 February 1992, United Nations document A/46/876 S/23580, paragraph 28. [Spanish original, free translation]

This duty of guarantee is founded on both international customary law and international treaty law. It is a feature which has been expressly enshrined in several human rights treaties: the International Covenant on Civil and Political Rights (article 2) and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination (article 6), the Convention on the Elimination of All Forms of Discrimination against Women (article 2 (c)), the American Convention on Human Rights (article 1, 1), the Inter-American Convention on Forced Disappearance of Persons (article 1), the Inter-American Convention to Prevent and Punish Torture (article 1), and the African Charter on Human and Peoples' Rights (article 1), among others. This duty is also reiterated in declaratory texts such as the Declaration on the Protection of All Persons from Enforced Disappearance and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.²⁵

In its analysis of article 1 (1) of the American Convention on Human Rights, the Inter-American Court of Human Rights pointed out that States parties have contracted a general obligation to protect, respect and guarantee each and every one of the rights enshrined in the American Convention and that therefore: “the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation... [In addition,] [t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.²⁶

The Inter-American Commission on Human Rights has also deemed the duty of guarantee to be an essential element of human rights protection: “In other words, the States have a duty to respect and to guarantee the fundamental rights. These duties of the States, to respect and to guarantee, form the cornerstone of the international protection system since they comprise the States' international commitment to limit the exercise of their power, and even of their sovereignty, vis-à-vis the fundamental rights and freedoms of the individual. The duty to respect entails that the States must ensure the effectiveness of all the rights contained in the Convention by means of a legal,

25 United Nations General Assembly, Resolution 44/162 of 15 December 1989.

26 Inter-American Court of Human Rights, *Judgment of 29 July 1988, Velázquez Rodríguez Case*, in Series C: Decisions and Judgments, N° 4, paragraphs 166 and 174.

political and institutional system appropriate for such purposes. The duty to guarantee, for its part, entails that the States must ensure the effectiveness of the fundamental rights by ensuring that the specific legal means of protection are adequate either for preventing violations or else for reestablishing said rights and for compensating victims or their families in cases of abuse or misuse of power. These obligations of the States are related to the duty to adopt such domestic legislative provisions as may be necessary to ensure exercise of the rights specified in the Convention (Article 2). As a corollary to these provisions, there is the duty to prevent violations and the duty to investigate any that occur since both are obligations involving the responsibility of the States".²⁷

The obligations which go to make up the duty of guarantee are, by their very nature, complementary and are not alternatives or substitutes for each other. For example, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions considered that: "Governments are obliged under international law to carry out exhaustive and impartial investigations into allegations of violations of the right to life, to identify, bring to justice and punish their perpetrators, to grant compensation to the victims or their families, and to take effective measures to avoid future recurrence of such violations. The first two components of this fourfold obligation constitute in themselves the most effective deterrent for the prevention of human rights violations [...] The recognition of the right of victims or their families to receive adequate compensation is both a recognition of the State's responsibility for the acts of its organs and an expression of respect for the human being. Granting compensation presupposes compliance with the obligation to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation".²⁸

The obligations that go to make up the duty of guarantee are clearly interdependent. For example, the obligation to bring to justice and punish those responsible for human rights violations is closely related to the obligation to investigate the facts. Nevertheless, as Juan Méndez has pointed out, "it is not possible for the State to choose which of these obligations it should fulfill".²⁹

27 Report N° 1/96, Case 10,559, *Chumbivilcas* (Peru), 1 March 1996.

28 United Nations document E/CN.4/1994/7, paragraphs 688 and 711.

29 Méndez, Juan, «*Derecho a la Verdad frente a las graves violaciones a los derechos humanos*», in *La aplicación de los tratados de derechos humanos por los tribunales locales*, CELS, compiled by Martín Abregú - Christian Courtis, Editores del Puerto s.r.l, Buenos Aires, 1997, p. 526. [Spanish original, free translation]

There are no subsidiary or conditional obligations. The fact that each of them can be discharged separately does not therefore mean that the State is not obliged to comply with each and every one of them. The Inter-American Commission on Human Rights has stated on many occasions that the granting of compensation to victims or their relatives and the establishment of “Truth Commissions” do not in any way relieve the State of its obligation to bring those responsible for human rights violations to justice and to ensure that they are punished.³⁰ In the case of Chile, the Inter-American Commission on Human Rights specifically stated that: “The Government’s recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation are not enough, in themselves, to fulfil its obligations under the Convention. According to the provisions of Article 1.1, the State has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and ensuring adequate reparations for the victim.”³¹ In the case of El Salvador, the Inter-American Commission on Human Rights pointed out that, despite the important role played by the Truth Commission in establishing the facts regarding the most serious violations and in promoting national reconciliation, the institution of this type of commission: “[cannot] be accepted as a substitute for the State’s obligation, which cannot be delegated, to investigate violations committed within its jurisdiction, and to identify those responsible, punish them, and ensure adequate compensation for the victim [...] all within the overriding need to combat impunity”.³² The autonomous nature of each of the obligations that comprise the duty of guarantee has also been taken up by the Inter-American Court of Human Rights. The Court has stated that, even though a victim of human rights violations may choose not to accept the compensation due to him or her, this does not relieve the State of its obligation to investigate the facts and ensure that the perpetrators are brought to justice and punished. The Inter-American Court of Human Rights considered that: “even though the aggrieved party may pardon the author of the violation of his human rights, the State is nonetheless obliged to sanction said author... The State’s obligation to investigate the facts and punish those responsible does not erase the

30 Inter-American Commission on Human Rights, Report N° 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 October 1992, paragraph 52.

31 Inter-American Commission on Human Rights, Report N° 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 77. See also Inter-American Commission on Human Rights, Report N° 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 76; and Report N° 25/98, Cases 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile), 7 April 1998, paragraph 50.

32 Inter-American Commission on Human Rights, Report N 136/99, Case 10,488, *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, paragraph 230.

consequences of the unlawful act in the affected person. Instead, the purpose of that obligation is that every State Party ensure, within its legal system, the rights and freedoms recognized in the Convention”.³³

A State does not only become internationally accountable when, through the active participation or negligence of its agents, it infringes a right of an individual but also when it fails to take appropriate action to investigate the facts, curb any criminal behaviour and compensate the victims and their relatives. Therefore, when a State breaches its duty of guarantee or fails to exercise it, it is answerable at an international level. This principle was established early on in international law, one of the first precedents set on the matter in jurisprudence being the judgment handed down by Professor Max Huber on 1 May 1925 concerning British claims for damages caused to British subjects in the Spanish part of Morocco.³⁴ So, as noted by the United Nations Observer Mission in El Salvador, failure to observe this duty of guarantee is not limited solely to the preventive aspects: “State responsibility can ensue not only as a result of a lack of vigilance in preventing harmful acts from occurring but also as a result of a lack of diligence in criminally prosecuting those responsible for them and in enforcing the required civil penalties”.³⁵

3. The Administration of Justice

As pointed out by Param Cumaraswamy, the United Nations Special Rapporteur on the independence of judges and lawyers, “the requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law. [...] the underlying concepts of judicial independence and impartiality [...] are ‘general principles of law recognized by civilized nations’ in the sense of Article 38 (1) (c) of the Statute of the International Court of Justice”.³⁶ The Special Rapporteur went on to conclude that the overall conception of justice embodied in the Charter and the work of the United Nations includes respect for human rights and is conditional on judicial independence and impartiality as a means of ensuring that the rights of the human person are protected.

33 Inter-American Court of Human Rights, Judgment of 27 August 1998, *Garrido and Baigorria Case (Reparations)*, paragraph 72.

34 United Nations, *Recueil de sentences arbitrales*, vol. II, pp. 615 to 742.

35 ONUSAL, op. cit., paragraph 29. [Spanish original, free translation.]

36 United Nations document E/CN.4/1995/39, paragraphs 32 and 34.

For his part, Professor Singhvi, a United Nations expert who has carried out several studies into judicial independence and impartiality, concluded that: “Historical analysis and contemporary profiles of the judicial functions and the machinery of justice shows the worldwide recognition of the distinctive role of the judiciary. The principles of impartiality and independence are the hallmarks of the rationale and the legitimacy of the judicial function in every State. The concepts of the impartiality and independence of the judiciary postulate individual attributes as well as institutional conditions. These are not mere vague nebulous ideas but fairly precise concepts in municipal and international law. Their absence leads to a denial of justice and makes the credibility of the judicial process dubious. It needs to be stressed that impartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake.”³⁷

International human rights instruments specify how justice is to be administered and under what conditions. The notions of an independent and impartial tribunal, due process of law and the existence of judicial guarantees are essential components. As pointed out by the United Nations General Assembly, an independent and impartial judiciary and an independent legal profession are essential pre-requisites for the protection of human rights and to ensure that there is no discrimination in the administration of justice.³⁸ At the universal level, it is worth highlighting articles 10 and 11 of the Universal Declaration of Human Rights, articles 2, 14 and 26 of the International Covenant on Civil and Political Rights, article 5 (a) of the International Convention on All Forms of Racial Discrimination, and article 37 of the Convention on the Rights of the Child. Several declaratory instruments are also worth mentioning: the Basic Principles on the Independence of the Judiciary,³⁹ the Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors. At a regional level, the following are worthy of note: article 6 of the European Convention on Human Rights, articles 47 and 48 of the Charter of Fundamental Rights of the European Union, articles XVIII and XXVI of the American Declaration on the Rights and Duties of Man, articles 8 and 25 of the American Convention on Human Rights, and articles 7 and 26 of the African Charter on Human and People’s Rights.

For justice to be administered properly, it is a *sine qua non* condition that the judiciary be independent from the other branches of public authority. This was emphasized by the Special Rapporteur on the Independence of Judges

37 United Nations document E/CN.4/Sub.2/1985/18, paragraph 75.

38 Resolution 46/120 of 17 December 1991.

39 Confirmed by the United Nations General Assembly in resolutions Nos. 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

and Lawyers when he pointed out that “the principle of the separation of powers, [...] is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a *sine qua non* for a democratic State [...]”.⁴⁰ In General Comment 13, the Human Rights Committee also considered that the notion of “competence, impartiality and independence of the judiciary... [as] established by law” [article 14 (1) of the Covenant] raised issues about “the actual independence of the judiciary from the executive branch and the legislative.”⁴¹ The existence of an independent judiciary, free from interference from the other public authorities, is intrinsic to the rule of law. On several occasions, the Human Rights Committee has stressed the need for all States parties to the International Covenant on Civil and Political Rights to ensure that the executive, legislative and judicial authorities of the State are effectively separated, that the armed forces are truly subordinate to the civilian authorities, that there is an independent and impartial judiciary, and that the rule of law and the principle of legality obtain. In General Comment N° 29, the Human Rights Committee recalled that the principle of legality and the rule of law are inherent to the International Covenant on Civil and Political Rights.⁴² The Human Rights Committee has, on numerous occasions, recommended that States adopt legislation and measures to ensure that there is a clear distinction between the executive and the judiciary so that the former cannot intervene in matters for which the legal system is responsible.⁴³

Military jurisdiction is often used as a means of escaping the control of the civilian authorities and of consolidating the military as a power within society, as well as a tool through which the military authorities can exert supremacy over civilians. The Human Rights Committee has repeatedly stated that States must take steps to ensure that military forces are subject to civilian authority.⁴⁴ For its part, the General Assembly of the Organization of

40 United Nations document E/CN.4/1995/39, paragraph 55.

41 General Comment 13, paragraph 3, of United Nations document HRI/GEN/1/Rev.1.

42 United Nations document CCPR/C/21/Rev.1/Add.11, paragraph 16.

43 Concluding Observations - Romania, 28 July 1999, United Nations document CCPR/C/79/Add.111, paragraph 10. See also Concluding Observations - Peru, 15 November 2000, United Nations document CCPR/CO/70/PER, paragraph 10; Concluding Observations - El Salvador, op. cit., paragraph 15; Concluding Observations - Tunisia, United Nations document CCPR/C/79/Add.43, 10 November 1994, paragraph 14; and Concluding Observations - Nepal, 10 November 1994, United Nations document CCPR/C/79/Add.42, paragraph 18.

44 Concluding Observations - Romania, op. cit. paragraph 9; Concluding Observations - Lesotho, United Nations document CCPR/C/79/Add. 106, paragraph 14; and Concluding Observations - El Salvador, United Nations document CCPR/C/79/Add.34, 18 April 1994, paragraph 8.

American States stressed that: “the system of representative democracy [enshrined both in the Charter of the Organization of American States and in the American Convention on Human Rights] is fundamental for the establishment of a political society in which human rights can be fully realized and one of the essential elements of such a system is the effective subordination of the military apparatus to the civilian authorities”.⁴⁵ Similarly, the United Nations Commission on Human Rights pointed out that promoting, protecting and respecting human rights and fundamental freedoms means that States must ensure that “the military remains accountable to democratically elected civilian government”.⁴⁶

4. The Right to Judicial Protection or the Right to Justice

The right to an effective remedy is enshrined in numerous international human rights instruments. At the universal level, the following are worth citing: article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. It is also worth highlighting the Declaration on the Protection of All Persons from Enforced Disappearance (articles 9 and 13) and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions (Principles 4 and 16). At the regional level, it is worth mentioning: article 13 of the European Convention on Human Rights, article 47 of the Charter of Fundamental Rights of the European Union, article XVIII of the American Declaration of the Rights and Duties of Man, articles 24 and 25 of the American Convention on Human Rights, article X of the Inter-American Convention on Forced Disappearance of Persons, article 8 of the Inter-American Convention to Prevent and Punish Torture, articles 3 and 7 of the African Charter on Human and Peoples’ Rights, and article 9 of the Arab Charter on Human Rights.

Any violation of a human right generates an obligation on the part of the State to provide and guarantee an effective remedy. Under the International Covenant on Civil and Political Rights (article 2.3), as well as under the European Convention on Human Rights (article 13), whether the remedy

45 Resolution AG/Res. 1044 (XX-0/90) of 1990. [Spanish original, free translation.]

46 Resolution N° 2000/47, 25 April 2000.

should be of a judicial, administrative or other nature depends both on the nature of the right violated and the effectiveness of the remedy. Under the American Convention on Human Rights (article 25) and the African Charter on Human and Peoples' Rights (article 7.1), in cases of violations of fundamental rights, the remedy must be judicial in nature. The Charter of Fundamental Rights of the European Union specifies an effective remedy before a court for violations of the rights and freedoms guaranteed under European Union law (article 47). The Court of Justice of the European Communities considered that the opportunity for a person whose rights have been infringed to have recourse to legal proceedings in order to have his or her rights enforced "is the expression of a general principle of law which forms the basis of the constitutional traditions common to the member States".⁴⁷

Despite the wide range of regulations to be found in international instruments concerning gross human rights violations that constitute criminal offences, jurisprudence is unanimous in stating that the effective remedy has to be judicial in nature. For example, the Human Rights Committee stated that "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life."⁴⁸ Where extrajudicial executions, enforced disappearance or torture are concerned, it is essential that the remedies be judicial in nature.⁴⁹ The European Court of Human Rights, for its part, deemed that "the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure".⁵⁰

47 Judgment of 15 May 1986, *Johnston Case*, N° 222/84, cited in Guy Braibant, La Charte des droits fondamentaux de l'Union européenne, Edition du Seuil, Paris, 2001, p. 236 [French original, free translation]

48 Decision of 13 November 1995, Communication N° 563/1993, *Case of Nydia Erika Bautista* (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8.2. See also the Decision of 29 July 1997, Communication N° 612/1995, *Case of José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.2.

49 On this issue see the decision on admissibility dated 13 October 2000, Communication N° 778/1997, *Case of Coronel et al* (Colombia), United Nations document CCPR/C/70/D/778/1997, paragraph 6.4.

50 European Court of Human Rights, Judgment (Preliminary Objection) dated 18 December 1996, in the case of *Aksoy v. Turkey*, cited in Conseil de l'Europe, Vademecum de la Convention Européenne des Droits de l'Homme, Editions du Conseil de l'Europe, Strasbourg, 1999, 2nd edition, p. 134.

The Inter-American Court of Human Rights, for its part, has taken the view that the right to an effective remedy and judicial protection “incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights [...] States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdictions.”⁵¹ The Inter-American Court also held that, “[a]ccording to this principle, the absence of an effective remedy to violations of the rights recognized by the [American] Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness; when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.”⁵² The Inter-American Court also deemed that “all States Parties to the American Convention have a duty to investigate human rights violations and to punish the perpetrators and accessories of such violations. And any person found to be a victim of such violations has the right of access to justice in order to ensure that, for his or her own benefit and for that of society as a whole, that State duty is carried out”.⁵³

The Human Rights Committee recalled that the obligation to provide remedies for any violation of the provisions of the Covenant, as stipulated in arti-

51 Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in States of Emergency* (Arts. 27.2, 25 and 8 American Convention on Human Rights), Series A: Judgments and Opinions No 9, paragraph 24.

52 Ibidem.

53 Judgment of 29 August 2002, “*El Caracazo*” v. *Venezuela Case*. See also the Court’s Judgment of 27 February 2002 in the *Trujillo Oroza Case (Reparations)*, paragraph 99. [Spanish original, free translation.]

cle 2.3, “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.”⁵⁴ The Committee considers that “[i]t is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights”.⁵⁵ The Inter-American Court of Human Rights considered that judicial remedies designed to protect non-derogable rights were themselves non-derogable.⁵⁶

In the case of gross human rights violations, there is no doubt that the right to an effective remedy means the right to have access to a court. Given the unlawful criminal nature of such gross violations, the right to have access to a court falls within the domain of criminal law. Doctrine considers that, where violations of non-derogable human rights are concerned, a specific right to justice exists.⁵⁷ This means having access to courts which are independent and impartial. As Professor Victoria Abellán Honrubia points out: “according to the Universal Declaration of Human Rights and international conventions on the subject [...] having access to the administration of justice in the form of a set of domestic legal guarantees designed to safeguard human rights is a human right which is internationally recognized as fundamental in its nature, a right which not only applies to anyone who holds such a right but which also directly involves the internal organization of the State and the operation of its own system for administering justice. In other words, as a logical

54 General Comment N° 29, op. cit., paragraph 14.

55 Ibid., paragraph 15.

56 Advisory Opinion OC-9/87, op. cit.

57 Abellán Honrubia, Victoria, «*Impunidad de violación de los derechos humanos fundamentales en América Latina: Aspectos jurídicos internacionales*», in Jornadas iberoamericanas de la Asociación española de profesores de derecho internacional y relaciones internacionales - La Escuela de Salamanca y el Derecho Internacional en América, del pasado al futuro, Salamanca University, Salamanca, 1993; Mattarollo, Rodolfo, «*La problemática de la impunidad*», in Cuadernos Centroamericanos de Derechos Humanos, N° 2, Ed. Codehuca, San José, Costa Rica, 1991; Méndez, Juan, «*Accountability for Past Abuses*», in Human Rights Quarterly, Volumen 19, N° 2, 1997; Senese, Salvatore, «*Pouvoir judiciaire, droit à la justice et impunité*» in Impunity, Impunidad, Impunité, ed. Lidlip, Geneva 1993; Valiña, Liliana, «*Droits intangibles dans le cadre du système interaméricain des droits de l'homme*», in Droits intangibles et états d'exception, Ed. Bruylant, Brussels, 1996.

adjunct to the international recognition of the right to justice, it is necessary to demonstrate that the power to organize and operate state institutions involved in the administration of justice is not something to be used by the State at its discretion but that there is a limit, namely, that the right to justice must be provided in the manner in which it is recognized under international law”.⁵⁸

Within this legal relationship, the human being is the holder of the right to justice and the State, at the other extreme, is the obligation holder. This obligation has two main components: on the one hand, the State must guarantee the right to justice for the individual and, on the other, it must impart justice. The inherent link between the right to justice and the obligation to impart justice is obvious. It is inconceivable that no legal protection should be available because if there were none, the very notion of legal order would be destroyed. As put by the United Nations Expert on the right to restitution, compensation and rehabilitation, “it is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators”.⁵⁹

5. The Obligation to Investigate

The obligation to investigate human rights violations is an international obligation under treaties as well as under customary international law and is one of the components of the State’s duty of guarantee. The United Nations Commission on Human Rights has repeatedly reminded States of their obligation to carry out prompt, impartial and independent investigations with regard to any act of torture, enforced disappearance or extrajudicial, summary or arbitrary execution. For example, with regard to torture, the Commission on Human Rights recalled that, under international law, “all allegations of torture or other cruel, inhuman or degrading treatment or punishment should be promptly and impartially examined by the competent national authority”.⁶⁰ Likewise, with regard to enforced disappearance, the Commission on Human Rights reminded governments of “the need to ensure their competent authorities conduct prompt and impartial inquiries” whenever there is reason to

58 Abellán Honrubia, Victoria, *op. cit.*, p.203. [Spanish original, free translation.]

59 United Nations document E/CN.4/Sub.2/1992/8, paragraph 5.5.

60 Resolution 2001/62, 25 April 2001, paragraph 6.

61 United Nations Commission on Human Rights, Resolutions 1993/35 (paragraph 13), 1994/39 (paragraph 14) and 1995/38 (paragraph 12), entitled “Question of enforced or involuntary disappearances”.

believe that an enforced disappearance may have occurred.⁶¹ The United Nations General Assembly and the Commission on Human Rights have also reiterated “the obligation of all Governments to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible”.⁶²

As repeatedly asserted by the Human Rights Committee, the International Covenant on Civil and Political Rights imposes the obligation to investigate any violation of the rights protected under it. The Committee has repeatedly stated that “the State Party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, [...]”.⁶³ For his part, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has repeatedly asserted that this obligation to investigate exists under international law. “It is the obligation of Governments to carry out exhaustive and impartial investigations into allegations of the right to life”.⁶⁴ This obligation constitutes “one of the main pillars of the effective protection of human rights”.⁶⁵ The United Nations Expert on the right to restitution, compensation and rehabilitation also considered that “States parties to human rights treaties [must] comply with their obligations [...] [this] includes the investigation of the facts”.⁶⁶ The States which attended the World Conference on Human Rights held in Vienna in June 1993 reaffirmed the existence of this obligation where enforced disappearance is concerned when they signed the Vienna Declaration and Programme of Action: “The World Conference on Human Rights reaffirms that it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators”.⁶⁷

62 Commission on Human Rights, Resolution 2002/36 of 23 April 2002, paragraph 6, and General Assembly Resolution 55/111 of 4 December 2000, paragraph 6.

63 Decision dated 13 November 1995, Communication N° 563/1993, *Case of Nydia Erika Bautista*, (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8.6. See also the Decision dated 29 July 1997, Communication N° 612/1995, *Case of José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.8.

64 United Nations document E/CN.4/1997/60, paragraph 46.

65 United Nations document E/CN.4/1993/46, paragraph 686.

66 United Nations Expert on the Right to Restitution, Compensation and Rehabilitation, Report to the Human Rights Sub-Commission, doc. E/CN.4/Sub.2/1992/8, paragraph 5.2.

67 World Conference of Human Rights, Vienna Declaration and Programme of Action, United Nations document A/CONF.157/23, paragraph 62.

The conditions under which the obligation to investigate must be carried out and discharged are laid down in international human rights law, both in treaties and declarations, as well as in the jurisprudence of international human rights protection bodies. This obligation to investigate cannot be carried out in any way whatsoever. It must be done in accordance with the standards set by international law and jurisprudence. It means carrying out investigations which are prompt, thorough, impartial and independent.

The duty to investigate is one of the so-called ‘obligations of means’.⁶⁸ The authorities must investigate all alleged human rights violations diligently and seriously because, as pointed out by the Inter-American Court of Human Rights, “[t]he State has a legal duty to... use the means at its disposal to carry out a serious investigation”.⁶⁹ This means that the duty to investigate has to be discharged by initiating *motu proprio* the activities required to clarify the facts and circumstances surrounding them and identify the perpetrators. As pointed out by the Inter-American Court of Human Rights, this is a legal duty and not just a step to be taken by private interests.⁷⁰ The Human Rights Committee has also said the same.⁷¹ This means that investigations must be opened *ex officio* by the authorities, regardless of whether or not an accusation or formal complaint has been made. In this regard, the Inter-American Court of Human Rights pointed out that: “The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane”.⁷²

68 Juan Méndez, «Accountability for Past Abuses», op. cit., p. 264 and following.

69 Inter-American Court of Human Rights, Judgment of 29 July 1988, op. cit., paragraph 174.

70 Ibid, paragraph 177.

71 Human Rights Committee, decision dated 19 July 1994, Communication No. 322/1988, *Case of Hugo Rodríguez* (Uruguay), United Nations document CCPR/C/51/D/322/1988, paragraph 12(3).

72 *Velásquez Rodríguez Case, Judgment of 29 July 1988, Series C No. 4*, paragraph 177, and *Godínez Cruz Case, Judgment of 20 January 1989, Series C No. 5*, paragraph 188. On the same issue, see also the following Judgment by the Inter-American Court of Human Rights: *Caballero Delgado and Santana Case, Judgment of 8 December 1995*, in *Series C: Decisions and Judgments, No. 22*, paragraph 58.

The Inter-American Commission on Human Rights has repeatedly pointed out that the obligation to investigate cannot be delegated since it forms part of “the overriding need to combat impunity.”⁷³ The Inter-American Commission recalled that this obligation is also compulsory: “This international obligation of the state cannot be renounced”.⁷⁴

The Human Rights Committee has repeatedly reminded States parties to the International Covenant on Civil and Political Rights that they must set up bodies and procedures so that prompt and impartial investigations which are independent of the armed forces and police can be carried out into human rights violations and cases of excessive use of force attributed to State security force personnel.⁷⁵ On the subject of forced disappearances, the Human Rights Committee pointed out in General Comment N° 6 that States have a duty to “establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.”⁷⁶ The Human Rights Committee

73 Inter-American Commission of Human Rights, Report No 136/99, Case 10,488 *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, paragraph 230.

74 Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paragraph 230.

75 Concluding Observations - Venezuela, 26 April 2001, United Nations document CCPR/CO/71/VEN, paragraph 8; Concluding Observations - Kyrgyz Republic, 24 July 2000, document CCPR/CO/69/KGZ, paragraph 7; Concluding Observations - Chile, 30 March 1999, document CCPR/C/79/Add.104, paragraph 10; Concluding Observations - Belarus, 19 November 1997, document CCPR/C/79/add.86, paragraph 9; Concluding Observations - Former Yugoslav Republic of Macedonia, 18 August 1998, document CCPR/C/79/Add.96, paragraph 10; Concluding Observations - Cameroon, 4 November 1999, United Nations document CCPR/C/79/Add.116, paragraph 20; Concluding Observations - Sudan, 19 November 1997, document CCPR/C/79/Add.85, paragraph 12; Concluding Observations - Mauritius, 4 June 1996, document CCPR/C/79/Add.60, literal E; Concluding Observations - Brazil, 24 July 1996, document CCPR/C/79/Add.66, paragraph 22; Concluding Observations - Germany, 18 November 1996, document CCPR/C/79/Add.73, paragraph 11; Concluding Observations - Bolivia, 1 May 1997, document CCPR/C/79/Add.74, paragraph 28; Concluding Observations - Kuwait, 27 July 2000, document CCPR/CO/KWT, paragraph 13; Concluding Observations - Sri Lanka, 23 July 1995, document CCPR/C/79/Add.56, paragraph 30; Concluding Observations - Yemen, 3 October 1995, document A/50/40, section N° 5; Concluding Observations - Guyana, 25 April 2000, document CCPR/C/79/Add.121, paragraph 10; Concluding Observations - Algeria, 18 August 1998, document CCPR/C/79/Add.95, paragraphs 6, 7 and 9; and Concluding Observations - Peru, 25 July 1995, document CCPR/C/79/Add.67, paragraph 22.

76 United Nations Human Rights Committee, *General Comment 6 (16) on article 6 of the International Covenant on Civil and Political Rights*, in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, doc. HRI/GEN/1/Rev.1, p. 8.

stated that “[c]omplaints about ill-treatment must be investigated effectively by competent authorities”⁷⁷ and that, as in the case of torture complaints, these “must be investigated promptly and impartially by competent authorities so as to make the remedy effective”.⁷⁸ The Human Rights Committee has stressed on many occasions that the fact that human rights violations and abuses attributed to police officers and police forces have not been investigated by an independent body helps to create a climate of impunity.⁷⁹

The Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment stipulates that, in the case of acts of torture, such investigations must be “prompt and impartial”.⁸⁰ The Committee against Torture recommended that investigation of such offences should be “under the direct supervision of independent members of the judiciary”.⁸¹ The Committee against Torture also recommended repeal of “the provisions authorizing the army’s involvement in public security and crime prevention, which should be the exclusive prerogative of the police”.⁸² In addition, it recommended that “all government bodies not authorized to conduct investigations into criminal matters should be strictly prohibited from doing so”.⁸³

International instruments which are declaratory in nature concur that the State must carry out thorough, impartial and independent investigations. For example, article 13 of the Declaration on the Protection of All Persons from Enforced Disappearance requires the authorities to have any complaint of disappearance “thoroughly and impartially investigated”. Similarly, article 9 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that the appropriate authorities “shall promptly proceed to an impartial investigation even if there has been no formal complaint”. The Principles on the Effective Prevention and Investigation of Extra-Legal,

77 Human Rights Committee, General Comment N° 7, on Article 7 of the Covenant, paragraph 1.

78 Human Rights Committee, General Comment N° 20, on Article 7 of the Covenant, paragraph 14.

79 Concluding Observations - Sri Lanka, 23 July 1995, United Nations document CCPR/C/79/Add.56, paragraph 15; Concluding Observations - Belarus, 19 November 1997, document CCPR/C/79/add.86, paragraph 9.

80 Article 12 of the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.

81 Conclusions and recommendations - Ecuador, 15 November 1993, United Nations document A/49/44, paragraph 105.

82 Conclusions and recommendations - Guatemala, 23 November 2000, United Nations document CAT/C/XXV/Concl.6, paragraph 10 (b).

83 *Ibid.*, paragraph 10 (d).

Arbitrary and Summary Executions set the criteria to be applied in complying with the duty to investigate and stipulate that “thorough, prompt and impartial investigation” is required (Principle 9). The Special Rapporteur on extrajudicial, summary or arbitrary executions has taken the view that failure to abide by the norms laid down in these Principles constitutes an “indicator of government responsibility” even when it cannot be proved that government officials were directly implicated in the summary or arbitrary executions in question.⁸⁴ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁸⁵ stipulates that any act of torture or cruel, inhuman or degrading treatment must be the subject of “impartial investigations” (Principle 7). The same Body of Principles also stipulates that, in the case of the death or disappearance of a person who has been deprived of liberty, “an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case” (Principle 34). The United Nations Rules for the Protection of Juveniles Deprived of their Liberty⁸⁶ stipulate that “[u]pon the death of a juvenile in detention, there should be an independent inquiry into the causes of death” (Principle 57). The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which States have been recommended to observe by the United Nations General Assembly,⁸⁷ stipulate that “States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial”.⁸⁸

The obligation to investigate gross human rights violations must be exercised in good faith and there must be no intention of using such investigations for the purpose of ensuring impunity. In this connection, the Inter-American Court of Human Rights deemed that “investigating the acts... is an obligation incumbent upon the State whenever there has been a violation of human rights, an obligation that must be discharged seriously and not as a

84 United Nations documents E/CN.4/1991/36, paragraph 591, and E/CN.4/1990/22, paragraph 463. [Spanish original, free translation.]

85 Adopted by the General Assembly in resolution 43/173 of 9 December 1988.

86 Adopted by the United Nations General Assembly in resolution 45/113 of 14 December 1990.

87 Resolution 55/89 of December 2001.

88 Principle 2. See United Nations document E/CN.4/2000/9, Annex, p. 255.

mere formality”.⁸⁹ The Court has therefore affirmed that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation... [of] serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”⁹⁰. The Inter-American Court also took the view that: “the State must ensure that domestic proceedings designed to investigate [...] the facts [...] produce the desired effects and, in particular, must refrain from resorting to mechanisms such as amnesties, statutes of limitations or the establishment of measures designed to eliminate responsibility [...] Public officials and private individuals who improperly obstruct, divert or delay investigations aimed at clarifying the truth about what happened must be punished by ensuring that domestic legislation on the matter is enforced with the utmost severity”.⁹¹

If a State does not amend its domestic legislation and practice in order to safeguard this obligation, in other words, to ensure that prompt, thorough, independent and impartial investigations are effectively carried out, then it is failing in its international responsibilities.

6. The Obligation to Prosecute and Punish

The obligation to bring to trial and punish the perpetrators of gross human rights violations is an essential component of the duty of guarantee. Its basis in law is to be found both in human rights treaties and in customary international law. Therefore, when a State breaches its duty of guarantee or fails to exercise it, it is answerable at an international level. This principle was established early on in international law, one of the first precedents set on the matter in jurisprudence being the judgment handed down by Professor Max

89 Judgment of 14 September 1996, *El Amparo Case (Reparations)*, paragraph 61. See also the Judgment of 22 January 1999, *Blake Case (Reparations)*, paragraph 65.

90 Judgment of 14 March 2001, *Barrios Altos Case*, paragraph 41. In a similar vein, see the Judgment of 27 February 2002, *Trujillo Oroza Case (Reparations)*, paragraph 106, and the Judgment of 3 September 2001, *Barrios Altos Case. Interpretation of the Judgment on the Merits*. (Art. 67, American Convention on Human Rights), paragraph 15.

91 Inter-American Court of Human Rights, Judgment of 29 August 2002, “*El Caracazo*” v. *Venezuela Case (Reparations)*, paragraph 119. [Spanish original, free translation.]

Huber on 1 May 1925 concerning British claims for damages caused to British subjects in the Spanish part of Morocco. In his judgment, Professor Max Huber recalled that, under international law: “The State may become accountable [...] also as a result of insufficient diligence in criminally prosecuting the offenders. [...] It is generally recognized that the curbing of crime is not only a legal obligation incumbent on the competent authorities but also [...] an international duty that is incumbent on the State”.⁹² As pointed out by the United Nations Observer Mission in El Salvador, “State responsibility can ensue not only as a result of a lack of vigilance in preventing harmful acts from occurring but also as a result of a lack of diligence in criminally prosecuting those responsible for them and in enforcing the required civil penalties”.⁹³

This obligation is explicitly enshrined in numerous human rights treaties. Among those from the universal system worth citing are: articles 4, 5 and 7 of the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, articles 3 and 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, article 4 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, articles 3, 4 and 5 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and articles IV, V and VI of the Convention on the Prevention and Punishment of the Crime of Genocide. At the regional level, the following are worth mentioning: the Inter-American Convention to Prevent and Punish Torture (articles 1 and 6), the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (article 7) and the Inter-American Convention on Forced Disappearance of Persons (articles I and IV). Several declaratory instruments also recognize this obligation. Those from the universal system include: the Declaration on the Protection of All Persons from Enforced Disappearance, the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, the Code of Conduct for Law Enforcement Officers, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity.

92 *Recueil de sentences arbitrales*, United Nations, Vol. II, pp. 645 and 646 [French original, free translation].

93 ONUSAL, op. cit., paragraph 29. [Spanish original, free translation.]

A number of other treaties contain no specific provisions on the obligation to try and punish the perpetrators of human rights violations. This is the case for the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter of Human and Peoples' Rights. Nevertheless, jurisprudence has concluded that, by virtue of the duty of guarantee enshrined in each of these treaties as well as the general principles of law, these conventions do make it obligatory for those responsible for gross human rights violations to be brought to justice and punished. That is the view the Human Rights Committee has taken with regard to the International Covenant on Civil and Political Rights. The Human Rights Committee recalled that: "[...] the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified".⁹⁴ Similarly, on deeming amnesties which prevent the investigation, trial and punishment of perpetrators of gross human rights violations to be incompatible with the obligations contained in the International Covenant, the Human Rights Committee reminded the Argentinian State that: "Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice".⁹⁵

The Inter-American Court of Human Rights has pointed out in several of its judgments that States parties to the American Convention on Human Rights have an international obligation to bring to justice and punish those

94 Decision dated 13 November 1995, Communication N° 563/1993, *Case of Nydia Erika Bautista*, (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8.6. See also the Decision of 29 July 1997, Communication N° 612/1995, *Case of José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.8.

95 Concluding Observations of the Human Rights Committee : Argentina, 3 November 2000, United Nations document CCPR/CO/70/ARG, paragraph 9.

responsible for human rights violations⁹⁶. The Inter-American Court recalled that, in light of its obligations under the American Convention on Human Rights: “The State has a legal duty to [...] use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment [...]”.⁹⁷ The Inter-American Court recalled that “punishing those responsible is an obligation incumbent upon the State whenever there has been a violation of human rights, an obligation that must be discharged seriously and not as a mere formality”.⁹⁸ The Inter-American Court therefore deemed that “the State must ensure that domestic proceedings designed to ... punish those responsible for the deeds [...] produce the desired effects and, in particular, must refrain from resorting to mechanisms such as amnesties, statutes of limitations or the establishment of measures designed to eliminate responsibility”.⁹⁹ Along the same lines, the Inter-American Court pointed out that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation... [of] serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”.¹⁰⁰

96 Inter-American Court of Human Rights: *Velásquez Rodríguez Case, Compensatory Damages, Judgment of 21 July 1989, (Art. 63.1, American Convention on Human Rights)*, Series C: Decisions and Judgments, No. 7, paragraphs 32 and 34; *Godínez Cruz Case, Compensatory Damages (Art. 63.1, American Convention on Human Rights), Judgment of 21 July 1989, Series C: Decisions and Judgments, No. 8*, paras 30 and 3; *Caballero Delgado and Santana Case, Judgment of 8 December 1995 Series C: Decisions and Judgments, No. 22*, paragraph 69 and operative paragraph 5; *El Amparo Case, Reparations (Art. 63.1, American Convention on Human Rights), Judgment of 14 September 1996, Series C Decisions and Judgments, No. 28*, paragraph 61 and operative paragraph 4; *Castillo Páez Case, Judgment of 3 November 1997, Series C, No. 34*, paragraph 90; *Suárez Rosero Case, Judgment of 12 November 1997, Series C: Decisions and Judgments, No. 35*, paragraph 107 and operative paragraph 6; and *Nicholas Blake Case, Judgment of 24 January 1998, Series C: Decisions and Judgments No. 36*, paragraph 97.

97 Inter-American Court of Human Rights, *Velásquez Rodríguez Case, Judgment of 29 July 1988, Series C: Decisions and Judgments, No. 4*, paragraph 174, and *Godínez Cruz Case, Judgment of 20 January 1989, Series C: Decisions and Judgments, No. 5*, paragraph 184.

98 *El Amparo Case, Reparations*, op. cit., paragraph 61. See also the *Blake Case, Reparations*, op. cit., paragraph 65.

99 Judgment of 29 August 2002, “*El Caracazo*” v. *Venezuela Case, (Reparations)*, paragraph 119. [Spanish original, free translation.]

100 Judgment dated 14 March 2001, *Barrios Altos Case*, paragraph 41. See also the Judgments in the *Trujillo Oroza Case, Reparations*, paragraph 106, and the *Barrios Altos Case, Interpretation of the Judgment on the Merits*, paragraph 15.

The Inter-American Court of Human Rights pointed out that, as enshrined in articles 8 and 25 of the American Convention on Human Rights, this obligation is directly related to the right of all persons to a hearing by a competent, independent and impartial tribunal so that their rights can be determined as well as the right to an effective remedy. The Inter-American Court said the following on this subject: “The American Convention guarantees everyone the right of recourse to a competent court for the determination of his rights and States have a duty to prevent human rights violations, investigate them and identify and punish those responsible for carrying them out or covering them up. [...] Article 8.1 of the American Convention, which is closely related to Article 25 taken together with Article 1(1) of the same Convention, obliges the State to guarantee every individual access to simple and prompt recourse, so that, *inter alia*, those responsible for human rights violations may be prosecuted.”¹⁰¹ The Inter-American Court considered that failure to comply with this obligation amounts to a denial of justice and therefore constitutes impunity, the latter being defined as “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of [the] rights”.¹⁰² The Inter-American Court of Human Rights recalled that therefore: “[...] the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives”.¹⁰³ The Court stated that “[t]he State has a duty to avoid and combat impunity”.¹⁰⁴

For its part, the Inter-American Human Rights Commission considered that the obligation to prosecute and punish the perpetrators of human rights violations could not be delegated or waived. For example, in its “Report on the Situation of Human Rights in Peru”, the Inter-American Commission stated that: “the state is under the obligation of investigating and punishing the perpetrators [of human rights violations]... This international obligation of the state cannot be renounced”.¹⁰⁵

101 Inter-American Court of Human Rights, *Nicholas Blake Case, Reparations, Judgment of 22 January 1999*, Series C: Decisions and Judgments, paragraphs 61 and 63.

102 Inter-American Court of Human Rights, *Paniagua Morales and Others Case, Judgment of 8 March 1998*, Series C: Decisions and Judgments, No. 37, paragraph 173.

103 *Ibid*, paragraph 173.

104 Inter-American Court of Human Rights, *Nicholas Blake Case, Reparations, Judgment of 22 January 1999*, Series C: Decisions and Judgments, paragraph 64.

105 Inter-American Human Rights Commission, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paragraph 230.

The Committee against Torture has highlighted the customary nature of the obligation to try and punish the perpetrators of human rights violations. For example, when considering cases of torture committed prior to the entry into force of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture recalled that the obligation to punish those responsible for acts of torture was already a requirement before the Convention came into force because “there existed a general rule of international law which should oblige all States to take effective measures [...] to punish acts of torture”.¹⁰⁶ The Committee against Torture based its view on the “principles of the judgment of the Nuremberg International Tribunal” and the right not to be tortured contained in the Universal Declaration of Human Rights. Several resolutions adopted by the United Nations General Assembly on extrajudicial executions and forced disappearances can also be cited. For example, the United Nations General Assembly, on reaffirming that enforced disappearance constitutes a breach of international law, recalled that it is a crime which must be punished under criminal law.¹⁰⁷ In Resolution 55/111 of 4 December 2001, the General Assembly reiterated “the obligation of all Governments to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, while ensuring the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity, to prevent the recurrence of such executions”.¹⁰⁸

It is through the action of the courts that the obligation to prosecute and punish the perpetrators of human rights violations is discharged. The courts must ensure that the victims of human rights violations and their families have the rights to justice and an effective remedy and at the same time provide legal safeguards for those facing prosecution. When performing this dual function, the courts must respect international norms and standards relating to the administration of justice. Within this legal framework, the obligation to prosecute and punish and ensure that the rights to justice and an effective remedy

106 United Nations Committee against Torture, Decision concerning communications 1/1988, 2/1988 and 3/1988 (Argentina), 23 November 1989, paragraph 7.2, in United Nations document General Assembly, Official Reports, Forty-Fifth Session, Supplement N° 44 (A/45/44), 1990.

107 General Assembly Resolution 49/193, adopted on 23 December 1994. See also Resolution 51/94 of 12 December 1996 and Resolution 53/150 of 9 December 1998.

108 Resolution 55/111, “Extrajudicial, Summary or Arbitrary Executions”, adopted by the General Assembly on 4 December 2001, paragraph 6.

are guaranteed must be assumed by an independent and impartial court. The task of discharging the obligation to impart justice must be understood in its obvious natural sense; that is to say, there must be an established impartial and independent court in operation to hear and judge cases and ensure that the judgment is enforced and, in criminal cases, to punish those responsible in accordance with the national or international law in force at the time the alleged offence was committed. There must be a close relationship between the criminal charges brought and the punishments imposed on the perpetrators of human rights violations, on the one hand, and the seriousness of the violation and the nature of the right which has been breached, on the other. In the case of torture, international instruments talk about the imposition of penalties which are in keeping with the gravity of the torture.¹⁰⁹ The Inter-American Convention to Prevent and Punish Torture refers to “severe penalties”. Article III of the Inter-American Convention on Forced Disappearance of Persons and Article 4 of the Declaration on the Protection of All Persons from Enforced Disappearance both include explicit provisions regarding the application of appropriate penalties which take into account the extreme gravity of that particular form of human rights violation.

In discharging this obligation to impart justice, the State must act diligently. The mere existence of formal judicial remedies and court structures is not enough: “[...] in order to protect human rights effectively it is not enough, indeed it is dangerous merely to go through the legal motions, to maintain the appearance of legal protection, since this is nothing more than the illusion of justice”.¹¹⁰ Such diligence on the part of the courts of justice must be translated into the prompt expedition of proceedings. How long a trial will take is intrinsically linked to the complexity of the case, the judicial activity of the interested party and the behavior of the judicial authorities.¹¹¹ These three elements need to be assessed on a case-by-case basis. However, in certain circumstances, as the Inter-American Commission on Human Rights pointed out, “the delay in judicial proceedings... could become yet another device for assuring the impunity...”.¹¹²

109 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 4 and the Inter-American Convention to Prevent and Punish Torture, article 6.

110 De Abreu Dallari, Dalmo, “National Jurisdictions and Human Rights”, in Justice not Impunity, International Commission of Jurists and National Consultative Human Rights Commission (France), Paris, 1993.

111 Inter-American Court of Human Rights: Genie Lacayo Case, Judgment of 29 January 1997, (Ser. C) No. 30 (1997), paragraph 77.

112 Resolution N° 01a/88, 12 September 1988, *Case 9755 Chile*, in Annual Report of the Inter-American Commission on Human Rights 1987-1988, op. cit., p. 142.

7. The Right to Reparation

It is a long-acknowledged general principle of international law that any breach of an international obligation entails the obligation to provide reparation.¹¹³ This principle, first developed by the Permanent Court of International Justice and reiterated in international jurisprudence, was recently recalled by the International Law Commission.¹¹⁴ International human rights law is not exempt from enforcement of this general principle. Any breach of the obligation to guarantee the effective enjoyment of human rights and to refrain from violating those same rights entails the obligation to provide reparation. As the United Nations Independent Expert on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms pointed out, “the issue of State responsibility comes into play when a State is in breach of the obligation to respect internationally recognized human rights. Such obligation has its legal basis in international agreements, in particular international human rights treaties, and/or in customary international law, in particular those norms of customary international law which have a peremptory character (*jus cogens*)”.¹¹⁵

The right to reparation for the violation of human rights is reaffirmed in numerous treaty-based and declaratory instruments.¹¹⁶ It has also been

113 See Permanent Court of International Justice, Judgement dated 13 September 1928, *Factory at Chorzow (Germany v. Poland)*, in Series A, N°17; International Court of Justice, Judgement on merits of June 1949, *Corfu Channel (United Kingdom v. Albania)* and International Court of Justice, Judgement on merits, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986.

114 See Report of the International Law Commission – 53rd session (23 April to 1 June and 2 July to 10 August 2001), Official Documents of the General Assembly, 56th session, Supplement N° 10 (A/56/10).

115 United Nations document E/CN.4/Sub.2/1993/8, 2 July 1993, paragraph 41.

116 For example, within the universal system, the following, among others, can be cited: the Universal Declaration of Human Rights (art. 8); the International Covenant on Civil and Political Rights (arts. 2.3, 9.5 and 14.6); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 13 and 14); and the International Convention on the Elimination of All Forms of Racial Discrimination (art. 6). Similarly, at a regional level, the following, among others, can be cited: the European Convention on Human Rights (arts. 5.5, 13 and 41), the Convention on the Rights of the Child (art. 39), the American Convention on Human Rights (arts 25, 68 and 63.1) and the African Charter on Human and Peoples’ Rights (art. 21.2). The following are also worth mentioning: the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the Declaration on the Protection of All Persons from Enforced Disappearance (article 19); the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 20); and the Declaration on the Elimination of Violence against Women.

reiterated by international courts and international human rights bodies.¹¹⁷ The Inter-American Court of Human Rights has repeatedly stated that the State's obligation to provide reparation, which is a correlative of the right to reparation to which the victims of human rights violations are entitled, is "a customary norm which constitutes one of the fundamental principles of contemporary international law on State responsibility. In this way, when an unlawful act attributable to a State takes place, that State becomes immediately accountable for violation of an international norm and as a result has the duty to provide reparation and to halt the consequences of the violation."¹¹⁸

Reparation can take a variety of forms including: restitution, compensation, redress, rehabilitation, satisfaction and guarantees of non-repetition. The reparation must be appropriate, fair and prompt and, depending on the nature of the right violated and group of people affected, can be individual or collective. For example, in the case of enforced disappearance, the Inter-American Commission on Human Rights considered that knowing the truth about the fate and whereabouts of the disappeared, as a means of reparation in the form of satisfaction, was a right which belonged to society.¹¹⁹

8. The Right to the Truth

International humanitarian law has explicitly recognized the existence of the right to the truth for relatives of people who have gone missing, a general category which includes the victims of enforced disappearance.¹²⁰ The United Nations Working Group on Enforced or Involuntary Disappearances, in its

117 See, for example, the Judgment by the Inter-American Court of Human Rights dated 29 July 1988 in the *Velásquez Rodríguez Case* (paragraph 174 and following) and the Judgment by the European Court of Human Rights dated 31 January 1995 in the case of *Papamichalopoulos v. Greece (Article 50)*, in *Series A, N° 330-B*, 1995, p. 36.

118 Judgment of 29 August 2002, "*El Caracazo*" v. *Venezuela Case*, paragraph 76. See also the judgments by the Inter-American Court of Human Rights in the cases of *Trujillo Oroza - Reparations* (paragraph 60) and *Bámaca Velásquez - Reparations* (paragraph 38).

119 See, *inter alia*, Annual Report of the Inter-American Commission on Human Rights, 1985-1986, OEA/Ser.L/V/II.68, Doc. 8 rev 1, 28 September 1986, p. 205, and Inter-American Commission on Human Rights, Report No 136/99, 22 December 1999, Case 10,488 - *Ignacio Ellacuría and others*, paragraph 224.

120 Article 32 of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts. See also Resolution XIII adopted by the XXV International Conference of the Red Cross and Red Crescent (1986).

first report to the Commission on Human Rights, therefore recognized that, on the basis of the 1977 Protocol I additional to the four Geneva Conventions, relatives had the right to know the fate of family members who had suffered enforced disappearance.¹²¹ The Inter-American Commission on Human Rights was to take a similar view.¹²² Doctrine supporting the right to know the truth for relatives of people who have suffered enforced disappearance, whether in wartime or peacetime, has also been grounded in international humanitarian law.¹²³ Gradually, the right of all victims of gross human rights violations and their relatives to know the truth came to be recognized. At the same time, the basis in law was to change from international humanitarian law to the State's duty of guarantee.

The Expert on the impunity of perpetrators of human rights violations (civil and political) on the Sub-Commission on Prevention of Discrimination and Protection of Minorities has taken the view that the right to the truth - or "right to know" - exists as such and is an "inalienable right".¹²⁴ The Expert concluded his study by drafting a *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*¹²⁵, which includes among its principles the "victims' right to know". To be more specific, Principle 3 states: "Irrespective of any legal proceedings, victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate". The Meeting of Experts on Rights not Subject to Derogation during States of Emergency and Exceptional Circumstances, organized by the United Nations Special Rapporteur on the question of human rights and states of emergency, concluded that, given that jurisprudence and the views of United Nations special rapporteurs were in

121 United Nations documents E/CN.4/1435, 22 January 1981, paragraphs 186 and 187; E/CN.4/1983/14, paragraph 134, and E/CN.4/1984/21, paragraphs 159 and 171.

122 Annual Report of the Inter-American Commission on Human Rights, 1985-1986, OEA/Ser.L/V/II.68, Doc. 8, rev 1, 28 September 1986, p. 205, and Annual Report of the Inter-American Commission on Human Rights, 1987-1988, 1988, OAS document, OEA/Ser.L/V/II.74, Doc. 10, rev. 1, p. 359.

123 See, for example: Louis Joinet, "Rapport général", in *Le refus de l'oubli - La politique de disparition forcée de personnes - Colloque de Paris, Janvier/février 1981*, Ed. Berger-Levrault, collection "Mondes en devenir", Paris 1982, p. 302; Rodolfo Mattarollo, "Impunidad, democracia y derechos humanos" in *Por la Vida y la Paz de los Pueblos Centroamericanos*, series entitled *Cuadernos centroamericanos de derechos humanos*, No. 2, Ed. Codehuca, San José, Costa Rica, 1991, p.7; and Eric David, Principes de droit des conflits armés, ed. Bruylant, Brussels, 1994, paragraph 3.35, p.502.

124 United Nations document, E/CN.4/Sub.2/1993/6, paragraph 101.

125 United Nations document E/CN.4/Sub.2/1997/Rev.1, Annex I.

agreement on this issue, the right to the truth constituted a norm of customary international law.¹²⁶

Even though the International Covenant on Civil and Political Rights does not expressly refer to the right to the truth, the Human Rights Committee has expressly recognized the existence of the right of the relatives of victims of forced disappearance to know the truth. In one case of enforced disappearance, the Human Rights Committee concluded that “the author [of the communication to the Committee and the mother of the disappeared person] has the right to know what has happened to her daughter”¹²⁷. Without using the words “right to the truth” and without it being confined to enforced disappearances, the Human Rights Committee urged States parties to the International Covenant on Civil and Political Rights to ensure that victims of human rights violations know the truth about the acts committed. In its Concluding Observations on Guatemala’s initial report, the Human Rights Committee called on the Guatemalan authorities to, *inter alia*, continue working to “allow the victims of human rights violations to find out the truth about those acts”.¹²⁸

Similarly, the doctrine developed by the Inter-American Commission on Human Rights over the years has resulted in the right to know the truth becoming grounded in human rights norms from the Inter-American system. For example, in the case of *Ignacio Ellacuría v. El Salvador*, the Inter-American Commission concluded that: “The right to know the truth with respect to the facts that gave rise to the serious human rights violations that occurred... and the right to know the identity of those who took part in them, constitutes an obligation that the State must satisfy with respect to the victims’ relatives and society in general. This obligation arises essentially from the provisions of Articles 1(1), 8(1), 25 and 13 of the American Convention.”¹²⁹ The Inter-American Commission has gradually defined the scope and meaning of the right to the truth. Initially this was defined as the “right to know the truth about what happened, as well as the reasons and

126 See “Report of the Meeting of Experts on Rights not Subject to Derogation during States of Emergency and Exceptional Circumstances, held in Geneva from 17 to 19 March 1995”, reproduced in the report of the United Nations Special Rapporteur on the question of human rights and states of emergency, United Nations document E/CN.4/Sub.2/1995/20, Annex I, paragraph 40, p. 57.

127 Human Rights Committee, Decision of 21 July 1983, *Case of María del Carmen Almeida de Quintero and Elena Quintero de Almeida (Uruguay)*, Communication No. 107/1981, paragraph 14.

128 United Nations document, CCPR/C/79/Add.63, paragraph 25.

129 Report N° 136/99, 22 December 1999, *Case of Ignacio Ellacuría and others*, paragraph 221.

circumstances that gave rise to these crimes being committed”.¹³⁰ In recent decisions, the Inter-American Commission has made the meaning more explicit by stating that this right involves “know[ing] the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them”.¹³¹ There is an intrinsic relationship between the right to the truth and the right to have access to the courts. This relationship has been established by the Inter-American Commission: “The right to know the truth is also related to Article 25 of the American Convention, which establishes the right to simple and prompt recourse for the protection of the rights enshrined therein”.¹³²

The Inter-American Court of Human Rights, in its judgment in the *Velásquez Rodríguez case*, recognized the existence of the right of the relatives of victims of forced disappearance to know the fate of the person who has disappeared and the location of their remains.¹³³ The Inter-American Court of Human Rights also recognized this right in its judgment in the *Godínez Cruz case*.¹³⁴ In its judgment in the *Castillo Páez case*, even though the expression “right to the truth” was not used, the Inter-American Court of Human Rights recognized that “the victim’s family... have the right to know what happened to him”.¹³⁵ But the Inter-American Court has not limited this right to cases of forced disappearance. For example, in its Reparations Judgment on the case of “*El Caracazo*”, in which many people were executed by the Venezuelan armed forces and security forces, the Inter-American Court stated that “the results of [the investigations] must be made public so that Venezuelan society knows the truth”.¹³⁶ Similarly, the Inter-American Court considered that legal provisions, such as amnesty laws, which “preclude the identification of the individuals who are responsible for human rights violations... and prevent

130 Annual Report of the Inter-American Commission on Human Rights, 1985-1986, OEA/Ser.L/V/II.68, Doc. 8 rev 1, 28 September 1986, p. 205. [Spanish original, free translation.]

131 Inter-American Commission on Human Rights, Report No. 37/00, 13 April 2000, case 11,481, *Monsignor Oscar Arnulfo Romero y Galdámez*, paragraph 148. See also Report No. 136/99, 22 December 1999, Case 10,488, *Ignacio Ellacuría S.J. and others*, paragraph 221, and Report No. 1/99, 27 January 1999, Case No. 10,480, *Lucio Parada Cea and others*, paragraph 147.

132 Report No 136/99, 22 December 1999, Case 10,488, *Ignacio Ellacuría S.J. and others*, paragraph 225.

133 Judgment of 29 July 1988, *Velásquez Rodríguez Case*, paragraph 181.

134 Judgment of 20 January 1989, *Godínez Cruz Case*, paragraph 191.

135 Judgment of 3 November 1997, *Castillo Páez v. Peru*, paragraph 90.

136 Judgment of 29 August 2002, “*El Caracazo*” v. *Venezuela*, paragraph 118. [Spanish original, free translation.]

[the victims and] their next of kin from knowing the truth”¹³⁷... “are manifestly incompatible with the aims and spirit of the [American] Convention [on Human Rights]”.¹³⁸

The right to the truth is intimately linked to the State’s duty to discharge the obligations it has under treaty-based instruments on the protection of human rights and fundamental freedoms to which it has voluntarily subscribed. It is beyond question that the relatives of victims have the right for any investigation that is carried out to be thorough so that they can know the truth about the fate of their loved ones and the circumstances they went through and so that the identity of those directly responsible for the human rights violations in question can be made public. At the same time, the truth is essential to be able to properly assess the amount of compensation arising from any liability for human rights violations. Nevertheless, the State’s obligation to guarantee this right to the truth is not a substitute or alternative for the other obligations it has to fulfill within the framework of its duty of guarantee, namely, the obligations to investigate and impart justice. Such an obligation exists and carries on existing, regardless of whether or not the other obligations have been satisfied. The right of the victims of gross human rights violations and their relatives to know the truth has gradually taken on greater significance over the past ten years. A specific indication of this has been the creation in several countries of “truth commissions” and other similar mechanisms, the fundamental purpose of which is to confirm that human rights violations took place, uncover any unknown factors surrounding the fate of the victims, identify those responsible and, in some cases, provide the basis for bringing them to trial.

9. Impunity

Impunity is a violation by the State of the international obligations it has to satisfy whenever human rights violations have been committed. To put it another way, it is unlawful. The Inter-American Court of Human Rights has defined impunity as “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of [the] rights”¹³⁹. A definition of impunity has been proposed in the draft *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*¹⁴⁰, drawn up by the Expert on the impunity of perpetrators of

139 Judgment of 8 March 1998, *Paniagua Morales and Others Case*, paragraph 173.

140 United Nations document E/CN.4/Sub.2/1997/20/Rev.1, Annex.

human rights violations (civil and political) and currently under consideration by the United Nations Commission on Human Rights. In article 18, impunity is defined as “a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations”.¹⁴¹ The draft set of principles has been frequently cited by many international human rights mechanisms, in particular, the Inter-American Court of Human Rights¹⁴² and the Inter-American Commission on Human Rights, in their decisions on individual communications.¹⁴³

Impunity for the perpetrators of human rights violations in itself constitutes a breach of the duty of guarantee the State has where human rights are concerned. As the Expert on impunity put it, “[i]mpunity conflicts with the duty to prosecute and punish the perpetrators of gross violations of human rights which is inherent in the entitlement of victims to obtain from the State not only material reparation but also satisfaction of the ‘right to know’ or, more precisely, the ‘right to the truth’.”¹⁴⁴ The obligation to prevent and eradicate impunity for human rights violations is implicit in the norms established by the duty of guarantee. And it is for this reason that the issue of impunity is usually not specifically addressed in international treaty-based instruments. In keeping with this, the Expert on impunity has considered that several international instruments establish an imperative obligation to fight against impunity.¹⁴⁵ They include the Universal Declaration of Human Rights (articles 7 and 8), the International Covenant on Civil and Political Rights (article 2), the Convention against Torture and Other Cruel, Inhuman or Degrading

141 Ibidem, Principle 18.

142 See, for example, Inter-American Court of Human Rights, Judgment of 22 February 2002, *Bámaca Velásquez v. Guatemala (Reparations)*, paragraph 75, and the Judgment of 27 November 1998, *Castillo Páez v. Peru*, paragraph 48.

143 The Inter-American Commission on Human Rights has used the draft principles drawn up by Independent Expert Louis Joinet as an indispensable referent in the following cases: Report N° 136/99, Case 10,488 *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999; Report N° 37/00, Case 11,481 (El Salvador), *Monsignor Oscar Arnulfo Romero y Galdámez*; Report N° 45/00, Case 10,826 *Manuel Mónago Carhuaricra and Eleazar Mónago Laura* (Peru), 13 April 2000; Report N° 44/00, Case 10,820, *Américo Zavala Martínez* (Peru) 13 April 2000; Report N° 43/00, Case 10,670, *Alcides Sandoval and others* (Peru) 13 April 2000; Report N° 130/99, Case 11,740, *Victor Manuel Oropeza* (Mexico), 19 November 1999; Report N° 133/99, Case 11,725, *Carmelo Soria Espinoza* (Chile), 19 November 1999; and Report N° 46/00, Case 10,904, *Manuel Meneses Sotacuro and Félix Inga Cuya* (Peru), 13 April 2000.

144 United Nations document E/CN.4/Sub.2/1995/18, paragraph 13.

145 United Nations document E/CN.4/Sub.2/1993/6, paragraph 46 and following.

Treatment or Punishment (articles 4 and 5) and the Declaration on the Protection of All Persons from Enforced Disappearance.

This same view has been taken by international human rights courts and bodies. For example, the Human Rights Committee has reiterated that impunity - be it *de jure* or *de facto* - for human rights violations is incompatible with State obligations under the International Covenant on Civil and Political Rights.¹⁴⁶ On the subject of impunity, the Human Rights Committee also considered that “[i]t is imperative that stringent measures be adopted to address the issue of impunity by ensuring that allegations of human rights violations are promptly and thoroughly investigated, that the perpetrators are prosecuted, that appropriate punishments be imposed on those convicted, and that victims be adequately compensated”.¹⁴⁷ Where gross human rights violations are concerned, the Inter-American Court of Human Rights has deemed that, under the American Convention on Human Rights, “the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.”¹⁴⁸ In the opinion of the Inter-American Court, “[t]he State has a duty to avoid and combat impunity”.¹⁴⁹

As the Expert on the impunity of perpetrators of human rights violations (civil and political) has pointed out, impunity is a “phenomenon whose geometry is variable”, inasmuch as there are many different ways and means in which the State can infringe its human rights obligations. Doctrine talks about *de jure* impunity to refer to impunity which directly originates from legal norms such as amnesties and *de facto* impunity to encompass other situations. With regard to *de jure* impunity, it is worth highlighting the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights which contains the following clause: “States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law”.¹⁵⁰ It is also worth mentioning the

146 Concluding Observations of the Human Rights Committee - Lesotho, 8 April 1999, United Nations document CCPR/C/79/Add.106, paragraph 17; Concluding Observations of the Human Rights Committee - Brazil, 24 July 1996, United Nations document CCPR/C/79/add.66, paragraph 8.

147 Concluding Observations of the Human Rights Committee - Brazil, op. cit., paragraph 20.

148 Judgment of 8 March 1998, *Paniagua Morales and Others Case*, paragraph 173.

149 Judgment of 22 January 1999, *Nicholas Blake Case (Reparations)*, paragraph 64.

150 World Conference on Human Rights - Vienna Declaration and Programme of Action, June 1993, United Nations document DPI/1394-48164-October 1993-/M, Section II, paragraph 60.

Declaration on the Protection of All Persons from Enforced Disappearance, article 18 (1) of which expressly stipulates that: “Persons who have or are alleged to have committed offences [of enforced disappearance] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction”. A measure typical of *de jure* impunity is the granting of amnesties to the perpetrators of gross human rights violations. The Human Rights Committee has repeatedly deemed amnesties and other such legal measures which prevent investigation, prosecution and punishment of the perpetrators and the granting of reparation to the victims to be incompatible with obligations under the International Covenant on Civil and Political Rights.¹⁵¹ The Human Rights Committee has emphasized that these kinds of amnesties help to create an atmosphere of impunity for the perpetrators of human rights violations as well as to undermine efforts to re-establish respect for human rights and the rule of law, both of which constitute a breach of the State’s obligations under the Covenant. The Inter-American Commission on Human Rights has repeatedly concluded that “the application of amnesties renders ineffective and worthless the obligations that States Parties have assumed under Article 1.1 of the Convention, and thus constitute a violation of that article and eliminate the most effective means for protecting such rights, which is to ensure the trial and punishment of the offenders”.¹⁵²

151 General Comment No. 20 (44) on Article 7, 44th session of the Human Rights Committee (1992) in Official Documents of the General Assembly, Forty-Seventh Session, Supplement N° 40 (A/47/40), Annex VI.A. See the Observations and Recommendations of the Human Rights Committee to: Argentina, CCPR/C/79/Add.46 - A/50/40, paragraph 144 and CCPR/CO/70/ARG, paragraph 9; Chile, CCPR/C/79/Add.104, paragraph 7; France, CCPR/C/79/Add.80, paragraph 13; Guatemala, CCPR/C/79/Add.63, paragraph 25; Lebanon, CCPR/C/79/Add78, paragraph 12; El Salvador, CCPR/C/79/Add.34, paragraph 7; Haiti, A/50/40, paragraphs 22 - 24; Peru, CCPR/C/79/Add.67, paragraphs 9 and 10 and CCPR/CO/70/PER, paragraph 9; Uruguay, CCPR/C/79/Add.19 paragraphs 7 and 11 and CCPR/C/79/Add.90, Part C; Yemen, A/50/40, paragraphs 242 - 265; and Croatia, CCPR/CO/71/HRV, paragraph 11.

152 Inter-American Commission on Human Rights, Report N° 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 50. See also: Report N° 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 50; Report N° 25/98, Cases 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile), 7 April 1998, paragraph 42; Report N° 136/99, Case 10,488 *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, paragraph 200; Report N° 1/99, Case 10,480 *Lucio Parada Cea and others* (El Salvador), 27 January 1999, paragraph 107; Report N° 26/92, Case 10,287 *Las Hojas Massacre* (El Salvador), 24 September 1992, paragraph 6; Report N° 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 October 1992; and Report N° 29/92 (Uruguay), 2 October 1992.

But, of course, as the Inter-American Court of Human Rights has pointed out, *de jure* impunity is not confined to amnesties and pardons but encompasses all types of legal measures which are similarly incompatible with the State's international obligations. For example, in its momentous judgment in the *Barrios Altos* case, the Inter-American Court pointed out that, under the American Convention on Human Rights, "it is unacceptable to use amnesty provisions, statutes of limitations or measures designed to remove criminal liability as a means of preventing the investigation and punishment of those responsible for gross violations of human rights such as torture, summary, extra-legal or arbitrary executions and disappearances, all of which are prohibited as breaches of non-derogable rights recognized under international human rights law".¹⁵³ For the Inter-American Court these types of legal provisions are contrary to the general obligations enshrined in articles 1.1 and 2 of the American Convention on Human Rights and are also in breach of articles 8 and 25 (judicial protection and the right to simple and effective recourse).¹⁵⁴

There are several forms of *de facto* impunity. For example, they include complicit inertia on the part of the authorities, frequent passivity on the part of investigators, bias, intimidation and corruption within the judiciary.¹⁵⁵ In general, *de facto* impunity exists when, in the words of the United Nations Expert on the right to restitution, compensation and rehabilitation, "the State authorities fail to investigate the facts and to establish criminal responsibility".¹⁵⁶ Thus, in the vast realm inhabited by *de facto* impunity, the latter exists not only when the authorities fail to investigate human rights violations but also when they do investigate but fail to do so promptly and diligently in accordance with the relevant international standards. Thus, in the "*El Caracazo*" case, the Inter-American Court of Human Rights considered that investigations which carry on for a long period without those responsible for gross human rights violations being identified and punished, constitute "a situation of serious impunity and [...] a breach of the State's duty [of guarantee]".¹⁵⁷ Similarly, *de facto* impunity exists when the State does not bring the perpetrators of human rights violations before the courts or when only some of the perpetrators are criminally prosecuted. But there is also *de facto* impunity when the authorities fail to investigate all of the human rights viola-

153 Judgment of 14 March 2001, *Barrios Altos Case (Chumbipuma Aguirre and others v. Peru)*, paragraph 41. [Spanish original, free translation.]

154 *Ibid.*, paragraph 43.

155 United Nations document E/CN.4/Sub.2/1993/6, paragraph 46.

156 United Nations document E/CN.4/Sub.2/1992/8, paragraph 5.2.

157 Judgment of 29 August 2002, "*El Caracazo*" v. *Venezuela*, paragraph 117. [Spanish original, free translation.]

tions involved in a particular case or to prosecute all of those responsible for all the offences committed. Another way in which *de facto* impunity is brought about is when those responsible for a case of human rights violation are given sentences that are not consistent with the gravity of the violation or when the authorities do not ensure that the sentence is enforced. *De facto* impunity is also present, purely and simply, when the right to justice is denied to the victims of human rights violations, their access to the courts is restricted or cases are not conducted in accordance with the international standards applicable to due process. Furthermore, it arises when the existence of a court which is independent and impartial has not been guaranteed because the absence of these two qualities leads to the denial of justice and damages the credibility of the judicial process.¹⁵⁸

Numerous Special Rapporteurs and Working Groups designated by the Commission on Human Rights have pointed out that impunity constitutes a breach of international human rights law and that it is the main factor contributing to the recurrence of practices such as torture, extrajudicial execution and enforced disappearance.¹⁵⁹

10. Military Jurisdiction

There are few norms which specifically refer to the trial of perpetrators of gross human rights violations under military jurisdiction. The United Nations Declaration on the Protection of All Persons from Enforced Disappearance was the first international instrument to have specific provisions on the trial of human rights violators under military jurisdiction. Article 16 (2) stipulates that those responsible for enforced disappearance, either as principal or accessory, “[...] shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.”

The Inter-American Convention on Forced Disappearance of Persons, adopted in 1994, was the first treaty to address this issue. In article IX, it specifies that “Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions. [...] The acts constituting

158 United Nations document E/CN.4/Sub.2/1985/18.

159 Among others, see the Special Rapporteur on Torture, E/CN.4/1990/17, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1990/22 and E/CN.4/1991/36, and the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1990/22/Add.1 and E/CN.4/1991/20.

forced disappearance shall not be deemed to have been committed in the course of military duties”. The Convention did not only exclude members of the military or police who were responsible for forced disappearances from military jurisdiction, as the Declaration did. It also established that it was not possible to consider an act constituting enforced disappearance to be an ‘offence committed in the line of duty’ (*delito de función*), a ‘service-related act’ (*acto de servicio*) or an ‘ordinary criminal offence committed while on duty’ (*delito común cometido con ocasión al servicio*).

Where other gross human rights violations are concerned, there are no international instruments, either treaty-based or declaratory, containing specific provisions relating to military jurisdiction. Nevertheless, despite this, the Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights have adopted several resolutions urging States to exclude gross human rights violations from the jurisdiction of military courts. For example, it is worth mentioning Resolution 1989/32 of the Commission on Human Rights which recommends that States should bear in mind and implement the principles contained in the draft Universal Declaration on the Independence of Justice. Principle 5 (f) of the draft, known as the *Singhi* Declaration, expressly stipulates that the jurisdiction of military courts should be limited to military offences. Similarly, the Commission on Human Rights, in Resolution 1994/67, entitled “Civil Defence Forces”¹⁶⁰, recommended that whenever “armed civil defence forces are created”, governments should ensure that their domestic legislation specifies that “offences involving human rights violations by such forces shall be subject to the jurisdiction of the civilian courts”. In Resolution 1994/39, the Commission on Human Rights noted the recommendation made by the Working Group on Enforced and Involuntary Disappearances on “[...] the trial by civilian courts of alleged perpetrators” of enforced disappearance.¹⁶¹ For its part, the Sub-Commission, in Resolutions 1998/3 and 1999/3, urged governments “to ensure that crimes committed against human rights defenders do not go unpunished, to allow and facilitate all necessary inquiry and to ensure judgement by a civil tribunal and punishment of the perpetrators”.

Lastly, it is worth mentioning three draft international instruments currently awaiting adoption by the United Nations Commission on Human Rights which also make reference to military jurisdiction where human rights violations are concerned. They are the draft *International Convention on the Protection of All Persons from Forced Disappearance*,¹⁶² the draft *Set of*

160 Resolution 1994/67, “Civil Defence Forces”, paragraph 2.

161 Resolution 1994/39, paragraph 21.

162 United Nations document E/CN.4/Sub.2/1998/19, Annex.

*Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*¹⁶³ and the draft *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*.¹⁶⁴

The draft Convention stipulates in article 10 that “1. The alleged perpetrators of and other participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention shall be tried only in the courts of general jurisdiction of each State, to the exclusion of all courts of special jurisdiction, and particularly military courts. [...] 3. The perpetrators of and other participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention shall in no case be exempt from criminal responsibility including where such offences or acts were committed in the exercise of military or police duties or in the course of performing these functions”.¹⁶⁵

Principle 31 of the draft *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* states that “[i]n order to avoid military courts, in those countries where they have not yet been abolished, helping to perpetuate impunity owing to a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, that of an international criminal court.”

Principle 25 (i, ii) of the draft *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* stipulates that one of the guarantees of non-recurrence must be the restriction of “the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces”. Like the draft principles against impunity, these draft principles and

163 United Nations document E/CN.4/Sub.2/1997/20/Rev.1, Annex.

164 United Nations document E/CN.4/2000/62.

165 The draft was drawn up and adopted by the Sub-Commission. The types of conduct listed in article 2 to which article 10 refers are: instigation, incitement or encouragement of the commission of the offence of forced disappearance; conspiracy or collusion to commit an offence of forced disappearance; attempt to commit an offence of forced disappearance; concealment of an offence of forced disappearance; and non-fulfilment of the legal duty to act to prevent a forced disappearance.

guidelines on the right to reparation have been cited by the Inter-American Court of Human Rights as a reference in several of its judgments.¹⁶⁶

Finally, it is worth mentioning that, in 2000, the United Nations Sub-Commission on the Promotion and Protection of Human Rights began a study into the issue of the administration of justice through military tribunals.¹⁶⁷ This should include the development of international standards on military jurisdiction. The Rapporteur responsible for the study has already taken some steps in this direction by provisionally formulating nine recommendations. One of them, Recommendation N° 1, excludes the prosecution of gross human rights violations from the jurisdiction of military courts.¹⁶⁸

166 See, for example, Inter-American Court of Human Rights, Judgment of 22 February 2002, *Bámaca Velásquez v. Guatemala (Reparations)*, paragraph 75, and the Judgment of 27 November 1998, *Castillo Páez v. Peru*, paragraph 48.

167 United Nations documents E/CN.4/Sub.2/2000/WG.1/CRP1, E/CN.4/Sub.2/2001/WG.1/CRP3 and E/CN.4/Sub.2/2002/4.

168 United Nations document E/CN.4/Sub.2/2002/4, paragraph 30.

Section II

International Jurisprudence and Doctrine on Human Rights

A. The Universal System of Human Rights Protection

1. Human Rights Treaty Monitoring Bodies

The human rights treaty monitoring bodies within the universal system have addressed the issue of bringing military and police personnel accused of human rights violations to trial in military or police courts. Although they have gradually come to the same conclusion, the way in which their doctrine and jurisprudence have developed has been uneven. This is mainly due to the nature of the rights and obligations for which each particular body is responsible. The Human Rights Committee, the body charged with monitoring the International Covenant on Civil and Political Rights, has been the body *par excellence* in developing doctrine on the question of using military or police courts to try military and police personnel accused of human rights violations. To a lesser extent, this has also been done by the Committee against Torture, the body responsible for monitoring the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The issue has also been addressed on several occasions by the Committee on the Rights of the Child, the body which monitors the Convention on the Rights of the Child.

1.1. The Human Rights Committee

The International Covenant on Civil and Political Rights does not contain any specific provisions on the subject of military courts. However, article 2(3) establishes the right to an effective remedy of a judicial nature. In addition, article 14 recognizes the right to a hearing by an independent and impartial

tribunal and the right to the judicial guarantees that are necessary for a fair trial. These two provisions are the pillars upon which the Human Rights Committee's doctrine on the question of military courts has been established.

Human Rights Committee doctrine on the use of military courts to try military and police personnel who are responsible for human rights violations has significantly evolved over the past fifteen years. Traditionally, the Human Rights Committee did not consider that this practice, or that of trying civilians in military courts, was incompatible *per se* with the provisions of the International Covenant on Civil and Political Rights, in particular article 14. For example, in 1984, in General Comment N° 13 on article 14 of the Covenant, entitled "Equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law", the Human Rights Committee said the following:

"The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts 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. [...] In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14".¹

1 Human Rights Committee, General Comment No 13, "Equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law" (article 14 of the Covenant), paragraph 4, adopted at the 21st session, 1984, United Nations document HR1/GEN/1/Rev.3.

Although, in General Comment N° 13, the Human Rights Committee was essentially addressing the question of trying civilians in military courts, their considerations were also applicable to the practice of trying military and police personnel accused of human rights violations in military courts. However, as a result of observing how the Covenant was being implemented by the States parties and examining their periodic reports, the Human Rights Committee gradually began to change its view. The Human Rights Committee now believes that the practice of using military courts to try military and police personnel who have committed human rights violations is incompatible with the obligations assumed under the International Covenant on Civil and Political Rights, especially those stemming from articles 2(3) and 14.

In 1992, in its Concluding Observations to Colombia, the Human Rights Committee stated that:

“the measures that have been taken do not seem to be sufficient to guarantee that all members of the armed forces who abuse their power and violate citizens’ rights will be brought to trial and punished. Military courts do not seem to be the most appropriate ones for the protection of citizens’ rights in a context where the military itself has violated such rights. [...] The Committee recommends that the State party should [...] eliminate impunity; strengthen safeguards for individuals *vis-à-vis* the armed forces; limit the competence of the military courts to internal issues of discipline and similar matters so that violations of citizens’ rights will fall under the competence of ordinary courts of law [...]”.²

That same year, in its Concluding Observations to Peru, the Human Rights Committee said that it was regrettable that, with regard to extrajudicial executions and enforced disappearances attributed to the security forces as well as with regard to terrorist acts, those responsible for such criminal acts “can be tried for acts of violence only under military law”.³

In its Concluding Observations to Venezuela, in expressing “concern at the serious human rights violations, such as enforced and involuntary disappearances, torture and extrajudicial executions, that were committed during the attempted *coup d’état* in 1989 and early 1992”, the Human Rights Committee

2 United Nations document CCPR/C/79/Add.2, 25 September 1992, paragraph 393.

3 United Nations document CCPR/C/79/Add.8, 25 September 1992, paragraph 8.

was “disturbed by the failure to take sufficient steps to punish those guilty of such violations, and concerned that members of the police force and the security services and military personnel are likely to go unpunished as a result”.⁴ The Human Rights Committee therefore recommended the Venezuelan State to:

“see to it that all members of the armed forces or the police who have committed violations of the rights guaranteed by the Covenant are tried and punished by civilian courts”.⁵

In its Observations to Croatia, the Human Rights Committee said the following:

“Those responsible for violations of human rights should be brought speedily before the courts. In that regard, the existing distinctions between military and civil jurisdictions should be reviewed so that military personnel might be tried and, if found guilty, punished under normal civil jurisdiction”.⁶

In its Concluding Observations to Brazil in July 1996, the Human Rights Committee expressed its concern at “the practice of trying military police accused of human rights violations before military courts and regrets that jurisdiction to deal with these cases has not yet been transferred to the civilian courts”.⁷

When carrying out their periodic examination of Peru’s report at the July 1996 session of the Human Rights Committee, several members of the Committee considered military courts to be incompatible with several different provisions of the International Covenant on Civil and Political Rights.⁸ For one Committee member, Mr. T. Buergenthal, “the military courts [...] violated the principle of the guarantees of due process recognized in all international human rights instruments”.⁹ In the opinion of another member, Ms. Medina Quiroga, in Peru “[t]he military trial and appeal courts were not in compliance with article 14 of the Covenant, since the judges were serving military officers”.¹⁰

4 United Nations document CCPR/C/79/Add.13, 28 December 1992, paragraph 7.

5 Ibid., paragraph 10.

6 United Nations document CCPR/C/79/Add.15 - A/48/40, 28 December 1992, paragraph 369.

7 United Nations document CCPR/C/79/Add.66, 24 July 1996, paragraph 10.

8 United Nations document CCPR/SR.1519 and CCPR/C/SR.1521.

9 United Nations document CCPR/SR.1519, paragraph 49.

10 United Nations document CCPR/C/SR.1521, paragraph 6.

The Human Rights Committee, in its 1997 Concluding Observations to Colombia, noted:

“with great concern that impunity continues to be a widespread phenomenon and that the concept of service-related acts has been broadened by the Higher Adjudication Council to enable the transfer from civilian jurisdiction to military tribunals of many cases involving human rights violations by military and security forces. This reinforces the institutionalization of impunity in Colombia since the independence and impartiality of these tribunals are doubtful. The Committee wishes to point out that the military penal system lacks many of the requirements for a fair trial spelled out in article 14, for example the amendments to article 221 of the Constitution allowing active duty officers to sit on military tribunals and the fact that members of the military have the right to invoke as defence the orders of a superior”.¹¹

As a consequence, the Human Rights Committee urged the Colombian authorities to take all necessary steps:

“to ensure that members of the armed forces and the police accused of human rights abuses are tried by independent civilian courts and suspended from active duty during the period of investigation. To this end, the Committee recommends that the jurisdiction of the military courts with respect to human rights violations be transferred to civilian courts and that investigations of such cases be carried out by the Office of the Attorney-General and the Public Prosecutor. More generally, the Committee recommends that the new draft Military Penal Code, if it is to be adopted, comply in all respects with the requirements of the Covenant. The public forces should not be entitled to rely on the defence of ‘orders of a superior’ in cases of violation of human rights”.¹²

In its Concluding Observations to Lebanon in 1997, the Human Rights Committee expressed its concern “about the broad scope of the jurisdiction of military courts in Lebanon, especially its extension beyond disciplinary matters and its application to civilians. It is also concerned about the procedures followed by these military courts, as well as the lack of supervision of the

11 United Nations document CCPR/C/79/Add.76, 5 May 1997, paragraph 18.

12 Ibid., paragraph 34.

military courts' procedures and verdicts by the ordinary courts".¹³ The Human Rights Committee recommended that the State party concerned:

“should review the jurisdiction of the military courts and transfer the competence of military courts, in all trials concerning civilians and in all cases concerning the violation of human rights by members of the military, to the ordinary courts”.¹⁴

In its Concluding Observations to Chile in 1997, the Human Rights Committee concluded that “[t]he wide jurisdiction of the military courts to deal with all the cases involving prosecution of military personnel and their power to conclude cases that began in the civilian courts contribute to the impunity which such personnel enjoy against punishment for serious human rights violations”.¹⁵ The Human Rights Committee therefore recommended that:

“the law be amended so as to restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature”.¹⁶

In its Observations to the Dominican Republic, the Human Rights Committee deplored the fact that “the National Police has its own judicial body, separate from that established by the Constitution, to try crimes and offences by its members; this is incompatible with the principle of equality before the law protected by articles 14 and 2, paragraph 3, of the Covenant. The Committee also observes that, although the police is a civilian body legally subordinate to the Department of the Interior and Police, in practice it is subject to military authority and discipline, to the extent that the chief of police is a general of the armed forces on active duty”. The Human Rights Committee therefore called on the country's authorities:

“to ensure that the jurisdiction of the police tribunals is restricted to internal disciplinary matters and that their powers to try police officers accused of common crimes are transferred to the ordinary civilian courts”.¹⁷

In its Observations to Guatemala in 2001, after the proposed constitutional reform had been rejected, the Human Rights Committee expressed its

13 United Nations document CCPR/C/79/Add.78, 1 April 1997, paragraph 14.

14 Ibidem.

15 United Nations document CCPR/C/79/Add.104, 30 March 1999, paragraph 9.

16 Ibidem.

17 United Nations document CCPR/CO/71/DOM, 26 April 2001, paragraph 10.

concern that “personal jurisdiction has been maintained for members of the military”.¹⁸ The Human Rights Committee stated that:

“The wide jurisdiction of the military courts to hear all cases involving the trial of military personnel and their powers to decide cases that belong to the ordinary courts contribute to the impunity enjoyed by such personnel and prevent their punishment for serious human rights violations, as the State party recognized when including the amendments not adopted in the 1999 referendum. The State party should amend the law to limit the jurisdiction of the military courts to the trial of military personnel who are accused of crimes of an exclusively military nature (arts. 6, 7, 9 and 14 of the Covenant)”.¹⁹

Conversely, measures and reforms adopted by States parties to bar military and police courts from trying military or police personnel for human rights violations and hand over jurisdiction for such cases to the ordinary criminal courts have been seen by the Human Rights Committee as a positive factor that contributes towards implementation of the International Covenant on Civil and Political Rights. In its Concluding Observations to Bolivia in 1997, the Human Rights Committee also welcomed “the information that torture, forced disappearances and extrajudicial executions are punishable offences in Bolivia. It also welcomes the information that military tribunals have no jurisdiction except within the military institution and that cases of human rights violations by members of the army and the security forces fall under the jurisdiction of civil courts”.²⁰ In its Observations to El Salvador, the Human Rights Committee welcomed the fact that the jurisdiction of military courts had been curbed, seeing it as a positive factor for implementation of the Covenant.²¹ In its Observations to Ecuador in 1998, the Human Rights Committee welcomed “the information that the jurisdiction of the military tribunals has been limited to members of the armed forces in the exercise of their official functions; that these tribunals have no jurisdiction over civilians; and that cases of human rights violations by members of the army and the security forces fall under the jurisdiction of civilian courts”.²² However, the Human Rights Committee had been mistaken because, although under the new Ecuadorian Constitution military courts had become part of the ordinary

18 United Nations document CCPR/CO/72/GTM, 27 August 2001, paragraph 10.

19 Ibid., paragraph 20.

20 United Nations document CCPR/C/79/Add.74, paragraph 11.

21 United Nations document CCPR/C/79/Add.34, 18 April 1994, paragraph 5.

22 United Nations document CCPR/C/79/Add.92, 18 August 1998, paragraph 7.

court system, they had not lost jurisdiction over cases of military personnel accused of violating human rights. In its Observations to Guinea, the Human Rights Committee welcomed the fact that military courts had been abolished as a result of the Basic Law with constitutional status adopted by referendum on 23 December 1990.²³

The Human Rights Committee has examined the question of trying military personnel accused of violating human rights in military courts in the decisions it has taken on individual communications presented under the Optional Protocol to the International Covenant on Civil and Political Rights. In such cases, the Human Rights Committee has addressed the issue by looking at whether a suitable remedy exists and if so, whether it has been exhausted.²⁴

It is important to stress that, in several of its observations and recommendations to countries, the Human Rights Committee has taken the general view that the jurisdiction of military courts should be limited to offences which are strictly military in nature and which have been committed by military personnel. For example, in its observations to Egypt, the Human Rights Committee considered that “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”.²⁵ In its observations to Chile, the Human Rights Committee stated that “the continuing jurisdiction of Chilean military courts to try civilians does not comply with article 14 of the Covenant. Therefore: The Committee recommends that the law be amended so as to restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature”.²⁶ In its observations to Poland, the Human Rights Committee was “concerned at information about the extent to which military courts have jurisdiction to try civilians (art. 14); 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”.²⁷ In its observations to Cameroon, the Human Rights Committee recommended that the State party

23 United Nations document CCPR/C/79/Add.20, 29 April 1993, paragraph 3.

24 Decision dated 29 July 1997, Communication N° 612/1995, Case of *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, United Nations document CCPR/C/60/D/612/1995, 19 August 1997, and the decision dated 13 November 1995, Communication N° 563/1993, Case of *Nydia Erika Bautista v. Colombia*, United Nations document CCPR/C/55/D/563/1993.

25 United Nations document CCPR/C/79/Add.23, 9 August 1993, paragraph 9.

26 United Nations document CCPR/C/79/Add.104, 30 March 1999, paragraph 9.

27 United Nations document CCPR/C/79/Add.110, 29 July 1999, paragraph 21.

“ensure that the jurisdiction of military tribunals be limited to military offences committed by military personnel”.²⁸ In its observations to Morocco²⁹, Syria³⁰, Kuwait³¹, the Russian Federation³², Slovakia³³ and Uzbekistan³⁴, the Human Rights Committee considered that military courts did not meet the requirements of article 14 of the International Covenant on Civil and Political Rights. In these observations, the Human Rights Committee also recommended that the jurisdiction of military courts be restricted to trying members of the armed forces accused of military offences. In its 1999 observations to Lesotho, while not specifically commenting on military courts, the Human Rights Committee was “concerned about the continuing influence of the military in civilian matters and in particular about the climate of impunity for crimes and abuses of authority committed by members of the military. The Committee strongly urges that measures be taken by the State party to ensure the primacy of civil and political authority”.³⁵

1.2. The Committee against Torture

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains no explicit provisions regarding military courts and does not explicitly state that those believed to be responsible for torture offences have to be tried in ordinary courts to the exclusion of military courts. Nevertheless, the Convention makes it obligatory for acts of torture to be classified as criminal offences and for them to be punishable “by appropriate penalties which take into account their grave nature”.³⁶ Similarly, article 5 of the Convention makes it obligatory for the State party to exercise criminal jurisdiction over acts of torture committed in any territory under its jurisdiction or when the alleged perpetrator or the victim is a national of that State. Article 5 also makes it obligatory for the State party to prosecute or extradite any alleged perpetrator who is found on any territory under its jurisdiction (the *aut dedere aut judicare* principle).

28 United Nations document CCPR/C/79/Add.116, 4 November 1999, paragraph 21.

29 United Nations document A/47/40, 23 October 1991, paragraph 57.

30 United Nations document CCPR/CO/71/SYR, paragraph 17.

31 United Nations document CCPR/CO/69/KWT, paragraph 10.

32 United Nations document CCPR/C/79/Add.54, 29 July 1995, paragraph 25.

33 United Nations document CCPR/C/79/Add.79, paragraph 20.

34 United Nations document CCPR/CO/71/UZB, 26 April 2001, paragraph 15.

35 United Nations document CCPR/C/79/Add. 106, paragraph 14.

36 Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Despite the absence of specific norms on the issue, the Committee against Torture has on several occasions considered that military personnel believed to be responsible for torture offences should be tried by ordinary criminal courts and not by military courts. The Committee has said this in several of its observations and recommendations to States parties. In its observations to Peru in 1994, the Committee was “concerned by the subjection of civilians to military jurisdiction and by the fact that, in practice, the competence of the military courts is being extended as regards cases of abuse of authority”.³⁷ The Committee against Torture made the following recommendation to the State party concerned:

“The military courts should be regulated to prevent them from trying civilians and to restrict their jurisdiction to military offences, by introducing the appropriate legal and constitutional changes”.³⁸

Five years later, in its observations to Peru, the Committee against Torture recommended that the State party should ensure “vigorous investigation and, where appropriate, the prosecution of all reported instances of alleged torture and ill-treatment by its authorities, whether civil or military”.³⁹ The Committee also “once again emphasize[d] that the State party should return jurisdiction from military courts to civil courts in all matters concerning civilians”.⁴⁰

In its observations to Colombia, the Committee against Torture noted with concern that “the light penalties for the offence of torture in the Code of Military Justice do not seem to be acceptable, nor does the extension of military jurisdiction to deal with ordinary crime by means of the inadmissible expansion of the concept of active service”.⁴¹ The Committee against Torture recommended to the State party that “the situation of impunity [...] be terminated by adopting the necessary legislative and administrative amendments to ensure that military courts judge only violations of military regulations, punishing torture by means of penalties commensurate with its seriousness and dispelling any doubt as to the responsibility of anyone who obeys an illegal order”.⁴²

37 United Nations document A/50/44, 26 July 1995, paragraph 69.

38 *Ibid.*, paragraph 73.

39 United Nations document A/55/44, 16 November 1999, paragraph 61.

40 *Ibid.*, paragraph 62.

41 United Nations document A/51/44, 9 July 1996, paragraph 76.

42 *Ibid.*, paragraph 80.

In its observations to Jordan, the Committee against Torture urged the country's authorities "to consider abolishing exceptional courts such as the State security courts and allow the ordinary judiciary to recover full criminal jurisdiction in the country".⁴³

In its observations to Venezuela, the Committee against Torture recommended that the country's criminal legislation be amended in order to "provide for the hearing and trial in the ordinary courts of any charge of torture, regardless of the body of which the accused is a member".⁴⁴

In its observations to Guatemala, the Committee against Torture viewed as positive "[t]he restriction of military jurisdiction to essentially military crimes and misdemeanours and the consequent transfer to ordinary courts of all proceedings against members of the armed forces for ordinary crimes and similar acts".⁴⁵ In its 1995 observations, the Committee against Torture had requested the State party to change "the legal provisions concerning the military jurisdiction, in order to limit the jurisdiction of military judges exclusively to military crimes".⁴⁶

In its observations to Portugal, the Committee against Torture saw "[t]he revision of the Constitution, especially the ending of the status of military courts as special courts" as a positive step in combatting torture.⁴⁷

1.3. The Committee on the Rights of the Child

The Convention on the Rights of the Child does not contain any provisions which refer explicitly to military courts or violations of the rights of the child committed by military personnel. Nevertheless, the considerations the Committee on the Rights of the Child conveyed to Colombia in 1995 are worth mentioning:

"Violations of human rights and children's rights should always be examined by civilian courts under civilian law, not military courts. The outcome of investigations and cases of convictions should be widely publicized in order to deter future offences and thus combat the perception of impunity".⁴⁸

43 United Nations document A/50/44, 26 July 1997, paragraph 175.

44 United Nations document A/54/44, 5 May 1999, paragraph 142.

45 United Nations document A/53/44, 27 May 1998, paragraph 162 (e), "Positive Aspects".

46 United Nations document A/51/44, 7 July 1996, paragraph 57 (h).

47 United Nations document A/53/44, 21 November 1997, paragraph 44(e), "Positive Aspects".

48 United Nations document CRC/C/15/Add.30, 15 February 1995, paragraph 17.

2. The Commission on Human Rights

The Commission on Human Rights has repeatedly addressed the question of using military or police courts to try military and police personnel for human rights violations. This has been done mainly through the general reports and reports of country visits compiled by its thematic mechanisms, be they Special Rapporteurs, Experts, Special Representatives or Working Groups. The country mechanisms have also addressed the issue when studying the situation of human rights in specific countries. They all agree on the diagnosis: as far as the prosecution of military and police personnel for human rights violations is concerned, military and police courts are sources of impunity and fail to safeguard the rights of the victims and their relatives.

2.1. *The Special Rapporteur on extrajudicial, summary or arbitrary executions*

The Special Rapporteur on extrajudicial, summary or arbitrary executions has made reference on several occasions to the use of military courts to try members of the security forces who have committed human rights violations.⁴⁹ Referring to the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, the Special Rapporteur, Mr. Amos Wako, considered that:

“Any government practice that does not comply with the norms established in the principles can be taken as evidence of government responsibility, even though there may be no proof that government officials were directly involved in the summary or arbitrary executions in question”.⁵⁰

The Special Rapporteur recommended that States should “thoroughly investigate any allegations of summary or arbitrary executions that are presented, regardless of the status of those responsible or the position they hold, and ensure that they are brought without delay before an independent and impartial tribunal which guarantees full respect for the rights of the victims”.⁵¹ He also said that: “One of the main pillars of effective human rights protection is

49 This mandate was first established in 1982. Amos Wako (Kenya) was the first Rapporteur (1982-1992). The position has subsequently been held by Bacre Waly Ndiaye (Senegal, 1992-1998) and Asma Jahangir (Pakistan, 1998 onwards).

50 United Nations document E/CN.4/1990/22, paragraph 463. See also United Nations document E/CN.4/1991/36, paragraph 591. [Spanish original, free translation.]

51 United Nations document E/CN.4/1992/CRP.1, paragraph 649. [Spanish original, free translation.]

for governments to take steps to open independent and impartial investigations in order to identify and bring to justice those responsible for human rights violations. Consequently, an atmosphere of impunity for human rights violators is a major contributing factor in the persistence and often the increase in human rights abuses in various countries. [...] Special attention must be paid to the procedures used in [military] courts, which must not disregard the internationally recognized standards for a fair trial. In addition, any penalties imposed as a result of such procedures must not in practice amount to disguised impunity”.⁵²

In his 1983 report to the Commission on Human Rights, the Special Rapporteur presented a general picture of the situations in which extrajudicial executions had tended to occur between approximately 1965 and 1983.⁵³ The Rapporteur noted that death sentences were almost always passed by a special tribunal, special military tribunal or revolutionary tribunal which did not comply with procedural norms. According to the Special Rapporteur, in many countries, special tribunals, such as military tribunals, had been set up after the fall of the previous government. Such courts imposed death sentences without following appropriate procedures. The Rapporteur described how, in one country, following an attempted coup to overthrow the head of government, special military tribunals had been set up to try those believed to be responsible for the coup attempt as well as for the deaths of government officials that had occurred during it. Executions went on for a year and hundreds of people were allegedly executed on the orders of the said tribunals with total disregard for procedural safeguards.⁵⁴

The Rapporteur also noted that in many countries trials conducted by military tribunals were held behind closed doors and resulted in public or secret executions.⁵⁵ The Rapporteur went on to point out that in many countries such courts were presided by judges with no qualifications and were not independent.⁵⁶ In fact, sentences were handed down by special military tribunals made up of military officials who not only were not members of the judiciary but had not received the training required to undertake such a task. “It would seem that the most serious defects were in the structure itself and in the institutional position of this type of court or tribunal”.⁵⁷ In most cases, they did not form part of the judiciary but of the executive. Furthermore, given the

52 United Nations document E/CN.4/1993/46, paragraph 686. [Spanish original, free translation.]

53 United Nations document E/CN.4/1983/16, Chapter VII(A), paragraph 73.

54 *Ibid.*, paragraphs 75 to 76.

55 *Ibid.*, paragraph 78.

56 *Ibid.*, paragraph 82.

57 *Ibidem.* [Spanish original, free translation.]

way in which judges were appointed, it was impossible for such courts to be considered independent of the executive. The Rapporteur pointed out that the verdicts handed down by these courts were of a political nature and based on guidelines provided by the executive, thereby turning such trials into a mere formality for rubberstamping decisions that had already been made.⁵⁸ In his general conclusions and recommendations, the Special Rapporteur said that “although certain relatively clear basic standards exist for determining cases of arbitrary or summary executions, further long-term work needs to be carried out to establish standards in some areas, in particular [...] 2. To clarify the minimum substantive and procedural guarantees that must be respected by military courts, [...] during states of emergency or when there are disturbances or internal tension, and the requirements and conditions to be met by such courts”.⁵⁹

In his 1984 report to the Commission on Human Rights, the Special Rapporteur carried out an analysis of the situations in which arbitrary and summary executions usually occur.⁶⁰ The analysis devoted particular attention to military courts.⁶¹ According to the Special Rapporteur, one of the characteristic features that can lead to the creation of conditions in which summary or arbitrary executions may occur is the existence of special tribunals:

“In a considerable number of cases special tribunals, such as [...] security tribunals, were set up outside of the country’s legal system. On several different occasions, military courts tried civilians without supervision from the judiciary. Such special tribunals are usually empowered to try ‘political’, ‘security’ or ‘counter-revolutionary’ offenders and, in most cases, are not compelled to follow the procedures that apply in ordinary courts. Consequently, they tend to disregard the safeguards that must characterize a fair trial and the right to defence is usually extremely limited. In some cases, access to legal advice is not permitted in special tribunals. In other cases the defendants are not informed of the charges against them until the time of the trial so that it is impossible for them to prepare a proper defence. It is also not possible to cross-examine prosecution witnesses. Consequently, the evidence put forward by the prosecution cannot be refuted. The right of appeal to a higher

58 Ibidem.

59 United Nations document, E/CN.4/1983/16, paragraph 230. [Spanish original, free translation.]

60 United Nations document, E/CN.4/1984/29. See also United Nations document, E/CN.4/1985/17, paragraphs 41 to 45.

61 United Nations document, E/CN.4/1984/29, paragraphs 75 to 86.

court is also usually denied. Judges and magistrates are not always independent officials with legal training but are often members of the military. The tribunals are usually controlled by the executive or the military and are answerable to them. In some cases, special tribunals are set up for purposes determined by the government or military. Trials are held behind closed doors and the sentence is often passed not in accordance with the law but in response to political dictates. As a result of retrospective decrees promulgated by the executive, the death penalty became obligatory for a wide range of offences. The offences for which special courts could impose the death sentence were murder, terrorism, sabotage, treason, other ‘crimes against security’ and, in some countries, offences of a moral or economic nature. Executions frequently took place immediately after sentencing or shortly afterwards”.⁶²

According to the Special Rapporteur, another of the characteristic features that can lead to the creation of conditions in which summary or arbitrary executions may occur is when the executive or the military have control over the judiciary. According to the Special Rapporteur: “The independence of the courts was seriously curtailed in a considerable number of cases [...] On quite a few occasions, the ordinary courts were deprived of jurisdiction over specific cases without any legal justification whatsoever. Such cases were tried by military courts or special tribunals”.⁶³

In his 1987 report to the Commission on Human Rights, the Special Rapporteur pointed out that, according to reports he had received, it was very often special tribunals operating outside of the ordinary judicial framework that were said to be responsible for sentencing people to death following trials in which no procedural safeguards for the rights of the accused had been provided.⁶⁴ The following were classed as special courts by the Special Rapporteur: State Security Courts, revolutionary tribunals, special courts martial and military tribunals.⁶⁵ He called on governments to review the rules of procedure applicable to courts, including special courts, in order to ensure that they contained appropriate safeguards for the rights of the accused, as stipulated in the relevant international instruments.⁶⁶

62 United Nations document, E/CN.4/1984/29, paragraph 130. [Spanish original, free translation.]

63 United Nations document, E/CN.4/1984/29, paragraph 131. [Spanish original, free translation.]

64 United Nations document, E/CN.4/1987/20.

65 Ibid., paragraph 186.

66 Ibid., paragraph 246 (a)(iv).

With regard to the situation in the Philippines, the Special Rapporteur considered that the action of the military courts in cases of human rights violations was a factor which contributed to impunity.⁶⁷

The successor to Mr. Amos Wako, Special Rapporteur Mr. Bacre Waly Ndiaye, pointed out in his 1994 report to the Commission on Human Rights that:

“The problem of military jurisdiction over alleged perpetrators of human rights violations has once again been raised in this regard. Sometimes, the fact that the civilian justice system does not function properly is invoked by the authorities to justify trials before military tribunals. Ample information received by the Special Rapporteur indicates that, in practice, this almost always results in impunity for the security forces. The Special Rapporteur therefore once again appeals to all Governments concerned to provide for an independent, impartial and functioning civilian judiciary to deal with all cases of alleged violations of the right to life. The Special Rapporteur also calls on the authorities to ensure that the security forces fully cooperate with the civilian justice system in its efforts to identify and bring to justice those responsible for human rights violations”.⁶⁸

In his report on his visit to Peru, the Special Rapporteur concluded that:

“Another factor contributing to the impunity enjoyed by members of the security forces is the fact that when legal proceedings are opened against them for alleged extrajudicial executions, they are almost always without exception heard by military tribunals”.⁶⁹

Even though the Peruvian legislation in force in 1993 only allowed military tribunals to try ‘offences committed in the line of duty’ (*delitos de función*) by military and police personnel, the Special Rapporteur remarked that:

“In practice, military judges have for many years claimed jurisdiction over all cases in which the security forces have commit-

67 United Nations document E/CN.4/1989/25, paragraph 220.

68 United Nations document, E/CN.4/1994/7, 7 December 1993, paragraph 697.

69 United Nations document E/CN.4/1994/7/Add.2, 15 November 1993, paragraph 48. [Spanish original, free translation.]

ted offences while in service, regardless of the nature of the offence”.⁷⁰

In response to the argument put forward by some Peruvian authorities that military courts were more efficient than the ordinary criminal courts, the Special Rapporteur said that “if civilian courts are not operating in a satisfactory way, the authorities should seek to deal with the basic causes and not confine themselves to referring jurisdiction over those who have violated human rights or who are accused of treason to the military courts since in those courts guarantees that those accused of treason will receive a fair trial are limited and absolute impunity for those who have violated human rights is practically guaranteed”.⁷¹ Lastly, the Special Rapporteur recommended that steps be taken by the Peruvian authorities to ensure that the military courts could prosecute and bring to trial “solely members of the security forces who commit military offences, a category from which serious violations of human rights should be clearly and explicitly excluded”.⁷²

In the report on the joint visit made to Colombia with the Special Rapporteur on Torture, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions stated that a:

“disturbing aspect of these courts is the fact that they are composed of officers who can also be responsible for ordering military operations in connection with which human rights violations have occurred -something that is contrary to the principle of the independence and impartiality of military judges and is a cause of impunity”.⁷³

In the same report, the Special Rapporteur said that:

“Another highly controversial concept is that of an offence committed while on duty, which is used in certain cases to grant jurisdiction to the military courts. [...] This concept has been and is interpreted broadly, to the point of including human rights violations. In addition, when non-military offences occur during military operations, offences against unarmed civilians are dealt with as part of the violation of internal regulations, on the basis of the argument that an act committed while on duty

70 Ibid., paragraph 50. [Spanish original, free translation.]

71 Ibid., paragraph 98. [Spanish original, free translation.]

72 Ibid., paragraph 99. [Spanish original, free translation.]

73 United Nations document E/CN.4/1995/111, 16 January 1995, paragraph 89.

includes anything that a member of the armed forces may do while in uniform”.⁷⁴

In conclusion, the Special Rapporteur recommended that steps be taken by the Colombian authorities to substantially amend the Military Criminal Code to include, among other things:

“Explicitly excluding from military jurisdiction the crimes of extrajudicial, summary or arbitrary execution, torture and enforced disappearance”.⁷⁵

In his 1995 report, having examined military criminal jurisdiction in Chile, the Special Rapporteur considered that:

“Military tribunals, particularly when composed of military officers within the command structure of the security forces, very often lack the independence and impartiality required under international law. Military jurisdiction over human rights violations committed by members of the security forces very often results in impunity. In this context, reports of an amnesty granted by the Chilean military judiciary to army officers accused of an extrajudicial, summary or arbitrary execution are particularly disturbing. The Special Rapporteur wishes to express deep concern and calls on the authorities to enact legislative reforms allowing for such cases to be treated by civilian tribunals”.⁷⁶

With regard to military courts in Venezuela, the Special Rapporteur was concerned:

“at reports of decisions in which the Supreme Court of Justice found that competence in cases involving human rights violations by security forces personnel belonged to the military courts. Experience in other countries has shown that this almost always results in impunity. The Special Rapporteur therefore urges the Government to ensure that judges participating in military tribunals hearing cases of security forces personnel accused of human rights violations are independent, impartial and competent, and that the rights of victims and witnesses to participate in the proceedings are fully respected”.⁷⁷

74 Ibid., paragraph 90.

75 Ibid., paragraph 120 (f).

76 United Nations document E/CN.4/1995/61, 4 December 1994, paragraph 93.

77 Ibid., paragraph 343.

The Special Rapporteur also stated that the military courts in Egypt and Iraq did not fulfil the requirements of the relevant international standards on the administration of justice.⁷⁸ The Special Rapporteur concluded that:

“In the vast majority of alleged extrajudicial, summary or arbitrary executions brought to the attention of the Special Rapporteur over the past three years, sources report that either no investigation at all has been initiated, or that investigations do not lead to the punishment of those responsible. In many countries where perpetrators of human rights violations are tried before military courts, security forces personnel escape punishment due to an ill-conceived *esprit de corps*. [...]

The reports and allegations received indicate that breaches of the obligation to investigate alleged violations of the right to life and punish those responsible occur in most of the countries the Special Rapporteur is dealing with in the framework of his mandate. The Special Rapporteur reiterates his appeal to all Governments concerned to provide for an independent civilian justice system with an independent and competent judiciary and full guarantees for all those involved in the proceedings. Where national legislation provides for the competence of military tribunals to deal with cases involving violations of the right to life by members of the security forces, such tribunals must conform to the highest standards required by the pertinent international instruments as concerns their independence, impartiality and competence. The rights of defendants must be fully guaranteed before such tribunals, and provision must be made to allow victims or their families to participate in the proceedings.”⁷⁹

In his report on his visit to the island of Bougainville in Papua New Guinea, the Special Rapporteur, having found that civil actions brought for human rights violations committed by the Armed Forces were heard in military courts, considered this to be “contrary to the rules of natural justice”.⁸⁰

In his report on his visit to Indonesia and East Timor, having found that, under Indonesian law, military courts had sole jurisdiction to try members of the armed forces for the torture, murder and kidnapping of civilians, the Special Rapporteur pointed out that:

78 Ibid., paragraphs 125 and 183 respectively.

79 Ibid., paragraphs 402 and 403.

80 United Nations document E/CN.4/1996/4/Add.2, 27 February 1996, paragraph 72(c).

“Victims of human rights violations or their relatives still do not have direct access to the judicial system in cases of abuses perpetrated by members of the security forces. Consequently, such complaints have to be filed with the police, which belongs to the armed forces. In practice, investigations are, therefore, rarely concluded. This can hardly be called an effective remedy. The Special Rapporteur is not aware of any provision entitling a civilian to bring such a complaint before a judicial or other authority if the police have rejected the complaint or refused to carry out an investigation. Even the Prosecutor has no authority to order the police to carry out an investigation. If the police find a complaint filed by a civilian to be well founded, the file is transmitted to the office of the Military Attorney-General, since the suspect would have to stand trial before a military court. This means that no civilian authority is involved in any way in dealing with a complaint filed by a civilian of an alleged encroachment on his fundamental rights. The Special Rapporteur feels that a system which places the task of correcting and suppressing abuses of authority by members of the army in that same institution will not easily inspire confidence. The Special Rapporteur believes that there is no reason why persons belonging to the military should be tried by military courts for offences committed against civilians during the essentially civil task of maintaining law and order”.⁸¹

The Special Rapporteur recommended that jurisdiction over cases of human rights violations committed by military personnel be handed over “to the ordinary civilian judiciary”.⁸²

In his 1998 report to the Commission on Human Rights, the Special Rapporteur pointed out that:

“Impunity has further been encouraged by problems related to the functioning of the judiciary, in particular its lack of independence and impartiality. [...] The Special Rapporteur also remains concerned about the prosecution of members of the security forces before military courts, where they may evade punishment because of an ill-conceived *esprit de corps*”.⁸³

81 United Nations document E/CN.4/1995/61/Add.1, 1 November 1994, paragraph 70 (b).

82 Ibid., paragraph 81 (a).

83 United Nations document E/CN.4/1998/68, 23 December 1997, paragraph 97.

In 1999, in her first report to the Commission on Human Rights as Special Rapporteur, Mrs. Asma Jahangir stated that:

“In some cases situations of impunity are a direct product of laws or other regulations which explicitly exempt public officials or certain categories of State agents from accountability or prosecution. [...] The Special Rapporteur is also increasingly concerned about the practice of prosecuting members of security forces in military courts, which often fall short of international standards regarding the impartiality, independence, and competence of the judiciary”.⁸⁴

The Special Rapporteur, in her report to the Commission on Human Rights on country situations, pointed out that the problem of impunity in Colombia was exacerbated by the system of military justice.⁸⁵ Similarly, the Special Rapporteur pointed out that the military courts in operation in the Democratic Republic of the Congo, Egypt, Nigeria and Sierra Leone fell short of the established international standards on administration of justice.⁸⁶

In her report on her visit to Mexico, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mrs. Asma Jahangir, said the following:

“Violations of human rights committed by members of the armed forces are investigated and tried by military courts, and the procedure followed is regulated by the Military Justice Code. Members of all military courts are serving officers appointed by the executive. Independent complainants may not initiate criminal proceedings against a member of the armed forces, as only the Ministry of Defence has the authority to prosecute members of the armed forces before a military court. These courts do not conform to the Basic Principles on the Independence of the Judiciary. The military justice system is arbitrary, resulting in miscarriage of justice”.⁸⁷

In her General Report to the Commission on Human Rights in 2000, the Special Rapporteur concluded that:

“In most situations impunity is the result of a weak and inadequate justice system, which is either reluctant or unable to

84 United Nations document E/CN.4/1999/39, 6 January 1999, paragraph 67.

85 United Nations document E/CN.4/1999/39/Add.1, 6 January 1999, paragraph 62.

86 Ibid., paragraphs 66, 72, 172 and 216 respectively.

87 United Nations document E/CN.4/2000/3/Add.3, 25 November 1999, paragraph 44.

investigate and prosecute cases of human rights violations, including violations of the right to life. While in some countries the judiciary is strongly influenced by or directly subordinate to the executive authorities, in others court decisions are flatly overruled or ignored by the law enforcement authorities or the armed forces. Members of security forces are often prosecuted in military courts which in many cases fall short of international standards regarding the impartiality, independence and competence of the judiciary”.⁸⁸

In her General Report to the Commission on Human Rights in 2001, the Special Rapporteur remarked that “[i]mpunity for human rights offenders seriously undermines the rule of law, and also widens the gap between those close to the power structures and others who are vulnerable to human rights abuses. In this way, human rights violations are perpetuated or sometimes even encouraged, as perpetrators feel that they are free to act in a climate of impunity”.⁸⁹ The Rapporteur also stated that military courts are a source of impunity:

“In cases when members of security forces are prosecuted, they are usually tried in military courts, which often fall short of international standards regarding the impartiality, independence and competence of the judiciary”.⁹⁰

2.2. The Special Rapporteur on Torture

The Special Rapporteur on Torture has addressed the issue of military jurisdiction and torture from two perspectives: on the one hand, whether or not torture can be deemed to be a military offence and, on the other, whether military courts meet the requirements set out in international standards with regard to the administration of justice.⁹¹

In his 1990 report to the Commission on Human Rights, the Special Rapporteur, Mr. Peter Kooijmans, believed that military justice:

“makes no sense in any case in which members of the security forces have seriously violated the basic human rights of a

88 United Nations document E/CN.4/2000/3, 25 January 2000, paragraph 89.

89 United Nations document E/CN.4/2001/9, 11 January 2001, paragraph 56.

90 Ibid., paragraph 62.

91 The mandate was established in 1985 and has been held successively by Msrs. Peter Kooijmans (Netherlands, 1985 - 1993), Nigel Rodley (United Kingdom, 1993 - 2001) and Theo van Boven (Netherlands, 2001 onwards).

civilian. Such an act constitutes an offence against civil public order and must therefore be tried by a civil court".⁹²

In his 1988 report to the Commission on Human Rights, when referring to his visit to Uruguay⁹³, the Special Rapporteur said he had received information confirming that one of the reasons why, under the military dictatorship, civilian judges were often powerless to defend the human rights of citizens was that military courts had jurisdiction over 'crimes' which were considered to be related to domestic security. Following the return to democracy, the Supreme Court restored the old law, which stated that "all offences mentioned in the Penal Code must be tried in the civil courts with no account being taken of whether the persons who committed them were civilians or members of the military, while the jurisdiction of the military courts is restricted to typically military offences".⁹⁴

When referring to his visit to Peru in his 1989 report to the Commission on Human Rights, the Special Rapporteur pointed out that, according to the country's Code of Military Justice, "military courts have sole jurisdiction over offences specified [in the Code] and committed while carrying out duties (*delitos de función*), except when such duties are not service-related".⁹⁵ The expression '*delitos de función*' was the subject of serious controversy in Peru. Some sources believed that some serious offences such as murder, kidnapping and torture, when committed by members of the armed forces, could never be called '*delitos de función*' and that therefore they should be tried in civil courts. However, the military took the position that all offences committed by the armed forces in emergency zones were '*delitos de función*' and that therefore they should be tried by military courts. The President of the Peruvian Supreme Court told the Special Rapporteur that it was possible to assume that abuses committed by members of the armed forces not acting on orders from above came under the jurisdiction of civil courts while abuses committed when such military personnel were acting on orders from above fell within the remit of military courts. The Special Rapporteur pointed out that, in practice, this meant that "most cases are referred to military courts [and that] although in some cases members of the police had been tried and convicted [...] at the time of his visit, no military court had convicted any member of the armed forces".⁹⁶ The Rapporteur recommended that a bill,

92 United Nations document E/CN.4/1990/17, paragraph 271. [Spanish original, free translation.]

93 United Nations document, E/CN.4/1988/17/Add.1.

94 Ibid., paragraphs 19 and 20. [Spanish original, free translation.]

95 United Nations document, E/CN.4/1989/15. [Spanish original, free translation.]

96 Ibid., paragraphs 176-177. [Spanish original, free translation.]

which had already been approved by the Senate, be passed into law. In it, “the concept of *‘delito de función’* is defined and it is stipulated that serious offences committed by members of the armed forces and the security police, such as torture, are always to fall to the jurisdiction of the civilian courts. This would be an important punitive measure as well as a preventive one”.⁹⁷

In his 1990 report to the Commission on Human Rights, the Special Rapporteur stated that in Guatemala hardly anyone had been brought to justice for offences such as kidnapping, torture and extrajudicial execution. Under the Constitution then in force in Guatemala, members of the security forces suspected of having committed a crime against a civilian had to be tried by a military court. The Rapporteur believed that, as long as those allegedly responsible for committing such crimes against civilians were not tried by civil courts, confidence in the legal system could not be established.⁹⁸ He also recommended to the Guatemalan State that “all persons who are considered to be responsible for human rights violations must be brought to justice and, if their guilt is demonstrated, they must be punished; if the victim is a civilian, such people must be tried in principle by a civil court, whatever their status”.⁹⁹

In the same report, the Special Rapporteur pointed out that in Honduras, owing to conflicting interpretations of the country’s Constitution, in practice members of the armed forces were never tried in ordinary courts.¹⁰⁰ The Special Rapporteur said that he was “convinced that if such an abuse of authority (unlawful arrest or detention, or torture) has been committed against a civilian, the ordinary courts should have jurisdiction over the matter, regardless of whether or not the official responsible belongs to the armed forces. The rights of civilians, by their very nature, are best protected by means of an open trial in an ordinary court. The hearing of such cases by military courts can easily lead to suspicion of a cover-up”.¹⁰¹ The Special Rapporteur also recommended that, bearing in mind that an abuse of authority committed against a civilian is an ordinary criminal offence, regardless of whether it has been committed by a civilian or a member of the military, such cases be heard by the ordinary criminal courts.¹⁰²

97 Ibid., paragraph 187(b). [Spanish original, free translation.]

98 United Nations document, E/CN.4/1990/17, paragraph 212.

99 Ibid., paragraph 216(e). [Spanish original, free translation.]

100 Ibid., paragraph 235.

101 Ibid., paragraph 249. [Spanish original, free translation.]

102 Ibid., paragraph 254 (c).

In the conclusions to his report, the Special Rapporteur pointed out that in most States it has been a long-established rule that people from the army who are suspected of having committed a criminal offence should be tried by a military court. According to the Special Rapporteur, this can be explained by the fact that from time immemorial the military have had their own *esprit de corps* which is still appropriate in the case of offences which are typically military in nature, such as desertion or mutiny. However, in the view of the Special Rapporteur, this rule did not make sense for any case in which members of the security forces had seriously violated the basic human rights of a civilian. “Such an act constitutes an offence against civil public order and must therefore be tried by a civil court. Torture is prohibited in all circumstances and this prohibition applies to all officials, be they military or civilian. Consequently, it cannot be claimed that it has anything to do with the specific duties of the military. Bearing in mind that the general task of dispensing justice in order to protect civil public order falls to the civil courts, it is they who must be responsible for trying any offences against public order, regardless of who commits them”.¹⁰³

In his 1991 report to the Commission on Human Rights, when referring to his visit to the Philippines, the Special Rapporteur noted that no cases in which criminal proceedings against military personnel had been brought before a military court had resulted in conviction.¹⁰⁴ In the opinion of the Special Rapporteur, there seemed to be no reason why a member of the military should be tried by a military court for a criminal offence committed against a civilian in the course of carrying out such an essentially civil duty as maintaining public order. Trying such people in military courts “easily leads to suspicion of a cover-up”.¹⁰⁵ The Special Rapporteur went on to recommend repeal of the presidential decree granting military courts jurisdiction over all offences committed by military personnel, including those which were not strictly related to military duties.¹⁰⁶

In his report of his visit to Indonesia and East Timor, the Special Rapporteur took the view that “a system which entrusts the task of correcting and eliminating abuses of authority to the same institution which commits them does not easily inspire confidence”.¹⁰⁷ In his conclusions, the Special Rapporteur

103 Ibid., paragraph 271. [Spanish original, free translation.]

104 United Nations document, E/CN.4/1991/17, paragraphs 203-274.

105 Ibid., paragraph 269. [Spanish original, free translation.]

106 Ibid., paragraph 274 (d).

107 United Nations document, E/CN.4/1991/17/Add.1, paragraph 76. [Spanish original, free translation.]

urged Indonesia to grant the civil courts jurisdiction over criminal offences committed by members of the armed forces, including the police.¹⁰⁸

His successor, Mr. Nigel Rodley, also came to the same conclusion and went on to repeatedly recommend that:

“A person found to be responsible for torture or severe maltreatment should be tried and, if found guilty, punished. [...] If torture has occurred in an official place of detention, the official in charge of that place should be disciplined or punished. Military tribunals should not be used to try persons accused of torture. [...] Complaints about torture should be dealt with immediately and should be investigated by an independent authority with no relation to that which is investigating or prosecuting the case against the alleged victim”.¹⁰⁹

In his 1999 report to the Commission on Human Rights, the Special Rapporteur stated that the sources of impunity included:

“the existence of special legal norms, procedures and forums in cases where State security forces are involved. Sometimes the perpetrators are immune from the ordinary courts, being subject to, or perhaps more accurately, protected by, military justice, a phenomenon that seems fortunately to be beginning to recede. Sometimes, special security courts will know how to ignore claims that confessions are the product of torture”.¹¹⁰

In his reports on country visits, the Special Rapporteur found that, as far as acts of torture committed by personnel from the armed forces and other State security bodies were concerned, military courts were one of the factors leading to *de facto* impunity. In the reports in question, the Special Rapporteur recommended that jurisdiction over military or police personnel accused of acts of torture be transferred to the ordinary criminal courts. For example, in his 1994 report to the Commission on Human Rights, when addressing the situation in Peru, the Special Rapporteur stated the following:

“It was also reported that the perpetrators were rarely prosecuted, even in cases which had been reported to the competent authorities. The military courts ignored such cases and did not

108 *Ibid.*, paragraph 80 (k).

109 United Nations document E/CN.4/1995/34, 2 January 1995, paragraph 926 (g). See also documents E/CN.4/1994/31, paragraph 666; E/CN.4/2001/66, 25 January 2001, paragraph 1316 (i); and E/CN.4/2002/76, 27 December 2001, Annex I, letter j.

110 United Nations document E/CN.4/1999/61, Annex.

place the accused at the disposal of the civil courts in accordance with their obligation under the law. This situation of impunity combined with other factors, such as the difficulty of providing proof or the attitude of society towards the victims meant that a large proportion of cases were not even reported".¹¹¹

In 1995, the Special Rapporteur, together with the Special Rapporteur on Extrajudicial Executions, presented the report of their joint visit to Colombia. The two Rapporteurs called for reforms to military jurisdiction and, in particular, for cases of extrajudicial execution, torture and enforced disappearance to be removed from its remit. The joint report concluded that:

"As for the military justice system, measures must be taken in order to ensure its conformity with the standards of independence, impartiality and competence required by the pertinent international instruments. Due regard should be given, in particular, to the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985, and endorsed by the General Assembly in resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Thus, an important step forward would be a substantial reform of the code of military justice, along the lines suggested, *inter alia*, by the *Procuraduría General*. These reforms would need to include the following elements: [...]

"(f) Explicitly excluding from military jurisdiction the crimes of extrajudicial, summary or arbitrary execution, torture and enforced disappearance.

"Furthermore, the organ deciding in conflicts of competence between the civilian and the military justice systems should be composed of independent, impartial and competent judges".¹¹²

In his 1996 report to the Commission on Human Rights, when discussing his visit to Chile, the Special Rapporteur drew attention to the fact that a significant number of cases of torture had been attributed to the uniformed police (*Carabineros*) but that they enjoyed military privilege. In his conclusions, the Special Rapporteur made the following recommendations:

111 United Nations document E/CN.4/1994/31, paragraph. 433.

112 United Nations document E/CN.4/1995/111, 16 January 1995, paragraph 120.

“The uniformed police (*Carabineros*) should be brought under the authority of the Minister of the Interior, rather than the Minister of Defence. They should be subject to ordinary criminal jurisdiction only, and not to military jurisdiction. As long as the military criminal code continues to apply to them, acts of criminal human rights violations, including torture of civilians, should never be considered as an ‘act committed in the course of duty’ (*acto de servicio*) and should be dealt with exclusively by the ordinary courts”.¹¹³

In 1998, in his report on his visit to Mexico, the Special Rapporteur found that “[a]ccording to article 57 of the Code of Military Justice, offences under common or federal law are deemed offences against military discipline when committed by military personnel on active service or in connection with active service”.¹¹⁴ The Special Rapporteur also found that, even though the Code of Military Justice does not provide for the offence of torture, it nevertheless stipulated that when a member of the military behaved in a manner not covered by the Code, and did so while on active service or as a result of it, the relevant federal laws also applied. As a result, members of the military accused of acts of torture were tried by military courts under the terms of the 1991 Federal Law to Prevent and Punish Torture (*Ley federal para prevenir y sancionar la tortura*). The Special Rapporteur recommended that appropriate measures be taken by the Mexican authorities to ensure that:

“Cases of serious crimes committed by military personnel against civilians, in particular torture and other cruel, inhuman or degrading treatment or punishment, [...], regardless of whether they took place in the course of service, [are] subject to civilian justice”.¹¹⁵

In his report on his visit to Romania, having found that responsibility for investigating cases of torture and ill-treatment committed by the police fell to military prosecutors who, according to Law N° 54/1993, could only be military officials on active service, the Special Rapporteur recommended that:

“Legislation should be amended to transfer the power to investigate claims of police abuse and torture from military to civilian prosecutors”.¹¹⁶

113 United Nations document E/CN.4/1996/35/Add.2, paragraph 76 (a).

114 United Nations document E/CN.4/1998/38/Add.2, paragraph 69.

115 United Nations document E/CN.4/1998/38/Add.2, paragraph 88.

116 United Nations document E/CN.4/2000/9 /Add.3, 23 November 1999, paragraph 57.

In his report on his visit to Cameroon, the Special Rapporteur stated that “[s]ince the gendarmes were part of the armed forces, they were brought before military tribunals when they committed offences in the performance of their duties, whereas offences committed by police officers were tried by the civil courts”.¹¹⁷ The Special Rapporteur made the following recommendations:

“A separate fully resourced corps of prosecutors, with specialized independent investigative personnel, should be established to pursue serious criminality, such as torture, committed or tolerated by public officials; [... and] [t]he gendarmerie and police should establish special services designed to investigate complaints of, and to weed out, serious wrongdoing, such as torture”.¹¹⁸

In his report on his visit to Brazil, the Special Rapporteur stated that:

“with respect to criminal offences committed by military police officers, the Military Criminal Procedure Code (Decree-Law No. 1002/69 of 21 October 1969) provides that they must be tried by the military justice system. By Law 9299/96, jurisdiction has been transferred to ordinary courts in cases of intentional homicide (*homicidio doloso*) against a civilian. However, the initial police inquiry continues to rest with the military investigators, and so does the classification of whether a crime is considered ‘intentional homicide’ or ‘manslaughter’. The crimes of bodily harm, torture and manslaughter, when committed by military police officers, continue to fall within the exclusive jurisdiction of military courts, which are composed of four military officers and one civilian judge. The crime of abuse of authority does not exist in the military criminal code, and hence cases on this count may be filed against military police officers in ordinary courts. Prosecutions in military court reportedly take many years as the military justice system is said to be overburdened and inefficient”.¹¹⁹

The Special Rapporteur made the following recommendations to the Brazilian authorities:

“Investigations of police criminality should not be under the authority of the police themselves, but in principle, an indepen-

117 United Nations document E/CN.4/2000/9 /Add.2, 11 November 1999, paragraph 59.

118 Ibid., paragraph 78.

119 United Nations document E/CN.4/2001/66/Add.2, 30 March 2001, paragraph 156.

dent body with its own investigative resources and personnel. As a minimum, the Office of the Public Prosecutor should have the authority to control and direct the investigation [...]

“The police should be unified under civilian authority and civilian justice. Pending this, Congress should approve the draft law submitted by the federal Government to transfer to the ordinary courts jurisdiction over manslaughter, causing bodily harm and other crimes including torture committed by the military police”.¹²⁰

2.3. The Working Group on Enforced or Involuntary Disappearances

The Working Group on Enforced or Involuntary Disappearances has “repeatedly insisted that independent and effective administration of justice is essential in curbing enforced disappearances”.¹²¹ The Working Group has also stated on several occasions that its “experience [...] has demonstrated that military courts are a significant contributory factor to impunity”.¹²² In addition, the Working Group has taken the view that “abuses of power [...] would be considerably reduced if there was an independent and effective judiciary capable of carrying out swift investigations and properly protecting the rights of the person. [...] Military courts should only try offences of a military nature committed by members of the security forces and serious human rights violations such as enforced disappearances should be specifically excluded from that category of offence”.¹²³

In its 1993 report to the Commission on Human Rights, the Working Group recommended that:

“Legal prosecution and sentencing in the case of offences involving gross violations of human rights such as disappearances should take place within the framework of the civil courts, even if those concerned belonged or belong to the armed forces”.¹²⁴

At the time of its mission to Colombia in 1988, the Working Group said the following: “Members of the mission did not leave convinced that military

120 Ibid., paragraph 169 (m) and (s).

121 United Nations document E/CN.4/1995/36, 21 December 1994, paragraph 54.

122 United Nations document E/CN.4/1991/20, paragraph 408. See also, among others, E/CN.4/1990/13, paragraph 345. [Spanish original, free translation.]

123 United Nations document E/CN.4/1992/18, paragraph 367. [Spanish original, free translation.]

124 United Nations document E/CN.4/1993/25, paragraph 46. [Spanish original, free translation.]

criminal justice was functioning in a manner commensurate with the gravity of the allegations levelled against military officers as regards human rights abuses. [...] Evidently, [the Military Penal Code] was written for the battlefield, not for the administration of justice in times of peace”.¹²⁵

In its report on its visit to the Philippines in 1989, the Working Group said that:

“the members of the mission did not come away impressed by the *modus operandi* of the administration of military justice. In view of the overwhelming testimonies on involvement of members of the public forces in cases of disappearance and other human rights abuses, the number of convictions is surprisingly low. Impunity breeds contempt for the law”.¹²⁶

In its report on its visit to Sri Lanka in 1999, the Working Group concluded that:

“Officers of the armed forces that commit offences against civilians can be tried either by military or civil courts. In case of a summary trial before a military court, the punishment is of a disciplinary nature, such as reduction in rank, withholding of promotions or delay in promotions. In case of a court martial, the punishment can be imprisonment or discharge from service”.¹²⁷

The Working Group recommended that the Sri Lanka authorities:

“speed up [their] efforts to bring the perpetrators of enforced disappearances, whether committed under the former or the present Government, to justice. The Attorney-General or another independent authority should be empowered to investigate and indict suspected perpetrators of enforced disappearances irrespective of the outcome of investigations by the police;...”.¹²⁸

In its 2002 report to the Commission on Human Rights, the Working Group stressed that, among other “appropriate preventive measures” required to bring about “the eradication of the phenomenon of enforced or involuntary

125 United Nations document E/CN.4/1989/18/ Add. 1, paragraph 136.

126 United Nations document E/CN.4/1991/20/Add. 1, paragraph 166.

127 United Nations document E/CN.4/2000/64/Add.1, 21 December 1999, paragraph 29.

128 Ibid., paragraph 63.

disappearance” was the need to “bring [...] to justice all persons presumed responsible, guaranteeing their trial only by competent ordinary courts and not by any other special tribunal, in particular military courts”.¹²⁹

2.4. The Special Rapporteur on the independence of judges and lawyers

When examining the general issue of military jurisdiction, the Special Rapporteur recalled that:

“Principle 5 of the Basic Principles on the Independence of the Judiciary provides the right of everyone to be tried by ordinary courts or tribunals established by law. More categorically, principle 5 (f) of the Singhvi Principles provides that the jurisdiction of military tribunals shall be confined to military offences, and that there shall always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or a remedy by way of an application for annulment. Furthermore, principle 22 (b) of the Johannesburg Principles provides that ‘[i]n no case may a civilian be tried for a security-related crime by a military court or tribunal’. Article 16, paragraph 4, of the Paris Rules also provides that ‘civil courts shall have and retain jurisdiction over all trials of civilians for security or related offences; initiation of any such proceedings before or their transfer to a military court or tribunal shall be prohibited. The creation of special courts or tribunals with punitive jurisdiction for trial of offences which are in substance of a political nature is a contravention of the rule of law in a state of emergency’.”¹³⁰

In his report to the Commission on Human Rights on his visit to Peru, the Special Rapporteur expressed particular concern “about the practice of referring cases of human rights violations/wrongdoing committed by members of the armed forces to military courts in order to avoid the course of ordinary procedures”.¹³¹ The Special Rapporteur stated that: “While all judges in civil courts are generally legally qualified, in military courts, only one of the five judges is legally qualified; the other four members are career military officers, invariably without legal training. As a consequence, when these officers assume the role of ‘judges’, they continue to remain subordinate to their

¹²⁹ United Nations document E/CN.4/2002/79, 18 January 2002, paragraph 364.

¹³⁰ United Nations document E/CN.4/1998/39/Add.1, paragraph 79.

¹³¹ *Ibid.*, paragraph 133.

superiors, or are at least perceived to be so. Thus, critics argue that their independence and impartiality are suspect”.¹³² Lastly, the Special Rapporteur concluded that:

“This practice should be discontinued. The Special Rapporteur wishes to reiterate the recommendation of the Human Rights Committee that necessary steps need to be taken to restore the authority of the judiciary and to give effect to the right to effective remedy under article 2.3 of the International Covenant on Civil and Political Rights, and thus overcome an atmosphere of impunity”.¹³³

In his report on his visit to Colombia, the Special Rapporteur stated that “[m]ilitary jurisdiction [...] is one of the primary sources of impunity in Colombia”.¹³⁴ The Special Rapporteur pointed out that:

“The effectiveness of military courts in investigating and prosecuting crimes committed by members of the armed forces varies depending on the nature of the offences tried before military courts. It is reported that when the offence concerns internal police or armed forces regulations, the military criminal courts had handed down harsh sentences. However, the situation is quite different when the offences under investigation have been committed against civilians (robbery, injury, murder, etc.); in these cases, a high percentage end in the suspension of the proceedings”.¹³⁵

The Special Rapporteur pointed that this situation was due to “structural deficiencies in the military justice system, which guarantee that military and police officials are not criminally sanctioned for such offences”.¹³⁶ He stated that:

“The main structural deficiency is the fact that military courts are composed of active officers [and] it is common for officers to judge subordinate officers who are from the same unit. [In addition,] the concept of ‘due obedience defence’ provided by article 91 of the 1991 Constitution relieves the soldier of liability and places the sole responsibility on the superior officer. It is

132 Ibid., paragraph 80.

133 Ibid., paragraph 133.

134 United Nations document E/CN.4/1998/39/Add.2, 30 March 1998, paragraph 130.

135 Ibidem.

136 Ibid., paragraph 132.

alleged that under this provision, the subordinates can argue that the judges sitting on the bench ordered them to commit the crime".¹³⁷

The Special Rapporteur expressed his "concern in regard to the fact that active-duty officers try their own subordinates for human rights offences committed against civilians"¹³⁸ and considered that:

"given the military structure, active-duty officers lack the necessary independence and impartiality to try cases in which members of the same body are involved. Principle 2 of the Basic Principles on the Independence of the Judiciary provides that 'the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'. Active-duty officers, thus, are not seen to be independent and capable to render impartial judgements against members of the same Armed Forces".¹³⁹

Lastly, the Special Rapporteur concluded that:

"Given the high rate of impunity at military tribunals (99.5 per cent), the Special Rapporteur is of the view that the Government of Colombia has failed to prevent and to investigate human rights violations and to punish those members of the army that commit these violations as required by international law... [And that] given the highly hierarchical structure of the military, an institution which is based on principles of loyalty and subordination, active-duty officers lack the necessary independence and impartiality to try cases in which members of the same body are involved in cases related to violations of human rights committed against civilians. Active-duty officers, thus, are not seen to be independent and capable of rendering impartial judgements against members of the same Armed Forces".¹⁴⁰

In his report on his visit to Mexico, the Special Rapporteur found that "[m]ilitary tribunals have jurisdiction to try military personnel for breaches of the military code and for common crimes committed during service".¹⁴¹ Neither

137 Ibid., paragraph 133.

138 Ibid., paragraph 140.

139 Ibidem.

140 Ibid., paragraphs 170 and 172.

141 United Nations document, E/CN.4/2002/72/Add.1, 24 January 2002, paragraph 78.

the victims of human rights violations committed by military officials nor their relatives are able to participate in legal proceedings brought before such courts. The Special Rapporteur made the following recommendations to the Mexican authorities:

“Crimes alleged to be committed by the military against civilians should be investigated by civilian authorities to allay suspicions of bias. In any event current legislation should be amended to provide for the civil judiciary to try cases of specific crimes of a serious nature, such as torture and killings, alleged to have been committed by the military against civilians outside the line of duty. Urgent consideration should be given to removing the military from policing public law and order in society”.¹⁴²

2.5. The Working Group on Arbitrary Detention

The Working Group on Arbitrary Detention believed that, “if some form of military justice is to continue to exist, it should observe four rules: (a) It should be incompetent to try civilians; (b) It should be incompetent to try military personnel if the victims include civilians; (c) It should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime; and (d) It should be prohibited imposing the death penalty under any circumstances”.¹⁴³

In its report on its mission to Nepal, the Working Group found that military courts were composed solely of military personnel, had jurisdiction over civilians who had committed offences against military personnel as well as over offences committed by military personnel when the victims were civilians, and that only the military police were able to carry out investigations. The Working Group considered this situation to be incompatible with the right to a fair trial set out in article 14 of the International Covenant on Civil and Political Rights.¹⁴⁴ The Working Group recommended that the Nepalese authorities:

“Adapt[...] the functioning of the military courts to the standards concerning the right to a fair trial, by reviewing their composition so that, as a minimum, they are presided over by a

142 Ibid., paragraph 192 (d).

143 United Nations document E/CN.4/1999/63, 18 December 1998, paragraph 80.

144 United Nations document E/CN.4/1997/4/Add.2, 26 November 1996, paragraph 29.

civil magistrate, as well as ensuring that investigations are conducted by the civil judicial police, that *in camera* hearings become the exception, that the presence of counsel is assured in all circumstances and that the courts' powers are strictly limited to trying offences under the military regulations committed by members of the armed forces".¹⁴⁵

In its report on its mission to Bahrain, the Working Group found that jurisdiction over military offences committed by members of the armed forces was exercised by military courts.¹⁴⁶ According to article 102(b) of the Bahraini Constitution, the jurisdiction of courts martial is restricted to military offences committed by members of the armed forces and security forces. Although the article states that civilians cannot be tried in military courts, it allows the jurisdiction of military courts to be extended in time of martial law. The Working Group also noted that, under Legislative Decree No. 3 of 1982, members of the state security forces, including members of the police, had been given the same legal status as military personnel and several crimes attributed to them had been classified as military offences and were subject to the jurisdiction of a special court, the Disciplinary Tribunal, which is in fact a military court. Article 81 of Legislative Decree No. 3 categorizes offences committed by members of the security services at their workplace or in barracks, when on duty, when in uniform, or in the course of an assignment connected with their duties as military offences. After studying the composition and procedures of the Military Tribunals, in the case of armed forces personnel, and Disciplinary Tribunals, in the case of members of the police, the Working Group concluded that such courts did not meet international standards and recommended the adoption of whatever reforms were necessary to ensure that such courts could be brought into line with international standards and, in particular, that members of the police could be tried in ordinary criminal courts.¹⁴⁷

2.6. The Special Representative on the situation of human rights defenders

In her report on her visit to Colombia, the Special Representative on the situation of human rights defenders said that the decision handed down by the Constitutional Court in which it ruled that trials for human rights violations and crimes against humanity should fall to the jurisdiction of the ordinary

145 Ibid., paragraph 35 (i).

146 United Nations document E/CN.4/2002/77/Add.2, 5 March 2002.

147 Ibid., paragraphs 77 and 115.

criminal courts had not been fully complied with by the military courts. As a result, “cases of serious violations and breaches of international humanitarian law involving members of the military are still before military courts, and [...] important violations of human rights such as massacres still escape the jurisdiction of the ordinary courts”.¹⁴⁸ The Special Representative made the following recommendations to the Colombian authorities:

“The parties responsible, by commission or omission, for violations of the rights of human rights defenders should be tried by the ordinary justice system and punished. Appropriate compensation to the victims should be awarded. The fight against impunity should also imply the strengthening of judicial institutions by guaranteeing the competence, efficiency, security and independence of all institutions and persons in charge of investigation, prosecution and judicial examination of complaints of human rights violations.

“[...] the Government [should] guarantee the independence of the judiciary and adopt special measures to strengthen the protection mechanisms for judges, prosecutors, investigators, victims, witnesses and threatened persons. Ruling No. C-358 of 1997 and No. C-361 of 2001 of the Constitutional Court should be fully implemented so that cases involving violations of human rights and humanitarian law no longer be sent to military courts”.¹⁴⁹

2.7. Country Mechanisms

2.7.1. Guatemala

The Independent Expert on the Situation of Human Rights in Guatemala, Ms. Mónica Pinto, stated in her 1994 report to the Commission on Human Rights that:

“Military jurisdiction in Guatemala is very broad and covers any person dependent on the army for any offence whatsoever, not only for misdemeanours or offences of a military nature; it is a kind of personal privilege which is contrary to the provisions of article 14 of the International Covenant on Civil and

148 United Nations document E/CN.4/2002/106/Add.2, 17 April 2002, paragraph 183.

149 Ibid., paragraphs 286 and 297.

Political Rights and article 8 of the American Convention on Human Rights. As a result of this, the army is only accountable to civil society politically”.¹⁵⁰

In the view of the Independent Expert, “subordination of the military authorities to the political authorities is established in the constitutional norms. It bears on the essence and dynamics of democracy. It also means that, in comparison with what was happening before democracy was restored, limits should be set on the job to be done by the military institution and its objectives must be determined according to the overall policies of the Government. In this respect, it is imperative that non-interference on the part of the military authorities in the national decision-making process or political matters should be seen as a standard and a principle”.¹⁵¹ Lastly, the Independent Expert recommended that:

“in non-military matters, members of the army must be subject to the rules of accountability which apply to the civilian community. It is therefore essential that an urgent review of the regulations contained in the Code of Military Justice be carried out in order to restrict military jurisdiction to cases of military misdemeanours and offences. Taking both these steps will mean that military legal action is confined to matters befitting it and at the same time will allow the military institution to regain the trust in it that has been lost by part of the population”.¹⁵²

In her 1995 report, the Independent Expert, reiterated her concerns about the extent of military jurisdiction in Guatemala and said that “it should be noted that, while some progress has been made in restricting military jurisdiction, it has not been possible completely to prevent the military courts from dealing with cases in which there is *prima facie* evidence that members of the army have been involved in the commission of ordinary offences. The supervision of the investigation conducted by the Public Prosecutor through military judges who are qualified lawyers, the participation of two army officers in the trial stage and the designation of the court as a military court show that all that has been achieved so far is a cross between military and civil jurisdiction. Moreover, the fact that the seats of the courts of first instance are on military bases compromises the ability of the civil trial-court judges who are members

150 United Nations document E/CN.4/1994/10, 20 January 1994, paragraph 49. [Spanish original, free translation.]

151 *Ibid.*, paragraph 155. [Spanish original, free translation.]

152 *Ibidem.* [Spanish original, free translation.]

of the military court to reach an independent finding”.¹⁵³ The Independent Expert again recommended:

“the strict limitation of military jurisdiction to the hearing and trial of cases involving military offences”.¹⁵⁴

In the conclusions and recommendations contained in her penultimate report to the Commission on Human Rights in 1996, the Independent Expert said that:

“it is essential for the State to guarantee the security, independence and impartiality of all members of the Judiciary and, to that end, for the Government to eliminate, in accordance with the law, any improper interference in this area. The jurisdiction of the military must be cut back and rendered inapplicable to violations of human rights”.¹⁵⁵

2.7.2. *Equatorial Guinea*

In his 1994 report to the Commission on Human Rights, the Special Rapporteur on Equatorial Guinea, Mr. Alejandro Artucio, said that: “[w]hen it comes to trying abuses committed by military personnel, [...] military jurisdiction is as a rule a source of impunity. In such circumstances, and particularly during periods of political unrest, the use of military courts, made up of officers of the armed forces, who try civilians or their own comrades-in-arms is not a satisfactory solution”.¹⁵⁶ The Rapporteur recommended the authorities to:

“Restrict the scope of military jurisdiction to cases involving strictly military offences, committed by military personnel”.¹⁵⁷

In his report to the Commission on Human Rights in 1996, the Rapporteur repeated his recommendation “to restrict [...] [military] jurisdiction to trying strictly military offences committed by military personnel. Ordinary offences committed by military or police personnel should be judged by the ordinary courts, like offences committed by private individuals”.¹⁵⁸ This recommendation was reiterated in 1997:

153 United Nations document E/CN.4/1995/15, 20 December 1994, paragraph 57.

154 *Ibid.*, paragraph 186.

155 United Nations document E/CN.4/1996/15, 5 December 1995, paragraph 129.

156 United Nations document E/CN.4/1994/56, paragraph 56.

157 *Ibid.*, paragraph 103.

158 United Nations document E/CN.4/1996/67, paragraph 85.

“Where the military courts are concerned, the Special Rapporteur reiterates his earlier recommendation to limit their jurisdiction to trying strictly military offences committed by military personnel. Ordinary offences committed by military or police personnel should be tried by the ordinary courts, like offences committed by private individuals. Any offences involving slander or insults against the Head of State or any other dignitary should be tried by the ordinary criminal courts”.¹⁵⁹

His successor, Mr. Gustavo Gallón, in his first report as Special Representative in 2000, stated that: “Military judges are empowered to arrest, investigate and try civilians. Many of the executive’s senior officials regard such powers as normal and do not see them as contrary to the principle of the separation of powers proper to a State subject to the rule of law. They argue that it is military justice that should institute proceedings for acts of violence, even when committed by civilians, such as the attack on military facilities, or the use of military weapons or uniforms. Military justice, however, does not limit itself to such cases, in which its impartiality would in any case be dubious since it would simultaneously be judge and party. Military judges pass sentence for offences such as insulting the Head of State, and also conduct interrogations and investigations based on vague charges which do not refer in detail to a specific offence”.¹⁶⁰ The Special Representative also recalled that “[i]n the course of the last 20 years, the Independent Expert and the Special Rapporteurs have all recommended that [military justice] should be restricted to offences of a military nature committed by serving military personnel”.¹⁶¹ The Special Representative recommended that:

“the right to justice should be safeguarded. This will entail, above all, making the judiciary truly independent and impartial through the adoption of legislative and administrative measures to achieve the required separation between the executive branch and the judicial branch, [...]. All the above should be part of the overall aim of overcoming impunity by effectively pursuing the investigation, sentencing and punishment of human rights violators. Restricting the jurisdiction of military courts, which should not have competence in respect of civilians, is the necessary counterpart to the democratic strengthening of civil justice”.¹⁶²

159 United Nations document E/CN.4/1997/54, paragraph 98.

160 United Nations document E/CN.4/2000/40, paragraph 69.

161 *Ibid.*, paragraph 71.

162 *Ibid.*, paragraph 137.

In his second and last report, the Special Representative went on to reiterate these same recommendations.¹⁶³

2.7.3. *Somalia*

In her report on the situation of human rights in Somalia, the Independent Expert, Ms. Mona Rishmawi, said, with regard to violations committed by soldiers from the Canadian Forces in Somalia attached to the Joint Task Force,¹⁶⁴ that the Canadian Commission of Inquiry into these incidents “found the military justice system to be inadequate in handling such cases and recommended that military judges be replaced by civilian judges”.¹⁶⁵ Even though at first, on 26 April 1993, the Canadian Minister of National Defence had ordered the establishment of a military board of enquiry and some soldiers were also court-martialled for acts committed in Somalia, the military board was later replaced by a civilian one. The Canadian Commission of Inquiry, in its report entitled “Dishonoured Legacy”, recommended “reform [of] the military justice system by, *inter alia*, excluding military police from the chain of command and substituting civilian judges for military judges”.¹⁶⁶ The Independent Expert considered the work and recommendations of the Canadian Commission of Enquiry to be “positive examples for many other societies to follow”.¹⁶⁷

3. The Sub-Commission on the Promotion and Protection of Human Rights

Throughout its work, the Sub-Commission on the Promotion and Protection of Human Rights¹⁶⁸ has addressed the issue of military courts and, in particular, the question of the use of military or special tribunals to try military and police personnel for human rights violations. Perhaps one of the first forays into this area was undertaken by the Sub-Commission’s Special Rapporteur on Equality in the Administration of Justice, Mr. Mohammed Abu Rannat, in his 1969 study on equality in the administration of justice. When addressing the issue of military courts being made up of armed forces officials who are

163 United Nations document E/CN.4/2001/38, paragraph 69.

164 United Nations Security Council Resolution 794 (1992).

165 United Nations document E/CN.4/1998/96, 16 January 1998, paragraph 109.

166 *Ibid.*, paragraph 115.

167 *Ibid.*, paragraph 120.

168 Formerly the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

subject to the principle of hierarchical obedience and military discipline, the Special Rapporteur concluded that:

“one might wonder whether the aforementioned personnel can be tried and prosecuted in complete freedom, bearing in mind that they are dependent on their commanding officer as far as the determination of efficiency, promotion, allocation of tasks and the right to go on leave are concerned”.¹⁶⁹

3.1. The Special Rapporteur on human rights and states of emergency

The Special Rapporteur on human rights and states of emergency, Ms. Nicole Questiaux, pointed out, in her 1992 Study, that a common practice in states of emergency was for the judiciary to be placed under the authority of the executive. The Special Rapporteur said that one way of bringing this about was to change the criteria for assigning jurisdiction, thereby gradually removing “powers from the ordinary justice system in favour of military jurisdiction”.¹⁷⁰ The Special Rapporteur concluded that one of the consequences of such practices was that the principle of the separation of powers was replaced by the “hierarchical structuring of powers”, in which “the civilian authority itself, while retaining some of its prerogative powers, is subordinate to the military authority”.¹⁷¹ The Special Rapporteur considered that these practices amounted to a real “transformation of the rule of law”, which deeply affected “criminal law both in form (the definition of offences and the scale of penalties) and substance (procedural guarantees) as well as the regulations relating to jurisdiction”.¹⁷² As an example, the Special Rapporteur cited the military courts with jurisdiction over civilians which had been set up under emergency legislation in Turkey.

Her successor, Mr. Leandro Despouy, recommended in his 1989 report that “in order to best prevent a state of emergency from having negative effects on the enjoyment on human rights, [States should] maintain the jurisdiction of civil courts and limit the intervention of military courts to military crimes and offences”.¹⁷³

169 United Nations document E/CN.4/Sub.2/296, 10 June 1969, paragraph 195. [Spanish original, free translation.]

170 Study of the Implications for Human Rights of Recent Developments concerning Situations Known as State of Siege or Emergency, United Nations document E/CN.4/Sub.2/1982/15, 27 July 1982, paragraph 155. [Spanish original, free translation.]

171 *Ibid.*, paragraph 159. [Spanish original, free translation.]

172 *Ibid.*, paragraph 163. [Spanish original, free translation.]

173 United Nations document E/CN.4/Sub.2/1989/30/Rev.1, 7 February 1990, paragraph 33 (b). [Spanish original, free translation.]

In his 1991 report, when discussing the transfer of jurisdiction from ordinary courts to military courts, the Special Rapporteur pointed out that:

“when emergency measures are enforced to deprive independent and impartial courts of jurisdiction over officials accused of violating human rights, experience shows that the elimination of this vital safeguard in effect creates a climate of impunity which encourages the widespread and indiscriminate violation of human rights, including rights which should not be suspended”.¹⁷⁴

3.2. Experts on the Impunity of Perpetrators of Human Rights Violations

In their 1993 report, Independent Experts, Messrs. Louis Joinet and El Hadji Guissé, said the following on the subject of military courts:

“the judges who sit on these [courts] are, as members of the military, answerable to the Ministry of Defence and therefore to a hierarchical authority that hardly meets the criterion of independence. This results, on the one hand, in a strong spirit of solidarity which tends to justify or even legitimize violations as obeying a superior interest or being a means of accomplishing a task assigned to the armed forces (maintaining social order, fighting against subversion, etc.) and, on the other hand, a tendency to turn ‘secrecy on defence grounds’ into the rule rather than the exception, which means concealing evidence and the identity of those responsible for the violations”.¹⁷⁵

Later, Independent Expert Louis Joinet would be mandated by the Sub-Commission to carry out a study into the question of impunity for the perpetrators of human rights violations (civil and political). In his 1995 report, Expert Louis Joinet said the following:

“most Special Rapporteurs [from the Commission on Human Rights] point to the extent to which military courts can be a factor in impunity. In the light of studies conducted by the relevant United Nations bodies and by the regional (European, American and African) systems for the protection of human

174 United Nations document E/CN.4/Sub.2/1991/28/Rev.1, 21 November 1991, p. 49. [Spanish original, free translation.]

175 United Nations document E/CN.4/1993/6, paragraph 36. [Spanish original, free translation.]

rights, and the positions they have adopted, consideration should be given to measures in this respect that would make the combating of impunity as effective as possible. Should military courts be retained, with their competence limited to purely military offences committed solely by the military? But would that not legitimize the principle of the existence of such courts? [...] For is it not arguable that the characteristic rules governing these courts (on composition, competence and procedure) bring them into conflict with article 14 of the International Covenant on Civil and Political Rights; among other criteria, this article requires the presence of competent, independent and impartial judges, a difficult claim to make for bodies in which the military remain subject to their superiors, even supposing (although there is no known precedent) that all the other safeguards established by article 14 are respected”.¹⁷⁶

In his 1996 report, Expert Louis Joinet recommended that “[i]n order to avoid military courts, in those countries where they have not yet been abolished, helping to perpetuate impunity by virtue of a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction must be limited solely to offences committed among military personnel”.¹⁷⁷

In his final report, the Expert concluded that “[b]ecause military courts do not have sufficient statutory independence, their jurisdiction must be limited to specifically military infractions committed by members of the military, to the exclusion of human rights violations, which must come within the jurisdiction of the ordinary courts”.¹⁷⁸ The Expert’s work culminated in the drafting of a *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*.¹⁷⁹ Principle N° 31 of the draft principles states that “[i]n order to avoid military courts, in those countries where they have not yet been abolished, helping to perpetuate impunity owing to a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, that of an international criminal court”.¹⁸⁰

176 United Nations document E/CN.4/Sub.2/1995/18, 28 June 1995, paragraph 17.

177 United Nations document E/CN.4/Sub.2/1996/18.

178 United Nations document E/CN.4/Sub.2/1997/20/Rev.1, paragraph 38.

179 United Nations document E/CN.4/Sub.2/1997/20/Rev.1, Annex.

180 Ibidem.

3.3. *The Expert on the right to reparation*

The Expert on the right to restitution, compensation and rehabilitation for the victims of gross violations of human rights and fundamental freedoms, Mr. Theo van Boven, has addressed the issue of the prosecution of military personnel responsible for human rights violations in military courts. In particular, he has exposed the link between impunity and the right to restitution. The Expert took the view that:

“it can be concluded that in a social and political atmosphere in which impunity prevails, the right of the victims of flagrant violations of human rights and fundamental freedoms to obtain reparation is probably just an illusion. It is hard to imagine that a judicial system can safeguard the rights of victims while at the same time remaining indifferent and inactive in the face of the flagrant offences committed by those who violated those rights”.¹⁸¹

The work of the Expert culminated in 1997 with the drafting of the *Basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law*, clause 15 (h,ii) of which calls for the jurisdiction of military tribunals to be restricted “solely to specifically military offences committed by members of the armed forces” as a means of reparation in the form of satisfaction and a guarantee of non-recurrence.¹⁸² Although some amendments have been made to the draft, Cherif Bassiouni, who replaced Theo van Boven, has retained the clause restricting military jurisdiction with exactly the same wording.¹⁸³

3.4. *Special Rapporteurs on the right to a fair trial*

In their reports entitled “The right to a fair trial: Current recognition and measures necessary for its strengthening”, Messrs. Stanislav Chernichenko and William Treat did not address the issue of the use of military courts to try military personnel responsible for human rights violations. However, they made several comments on the need for all courts to be independent and impartial. In their 1992 report, they stated that “[i]mpartiality also describes the appropriate attitude of the court to the case being tried and that there will be an unbiased assessment of the evidence”.¹⁸⁴

181 United Nations document E/CN.4/Sub.2/1992/8, paragraph 55.

182 United Nations document E/CN.4/1997/104, Annex.

183 In the new version of the draft, the clause restricting military jurisdiction appears in article 25 (h,ii). United Nations document E/CN.4/2000/62, Annex.

184 United Nations document E/CN.4/Sub.2/1990/34, paragraph 37.

3.5. Special Rapporteur on the independence and impartiality of the judiciary

In his 1991 report, the Special Rapporteur on the independence and impartiality of the judiciary, Mr. Louis Joinet, considered that a series of measures granting jurisdiction to military courts in Myanmar were factors which negatively affected the independence and impartiality of the judiciary.¹⁸⁵ The Expert recalled the Draft Universal Declaration on the Independence of Justice and, in particular, principle 5(f), which stipulates that the jurisdiction of military courts must be restricted to military offences.¹⁸⁶

3.6. The Sessional Working Group on the Administration of Justice

Since 2000, the Working Group on the Administration of Justice has been undertaking a study into the issue of the “Administration of justice through military tribunals and other exceptional jurisdictions”.¹⁸⁷ As pointed out by Mr. Louis Joinet, the rapporteur responsible for the study, the “essential goal would be to reduce the incompatibility noted between the status of military courts and the international standards analysed in the study”.¹⁸⁸

During the 2001 session of the Sub-Commission, the Rapporteur submitted an interim report on the administration of justice through military courts¹⁸⁹ to the Working Group on the Administration of Justice.¹⁹⁰ In his report to the Working Group, the Rapporteur sought to identify trends and, secondly, to elaborate guidelines or benchmarks for governments engaged in reforming their systems of military justice.¹⁹¹

In his 2002 report, the Rapporteur on the Issue of the Administration of Justice through Military Tribunals concluded that:

“The trial, by military tribunals, of members of the armed forces or the police accused of serious human rights violations that constitute crimes is a current practice in many countries. It is frequently a source of impunity. This practice tests the effec-

185 United Nations document E/CN.4/Sub.2/1991/30, paragraph 277.

186 *Ibid.*, paragraph 283.

187 United Nations document E/CN.4/Sub.2/2000/44, 15 August 2000, paragraphs 40 to 46. See also working document E/CN.4/Sub.2/2000/WG.1/CRP.2.

188 *Ibid.*, paragraph 43.

189 United Nations document E/CN.4/Sub.2/2001/WG.1/CRP.3.

190 United Nations document E/CN.4/Sub.2/2001/7, 14 August 2001, paragraphs 28 to 39.

191 *Ibid.*, paragraph 30.

tiveness of the right to effective remedy (article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights), of the right to a fair hearing by an independent and impartial tribunal (article 14, paragraph 1, of the Covenant) and of the right to equal protection of the law (article 26 of the Covenant)".¹⁹²

But, at the same time, the Rapporteur stated that "[m]ore and more countries are adopting legislation that excludes the jurisdiction of military tribunals over serious human rights violations committed by members of the armed forces (or the police)".¹⁹³ The Rapporteur recommended that:

"In all circumstances, the competence of military tribunals should be abolished in favour of those of the ordinary courts, for trying persons responsible for serious human rights violations, such as extrajudicial executions, enforced disappearances, torture and so on".¹⁹⁴

4. Other Mechanisms

The phenomenon of military jurisdiction and human rights violations has been addressed by United Nations field missions. For example, the Human Rights Field Operation in Rwanda expressed its concern about the procedures followed by the Rwandan military courts when trying military personnel who had committed gross violations of human rights.¹⁹⁵

4.1. ONUSAL

The Human Rights Division of the United Nations Observer Mission in El Salvador (ONUSAL), in its report covering the period from 1 March to 30 July 1994, after pointing out the existence of "indications of the involvement of enlisted members of the Armed Forces in criminal activities",¹⁹⁶ concluded

192 United Nations document E/CN.4/Sub.2/2002/4, Executive Summary, p. 4.

193 *Ibid.*, p. 5.

194 *Ibid.*, paragraph 30.

195 United Nations document A/52/486, 16 October 1997, paragraphs 66 to 68.

196 Eleventh Report by the Director of the Human Rights Division of the United Nations Observer Mission in El Salvador (1 March to 30 July 1994), United Nations document A/49/281 S/1994/886, 28 July 1994, paragraph 111. [Spanish original, free translation.]

ed that “it is essential for investigations to be stepped up and for the individuals involved to be brought before the ordinary courts”.¹⁹⁷

4.2. MINUGUA

The United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA) addressed the problem of military personnel accused of human rights violations being brought to trial in military courts. In his Third Report, the Director of MINUGUA took the view that:

“the involvement of members of the Army in the judging of offences that are not specifically military is a breach of due process in respect of the State’s duty to investigate and punish. [...] Setting up a specialist tribunal to try offences which are not specifically military in nature is a privilege which is incompatible with a State subject to the rule of law since ordinary criminal offences must be tried by the same courts in the case of all citizens”.¹⁹⁸

In his 1996 report, the Director of MINUGUA reiterated the recommendation that the Guatemalan authorities should “make it a top priority to push forward with an anti-impunity policy” which should include, among other things, the adoption of “legislative measures to confine the jurisdiction of the military courts to specifically military offences committed by military personnel”.¹⁹⁹

4.3. OFACONU

The Office of the United Nations High Commissioner for Human Rights in Colombia (OFACONU), in its First Report to the Commission on Human Rights, noted that “[t]he military criminal courts do not belong to the judicial branch of the public power, but to its executive branch”²⁰⁰ and stated that:

197 Ibid., paragraph 130. [Spanish original, free translation.]

198 Third Report by the Director of the United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala, United Nations document A/50/482, 12 October 1995, paragraph 113. [Spanish original, free translation.]

199 United Nations document A/50/878, 24 March 1996, paragraph 168. [Spanish original, free translation.]

200 United Nations document E/CN.4/1998/16, 9 March 1998, paragraph 7.

“Impunity has been further strengthened by the fact that the great majority of proceedings for human rights violations and war crimes in which serving members of the armed forces and police appear as defendants have to date come under the jurisdiction of the military criminal courts. Under the Colombian Constitution, the investigation and trial of crimes committed by serving military and police personnel ‘and related to their service’ are the responsibility of the military courts. An excessively broad interpretation of the sphere of military jurisdiction meant that for many years it was assigned punishable acts which had no functional relation of any kind with the normal tasks of the armed forces. As a result of this interpretation, proceedings for crimes against humanity were removed from the jurisdiction of the ordinary courts”.²⁰¹

OFACONU repeated its recommendation concerning “removal of offences constituting serious human rights violations from the jurisdiction of the military criminal courts, [and] rejection of the concept of ‘due obedience’ as exonerating the perpetrators of such offences”.²⁰²

In its Second Report, OFACONU reiterated its analysis of the military justice system:

“Another factor favouring impunity is the leniency of the military criminal courts in investigating and trying members of the security forces involved in human rights violations and breaches of international humanitarian law. Very few soldiers and police officers have been sentenced by the military courts, even though the Office of the Attorney-General of the Nation has established the disciplinary responsibility of the accused for the offences for which they are being tried. The decisions of the Constitutional Court clearly show that, in the Colombian legal system, military jurisdiction is of a special and exceptional nature and may handle the offences committed only when the punishable acts have a clear-cut, close and direct link with official duties. However, the military courts continue to claim that they have jurisdiction to prosecute members of the armed forces who have been accused of wrongful acts, which, by their very nature and seriousness, cannot be considered to be related to the duties of the security forces. According to the Court, any doubt about jurisdiction to try an offence committed by

201 Ibid., paragraph 121.

202 Ibid., paragraph 164.

members of the security forces must be resolved in favour of the ordinary courts. This criterion has not been stringently applied. In settling conflicts of jurisdiction, the Supreme Judicial Council has continued to refer proceedings to the military criminal courts which should, according to the above-mentioned ruling, be tried by the ordinary courts".²⁰³

OFACONU considered that the trial of military or police personnel responsible for human rights violations in military courts violated the principle of due process. OFACONU considered that it was:

“also contrary to the provisions of article 14 of the International Covenant on Civil and Political Rights. It contravenes the principle of the independence and impartiality of the judicial authorities, since the trial function is entrusted to the hierarchical superior and there is no separation at all between the function of command and that of prosecution. This means that in some cases the same official may act both as judge and as party in relation to the acts under investigation. It must also be regarded as a violation of human rights that, in the military criminal courts, persons who have suffered loss or injury as a result of an offence are not allowed to introduce criminal indemnification proceedings (*parte civil*)”.²⁰⁴

B. The European System of Human Rights Protection

The European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain any specific provisions regarding military courts. Nevertheless, matters relating to the right to a fair trial are dealt with in article 6. The European Court of Human Rights does not consider that military courts lack impartiality or independence *per se*. However, in several cases, the European Court has said that it is not enough for a court hearing a case to be impartial and independent but that it also has to be seen to be so. More recently, in several decisions on individual communications, the European Court has addressed the issue of whether judicial proceedings conducted in military courts are compatible with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, it should be pointed out that the cases examined by the

203 United Nations document E/CN.4/1999/8, 16 March 1999, paragraph 61.

204 *Ibid.*, paragraph 63.

European Court do not deal with the question of the use of military or police courts to try military or police personnel for human rights violations. They concern the trial of civilians by military courts and the prosecution of military personnel for military offences. However, the conclusions reached by the European Court are of interest for the purposes of this study.

In one case, the European Court considered that, in a situation in which a Police Board whose only member was a senior public official who might well return to operational work and be perceived by the ordinary citizen as an official who was subordinate to those above him in the hierarchy of the police force in question, “the confidence which must be inspired by the courts in a democratic society” might be undermined and that the doubts expressed by the petitioner about the independence of the court were legitimate.²⁰⁵

In another case²⁰⁶, the European Court considered that, while impartiality normally denotes the absence of prejudice or bias, its existence or otherwise could be tested in two ways. “A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.” However, these are not enough on their own. The European Court, opting for the second approach, considered that the fact that a judge had participated at an earlier stage, albeit in a different capacity to that of trial judge, for example, as a member of the public prosecutor’s department, could raise well-founded doubts about whether he had dealt with the case impartially.

In the case of *Incal v. Turkey*, the European Court considered that the presence of a military judge on the National Security Court contravened the principles of independence and impartiality which are inherent to due process.²⁰⁷ Incal was a lawyer and member of the executive committee of the Izmir section of the People’s Labour Party (HEP) which, in July 1992, had distributed a leaflet criticizing measures taken by the local authorities. Incal, together with other members of the executive committee, was accused of attempting to incite hatred and hostility through racist words. They were tried and convicted by the National Security Court, which was made up of three judges, including a member of the armed forces attached to the Military Legal Service. The European Court considered that Incal had not had a fair trial

205 Cited in United Nations document E/CN.4/Sub.2/1992/24/Add.1, paragraph 197.

206 European Court of Human Rights, Judgment of 1 October 1982, Case of *Piersarck v. Belgium*.

207 Judgment of 9 June 1998, Case of *Incal v. Turkey*, Recueil 1998 - IV.

before an independent and impartial court because the military judge who had participated in the National Security Court was responsible to the executive and the military authorities since he remained an officer and still had links with the armed forces and his superiors who were in a position to influence his career. Finally, the European Court attached “great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces. It follows that the applicant could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. [...] In conclusion, the applicant had legitimate cause to doubt the independence and impartiality of the Izmir National Security Court”.^{207bis} This jurisprudence has also been cited by the European Court in other cases.²⁰⁸

In the case of *Findlay v. United Kingdom*, the European Court considered that the court martial which had tried the petitioner was neither independent nor impartial because its members were subordinate to the prosecuting officer and the latter was in a position to change any decision that was made by the court.²⁰⁹

In the case of *Duinhof and Duif and others v. The Netherlands*, in which several conscientious objectors who had refused to obey specific orders related to their obligation to do military service were arrested for offences against the Military Criminal Code and tried and convicted for insubordination by a military court, the European Court analyzed the structure and operation of the military court. Without entering into an analysis of whether or not, given its composition (two military members with a presiding judge who was a civilian), the military court was sufficiently independent, the European Court examined the role of the judge advocate in the legal proceedings and, in particular, the question of whether the judge advocate was independent from the military authorities. Among other things, the Court considered that the judge advocate was unable to fulfill the judicial function contemplated in article 5.3 of the Convention since “he at the same time performed the function of prosecuting authority before the Military Court [...]. The *auditeur-militaire* was thus a committed party to the criminal proceedings being conducted against the detained serviceman on whose possible release he was empowered to

^{207bis} Ibid., paragraph 72.

²⁰⁸ European Court of Human Rights, judgments dated 28 October 1998, *Case of Ciralpar v. Turkey*, and 8 July 1999, case of *Gerger v. Turkey*.

²⁰⁹ European Court of Human Rights, judgment dated 25 February 1997, *Case of Findlay v. United Kingdom*, paragraphs 74 to 77.

decide”. The European Court concluded that therefore it was not possible for the judge advocate to be “independent of the parties”.²¹⁰

C. The Inter-American System of Human Rights Protection

Neither the American Declaration on the Rights and Duties of Man nor the American Convention on Human Rights contain any specific provisions on the question of military courts. Nevertheless, it is worth noting that the right to a fair trial and the right to a simple and prompt judicial remedy are enshrined in both the Declaration and the Convention.²¹¹ The Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women also do not contain any provisions relating to military courts. However, the inter-American system of human rights protection stands out as being the only one with a treaty that specifically restricts military jurisdiction over human rights violations. The Inter-American Convention on Forced Disappearance of Persons²¹² expressly states that members of the military or other state actors involved in forced disappearances shall not enjoy military jurisdiction. Article IX states:

“Persons alleged to be responsible for the acts constituting the offence of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.

“The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties”.

Despite the fact that military courts are not specifically regulated in the American Declaration of the Rights and Duties of Man or the American Convention on Human Rights, this gap was filled from very early on by the Inter-American Commission on Human Rights, both in its reports on the situation of human rights in countries within the American hemisphere as well as

210 Judgment dated 22 May 1984, *Case of Duinhof and Duif and others v. The Netherlands*, Series A No 79. See also the judgment dated 22 May 1984, *Case of van der Sluijs, Zuiderveld and Klappe v. The Netherlands*, Series A No 78, which makes the same point.

211 Articles XVIII and XXVI of the Declaration and articles 8.1 and 25 of the Convention.

212 Adopted by the General Assembly of the Organization of American States in 1994.

in its judgments on individual communications. More recently, rulings on the subject have also been handed down by the Inter-American Court of Human Rights.

1. The Inter-American Court of Human Rights

1.1. Military jurisdiction and human rights violations committed by military personnel

The Inter-American Court of Human Rights did not address the problem of the use of military courts to prosecute military personnel responsible for human rights violations until 1997 when it ruled on the case of *Genie Lacayo v. Nicaragua*. The case involved the killing of a Nicaraguan citizen, Jean Paul Genie Lacayo, by members of the Sandinista People's Army (*Ejército Popular Sandinista*) on 28 October 1990, and the proceedings were conducted under military jurisdiction. The Inter-American Commission on Human Rights decided to refer the case to the Court because, among other things, "to prosecute ordinary crimes as though they were military crimes simply because they had been committed by members of the military breached the guarantee of an independent and impartial tribunal"²¹³, as enshrined in the American Convention on Human Rights.

The Inter-American Court of Human Rights considered that "the fact that it involves a military court does not *per se* signify that the human rights guaranteed the accusing party [the relatives of the victim] by the Convention are being violated".²¹⁴ Starting from that premise, the Court decided to find out whether, in that particular case, the right to a fair trial had been safeguarded. The victim's family had been able to bring a civil action (*parte civil*) in the course of the military trial and had therefore been able "to participate in the military proceeding, submit evidence, avail [itself] of the appropriate remedies and, lastly, apply for judicial review before the Supreme Court of Justice of Nicaragua".²¹⁵ Furthermore, in the view of the Court, during the proceedings the complainants had not found themselves in a position of inferiority in relation to the defendant or the military judges.²¹⁶ The Court concluded that the right to an independent and impartial tribunal had not been violated.

213 Inter-American Court of Human Rights, judgment of 29 January 1997, Series C N° 30, *Genie Lacayo v. Nicaragua*, paragraph 53.

214 *Ibid.*, paragraph 84.

215 *Ibid.*, paragraph 85.

216 *Ibid.*, paragraph 88.

This legal precedent set by the Court not only conflicts with the doctrine developed by the Inter-American Commission on Human Rights but also with the way in which the process of codification of international human rights law has developed. In a commentary on this judgment by the Court, León Carlos Arslanian rightly stated that “it is extremely dangerous for an international human rights court to set a precedent of this kind by endorsing the conduct of the military court on the pretext that it allowed certain formalities which would supposedly safeguard the right of the victim’s relatives to a hearing to be observed”.²¹⁷

In the case of *El Amparo v. Venezuela*, in which military and police personnel from the “José Antonio Páez Specific Command” (“*Comando Específico José Antonio Páez*”) were tried under military jurisdiction for killing 14 fishermen, the Inter-American Commission on Human Rights, when submitting the case to the Inter-American Court for study, had requested it, in assessing the merits of the case, to:

“declare that the enforceability of Article 54, paragraphs 2 and 3 of the Military Code of Justice analyzed in confidential Report N° 29/93, is incompatible with the purpose and objective of the American Convention on Human Rights, and that it must be adjusted to the latter in conformity with the commitments acquired pursuant to Article 2 thereof”.²¹⁸

Under article 54 of the Military Code of Justice, the President of the Republic has the power to order that proceedings not be opened or, once opened, that they be adjourned on grounds of national interest. The Venezuelan State admitted responsibility for the acts in question and the Court therefore considered that “the controversy concerning the facts that originated the instant case” had ceased and ordered that the proceedings move on to the reparations stage. It also ordered the Venezuelan State and the Inter-American Commission to establish, through mutual agreement, the form and amount of the reparations, with the Court reserving the power to review and approve any such agreement and, in the event that no such agreement could be reached, to determine the scope and amount of the reparations. In his concurring opinion, Judge Cançado Trindade considered that the faculty reserved by the Court should be interpreted as including the power to decide whether or not article

217 León Carlos Arslanian, “*La jurisdicción militar en la opinión de la Corte Interamericana de Justicia*”, in *Revista IIDH*, Inter-American Institute of Human Rights, N° 25, January-June 1997, p. 107. [Spanish original, free translation.]

218 Inter-American Court of Human Rights, judgment of 18 January 1995, *El Amparo Case*, Series C No. 19 (1995), paragraph 4 (5).

54 of the Military Code of Justice was compatible with the American Convention.

The reparations agreement did not materialize within the deadline set by the Court and reparations proceedings were therefore opened before the Court. The Inter-American Commission on Human Rights requested that, as reparation for the moral damages, amendments be made to article 54 (paragraphs 2 and 3) of the Military Code of Justice and other military regulations and instructions that were incompatible with the American Convention on Human Rights. The Venezuelan State opposed this, arguing that in this case article 54 of the Military Code of Justice had not been applied. Citing Advisory Opinion N° 14 in which it stated that “[t]he contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions”²¹⁹, the Court, in its reparations judgment, refrained from ruling on the issue of reform of the Military Code of Justice.²²⁰ In his dissenting opinion, Judge Cançado Trindade considered that “the very existence of a legal provision may *per se* create a situation which directly affects the rights protected by the American Convention. A law can certainly violate those rights by virtue of its own existence, and, in the absence of a measure of application or execution, by the real *threat* to the person(s), represented by the situation created by such law. It does not seem necessary to me to wait for the occurrence of a (material or moral) damage for a law to be impugned; it may be so without this amounting to an examination or determination *in abstracto* of its incompatibility with the Convention. If it were necessary to wait for the effective application of a law causing a damage, the duty of prevention could hardly be sustained. A law can, by its own existence and in the absence of measures of execution, affect the rights protected to the extent that, for example, by its being in force it deprives the victims or their relatives of an effective remedy before the competent, independent and impartial national judges or tribunals, as well as of the full judicial guarantees”.²²¹

The case of *Durand and Ugarte v. Peru* marked a change in direction on the issue for the Inter-American Court. This case concerned two Peruvian detainees who disappeared during the riot at El Frontón Prison in which 111 people died as a result of the military operation to put down an uprising by

219 Inter-American Court of Human Rights, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC-14/94, 9 December 1994, in Series A N° 14, paragraph 49.

220 Inter-American Court of Human Rights, Judgment dated 14 September 1996, *El Amparo Case*, Series C No. 19 (1995), paragraphs 60 and operative paragraph 5.

221 *Ibid.*, dissenting opinion by Judge A.A. Cançado Trindade, paragraphs 2 and 3.

the inmates. Even though their bodies were never identified or returned to their relatives, Durand and Ugarte almost certainly lost their lives. The writs of *habeas corpus* which had been lodged on their behalf were dismissed and responsibility for investigating the events that took place in El Frontón Prison was entrusted to the Peruvian military courts. The Inter-American Court considered that:

“In a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offences that by its own nature attempt against legally protected interests of military order. [...]

“In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate death toll. Thus, the actions which brought about this situation cannot be considered as military felonies, but common crimes, so investigation and punishment must be placed on the ordinary justice, apart from the fact that the alleged active parties had been military or not”.²²²

The Inter-American Court concluded that, given that the investigation into the events at El Frontón was carried out under military jurisdiction, the “victims or their relatives did not have an effective recourse that could guarantee their rights”.²²³ The Court stated that “it is reasonable to consider that military court officials who acted in the leading process to investigate the events in El Frontón lacked the required independence and impartiality as stipulated in Article 8(1) of the Convention to efficiently and exhaustively investigate and punish the liable parties”.²²⁴ Given that the courts which dealt with the events at El Frontón were made up of members of the Armed Forces on active service, the Court considered that “they were unable to issue an independent and impartial judgment”.²²⁵ On the basis of these arguments, the Inter-American

222 Inter-American Court of Human Rights, *Durand and Ugarte v. Peru*, judgment of 16 August 2000, Series C No. 68, paragraphs 117 and 118.

223 *Ibid.*, paragraph 122.

224 *Ibid.*, paragraph 125.

225 *Ibid.*, paragraph 126.

Court declared the Peruvian State to be in breach of articles 8.1 (the right to an independent and impartial court) and 25.1 (the right to an effective remedy) of the American Convention on Human Rights.²²⁶

1.2. Military jurisdiction and civilians

In September 1997, in the case of *Loayza Tamayo v. Peru*, a Peruvian citizen who, in violation of the *non bis in idem* principle, was convicted by a civilian court after having been acquitted by a military court for the same offences, the Inter-American Court deemed it unnecessary to rule on the question of the lack of independence and impartiality of military courts due to the fact that Ms Loayza had been acquitted by a military court.²²⁷ Despite this deliberate omission by the Inter-American Court, the concurring opinion delivered by Judges Cançado Trindade and Jackman is worth highlighting:

“While it is true that, in the present case, those tribunals did absolve Ms. Loayza-Tamayo, we are of the opinion that special military tribunals composed of military personnel appointed by the Executive Power and subject to the dictates of military discipline, assuming a function which belongs to the Judicial Power, endowed with jurisdiction to judge not only the military but civilians as well, and - as in the present case - rendering judgments for which no reasons are given, do not meet the standards of independence and impartiality imposed by Article 8(1) of the American Convention, as an essential element of the concept of due process”.²²⁸

In the case of *Cesti Hurtado v. Peru*, a retired Peruvian military official who had been tried by a military court for a “crime against the duty and dignity of the service” as well as for negligence and fraud, the Inter-American Court considered that:

“when this proceeding was opened and heard [by a military court], [the status of Cesti Hurtado] was that of a retired member of the armed forces and, therefore, he could not be judged by the military courts. Consequently, the proceeding to which

226 *Ibid.*, paragraphs 131 and operative paragraph 5.

227 Inter-American Court of Human Rights, *Loayza Tamayo v. Peru*, Judgment of 17 September 1997, Series C No. 33, paragraph 60.

228 Joint concurring opinion by Judges Cançado Trindade and Jackman, Inter-American Court of Human Rights, *Loayza Tamayo Case*, Judgment of 17 September 1997, Series C No. 33.

Gustavo Cesti Hurtado was submitted violated the right to be heard by a competent tribunal, according to Article 8.1 of the Convention”.²²⁹

The case in which the Inter-American Court came to adopt a clear and unequivocal position on the practice of trying civilians in military courts was that of *Castillo Petruzzi et al. v. Peru*. It concerned several civilians who had been tried and convicted by a Peruvian military court for treason, which is classified under Peruvian law as a terrorist offence. In its judgment of 30 May 1999, the Inter-American Court declared that the procedures followed by the military courts when trying the civilians were in breach of the provisions of article 8 of the American Convention and the principle of access to a competent, independent and impartial tribunal. In its *obiter dictum*, the Court made the following points:

“[...] under Peru’s Code of Military Justice, military courts are permitted to try civilians for treason, but only when the country is at war abroad. A 1992 decree-law changed this rule to allow civilians accused of treason to be tried by military courts regardless of temporal considerations. In the instant case, DIN-COTE was given investigative authority, and a summary proceeding ‘in the theatre of operations’ was conducted, as stipulated in the Code of Military Justice”.²³⁰

“[...] several pieces of legislation give the military courts jurisdiction for the purpose of maintaining order and discipline within the ranks of the armed forces. Application of this functional jurisdiction is confined to military personnel who have committed some crime or were derelict in performing their duties, and then only under certain circumstances. This was the definition in Peru’s own law (Article 282 of the 1979 Constitution). Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes

229 Inter-American Court of Human Rights, *Cesti Hurtado v. Peru*, Judgment of 29 September 1999, Series C No. 56, paragraph 151.

230 230 Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru*, Judgment of 30 May 1999, Series C No. 52, paragraph 127.

jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.²³¹ [...]

“In the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have. Moreover, under the Statute of Military Justice, members of the Supreme Court of Military Justice, the highest body in the military judiciary, are appointed by the minister of the pertinent sector. Members of the Supreme Court of Military Justice also decide who among their subordinates will be promoted and what incentives will be offered to whom; they also assign functions. This alone is enough to call the independence of the military judges into serious question”.²³²

The Court also recalled that “[a] basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create ‘[t]ribunals that do not use the duly established procedures of the legal process [...] to displace the jurisdiction belonging to the ordinary courts or judicial tribunals’.”²³³ The Court concluded that:

“the military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8(1) of the American Convention recognizes as essentials of due process of law”.²³⁴

This jurisprudence has subsequently been reiterated by the Court in other cases. For example, in the case of *Cantoral Benavides v. Peru*, a citizen tried by a military court for the terrorist offence of ‘treason against the motherland’, the Court ruled:

“that the trial of Mr. Luis Alberto Cantoral-Benavides in the military criminal court violated Article 8(1) of the American

231 Ibid., paragraph 128.

232 Ibid., paragraph 130.

233 Ibid., paragraph 129.

234 Ibid., paragraph 132.

Convention, which refers to the right to a fair trial before a competent, independent and impartial judge”.²³⁵

It is important to stress that, in its *obiter dictum*, the Court reiterated that “military jurisdiction is established in several laws, in order to maintain order and discipline within the armed forces. Therefore, its application is reserved for military personnel who have committed crimes or misdemeanors in the performance of their duties and under certain circumstances”.²³⁶

2. The Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (IACHR) has repeatedly taken the view that military courts do not meet the requirement of independence and impartiality of courts of law. The Commission has come to this conclusion through observing how military courts operate when trying civilians as well as through studying cases of military personnel tried for human rights violations in military courts in several different countries.

2.1. General Considerations

In its 1979 report on Nicaragua, the Commission pointed out that, under the martial law then in force, a series of preventive measures and executive decrees could be executed. These included, among others, granting military courts the power to try crimes against security.²³⁷ The Commission also added that the physical liberty of the people was seriously affected. Furthermore, the situation was “aggravated by the administration of the judicial system which exists in Nicaragua and [...] by the powers of the military courts to judge civilians during periods of emergency”.²³⁸ The Commission concluded that the right of protection against arbitrary detention and to due process, and, in particular the right to an adequate defence had been violated.

In its Second Report on Nicaragua (1981), the Commission, on referring to the Special Tribunals set up after the overthrow of the then *de facto* President, Anastasio Somoza, pointed out that the Government, having disregarded the

235 Inter-American Court of Human Rights, *Cantoral Benavides v. Peru*, Judgment of 18 August 2000, Series C No. 69, paragraph 75.

236 *Ibid.*, paragraph 112.

237 Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Nicaragua, OEA/Ser.L/V/II.45, doc. 16 rev. 1, Chapter I(c), 17 November 1979.

238 *Ibid.*, Conclusions, paragraph g.

wise advice given to it by the Supreme Court that it should increase the number of ordinary criminal courts, chose to set up special tribunals to try those accused of being Somocistas. In the view of the Commission, the way in which such tribunals operated gave rise to certain irregularities which were incompatible with Nicaragua's commitments under the American Convention on Human Rights. Of particular concern to the Commission were the following: "the lack of opportunity [on the part of the accused] to exercise his rights, the length of time the detainees were kept in detention before being brought to trial; the composition of the Special Tribunals, the vagueness and imprecision of many of the charges; the very short periods the accused were given to prepare their defense and to present evidence; the lack of basis for the judgments; [and] the lack of jurisdiction of the Appeals Court to review the facts established by the Special Tribunals".²³⁹ The Commission urged the Nicaraguan Government to ensure that all guilty verdicts handed down by the special tribunals be reviewed by a higher judicial authority, either the Supreme Court or the Appeals Courts, and that all due process guarantees were in operation in the course of such reviews.²⁴⁰

In its First Report on the Situation of Human Rights in Chile in 1974, one of the issues about which the Commission was most concerned was the way in which the military justice system operated and, in particular, "the extent of the powers conferred on military courts as a consequence of the declaration by decree-law of a 'state of war'." ²⁴¹ The Commission concluded that the guarantees of due process had been seriously affected because "[i]n many cases, the right to be tried by a court established by law prior to the alleged offence, and in general the right to a regular trial had been violated and was being violated [...] [and] [s]tatements made by the accused, under the pressure of psychological or physical torture, to the arresting official rather than to the trial judge, have been taken as 'confessions'. The proceedings of War Councils have constituted a massive violation of the guarantees of due process".²⁴²

The Commission recommended that, in order to ensure that the rights enshrined in the American Declaration of the Rights and Duties of Man were safeguarded as promptly as the circumstances required, the Chilean State

239 Inter-American Commission on Human Rights : Report on the Situation of Human Rights in Nicaragua, (OEA Ser. L/V/II 33), 30 June 1981, Chapter IV, paragraph 18.

240 *Ibid.*, Chapter IV, paragraph 19.

241 Inter-American Commission on Human Rights : Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.34, Doc. 21, 1974, Chapter VII, "Administration of Justice by the War Councils and the Military Courts", paragraph 1.

242 *Ibid.*, Conclusions, paragraph No 5.

should order the carrying out of “an exhaustive, detailed, speedy, and impartial investigation of the [...] acts”²⁴³ (namely, the alleged involvement of state officials in a variety of human rights violations). The Commission felt that such an investigation should be carried out so that: “a) unity of viewpoint be ensured in establishing and evaluating the facts, for which purposes the persons performing this task should be able to take action throughout the territory of the country, and b) any reasonable possibility of suspicion that those responsible for the investigation do not have the essential independence and resources to properly carry out their mission be excluded *a priori*”.²⁴⁴ Lastly, the Commission called on the Chilean Government to establish a remedy of review to make possible “a full examination of all of the verdicts handed down by the Councils of War, in order to verify the regularity of the proceedings and to decide on their validity, appropriateness and, as the case may be, the possibility of reducing the penalties imposed [...]”.²⁴⁵

In its 1985 Report on Chile, the Commission stated that “the independence of the courts and judges from the Executive is one of the fundamental conditions of the administration of justice. Permanent tenure (*inamovilidad*) and appropriate professional training are prerequisites for ensuring independence”.²⁴⁶ The Commission also considered that a military officer on active service, as well as being subordinate to the authorities “and, therefore, lacking functional independence [...] also lacks permanent tenure and, in addition and for reasons of his profession, [...] does not have the legal training required of a judge”.²⁴⁷

In its 1978 report on Uruguay, the Commission pointed out that “[s]ince enactment of the laws defining new crimes against the security of the State and transferring the competence to try civilians to the Military Courts, the Commission has frequently received denunciations alleging that those courts have violated the guarantees of due process of law”.²⁴⁸ With regard to the question of the impartiality of judges in military courts, the Commission said the following: “A military judge lacks independence because he is subordinate to his superiors, from whom he receives orders in keeping with the established military hierarchy. He cannot decline to carry out an order from a

243 Ibid., Recommendations 1(d), paragraph 2.

244 Ibidem.

245 Ibid., Recommendation No 4, paragraph 2.

246 Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Chile, 1985, Doc. OEA/S.R.L./V/II.66, paragraph 139.

247 Ibid., paragraph 140.

248 Inter-American Commission on Human Rights : Report on the Situation of Human Rights in Uruguay, (OEA Ser. L/V/II.43), 31 January 1978, Chapter VI, Right to Fair Trial and Due Process of Law, paragraph 1.

superior, for if he were to do so, he would be relieved of his command—that is, he would no longer have any authority. The manner in which a military man behaves in fulfilling the task assigned him will play a decisive role in determining future promotions; if he does his duty well, that is a merit to be considered, and he gets a demerit if his performance fails to please his superiors. His degree of dependence is determined by the very nature of military organizations. Consequently, justice becomes a derivation of the policies inspired and directed by the military command; a judge who tried to contradict or alter those policies would be viewed as an obstructionist, he would inevitably lose his job, and this would be harmful to his military career”.²⁴⁹ The Commission stated that “military justice does not form part of the judicial authority but operates in subordination to the military hierarchy. The Code of Military Penal Procedure (*Código de Procedimiento Penal Militar*) requires a specific order from above before the military judge can assume jurisdiction in a case, even though this right of jurisdiction is exclusively theirs”.²⁵⁰

During its visit to Argentina in 1980, the Commission was able to determine that a significant percentage of those detained for subversive activities had been tried and convicted by military courts.²⁵¹ In the opinion of the Commission, “the fact that civilians are subject to military jurisdiction under the prevailing emergency legislation amounts to a serious restriction of the right to defend oneself that is implicit in due process”.²⁵² It concluded that the right to justice and a fair trial had been violated “owing to the limitations the Judiciary have in carrying out their functions; (and) the lack of the proper guarantees in trials before military courts”.²⁵³ At the same time, the Commission made the following recommendations to the Argentinian Government:

“9. Adopt the following measures concerning procedural and defence guarantees during trial:

- a) Provide those brought to trial before military courts with guarantees for a fair trial, especially the right of the accused to be defended by a lawyer of his choice.
- b) Appoint a commission of qualified lawyers to study the trials

249 Ibid., Chapter VI, Right to Fair Trial and Due Process of Law, paragraph 29.

250 Ibid., Chapter VI, Right to Fair Trial and Due Process of Law, paragraph 30.

251 Inter-American Commission on Human Rights : Report on the Situation of Human Rights in Argentina; OEA/Ser.L/V/II.49, Doc. 19, 11 April 1980, Chapter VI - The Right to Justice and a Fair Trial (C) Military Courts, paragraph 2.

252 Ibidem. [Spanish original, free translation.]

253 Ibid., Conclusions (d). [Spanish original, free translation.]

conducted by military courts under the State of Siege and, in cases in which guarantees for a fair trial have not been provided, make appropriate recommendations”.²⁵⁴

More recently, in a resolution on terrorism and human rights passed three months after the terrorist attack of 11 September 2001, the Commission pointed out that “[t]he terrorist attacks have prompted vigorous debate over the adoption of anti-terrorist initiatives that include, *inter alia*, military commissions and other measures”.²⁵⁵ The Commission went on to reiterate that:

“According to the doctrine of the IACHR, military courts may not try civilians, except when no civilian courts exist or where trial by such courts is materially impossible. Even under such circumstances, the IACHR has pointed out that the trial must respect the minimum guarantees established under international law, which include non-discrimination between citizens and others who find themselves under the jurisdiction of a State, an impartial judge, the right to be assisted by freely-chosen counsel, and access by defendants to evidence brought against them together with the opportunity to contest it”.²⁵⁶

Referring to military justice in Peru in the case of General Rodolfo Robles Espinoza, the Commission concluded that the general had been deprived of his freedom for purposes other than those permitted by law. The Commission considered that “the Military Justice system has been used to repress criticisms, opinions, and denunciations about the actions of its officers and the crimes they have committed. In this, the Military Justice system has made particular use of the crimes of undermining the Armed Forces and of insulting a superior, holding that allegations of criminal acts constitute ‘slandorous phrases’ or ‘insults’. The Commission believes that undermining the Armed Forces or insulting a superior are appropriate terms when applied to the crimes for which they were created, in order to maintain a level of discipline suitable to the vertical command structure needed in a military environment, but that they are totally inappropriate when used to cover up allegations of crimes within the Armed Forces”.²⁵⁷

254 *Ibid.*, Recommendations, No 9. [Spanish original, free translation.]

255 Inter-American Commission on Human Rights : Resolution on Terrorism and Human Rights, 12 December 2001.

256 *Ibidem.*

257 Annual Report of the Inter-American Commission on Human Rights - 1998, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Report N° 20/99, Case 11,317, *Rodolfo Robles Espinoza and children (Peru)*, paragraph 151.

2.2. Military jurisdiction and human rights violations committed by military personnel

The Inter-American Commission on Human Rights has long asserted that, as far as the investigation, prosecution and punishment of military personnel accused of human rights violations are concerned, military courts violate the right to justice and are in serious breach of obligations incurred under the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The Commission has repeatedly recommended that member States of the Organization of American States (OAS) and States parties to the American Convention on Human Rights should limit the scope of military jurisdiction and, in particular, exclude human rights violations from its remit. For example, in its 1987-1988 report, the Commission remarked on the broad jurisdiction enjoyed by military courts, which encompassed conduct that did not necessarily have any connection with the military sphere of competence.²⁵⁸ In its 1992-1993 annual report, the Commission recommended:

“That pursuant to Article 2 of the Convention, the member States undertake to adopt the necessary domestic legal measures to confine the competence and jurisdiction of military tribunals to only those crimes that are purely military in nature; under no circumstances are military courts to be permitted to sit in judgment of human rights violations”.²⁵⁹

In its 1993 annual report, the Commission made the following specific recommendation:

“That, in accordance with article 2 of the Convention, States parties adopt the necessary domestic legislative measures to restrict the jurisdiction of military courts solely to offences that are exclusively military in nature. All cases of human rights violations should be subjected to ordinary justice”.²⁶⁰

In its 1997 annual report, the Commission reminded member States “that their citizens must be judged pursuant to ordinary law and justice and by their natural judges. Thus, civilians should not be subject to Military Tribunals.

258 Annual Report of the Inter-American Commission on Human Rights - 1986 - 1987, OEA/Ser.L/V/II.71, Doc. 9 rev. 1, chapter IV (b).

259 Annual Report of the Inter-American Commission on Human Rights 1992 - 1993, OEA/Ser.L/V/II.83, Doc. 14, Chapter V(VII), 12 March 1993, paragraph 6.

260 Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V/II.85, Doc. 8 rev., 11 February 1994, Chapter V (IV), Final Recommendations.

Military justice has merely a disciplinary nature and can only be used to try Armed Forces personnel in active service for misdemeanors or offences pertaining to their function. In any case, this special jurisdiction must exclude the crimes against humanity and human rights violations”.²⁶¹

In its 1998 annual report, the Commission reminded the member States that “[m]ilitary justice [...] can only be used to try armed forces personnel in active service for misdemeanors or offences pertaining to their function. In any case, this special jurisdiction must exclude the crimes against humanity and human rights violations”.²⁶² In the same report, when talking specifically about the armed forces, the Commission referred to the use of military courts to prosecute acts whose consequences were covered under ordinary criminal legislation, including, among others, acts related to respect for individual rights. The Commission reiterated that “military tribunals should only be employed to address those cases involving internal discipline within the Armed Forces [and recommended] emphatically, that the member States take the necessary measures to ensure that those members of the Armed Forces who commit common crimes be judged by ordinary courts and pursuant to ordinary law so as to ensure the right of the affected party to an impartial judge”.²⁶³

The question of prosecuting military and police personnel accused of human rights violations in military courts has been studied by the Inter-American Commission on Human Rights during its visits to countries of the region.

a. Brazil

Referring to the system of military justice in operation in Brazil in 1997, the Commission found that it tended to be lenient with police accused of human rights abuses and other criminal offences, thereby making it easy for the guilty to go unpunished. It also added that “[i]n this climate of impunity, which breeds violence by the ‘military’ police corps, the police officers involved in this type of activity are encouraged to participate in extrajudicial executions, to abuse detainees, and to engage in other types of criminal activity. The violence has even spread to the prosecutors who, when they insist on continuing investigations into the crimes committed by the ‘military’ police, have been threatened and even subjected to death threats. It is also not

261 Annual Report of the Inter-American Commission on Human Rights - 1997, OEA/Ser.L/V/II.98, Doc. 6, Chapter VII, 17 February 1998.

262 Annual Report of the Inter-American Commission on Human Rights - 1998; OEA/Ser.L/V/II.102, Doc. 6, Rev., 16 April 1999, Chapter VII, Section 1.

263 *Ibid.*, Chapter VII, Section 3.

uncommon for witnesses summoned to testify against police officers on trial to receive intimidating threats”.²⁶⁴

The Commission concluded that “the impunity of crimes committed by state ‘military’ or civil police breeds violence, establishes perverse chains of loyalty between police officers out of complicity or false solidarity, and creates circles of hired killers, whose ability to terminate human life is at the service of the highest bidder”²⁶⁵ and made the following recommendations to the Brazilian State: “d. Change... the investigation process so that the members of a police division or district are not appointed to investigate abuses by members of the same division”²⁶⁶ and “i. Confer... on the ordinary justice system the authority to judge all crimes committed by members of the state ‘military’ police”.²⁶⁷

b. Colombia

In its Second Report on Colombia in 1993, the Commission said that “rarely... do the military criminal courts sanction members of the armed forces for these violations. In fact, military criminal justice prevents ordinary judges from trying military and police, even in cases of crimes against humanity”.²⁶⁸ The Commission observed:

“Another irregularity in its justice system that the Commission pointed out for the Colombian Government is that in cases where the State is accused of violating human rights, it is the military criminal court that determines legal truth, rather than the regular criminal court. When a regular court takes cognizance of a criminal case in which a member of the military is accused of committing a crime while in service, which is precisely the typical human rights violation that so often compromises the State’s international responsibility in this regard, then that regular court must refrain from continuing to prosecute the case and refer it to the military courts to investigate and decide. While the administration of justice in Colombia is poorly served [...] so are the right to a fair trial provided for in the

264 Inter-American Commission on Human Rights : Report on the Situation of Human Rights in Brazil, 29 September 1997, OEA/Ser.L/V/II.97, Chapter III, paragraph 78.

265 *Ibid.*, Chapter III, Conclusions.

266 *Ibid.*, Chapter III, paragraph 95.

267 *Ibidem.*

268 Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, Doc. 39 rev, 14 October 1993, p. 93.

American Convention on Human Rights and the Inter-American system itself, which requires that States parties like Colombia act swiftly to adapt their due process laws to the American Convention”.²⁶⁹

The Commission concluded that in Colombia:

“The military tribunals do not guarantee that the right to a fair trial will be observed, since they do not have the independence that is a condition *sine qua non* for that right to be exercised. Moreover, their rulings have frequently been biased and have failed to punish members of the security forces whose involvement in very serious human rights violations has been established”.²⁷⁰

In its Third Report on Colombia in 1999, the Commission pointed out that the “problem of impunity is aggravated by the fact that the majority of cases involving human rights violations by members of the State’s public security forces are processed by the military justice system. The Commission has repeatedly condemned the military jurisdiction in Colombia and in other countries for failing to provide an effective and impartial judicial remedy for violations of Convention-based rights, thereby insuring impunity and a denial of justice in such cases. In Colombia specifically, the military courts have consistently failed to sanction members of the public security forces accused of committing human rights violations”²⁷¹ and added that “cases of human rights violations tried in the military courts are protected by impunity”.²⁷²

The Commission went on to say that the “problem of impunity in the military justice system is not tied only to the acquittal of defendants. Even before the final decision stage, the criminal investigations carried out in the military justice system impede access to an effective and impartial judicial remedy. When the military justice system conducts the investigation of a case, the possibility of an objective and independent investigation by judicial authorities which do not form part of the military hierarchy is precluded. Investigations into the conduct of members of the State’s security forces carried out by other members of those same security forces generally serve to

269 Ibid., p.96.

270 Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, Doc. 39 rev. 14 October 1993, pp. 237-238.

271 Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 Rev. 1, 26 February 1999, Chapter V, paragraph 17.

272 Ibid., paragraph 18.

conceal the truth rather than to reveal it. Thus, when an investigation is initiated in the military justice system, a conviction will probably be impossible even if the case is later transferred to the civil justice system. The military authorities will probably not have gathered the necessary evidence in an effective and timely manner. In those cases which remain in the military justice system, the investigation will frequently be conducted in such a manner as to prevent the case from reaching the final decision stage”.²⁷³

The Commission concluded that “[t]he military criminal justice system has several unique characteristics which prevent access to an effective and impartial judicial remedy in this jurisdiction. First, the military justice system may not even be properly referred to as a true judicial forum. The military justice system does not form part of the judicial branch of the Colombian State”.²⁷⁴ Furthermore, judges within the military justice system are generally members of the army in active service. In 1995, the Constitutional Court interpreted the Constitution as only allowing retired officers to serve on courts martial. The Court said in this context that “the social conflict situation faced by the country for the last several years places members of the forces of public order . . . in a situation where they must participate in the different repressive actions required to subdue the enemies of the [institutional] order and, at the same time, serve as judges of the excesses committed in the course of those actions which constitute crimes”.²⁷⁵

The Commission pointed out that under military justice “the proceeding takes place within the hierarchy of the security forces. The members of the courts martial respond hierarchically to their superiors in almost all aspects of their lives as soldiers or police officers [...] It is thus difficult, if not impossible, for these individuals to become independent and impartial judges free from the influence of their commanders or other superiors. As noted above, their commanders may also have ordered and directed the very operation which they are asked to analyze as members of a court martial. Their commanders may face responsibility if any irregularities are found. This situation may lead to pressure by commanders on the courts martial or outright orders designed to obtain a verdict absolving soldiers of all responsibility for any acts they allegedly committed in violation of human rights”.²⁷⁶ “Also, throughout the proceedings in the military justice system, members of the military are engaged in judging the actions of their military colleagues, making impartial-

273 Ibid., paragraph 19.

274 Ibid., paragraph 20.

275 Ibid., paragraph 21.

276 Ibid., paragraph 25.

ity difficult to achieve. Members of the military often feel bound to protect their colleagues who fight by their side in a difficult and dangerous context”.²⁷⁷

The Commission pointed out that “certain crimes truly relating to military service and military discipline may be tried in military tribunals with full respect for judicial guarantees [...] The Commission considers, however, that various state entities have interpreted excessively broadly the notion of crimes committed in relation to military service”.²⁷⁸

As to the fact that military courts, rather than civilian ones, usually carried out investigations into cases of the extrajudicial execution of minors attributed to the National Police, the Commission considered that it constituted a denial of the rights to “due process and judicial protection... [of] the victims and their families” [and that] “[m]ilitary courts are not independent courts that carry out serious and impartial investigations of flagrant human rights violations committed by members of the military or the police, such as the extrajudicial killing of street children”.²⁷⁹

Lastly, the Commission recommended the Colombian State to adopt “all measures necessary and consistent with its international legal obligations to ensure that the jurisdiction of the military justice system is limited to crimes truly related to military service. In this regard, the State should ensure that cases involving serious human rights violations are not processed by the military justice system”.²⁸⁰

c. Chile

In its 1985 report on Chile, the Commission pointed out that “the scope of military criminal jurisdiction in Chile was particularly broad. Three reasons have been adduced to explain this fact: first, that the classification of criminal acts in the Code of Military Justice includes crimes that may be committed by civilians; second, that it may include common crimes committed by military personnel or by civilians employed by the Armed Forces, under a given set of circumstances; and third, that military law extends to civilians as partners in

277 Ibid., paragraph 26.

278 Ibid., paragraph 27.

279 Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter XIII, paragraph 44.

280 Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 Rev. 1, 26 February 1999, Chapter V, Recommendation No. 6.

crime, accessories or by means of a combination of crimes”.²⁸¹ The Commission concluded that the process of expansion of military justice in Chile:

“has gradually eroded the jurisdiction of the ordinary courts and has been marked by a clear ambivalence. On the one hand, it has incorporated into military jurisdiction a group of political acts performed by civilians—such as clandestine entry into the country or activities connected with the recess of political parties, for example—through the corresponding characterization or the introduction of new forms of assignment of subject-matter jurisdiction. Furthermore, jurisdiction over common crimes has been transferred to the military courts for the sole fact that they have been executed by military personnel or members of the security forces or because they have been committed in military or police establishments. This ambivalence cannot but adversely affect the exercise of the right to a fair trial, especially if it is collated with the changes introduced into the composition of the military courts and the way in which they have decided certain cases submitted to them”.²⁸²

The Commission also pointed out that:

“[t]he widespread and virtually routine intervention of peacetime military courts in the consideration of a very broad category of acts necessarily constitutes an abuse of the purposes for which they are envisaged. Even so, not only the existence of exceptional and limited situations in time and space justify the intervention of these courts; there must also be clear institutional interrelationships that make it possible to control both the elaboration of rules for assigning them jurisdiction and the exercise of the powers with which they are invested”.²⁸³

The Commission added that “the serious limitations peace-time military courts suffer from are further accentuated in the case of war-time courts. The lack of independence of those who exercise military jurisdiction in this case is obvious and there is a complete lack of permanent tenure or legal training.

281 Inter-American Commission on Human Rights : Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc. 17 rev.1, 9 September 1985, Chapter VIII, Right to a Fair Trial and Due Process, paragraph 108.

282 *Ibid.*, paragraph 138

283 *Ibid.*, paragraph 143.

For its part, the Supreme Court declared it[*self*] incompetent to try on appeal the judgments handed down by the Courts Martial, as explained in this chapter. The lengthy period during which they were in operation, added to the acts submitted to their jurisdiction pursuant to provisions issued by the Government Junta, show the serious violation of the right to a fair trial resulting from the exercise of the jurisdiction assigned to them”.²⁸⁴ The Commission referred to “the ambivalence that has marked the process through which the jurisdiction of the military courts has been progressively extended” [and which] “results, on the one hand, from the inclusion of political acts into the ambit of military jurisdiction, although they are performed by civilians, and submits to it, on the other hand, common crimes that are committed by personnel of the security forces or in military or police establishments. The consequence of this phenomenon has been a differentiated treatment by the military courts according to the agent they are charged with trying”.²⁸⁵

In the same report, the Commission pointed out that, bearing in mind “the extension of military jurisdiction in Chile, the composition and functions assigned to Military Courts and the way in which they have decided some cases”, [it has been possible to conclude] “that the system established violates the right to a fair trial and radically affects the principle of equality before the law”. The Commission was also of the opinion that “the actions of those courts have served to provide a veil of formal legality to the impunity enjoyed by the members of the Chilean security forces when they have been involved in flagrant violations of human rights”.²⁸⁶ It also pointed to the fact that it was not possible to appeal against judgments handed down by military courts in Chile and considered that such courts “affect[...] the guarantees of due process, in that the power to try and apply the law is given, as pointed out in the preceding section, to a court composed of military personnel without legal training of any kind who, in addition, lack an essential attribute of every judge; permanent tenure and, consequently, independence”. The Commission added that the fate of the accused depended on “the judgment of a general in active service, in command of troops and directly subordinate to the President. This military chief, furthermore, may convert an acquittal into a verdict of guilty”.²⁸⁷

Lastly, the Commission believed that the tendency to extend the jurisdiction of military courts in Chile, together with the nature of their composition and functions and the manner in which they had decided certain specific cases,

284 *Ibid.*, paragraph 149.

285 *Ibid.*, paragraph 150.

286 *Ibid.*, paragraph 165.

287 *Ibid.*, paragraph 173.

made it possible “to conclude that the established system violates the right to justice and profoundly affects the principle of equality before the law”.²⁸⁸ The Commission also believed that “in practice, the actions of these courts have served to provide veneer legality to cover-up the impunity, which the members of the Chilean Security Forces enjoy when they are found to be involved in flagrant violations of human rights”.²⁸⁹ The Commission also concluded that “with regard to... the right to due process, in practice, the Chilean Government has committed serious violations of fundamental principles related to the observance of that right”,²⁹⁰ because “[t]he procedures carried out by both kinds of military tribunals [peace-time and war-time] charged with judging a broad range of offences are in blatant contradiction [...] with the international instruments to which Chile is party [...] All the above permits the Commission to declare that the rule of law, at present, does not exist in Chile, which has permitted the occurrence of the serious violations which have been described in this report”.²⁹¹

In its 1987-1988 Annual Report, the Commission pointed out, that “regarding cases of torture and ill-treatment, it must be said first of all that the judicial proceedings are continuing in many cases without any responsibility being fixed. These cases are still handled by the military courts when it is found that the charges involve security personnel. This was why the Commission, the Government of Chile having signed the American Convention for the Prevention and Punishment of Torture, asked that Government to take the necessary steps to have the cases transferred to the civilian courts”.²⁹²

In the conclusions to its 1990 report on Chile, the Commission concluded that “military courts do not guarantee the exercise of the right to justice since they lack the independence that is a basic requirement of the exercise of that right; in addition, they have shown marked partiality in the judgments they have handed down. Thus, the grave sanctions imposed on persons who have committed acts deemed attempts against the security of the State have been in manifest contrast with the total lack of sanctions imposed on members of the security forces who have been involved in extremely serious violations of human rights”.²⁹³ The Commission stated that “[t]he independence of the

288 *Ibid.*, paragraph 180.

289 *Ibidem.*

290 *Ibid.*, paragraph. 181

291 *Ibidem.*

292 Annual Report of the Inter-American Commission on Human Rights, 1987-1988, OEA/Ser.L/V/II.74, Doc. 10 rev. 1, Chapter IV, Chile, 16 September 1988.

293 Report on the Situation of Human Rights in Chile; OEA/Ser.L/V/II.66, doc. 17 rev.1, OAS, 1985, The Right to Due Process and Military Jurisdiction in Chile, Recommendation 8.

courts and judges from the Executive is one of the fundamental conditions of the administration of justice. Permanent tenure (*inamovilidad*) and appropriate professional training are prerequisites for ensuring independence”.²⁹⁴ The Commission also considered that a military officer in active service, as well as being “subordinate to his authorities and, therefore, lacking functional independence [...] also lacks permanent tenure and, in addition and for reasons of his profession, [...] does not have the legal training required of a judge”.²⁹⁵

The Commission concluded that “in practice, the actions of these courts have served to provide veneer legality to cover-up the impunity, which the members of the Chilean Security Forces enjoy when they are found to be involved in flagrant violations of human rights”.²⁹⁶

d. Ecuador

In 1997, the Commission recommended that the State of Ecuador should adopt “the internal measures necessary to limit the application of the special jurisdiction of police and military tribunals to those crimes of a specific police or military nature, and to ensure that all cases of human rights violations are submitted to the ordinary courts”.²⁹⁷

Two years later, referring to the National Security Law, which established that during a state of emergency acts resulting in certain breaches of that law and punishable with imprisonment should be tried under the provisions of the Military Criminal Code, the Commission noted that the latter gave military courts total jurisdiction over civilians. The Commission considered this to be incompatible with, and in breach of, article 27 (2) of the American Convention which states that certain rights and freedoms, together with “the judicial guarantees essential for the protection of such rights”, cannot be suspended.²⁹⁸ The Commission pointed out that “giving the military criminal

294 *Ibid.*, paragraph 139.

295 *Ibid.*, paragraph 140.

296 *Ibid.*, paragraph 180.

297 Inter-American Commission on Human Rights : Report on the Situation of Human Rights in Ecuador; OEA/Ser.L/V/II.96, Doc. 10 Rev. 1, 1997, Chapter III, The Right to Judicial Recourse and the Administration of Justice in Ecuador.

298 Annual Report of the Inter-American Commission on Human Rights 1998, OEA/Ser.L/V/II.102, Doc. 6 Rev. 16, April 1999, Chapter V(I), paragraph 46.

courts immediate jurisdiction over a wide range of situations involving civilians undermines the right to a trial before an independent, impartial court: this is because the armed forces play a dual role - first, they are active agents during the state of emergency and, second, the military courts administer justice with regard to actions affecting civilians that are not an inherent part of military functions”.²⁹⁹ The Commission urged the Ecuadorian State “to ensure that crimes involving civilians - and especially those alleging violations of basic rights by soldiers or police officers during the state of emergency - are dealt with by the civil courts and not by military justice in accordance with the rules of due legal process set forth in Articles 8 and 25 of the American Convention and, when applicable, to ensure that the perpetrators are punished and that the victims receive restitution for the human rights violations suffered”.³⁰⁰

e. Guatemala

With regard to military courts in Guatemala, the Commission said that “the rights to a fair trial and judicial protection envisaged in articles 8 and 25 of the American Convention have also reportedly not been implemented or have been ineffective, due mainly to the fact that those who exercise judicial power are chosen and appointed by the same local military authorities against whom complaints and reports about human rights violations are being made”.³⁰¹

In its Report on the Situation of Human Rights in Guatemala, the Commission, when discussing the Special Courts set up by the government of General Efraín Ríos Montt, pointed out that such courts “did not provide the most elementary guarantees of due process”.³⁰² At the same time, it added that “[w]ith regard to the right to counsel, [...] none of the accused [...] had counsel to guide them and give them legal advice and professional aid before their statement was taken. The families of the persons who were tried and executed endeavored unsuccessfully to appoint lawyers as counsel, without [...] obtaining any results from their efforts”.³⁰³ “The other due process

299 *Ibid.*, Chapter V(I), paragraphs 46 and 48.

300 *Ibid.*, Chapter V(I), paragraph 49.

301 Annual Report of the Inter-American Commission on Human Rights, 1984-1985, p. 166, Guatemala. [Spanish original, free translation.]

302 Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.61 Doc. 47, 3 October 1983, Chapter IV(C), paragraph 31.

303 *Ibid.*, Chapter IV(C), paragraph 32.

guarantees [...] have also been violated” including “the right of being placed under the jurisdiction of a competent, independent and impartial court”.³⁰⁴

In the view of the Commission, the Special Courts suffered from the following procedural defects, among others: “a) Their jurisdiction was very broad, since they covered both political crimes and common crimes related to political crimes, as well as all common crimes [...] d) A system of Special Courts was established, with other factors determining their jurisdiction being unknown”.³⁰⁵

The Commission concluded that trials conducted by the Special Courts, which failed to respect the minimum guarantees of due process, “truly constituted a farce and regardless of where they might occur the practice of appointing unqualified judges, defenders who do not defend, a Public Ministry unconcerned with the prompt, fair and effective administration of justice and Law Courts that really are courts martial, devoid of independence and impartiality, that function in secret under military auspices, in fact impede rather than foster justice.”³⁰⁶ The Commission recommended that the Guatemalan Government should “order a complete review of the trials of the Special Courts”.³⁰⁷

In its 1996 annual report, the Commission welcomed the decision by the Guatemalan Congress to amend the Military Code so that it would not apply to members of the armed forces implicated in ordinary criminal offences. This measure was seen by the Commission as important in reducing the power of the military courts and ensuring that ordinary courts would have jurisdiction over military personnel who committed criminal offences contained in the Criminal Code. The jurisprudence developed by the Commission confirms that violations of human rights, in particular, rightfully pertain to the Penal Code and the jurisdiction of the ordinary criminal courts.³⁰⁸

f. Paraguay

In its report on Paraguay in 2001, the Commission pointed out that “Paraguay’s international obligation as a State party to the American Convention, in line with Article 1(1), is to ensure the free and full exercise of

304 Ibid., paragraph 33.

305 Ibid., paragraph 35.

306 Ibid., paragraph 36.

307 Ibid., Recommendation N° 2 .

308 Annual Report of the Inter-American Commission on Human Rights - 1996, OEA/Ser.L/V/II.95, Doc. 7 rev. 1, Chapter V(3), paragraph 14.

the human rights enshrined in the Convention. [...] This includes the obligation of the States to prevent, investigate, and punish any violation of the rights recognized in the Convention; to seek the restoration of the right violated; and, as appropriate, to compensate the harm caused by the human rights violation". At the same time, the Commission reiterated the view that:

"Hemispheric experience suggests that in those States in which massive and systematic human rights violations take place, there has been a tendency for such crimes to go unpunished. In some cases, it is a question of *de facto* impunity, [...] or because State organs that lack the necessary independence and impartiality are in charge of determining the responsibilities of their own members, as is the case of the military courts".³⁰⁹

g. Peru

In 1992, the Commission said that "[t]he scope of the military jurisdiction—which is exercised in respect of those who are *prima facie* responsible for violations of the human rights of the people, including members of the judiciary—in the emergency zones, i.e. in half of the country, is not compatible with the guarantee of trial by an independent and impartial court specified in Article 8(1) of the American Convention on Human Rights".³¹⁰

In its analysis of the human rights situation in Peru in 2000, the Commission reiterated the doctrine that military justice can only be applied to military personnel who have committed offences in the line of duty (*'delitos de función'*) and that military courts do not have the independence and impartiality required to sit in judgment on civilians. The Commission recalled that the Inter-American Court had confirmed "that the purpose of the military jurisdiction is to maintain order and discipline in the Armed Forces; in this regard, it is a functional jurisdiction whose application should be reserved to those members of the military who have committed offences or violations in the performance of their duties, under certain circumstances". In the same vein, it pointed out that "principle (5)(f) of the Singhvi principles provides that the jurisdiction of military courts should be circumscribed to offences related to military service, and that one should have the right to appeal the decisions of

309 Third Report on the Situation of Human Rights in Paraguay, OEA/Ser.L/VII.110, 2001, Impunity and Human Rights Violations under the Dictatorship (1954-1989), paragraphs 21 and 22.

310 Annual Report of the Inter-American Commission on Human Rights, 1992-1993, OEA/Ser.L/V/II.83, Doc. 14, 12 March 1993, Chapter V (I).

those courts to a legally qualified appellate court or to pursue a remedy to move for annulment”.³¹¹

In response to the Peruvian State’s assertion that exceptional jurisdictions were not prohibited under the American Convention on Human Rights and that the Inter-American Court had not indicated what the grounds were for establishing the doctrine that military courts lacked the independence and impartiality required to try civilians, the Commission referred to a paragraph in the Court’s judgment on the case of *Castillo Petruzzi and others*, in which it warned that: “A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create ‘[t]ribunals that do not use the duly established procedures of the legal process [...] to displace the jurisdiction belonging to the ordinary courts or judicial tribunals’. In paragraph 130 of the same judgment, the Court notes: ‘In the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have’.”³¹²

In the same report, the Commission added that the problem of impunity in Peru “is aggravated by the fact that most of the cases that involve human rights violations by the members of the State security forces are tried by the military criminal courts”.³¹³ The Commission again said that:

“the problem of impunity in military criminal justice is not linked exclusively to the absolution of the accused; the investigation of human rights violations by the military courts itself entails problems where it comes to having access to an effective and impartial judicial remedy. The investigation of the case by the military courts precludes the possibility of an objective and independent investigation carried out by judicial authorities not linked to the command structure of the security forces. The fact that the investigation of the case was initiated in the military justice system may make a conviction impossible, even if the case is passed on to the regular courts, as it is likely that the necessary evidence has not been collected in a timely and effective manner. In addition, the investigation of the cases that remain in the military jurisdiction may be conducted so as to

311 Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, “The Military Jurisdiction: Expansion”, paragraph 150.

312 *Ibidem*.

313 *Ibid.*, paragraph 209.

impede them from reaching the final decision-making stage”.³¹⁴

The Commission pointed out that the system of military justice in Peru had “certain peculiar characteristics that impede access to an effective and impartial remedy in this jurisdiction. One of these is that the military jurisdiction cannot be considered a real judicial system, as it is not part of the Judicial branch, but is organized instead under the Executive. Another aspect is that the judges in the military judicial system are generally active-duty members of the Army, which means that they are in the position of sitting in judgment of their comrades-in-arms, rendering illusory the requirement of impartiality, since the members of the Army often feel compelled to protect those who fight alongside them in a difficult and dangerous context”.³¹⁵ The Commission reiterated that “certain offences that are either service-related or have to do with military discipline may be judged by military courts with full respect for judicial guarantees”³¹⁶ but pointed out that “the Peruvian State has interpreted the concept of offences committed in relation to military service in overly-broad terms”.³¹⁷

Lastly, the Commission concluded that military justice should only be used “to judge active-duty military officers for the alleged commission of service-related offences, strictly speaking. Human rights violations must be investigated, tried, and punished in keeping with the law, by the regular criminal courts. Inverting the jurisdiction in cases of human rights violations should not be allowed, as this undercuts judicial guarantees, under an illusory image of the effectiveness of military justice, with grave institutional consequences, which in fact call into question the civilian courts and the rule of law”.³¹⁸

h. Suriname

In its Report on the Situation of Human Rights in Suriname (1983), the Commission expressed its concern at the fact that “crimes relating to the security of the State are no longer under the jurisdiction of Regular Courts of Justice but under Military Courts. The final decisions on proceedings instituted under Military Courts cannot be appealed to the courts but must be appealed to the High Military Court whose members are named by the

314 *Ibid.*, paragraph 210.

315 *Ibid.*, paragraph 211.

316 *Ibid.*, paragraph 212.

317 *Ibidem.*

318 Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, “Military Courts and Impunity”, paragraph 214.

President and proposed by the Military Authority. During the Commission's visit to the Supreme Court, its current President indicated that the civil courts are totally prevented from hearing matters relating to the State security".³¹⁹

2.3. Jurisprudence developed by the Commission

In numerous judgments on individual cases, the Inter-American Commission on Human Rights has reiterated that trying military and police personnel for human rights violations in military or police courts constitutes a violation of the right to an independent and impartial tribunal and the right to due process, as well as the right to an effective remedy.

In the case of *Aluisio Cavalcante et al. v. Brazil*, the Commission remarked that military justice had "the authority to try and judge members of the 'military' police accused of committing crimes, defined as military crimes, against the civilian population. This jurisdiction is governed by military criminal law [...] which contains substantive penal standards and constitutes 'a set of legal provisions to ensure the accomplishment of the main purposes of military institutions, whose primary objective is the defence of the nation'. In this jurisdiction, 'rank and discipline prevail'".³²⁰ The Commission considered that it was "a special legal system, with its own principles and guidelines, in which most of the provisions apply only to military personnel and civilians who commit crimes against military institutions, unlike the ordinary penal system, which is applicable to all citizens".³²¹

The Commission also found that the power to bring a criminal action and to carry out investigations lay with the State Military Prosecutor's Office. The Commission called this a "legacy [of the] military regime" and considered it to be "a critical breakdown in the system of guarantees of police action, for it wrests from the civilian public ministry common police control activities (entrusted to the 'military' police), which are precisely the ones to whom are attributed the largest number of human rights violations".³²² The Commission pointed out that this special jurisdiction for the police came into being in 1977 under the military government in Brazil and in its wake the Federal Supreme Court considered that the state-level military justice system

319 Report on the Situation of Human Rights in Suriname, OEA/Ser.L/V/II.61, Doc. 6 Rev. 1, 6 October 1983, Chapter III – Other Human Rights. C. Right to Justice and Due Process, paragraph 11.

320 Annual Report of the Inter-American Commission on Human Rights - 2000, OEA/Ser.L/V/II.111, doc. 20 rev., 16 April 2001, Report N° 55/01, *Aluisio Cavalcante et al.*, paragraph 149.

321 *Ibidem*.

322 *Ibid.*, paragraph 150.

had jurisdiction to judge the ‘military’ police, a state of affairs which had resulted in an increase in the number of crimes committed by ‘military’ police with impunity.³²³ The Commission found that these military courts tended to be lenient with police accused of human rights violations and other criminal offences, thereby allowing the guilty to go unpunished.³²⁴

The Commission reiterated its position that “trying common crimes as though they were service-related offences merely because they were carried out by members of the military violates the guarantee of an independent and impartial court”.³²⁵ In support of its argument, it cited, together with its own doctrine, the concluding observations of the United Nations Human Rights Committee regarding Brazil as well as Principles 3 and 5 of the United Nations Basic Principles on the Independence of the Judiciary and article 16(4) of the Standard Minimum Rules on Human Rights in States of Emergency (Paris, 1984).³²⁶

In this case, the Commission considered that “the ineffectiveness, negligence, or omission in the development of the investigations and proceedings by the military justice system of São Paulo, which culminated in an unwarranted delay in the conclusion of the proceedings, [...] is also a violation of Article XVIII of the Declaration and Articles 8 and 25 of the Convention, as it has deprived the victims’ families the right to obtain justice within a reasonable time by means of a simple and prompt remedy. Article 1(1) of the Convention establishes that the States party undertake to respect the rights and liberties recognized in it, and to ensure their free and full exercise for all persons under their jurisdiction”.³²⁷

This interpretation, namely, that the use of military courts to try military and police personnel for human rights violations is incompatible with the right to an effective judicial remedy, an independent and impartial court and due process of law, has been reiterated by the Commission in several cases. For example, in the cases of the *Riofrío Massacre* (Colombia), *Carlos Manuel Prada González and Evelio Antonio Bolaño Castro* (Colombia) and *Leonel De Jesús Isaza Echeverry and one other* (Colombia), the Commission again stated that:

“military jurisdiction is not an appropriate forum and therefore does not offer adequate remedies for investigating, prosecuting, and punishing violations of human rights established in the

323 Ibid., paragraph 151.

324 Ibid., paragraph 152.

325 Ibid., paragraph 153.

326 Ibidem.

327 Ibid., paragraph. 165.

American Convention, allegedly committed by members of the armed forces or with their collaboration or acquiescence”.³²⁸

In the case of the *Ríofrío Massacre* (Colombia), the Commission recalled that, as established by the Inter-American Court, whenever a State claims that the petitioner has failed to exhaust domestic remedies, it bears the burden of demonstrating that the remedies which have not been exhausted are ‘adequate’ enough to rectify the alleged violation, in other words, that the functioning of those remedies within the domestic legal system is suitable to address an infringement of a legal right. In this particular case, which was being considered by the Colombian military courts, the Commission took the view that military criminal justice did not provide a suitable remedy for investigating, bringing to trial and punishing conduct of the type involved in the case in question and, therefore, the requirements set out in article 46(1)(a) and (b) did not apply.³²⁹ The Commission remarked that:

“The military criminal justice system has several unique characteristics which prevent access to an effective and impartial judicial remedy in this jurisdiction. First, the military justice system may not even be properly referred to as a true judicial forum. The military justice system does not form part of the judicial branch of the Colombian State. Rather, this jurisdiction is operated by the public security forces and, as such, falls within the executive branch. The decision-makers are not trained judges, and the Office of the Prosecutor General does not fulfill its accusatory role in the military justice system”.³³⁰

The Commission considered that, in the case in question, since the execution of the victims resulted from the joint action of the army and the paramilitaries and its subsequent covering up, it did not constitute a legitimate service-related activity that justified the use of that forum to bring those responsible to trial. Consequently, the fact that the accused had been tried under military criminal jurisdiction contravened the right of the victims’ families to have access to an independent and impartial tribunal, as well as the judicial protection due to them established in Articles 8(1) and 25 of the American

328 Report N° 62/01, *Ríofrío Massacre*, Case 11,654 (Colombia), paragraph 28. See also Report N° 63/01, Case 11,710, *Carlos Manuel Prada González and Evelio Antonio Bolaño Castro (Colombia)*, and Report N° 64/01, Case 11,712, *Leonel De Jesús Isaza Echeverry and one other (Colombia)*, 6 April 2001.

329 Annual Report of the Inter-American Commission on Human Rights - 2000, OEA/Ser./L/V/II.111, Doc. 20 Rev., 16 April 2001, Report N° 62/01, *Ríofrío Massacre*, Case 11,654 (Colombia), paragraph 29.

330 *Ibid.*, paragraph 70.

Convention.³³¹ The Commission recommended that the Colombian State should:

“1. Conduct an impartial and effective investigation in ordinary jurisdiction with a view to prosecuting and punishing those materially and intellectually responsible for the massacre. [...]”

“3. Take the necessary steps to prevent any future occurrence of similar events in accordance with its duty to prevent and guarantee the basic rights recognized in the American Convention as well as the necessary measures to give full force and effect to the doctrine developed by the Constitutional Court of Colombia and by the Inter-American Commission on Human Rights in investigating and prosecuting similar cases through the ordinary criminal justice system”.³³²

In the case of *Ana, Beatríz and Celia González Pérez v. Mexico*, three sisters (one of them a minor) who were detained and raped by members of the army, a case in which the Office of the Attorney-General (*Procuraduría General de la República*) handed over jurisdiction to the Office of the Military Attorney-General (*Procuraduría General de Justicia Militar*), the Commission observed that, given the seriousness of the evidence submitted to the authorities, the Mexican State had a duty to “undertake a prompt, impartial, and effective investigation, in accordance with the guidelines stipulated in its own domestic legislation and the international obligations freely assumed”.³³³ The Commission found that the Office of the Military Attorney-General had completely ignored the evidence submitted by the victims. Given this state of affairs, the victims had refused to undergo another examination as part of the military investigation. Arguing that this denoted a “lack of interest, from a legal standpoint, of the victims and their representatives” and that “the criminal evidence is not in any way credible, nor is the probable liability of the military officers”³³⁴, the Office of the Military Attorney-General had closed the case in September 1995.

The Inter-American Commission again stated that “when the State permits investigations to be conducted by the entities with possible involvement, independence and impartiality are clearly compromised”. As a result, it is “impossible to conduct the investigation, obtain the information, and provide

331 *Ibid.*, paragraph 72.

332 *Ibid.*, Chapter IV, Recommendations.

333 Annual Report of the Inter-American Commission on Human Rights - 2000, OEA/Ser.L/V/II.111, Doc. 20 Rev., 16 April 2001, Report N° 53/01, *Ana, Beatríz and Celia González Pérez*, Case 11,565 (Mexico), paragraph 69.

334 *Ibidem*.

the remedy that is allegedly available” and *de facto* impunity, which “has a corrosive effect on the rule of law and violates the principles of the American Convention”, takes place. In particular, the Commission has determined that, given their nature and structure, military courts do not meet the requirements of independence and impartiality imposed under Article 8(1) of the American Convention.³³⁵

The Commission pointed out that the detention and rape of the González Pérez sisters “cannot in any way be considered acts that affect the legal assets of the military”. Neither was it the case that the offences had been committed while the soldiers were carrying out legitimate duties entrusted to them under Mexican legislation since, as had been noted, there had been a series of violations beginning with the arbitrary detention of the four women. In other words, even if there had been no evidence of ordinary criminal offences that constituted human rights violations (and that was not the case here), there was no link to any armed forces activity which could have justified the military courts becoming involved. The Inter-American Commission stressed that “torture in all its forms is categorically prohibited by international law, and, for this reason, the investigation into the facts related to this case by the military courts is completely inappropriate”.³³⁶ The Inter-American Commission considered that the State had failed to fulfill its duty of guarantee under article 1(1) of the American Convention, which stipulates that States parties are obliged to guarantee that the rights and freedoms recognized in the convention can be exercised by all persons under their jurisdiction.³³⁷

In the case of *José Félix Fuentes Guerrero et al. v. Colombia*, the Commission pointed out that torture in all its forms is categorically prohibited under international law and that it was therefore totally inappropriate for investigation of the facts of this case to fall to military criminal jurisdiction.³³⁸

In the case of *Amparo Tordecilla v. Colombia*, the Commission considered that “the forced disappearance of a citizen can never be considered part of the legitimate functions of the agents who work with the security forces”.

335 *Ibid.*, paragraph 81.

336 *Ibid.*, paragraph 82. See also: Annual Report of the Inter-American Commission on Human Rights - 1998, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Report N° 61/99, *José Félix Fuentes Guerrero et al.*, Case 11,519 (Colombia), paragraphs 46 and 47.

337 Annual Report of the Inter-American Commission on Human Rights - 2000, OEA/Ser.L/V/II.111, Doc. 20 Rev., 16 April 2001, Report N° 53/01, *Ana, Beatriz and Celia González Pérez*, Case 11,565 (Mexico), paragraph 85.

338 Inter-American Commission on Human Rights : Annual Report for 1998, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Report N° 61/99, *José Félix Fuentes Guerrero et al.*, Case 11,519 (Colombia), paragraphs 46 and 47.

Consequently, the fact that the criminal investigation had remained under military criminal jurisdiction for five years constituted a violation of articles 8 and 25 of the Convention.³³⁹ The Commission considered it necessary to recognize the importance of this fact, given that the military justice system was not the appropriate forum for investigating, trying, and punishing grave human rights violations. “Nonetheless, it notes that the transfer, effectuated almost a decade after the disappearance was perpetrated, has come late and, predictably, it has yet to prove effective in clarifying the facts in determining the whereabouts of the remains, or in trying and punishing the persons responsible”.³⁴⁰ The Commission concluded that “the State has failed in its duty to provide adequate judicial protection as established at Articles 8 and 25 of the American Convention”.³⁴¹

In the cases of *los Uvos (Colombia)* and *Caloto (Colombia)*, two massacres of civilians, the Commission believed that the massacre of defenceless civilians could not be considered to form part of the legitimate functions of the security forces. Consequently, the fact that the authority to try those suspected of masterminding the grave violations committed had been granted to the military courts constituted a breach of articles 8 and 25 of the American Convention.³⁴²

The Commission also deemed that extrajudicial execution could not be considered to be a service-related act and should not therefore fall to military or police jurisdiction. Thus in the cases of *Santos Mendivelso Coconubo (Colombia)* and *Alvaro Moreno Moreno (Colombia)*, the Commission considered that the “the summary execution of a person suspected of maintaining links with a dissident armed organization cannot be considered a legitimate function of the Colombian National Police. Therefore, the mere fact that a military court has assumed jurisdiction impedes access to the judicial protection enshrined in Articles 8 and 25”.³⁴³

339 Annual Report of the Inter-American Commission on Human Rights - 1999, OEA/Ser.L/V/II.106, Doc. 3, 13 April 2000, Report N° 7/00, Case 10,337, *Amparo Tordecilla Trujillo (Colombia)*, 24 February 2000, paragraph 54.

340 *Ibid.*, paragraph 56.

341 *Ibid.*, paragraph 59.

342 Annual Report of the Inter-American Commission on Human Rights - 1999, OEA/Ser.L/V/II.106, Doc. 3, 13 April 2000, Report N° 35/00, *Los Uvos*, Case 11,020 (Colombia), paragraph 61. See also: Report N° 36/00, *Caloto*, Case 11,101 (Colombia), paragraph 56.

343 Annual Report of the Inter-American Commission on Human Rights - 1998, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Report N° 62/99, *Santos Mendivelso Coconubo*, Case 11,540 (Colombia), paragraph 39. See also: Annual Report of the Inter-American Commission on Human Rights - 1997, OEA/Ser.L/V/II.98, Doc. 6, 17 February 1998, Report N° 5/98, *Alvaro Moreno Moreno*, Case 11,019 (Colombia).

In the case of the *Puerto Lleras massacre (Colombia)*, the Commission pointed out that, according to the jurisprudence developed by the Colombian Constitutional Court, “[f]or an offence to come under the jurisdiction of the military criminal justice system, a clear link should be made, from the outset, between the offence and the activities of military service. In other words, the punishable act should occur as an excess or abuse of power that occurs in the context of an activity directly linked to the function particular to the armed forces. The link between the criminal act and the military service-related activity is broken when the offence is extremely serious, as is the case of crimes against humanity. In such circumstances, the case should be referred to the civilian justice system”.³⁴⁴ Consequently, the Commission concluded that “[t]he perpetration of an indiscriminate attack against unarmed civilians cannot be considered an activity linked to the functions of the Armed Forces. Even if such a link were present in this case, the seriousness of the violations of fundamental rights committed in Puerto Lleras severed that link and rendered inappropriate the exercise of military jurisdiction over this case. In other words, the matter should have been examined from the outset by the ordinary and not the military courts”.³⁴⁵

In the case of *Hildegard María Feldman et al. v. Colombia*, the Commission considered that “the fact that it was military criminal justice that finally conducted the investigation and issued the final decision exonerating those responsible for the death of Hildegard María Feldman, Hernando García, and Ramón Rojas Erazo, constituted an openly unfavorable circumstance for obtaining a fair decision based on the collection and evaluation of the body of evidence put forward in the trials in an objective and impartial manner, as provided by the American Convention on Human Rights”.³⁴⁶ The Commission concluded that “[t]rial of military personnel by military courts does not provide the guarantee of impartiality and independence required by the Convention for victims”.³⁴⁷

The Commission recommended the Colombian State to “adapt its domestic laws to the American Convention on Human Rights so that trials of Government agents involved in human rights violations be conducted by

344 *Annual Report of the Inter-American Commission on Human Rights - 1998*, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Report N° 61/99, *José Félix Fuentes Guerrero*, Case 11,519 (Colombia), paragraph 47.

345 *Ibid.*, paragraph 48.

346 *Annual Report of the Inter-American Commission on Human Rights - 1995*, OEA/Ser.L/V/II.91, Doc 7 rev., 28 February 1996, Report N° 15/95, Case N° 11.010, Colombia.

347 *Ibidem.*

regular courts and not by military penal courts, in order to guarantee that victims will have independent and impartial courts to decide on their cases".³⁴⁸

In the case of *Manuel Stalin Bolaños Quiñonez v. Ecuador*, the Commission recalled that "[i]t is the obligation of the Government to carry out a full, independent and impartial investigation into an alleged violation of the right to life. This obligation is incident to the Government's duty to protect and ensure the human rights recognized in the American Convention. Where the state allows investigations to be conducted by the organs potentially implicated, independence and impartiality are clearly compromised. Legal procedures compromised in this way are incapable of affording the investigation, information and remedy purportedly available. In this case, military authorities conducted an investigation into facts implicating responsibility on the part of members of the organization and the organization itself. Military authorities were not attributed with the legal authority to perform such functions in this case, nor could they possibly act with the requisite independence and impartiality. It is instructive to note in this regard that all the witnesses summoned to provide testimony in the military penal process carried out in the case were members of the military. The consequence of such compromise is insulation of those presumably responsible from the normal operation of the legal system. This type of *de facto* impunity is corrosive of the rule of law and violative of the principles of the American Convention".³⁴⁹

In the cases of *Honduras* and *La Negra (Colombia)*, two massacres attributed to paramilitary groups and members of the army, the Commission considered "[t]hat in a country in which a series of investigations on a single criminal act are conducted simultaneously and where, by law, when the actions constitute a violation of human rights and are attributed to soldiers on active service, the judicial investigations must be carried out by the military institute in question, it is symptomatic, although explainable, that this jurisdiction almost invariably fails to recognize the accusatory evidence presented and exonerates the soldiers involved from responsibility, hindering the truth and the punishment of the perpetrators, as in the present case, thus committing a serious act which directly affects the right of the victims and their families to justice".³⁵⁰

348 Ibid., paragraph 5.

349 Annual Report of the Inter-American Commission on Human Rights - 1995, OEA/Ser.L/V/II.91, Doc 7 rev., 28 February 1996, Report N° 10/95, Case 10,580 (Ecuador), paragraph 48.

350 Annual Report of the Inter-American Commission on Human Rights - 1993, OEA/Ser.L/V/II.85, Doc. 8 rev., 11 February 1994, Report N° 2/94, Case 10,912 (Colombia), 1 February 1994, paragraph 4 (e) under 'Considering'.

In the case of *J.E. Maclean v. Suriname*, in which a person was tortured and killed by a military patrol, the Commission took the view “[t]hat it was impossible for the complainants to exhaust domestic remedies in this matter since the authorities that would have been responsible for the investigation, namely the military police, form part of the military establishment accused of the violations in question, and that it can reasonably be deduced that the inaction of the military in this and other cases clearly demonstrates an unwillingness to investigate, prosecute, and punish those responsible for the violations”.³⁵¹

In the case of *Rodrigo Rojas De Negri and Carmen Gloria Quintana Arancibia v. Chile*, in which two young people were detained by a military patrol and then beaten, doused in petrol and set on fire and which had been dealt with by the Chilean military courts, the Commission pointed to “[t]he various irregularities pertaining to legal process inherent in the military justice system in Chile” and stated that “the actions of these courts [military] have served to provide a veneer of legality to cover up the impunity which the members of the Chilean Security Forces enjoy when they are found to be involved in flagrant violations of human rights”.³⁵² The Commission also stated that, in this case, “these irregularities pertaining to legal process inherent in Chilean military justice are reflected in the abusive recourse to secrecy in the conduct of the proceedings. The situation that has thereby arisen has made it virtually impossible to gain access to basic elements of the trial and allows the military authorities to control the evidence submitted. The Commission is, therefore, led to believe that the provisions of Article 37.2.b concerning the nonexistence of due process of law should be applied in this case”.³⁵³ In the same report, when talking about the use of military justice in cases of human rights violations, the Commission pointed to “[t]he very small proportion of military or police personnel who have been convicted in Chile for numerous denunciations of human rights violations, which gives reason to believe that the delay in judicial proceedings in this case could become yet another device for assuring the impunity of the perpetrators of a crime that is so reprehensible”.³⁵⁴

351 Annual Report of the Inter-American Commission on Human Rights, 1988 - 1989, OEA/Ser.L/V/II.76, Doc.10, 18 September 1989, Resolution 18/89, Case 10,116 (Suriname).

352 Annual Report of the Inter-American Commission on Human Rights, 1987-1988, OEA/Ser.L/V/II.74, Doc. 10 Rev. 1, 16 September 1988, Resolution N° 01a/88, Case 9,755 (Chile), Considerings 7(c).

353 Ibidem.

354 Ibid., Considerings 7(d).

Section I

General Observations

1. Introduction

It is often said that ‘military justice’ has existed ever since armies came into being. Some authors believe that “what constitutes military criminal law today came into flower”¹ in Rome while others go back to Ancient Greece, citing the example of the military court which condemned General Filotas to death for conspiring against Alexander the Great in 330 BC.² In the time of the Roman Empire, troop discipline was maintained by enforcing the principle of ‘he who gives the orders sits in judgment’, the predominant figure being the *Magister Militari*. It was also during that period that the famous Ciceronian phrase ‘*silent leges inter arma*’ (‘the laws are silent amidst arms’) was coined to describe the *sui generis* relationship that existed between law and military matters. Nevertheless, that eurocentric view of the world, which fails to take account of the reality of the situation and historical events in other parts of the world, is nowadays contested. For example, in 1979 at the VIII International Congress of the International Society for Military Law and the Law of War, Belgian judge advocate and university professor John Gilissen concluded that “it seems that it is not possible to talk about military justice existing before the 15th and 16th centuries”.³

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- 1 Francisco Jiménez y Jiménez, *Introducción al Derecho Penal Militar*, Editorial Civitas S.A., Madrid, 1987, p.178.
 - 2 “Military Jurisdiction Seminar, 10-14 October 2001 at Rhodos - Report”, on the web page of the International Society for Military Law and the Law of War: <http://www.soc-mil-law.org/seminar%20Rhodos%20Report.htm>.
 - 3 John Gilissen, “*Evolution actuelle de la justice militaire - Rapport général*”, in *Huitième Congrès International, Ankara, 11-15 octobre 1979, L’Evolution actuelle de la justice militaire*, Recueils de la Société internationale de droit pénal militaire et de droit de la guerre, VIII, Volume 1, Brussels, 1981, p.48. [French original, free translation.]

The well-known phrase “where there is an army, there is military justice”⁴, which sought to claim that military courts existed as a natural consequence of the existence of the military apparatus and were therefore a matter of indisputable historical fact, has been widely discredited. Historically, the fact that armies existed did not always mean that they were accompanied by organs of military justice, an example being Imperial China. At the present time, several countries with armies do not have a system of military criminal justice operating in peacetime. In those countries, responsibility for punishing any wrongdoing within the ranks of the military falls to the ordinary courts and/or disciplinary bodies.

2. The difficulties in classifying military courts

While there are a number of common denominators within national legal systems as far as ordinary jurisdiction is concerned, this is not the case for military jurisdiction. That is what Francisco Fernández Segado has found as far as European systems of military justice are concerned.⁵ There have been various attempts to classify types of military jurisdiction. For example, in 1979, John Gilissen suggested a means of classification based on the three main existing systems of law: the common law system, the Roman law system and the socialist law system.⁶ John Stuart-Smith, Francis Clair and Klaus suggested a classification based on the jurisdictional powers of military courts. They distinguished four different systems as follows: one in which military courts have general jurisdiction; one in which they have general jurisdiction on a temporary basis; one in which jurisdiction is limited to military offences; and one in which they have jurisdiction solely in time of war.⁷ Another method of classification, which takes as its starting point the aims and objectives of a State based on the rule of law, proposes three types of military jurisdiction: firstly, the traditional kind, based on the principle of ‘he who gives the orders sits in judgment’, made up of members of the military and endowed with broad jurisdictional powers; secondly, one in which military justice is incorporated into ordinary jurisdiction as a specialized branch of the latter; and,

4 Ibid., p.39. [French original, free translation.]

5 Francisco Fernández Segado, “*La justicia militar en el Derecho comparado*”, in Consejo General del Poder Judicial, *Poder Judicial*, 2a. época, N° 23, Madrid, September 1991, p.60.

6 John Gilissen, op. cit., p.46 and following.

7 Ibid., p. 43 and following.

thirdly, one in which military justice is abolished in peacetime.⁸ But this typology corresponds more to the ways in which military courts have evolved historically rather than to models of military justice. Some authors have opted for thematic classifications or typologies, based on the specific features of military courts, or for an approach based on 'national models'.⁹ These attempts at classification and methods of approach have helped in understanding different aspects of military courts from the perspective of comparative law. However, their usefulness is relative and, in some cases, the proposed typologies are debatable.

If, as well as considering factors related to jurisdiction (*ratione personae*, *loci*, *materiae* and *tempore*), account is also taken of structure, composition and operation, position within the state structure, relationship with the judiciary, sources of law, etc., it is difficult to come up with a model for classifying military courts. The fact is that, when these elements are taken into account, military courts are extremely diverse and heterogeneous and features from several of the models put forward by the theorists are present in every national system.

The position occupied by military criminal jurisdiction within the state structure differs from one country to another. In several legislations, military courts are formally part of the judiciary. In such cases, they are sometimes incorporated into ordinary jurisdiction and sometimes constitute a special jurisdiction. For example, in Suriname, the Constitution specifies that military justice is separate from ordinary jurisdiction.¹⁰ In some countries, different stages of jurisdiction are provided by different jurisdictional organs, some military and some from the judiciary. Conversely, in many countries, military courts fall outside of the scope of the judiciary and, in terms of organization and function, are often, when not responsible to the Ministry of Defence, attached to the executive. In some countries, the judiciary retains the authority to confirm and review verdicts handed down by military courts. In the Federal Republic of Yugoslavia, the power to appoint and remove presiding judges, judges and prosecutors in military courts lays with the President of the Republic¹¹ and military justice is an autonomous system consisting of three levels of jurisdiction, with the Supreme Military Court at the summit.

8 See Fundación Myrna Mack, *Justicia Militar*, 1996, on web page: <http://www.min-ugua.guate.net/derhum/CDROM/asegunda%20Incorporacion/justicia%20Militar/Justicia1.htm>.

9 See, among others, Francisco Fernández Segado, *op. cit.*, and Fundación Myrna Mack, *op.cit.* [Spanish original, free translation.]

10 Articles 132, 134 and 145 of the 1987 Constitution, as amended in 1992.

11 Article 138 of the Constitution of the Federal Republic of Yugoslavia.

The composition of military courts varies from country to country. In many countries, they are made up solely of active members of the armed forces or police. For example, in Israel, judges and prosecutors in military courts are officers on active service or in the Defence Forces reserve. Judges are appointed by the regional commander of the Defence Forces.¹² There is frequently no legal requirement for these military judges to have undergone any legal training. There is also often no distinction between military criminal jurisdiction and the operational command structure of the armed forces, with the commander of the military operating unit himself being a military judge. In many countries it can be seen that military criminal jurisdiction is structured along the same lines as the armed forces in terms of rank, hierarchy and chain of command. In other countries, military criminal jurisdiction is separate from the operational command structure of the armed forces.

Similarly, the jurisdictional powers of military courts - whether *rationae materiae*, *rationae loci*, *rationae personae* (passive or active) or *rationae temporis* - are regulated in different ways in different national legal systems. In a large number of countries, military courts simultaneously exercise judicial functions and disciplinary authority and are competent to try criminal offences as well as breaches of discipline committed by armed forces personnel. The dividing line between breaches of discipline and criminal offences is not clear. Therefore, what for one country is a disciplinary matter, for another is a military offence.¹³ As Manlio Lo Casio has pointed out, "it is not possible to determine a scientific basis for clearly distinguishing between the one and the other".¹⁴

In several countries, military systems of criminal justice and discipline coexist. Other systems of military law simply make no distinction in law between a criminal offence and a breach of discipline. They are based on the concept of the 'service offence', which encompasses both military offences and breaches of discipline, as opposed to the 'civil offence', which equates to criminal offences and misdemeanours. For example, in the United States of America, military courts try any infraction, be it a criminal offence or breach of discipline, committed by those under their jurisdiction. In some countries, disciplinary procedures constitute a phase that precedes trial before a military

12 The system of military jurisdiction is established in the Military Law Act and consists of a trial court and an appeal court. Military appeal court decisions can be reviewed by the Israeli Supreme Court. The courts have jurisdiction over offences committed by military personnel, whether they are of a military nature or not.

13 Francisco Jiménez y Jiménez, *Introducción al derecho penal militar*, Ed. Civitas, Madrid, 1987, pp. 61 to 75.

14 As quoted in Francisco Jiménez y Jiménez, op. cit., p.63. [Spanish original, free translation]

court. In other countries which have abolished military courts in peacetime, such as Austria, Germany and Japan, wrongdoing is punished through the use of disciplinary or administrative courts, with action sometimes also being taken simultaneously in the ordinary criminal courts. For example, in Denmark, grave breaches of the Geneva Conventions are dealt with by applying military disciplinary law (article 25.1) as well as enforcing the ordinary Criminal Code in the civilian courts.

Different systems of military criminal law criminalize different kinds of unlawful behaviour and there is no consistency about what is meant by a 'military offence'. Under many military codes of justice, all of the following are criminalized: military offences *stricto sensu*, military offences *lato sensu*¹⁵, ordinary criminal offences that are treated as military offences due to the circumstances in which they were committed, and ordinary offences that have been 'militarized'.¹⁶ In some systems, these distinctions have been formalized while in others any criminal infraction specified in the military code of justice is classified as a military offence. In addition, some systems which still cling on to the old idea of military jurisdiction being a class privilege consider any criminal infraction committed by or against a member of the military to be a military offence. In a similar vein, several codes of military justice consider any offence committed in a military establishment or on a military site, regardless of the nature of the act and whether or not the perpetrator or the victim are members of the military, to be subject to military jurisdiction. In quite a large number of countries, military courts have jurisdiction over any offence committed by military personnel while in service. National laws therefore use formulas such as '*delito de función*' [an offence committed in the line of duty], '*acto de servicio*' [a service-related act or offence], '*delito cometido con ocasión al servicio*' [an offence committed due to service], '*delito de misión*' [a mission offence], '*delito de ámbito castrense*' [an offence within the military sphere], etc. It is through the use of such labels that military courts are able to try human rights violations against civilians that amount to crimes, such as torture, extrajudicial execution and enforced disappearance.

15 Offences which are a breach of both ordinary and military juridical rights but in which the military juridical right has greater weight.

16 This covers a variety of situations: ordinary offences in which there is a military element but it is insufficient for it to be called a military offence, ordinary offences which are subject to military jurisdiction because punishment is more severe under military law and ordinary offences which have nothing to do with the military but which have been made subject to military jurisdiction solely at the whim of the legislator.

3. Developing trends

Military jurisdiction and ‘military justice’ exist as institutions in many countries. It also remains common practice in many parts of the world for military personnel who have committed human rights violations to be tried in military courts. Nevertheless, as John Gilissen has pointed out, since the 1950s and 1960s, there has been an increasing tendency to curb the jurisdiction of military courts, both *ratione tempore* and *ratione materiae*, and their structures have begun to undergo a process of ‘civilization’, “in other words, [to move towards a situation] in which civilians, and in particular civilian judges, have an increased role in the composition of military courts”.¹⁷ Likewise, the question of ensuring that the human rights of military personnel facing trial in military courts are respected gradually began to emerge and to be translated into legal reforms in several countries. After the Second World War, some countries abolished military criminal courts altogether. With the adoption of the Japanese Constitution on 18 May 1946, the Military Criminal Codes for the Land and Sea Armies of 1921 and 1922 were repealed. The 1946 Constitution effectively abolished the armed forces as a “potential for war”.¹⁸ The Japanese Armed Forces continued to exist but only as a national defence force and their personnel were subject to ordinary criminal law and the ordinary courts. In the case of Costa Rica, technically it cannot be said that military justice as such has been abolished. Its disappearance resulted from the abolition of the Costa Rican army. Several other countries, including Germany, Austria, Norway and Sweden, have also abolished military courts in peacetime.

Nevertheless, while John Gilissen’s observations are true for a large number of countries, especially in Europe, they do not tell the whole story and must be put into perspective. Decolonization processes, national liberation struggles, conflicts over territory and the redrawing of frontiers inherited from former powers, the ‘cold war’ which characterized the post-war period, the adoption in several parts of the world, especially Latin America, of the Doctrine of National Security and the emergence of military dictatorships and authoritarian governments in many countries of Africa, Latin America, Asia and the Middle East set the stage for the expansion of ‘military justice’ in many countries. Military courts became an important component of military strategy, not as a tool for disciplining the troops but as a weapon with which to fight the adversary. The Doctrine of National Security, in particular, turned

17 Francisco Jiménez y Jiménez, op. cit., p.46. [Spanish original, free translation.]

18 Francisco Jiménez y Jiménez, Introducción al derecho penal militar, Ed. Civitas, Madrid, 1987, p.134. [Spanish original, free translation.]

military courts into an instrument for combatting the so-called “enemy within”.¹⁹ Thus, as pointed out by one of its critics, the late President of the Colombian Supreme Court of Justice, Dr. Alfonso Reyes Echandía, the practice of trying civilians in military courts was to become an extension of the Doctrine of National Security.²⁰ From a different standpoint, US General and Judge Advocate, Georges S. Prugh, said, “Is the goal to insure discipline in the forces? Most codes go far beyond that and allow jurisdiction over some civilians in certain circumstances, oftentimes for offences which are considered to be against national security. So one might consider that the purpose is broader than insuring forces discipline; it is also to insure national security”.²¹

Despite these realities, the trends pointed to by John Gilissen in 1979 continued in the 1980s and beyond. In his 2002 report, the United Nations Special Rapporteur on the Administration of Justice through Military Tribunals noted a deepening of these trends.²² In fact, during the 1980s and 1990s, military courts in peacetime were abolished in many countries, for example, Denmark, Slovenia,²³ Estonia, France, the Netherlands, the Czech Republic and Senegal. The Constitution of Guinea, adopted on 23 December 1990, abolished military courts at a stroke. In Portugal military criminal jurisdiction began to undergo a process of reform. The legislative reform that is under way at the time of writing is attempting, among other things, to bring military justice into line with the terms of the Constitution as amended in 1997. In this connection, the Government has drafted three bills and a new Code of

19 The Doctrine of National Security, in vogue from the 1960s in military academies in the USA, gave rise to authoritarian and dictatorial governments and serious human rights violations in several parts of the world. The Doctrine of National Security played a key role in the organization and development of the military dictatorships which were installed in several countries of the Southern Cone of Latin America in the 1960s and 1970s: in Brazil from 1964, in Argentina from 1966 and again later from 1975, in Chile from 1973, as well as in Uruguay. Other countries of the region which did not have military governments were nonetheless strongly influenced by the doctrine, especially where public order, the armed forces and military criminal jurisdiction were concerned. It is interesting to note that in the 1960s and 1970s, the majority of Latin American countries, whether or not they had *de facto* governments, adopted similar national security laws.

20 Alfonso Reyes Echandía, “*Legislación y Seguridad Nacional en América Latina*”, in the magazine *6 de noviembre*, No. 2, Bogotá, June 1986, p.12.

21 Georges Prugh, “The Exercise of Military Jurisdiction in Periods of Military Stress”, in *Huitième Congrès International, Ankara, 11-15 octobre 1979, L’Evolution actuelle de la justice militaire*, Recueils de la Société internationale de droit pénal militaire et de droit de la guerre, VIII, Volume 1, Brussels, 1981, p. 292.

22 United Nations document E/CN.4/Sub.2/2002/4, 9 July 2002.

23 Article 126 of the 1991 Constitution.

Military Justice.²⁴ The Constitution confines the jurisdiction *ratione materiae* of military courts to “strictly military crimes”²⁵ and the jurisdiction *ratione temporis* to wartime, thereby abolishing permanent peacetime military courts and bringing military personnel under ordinary jurisdiction. Nevertheless, it does not rule out the involvement of military personnel in the trial of members of the military in peacetime. In determining the powers and jurisdiction of the courts, the Constitution stipulates that “one or more military judges must be included in the composition of courts belonging to any authority which adjudicates on crimes of a strictly military nature, in accordance with the law”.²⁶ Other countries, for example, Finland and Hungary, have reformed their military courts either through strengthening the role of civilian judges or bringing their procedures into line with the rules of procedure used in ordinary courts.

One of the issues which has gradually taken on greater significance, especially since the 1990s, has been the question of respect for human rights by military courts. In many countries this has resulted in the introduction of constitutional and legal reforms as well as developments in the jurisprudence propounded by national courts. The human rights dimension of ‘military justice’ encompasses three main areas: the question of the rights and judicial guarantees afforded to military and police personnel who are brought to trial in military courts, the question of civilians being tried by military judges and the question of military and police personnel who have committed human rights violations being tried by their peers.

In many countries, such as Canada and the United Kingdom, reforms have been introduced to ensure that judicial guarantees are afforded to military personnel facing trial in military courts. In other countries, such as Ireland, similar reforms are on the way. The Irish authorities have embarked on a comprehensive reform of the system of military criminal jurisdiction²⁷ and have announced that one of the purposes of the reform is to incorporate the provisions of the European Convention on Human Rights. A more radical position has been taken by the High Court of South Africa which, in March 2001, ordered application of the Code of Military Justice to be suspended.

24 The first bill authorizes the government to approve a new code of military justice, the second amends the law governing the organization and operation of the courts of justice and the third creates a code for military judges and military advisers working in the Public Prosecutor’s Office. Lastly, the government has also published a bill containing a new Code of Military Justice.

25 Portuguese Constitution, arts. 211, 213 and 219.

26 Constitution of Portugal, art. 211. [Spanish original, free translation.]

27 This is based on the 1954 Defence Act. Since its adoption, the Defence Act has undergone some minor amendments, mainly in 1998.

The High Court took the view *prima facie* that military criminal jurisdiction was incompatible with the principle of equality before the law and the right to judicial protection guaranteed in the Constitution. In the opinion of the High Court, “[t]he military is not immunized from the democratic change. Maintaining discipline in the defence force does not justify the infringement of the rights of soldiers, by enforcing such military discipline through an unconstitutional prosecuting structure”.²⁸

There is a growing trend towards abolition of the use of military courts for the trial of civilians. In several countries a ban on such practices has been incorporated into the constitution. In some countries, such as Mexico,²⁹ the ban is long-established. Article 96 (4) of the Greek Constitution of 1975 states that military courts cannot try private individuals. The Honduran Constitution of 1982 states that “No one shall be judged other than by a judge and competent tribunal adhering to the formalities established by law. [...] Under no circumstances shall military tribunals extend their jurisdiction to include persons who are not on active service in the Armed Forces”.³⁰ Over the last ten years, this trend has grown even stronger. For example, it is worth highlighting the bans incorporated into the constitutions of Colombia³¹, Haiti, Guatemala³² and Nicaragua.³³ The Paraguayan Constitution only authorizes military courts to try civilians in the event of an international armed conflict.³⁴

During the 1990s, the issue of impunity for human rights violations and the use of military courts became extremely significant for the way in which military courts were to evolve. As the United Nations Special Rapporteur on the Administration of Justice through Military Tribunals has said, more and more countries are adopting national legislation that removes serious human rights violations committed by members of the armed forces and police from the jurisdiction of military courts.³⁵ These changes have come about through the adoption of new constitutions or amendments to existing ones, amendments

28 28 Order dated 29 March 2001, paragraph 14.6.

29 Article 13 of the Constitution of the United States of Mexico, adopted in 1917 and still in force today.

30 Article 90 of the Constitution. Article 91 also states that: “When a civilian or discharged member of the military is implicated in an offence or breach of military order, the case shall be heard by the competent authority under ordinary jurisdiction.” [Spanish original, free translation.]

31 Article 213 of the 1991 Constitution.

32 Article 219 of the Constitution states that “No civilian shall be judged by military tribunals.”

33 Article 93 of the Constitution.

34 Article 174 of the 1992 Constitution.

35 United Nations document E/CN.4/Sub.2/2002/4, 9 July 2002.

to military criminal legislation and/or the ordinary codes of criminal procedure, the monitoring of constitutionality carried out by the courts and interpretations of law made by judges in specific cases, especially when ruling on conflicts of jurisdiction. For example, it is worth mentioning the Bolivian Constitution, as amended in 1993, 1994 and 1995, which restricted military jurisdiction over conduct that involves violation of human rights. Article 34 of the Constitution states that “those who violate constitutional rights and guarantees shall be subject to ordinary jurisdiction”.³⁶ The Haitian Constitution of 1987 expressly prohibits members of the armed forces responsible for human rights violations from being entitled to the privilege of military jurisdiction. Article 42 (3) states that “[c]ases of conflicts between civilians and military personnel, abuses, violence and crimes perpetrated against a civilian by a member of the military in the performance of his duties are under the jurisdiction of courts of ordinary law”. Nevertheless, it should not be forgotten that Haiti was ruled by a military government between September 1991 and February 1994 and that the provisions of the constitution were disregarded. When democracy was restored, the 1987 Constitution was fully reinstated and, once the Haitian Armed Forces had been abolished, the provisions relating to military jurisdiction became irrelevant. Article 29 of the Venezuelan Constitution of 1999 states that “The State shall be obliged to investigate and lawfully punish any offences against human rights committed by its authorities. Legal action taken to punish crimes against humanity, serious human rights violations and war crimes shall not be subject to the statute of limitations. Human rights violations and crimes against humanity shall be investigated and judged by the ordinary courts. Such offences shall be exempt from any benefits that might ensue if they were not punished, including pardon and amnesty”.³⁷

Other countries have introduced similar restrictions at the level of the law. For example, in 1996, amendments were made to the Guatemalan Military Code limiting the jurisdiction of military tribunals to strictly military offences and granting the ordinary courts jurisdiction over ordinary offences committed by military personnel.³⁸ Article 1 of Decree 41-96, which amended article 2 of the Military Code, stated that “[j]urisdiction over offences or breaches of an essentially military nature is the sole responsibility of the tribunals designated in this law. In the case of ordinary or associated offences or breaches

36 Bolivian law establishes military jurisdiction both in peacetime and wartime. It is regulated under the Law on Military Judicial Organization (*Ley de Organización Judicial Militar*) as well as the Military Criminal Code and the Code of Military Criminal Procedure. [Spanish original, free translation.]

37 Spanish original, free translation.

38 Decree N° 41-96 of 1996.

committed by members of the military, the Criminal Procedural Code shall apply and they shall be judged by the ordinary courts referred to in the Law on the Judiciary (*Ley del Organismo Judicial*).³⁹ The Human Rights Procurator pointed out that the curbs on military jurisdiction which were introduced as a result of the 1996 reforms also required an amendment to the Constitution, in particular to article 219⁴⁰, since it was not sufficient to merely amend the Law on the Judiciary. On 26 October 1998, in compliance with the Peace Accords signed between the Guatemalan Government and the *Unidad Revolucionaria Nacional de Guatemala* (*URNG*), Guatemalan National Revolutionary Unity, in 1996⁴¹, Congress approved the amendments to the Constitution. Article 30 of the draft constitutional reform bill amending article 219 was therefore adopted and reads as follows: “Military courts are an integral part of the judiciary and shall be responsible for trying any offences and misdemeanours of a strictly military nature, as specified in the Military Code, that are committed by members of the military on active service. Ordinary offences and misdemeanours committed by members of the military shall be tried and judged by judges under ordinary jurisdiction. No civilian shall be tried by military tribunals”.⁴² When the proposed amendments to the Constitution were put to a referendum on 16 May 1999, they were rejected. In the Philippines, Law N° 7055 of 1989 authorized the ordinary courts to try certain offences committed by members the Philippines Armed Forces and other people subject to military law.⁴³ Nevertheless, as far as human rights violations are concerned, the scope of the law is not clear because jurisdiction is retained by the military courts when an offence is service-related. Presidential Decree N° 1850 also states that “uniformed members of the Integrated National Police who commit any crime or offence cognizable by the civil courts shall henceforth be exclusively tried by courts-martial”.⁴⁴ This measure also applies to the Armed Forces.

39 Spanish original, free translation.

40 Article 219 of the Guatemalan Constitution states as follows: “Military tribunals: Military tribunals shall try offences or breaches committed by members of the Guatemalan Army. No civilian shall be judged by military tribunals.”

41 In the framework of the negotiations which culminated in the Agreement on a Firm and Lasting Peace (*Acuerdo de Paz Firme y Duradera*), signed on 29 December 1996, several thematic agreements were agreed between the parties, including the Agreement on constitutional and electoral reforms (*Acuerdo sobre reformas constitucionales y régimen electoral*), signed on 7 December 1996.

42 Spanish original, free translation.

43 Republic Act No. 7055: An Act strengthening civilian supremacy over the military by returning to the civil courts the jurisdiction over certain offenses involving members of the Armed Forces of the Philippines, other persons subject to military law, and the members of the Philippine National Office, repealing for the purpose certain presidential decrees.

44 E/CN.4/1991/20/Add.1, paragraph 78.

In many countries, the jurisprudence developed by national courts, both in the context of monitoring constitutionality as well as when ruling on conflicts of jurisdiction, has been of great assistance in curbing military jurisdiction as far as human rights violations against civilians are concerned. There has been a move towards a more restrictive interpretation of the scope of military jurisdiction and, in particular, of the meaning of terms such as *'delito de función'* [an offence committed in the line of duty], *'acto de servicio'* [a service-related act or offence], *'delito cometido con ocasión al servicio'* [an offence committed due to service], *'delito de misión'* [a mission offence], *'delito de ámbito castrense'* [an offence within the military sphere], etc. For example, in a recent ruling on a conflict of jurisdiction in the case of the alleged murder of a civilian by two noncommissioned police officers, the Supreme Court of the Dominican Republic took the view that in peacetime the jurisdiction of police courts was restricted to offences defined in the Code of Police Justice that are specifically of a police nature and did not apply to all the offences stipulated in the code. The Supreme Court therefore referred the case to the jurisdiction of the ordinary courts.⁴⁵ In the opinion of the Constitutional Court of Colombia, gross violations of human rights and crimes against humanity could not be deemed to be service-related acts (*'actos del servicio'*) and jurisdiction over such offences fell to the ordinary criminal courts.⁴⁶

4. Constitutions and Military Justice

With very few exceptions, almost all States have a constitution or a series of constitutional laws. The constitution has a key role to play in protecting human rights as well as in regulating the administration of justice. This has been emphasized on many occasions by the United Nations Human Rights Committee.⁴⁷ It is absolutely essential for there to be clear constitutional provisions with regard to fundamental rights as well as the powers of the ordinary courts to punish human rights violations and the provision of safeguards against impunity. Shortcomings in this area, together with broad-ranging or ambiguous constitutional regulations on the subject of military jurisdiction, are largely responsible for military courts being a contributory factor to the persistence of human rights violations and impunity. Another contributory factor is the absence of constitutional provisions on military jurisdiction or

45 Supreme Court Judgment dated 26 December 2001 in the case of the murder of Pedro M. Contreras.

46 Judgment No C-358/97 (ref: File No D-1445) dated 5 August 1997.

47 See, among others, General Comment N° 13 by the Human Rights Committee.

the use of the generic mechanism of simply deferring to the law. It is true that such shortcomings and gaps, as well as ambiguous constitutional provisions on the subject of military jurisdiction, are often resolved in a positive manner, be it as a result of legal measures or the action of the courts or in the context of monitoring constitutionality or resolving conflicts of jurisdiction. However, that is not always the case.

Virtually all countries of the world which have written constitutional legislation use those constitutions or constitutional laws to regulate the ordinary legal system. Nevertheless, that is not the case for military jurisdiction and many countries with military courts do not regulate military jurisdiction in their constitutional legislation. So, for example, even though their legal systems provide for military courts, the Constitutions of Cambodia, Slovakia, Hungary, Lithuania and Romania contain no clauses on the question of military justice. The Constitution of the Dominican Republic makes no reference to military courts, even though both military and police courts exist. Such courts exist by virtue of specific laws⁴⁸ and, pursuant to the provisions of such laws, it is customary for military and police courts to try cases of human rights violations involving members of the country's security forces. There are no clauses on military jurisdiction in the Constitution of Tunisia and those relating to the administration of justice and the definition of human rights are weak, especially with regard to judicial safeguards.⁴⁹ Military courts in that country have extensive jurisdiction. Among others, they can try any offence committed in a military establishment or on a military site, any ordinary offence committed by or against military personnel in the course of service or due to it and any ordinary offence committed by a soldier against another soldier when not on duty.⁵⁰

Other countries have clauses on military jurisdiction in their constitutions. These can vary in their scope. Some simply defer to the law. For example, article 94 of the 1868 Constitution of the Grand Duchy of Luxembourg defers to the law to regulate matters related to military courts.⁵¹ The Constitutions of

48 For example, the Police Justice Code and Law N° 285 of 29 June 1966 regulate police criminal jurisdiction.

49 The Constitution of Tunisia was adopted in 1959 and has been amended on several occasions, the most recent being in 2002.

50 Article 5 of the Code of Military Justice.

51 The Military Criminal Code of 1 November 1892, which remains in force with a number of amendments, has many similarities to the Belgian Military Criminal Code. According to Francisco Jiménez y Jiménez, the Military Criminal Code has only been "rarely applied" (Francisco Jiménez y Jiménez, *op. cit.*, p.134). [Spanish original, free translation.]

Latvia (1922)⁵², Egypt⁵³, Mali⁵⁴ and Niger⁵⁵ resort to the same solution. The Bulgarian Constitution simply stipulates that “jurisdiction is exercised by [...] the military tribunals [...]”.⁵⁶ The Constitutions of Laos⁵⁷ and Vietnam⁵⁸ confine themselves to establishing military courts as a part of the judiciary and under the supervision of their respective Supreme Courts. This means of constitutional regulation, namely, deferring to national laws, has obvious shortcomings and can lead to the existence of military jurisdictions that fail to meet international human rights standards. For example, in Equatorial Guinea, the constitutional law that establishes military courts states that the “applicable legal system” shall be determined by law.⁵⁹ As a result of a 1980 decree law that allows the subsidiary enforcement of earlier laws, military jurisdiction in Equatorial Guinea is governed by the Spanish Code of Military Justice of 1945. Military jurisdiction is all-embracing and applies to all ordinary offences committed by members of the military when not on duty as well as to civilians. There are no standing courts and military justice operates by means of courts martial made up of military officials with no legal qualifications and against whose verdicts there is no right of appeal. It is interesting to examine this form of regulation from an historical perspective. For example, in the Netherlands, military jurisdiction has not been regulated in the Constitution since 1887. The last Constitution, which was adopted in 1983 and is still in force today, simply states that criminal law in wartime shall be regulated by law.⁶⁰ Although military jurisdiction was abolished in 1982 and replaced by military divisions within the ordinary court system, prior to that the Netherlands had operated a form of ‘military justice’ which came under frequent criticism.

A significant number of States have military jurisdiction established in their constitutions, together with regulations relating to their composition, operation and powers. The scope of such regulations varies from country to country. Some allow military courts to have extensive powers. For example, the Irish Constitution of 1937 gives military courts broad-ranging jurisdiction. Article 38 (4.1) stipulates that military tribunals can be established “for the

52 Article 86 of the Constitution. The 1922 Constitution remains in force pursuant to the Constitutional Law of 1991.

53 Article 183 of the Constitution of the Arab Republic of Egypt of 1971.

54 Article 70 of the 1992 Constitution.

55 Article 80 of the Constitution of Niger of 1999.

56 Article 119 of the Constitution of Bulgaria of 1991. [Spanish original, free translation.]

57 Articles 65 and 66 of the Constitution of Laos of 1991.

58 Articles 127 and 134 of the Constitution of Vietnam.

59 The Constitutional Law, article 88, chapter VI, “The Judiciary”.

60 Article 113 of the Constitution.

trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion". The Constitution of the Federal Republic of Brazil⁶¹ probably has more articles on military jurisdiction than any other. For example, article 92 states that "the military tribunals and judges [...] are part of the judiciary [...]".⁶² Article 24 of the Constitution gives a general definition of the scope of Brazilian military criminal jurisdiction: "It is the responsibility of the military justice system to try and judge military crimes defined as such in law".⁶³ In addition, article 109 states that "[i]t is the responsibility of the federal judges to try and judge [...] [among others] political offences and criminal infractions against the assets, services or interests of the Union or of independent bodies and public sector companies, except for minor offences and offences for which military justice is competent [...] offences committed on board ships or aircraft, except those for which military justice is competent [...]".⁶⁴ The Constitution also stipulates that military criminal jurisdiction encompasses offences committed both in peacetime and wartime.⁶⁵

When constitutions seek to regulate the subject matter to be covered by military jurisdiction, they often simply confine themselves to the notion of a 'military offence'. Some try to be more specific by describing the offence as 'essentially military', 'strictly military' or 'purely military'. However, such constitutional regulations are usually not accompanied by safeguards to

61 Adopted on 5 October 1988. The text of the constitution has been amended on several occasions, the last being in 2001.

62 Spanish original, free translation.

63 Spanish original, free translation.

64 Spanish original, free translation.

65 Article 142, paragraph 3 (VI), "Concerning the Armed Forces", as amended in 1998. It is worth mentioning that the Constitution also regulates other aspects of military jurisdiction. For example, article 122 states that: "The following are the bodies of military justice: 1. The Superior Military Court; 2. The military courts and judges instituted by law". At the same time, article 123 establishes that the Superior Military Court shall be composed of fifteen life tenured Justices appointed by the President of the Republic following approval by the Senate. Three of the judges must be general officers from the Navy, four must be general officers from the Army, and three must be Air Force officers. All must be on active service. The other five judges must be civilians appointed by the President of the Republic, of whom three must be lawyers and two must be judge advocates or members of the Military Prosecution Service. Article 128 stipulates that the Military Prosecution Service is part of the Office of the Attorney-General. The Constitution also provides for the existence of military courts at the state level (article 125.4). Within each State, 'state military justice' consists of Councils of Justice, which act as trial courts, and the Court of Military Justice, which acts as the appellate court when the number of staff in the Military Police is over 20,000. 'State military justice' has jurisdiction over military offences committed by the Military Police and military fire brigades, both in peacetime and wartime (1998 amendment to article 42 of the Constitution).

ensure that human rights violations are kept in the province of the ordinary courts. The Constitution of Cape Verde states that military courts “are responsible for judging crimes which, due to their subject matter, are defined in law as being essentially military in nature”.⁶⁶ Article 216 of the Constitution of El Salvador, as amended in 2000, states that: “Military jurisdiction is established. For the adjudication of purely military offences and breaches, there shall be special proceedings and tribunals in compliance with the law. Military jurisdiction, as an extraordinary procedure within the overall justice system, shall be limited to the trying of purely military offences and breaches of duty, meaning solely those which are damaging to any strictly military juridical interest. Members of the Armed Forces on active service enjoy military privilege as far as purely military offences and breaches are concerned”.⁶⁷ The Constitution of Honduras states that “[w]artime jurisdiction is recognized for offences and breaches of a military nature”.⁶⁸ Under the Military Criminal Code of 22 January 1906, which is still in force today, military courts are permitted to try military personnel who are involved in violating human rights.

66 Article 240 (1) of the Constitution of Cape Verde of 1992. [Spanish original, free translation.]

67 Spanish original, free translation.

68 Article 90 of the 1982 Constitution. [Spanish original, free translation.]

Section II

Military Jurisdiction and Domestic Legislation

1. Argentina

History

Like most Latin American countries, when Argentina gained its independence from Spanish rule in 1810, it continued to enforce colonial military criminal legislation.¹ In 1815, 1816 and 1817, Argentinian laws expressly gave force of law to colonial legislation, as long as it was not incompatible with the new system of government, by clearly remitting to the authority of the Spanish sovereign with regard to matters relating to military justice.² In particular, it is worth mentioning the Spanish military ordinances (*ordenanzas*) promulgated by Carlos III in 1768, which, with some amendments, remained in force “in the new country for 85 years, including after the National Constitution of 1853 had been approved”.³ They stayed in force until 1895 when military criminal and procedural law was first codified. Nevertheless, from very early on, the emancipating army was provided with regulations for the punishment of any wrongdoing perpetrated by the troops. These included the Special Military Ordinances for the Cuyo Army (*Ordenanzas Militares Especiales del Ejército de Cuyo*) issued by General San Martín and approved by the Argentinian Government. They were known for their “severity and roughness in the punishment of offences”.⁴ Similarly, New Disciplinary Rules for the

1 The Ordinances of Felipe II of 1587, the Ordinances of Felipe IV of 1632, the Ordinances of Felipe V of 1771, the Military Ordinances of Carlos III of 1768, the Naval Ordinances of Carlos IV of 1793, the Royal Order of 1800 and the Shipping Registration Ordinances (*Ordenanzas de Matrículas de Mar*) of 1802.

2 The Provisional Statute of 1815, the Decree of 12 November 1816 and the Temporary Regulations of 1817.

3 Eugenio Raúl Zaffaroni and Ricardo Juan Cavallero, *Derecho Penal Militar*, Ediciones jurídicas Ariel, Buenos Aires, 1980, p.171. [Spanish original, free translation.]

4 Santiago Mario Sinópoli, Verónica de la Torre, Natalia Millán, Daniela Borghini and Verónica Rodríguez Feldman, “Antecedentes históricos del sistema de justicia militar argentino”, June 2002, on web page <http://derechomilitar.metropoliglobal.com/artidoc/dermilargentina.htm>. [Spanish original, free translation.]

Army and the Squadron (*Nuevas Reglas de Disciplina Para el Ejército y la Escuadra*) and Penalties for Military Offences on Land and Sea (*Penas para los Delitos Militares en tierra y agua*) were issued by General Belgrano. In the first few decades of existence of the newly-formed Argentinian nation, several fruitless attempts were made to draw up and adopt a military criminal code and so, in 1924, a commission was set up to draft a Code of Military Justice.

The National Constitution of Argentina had been adopted by the General Constituent Congress in 1853. This was later amended by the 1860 *ad hoc* National Convention and again in 1866 and 1898. The Constitution made no reference to military jurisdiction. In 1875, a commission was set up to draw up a Code of Military Justice and in 1881 a draft Naval Code was submitted to the parliament. On 7 September 1881, President Roca submitted the “Draft Military Criminal Code” to Congress for its consideration. In 1894 the “Military Codes for the Army and the Navy”⁵ were adopted. The entry into force of these Codes meant that the colonial military criminal legislation ceased to apply once and for all. Nevertheless, as pointed out by Zaffaroni and Cavallero, the new legislation was “seen as precipitate and premature to the extent that work immediately began on a replacement”.⁶ And so, at the end of the 19th century, further new military criminal legislation was adopted and remained in force until 1951, namely, the Code of Military Justice or Bustillo Code, named in honour of its author José María Bustillo. The latter was appointed Judge Advocate General for the Army and Navy (*Auditor General de Guerra y Marina*), with the rank of Brigadier General (*General de Brigada*).⁷

The Code of Military Justice was not adopted as a single set of provisions: in January 1898, regulations relating to the organization and jurisdiction of military courts (Agreement I) and military criminal procedure (Agreement II)⁸ were adopted, to be followed in November of the same year by regulations relating to substantive criminal law (Agreement III).⁹ In 1905, several amendments were introduced as a result of Law N° 4708. The Bustillo Code distinguished between peacetime and wartime, both for the purposes of how military courts were to be organized and in terms of jurisdiction, procedures

5 Law N° 3190 of 6 December 1894.

6 Zaffaroni and Cavallero, *op. cit.*, p.181. [Spanish original, free translation.]

7 Santiago Mario Sinópoli, Verónica de la Torre, Natalia Millán, Daniela Borghini and Verónica Rodríguez Feldman, “*Antecedentes históricos del sistema de justicia militar argentino*”, June 2002, on web page <http://derechomilitar.metropoliglobal.com/artidoc/dermilargentina.htm>.

8 Law N° 3679 of 1898.

9 Law N° 3737 of 1898.

and the types of punishment applicable. In this way, the Bustillo Code laid the foundations for current military criminal jurisdiction in Argentina. During the first half of the 20th century, several unsuccessful attempts were made to reform the Bustillo Code.¹⁰

The Bustillo Code remained in force until 1951 when a new Code of Military Justice¹¹ was issued. The 1951 Code was drafted by the Armed Forces, under the leadership of the Judge Advocate General for the Armed Forces, Colonel Oscar Ricardo Sacheri. It is important to point out that the new Code of Military Justice was adopted in the wake of the substantive reforms made to the National Constitution in 1949. The 1949 Constitution included a reference to military courts and so the Code of Military Justice of 1951 states in article 1 that “Military jurisdiction, as established under article 29 of the National Constitution, is exercised by the military tribunals and authorities determined by this Code”.¹² Following the “Liberating Revolution” (*“Revolución Libertadora”*) of 1955, the 1949 constitutional reform ceased to apply. In 1956, the new government repealed the 1949 reform and reinstated the National Constitution of 1853, together with its 1860, 1866 and 1898 amendments. In 1957, the 1853 Constitution was amended once again.¹³ Despite the fact that, when it came back into effect, the 1853 Constitution contained no specific reference to military courts, the Code of Military Justice of 1951, and article 1 in particular, remained in force and still applies today, a state of affairs which remains rather anachronistic.

In about 1974, armed opposition groups became increasingly active in Argentina. The death squad known as the *Alianza Anticomunista Americana* (AAA), American Anti-Communist Alliance, also appeared. On 6 November that year, the government of María Estela Martínez de Perón decreed a state of siege.¹⁴ In 1975, the Argentinian Government ordered the launching of a major military operation in the province of Tucumán.¹⁵ A few months later, the military operation was extended to the whole country.¹⁶ It is worth highlighting Directive N° 404/75 issued in the course of these operations by the Commander in Chief of the Army. It stated that since the intervention of the Armed Forces had been authorized by the country’s executive authority, such

10 In 1915, 1917, 1923, 1932 and 1946.

11 Law N° 14,029 of 4 July 1951

12 Spanish original, free translation.

13 Germán J. Bidart Campos, *Tratado elemental de derecho constitucional argentino*, Ed. Ediar, Buenos Aires 1992, Vol. I, pp. 115 to 118.

14 *Review of the International Commission of Jurists*, N° 14, June 1975, p.1.

15 Decree N° 261 of 1975.

16 Decree N° 270 of 1975.

“operations constitute the carrying out of an act of military service [and] consequently, military personnel are subject to military jurisdiction”.¹⁷

On 24 March 1976, the Argentinian Armed Forces carried out a *coup d'état* and a Military Junta, made up of the Commanders in Chief of the Army, Navy and Air Force, assumed power. The National Congress and the Provincial Congresses were dissolved and the state of siege which had been imposed by the previous government was extended. Public freedoms and judicial guarantees were suppressed and the press was censored. As documented by the Inter-American Commission on Human Rights¹⁸, extrajudicial executions, torture, forced disappearances and arbitrary detentions were systematically carried out. The National Commission on the Disappearance of Persons (*Comisión Nacional sobre la Desaparición de Personas*), set up by the Argentinian Government when democracy was restored in 1983, compiled 8,960 cases of forced disappearance and indicated that the true figure may have been even higher.¹⁹ Under the Argentinian military dictatorship, military criminal jurisdiction underwent an extraordinary process of expansion. Through the use of emergency powers, military courts were given broad-ranging jurisdiction, especially over civilians.²⁰ In 1976 the first Military Junta issued a decree that created new offences - some of which criminalized use of the right to strike, increased the penalties for others and granted jurisdiction to the military courts.²¹ The use of military courts to try civilians in times of public disorder or emergency was repeatedly endorsed by the Argentinian Supreme Court.²²

With the return to institutional normality which began at the end of 1983, the question arose of whether or not members of the military responsible for the gross human rights violations committed under the dictatorship should be brought to trial. Shortly before leaving power, the *de facto* military government had issued a Self-Amnesty Law (*Ley de autoamnistía*)²³ but it was set

17 Spanish original, free translation.

18 Report on the Situation of Human Rights in Argentina, document OEA/Ser.L/V/II.49, doc. 19, 11 April 1980, and Annual Report of the Inter-American Commission on Human Rights, 1981-1982, document OEA/Ser.L/V/II.57, doc. 6 rev.1, 20 September 1982.

19 Nunca Más - Informe de la Comisión Nacional sobre la Desaparición de Personas, Editorial Universitaria de Buenos Aires, Argentina, 1984, p.479.

20 Carlos H. Cerda, “*Evolution actuelle de la justice militaire en Argentine*”, in L'évolution actuelle de la justice militaire - Huitième Congrès international, Ankara 1979, Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, Tom. VIII, Vol. II, p. 576.

21 Revista de la Comisión Internacional de Juristas, N° 116-17, June - December 1976, p.6.

22 Bidart Campos, op. cit., p.462.

23 Law N° 22,924 of 22 September 1983.

aside by the National Congress.²⁴ The new civilian government ordered the former Commanders of the first three Military Juntas to be subjected to a summary trial (*juicio sumario*) by the Supreme Armed Forces Council (*Consejo Supremo de las Fuerzas Armadas*), the senior court within the military justice system.²⁵ In 1984, Law N° 23,049, which amended several articles of the Code of Military Justice, was issued. This reform stipulated that any offences committed by the Armed Forces and police and state security personnel between 24 March 1976 and 26 September 1983 were to come under the jurisdiction of the Supreme Armed Forces Council and to be dealt with by means of the summary procedure applicable in peacetime. Nevertheless, the Supreme Armed Forces Council refused to try its peers.²⁶ The Federal Chamber (*Cámara Federal*) took over responsibility for trying the former Commanders of the Military Juntas. On 9 December 1985, the Federal Chamber sentenced four of the nine former Commanders on some of the charges laid against them by the Public Prosecutor's Office (*Fiscalía*). The verdict, which was challenged by the prosecution, was confirmed by the Supreme Court of Justice on 30 December 1986.

Under pressure from the Armed Forces, the "Full Stop" Law ("*Ley de Punto Final*") was passed.²⁷ Later, following the military uprising by the so-called "*carapintadas*" ("painted faces"), the "Due Obedience" Law ("*Ley de Obediencia Debida*") was passed.²⁸ Both laws granted a general amnesty to members of the military and state security bodies for human rights violations committed under the dictatorship. In 1989 and 1990, President Carlos Menem pardoned over one hundred members of the military - including the former Commanders of the Military Juntas - who had not benefitted from either of the two amnesty laws.²⁹ On 25 March 1998, the "Full Stop" and "Due Obedience" Laws were repealed as a result of Law N° 24,952. The reference to them being null and void which had appeared in the original draft was removed, giving rise to the interpretation that it was only possible for legal proceedings to be re-opened for humanitarian purposes (in order to clarify the fate and whereabouts of the disappeared) but not in order to prosecute the crimes which had been committed. Nevertheless, in March 2001, the Fourth National Court for Criminal and Correctional Matters (*Juzgado Nacional en lo Criminal y Correccional Federal Nro. 4*) declared the "Full Stop" and

24 Law N° 23,040 of 1983.

25 Decree N° 158 of 1993.

26 Resolution of the Supreme Armed Forces Council dated 25 September 1984.

27 Law N° 23,492 of 12 December 1986.

28 Law N° 23,521 of 4 June 1987.

29 Decrees Nos. 1002 and 1004 of 7 October 1989 and Decrees Nos. 2741 and 2743 of 30 December 1990.

“Due Obedience” Laws to be null and void.³⁰ In a momentous ruling at the end of 2001, the National Chamber for Federal Criminal and Correctional Matters (*Cámara Nacional en lo Criminal y Correccional Federal*) confirmed the decision of the Fourth National Court.

In 1994, a new Constitution was adopted. Like the previous one, it contains no specific reference to military jurisdiction. However, it is important to note that article 75 (22) of the new Constitution gives several human rights treaties “higher ranking than the laws”.³¹ Although the Inter-American Convention on Forced Disappearance of Persons was not originally among the treaties listed in the Constitution, it was later added.³² It is worth recalling that article IX of the Convention says that following: “Persons alleged to be responsible for the acts constituting the offence of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions. The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties”. Nevertheless, the new Constitution did not lead to a restructuring of the military justice system and the 1951 Code of Military Justice remained in force.

The current situation

Argentinian military criminal legislation consists of the 1951 Code of Military Justice together with subsequent amendments and additions.³³

The military courts are answerable to the executive and, in particular, the Ministry of National Defence. All members of military courts are members of the Armed Forces. The different bodies within the military court system, such as the Supreme Armed Forces Council, the permanent courts martial, the Office of the Judge Advocate and the Office of the Armed Forces Attorney-General (*Fiscalía General de las Fuerzas Armadas*) form part of the Ministry of Defence.³⁴ The Code of Military Justice authorizes “military personnel from the general services or their equivalent” and retired members of the military to hold posts within the military justice system.³⁵ Employees of

30 Judgment dated 6 March 2001, case N° 8686/2000, entitled “Simón, Julio, Del Cerro, Juan - abduction of 10-year-old juveniles”.

31 1994 Constitution, article 75 (22). [Spanish original, free translation.]

32 Law 24,556 of 18 October 1995.

33 National Decree 32,535 of 1947, Decree Law 6,746 of 1963, Law 23,049 of 1984, Law 22,971, National Decree 531 of 1987 and National Decree 712 of 1989.

34 See the web page of the Ministry of Defence:
<http://www.mindef.gov.ar/Principal.htm>

35 Article 7 of the Code of Military Justice. [Spanish original, free translation.]

the military justice secretariat are members of the military. Their rank and grade varies according to which court they are attached.

For the purposes of the structure of military criminal jurisdiction, the Code of Military Justice distinguishes between peacetime and wartime. In peacetime, military jurisdiction is exercised by the Supreme Armed Forces Council, the permanent courts martial, special courts and military examining magistrates (*jueces de instrucción*).

The Supreme Armed Forces Council has nine members who are appointed by the President of the Republic for a six-year period. Six of them must be from combatant or commando corps and hold the rank of general or its equivalent, with two being from the army, two from the navy and two from the air force. The other three must be lawyers from the various judge advocate corps attached to each branch of the armed services. The Council is presided by the officer who is highest in rank and the longest serving. There is a specific provision stipulating that it is accountable to the Ministry of National Defence.³⁶ It is the appellate court for cases within the military justice system as well as the trial court, from which there is no right of appeal, for senior officers, lawyers on the Supreme Council, members of courts martial and lawyers working within the military justice system. It is also responsible for settling any conflicts of jurisdiction which may arise within the military justice system.

There are two types of permanent courts martial: one for commanders and junior officers and one for non-commissioned officers and the rank and file. Depending on whether they have jurisdiction over one or more branches of the armed services, they are answerable to the Commander of the service in question or the Ministry of National Defence. The panel for permanent courts martial dealing with commanders and junior officers consists of a major general (*general de división*) or brigadier general (*general de brigada*), who presides over it, and six other officers with the rank of colonel. All must be officers from combatant or commando corps. The panels for courts martial dealing with noncommissioned officers and the rank and file are made up of officers from the combatant or commando corps. Each one must be presided by a colonel or lieutenant colonel and consist of six other officers with the rank of lieutenant colonel or major. The presidents and members of these types of courts are appointed by the President of the Republic for a four-year period. Courts martial are the trial courts or courts of first instance within the military system.

36 Article 16 of the Code of Military Justice.

Special peacetime courts (*tribunales especiales en tiempo de paz*) can be instituted on the orders of the President of the Republic for troops who are on manoeuvres outside of their base or abroad. They are governed by the same rules as the permanent courts martial in peacetime.

The military examining magistrates are members of the military who have been appointed to the post by the President of the Republic. The rank required depends on the rank of the accused since the examining magistrate cannot be lower in rank than the latter.

In wartime, it is possible for military peacetime courts to carry on operating at the same time as military wartime courts. In wartime, military criminal jurisdiction is exercised by the commanders in chief; the commanding officers of each force, if they are operating independently or are incommunicado; special courts martial; and the armed forces police superintendents (*comisarios de policía*).

The special courts martial are not permanent bodies. They consist of a president and four or six members, depending on the circumstances. The president, prosecutor, judge advocate and clerk of each court are appointed by the relevant military commander from among the troops under his command. There are three kinds of special courts martial, depending on the rank of the accused (one for superior commissioned officers and commanders, one for lower-ranking commissioned officers and one for noncommissioned officers and the rank and file). Members of the courts martial must be officers of a rank not lower than that of the accused and the one with the highest rank and longest period of service is responsible for presiding.

Armed forces police superintendents are appointed by the commanders in chief of the army in the field or the officers in charge of divisions, corps or units of the armed forces that are operating independently.

The prosecutorial function (*Ministerio Fiscal*) is discharged by the Armed Forces Attorney-General in the case of the Supreme Armed Forces Council and by military prosecutors in the case of courts martial. The Armed Forces Attorney-General and other military prosecutors are appointed by the President of the Republic. The Attorney-General is accountable to the Ministry of National Defence. The prosecutors acting before permanent courts martial are military officers of the same rank as the members of the court in question. The Office of the Armed Forces Attorney-General is responsible for bringing legal action, is a party to all military criminal proceedings and is entitled to appeal. In wartime, the prosecutorial role is discharged by *ad hoc* prosecutors.

The Permanent Judge Advocate's Office (*Auditoría Permanente de Guerra*) is made up of a Judge Advocate General, who serves all branches of the armed services, various judge advocates who are assigned to courts martial and those who are attached to the high command of the different armed forces corps and units. The Judge Advocate General and the judge advocates assigned to permanent courts martial are appointed by the President of the Republic. In principle, but with some exceptions, the judge advocates come from the armed forces. The Judge Advocate General of the Armed Forces, who has the same rank, rights and privileges as the lawyer members (*vocales letrados*) and the Attorney-General, is answerable to the Ministry of National Defence. It is the responsibility of the Permanent Judge Advocate's Office to oversee the legality of investigating procedures and trials within the military justice system, to advise examining magistrates and trial judges and to assist military courts in drafting judgments. In wartime, the judge advocate function is exercised by field judge advocates or *ad hoc* judge advocates.

As far as the jurisdiction of military courts is concerned, the Code of Military Justice distinguishes between peacetime and wartime. However, military courts essentially have jurisdiction *ratione personae* at all times over any offences committed by "enlisted men" (*los "alistas"*) in the armed services (this includes those on active service as well as, in some circumstances, those in retirement), those doing compulsory military service, students in military institutions and colleges and retired members of the military, when in uniform or undertaking operational work.

In peacetime, military courts are responsible for trying "essentially military offences and breaches, these being deemed to be all infractions which, due to the fact that they may affect the existence of the military institution, are exclusively established and punishable under military law".³⁷ Members of the National Gendarmerie (*Gendarmería Nacional*) are treated as members of the military for the purposes of military criminal jurisdiction.

In wartime, military courts are responsible for trying the following offences: those directly affecting the rights and interests of the State or of individuals, if they are committed by members of the military or military employees in the line of duty or in places which are under the exclusive authority of the military; those committed by members of the military in the course of carrying out a duty they have been ordered to undertake by their superior officers or at the request of the civilian authorities or when coming to the aid of the latter; and those committed by retired members of the military or civilians, as specified in the Code of Military Justice or in special laws. From the *ratione personae* perspective, in wartime military tribunals have jurisdiction over the

37 Article 108 of the Code of Military Justice. [Spanish original, free translation.]

following people: employees and operatives who do not have military status and have not been incorporated into the military but who are supplying services to military establishments or military facilities and who commit any offence in such places or in connection with their work; prisoners of war; civilians who are accompanying troops; and civilians who commit certain offences laid down in the Code of Military Justice in areas where military operations or war are taking place. Any citizens, employees or workers from official or private establishments which have been militarized by the executive during a state of war or in the event of “imminent danger” of war are also subject to military criminal jurisdiction.³⁸ In addition, military criminal jurisdiction in wartime can be extended to cover other offences and civilians by means of military edicts (*bandos militares*) issued by military commanders.

The Code of Military Justice defines a military offence as “any breach of military duty which is punishable under the code or other military laws and which is not classed as a breach of discipline, as well as any act made punishable as a result of edicts issued by the military authorities authorized to do so in wartime”.³⁹ A broad range of infractions are listed in the Code: offences against the loyalty of the Nation,⁴⁰ offences against the authorities and constitutional order,⁴¹ offences against discipline,⁴² “political or subversive activities”,⁴³ typically military offences⁴⁴ and ordinary criminal offences which have been ‘militarized’,⁴⁵ and other ordinary criminal offences.⁴⁶ The Code also allows for ordinary criminal offences committed in the line of duty to be subject to military jurisdiction. Article 878 defines a service-related act (*acto de servicio*) as: “anything concerning or connected with the specific duties incumbent on each member of the military as a result of belonging to the armed forces”.⁴⁷ As well as this broad, generic definition, the Code class-

38 Article 873 of the Code of Military Justice.

39 Article 508 of the Code of Military Justice. [Spanish original, free translation.]

40 Articles 621 to 641 of the Code of Military Justice. The following, among others, are classed as offences in this chapter: treason, incitement to commit hostile acts, and espionage or the revelation of national defence secrets.

41 Articles 642 to 655 of the Code of Military Justice. Among other offences, this chapter includes rebellion.

42 Articles 656 to 701, such as assaulting a superior, disrespect, insubordination, and insulting the sentinel.

43 Articles 700 to 702 of the Code of Military Justice. [Spanish original, free translation.]

44 Articles 708 to 757 of the Code of Military Justice, such as desertion, offences against the service, abandonment of service and abandonment of one’s post or quarters.

45 Offences against property, perverting the course of justice, denial or obstruction of justice, bribery, administrative fraud or embezzlement.

46 Articles 870 to 871 of the Code of Military Justice. This chapter includes robbery and larceny.

47 Article 878 of the Code of Military Justice. [Spanish original, free translation.]

es any act carried out when undertaking duties related to combat, security (for example, standing guard, manning checkpoints and going out on patrol), operating equipment, undergoing instruction (for example, going on exercises and manoeuvres and attending academies) or training as a service-related act.⁴⁸

For peacetime the Code of Military Justice provides for an ordinary procedure, a procedure for special courts martial and a summary trial (*juicio sumario*). The power to order an investigation lies with the military commanders. In the ordinary procedure, once the investigative stage (*fase sumarial*), for which the military examining magistrate is responsible, has been completed and if the case has not been dismissed at that stage, charges are laid against the accused by the military prosecutor at a permanent court martial. After hearings have taken place, the court reaches its verdict and specifies what forms of appeal are available. In the case of special courts martial, the Code establishes another shorter procedure. The summary trial in peacetime can be used “when it is necessary to punish an offence immediately in order to keep up the morale, discipline and military spirit of the armed forces and when serious offences, such as treason, revolt, mutiny, looting, assault on a superior, an attack on the guard or the murder of a sentinel, are involved”.⁴⁹ For some kinds of offences, the verdicts reached by military courts can be appealed before the Federal Chamber of Appeal (*Cámara Federal de Apelaciones*) with territorial jurisdiction over the place where the act that gave rise to the proceedings was carried out. The competent court in the case of other types of appeal is the Supreme Armed Forces Council. For wartime, an extraordinary procedure with similar features to the summary trial is established in the Code of Military Justice. Verdicts reached as a result of summary trials, whether in peacetime or wartime, can only be appealed before the Supreme Armed Forces Council.

The counsel for the defence in military courts must always be an officer on active service or in retirement. Retired officers who act as defence counsel are, for those purposes, subject to the Armed Forces disciplinary system.

Law No. 23,049 of 1984, which amended several features of the Code of Military Justice, was introduced specifically to regulate the involvement of the “individual victim” (“*particular damnificado*”) in military criminal proceedings. Nevertheless, such involvement is limited since it is confined to indicating measures of proof, requesting notification of the verdict and appealing against it. The involvement of the successors (*causahabientes*) of the victims in proceedings is also limited in that it is only possible in the case

48 Article 879 of the Code of Military Justice.

49 Code of Military Justice. [Spanish original, free translation.]

of murder or “unlawful imprisonment which has not come to an end” (“*privación ilegítima de libertad no concluida*”).⁵⁰ The legal status and powers granted to the victim and his or her successors in military criminal proceedings cannot be said to compare to those available to someone wishing to bring a civil action for damages (*parte civil*) in the ordinary courts.

2. Austria

The Military Criminal Code of 1855 governed military criminal jurisdiction until the beginning of the 20th century. The Code included both typically military offences and ordinary offences which had been ‘militarized’ as well as “any provision of a penal nature concerning military personnel”.⁵¹ It is important to point out that in 1862 the Personal Liberty Law, which was later incorporated into the 1867 Basic Law on the General Rights of Nationals, was passed, article 1 of which stated that no one could be removed from his or her competent or ‘natural’ judge. After the First World War, significant changes were made to military criminal jurisdiction. In 1920, the ordinary Code of Criminal Procedure was passed. This stipulated that in peacetime members of the army were subject to ordinary criminal jurisdiction. The ordinary procedural code only provided for military criminal jurisdiction in the case of war, adding that it should be governed by a new military criminal code which was not in fact promulgated until 1970.

In 1929 the Austrian Constitution was adopted and remains in force today with some amendments. Article 84 only allowed for military courts in wartime and abolished them in peacetime. In 1945, the ordinary Criminal Code⁵², which incorporated military offences into its list of offences under the heading of “Special Provisions for the Military”, was introduced. Under it, typical military offences⁵³ and some ‘militarized’ ordinary offences⁵⁴ were classed as “professional offences” which were only applicable to members of the Armed Forces.⁵⁵

50 Article 100 bis of the Code of Military Justice. [Spanish original, free translation.]

51 Oskar Zlamala, “*Les infractions militaires*”, in *Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, IV Congrès International, Madrid 9-12 Mai 1967, Les Délits Militaires*, Strasbourg, 1969, p.171. [French original, free translation].

52 Law of 3 November 1945.

53 For example, the offences of insubordination (art. 548 and following), mutiny, attacking or insulting a sentinel (art. 575 and following), desertion (art. 583), etc...

54 For example, some types of larceny.

55 Oskar Zlamala, *op. cit.*, p.171.

A new Military Criminal Code was issued in 1970 and was later amended on several occasions, particularly in 1974. However, it is still based on the principle that military criminal jurisdiction does not exist in peacetime.

3. Belgium

History

With the creation of the Kingdom of Belgium in 1831, the Constitution of the new sovereign state, which is still in force today, was adopted.⁵⁶ The Belgian Constitution made provision for military courts but left it to the legislators to determine how they should be organized and what powers they should have.⁵⁷ According to article 105, title III, chapter III, concerning “The Judiciary”, “[s]pecific laws cover the organization of military courts, their attributions, the rights and the obligations of the members of these courts, in addition to the duration of their assignments”. Although the Constitution was amended in 1994, no substantial changes were made to the regulations governing military courts. In the amended version of the Constitution, the provisions relating to military jurisdiction were moved to article 157, chapter VI, concerning “The Judiciary”, but the content remained the same.

The Procedural Code for the Land Army, which had been adopted in 1814, and the Military Criminal Code of 1815 remained in force in the newly-established Kingdom of Belgium. Under the military criminal legislation of 1814 and 1815, the jurisdiction *ratione materiae* and *ratione personae* of military courts was confined to any offence (military or ordinary) committed by a soldier while on active service, including while on leave, offences against superiors committed by retired soldiers within 18 months of the date of their retirement, certain offences committed by civilians working for the Army and offences committed by civilians accompanying troops in wartime.⁵⁸

But it was at the end of the 19th century that the military criminal legislation which is still in force today, albeit with many amendments, was introduced. The Code of Military Justice was promulgated in 1870 and the Code of Military Criminal Procedure in 1899. The two Codes were strongly inspired by the military criminal legislation of 1814 and 1815. The Code of Military Justice has undergone many changes, one of the most important being the

56 The exact date of the Constitution is 7 February 1831.

57 Jacques Maes, “*La Justice Militaire et l’opinion publique belges*”, in *Revue de droit militaire et de droit de la guerre*, XIX-3-4, Brussels 1980, p.367.

58 Jacques Maes, *op.cit.*, p.368.

reform introduced as a result of the Law of 24 July 1923.⁵⁹ It is also worth mentioning that, as a result of an 1899 law, it became possible to join a civil action for damages to proceedings before military courts, something which prior to that had been forbidden under military criminal procedure. Several further changes were made to military criminal legislation between the two World Wars.

The development of military justice in Belgium is notable for the way in which its powers were extended. As Jacques Maes points out, “from 1831, the number of citizens who were totally or partially removed from the jurisdiction of the ordinary criminal courts and subjected to the military courts gradually increased”.⁶⁰ Nevertheless, between 1836 and 1978, several initiatives were presented to parliament in an attempt to restrict the jurisdiction of military courts or simply calling for their total abolition. None were successful.⁶¹ Although in 1958 the authority to try offences committed by soldiers while on indefinite leave was removed from military courts, this limitation on the jurisdiction of military courts seems to have been merely an exception. Among the parliamentary initiatives to restrict military jurisdiction, it is worth mentioning the one introduced in 1972 by Senator Bouwens who, for the first time, raised the issue of the ‘corporativist philosophy’ of military justice.

In 1991, the statute governing the National Gendarmerie of Belgium was amended to allow the corps to be demilitarized.⁶² In a law dated 24 July 1992, it was determined that military criminal legislation would no longer apply to members of that institution.

In 1992, several provisions of the 1870 Military Criminal Code were repealed. In 1996, changes were made to the system of punishment used by the military justice system and the death penalty was abolished for military offences, including in wartime.⁶³ Lastly, it is important to point out that since 1999 there have been several parliamentary initiatives seeking to abolish military justice in peacetime. Some have also called for it to be abolished in wartime. The initiatives currently on the table propose amendments to article 157 of the Constitution which deals with military courts.⁶⁴

59 Francisco Jiménez y Jiménez, Introducción al derecho penal militar, Ed. Civitas, Madrid, 1987, p.119.

60 Jacques Maes, op. cit., p.370 [French original, free translation.]

61 In 1836, 1853, 1989, 1923, 1947, 1972, 1973, 1974, 1977 and 1978.

62 Law dated 18 July 1991.

63 Law dated 10 July 1996.

64 Bill N° 1491-99/00 and proposal dated 23 June 2000 by Members of Parliament Vanhoutte, Tahaoui, Dardenne and Minne.

The current situation

Belgian military criminal legislation consists of many different sets of regulations: the Military Criminal Code of 1815,⁶⁵ the Code of Military Justice of 1870, the Code of Military Criminal Procedure of 1899, the ordinary Criminal Code of 1867 and many supplementary laws and amendments.

The Belgian military court system consists of courts martial and the Military Court. The *Cour de Cassation*, the highest court within the civilian justice system, provides the third level of jurisdiction for military matters. Military Judicial Commissions and the Office of the Military Judge Advocate General complete the military justice system.

In peacetime, there are two types of court martial: permanent ones and field courts martial which accompany troops stationed or operating outside of Belgian territory. Each permanent court martial is made up of a superior officer, who acts as president, a civilian magistrate and three officers who must be no lower in rank than the accused. Courts-martial are courts of first instance and are responsible for trying members of the Armed Forces up to the rank of captain. In wartime, the King can authorize field courts martial to be set up, both on Belgian territory and abroad. Such courts are attached to each of the main armed services.

The Military Court constitutes the second level of jurisdiction. It is presided by a professional military judge and also consists of an officer with the rank of general and three superior officers. The Military Court acts as a court of appeal. Nevertheless, depending on the rank of the accused, it is also the court of original jurisdiction for offences involving generals and superior officers and its decisions in such cases are unappealable.

The Office of the Military Judge Advocate General is a hierarchical body made up of professional military judges. It has three main functions: it is the representative of the Public Prosecutor's Office (*Ministère Publique*), it is responsible for the Judicial Police and it carries out military criminal investigations. On behalf of the Public Prosecutor's Office, the Office of the Military Judge Advocate General brings charges before the military courts and must ensure that all decisions and verdicts issued by the latter are properly enforced. Its director is the Judge Advocate General. Military judge advocates act before courts martial and the Judge Advocate General acts before the Military Court.

The Military Judicial Commissions are responsible for the investigative stage of military criminal proceedings. They are attached to each court martial and

65 Although only articles 8, 10, 11, 12 and 13 of this Code are still in force.

the Military Court. At the level of courts martial, each Military Judicial Commission consists of a military judge advocate, who acts as president, and two armed forces officers with the rank of captain and lieutenant. In the case of the Military Court, the Commission is made up of the Judge Advocate General and two officers whose rank is no lower than that of the accused. In the case of conduct which simultaneously constitutes a minor criminal offence and a breach of discipline, the Commissions can refer the case to the military commander of the accused so that he can exercise his disciplinary powers.

From the point of view of composition, three types of official exercise jurisdictional functions on the Commissions: professional military judges, civilian judges and officers from the armed services. Professional military judges must have a law degree and must be lawyers by profession or have held a post within the judiciary. They are appointed for life by the King and are answerable to the Ministry of Justice. However, they wear uniform and are due the same respect as military officers in the same post. Military judges belong to the judge advocate corps which is headed by the Judge Advocate General. The President of the Military Court and the military judge advocates are military judges. Civilian judges can, in certain circumstances and on a temporary basis, perform duties within the military justice system. They are appointed by the King and, in exceptional cases, by the commander of the military unit to which the court martial on which they are going to sit is attached. Armed forces officers who sit on courts martial or in the Military Court retain their military status while they are performing their legal functions.

In both peacetime and wartime, the Belgian military criminal courts try any criminal infraction committed by members of the military, be it a military offence or an ordinary offence, even when it is not service-related. Therefore, from the point of view of jurisdiction *ratione personae* and as far as members of the military are concerned, military courts have extensive jurisdiction, encompassing any ordinary or military criminal offence. However, there are a few exceptions to this general principle. Some offences, such as tax violations and breaches of the hunting and fishing regulations, etc., even though committed by military personnel, do not fall to the jurisdiction of military courts. The military courts also try offences committed by civilians who are working for the armed forces and officials who have parity of status with armed forces officers. Military jurisdiction also applies to military personnel on leave for a limited period and some categories of civilians who have a specific link with the Army.⁶⁶ In addition, in wartime, the jurisdiction of the

66 Elens, J.F., "*L'évolution actuelle de la justice militaire en Belgique*", in *L'évolution actuelle de la justice militaire - Huitième Congrès international*, Ankara 1979, Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, Tom. VIII, Vol. II, p. 617.

military courts extends to prisoners of war, foreigners who have taken refuge in Belgium, journalists and war correspondents who have been authorized to accompany military operations, the perpetrators of and accessories to offences against State security or espionage, whether those concerned are members of the military or civilians. In wartime, the military courts also try any offence committed - whether by members of the military or civilians - on territory under their jurisdiction where no ordinary criminal courts are in operation.

Military courts also have the power to exercise extraterritorial jurisdiction (in this case universal) with regard to grave breaches of the 1949 Geneva Conventions and the two Additional Protocols of 1977.⁶⁷ In wartime, within Belgium itself, the military courts have sole jurisdiction in such cases.

From the point of view of procedure, the military courts are governed by the 1899 Code of Military Criminal Procedure and its supplementary provisions. The *Cour de Cassation* has stated on several occasions that, as far as procedures are concerned, the military courts are governed by special laws and that the regulations followed in the ordinary criminal courts are not applicable, except where specifically provided by law.⁶⁸

Lastly, it should be pointed out that victims and their successors can seek damages within the context of military criminal proceedings. However, their ability to do so depends on whether a criminal action has been brought, something for which the Office of the Judge Advocate General has sole responsibility. If this does not occur, the victims and their successors are unable to obtain compensation through the military courts.

4. Cameroon

Once independence had been proclaimed, Cameroon adopted its first Constitution on 4 March 1960. It contained no specific provisions on military criminal jurisdiction or any type of special jurisdiction for members of the armed forces. However, at the end of 1959, military criminal jurisdiction had

67 Law dated 16 June 1993 on the penalties applicable to grave breaches of the Geneva Conventions of 12 August 1949 and Protocols I and II of 8 June 1977 additional to those Conventions (article 9). Although this law was amended in 1999, the jurisdiction of the military courts was not affected.

68 Judgment of 6 January 1966, *Cour de Cassation*, French Section, Second Chamber; Judgment of 15 February 1975, *Cour de Cassation*, French Section, Second Chamber; Judgment of 5 June 1998, *Cour de Cassation*, French Section, Second Chamber, File N° P980094 F.

been introduced.⁶⁹ The ordinance under which military criminal jurisdiction was established referred back to the French Code of Military Justice of 1928, which by that time had been repealed.⁷⁰

The 1972 Ordinance

In 1972, a new Constitution was promulgated and, with some amendments⁷¹, it is still in force today. The Constitution contained no clauses specifically relating to the question of military criminal jurisdiction or any type of special jurisdiction for members of the armed forces. That same year changes were made to the system of military criminal jurisdiction. Ordinance 72/5 of August 1972, concerning the organization of military justice, which was later amended by Ordinance N° 74/4 of July 1974, was to form the basis in law for the new system. According to the new legislation, military criminal jurisdiction was to be exercised by a single court, the Military Tribunal. One of the main features of the form of military criminal jurisdiction established under Ordinance 72/5 was its total subjugation to the executive. The Military Tribunal and the Military Prosecutor's Office were attached to the Ministry responsible for the Armed Forces which had broad powers with regard to military jurisdiction.

The composition of the Military Tribunal varied depending on whether it was peacetime or wartime and/or a state of emergency was in force. In peacetime, the Military Tribunal consisted of a president and one or more vice-presidents and two advisers. The president and vice-presidents had to be members of the military or judges from the judiciary. The advisers could be commissioned officers or noncommissioned officers from the armed forces or judges from the judiciary. In all cases, one of the two assessors had to be a member of the military. In practice, all were from the military. One or more military examining magistrates were attached to the Military Tribunal. In wartime or in the event of a state of emergency, the Military Tribunal consisted of officers from the armed forces, with the highest-ranking officer acting as president. In all cases, whether in peacetime, wartime or under a state of emergency, the rank held by the members of the Military Tribunal had to be the same as, or higher than, that of the defendant.

69 Ordinance of 31 December 1959. Successive amendments were made to it in 1961, 1963 and 1964.

70 Francisco Jiménez y Jiménez, *Introducción al derecho penal militar*, Ed. Civitas, Madrid, 1987, p.15.

71 In 1996, Law N° 96-06 of 18 January introduced some amendments into the 1972 Constitution.

The prosecutorial function in military courts was fulfilled by the *Commissaire de Gouvernement*, a senior civilian justice official, who could be assisted by one or more alternates who could be either armed forces officers or civilian or military judges. Nevertheless, it should be pointed out that, rather than being responsible for bringing criminal actions, the military prosecutor could only really encourage such action to be taken. It was the Minister for the Armed Forces who had responsibility for bringing criminal actions. He had broad decision-making powers with regard to whether a specific unlawful act warranted the opening of criminal proceedings or whether it should be treated as a disciplinary matter. This meant that conduct which in fact constituted a criminal offence could be punished by the Minister for the Armed Forces as a disciplinary matter, thereby ruling out the possibility of criminal prosecution.⁷²

There were differences in the jurisdiction *ratione materiae* and *ratione personae* of the Military Tribunal depending on whether it was peacetime or wartime and/or whether a state of emergency was in force. In peacetime, the Military Tribunal had jurisdiction to try offences specified in the Code of Military Justice that were committed by members of the military or persons treated as such; civilians who were jointly responsible for, or accessories to, an offence committed by a member of the military or a person treated as such in a military installation or in the line of duty; and political offences contained in the ordinary Criminal Code and breaches of the laws on armaments, regardless of whether the perpetrator was a member of the military, a person treated as a member of the military or a civilian. The jurisdiction of the Military Tribunal could also be extended on the orders of the Minister for the Armed Forces to include other offences such as murder, bodily harm and armed robbery. In wartime or under a total or partial state of emergency, the Military Tribunal had the authority to try any criminal offence, whether military or ordinary, committed by a member of the military or person treated as such, whether in the line of duty or not. In wartime or under a state of emergency, the Military Tribunal was given broad jurisdiction to try civilians for various types of offence.

It is important to point out that, for the purposes of military criminal jurisdiction, members of the military and persons treated as such included members of the armed forces, civilians working for the armed forces and members of the National Gendarmerie.

72 M. Ndeby Pondy, "Evolution actuelle de la Justice Militaire au Cameroun", in *L'évolution actuelle de la justice militaire - Huitième Congrès international*, Ankara 1979, Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, Tom. VIII, Vol. II, p.637.

At first, the principle of two-tier jurisdiction did not exist within the military justice system and the Military Tribunal was the court of first and sole instance for all matters. Nevertheless, appeals against some judgments handed down by the Military Tribunal could be referred to the Military Division of the Court of Appeal. However, this possibility existed on paper rather than in practice. Military criminal law itself ruled that there could be no appeal of any kind against verdicts in the case of offences against state security, “subversion” or breaches of the legislation on the possession of weapons. Several other laws which gave the Military Tribunal the power to try certain offences also expressly stated that it was not possible to appeal on any grounds against the verdicts handed down in such cases.

Conflicts of jurisdiction between the ordinary courts and the Military Tribunal were settled by the Supreme Court.⁷³ Nevertheless, the Military Tribunal had sole responsibility for trying members of the military. Furthermore, in the event that criminal action was brought simultaneously in the ordinary courts and the Military Tribunal, the jurisdiction of the latter took precedence.⁷⁴

As far as the rights of the victims and their successors were concerned, they could only join an action for damages to military criminal proceedings in the case of offences committed in peacetime, as long as they had not been committed in “emergency zones”. In wartime or under a state of emergency or in the case of offences committed in an “emergency zone”, there was no possibility for them to introduce an action for damages into the proceedings. In such circumstances, the victims or their successors could seek compensation through the ordinary courts once the Military Tribunal had reached its verdict.

The 1983 Reform

In 1983, the military court system underwent reform so that it no longer consisted of a single body, the Military Tribunal. In Yaoundé, the capital of Cameroon, a military court (the Yaoundé Military Tribunal) was set up with jurisdiction over the whole country and several other military courts with specific territorial jurisdiction were established: the Buea Military Tribunal, with jurisdiction over the south-western province⁷⁵, the Bafoussam Military Tribunal, with jurisdiction over the western and north-western provinces⁷⁶,

73 Ordinance N° 72/6 of 26 August 1972, later amended through Laws N° 75/16 of 8 December 1975, N° 76/28 of 14 December 1976 and N° 89/018 of 28 July 1989.

74 M. Ndeby Pondy, *op. cit.*, pp. 642 and 643.

75 Decree N° 76-468 of 3 October 1983.

76 Decree N° 76-468 of 3 October 1983.

and the Garoua Military Tribunal, with jurisdiction over the northern and extreme northern provinces and the province of Adamaoua.⁷⁷ There was also the Douala Military Tribunal, whose jurisdiction covered the coastal province and which had already existed since 1976.⁷⁸ In 1984, the Yaoundé Military Tribunal was given special jurisdiction over the central, southern and eastern provinces.⁷⁹ Otherwise, the 1983 reforms did not affect the substantive or procedural norms that applied to military justice. In terms of powers and procedures, the military courts continued to be governed by the provisions of Ordinance 72/5 and the Code of Military Justice.

The 1990 Reform

In 1990, the political system began to undergo an important reform process. Many laws and restrictions on public liberties were abolished or amended and changes were made to the legal system. A multiparty system was introduced and political life became more liberalized.⁸⁰ This reform process culminated in 1996 when numerous amendments were made to the 1972 Constitution.⁸¹ Among other things, more human rights were recognized and several changes were made to the provisions concerning the justice system. The revised Constitution did not contain any specific provisions on military jurisdiction.

The 1990 reforms included changes to military criminal legislation. For example, Law N° 90/058 of December 1990 partially amended Ordinance N° 72/5 of 1972. It should be noted that at the same time amendments were also made to the structure of the judiciary by means of Law N° 90/058.

Among the changes introduced in 1990, it is worth highlighting the introduction of the principle of two-tier jurisdiction which has meant that since then it has been possible to appeal against decisions handed down by military courts. Defence rights in military proceedings were also extended. As far as other aspects of military criminal jurisdiction were concerned - the way in which military courts were organized, the powers granted to them, the procedures to be followed and the fact that the authority to start criminal action lay with the Ministry of Defence - the provisions of Ordinance N° 72/5 of 1972 continued to apply, together with the amendments made to it in 1983 and 1984.

77 Decreto N° 83-469 of 3 October 1983.

78 Decree N° 76-346 of 14 August 1976.

79 Decision N° 9 of 25 April 1984.

80 Law N° 90/56, of 19 December 1990, Law N° 91/020 of 16 December 1991 and Law N° 92/002 of 14 August 1992.

81 Law N° 96-06 of 18 January 1996.

The powers of the military courts were extended in 1997 as the result of a presidential decree which gave them the authority to prosecute and judge offences committed in military establishments, offences involving firearms and weapons of war and acts of gangsterism and organized crime.

5. Canada

History

Given that Canada was a former British colony, the development of its military justice system throughout its history has been influenced by the British system, especially in the years immediately after independence. These days, British military law is still a constant in the Canadian system of military justice. Before Canada achieved independence in 1867, the only armed forces in the country were the British armed forces. British armed forces serving abroad were governed by the Articles of War which, among other things, regulated the military justice system. In Great Britain, the Sovereign was Commander-in-Chief of the Armed Forces. Regulation of the Armed Forces, including issues relating to justice, was a matter of royal prerogative. Until 1689 when the British Parliament passed the Mutiny Act, the military justice system only applied to armed forces serving abroad in wartime while offences committed within Great Britain fell to the jurisdiction of the ordinary courts. The Mutiny Act established military jurisdiction in peacetime within Great Britain itself.⁸²

In 1867, Canada gained its independence and its Constitution, the British North America Act, was promulgated. The British provinces of Canada, Nova Scotia and New Brunswick were organized into a single federal entity under the Crown of the United Kingdom of Great Britain and Ireland and given the name of Canada.⁸³ Each one of the provinces of the newly-established Canadian state was supposed to set up its own voluntary militia, a process which was to be supervised by the British. However, in reality, the Canadian militia was “largely unarmed, untrained and unorganized”.⁸⁴ The Canadian political and legal system remained under the charge of the British Crown to a certain extent and in many spheres British law still applied.

82 See the section on the system of military justice in the United Kingdom.

83 Preamble to the 1867 constitution. In subsequent years, other provinces would be incorporated into the new State of Canada.

84 Brigadier-General Jerry S. T. Pitzul and Commander John C. Maguire, “A Perspective on Canada’s Code of Service Discipline”, in *JAG Newsletter*, vol. IV, Oct-Dec. 1999, pp.6-16, first presented on 1 August 1998 at the ABA Annual Meeting, General Practice and Small Firm Section, Toronto, Canada.

Nevertheless, under the constitution, the Canadian Parliament had sole responsibility for legislating on matters relating to the “militia, military and naval service, and defence”.⁸⁵ In 1868, Canada passed its first Militia Act and British forces were subsequently withdrawn and replaced by Canadian forces.⁸⁶ This first Militia Act was essentially inspired by British military law and so Canada came to adopt the British military justice system, which was mainly characterized by its use of summary trials and courts martial, both in peacetime and wartime. The Canadian system would also reproduce another feature of British military law, namely, the fact that no distinction was made between a criminal offence and a breach of discipline. The Canadian system, like the British one, was based on the concept of the ‘offence’, with ‘service offences’, which encompassed both military offences and breaches of discipline, being distinct from ‘civil offences’, which were equivalent to offences and misdemeanours under ordinary criminal law. The Canadian military justice system therefore covered both criminal and disciplinary matters, with aspects of discipline falling into both categories. This is why Canadian legislation uses the term ‘discipline’ when referring to military justice.⁸⁷

The Royal Canadian Navy was established in 1910 through the Naval Services Act. In 1944, a new Naval Services Act was passed, including the first real military justice code, the Code of Naval Discipline. This was the first time that a Canadian act had created its own military justice system rather than simply emulating the British system.⁸⁸ The 1944 Naval Services Act set the foundations for the military justice system which was later established in the National Defence Act. Nevertheless, it still relied heavily on the British system. In 1924, the Order in Council which set up the Canadian Air Force stipulated that, as far as justice matters were concerned, the regulations contained in the British Air Force Act, which were based on British Army legislation, should be followed.

Regulations governing the Office of the Judge Advocate General were introduced at the beginning of the 20th century. The Office’s basic function was to advise the military authorities on legal matters. The Judge Advocate General acted as legal adviser to the Governor General, the Minister of National Defence, the Department of National Defence and the Canadian Forces.

In 1929, after the First World War, together with the summary trials and the courts- martial, a new type of summary trial was introduced for minor

85 Article 91 (7) of the Constitutional Law of 1867.

86 D. Morton, *Military History of Canada* (1990), as quoted by Pitzul and Maguire, op. cit.

87 For example, the Code of Military Justice is called the Code of Service Discipline.

88 J.B. Fay, “Canadian Military Law: An Examination of Military Justice”, (LL. M. thesis, Dalhousie University, 1974, unpublished), cited in Pitzul and Maguire, op.cit.

offences committed by army officers up to the rank of captain. Until then, summary trials could only be used for members of the rank and file and non-commissioned officers.

During and immediately after the Second World War, military justice legislation applicable to the army and air force consisted of a mixture of British and Canadian norms. This state of affairs, as well as several cases which had been brought before the military courts, was widely criticized, particularly because a large number of civilians had served in the armed forces during the war.⁸⁹ As a result, a review of Canadian military legislation was begun. Given the similarities of their military justice systems, similar processes of legislative review also took place in Great Britain and the United States of America. The Canadian review culminated in the passing of the National Defence Act in 1950. This was to be the last major development in Canadian military justice until the wholesale review of the political and legal system which took place in 1982. The latter resulted in adoption of the 1982 Constitution Act and the coming into force in the same year of the Canadian Charter of Rights and Freedoms.

A single statute in the form of the 1950 National Defence Act was created to govern all three branches of the armed services under the Department of National Defence. Any connection with the British statutes was abolished and as any remaining British influence was removed, so the control exercised by the Canadian authorities grew.⁹⁰ It was the first time that military justice legislation for the three branches of the armed services, in the form of the Code of Service Discipline, was provided by a Canadian statute.⁹¹ However, in this process of standardization of the Canadian military justice system, as in the British system, separate military jurisdictions were retained for each branch of the armed services. The National Defence Act established the right of appeal against judgments handed down by courts martial.

The Code of Service Discipline granted the Ministry of National Defence broad discretionary powers by conferring on it a quasi-judicial role within the system in the form of service tribunals. Several types of summary trial to be conducted by service tribunals were established under the Code. Such tribunals were presided by the appropriate superior officer in the chain of command.⁹² Service tribunals conducted summary trials for minor offences and

89 K.W. Watin, Canadian Military Justice: Summary Proceedings and the Charter, (1990) (LL. M. tesis, Queen's University, unpublished), cited in Pitzul and Maguire, *op.cit.*

90 R.A. McDonald, The Trial of Discipline: The Historical Roots of Canadian Military Law 1 C.F. JAG J. 1 (1985) cited in Pitzul and Maguire, *op. cit.*

91 The Canadian Armed Forces are made up of the Army, Navy and Air Force.

92 These were the commanding officer, the delegated officer or the superior commander.

the maximum punishment they could impose was detention for a maximum of 90 days.

Based on the previous system of courts martial, the Code established the General Court Martial, the Disciplinary Court Martial and the Standing Court Martial. The first two were panels composed of armed forces officers on active service while the latter consisted of a single member who also had to be an officer on active service. It was not necessary to have any legal qualifications to sit on a court martial but legal advice was provided by a judge advocate. Courts martial were not permanent courts but they could be convened to hear a specific case by the “senior military authority”, namely the superior or commanding officer of the accused. The “senior military authority” determined what type of court was appropriate, appointed its members and designated the prosecutor from among the officers in the Judge Advocate General’s Office. As the prosecutor was the direct agent of the senior military authority, the chain of command was closely involved in the supervision of any particular case. An officer from the Judge Advocate General’s Office acted as defence counsel for the alleged offender.

In the Code of Service Discipline, the Judge Advocate General was retained as legal adviser to the military high command. Officers from the Judge Advocate General’s Office were responsible for performing the functions of judge advocate, prosecutor and defence counsel in courts martial.

The system of military justice established under the Code of Service Discipline had wide-ranging jurisdiction. As well as members of the armed forces, any person, whether civilian or military, who was implicated in an offence specified in the code as well as any civilians connected to the armed forces, either through work or a family relationship, came under the jurisdiction of the military courts.

Some amendments were made to the National Defence Act after it was passed. In 1952, changes were made to one of the types of summary trial. In 1959, an amendment was introduced to allow a member of the military who had committed an act deemed to be an offence under both military and ordinary criminal law to elect trial by court martial. Also in 1959, the Court Martial Appeal Court, made up of civilian judges from the Federal Court of Appeal, was set up to hear appeals against sentences passed by courts martial. Appeals against the verdicts handed down by courts martial could be heard by the Court Martial Appeal Court, consisting of three civilian judges from the Federal Court of Appeal. The Act also established that the last tier of jurisdiction was to be exercised by the Supreme Court of Canada.

In 1968, the Army, Navy and Air Force were brought together to form the Canadian Armed Forces or Canadian Forces. This did not have a significant

impact on the military justice system since the Code of Service Discipline already applied equally to the Army, Navy and Air Force. In 1969, a fourth type of court martial was created: the Special General Court Martial. The new court was granted sole jurisdiction over civilians who were subject to military justice under the terms of the Code of Service Discipline.

Reforms during the 1990s

Until 1982, when the new Constitution Act and the Canadian Charter of Rights and Freedoms were introduced, there had been very few changes to Canadian military justice. The new Constitution Act stipulated, among other things, that acts of the United Kingdom Parliament adopted after the entry into force of the new Canadian Constitution should not form part of Canadian law. The need to bring the military justice system into line with the Constitution and, in particular, the Canadian Charter of Rights and Freedoms, led to reform of the Code of Service Discipline. An examination of the Code and system in place at that time was started and has continued over the past twenty years as different aspects of the military justice system have been found to violate the rights enshrined in the Charter. As a result, many amendments have been made to the Code of Service Discipline. Among others, it is worth highlighting the changes made to the review and appeal processes for judgments handed down by courts martial, the introduction of provisions regarding the rights of defendants who have mental health problems and changes to the system for selecting personnel to sit on courts martial.

In the 1990s, two developments had a significant impact on the Canadian military justice system: the decision by the Supreme Court in the *Généreux* case⁹³ and the involvement of the Canadian Forces in the Joint Task Force in Somalia.⁹⁴

In the verdict on the *Généreux* case, a majority of the Supreme Court held that the way in which the General Court Martial was structured was incompatible with the requirements of article 11(d) of the Canadian Charter of Rights and Freedoms.⁹⁵ Writing on behalf of the majority, Judge Lamer held that three essential conditions were required to guarantee judicial independence: security of tenure, financial security and “institutional independence with regard to matters of administration that relate directly to the exercise of

93 Decision of 13 February 1992, *Regina v. Généreux*, N° 22103.

94 United Nations Security Council Resolution 794 (1992).

95 Art. 11 (d) of the Charter states that “Any person charged with an offence has the right: [...] to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”

the tribunal's judicial function".⁹⁶ With respect to the third criterion, the Court held that the system had many features which might prompt speculation as to whether the military justice system was separate from the military hierarchy. Many military officers answerable to the Department of Defence were involved in the proceedings. In addition, the executive appointed both the prosecutor for the case and the panel of the court martial who served as triers of fact. The judge advocate was also appointed by the Judge Advocate General who was himself appointed by the executive. Judge Lamer held that the test for independence and impartiality was an objective one, in other words, whether an "informed and reasonable person" would "perceive" the tribunal to be independent, based on this criterion, which was not the same thing as determining whether or not the particular judge or panel could be deemed to be independent on an individual basis. The Supreme Court concluded that, given the close interdependence that existed between the judge advocate and the executive, the General Court Martial could not have been viewed, from an objective standpoint, as possessing all the essential requisites of independence. However, although the Supreme Court held that the structure of the General Court Martial had to be changed, it also upheld the need for a military justice system. Nevertheless, it suggested that a military criminal system which was distinct from the disciplinary system should be set up. Thus, in the words of Judge Lamer, "To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. [...] Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military."⁹⁷

The disastrous outcome of the Joint Task Force in Somalia and the gross human rights violations committed by soldiers from the Canadian Forces who participated in the mission put military justice at the heart of public debate. It was in these circumstances that the Canadian Government set up the Somalia Commission of Inquiry to investigate the human rights violations committed by Canadian soldiers and to draft recommendations. At the same time, a Special Advisory Group on Military Justice and Military Police Investigation Services, known as the Dickson Group from the name of the Canadian Supreme Court judge who headed it, was set up. The report of the Somalia Commission of Inquiry and the conclusions of the Dickson Group led to extensive changes to the National Defence Act and reform of the Canadian military justice system.

96 Decision of 13 February 1992, *Regina v. G  n  reux*, N   22103, at 286.

97 *Ibid.*, at 293.

The Special Advisory Group submitted its first report to the government on 14 March 1997. It included 35 recommendations and measures for improving the effectiveness and independence of the justice systems used by both the military and military police.⁹⁸ All of the recommendations were supported by the government in a follow-up report published by the Ministry of National Defence. The Prime Minister, Jean Chrétien, gave his personal backing to the Dickson Group report and implementation began. A second report was submitted by the Dickson Group on 25 July 1997 and contained a further 18 recommendations, mainly related to the quasi-judicial role played by the Minister of National Defence within the military justice system.⁹⁹ These recommendations were also supported by the government. While agreeing that “the need for a separate and distinct military justice system is inescapable”, the Dickson Group was concerned that such a system should be “consistent with the primacy of the Rule of Law”.¹⁰⁰ The Dickson Group stated that “[n]otwithstanding the requirement for a separate Code of Service Discipline and for a special court system to deal with breaches of that Code, it does not follow that the military justice system can be divorced completely from the rules of government and society as a whole. In particular, this system must be compatible with our Constitution, including the Canadian Charter of Rights and Freedoms”.¹⁰¹

For its part, in its report entitled “Dishonoured Legacy” which was presented on 30 June 1997, the Somalia Commission of Inquiry concluded that, “It is abundantly clear that the military justice system is replete with systemic deficiencies that contributed to the problems we investigated. Without substantial change to the system, it will continue to demonstrate shortcomings in promoting discipline, efficiency, high morale and justice”.¹⁰² The Commission found “the military justice system to be inadequate in handling such cases and recommended that military judges be replaced by civilian judges”.¹⁰³ In particular, the Commission went into detail about the central role and extensive discretionary powers enjoyed by the commanding officer in the military justice system as well as about its procedures. In its report, the Commission

98 Special Advisory Group on Military Justice and Military Police Investigation Services, Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, Ottawa, 25 March 1997 (<http://www.dnd.ca/eng/min/reports/Dickson/justictc.htm>).

99 Ibidem.

100 Ibidem.

101 Ibidem.

102 Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Dishonoured Legacy: The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Ottawa, 30 June 1997, volume V, (<http://www.dnd.ca/somalia/somaliae.htm>).

103 United Nations document E/CN.4/1998/96, 16 January 1998, paragraph 109.

made 160 recommendations, including the need “[t]o reform the military justice system by, *inter alia*, excluding military police from the chain of command and substituting civilian judges for military judges”.¹⁰⁴ Of the 160 recommendations, the Government accepted 132 and committed itself to their implementation.¹⁰⁵ Of the 48 specific recommendations made by the Commission on the question of military justice, the Government accepted 37 in whole or in part.¹⁰⁶

Against this background, in 1997 the government instituted a large-scale review of the military justice system. The government stated that it had five main goals in seeking to amend the system, namely, 1) to clarify the roles and responsibilities of the different actors; 2) to make a clear separation between the investigative, prosecutorial, defence and judicial functions; 3) to reform the summary trial process; 4) to improve oversight and review of the system; and 5) to eliminate the death penalty as a form of punishment.¹⁰⁷ The military justice system was restructured and the National Defence Act and the Queen’s Regulations and Orders for the Canadian Forces were amended in 1998.¹⁰⁸

The Canadian military justice system today

The Canadian military justice system is a special jurisdiction distinct from ordinary criminal jurisdiction. In contrast to the latter, the military justice system comes under the charge of the Department of National Defence. Nevertheless, it should be noted that, as a result of the reforms made to the National Defence Act, the quasi-judicial role and discretionary powers previously enjoyed by the Minister of Defence have been substantially curbed.

The military justice system is regulated through the National Defence Act, the Queen’s Regulations and Orders for the Canadian Forces and other supplementary regulations. The military justice statute, the Code of Service Discipline, forms part of the National Defence Act.¹⁰⁹ In addition to these

104 *Ibid.*, paragraph 115.

105 Canada, Department of National Defence, *A Commitment to Change: Report on the Recommendations of the Somalia Commission of Inquiry*, Ottawa, October 1997 (www.dnd.ca/menu/press/Reports/somalia/p0e.htm).

106 *Ibidem*.

107 Canada, Department of National Defence, Amendments to the National Defence Act, November 1997 (http://www.dnd.ca/eng/archive/1997/dec97/ammend_b_e.htm).

108 The National Defence Act, R.S. 1985 was amended in 1998 as a result of the Act to Amend the National Defence Act, R.S.C.: 1998, which entered into force on 1 September 1999.

109 The Code can be found in Chapter N-5 of the 1985 National Defence Act and Chapter 35 of the Act to Amend the National Defence Act of 1998.

specific laws, the military justice system must comply with the requirements and standards set out in Canadian law, especially the provisions of the Canadian Charter of Rights and Freedoms.¹¹⁰

The military justice system applies in peacetime as well as in time of war or armed conflict and encompasses offences committed both within Canada and abroad. The system is based on two main pillars: the summary trial and the court martial. This is a consequence of the lack of clear differentiation between an offence and a breach of discipline and the fact that Canadian military law is based on the concept of the ‘service offence’, which includes both military offences and breaches of discipline, as opposed to that of the ‘civil offence’ on which ordinary criminal law is based. The military justice system therefore encompasses both the criminal and disciplinary spheres. Summary trials are used to deal with minor service offences that are tantamount to breaches of discipline while courts martial deal with more serious offences that are on a par with what are known as ‘military offences’ in other systems. In this sense, doctrine sees the Canadian justice system as having two distinct types of jurisdiction: one of a disciplinary and administrative nature (as characterized by the summary trial) and the other of a judicial nature (as characterized by the court martial). Nevertheless, the National Defence Act expressly defines a ‘service tribunal’ as a “court martial or a person presiding at a summary trial”.¹¹¹

From the point of view of structure, the military justice system consists of the authorities responsible for conducting summary trials, courts martial, the Court Martial Administrator, the Court Martial Appeal Court, the Office of the Judge Advocate General, the Canadian Military Prosecution Service, the Defence Counsel Services and the National Investigation Service of the Military Police.

It is the commanding officer, delegated officer or superior commander who is responsible for conducting summary trials and presiding over the proceedings. They must be officers on active service within the military unit to which the accused is attached. The commanding officer or superior commander determines whether the offence should go to summary trial or court martial. In the event of the latter, the case must be referred to the Military Prosecution Service. Nevertheless, the defendant has the right to elect which type of procedure (a summary trial or court martial) is to be used. However, whether this

110 Office of the Judge Advocate General, “Canadian military law, including the military justice system, is a component of Canadian law and is subject to the Canadian Charter of Rights and Freedoms”, web page http://www.forces.gc.ca/jag/dyk_3_f.html. [French original, free translation.]

111 Article 2 (definitions) of the National Defence Act.

principle applies depends on the seriousness and nature of the offence¹¹² as well as the rank of the defendant since officers with the rank of Lieutenant Colonel or higher can only be tried by courts martial. Minor service offences go to summary trial. The procedures differ from those of a court martial: the proceedings are brief, the accused has no right to defence counsel and the Military Rules of Evidence do not apply.¹¹³ The punishment which can be imposed varies according to who has the authority to do so (the commanding officer, delegated officer or superior commander). The commanding officer has the power to impose the most serious punishments, these being detention for a period of not more than 30 days, a fine of not more than basic pay for 60 days or demotion. Decisions may be reviewed by the superior officer who presided over the summary trial.

There are four types of court martial: the General Court Martial, the Disciplinary Court Martial, the Standing Court Martial and the Special General Court Martial. They are the first tier of jurisdiction for serious infractions which are tantamount to 'military offences'. The type of court martial depends on the nature of the offence and the rank or status of the accused. Courts martial are presided over by a military judge, who must be an officer with ten years' standing as a lawyer. Judges are appointed for a five-year period which can be renewed. The Chief Military Judge is responsible for assigning military judges to preside over courts martial. In the case of Disciplinary and General Courts Martial, there is also a panel of members which is the equivalent to a jury in ordinary criminal proceedings. The panel is made up of members of the military on active service as appointed by the Court Martial Administrator who works under the supervision of the Chief Military Judge. If the accused is an officer, the panel must be made up solely of officers. However, neither the commanding officer of the accused or anyone who has participated in the investigation can be a member of the panel. The rules and procedures for courts martial are similar to those applicable to ordinary criminal trials. In the case of Disciplinary and General Courts Martial, the military judge determines questions of law and the panel decides, by means of a vote, whether the accused is guilty or not. Nevertheless, it is the military judge who fixes the sentence. The authority to send a case to court martial lies with the commanding officer, the superior commander, the director of the Military Prosecution Service or, under certain circumstances

112 Some offences can only be dealt with in a summary trial while others may not go to summary trial. For example, acts classified as ordinary criminal offences under the ordinary Criminal Code but which have been 'militarized' in accordance with article 130 of the Code of Service Discipline.

113 Office of the Judge Advocate General, "The Code of Service Discipline and Me: A guide to the military justice system for Canadian Forces members", web page http://www.dnd.ca/jag/training/publications/CSD_ME_e.pdf.

and following the chain of command, the National Investigation Service. Cases involving serious offences which cannot go to a summary trial must be passed through the chain of command to the director of the Military Prosecution Service.

The Court Martial Appeal Court constitutes the second tier of jurisdiction and hears appeals against sentences handed down by courts martial. It comprises a panel of three civilian judges from the Federal Court of Canada. The third tier of jurisdiction is provided by the Supreme Court of Canada.

The Office of the Judge Advocate General is directed by the latter who must be an officer on active service with the rank of at least Brigadier General and a lawyer of at least ten years' standing. The Office of the Judge Advocate General is attached to the Ministry of National Defence and the Judge Advocate General is responsible to the Minister. The Judge Advocate General still acts as legal adviser to the government, the Minister of Defence and the Canadian Forces on matters relating to military law. As a result of the 1998 reforms, the Judge Advocate General has the power to monitor and review the military justice system. He is also responsible for supervising the work of the Military Prosecution Service, the National Investigation Service and the Defence Counsel Services.

The Military Prosecution Service, under the leadership of a director, is responsible for presenting charges and conducting prosecutions at courts martial. It is made up of military lawyers. As well as acting as the prosecuting authority, it also represents the Canadian Forces at the Court Martial Appeal Court and the Supreme Court. The Defence Counsel Services, under the leadership of a director and made up of military lawyers, is responsible for overseeing and providing legal advice to those facing trial. However, the accused may elect to appoint a civilian lawyer as defence counsel. The directors of both these services must be lawyers of at least ten years' standing.

The National Investigation Service is a Military Police unit. It has extensive powers of detention and, in certain circumstances, can make arrests without a warrant. Members of the Military Police working with the National Investigation Service have the power to investigate and bring charges before the competent military courts. These powers also extend to offenders not normally triable by military courts, if they are on premises belonging to the national defence system.

In terms of jurisdiction *ratione personae*, military justice applies to members of the Canadian Forces on active service, members of the Canadian Forces reserve in certain circumstances, retired personnel who have committed offences while in service and some categories of civilian. The latter include

civilians working for the Canadian Forces, civilians accompanying a military unit and spies. According to the Code, civilians accompanying a military unit include persons who participate with a military unit in its movements or duties, persons who are given accommodation or rations by a military unit, the dependants outside Canada of Canadian Forces officers and persons embarked on military ships or aircraft.

In principle, the military justice system only tries service offences which are tantamount to ‘military offences’ and breaches of discipline committed by members of the Canadian Forces. However, under the National Defence Act, any act or omission which is classified as an offence in the ordinary Criminal Code or in federal laws is deemed to be a service offence. Military justice therefore has jurisdiction over ordinary offences committed by military personnel or persons treated as such as well as by certain categories of civilians. Nevertheless, if committed in Canada, murder, manslaughter and abduction must be tried in a civil court. However, if such offences are committed outside of Canada, it is worth noting that the military justice system retains jurisdiction. In the past, the ordinary courts had sole jurisdiction over the offence of sexual assault when committed in Canada but, under the amended National Defence Act, jurisdiction has been restored to the military courts.

6. Central African Republic

At the end of 1958, the move towards independence that had begun in the preceding years started coming to fruition and the territory of Ubangui-Shari became the Central African Republic. On 16 February 1959, the Central African Republic adopted its first Constitution which “gave France broad powers in matters forming part of State sovereignty, such as currency, foreign affairs, the army, justice and energy resources”.¹¹⁴ Some time later, on 13 August 1960, the country achieved full independence and national sovereignty. On 25 November 1960 a new Constitution of the Central African Republic was introduced. It remained in force until 1964 when yet another was adopted. A little later, in 1965, as a result of a military coup led by Colonel Jean-Bedel Bokassa, several constitutional acts were published and eventually, on 4 December 1976, an “Imperial Constitution” granting the coup leader the title of Emperor Bokassa I was introduced. After the reign of Emperor Bokassa I, two further constitutions were adopted in 1981 and 1986. Lastly, after a tortuous process of transition, in 1995 the current Constitution of the Central African Republic was adopted. The new constitution called for the creation of a Constitutional Court as well as the establishment of a judicial

114 United Nations document HRI/CORE/1/Add.100, 19 March 1999, paragraph 15.

system since the existing one had been inadequate. However, the new constitution did not specifically refer to the regulation of military courts.

Military criminal jurisdiction in the Central African Republic came into being as a result of Order N° 85-013 of 19 April 1985 which established the Permanent Military Court and the Code of Military Justice. Order N° 85-013 regulates the organizational and procedural aspects of the military justice system which appears to consist of a single body, the Permanent Military Court. It should be noted in this regard that the Central African authorities, in the core document forming part of its State party report to the United Nations, classified this court as a “special court”.¹¹⁵

In peacetime, the Permanent Military Court is competent to try all military crimes and offences (*crimes et délits*) contained in the Code of Military Justice and committed by members of the military or people who are treated as such, all ordinary or military crimes and offences committed by members of the military or people who are treated as such in a military establishment (of either a temporary or permanent nature) or military ship or aircraft, and all crimes and offences - be they ordinary or military - committed in the course of service by members of the military or people who are treated as such.¹¹⁶

In wartime or under a state of emergency, the jurisdiction of the Permanent Military Court is considerably extended. At such times, and regardless of whether the accused is a member of the military or a civilian, the Permanent Military Court has sole jurisdiction for crimes and offences against state security; crimes and offences, infractions and hostile acts against any member of the military, the Armed Forces or military installations and establishments; attacks on the Head of State or national symbols; and any crimes or offences related to the aforementioned crimes and offences.¹¹⁷ In addition, under a state of emergency, the Permanent Military Court has jurisdiction - though not exclusively - to try any offence specified in the Criminal Code and special laws. This means that, in wartime and under a state of emergency, only a few offences are left to the jurisdiction of the ordinary courts.

In terms of jurisdiction *ratione personae* and for the purposes of the exercise of criminal jurisdiction by the Permanent Military Court, Order N° 85-013 stipulates that a member of the military or a person treated as such means any member of the military or person who is a part of the Armed Forces and who is on active service or available for posting; anyone who, though not employed by the Armed Forces, is at the disposal of the authorities and

115 United Nations document HRI/CORE/1/Add.100, 19 March 1999, paragraph 35 and 42.

116 Article 3 of Order N° 85-013 of 19 April 1985.

117 Article 4 of Order N° 85-013 of 19 April 1985.

receives a fee; any member of a captured crew; and prisoners of war. Members of other state security bodies of a military nature or which undertake military duties are also treated as members of the military for such purposes.

The Permanent Military Court consists of two judges who act as president and vice-president and three officers from the Armed Forces, all of whom are appointed by executive decree. The position of military examining magistrate does not exist and the investigation of cases is carried out by one of the members of the court under the supervision of the presiding judge.

The prosecuting authority (*Ministère public*) is the Government Commissioner (*Commissaire de Gouvernement*) who is accountable to the Ministry of National Defence.

The prosecuting authority is responsible for bringing actions. However, under a state of emergency, the Permanent Military Court cannot start to hear a case without the prior authorization of the President of the Republic or his delegate. In terms of procedures, the provisions of Order N° 85-013 and any provisions of the Code of Criminal Procedure which are not incompatible with them apply. However, many of the provisions of Order N° 85-013 invalidate the ordinary rules of criminal procedure. It is not possible to appeal against the decisions of the Permanent Military Court in the case of crimes or offences committed in wartime or under a state of emergency. Appeals against other decisions handed down by the Permanent Military Court can, with a few exceptions, be brought before the Court of Cassation (*Cour de Cassation*) which is a civil court.

Under the terms of Order N° 85-013, it is expressly forbidden, for the victims of a crime or offence to join an action for damages to criminal prosecutions brought before the Permanent Military Court.¹¹⁸

7. Chad

History

Chad achieved independence on 11 August 1960 and on 28 November its first constitution was enacted. The constitution made no reference to military courts. However, a military justice system, complete with a Code of Military Justice, was established within the first few years. The system comprised

118 Article 30 of Order N° 85-013.

military courts and military examining magistrates who were assisted in their investigations and the enforcement of judgments by the National Gendarmerie, a military body with judicial police functions.¹¹⁹ After a few years of relative stability, the newly-established Republic of Chad became bogged down in a series of civil wars which lasted over 30 years. Three years after independence, the then government abolished the multi-party system and opted for a single party, thus prompting the first outbreaks of armed opposition which were put down by the Chadian Army and the French Foreign Legion. The first civil war broke out in 1965 and most of the post-independence governments were overthrown *manu militari* (in 1975, 1979, 1980, 1982 and 1990).

When Hissène Habré (who was Prime Minister in 1978 and President from 1982 until 1990) was in power, a new Code of Military Justice was issued. Although the Code envisaged the establishment of military courts, they were not set up or did not function and, on 24 April 1990, under Ordinance N° 90-012 of 24 April, ordinary courts were authorized to try “offences committed by members of the military and persons treated as such”.¹²⁰ In December 1990, Hissène Habré was overthrown by the Army Chief of Staff, Idriss Déby, who took over the Presidency.

In 1991, against a background of heavy militarization and conflict, a process of transition and stabilization got under way. On 28 February of that year a National Transitional Charter (or Constitution) was promulgated.¹²¹ Two years later, a Sovereign National Conference was held to try to put an end to the long period of political instability and, as a result, a transitional government was set up. The National Charter of 1991 contained no specific provisions on military criminal jurisdiction. But a few months after adoption of the National Charter, a Court Martial was set up under Ordinance N° 91-001 of 2 April 1991. This Court Martial, which was the only military court, had national jurisdiction and was made up of a president (a member of the military), four advisers (of which two had to be judges), two alternate advisers, the Public Prosecutor (*Commissaire de gouvernement*) and his deputy. All were appointed by the President of the Republic on the basis of proposals put forward by the Ministers of Justice and National Defence. Its jurisdiction *ratione materiae* encompassed a wide range of offences¹²² while its jurisdic-

119 Decree N° 62-125 of 20 June 1962, articles 28, 43, 61, 62 and 63 to 72.

120 Ordinance N° 90-012 of 24 April 1990. [Spanish original, free translation.]

121 In 1992 the National Charter underwent several amendments (Ordinance N° 007/PR/92 of 19 May 1992). Publication of the Charter was ordered through Decree N° 282/PR/93 of 9 April 1993.

122 They included military offences and other criminal offences such as: culpable homicide, kidnapping, robbery, rape, conspiracy, the illegal carrying of weapons or munitions, and the illegal wearing of military uniform.

tion *ratione personae* comprised military personnel, paramilitaries and combatants who had committed culpable homicide and any civilians who were accomplices or accessories. The *Commissaire de gouvernement* was responsible for bringing criminal proceedings and the procedures to be followed were those set out in the ordinary Code of Criminal Procedure of 1967 for offences detected *in flagrante delicto*. There were no grounds for appeal against sentences handed down by the Court Martial. It is important to point out that in 1993 a Special Criminal Court¹²³ was set up to try a series of crimes, including murder, kidnapping, unlawful detention and bodily harm, committed between 7 June 1982 and 1 December 1990 by the deposed government of Hissène Habré.¹²⁴ This Special Court which was responsible for trying human rights violations committed under the previous government was not a military court and, with a few exceptions, the procedures followed were those laid down in ordinary criminal legislation for offences detected *in flagrante delicto*.

The 1996 Constitution

The Constitution of the Republic of Chad, which is still in force today, was adopted by referendum on 31 March 1996. The new constitution stipulated that the armed forces and security forces consisted of the Army, the National Gendarmerie, the National Police and the National Nomad Guard.¹²⁵ However, it did not expressly regulate the question of military criminal jurisdiction or grant members of the armed forces any type of special court. As well as determining that the judiciary should be independent from the executive and the legislature, the Constitution specified that the judiciary should comprise a single court system consisting of the Supreme Court, courts of appeal, ordinary courts and magistrates' courts (*juges de paix*).¹²⁶ Later, in 1998, it was made explicit in the law on the organization of the judiciary that "justice is dispensed in the Republic of Chad by a system of jurisdiction that comprises the Supreme Court, courts of appeal, ordinary courts, courts of first instance, labour courts, commercial courts and magistrates' courts".¹²⁷

The current situation

At the moment it is not clear whether the military criminal legislation, and in particular the 1991 Court Martial, which was adopted before the introduction of the new Constitution, is still in force. According to information supplied to

123 Ordinance N° 93-004 of 27 February 1993.

124 Ibidem.

125 Article 189 of the Constitution.

126 Article 148 of the Constitution.

127 Article 1 of Law N° 004/PR/98 of 28 May 1998. [French original, free translation.]

the United Nations in 1997 by the Chadian authorities, “[t]he courts of general jurisdiction hear cases of human rights violations through criminal indemnification actions coupled with criminal actions against the perpetrators... Any person who is a victim of a human rights violation may bring his case before the national courts which have jurisdiction. The courts also have jurisdiction to order offenders to provide redress for their offence. In the event of failure to act on the part of the courts of general jurisdiction, the victim may take his case to the National Commission on Human Rights, in accordance with Decree No. 163/PR/96 of 2 February 1996, which established the Commission’s rules of procedure”.¹²⁸

In a recent ruling handed down in 2001 in which the Special Criminal Court set up in 1993 was declared to be unconstitutional, the Constitutional Council took the view that a court which had been set up before the new Constitution came into force and whose continued existence had not been specified under article 148 of the Constitution or the 1998 law on the organization of the judiciary could not be deemed to exist.¹²⁹ The Council considered that any criminal acts which had come under the jurisdiction of the 1993 Special Criminal Court prior to the coming into force of the new Constitution should in future be referred to the ordinary examining magistrate.

8. Chile

History

In the colonial period, Chile, like the other former Spanish colonies, was governed by the laws of the motherland. From the start, “men-at-arms always had special legislation”.¹³⁰ Although at first military criminal legislation was spread over several different texts (the *Fuero Juzgo*, *Fuero Viejo de Castilla*, etc.), in the middle of the 16th century, the first corpora of laws on the subject - known as military ordinances (*Ordenanzas militares*) - were issued. The first military ordinance was issued by Carlos I in 1551 and the last by Carlos III in 1768.

Military jurisdiction was broad-ranging and encompassed criminal offences and breaches of discipline as well as civil matters. It did not only apply to the military; it also applied to the widows of members of the military, their

128 Core Document forming Part of the Reports of States Parties : Chad, United Nations document HRI/CORE/1/Add.88, 12 December 1997, paragraphs 41 and 45.

129 Judgment N° 002/PCC/SG/001 handed down by the Constitutional Council on 6 April 2001.

130 Carlos López Dawson, *Justicia Militar, una nueva mirada*, Comisión Chilena de Derechos Humanos, Santiago 1995, p.23. [Spanish original, free translation.]

children under the age of 16 and even their adult daughters if they were unmarried or had become nuns. Different military courts served the different army corps. Military criminal legislation from the colonial period remained in force after Chile achieved independence although some procedural amendments had to be made owing to the disappearance of the colonial institutions.

No republican legislation on military justice was issued until 1839. On 25 April of that year, the General Army Ordinance (*Ordenanza General del Ejército*), which regulated various aspects of military life, was promulgated. In contrast with the colonial legislation, the new statute distinguished between peacetime and wartime for the purposes of both jurisdiction and procedure. The General Army Ordinance limited jurisdiction to those “individuals who serve the army from the general down to the soldier, those who have retired as long as they have authorization from the government” and “non-members of the military working for the army”.¹³¹ As far as jurisdiction *ratione materiae* was concerned, the 1839 legislation removed several offences, such as pimping, the manufacture of fake currency and the submission of fraudulent tax returns not related to the Army, from military jurisdiction. Nevertheless, as a general rule, both ordinary criminal offences and military offences fell to the jurisdiction of the military courts.

A new military criminal statute, Decree Law 806 or the Code of Military Justice, was issued on 23 December 1925. The Code, which was introduced by a *de facto* government, underwent a series of amendments in 1932, 1967 and 1970. Like the 1839 Ordinance, it distinguished between peacetime and wartime, both with regard to the military court structure and in terms of jurisdiction, as well as, in many cases, with regard to the types of punishment which could be applied.

On 11 September 1973, a Military Junta headed by General Augusto Pinochet Ugarte overthrew the constitutional President, Salvador Allende. The *de facto* government decreed a state of siege, constitutional guarantees were in practice rendered invalid as a result of over 3,500 decree laws issued over a period of several years as well as four “constitutional laws” (“*actas constitucionales*”), and the Congress was dissolved. As described by the Chilean authorities, “[f]rom 11 September 1973 to August 1988 the country lived under one or more states of exception, a context that left the way open - during that period - to a situation of systematic violation of human rights”.¹³² As far as military criminal jurisdiction was concerned, the 1925 legislation remained in force during the dictatorship (1973-1989) but several amend-

¹³¹ General Army Ordinance, 25 April 1839. [Spanish original, free translation.]

¹³² Core Document which Forms Part of the Reports of the States Parties : Chile, United Nations document HRI/CORE/1/Add.103, 17 March 1999, paragraph 18.

ments, designed, among other things, to “establish privileges for military personnel facing judicial proceedings and use the jurisdiction for political repression”¹³³, were introduced. The *de facto* government issued a decree which put a state of siege on a par with a state of war for the purposes of military justice.¹³⁴ As a result, military courts were given inordinate jurisdictional powers that allowed them to try the vast majority of offences and to subject civilians to summary trials. Another consequence was that General Pinochet, as General in Chief of the Army, was granted the status of supreme military judge. Using these powers, he set up military justice commissions (*comisiones de justicia militar*), the most well-known being the one known as the “Caravan of Death” (“*la Caravana de la Muerte*”). This commission, consisting of senior officers under the direct orders of General Pinochet, were charged with carrying out “work relating to the coordination of institutional matters, internal government affairs and legal proceedings”, which included reviewing and speeding up court martial proceedings against political opponents in detention. As pointed out by Alejandro Artucio, “[a]s a direct consequence of the ‘coordination’ work and ‘speeding up of trials’ carried out by the mission in October 1973, 72 people lost their lives”.¹³⁵ In 1978, with the intention of ensuring that the human rights violations committed during the first five years of the *de facto* government would go completely unpunished, the dictatorship decreed an amnesty for members of the Armed Forces and the other security services.¹³⁶

The 1980 Constitution and the return to democracy

Drafted by the *de facto* government of General Pinochet Ugarte, the Constitution of the Republic of Chile was adopted as the result of a plebiscite on 11 September 1980. Still in force today, it underwent some amendments in 1989, 1997 and 2000. The return to democracy in 1990 did not lead to a review of the military or the redefining or restructuring of military criminal jurisdiction in Chile. In 1991 and 1992, the administration of President Andrés Aylwin introduced two proposals for reforming military justice. The 1991 proposal sought to confine the jurisdiction of the military courts to the trial and judgment of military offences, thereby preventing civilians from being prosecuted by them. In 1992, the President submitted a bill to the

133 Carlos López Dawson, op. cit., p.31. [Spanish original, free translation.]

134 Decree Law N° 5 of 12 September 1973, article 1 of which stipulated that, when interpreting article 418 of the Code of Military Justice, a state of siege should be treated in the same way as a state of war.

135 Alejandro Artucio, “*Augusto Pinochet Ugarte ante la Justicia Chilena*”, in Revista de la Comisión Internacional de Juristas - Impunidad, crimen de lesa humanidad y desaparición forzada, N° 62-63, July 2001, p.51. [Spanish original, free translation.]

136 Decree Law N° 2191 of 1978.

Chamber of Deputies which was designed to ensure that the military justice system “would under no circumstances try civilians or military personnel for acts detrimental to civilians or directed against democratic institutions”.¹³⁷ At the same time, a group of members of parliament tabled a motion to restrict the jurisdiction of military courts solely to offences under the Code of Military Justice committed by military personnel and granting the ordinary courts jurisdiction over both ordinary offences committed by military personnel and military offences committed by civilians. Neither of these initiatives prospered.

Chapter VI of the 1980 Constitution, entitled “The Judiciary”, contains no provisions which expressly regulate the scope of military jurisdiction. Nevertheless, article 79 removes “military courts in wartime” from the “executive, correctional and economic supervision” of the Supreme Court.¹³⁸ In addition, article 80 A concerning the “Office of the Public Prosecutor” (*Ministerio Público*) stipulates that “[...] [r]esponsibility for bringing public criminal prosecutions and conducting investigations of the acts that make up the offence, determining those which show the punishable involvement and those which demonstrate the innocence of the accused in cases which fall to the jurisdiction of military courts, as well as for taking steps to protect the victims of and witnesses to such acts shall lie, in accordance with the provisions of the Code of Military Justice and the relevant laws, with the bodies and persons specified in that Code and in those laws”.¹³⁹

Chilean military criminal jurisdiction today

The Code of Military Justice was adopted in 1925 and entered into force on 1 March 1926. It was last amended in 2000.¹⁴⁰ Among the numerous amendments made to it, it is worth highlighting those that made in 1991 and 1995. In 1991, terrorist offences against members of the police as well as offences involving contempt for the Armed Forces or police were removed from the jurisdiction of the military courts.¹⁴¹ In 1995, article 137 of the Code of Military Justice was amended so that military personnel facing prosecution for ordinary offences lost the privilege of being held in military facilities. Despite the reforms that have been introduced, as Professor Jorge Mera

137 Fourth Periodic Report: Chile, United Nations document CCPR/C/95/Add.11, 2 December 1998, paragraph 186.

138 Article 79, Chapter VI of the 1980 Constitution. [Spanish original, free translation.]

139 *Ibid.*, Article 80 A. [Spanish original, free translation.]

140 Law N° 19,683, June 2000.

141 Law N° 19,047 of 1991.

Figueroa points out, military criminal jurisdiction “has not so far been the object of structural change”.¹⁴²

The Code of Military Justice regulates the military court structure and matters relating to substantive military criminal law and procedure. Article 1 of the Code stipulates that, “[t]he authority to try civil and criminal cases that are subject to military jurisdiction, judge them and enforce the sentence rests solely with the courts specified in this Code”.¹⁴³

The structure, organization and extent of jurisdiction of the military courts varies according to whether it is peacetime or wartime. Nevertheless, it should be stressed that the Chilean military justice system, both in peacetime and wartime, is built on the old military principle that ‘he who gives the orders sits in judgment’ (*‘el que manda juzga’*). It should be pointed out, however, that, for the purposes of military justice, the Code stipulates that a ‘time of war’ should not only be understood to exist when a state of war has been officially declared but also when a state of siege has been declared. Similarly, ‘time of war’ encompasses situations in which, even though such declarations may not have been made, “there is an actual war or a general call-up for war has been decreed”.¹⁴⁴ This provision of the Code of Military Justice has been widely criticized in legal writings as creating a kind of *de facto* state of war or emergency.¹⁴⁵

In peacetime, military justice comprises the Institutional Courts (*Juzgados Institucionales*), Courts Martial and the Supreme Court. This structure is supplemented by the Office of the Military Attorney-General (*Fiscalía Militar General*) and the offices of the military judge advocates (*Auditorías Militares*).

Institutional Courts exist in each corps and unit of the Armed Forces. Thus, there is a Naval Court (*Juzgado Naval*) in each Naval Zone and a permanent Military Court (*Juzgado Militar*) in each division or brigade of the Army. As for the Air Force, there is just one Air Force Court (*Juzgado de Aviación*) but the President of the Republic has the authority to set up others. The commander in chief of each military unit has jurisdictional power and acts as institutional judge (*juez institucional*). However, this role can be delegated to

142 Jorge Mera Figueroa, *La modernización de la justicia militar: un desafío pendiente*, Centro de Investigaciones Jurídicas, Diego Portales University - Faculty of Law, Santiago de Chile, on web page: http://derecho.udp.cl/inf_invest.htm. [Spanish original, free translation.]

143 Article 1 of the Code of Military Justice. [Spanish original, free translation.]

144 Article 418 of the Code of Military Justice. [Spanish original, free translation.]

145 Hernán Montealegre, *La seguridad del Estado y los Derechos Humanos*, Edición Academia de Humanismo Cristiano, Chile 1979, p.29 and following.

another general officer. The commander or institutional judge is assisted by a military judge advocate.

Institutional Courts are courts of first instance for “all civil and criminal matters that constitute military jurisdiction”. They also exercise “disciplinary jurisdiction over all those involved in administering military justice in the first instance”.¹⁴⁶ In the case of offences committed outside Chilean territory, the Institutional Courts are as follows: the Santiago Military Court, the Court for Naval Zone 1 and the Air Force Court, which has its headquarters in Santiago.

There are two Military Courts of Appeal (*Cortes Marciales*), the Military Court of Appeal for the Army, Air Force and Police and the Military Court of Appeal for the Navy. The first is made up of two judges (*ministros*) from the Santiago Court of Appeal, the Judge Advocates General for the Air Force and Police and a colonel from the Army legal corps on active service. The Military Court of Appeal for the Navy is made up of two judges (*ministros*) from the Valparaíso Court of Appeal, the Judge Advocate General for the Navy and a general officer from the navy on active service. Military Courts of Appeal are the appellate courts for Institutional Courts and they are also responsible for settling conflicts of jurisdiction involving courts within their jurisdiction and hearing applications for the enforcement of rights (*recursos de amparo*) submitted on behalf of individuals who have been detained or arrested on the orders of military courts.

For the purposes of military criminal jurisdiction, the Supreme Court comprises the General Judge Advocate of the Army who hears applications for the quashing of judgments (*recursos de casación*) handed down by the Military Courts of Appeal, applications for review (*recursos de revisión*) with regard to final judgments handed down by military courts in peacetime, and petitions in error (*recursos de queja*) concerning decisions made by the Military Courts of Appeal. The Supreme Court also has responsibility for settling conflicts of jurisdiction between military courts and the ordinary courts.

The military prosecutorial function (*Ministerio Público Militar*) is discharged by the Military Attorney-General (*Fiscal General Militar*) whose role is to “ensure that the social interest involved in offences for which military courts in peacetime have jurisdiction and the interests of the National Defence institutions are safeguarded in those courts”.¹⁴⁷ The Military Attorney-General is appointed by the President and must be a justice official with the rank of colonel or captain. Each Institutional Court also has a military prosecutor

146 Code of Military Justice. [Spanish original, free translation.]

147 Article 69 of the Code of Military Justice. [Spanish original, free translation.]

(*Fiscal Militar*) assigned to it who is responsible for carrying out investigations and has the power to order the arrest of defendants. Military prosecutors are initially appointed by the President but, in some circumstances, they can be appointed by the respective Institutional Judge (*Juez Institucional*) from among his subordinates. Police prosecutors (*Fiscales de Carabineros*) can be appointed by the Military Judge (*Juez Militar*), on the basis of proposals put forward by the Office of the Chief of Police (*Dirección General de Carabineros*) and endorsed by the Office of the Judge Advocate General of the Army. Prosecutors do not give up their operational duties as officers of the Armed Forces.¹⁴⁸

Each armed forces and police corps has a judge advocate general (*Auditor General*) and each Institutional Court has a judge advocate assigned to it. Judge advocates are appointed by the President and their function is to provide advice to the administrative and judicial officials of the armed services.

In wartime or under a state of siege, military jurisdiction is exercised by the Generals in Chief or Superior Commanders of garrisons or fortresses that are under siege or being blockaded or of divisions or corps which are operating alone and their counterparts in the Navy, courts martial, prosecutors and judge advocates. The jurisdiction of the peacetime military courts ceases automatically and is replaced by that of the wartime military courts. From the point of view of jurisdiction *ratione loci*, in such circumstances military criminal jurisdiction applies to any national territory which has been declared to be under a state of alert or siege, whether as the result of an attack from abroad or internal disturbances, and any foreign territory that is under armed occupation by Chile.

The General in Chief of the Army performs the functions of military judge for all the troops under his command throughout the territory under his jurisdiction. He also has the power to order courts martial to be convened to prosecute those troops, confirm, revoke or change any sentences handed down by such courts and order such sentences to be enforced. His jurisdiction encompasses criminal and civil cases as well as the exercise of discipline. The General in Chief can delegate his military judge functions to divisional or brigade commanders under his command. The General in Chief of the Army or any general in command of an army division or corps operating on its own who is acting as military judge has the authority to issue military edicts.

Courts martial have the authority to try all offences which fall to the jurisdiction of the military court system and there is no right of appeal against their

148 Article 28 of the Code of Military Justice.

decisions.¹⁴⁹ They are set up on the orders of the General in Chief of the Army or the general or commanding officer responsible for the unit in question. Courts martial are presided over by the commanding officer or, if he is not available, the longest-serving and highest-ranking officer available and made up of officers from the military unit in question, their number varying according to the rank of the accused. When the defendants are “ordinary civilians without ties to the military”¹⁵⁰, the court martial must have six members. Judge advocates also serve on courts martial. The proceedings are swift and of a summary nature.

Military prosecutors in wartime are appointed by the President or the General in Chief or Superior Commander of the forces. Only military personnel can be appointed to these posts. They can be officers on active service or lawyers who are officers in the reserve forces who have been called up for service. Their duties are the same as in peacetime.

Lastly, it should be pointed out that, in principle, both in peacetime and wartime, lawyers who are authorized to exercise their profession in an ordinary court and officers belonging to the Armed Forces and Police - who must be no higher in rank than the panel members of the military court in question - can act as defence counsel.

The Code of Military Justice establishes several types of procedure depending on whether it is peacetime or wartime or whether a state of emergency is in force. In peacetime, the provisions of the Code of Military Justice, together with some of the regulations from the ordinary Code of Criminal Procedure (*Código de Procedimiento Penal*), are to be applied. It is the Institutional Judge who is responsible for ordering the preliminary investigatory phase of proceedings (*el sumario*) to be opened and the investigation must be carried out by the military prosecutor. Article 113 of the Code of Military Justice states that “the *sumario* shall ensue solely at the initiative of the authorities and, therefore, it is not possible for a private party to bring an action in these trials”.¹⁵¹ Nevertheless, in the case of certain offences¹⁵², the victim of the offence must first of all give consent for prosecution to go ahead. It is important to point out that during the investigation, “secret documents belonging to the Armed Forces or the Chilean Police Force”¹⁵³ can be introduced into the proceedings but this must be authorized in advance by the commander in chief of the institution concerned or by the Chief of Police who can refuse on

149 Article 81 of the Code of Military Justice.

150 Code of Military Justice. [Spanish original, free translation.]

151 Article 113 of the Code of Military Justice. [Spanish original, free translation.]

152 They are: rape, abduction, adultery and sexual intercourse with a minor (*estupro*).

153 Code of Military Justice. [Spanish original, free translation.]

the grounds of state security, national defence, internal public order or public safety. Anonymous or secret evidence can also be introduced into the proceedings. Access to such documents or testimony is restricted and can be made available to “the lawyers of the parties only to the extent that they form the basis of the charges, dismissal or the final judgment”,¹⁵⁴ Once the military prosecutor has completed the investigatory phase, the Institutional Judge can order a temporary stay of proceedings, close the case once and for all or order a full trial (*plenario*) to go ahead. Decisions to temporarily stay proceedings or dismiss the case can be the subject of appeal and, in the case of offences carrying a heavy sentence (“*pena afflictiva*”)¹⁵⁵, can be referred for consultation to the Military Court of Appeal. Appeals against the final sentence can be lodged by the accused, the Military Attorney-General and the victim of the offence. If there is no appeal, the Military Court of Appeal must be consulted about the sentence. Once the sentence is final and the appeal and consultation procedures have been exhausted, an application for review may be submitted to the Supreme Court. In the case of offences detected *in flagrante delicto*, a summary procedure, under the charge of the commander of the unit in question or the officer in “direct command of the force or place where the deed was committed”, is used.¹⁵⁶ The commander or officer in question has the power to arrest the suspects and carry out an investigation. Once this has been completed, the case is referred to the appropriate Institutional Court.

In wartime, a swift procedure of a summary nature is conducted by a court martial. The relevant senior military authority orders the appropriate military prosecutor to prepare the groundwork for prosecution. The military prosecutor carries out a swift summary investigation which must take no more than 48 hours. Once the investigation is complete, the military commander, on the advice of the relevant judge advocate, either dismisses the case or convenes a court martial. In the case of offences detected *in flagrante delicto*, the proceedings are even more summary.

The Code of Military Justice treats the victims, their successors or anyone else affected by the offence differently depending on whether it is peacetime or wartime. In peacetime, the victims, their successors and anyone else affected by the offence can join a civil action for damages to a criminal action being brought in a military court. However, the Code does not allow more than one civil action to be brought in the same case since it stipulates that, if

154 Ibidem. [Spanish original, free translation.]

155 They are: military imprisonment (*presidio militar*) or maximum military imprisonment (*reclusión militar máxima*).

156 Code of Military Justice. [Spanish original, free translation.]

there is more than one, those concerned must “bring a joint action”.¹⁵⁷ In wartime, the Code of Military Justice does not allow the victims, their successors or anyone else affected by the offence to bring a civil action.

It is important to stress that the Chilean authorities themselves made the following comment to the United Nations Human Rights Committee: “The impartiality of the military courts is questioned whenever military personnel are put on trial for ordinary offences, since the members of military courts are not irremovable and are subject to disciplinary action by higher-ranking officers, while an *esprit de corps* predominates in their decisions. Furthermore, the competence of the judges to conduct proceedings in keeping with the rules of due process, while ensured in the ordinary courts by the requirement that judges should be lawyers, is not guaranteed in the military justice system”.¹⁵⁸

From the point of view of jurisdiction *ratione personae*, the military courts can try Chileans and foreigners,¹⁵⁹ military personnel and civilians, as well as juveniles under 16 years of age. For the purposes of military justice, military personnel are defined in the Code as being members of the Army, Navy, Air Force and Police, as well as ordinary students at Armed Forces and Police Colleges, civilians employed by the Armed Forces and Police, conscripts, members of the Armed Forces from the time of their call-up, people who accompany the Armed Forces in the field in wartime and prisoners of war.

As far as jurisdiction *ratione loci* is concerned, the military courts try offences committed on Chilean territory as well as offences committed abroad in the following circumstances: offences committed on territory under military occupation by Chilean troops, offences committed by military personnel in the line of duty or when on secondment and offences against the sovereignty of the state or its external or internal security.

From the point of view of jurisdiction *ratione materiae*, the military courts are authorized to try any offences specified in the Code of Military Justice that are committed by military personnel or civilians, any offences assigned to military courts as a result of special laws, any breaches of the Air Force Code (*Código Aeronáutico*) or the regulations on recruitment and mobilization committed by military personnel or civilians and any ordinary offences committed by military personnel when at war, whether in the field, in the line of military duty or because of it, in any type of military facility or on military

157 Article 133 of the Code of Military Justice. [Spanish original, free translation.]

158 Fourth Periodic Report: Chile, United Nations document CCPR/C/95/Add.11, 2 December 1998, paragraph 185.

159 Article 3 of the Code of Military Justice.

territory, whether on a permanent or temporary basis. Quite a wide variety of offences are specified in the Code of Military Justice, ranging from typically military offences to ordinary criminal offences.¹⁶⁰ At the same time, some offences only apply in wartime or, in those circumstances, are deemed more serious, both in terms of their description and the type of punishment applicable.¹⁶¹ The Code also contains a section on special offences applicable to the Navy¹⁶² and the Police¹⁶³, whether or not the perpetrators are members of those institutions. In addition, as a result of other laws, the military courts have jurisdiction over other offences, in particular, political offences committed by civilians. In the event that the main perpetrator of an offence is subject to military jurisdiction, the Code gives military courts the authority to try people who are not normally subject to their jurisdiction. Military courts can also try any associated offences (*delitos conexos*), even in cases where the offence in question would normally fall under the jurisdiction of the ordinary courts. If there is any doubt about whether the offences are connected, the Code gives preferential jurisdiction to the military courts. Lastly, military courts are responsible for handling any civil actions arising from these offences.

All in all, military courts have jurisdiction over any ordinary offences committed by military personnel in the line of duty or arising from it, which means that they can try “human rights violations carried out by those in uniform”.¹⁶⁴ Nevertheless, it should be stressed that, despite this general provision on the jurisdiction of ordinary offences, the ordinary courts are responsible for trying “ordinary offences committed while performing duties whose purpose is normally of a civil public nature”.¹⁶⁵ However, at the same time the Code defines an act carried out in the line of duty as being “any act which relates to or is connected with the functions of any member of the military as a result of membership of the armed forces”.¹⁶⁶ It is a fact that military courts have been an active source of impunity as far as cases of human

160 For example, the following offences are specified in the Code of Military Justice: treason, espionage, offences against the sovereignty and external security of the state, offences against the internal security of the state (an attack on a sentinel, etc.), offences against military duties and honour (service offences, sentinel offences, abandonment of service, desertion, etc.), insubordination (disobedience, attacking or insulting a superior), offences against the interests of the Army, offences against Army property and offences involving misrepresentation (*falsedad*).

161 Article 372 and following of the Code of Military Justice.

162 Articles 378 to 404 of the Code of Military Justice.

163 Articles 405 and following of the Code of Military Justice.

164 Jorge Mera Figueroa, *op. cit.* [Spanish original, free translation.]

165 Article 9 of the Code of Military Justice. [Spanish original, free translation.]

166 Article 421 of the Code of Military Justice, as cited in [Fourth Periodic Report: Chile](#), United Nations document CCPR/C/95/Add.11, 2 December 1998, paragraph 101.

rights violation are concerned. Roberto Garretón said the following: “As far as trials for human rights violations are concerned, in other words, the prosecution of members of the military, the picture is diametrically opposed: presumption of innocence becomes certainty of innocence, the accused enjoy privileges which are not available to any other defendants [and] diligence is replaced by inaction”.¹⁶⁷

Traditionally, when settling conflicts of jurisdiction between the ordinary courts and the military courts in cases of human rights violations committed by military or police personnel, “[t]he majority on the Supreme Court decided to award jurisdiction to the military courts, in accordance with a broad interpretation of the concept of a ‘service-related act’ [...]”.¹⁶⁸ For example, in the case of Rodolfo González, a victim of forced disappearance, the Court maintained that since those allegedly responsible for the offence were members of the military on active service, authority for handling the proceedings lay with the military courts.¹⁶⁹ Nevertheless, over the past few years, the Supreme Court has gradually though timidly begun to change its position. For example, in 1994, in the case of the forced disappearance of David Silbermann, the Court took the view that the ordinary courts should be responsible for prosecuting the case.¹⁷⁰ However, the Supreme Court still tends to refer most cases to the military courts.¹⁷¹

9. China

History

The Chinese Army has traditionally held a privileged position within society and the State. In Imperial China, the Army was the main pillar of power on which the dynasties were built. According to Professor Tsien Tche-hao, even though there was an Army Ministry, for the purposes of justice, the Imperial Army was subject to the courts attached to the Ministry of Punishment and

167 Roberto Garretón Merino, in the prologue to *Justicia Militar, una nueva mirada*, Carlos López Dawson, Comisión Chilena de Derechos Humanos, Santiago 1995, p.11. [Spanish original, free translation.]

168 *Fourth Periodic Report: Chile*, United Nations document CCPR/C/95/Add.11, 2 December 1998, paragraph 101.

169 Kai Ambos, *Impunidad y el Derecho penal internacional*, Ed. Ad-Hoc, 2nd edition, Buenos Aires, 1999, p.212.

170 *Ibid.*, p.213.

171 See, among others, *Informe de la Vicaría de Solidaridad*, Chile, Appendix entitled “Proceso por detenidos desaparecidos o ejecutados que han tenido movimiento entre el 1° de enero 96 al 30 de junio 96”, on web page: <http://www.derechos.org/nizkor/chile/vicaria/proceso.html>.

there were specific chapters on the Army in the imperial codes describing the possible offences.¹⁷² There was no special system of justice for the Army. Nevertheless, if someone was sentenced to exile or banishment to the frontier, the Army Ministry was consulted.

When the Republic of China was created following the national revolution led by Sun Yat-sen in 1911, a system of military justice was set up. In 1929, the military law concerning the three armies was passed. A code of criminal procedure for the military courts was supposed to be introduced but this did not happen until 1954, after the triumph of the 1949 Revolution. As a consequence, the 1929 military law concerning the three armies and the 1954 law of military procedure remained in force in Taiwan but not in the People's Republic of China.

Before taking power, the Chinese Communist Party had set up a type of 'military justice' system. In fact, 'supreme commissions for military trials', attached to the Revolutionary Military Commission set up by the future government, had been established when the Republic of Chinese *Soviets* had been created in the province of Chiangxi in 1931.¹⁷³

In 1949, with the creation of the People's Republic of China, the beginnings of a military court system came into being. Chinese military courts were constantly active during the period of the Cultural Revolution. Under the 1954 Constitution of the People's Republic of China, military courts were set up as a form of special people's court as well as courts of appeal under the supervision of the Supreme People's Court. At the same time, military prosecutors' offices were set up as part of the special people's prosecutors' offices responsible to the Office of the Supreme People's Prosecutor. In 1979, a new ordinary Criminal Code was introduced and many typically military offences, such as desertion and abandonment of service, were added to the list of punishable offences.¹⁷⁴ The ordinary Code of Criminal Procedure was also amended in the same year. Military courts apparently applied the ordinary Criminal Code as well as a military law.¹⁷⁵ From the point of view of jurisdiction *ratione personae*, military courts only tried offences committed by

172 Tsien Tche-hao, "*L'évolution actuelle de la justice militaire en Chine*", in *L'évolution actuelle de la justice militaire - Huitième Congrès international*, Ankara 1979, Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, Tom. VIII, Vol. II, p.177.

173 Tsien Tche-hao, "*L'évolution actuelle de la justice militaire en Chine*", op. cit., p. 181.

174 Francisco Jiménez y Jiménez, *Introducción al derecho penal militar*, Ed. Civitas, Madrid, 1987, pp. 124-125.

175 Tsien Tche-hao, "*L'évolution actuelle de la justice militaire en Chine*", op. cit., pp. 183-184.

members of the Army, with reservists, members of the militia and civilians remaining outside their jurisdiction in peacetime as well as in wartime.

The military justice system consisted of military courts and military prosecutors' offices which were attached to each branch of the People's Liberation Army. According to Tsien Tche-hao, military criminal jurisdiction was incorporated into the organizational structure of the judiciary and, as far as the right to legal representation, appeals and the work of the prosecutors were concerned, was subject, in general terms, to the same procedures and norms as the ordinary courts or people's courts.¹⁷⁶ Military courts were made up of a panel of three judges, one a military judge and the other two advisers. Military judges had to be members of the military with legal training and were appointed by the Ministry of National Defence. Military prosecutors were responsible for performing the prosecutorial function as well as for ensuring the legality of proceedings, investigating cases and bringing charges as appropriate in the military courts.

The current situation

In 1982, a new Constitution of the People's Republic of China was adopted. With a few amendments made in 1988 and 1993, it remains in force. According to article 124 of the Constitution¹⁷⁷, the Chinese judicial system is made up of the Supreme People's Court, local people's courts, military courts and other special people's courts. Military courts are therefore special people's courts.¹⁷⁸ Like all people's courts, whether ordinary or special, military courts come under the judicial supervision of the Supreme People's Court. Similarly, the military prosecutors' offices are still classified as a form of special people's prosecutors' office under the authority of the Office of the Supreme People's Prosecutor and a "part of the State judicial machinery".¹⁷⁹

The Chinese judicial structure does not set military criminal jurisdiction apart as a separate jurisdiction within the general justice system. In all cases, 'military justice' is dispensed by the Military Court of the People's Liberation Army, the military courts of the regions, the local military courts and the naval courts. The military prosecutors' offices complete the system of military justice.

176 Tsien Tche-hao, "*L'évolution actuelle de la justice militaire en Chine*", op. cit., p.182.

177 This constitutional provision is developed in the Law on the People's Courts.

178 See also Report by the Working Group on Arbitrary Detention - Addition Visit to the People's Republic of China, United Nations document E/CN.4/1998/44/Add.2, 22 December 1997, paragraph 17.

179 Core Document forming Part of the Reports of States Parties: China, United Nations document HRI/CORE/1/Add.21/Rev.2, 11 June 2001, paragraph 29.

The Military Court of the People's Liberation Army is the highest level military court. It is the trial court for offences committed by senior officers above the rank of Division Commander, offences involving foreigners and any criminal prosecutions referred to it by the Supreme People's Court.¹⁸⁰ It is also the court of appeal for death sentences imposed by other military courts. Appeals against its decisions can be made to the Supreme People's Court. The president of the Military Court is appointed by the Standing Committee of the National People's Congress.¹⁸¹

The military courts for the main military regions are attached to the main branches of the People's Liberation Army (army, navy and air force). They are authorized to try offences committed by members of the military with the rank of Deputy Divisional Commander or Regiment Commander. They also try offences which carry the death penalty as well as cases assigned to it by the Military Court. In addition, they hear appeals against sentences handed down by the local military courts.

The local military courts are attached to the units which make up the three branches of the People's Liberation Army. They try offences committed by military personnel below the rank of Regiment or Battalion Commander as well as offences which do not carry the death penalty. In addition, as delegated by the military courts for the respective main military regions, they can try other cases that are assigned to them.

The navy courts are the trial courts for cases from the navy, including those involving foreigners. Navy courts do not only deal with criminal matters and their jurisdiction extends to all matters concerning the merchant navy. Although they perform jurisdictional functions with regard to military criminal matters, they are not military courts in the true sense.

The prosecutorial function in military courts is exercised by the Chief Prosecutor from the Military Prosecutors' Office, who is appointed by the Standing Committee of the National People's Congress.¹⁸² It is important to point out that the examining magistrate (*juge d'instruction*) does not exist in the Chinese system and it is the prosecutors, including military prosecutors, who carry out the investigations during the preliminary stage of the proceedings. In practice, this is done by the police under the supervision of the prosecutor's office.

180 "Le système juridique chinois", web page: <http://www.beiyan.com/03011/002.htm>.

181 Article 67 of the Constitution.

182 Article 67 of the Constitution.

10. Colombia

History

In Colombia, as in many other Latin American countries, many laws relating to military justice which had been introduced by the Spanish Crown during the colonial period remained in force following independence from Spain until the end of the 19th century.¹⁸³ For example, a decree dated 14 October 1821 allowed the authorities to enforce certain regulations from the colonial period concerning desertion and military discipline. Similarly, a decree dated 27 June 1831 stipulated that, in cases of desertion, military officials should continue to enforce the forms of punishment that had been applicable under Spanish legislation prior to 18 May 1808. Another law passed on 16 June 1853 declared that several ordinances on military matters dating from the colonial period were still valid. On 27 November 1861, a decree was issued stating that, together with the general laws of the Republic of New Granada and the Confederation of Granada which had been in effect until 1859, “the Spanish ordinances and Royal Charters (*Reales Cédulas*) which were and are in force in the country” (article 1) in relation to military business carried out by the Army and Navy continued to apply.¹⁸⁴ The same decree declared that these norms formed the basis of the Military Code of the United States of Colombia and ruled that, as far as military trials were concerned, the procedure established in the Royal Charters that had been in force prior to March 1808 should be observed. At the same time, several regulations relating to military criminal matters were issued. For example, Law N° 11 of 1825 laid down the rules on jurisdiction that applied to military trials for military and ordinary offences. A law dated 2 June 1842 regulated courts martial and authorized the Bogotá Supreme Court to hear appeals arising from such proceedings. It should not be forgotten that, throughout the 19th century and well into the 20th century, Colombia endured numerous civil wars and many federal governments. Throughout that century, a host of regulations relating to military justice were issued, both at the national and state level. Some of the federated states had military codes. Every time civil war broke out, it became an opportunity to issue new regulations on military justice matters. This means that for several decades norms dating from the colonial period coexisted with a vast array of national regulations.

However, it seems that the first Military Code was promulgated in 1881 as a result of Law N° 35 passed by the Congress of the United States of Colombia

183 Francisco Rodríguez Ussa, *Derecho penal comparado - Legislación Común y Legislación Militar*, Ed. Publicaciones jurídicas FRU, Bogotá 1988, Parte general, p.33.

184 Article 1, decree of 27 November 1861. [Spanish original, free translation.]

on 20 May 1881. It was not just a military criminal code. The 1881 Military Code regulated the security forces (*Fuerza Pública*)¹⁸⁵ and the rules applicable to military operations and situations of insurrection and rebellion¹⁸⁶ as well as matters relating to ‘military justice’.¹⁸⁷ Book 5 of the 1881 Military Code established how military courts were to be organized, defined military offences and set out judicial procedures. Article 1360 stipulated that “there is no military jurisdiction in peacetime. All individuals from the army are therefore triable by the ordinary judges and courts of the Union for any ordinary offences and wrongful acts (*culpas*) they may commit”.¹⁸⁸ Nevertheless, the Code allowed military courts to have jurisdiction over ordinary offences in certain circumstances but it was restrictive and expressly stated that if a military court acted without the necessary jurisdiction, it would be “grounds for a motion to quash (*recurso de nulidad*)”¹⁸⁹ and that if military judges or courts exercised “powers belonging to the legislative or administrative authorities [...] [it would constitute an] abuse of power”.¹⁹⁰

Later on, in 1931, a Code of Military Justice (*Código de Justicia Militar*) was introduced.¹⁹¹ Fourteen years later, in 1945, the 1931 Code was replaced by the Code of Military Criminal Justice (*Código de Justicia Penal Militar*).¹⁹² However, five years later, in 1950, yet another Military Criminal Code (*Código Penal Militar*) was issued.¹⁹³ The new code was later amended and supplemented through a vast array of emergency legislation. Among the changes made to the military court structure at that time, it is worth mentioning the creation in 1953 by the *de facto* government of General Rojas Pinilla of the Military Court of Cassation and Review (*Corte Militar de Casación y Revisión*) as the highest court within the military justice system. There was no precedent for this move because the military criminal statutes in force up until 1953 had recognized the Supreme Court of Justice as the highest court with regard to military criminal matters.¹⁹⁴ The Military Court of Cassation

185 Book One, “On the Security Forces” (*De la Fuerza Pública*), and Book Two, “On Forces in Action” (*De la Fuerza Activa*), of the Military Code, Law N° 35 of 1881.

186 *Ibid.*, Book Four, “Regulations related to the law of nations which must be observed by the heads of military operations”.

187 *Ibid.*, Book Five, “Military Justice”.

188 *Ibid.*, article 1360. [Spanish original, free translation.]

189 *Ibid.*, article 1363. [Spanish original, free translation.]

190 *Ibid.*, article 1364. [Spanish original, free translation.]

191 Law N° 84 of 23 June 1931.

192 Law N° 3 of 19 February 1945.

193 Decree N° 1125 of 31 March 1950.

194 For example, see articles 1381, 1385, 1386 and 1387 of the 1881 Military Code, articles 25, 27 and 28 of the 1931 Code of Military Justice and articles 5 and 24 of the 1945 Code of Military Criminal Justice.

and Review ceased to exist in 1958 when a new Code of Military Criminal Justice was introduced.

The 1958 Code of Military Criminal Justice was issued by decree by the *de facto* government of General Rojas Pinilla¹⁹⁵ and made permanent by means of a 1961 law.¹⁹⁶ The new code retained many of the emergency provisions introduced in previous years.¹⁹⁷ The 1958 Code remained in force until June 1989 when a new military justice statute, the Military Criminal Code, which had been promulgated in 1988, came into effect.¹⁹⁸ In 1999, that Code was in turn repealed and replaced by a new Military Criminal Code which entered into force in August 2000. Article 608 of the new law stipulated that the Code “shall come into effect one (1) year after its date of issue, providing that the respective Statutory Law which determines the structure of the Administration of Military Criminal Justice is in force”.¹⁹⁹

It is important to stress that, throughout the 20th century, Colombia experienced several civil wars and numerous states of siege. The powers of the military courts were considerably extended following the enactment of a myriad of laws, mainly of an emergency nature, one of the first being Law N° 28 of 1905 which authorized the military courts to try ordinary offences committed by military personnel and members of the rebel forces during the ‘Thousand Day War’ (*Guerra de los Mil Días*). A large number of provisions giving the military courts the power to try civilians were promulgated.

The subjection to military jurisdiction of members of the Colombian National Police, an institution which, despite its civilian nature, had long been incorporated into the Armed Forces²⁰⁰ and attached to the Ministry of Defence, has been a constant feature in the history of military criminal jurisdiction, as established in decrees Nos. 2900 of 1952, 1814 of 1953 and 1426 of 1954. Article 1 of Decree N° 1426 of 1954 expressly stipulated that “all offences committed by members of the Police Forces on active service”²⁰¹ were subject to the jurisdiction of the military courts. Subsequent provisions reiterated this and treated members of the Police as military personnel for judicial pur-

195 Decree N° 250 of 11 July 1958.

196 Law N° 141 of 1961 as a result of which Decree N° 250 of 11 July 1958 was adopted as a permanent law of the Republic.

197 Eduardo Umaña Luna, “*Factores socio-jurídicos de la impunidad*”, in G. Guzmán Campos, O. Fals Borda and E. Umaña Luna, *La Violencia en Colombia*, Carlos Valencia Editores, 9th edition, Bogotá 1980, Book I, p.382.

198 Decree N° 2550 of 12 December 1988.

199 Military Criminal Code of 2000, article 608. [Spanish original, free translation.]

200 Decree 1953 of 1814.

201 Decree 1426 of 1954, article 1. [Spanish original, free translation.]

poses.²⁰² Military criminal codes in force until 1958 did not specifically state that members of the Police were to be tried by military courts. However, the 1958 Code of Military Justice and, later on, the Military Criminal Codes of 1988 and 1999 did specifically grant military privilege to members of the National Police. The Supreme Court of Justice ruled on several occasions that members of the Military Police benefitted from military privilege.²⁰³

The 1958 Code of Military Criminal Justice

The 1958 Code of Military Criminal Justice brought the regulations on the organization and structure of the military justice system, the classification of offences and the rules of procedure together into a single document.

As a result of the new code, military criminal jurisdiction was completely incorporated into the hierarchical command structure of the Armed Forces.²⁰⁴ This was expressly stated in article 2 of the Code: “the exercise of military jurisdiction is inherent to the military hierarchy”.²⁰⁵ Thus the following were to be part of the military court structure: the Supreme Military Tribunal (*Tribunal Superior Militar*), military trial judges (*Jueces de Primera Instancia Penal Militar*), presidents of oral courts martial (*Presidentes de los Consejos Verbales de Guerra*) and military examining magistrates (*Jueces de Instrucción Instancia Penal Militar*). The Code also gave jurisdictional powers to the Minister of War in certain circumstances.²⁰⁶ The Criminal Appeals Division (*Sala de Casación Penal*) of the Supreme Court of Justice was to have powers with regard to military criminal jurisdiction as the court of cassation and review (*tribunal de casación y revisión*) for second instance judgments handed down by the Supreme Military Tribunal and as the appellate court (*tribunal de apelación*) for first instance judgments handed down by the Supreme Military Tribunal as well as for ruling on conflicts of jurisdiction between the ordinary criminal courts and the military courts. However, later on, in 1972, the power to rule on conflicts of jurisdiction was removed and given to the Disciplinary Tribunal (*Tribunal Disciplinario*)²⁰⁷,

202 For example, decrees 2953 of 1968, 2347 of 1971, law 2 of 1977 and decree 2137 of 1983.

203 For example, see the decisions handed down on 29 September 1973, 22 February 1979 and 4 October 1979.

204 The term *Fuerzas Armadas* (Armed Forces) applied to the Military Forces (Army, National Navy and Air Force) and the National Police. These days the equivalent term is *Fuerza Pública*.

205 1958 Code of Military Justice, article 2. [Spanish original, free translation.]

206 *Ibid.*, article 319. The name of the Ministry of War was later changed to Ministry of National Defence.

207 Law N° 20 of 1972.

which exercised it until July 1987 when it was restored to the Supreme Court of Justice.²⁰⁸ The fact that the Supreme Court of Justice had developed restrictive jurisprudence on matters relating to military jurisdiction and service-related acts (*actos del servicio*) was not unconnected with this transfer of jurisdiction.

The Supreme Military Tribunal was made up of the General Commander of the Armed Forces and fifteen judges appointed by the executive. The latter had to be Armed Forces officers who were qualified lawyers and had held the position of judge or prosecutor within the military justice system. The Supreme Military Tribunal was responsible for hearing applications for appeal or review of judgments rendered in the first instance by other military courts and was the court of original jurisdiction for proceedings against military examining magistrates and judge advocates. Nevertheless, in 1984, the Supreme Court of Justice ruled that this latter role was unconstitutional.²⁰⁹

The position of military trial judge was carried out by the highest-ranking official within the chain of command of each of the armed services (the Army, National Navy, Air Force and National Police) and, in turn, within each unit, however big or small, belonging to each of those bodies. For example, in the case of the Army, the Commander of the Army and the commanders of each division, brigade and battalion were military trial judges. Jurisdiction was allocated on the basis of several criteria: the rank of the soldier or police officer facing trial, which military or police unit he belonged to, which unit had territorial jurisdiction in the place where the offence was committed, etc. However, in the case of civilians facing trial by military courts, the role of military trial judge was placed on the shoulders of the Brigade Commanders. Since it was not necessary to have any legal qualifications to be a military trial judge, legal advice was provided to them by the judge advocate assigned to the military or police unit in question.

Rather than being a military court as such, the concept of president of an oral court martial refers to a procedure established by the Code for trying certain offences in the form of an oral court martial. The role of president of an oral court martial was to be performed by an Armed Forces officer appointed by the Commander of the armed force or military or police unit in question.²¹⁰

208 This power were restored to the Supreme Court of Justice in the new Code of Criminal Procedure (Decree N° 50 of 1987).

209 Judgment handed down on 1 November 1984.

210 1958 Code of Military Criminal Justice, article 354. See also Jorge H. Barrios Garzón, “Evolución actual de la jurisdicción penal militar en la República de Colombia”, in *Huitième Congrès International - Ankara, 11-15 octobre 1979. L'évolution de la Justice Militaire*, Brussels 1981, Book VIII, Volume II, p.668.

In practice, it was the commanders themselves who did so. Apart from the President, an oral court martial was made up of a panel of members and a prosecutor, all of whom had to be officers of the Armed Forces who were either on active service or in retirement. The duties of the president of an oral court martial were similar to those of a military trial judge.

The position of military examining magistrate could be held by any officer from the military forces or National Police who had been appointed by a military trial judge or by the Supreme Military Tribunal. In some special cases, the following were able to carry out the duties of military examining magistrate: civilians working for the Armed Forces who had been authorized to do so by the General Commander of the Armed Forces, judge advocates designated by the Minister of War or a military trial judge, officials from the ordinary criminal justice system who had been designated by the Minister of Justice following a request from the General Commander of the Armed Forces or the Armed Forces Prosecutor (*Procurador General de las Fuerzas Armadas*). To be a military examining magistrate, it was necessary to be a lawyer and to have been a judge or prosecutor within the ordinary criminal justice system, a judge advocate, a professor of law at a university or to have completed a special course of study in military law.

While the Supreme Military Tribunal and the military trial courts (*Juzgados de Instrucción Penal Militar*) were permanent courts within the military justice system, this was not the case for the other bodies. The commander of a particular military or police unit could take on the role of military trial judge or convene an oral court martial as the need arose.

The structure was supplemented by the Judge Advocate's Office (*Auditoría de Guerra*) and the Public Prosecutor's Office (*Ministerio Público*). The Judge Advocate's Office provided legal advice to the courts within the military justice system. Each Armed Forces institution had a Senior Judge Advocate's Office (*Auditoría Superior de Guerra*) and senior, principal and auxiliary judge advocates, who were employed by the Ministry of War by whom they were "freely appointed or removed".²¹¹ The Office of the Armed Forces Prosecutor (*Procuraduría General de las Fuerzas Armadas*)²¹² represented the Public Prosecutor's Office (*Ministerio Público*) within the military court system. To be Armed Forces Prosecutor, it was necessary to be an officer on active service with the rank of general who could be "freely appointed

211 *Ibid.*, article 374. [Spanish original, free translation.]

212 This later became the Office of the Prosecutor's Delegate for the Armed Forces (*Procuraduría delegada para las Fuerzas Armadas*) attached to the *Procuraduría General de la Nación*. It was later split between two delegates: one for the military forces and one for the National Police.

or removed” by the Government.²¹³ These requirements were retained following the 1971 reform of the Public Prosecutor’s Office (*Procuraduría General de la Nación*)²¹⁴ and, although the Supreme Court of Justice had declared them to be unconstitutional in 1983²¹⁵, it was not until 1987 that the first civilian would be appointed to the post. Within the various courts that made up the military justice system, the Public Prosecutor’s Office was represented by prosecutors (*fiscales*), the vast majority of whom were Armed Forces officers on active service.

Almost all officials working in the military justice system (prosecutors, tribunal members, court-appointed defence counsel, court clerks and legal advisers) are military or police personnel who are subordinate to the trial judge who is at the same time carrying out the duties of military or police commander and therefore responsible for freely removing or appointing them. This gives rise to a relationship of total dependence on the military or police command. The late President of the Supreme Court of Justice, Dr. Alfonso Reyes Echandía, was quite right when he said the following about the military justice system: “It is therefore the most senior-ranking military officers who investigate and rule on criminal proceedings concerning offences committed by members of the armed forces in the ordinary exercise of their military activities [...] with such a pyramidal system of hierarchy it is impossible to expect a balanced and fair trial”.²¹⁶

The Code of Military Criminal Justice established several types of proceedings: a court martial under the charge of a military trial judge, an oral court martial (a summary trial) and a special procedure (*Procedimiento Especial*),

213 1958 Code of Military Criminal Justice, article 378. [Spanish original, free translation.]

214 Article 36 (a) of Decree Law 521 of 1971. The *Procuraduría General de la Nación* has a dual function: in criminal matters it represents the interest of the Nation and supervise the legality of the proceedings; and it is also the highest authority in matters relating to the official conduct of persons in public service, to the exception of judges and magistrates. It exercises disciplinary authority, conducts the appropriate investigations and imposes the appropriate sanctions (art. 277 of the Constitution). It therefore exercises external disciplinary authority over government institutions, independently of the internal disciplinary authority of each institution. It may refer any evidence it collects to the prosecutors and judges for the purposes of the relevant criminal proceedings. Before the establishment of the *Fiscalía General de la Nación* (Office of the General Public Prosecutor), the *Procuraduría General de la Nación* has been in charge, partially or intirely, of the criminal investigation.

215 Judgment handed down on 16 June 1983.

216 Alfonso Reyes Echandía, “*Legislación y Seguridad Nacional en América Latina*”, in 6 de noviembre magazine, No. 2, Bogotá, June 1986, p.12. [Spanish original, free translation.]

an extremely summary form of trial which, in some cases, lasted less than 48 hours.²¹⁷

As a result of the 1958 Code of Military Criminal Justice, the jurisdiction of the military courts was extended by comparison with earlier military legislation, in particular, the rules on military jurisdiction contained in the 1886 Constitution which had been in force up until then. In fact, article 170 of the 1886 Constitution stipulated that “offences committed by military personnel on active service or in relation to it shall be heard by the courts martial (*Cortes Marciales*) or military tribunals (*Tribunales Militares*), in accordance with the provisions of the Military Criminal Code”.²¹⁸

Under the Code of Military Criminal Justice, the jurisdiction *ratione personae* of military courts encompassed all military and police personnel on active service, civilians working with the Armed Forces, foreign military personnel serving with the Colombian Armed Forces, prisoners of war and spies. As far as jurisdiction *ratione materiae* was concerned, military courts were responsible for trying all offences defined in the Code of Military Criminal Justice (including strictly military offences and ordinary criminal offences which had been ‘militarized’) as well as ordinary criminal offences committed by military or police personnel in the course of duty or connected with it. In wartime or under a state of emergency, their jurisdiction was extended to cover any military or ordinary criminal offence committed by members of the military or police or civilians working for the Armed Forces.

In addition to the regulations contained in the Code of Military Criminal Justice, under a state of siege emergency measures could be adopted. These drastically extended the scope of jurisdiction of the military courts. Under the emergency powers, military courts were systematically granted the authority to try civilians, usually by means of an oral court martial or the special procedure. It is worth remembering that, between November 1958 and June 1982 and from May 1984 until July 1991, Colombia was under a permanent state of siege²¹⁹ and that, for example, between 1965 and 1986, 42 decrees authorizing military courts to try civilians were issued.²²⁰ This practice carried on until 5 March 1987 when the Supreme Court of Justice declared the trying of civilians by military courts to be unconstitutional.

217 For example, see Gustavo Gallón and Federico Andreu, *Sistema judicial y derechos humanos en Colombia*, Comisión Andina de Juristas - Sección Colombiana, Ed. ECOE, Bogotá 1990, pp.24 to 26.

218 Constitution of 1886, article 170. [Spanish original, free translation.]

219 Gustavo Gallón and Federico Andreu, op. cit., pp.21 and 22.

220 Decrees Nos. 1290, 1752 and 3398 of 1965, 28 of 1966, 1661 and 1695 of 1969, 593, 636, 637 and 1133 of 1979, 254, 271, 1518 and 1989 of 1971; 357, 1267, 1315 and 2034 of 1972, 1394 of 1973, 1142, 1250, 1412 and 2407 of 1975, 429, 756, 2193, 219, 2195 and 2260 of 1976, 329 and 330 of 1977, 1923 of 1978, 747, 1042, 1056, 1057, 1058, 1071, 1209, 1290 and 2689 of 1984, and 3664 and 3671 of 1986.

The Code of Military Criminal Justice allowed the victims and their successors to bring a civil action for damages (*parte civil*) in the case of ordinary criminal offences. The only instance in which this was not permitted was in the case of strictly military offences. However, the jurisprudence developed by the Supreme Military Tribunal and other military courts did not allow a civil action to be brought in the case of ordinary criminal offences committed in the course of duty.²²¹

The Military Criminal Code of 1988

In 1988, as a result of a request for extraordinary powers made to Congress in December 1987 by the Minister of Defence, the executive issued a new Military Criminal Code which entered into effect in June 1989.²²²

In general, the new code reproduced most of the provisions of the 1958 Code of Military Criminal Justice together with the various changes and amendments it had undergone. In that sense, it was in reality a reform of the 1958 code rather than a new one. In terms of changes to the structure of the military courts, the following are worth noting: as well as the powers originally attributed to it in the 1958 Code, the Supreme Court of Justice was to be the trial court for proceedings against judges from the Supreme Military Tribunal and the high command of the armed forces; the Supreme Military Tribunal once again became the trial court for proceedings against military examining magistrates and judge advocates; the power to act as a military trial judge was extended to include the Joint Chief of Staff of the Military Forces, directors of military or police training colleges and other senior officers in a position of leadership; and the role of president of oral courts martial disappeared, with their duties being reassigned to military trial judges. The role of representative of the Public Prosecutor's Office remained in the hands of Attorney-General's Delegates for the Military Forces and National Police and the prosecutors acting before the Supreme Military Tribunal, the military trial courts and the oral courts martial. Paradoxically, even though it was possible for the Attorney-General's Delegates for the Armed Forces and National Police to be civilians, the Code stipulated that: "under no circumstances shall the Public Prosecutor's Office be represented by officers of lower rank or seniority than the accused".²²³

Under the new Military Criminal Code, the following procedures were specified: an oral court martial, an oral court martial without a panel (*sin interven-*

221 Gustavo Gallón and Federico Andreu, op. cit., p.26.

222 Decree 2550 of 12 December 1988.

223 Article 367 of the Military Criminal Code (Decree 2550 of 1988). [Spanish original, free translation.]

ción de vocales) and a special procedure (*Procedimiento Especial*). In general terms, these were similar to the procedures contained in the 1958 Code.

But the most sensitive changes introduced as a result of the new Military Criminal Code undoubtedly concerned the scope of jurisdiction of the military courts and the question of being able to bring a civil action for damages (*parte civil*). The new code extended military jurisdiction. Firstly, article 14 stipulated that its provisions would apply to “military personnel on active service who commit a punishable military or ordinary act related to the service itself, inside or outside national territory [...] They shall also apply to [senior] officers, non-commissioned officers and [ordinary] officers of the National Police”.²²⁴ According to article 291 of the Code, “military personnel on active service and members of the National Police, when they commit offences envisaged in this Code or other offences in the course of duty or in connection with it, shall only be tried by [military] judges and courts”.²²⁵ Secondly, among the offences defined in the Code were some which are typically viewed as political, such as rebellion, sedition and riot, thereby once again paving the way for civilians to be tried by military courts under emergency legislation.

Thirdly, under article 291 of the Code, typical gross human rights violations committed against civilians were classed as offences for which the military courts were to have sole jurisdiction. Thus, under the Code, the following were defined as military offences: torture (article 256), extrajudicial execution (article 259) and, according to statements by the then Minister of Defence, the forced disappearance of persons (article 253 concerning “special arbitrary detention”). The aim was clear: to settle once and for all, and in favour of the military courts, the question of which courts were authorised to try typical gross human rights violations committed by members of the security forces. Prior to that, these had been treated as ordinary criminal offences committed in the course of duty, thereby meaning that on some occasions ordinary judges could try such offences since they were not considered to be service-related.

As far as the possibility of bringing a civil action for damages (*parte civil*) was concerned, the new Code simply failed to make any reference to the issue in the section on “Parties to the proceedings”.²²⁶ This legal vacuum was frequently invoked by military courts to deny requests from the victims of human rights violations or their relatives to be parties to the proceedings. Nevertheless, later on, the Constitutional Court affirmed in several of its rul-

224 1988 Military Criminal Code, article 14. [Spanish original, free translation.]

225 *Ibid.*, article 291. [Spanish original, free translation.]

226 *Ibid.*, articles 362 to 382.

ings that there was nothing to prevent victims and/or their successors from joining a civil action to criminal proceedings in military courts and that access to the administration of justice is an integral part of due process.²²⁷

Lastly, it is important to point out although the 1988 Military Criminal Code restored the authority to settle conflicts of jurisdiction between military and ordinary courts to the Supreme Court of Justice, a few months later it was taken away again and given back to the Disciplinary Tribunal. This was done through Decree Law N° 1861 of 1989 and “the progress which had been made through jurisprudence [in terms of interpreting military jurisdiction in a restrictive manner] was wiped out at a stroke”.²²⁸

The system of military justice established in the 1988 Code was severely criticized by the *Procuraduría General de la Nación*. In his Third Report, the *Procurador General* said the following: “Military criminal justice has been very ineffective in bringing to trial and sentencing violators of human rights from among the ranks of the State defence and security bodies. [...] It is noticeable, as has happened on previous occasions, that a misconceived ‘*esprit de corps*’ has led to concealment, made investigation difficult, planted obstacles throughout the proceedings and ended up preventing justice from being done. In addition, in many cases, the decisions reached by the military courts openly contradict rulings by the *Procuraduría General de la Nación* [on disciplinary matters], [...] What is needed is a thorough re-thinking of the way in which members of the Armed Forces should be tried”.²²⁹ The *Procuraduría General de la Nación* concluded that “concepts such as military privilege, a service-related act and due obedience must be rethought in the light of the principles and values contained in the Colombian Constitution, the fundamental basis of which is respect for human rights. It should be made perfectly clear that such classifications should only protect members of the Armed Forces as an exception. To interpret them by extension as analogous to conduct that is not directly related to military or police duties in the strict sense is mistaken”.²³⁰

227 Rulings N° C-173/93 of 4 May 1993, N° C-104/93 of 11 March 1993 and N° 275/94 (Ref: File N° -31,551) of 15 June 1994.

228 Eduardo Umaña Mendoza, “*Examen del Fuero Militar*”, in *Tribunal Permanente de los Pueblos - Proceso a la Impunidad de Crímenes de Lesa Humanidad - Bogotá noviembre 4, 5 y 6 1989*, Ed. Liderlip, Bogotá 1989, p.327. [Spanish original, free translation.]

229 *Procuraduría General de la Nación, III Informe sobre Derechos Humanos, 1993 - 1994*, Bogotá, 1994 pp. 17 and 18. [Spanish original, free translation.]

230 *Ibid.*, p.73. [Spanish original, free translation.]

The 1991 Constitution and the process of military criminal reform

In 1991, a new Colombian Constitution was promulgated and, with several amendments, remains in force today. Members of the military and police are granted their own special jurisdiction in the new Colombia. For example, article 22 of the chapter entitled “On the Security Forces” (*“De la Fuerza Pública”*) states: “Offences committed by members of the security forces on active service, or in relation to it, shall be tried by courts martials (*Cortes Marciales*) or military tribunals (*Tribunales Militares*), in accordance with the provisions of the Military Criminal Code”.²³¹ In 1995, this article was the subject of an amendment to the Constitution that resulted in the addition of the following sentence: “Such Courts or Tribunals shall be made up of members of the security forces on active service or in retirement”.²³² This amendment was introduced in clear and direct response to several judgments and rulings on the protection of rights adopted by the Constitutional Court during 1995. In one such judgment, the Court had declared a provision of the 1988 Military Criminal Code stating that military courts should be made up of members of the Armed Forces on active service to be unconstitutional. The Constitutional Court took the view that members of the Armed Forces on active service, as officials answerable to the executive and subject to military or police structures and hierarchy, could not guarantee the principle of impartiality that is intrinsic to justice. The Court ruled that only civilians and retired members of the Armed Forces could sit on military courts.²³³ The proposed amendment to the Constitution was described as “classic retaliation against the Judiciary”.²³⁴

Issues relating to military jurisdiction were addressed in other provisions of the 1991 Constitution. Military courts were specifically prohibited, even in times of internal upheaval, from investigating and prosecuting civilians.²³⁵ At the same time, a new jurisdictional body, the Supreme Judicial Council (*Consejo Superior de la Judicatura*) was set up and given responsibility for settling conflicts of jurisdiction between different courts.²³⁶ This clearly implied conflicts of jurisdiction between the ordinary criminal courts and military courts. This body eventually replaced the Disciplinary Tribunal. Lastly, the Constitution created the National General Prosecutor’s Office

231 1991 Constitution, “On the Security Forces”, article 22. [Spanish original, free translation.]

232 Legislative Act N° 02 of 1995.

233 Ruling N° C-141/95 by the Constitutional Court.

234 See Comisión Colombiana de Juristas, *Colombia, derechos humanos y derecho humanitario: 1996*, Serie: Informes Anuales, Bogotá 1997, p.108. [Spanish original, free translation.]

235 Article 214 of the 1991 Constitution.

236 Article 256 (6) of the 1991 Constitution.

(*Fiscalía General de la Nación*) with responsibility for instituting criminal proceedings, investigating offences and bringing charges against those responsible.²³⁷ As a result, the Colombian criminal justice system, which until then had been inquisitorial in nature, became accusatorial. However, “offences committed by members of the security forces on active service or in connection with that service”²³⁸ were removed from the sphere of competence of the General Prosecutor’s Office. The creation of the General Prosecutor’s Office was to have a significant impact on the powers which, prior to that, had been held by the *Procuraduría General de la Nación*. Although the latter would continue to perform prosecutorial functions, its role in judicial proceedings would be reduced.

Throughout the 1990s, criticism of the military justice system, and especially the practice of military and police personnel being tried by their peers for human rights violations, gradually increased at both the national and international level. The *Procuraduría General de la Nación* and the Ombudsman’s Office (*Defensoría del Pueblo*), together with the United Nations Human Rights Committee and Special Rapporteurs on extrajudicial executions and Torture, as well as the Inter-American Commission on Human Rights, repeatedly criticized the phenomenon. In a statement on the situation of human rights in Colombia, the United Nations Commission on Human Rights, reiterated its appeal to the Colombian authorities to amend military criminal legislation in order to ensure that members of the security forces who had committed human rights violations could only be tried in the ordinary criminal courts.

On 11 October 1995, the Colombian Government submitted a draft bill to Congress on reform of the Military Criminal Code. However, the proposed reform did not remove torture and other human rights violations from the jurisdiction of the military courts. The Colombian Government presented a summary of the contents of the bill.²³⁹ The main intention was to bring military jurisdiction into line with the 1991 Constitution through adoption of the accusatorial system of criminal justice. Several other changes were included in the bill, such as a definition of what was meant by a service-related act

237 Articles 249, 250 and 251 of the 1991 Constitution.

238 Article 250 of the 1991 Constitution. [Spanish original, free translation.]

239 “*Palabras del Señor Presidente de la República, Doctor Ernesto Samper Pizano, en la Conmemoración de los cien años de la Academia de Jurisprudencia*”, copy, Santafé de Bogotá, 23 September 1994; “*Política del Gobierno del Presidente de la República de Colombia Ernesto Samper Pizano en materia de Derechos Humanos*”, Republic of Colombia, Santafé de Bogotá, February 1995, copy; “*Discurso del Señor Presidente de la República, Doctor Ernesto Samper Pizano de instalación de la Comisión redactora del Código Penal y Procesal Penal Militar*”, Santafé de Bogotá, 8 March 1995.

(*acto de servicio*), the “inclusion of new offences, such as torture, the forced disappearance of persons and genocide, together with severe penalties”²⁴⁰ and the setting up of “military legal apparatus [which is] independent from the operational command structure”.²⁴¹

The bill was widely criticized both inside the country and by the United Nations. At the same time as the proposal was under discussion, far-reaching rulings on the issue of military jurisdiction were being handed down by the Constitutional Court. Those worth highlighting include the 1996 judgment in which it considered that, given that military examining magistrates were employed by the executive, their “degree of independence and impartiality is practically non-existent”;²⁴² the 1997 judgment in which it ruled that under no circumstances could crimes against humanity be considered to be offences committed in the course of duty and that they could only be tried in the ordinary criminal courts;²⁴³ and the 1998 judgment in which several provisions of the 1988 Military Criminal Code were declared unconstitutional. In the latter ruling, the Court took the view that participation of members of the armed forces on active service as panel members on oral courts martial was “irreconcilable with the right to due process and the right to have access to justice”.²⁴⁴ In 1996, a parliamentary proposal calling for the forced disappearance of persons, as well as torture, genocide and the unlawful displacement of populations, to be made specific crimes was reactivated. It was finally adopted in 2000 and expressly stated that military courts could not try such offences.²⁴⁵ In 1999, in the midst of all this and following an unexpected and hasty debate in the Senate and the Chamber of Representatives, Law N° 522, namely the Military Criminal Code, was rushed through.²⁴⁶ Despite the initial draft, significant changes had been made to the new military statute.

240 “*Política del Gobierno...*”, February 1995, op. cit., p.12. [Spanish original, free translation.]

241 Ibidem. [Spanish original, free translation.]

242 Ruling N° C-037 of 1996 by the Constitutional Court. [Spanish original, free translation.]

243 Ruling N° C-358/97 (Ref: File N° D-1445) of 5 August 1997.

244 Ruling N° D-145/98 (Ref: File N° D-1772) of 22 April 1998. [Spanish original, free translation.]

245 Law N° 589 of 6 July 2000. Although in the end the clause prohibiting military courts from having jurisdiction for these offences was thrown out, jurisdiction was in fact attributed to the ordinary criminal courts.

246 Comisión Colombiana de Juristas, Panorama de los derechos humanos y del derecho humanitario en Colombia: 1999 - Informe de Avance, Bogotá, September 1999, p.35.

The Military Criminal Code of 1999

The new Military Criminal Code²⁴⁷ came into force in August 2000. Originally, a condition for its entry into force was that a statutory law, which would determine the administrative structure of the military justice system, should be issued.²⁴⁸ However, this requirement was declared unconstitutional by the Constitutional Court.²⁴⁹ When the Code came into effect and given that there was no such statutory law, the government introduced a whole raft of legislation on the subject.²⁵⁰

The basis of the new system of military justice, as established in the Military Criminal Code, was the removal of operational command duties within the Armed Forces from members of military courts, the partial abandonment of the concept of “judge-commander” that existed in earlier legislation and the establishment of standing military courts. Thus, article 214 of the Code stipulated that “[u]nder no circumstances shall members of the security forces perform command functions at the same time as carrying out the duties of investigator, prosecutor or judge”.²⁵¹ This resulted in the military court structure being completely changed so that it consisted of the Supreme Military Tribunal and the military trial judges and military examining magistrates assigned to each body and unit of the armed forces, all of whom were military or police officers with no operational command. For example, the General Inspectorate of the General Command of the Military Forces (*Inspección General del Comando General de las Fuerzas Militares*) is a military trial court. The following are also military trial courts for the Army: the General Army Inspectorate (*Inspección General del Ejército*) and the military courts at the level of division and brigade. For the Navy, the trial courts are the General Navy Inspectorate (*Inspección General de la Armada Nacional*), the military courts for the naval forces, the military courts for the Naval Infantry Brigade (*Brigada de Infantería de Marina*) and the courts for the Specific Command of San Andrés and Providencia (*Comando Específico de San Andrés y Providencia*). For the Air Force, the following are military trial courts: the General Air Force Inspectorate (*Inspección General de la Fuerza Aérea*) and the respective military courts for the air force command, air force bases, air force groups and training and technical colleges. As far as the National Police is concerned, the following are military trial courts: the National Police Headquarters Court (*Juzgado de la Dirección General de la Policía Nacional*), the General Inspectorate of the National Police (*Inspección General de la Policía Nacional*), the Metropolitan Police Courts

247 Law N° 522 of 1999.

248 Article 608 of the Military Criminal Code.

249 Ruling N° C-368 (Ref.: File No D-2546) of 29 March 2000.

250 Decrees Nos. 1512, 1513, 1514, 1790, 1791, 1797, 1798, 1800 and 1972 of 2000.

251 1999 Military Criminal Code, article 214. [Spanish original, free translation.]

(*Juzgados de Policías Metropolitanas*) and the Police Department Courts (*Juzgados de Departamento de Policía*). Lastly, the Military Court for the Joint Command (*Juzgado Militar de Comando Unificado*) is the trial court for all military criminal proceedings against officers, non-commissioned officers and soldiers from the Joint Command General Headquarters (*Cuartel General del Comando Unificado*). Military examining magistrates are attached to each trial court. Article 266 of the Code authorizes the General Commander of the Military Forces and the Director General of the National Police to set up investigation units (*unidades de instrucción*) consisting of several examining magistrates. In certain special cases, judge advocates can also act as military examining magistrates.

The Supreme Military Tribunal consists of the General Commander of the Military Forces, who presides over it, and fifteen judges. It is the court of original jurisdiction for military criminal proceedings against any military trial judges, military examining magistrates, prosecutors from trial courts and judge advocates who are serving members of the armed forces and who have committed offences while discharging their court responsibilities; it hears applications for the review of judgments handed down by trial judges; it provides advice and hears appeals (*recursos de apelación*) and applications for a review of the facts as well as of law (*recursos de hecho*), arising from military criminal proceedings; and it settles conflicts of jurisdiction within the military justice system. Conflicts of jurisdiction between the ordinary courts and the military courts are dealt with by the Supreme Judicial Council.

The Supreme Court of Justice has certain powers in connection with military justice both as an appellate court (*tribunal de alzada*) and a court of original jurisdiction (*tribunal de instancia*). Its Criminal Appeals Division (*Sala de Casación Penal*) is responsible for hearing applications for the quashing of verdicts that have already been enforced (*recurso extraordinario de casación*) as well as for reviewing appeal rulings handed down by the Supreme Military Tribunal. Once charges have been brought by the General Prosecutor's Office (*Fiscalía General de la Nación*), it is responsible for conducting criminal proceedings against senior officers of the Armed Forces²⁵² as well as senior judges and prosecutors from the Supreme Military Tribunal, from which there is no right of appeal. The Criminal Appeals Division also hears appeals arising from cases for which the Supreme Military Tribunal is the court of original jurisdiction.

The military prosecutors' offices (*Fiscalías Penales Militares*), the Office of the Judge Advocate and the *Ministerio Público* complete the new military

252 Senior officers are those with the rank of General, Admiral, Major General, Vice-Admiral, Brigadier General and Rear Admiral.

justice system. The military prosecutors' offices are responsible for preferring charges in military criminal proceedings brought before the Supreme Military Tribunal and the trial courts. In addition, the military prosecutors at the Supreme Military Tribunal rule on appeals (*recursos de apelación*) and applications for a review of the facts as well as of law (*recursos de hecho*) arising from decisions made by military prosecutors in trial courts. It also rules on impediments or objections raised with regard to the military prosecutors acting in trial courts. Judge advocates act as legal advisers to the trial courts. The *Ministerio Público's* function with regard to military justice is performed by the *Procuraduría General de la Nación* and his delegates or agents. Their duties include ensuring that military criminal proceedings respect human rights, the law and judicial guarantees as well as participating in the proceedings by arguing for the acquittal or conviction of the accused.

Although the new military court structure has been presented by the Colombian government authorities as being “an even more impartial, objective [...] [and] transparent [system of] administration of military criminal justice [...] [in which] the military prosecutors and judges [...] are freed from the chain of command”²⁵³, the reality is quite the opposite. By order of article 221 of the Constitution and as reiterated in article 1 of the Military Criminal Code, only members of the armed forces on active service or in retirement can be military judges. Furthermore, it is established in law that judges from the Supreme Military Tribunal, trial judges and examining magistrates, prosecutors, judge advocates and other officials are “public employees of the Ministry of National Defence”²⁵⁴ who, when on active service, are subject to the rules for career advancement that apply to the Military Forces²⁵⁵ or National Police²⁵⁶, as the case may be. It is also important to point out that officers and non-commissioned officers hold posts within the system of ‘military criminal justice’ and are subject to the disciplinary rules applicable to the Military Forces²⁵⁷ or the disciplinary rules and ethics that apply to the National Police.²⁵⁸ In the event that disciplinary proceedings are brought against these military justice officials, they are conducted by the Executive Director of Military Criminal Justice (*Director Ejecutivo de la Justicia Penal Militar*). Appeals in such cases are heard by the Minister of Defence. The

253 Ministry of National Defence, *La nueva Justicia Penal Militar en Colombia*, Ed. Ministerio de Defensa Nacional, Bogotá, October 2000, pp.3 and 10. [Spanish original, free translation.]

254 Article 3 of Decree N° 1415 of 11 August 2000. [Spanish original, free translation.]

255 Decree N° 1790 of 14 September 2000.

256 Decree N° 1971 of 14 September 2000.

257 Decree N° 1797 of 14 September 2000, article 77.

258 Decree N° 1798 of 14 September 2000, article 125.

Military Criminal Justice Corps (*Cuerpo de Justicia Penal Militar*), which is attached to the Ministry of Defence, is also made up of military judges and prosecutors. Lastly, a new institution, the Supreme Council of Military Criminal Justice (*Consejo Superior de Justicia Penal Militar*), which is attached to the Ministry of Defence, was set up, together with the Head Office of the Supreme Council of Military Criminal Justice (*Dirección Ejecutiva del Consejo Superior de Justicia Penal Militar*), which is attached to the Office for the Coordination of Decentralized Bodies (*Dirección para la Coordinación de Entidades Descentralizadas*) within the Ministry of Defence.²⁵⁹ The members of the Supreme Council of Military Criminal Justice are the Minister of Defence, the General Commander of the Military Forces, the Commanders of the Army, Navy and Air Force, the Director of the National Police, the Vice-President of the Supreme Military Tribunal and the Executive Director of Military Criminal Justice. Given all this, one is forced to the conclusion that the new military criminal structure has not been divorced from the chain of command. It has only been relieved of operational command duties over the troops. Meanwhile, its components - the judges and prosecutors, who are either active or retired members of the Armed Forces as well as employees of the Ministry of Defence - remain under the command of the Minister of Defence and the relevant commanders of the main bodies which go to make up the security forces (*Fuerza Pública*).

Broadly speaking, the definition of the scope of military jurisdiction contained in the new Military Criminal Code is identical to that contained in amended article 221 of the Constitution.²⁶⁰ Article 2 of the Code states that: "Service-related offences are offences committed by members of the security forces (*Fuerza Pública*) as a result of performing the military or police function that is appropriate for them [to carry out] [...]"²⁶¹ The principle that military courts have sole jurisdiction is firmly established in the Code. For example, article 16 also states that "[m]embers of the security forces (*Fuerza Pública*) on active service, when they commit offences envisaged in this Code or others that are service-related, shall only be tried by judges and courts established in this Code which had been instituted prior to commission of the punishable act".²⁶²

The military courts therefore have jurisdiction *ratione materiae* over all typically military offences and 'militarized' ordinary offences designated in the Military Criminal Code as well as any ordinary offences specified under ordinary criminal law and committed by members of the Military Forces or National Police in the course of duty. A long list of offences

259 Decrees Nos 1512 and 1514 of 11 August 2000.

260 1999 Military Criminal Code, article 1.

261 *Ibid.*, article 2. [Spanish original, free translation.]

262 *Ibid.*, article 16. [Spanish original, free translation.]

is given in the code, ranging from typically military offences²⁶³ to ‘militarized’ ordinary offences²⁶⁴ and including offences against public administration.²⁶⁵ In contrast to the 1988 Code, the new code includes political offences.

But the main innovation in the new code is that some types of gross human rights violation have been expressly removed from the jurisdiction of the military courts. Thus, article 3 stipulates that “[i]n spite of the provisions of the previous article, under no circumstances shall the crimes of torture, genocide and forced disappearance, as defined in the conventions and treaties ratified by Colombia, be considered to be service-related offences”.²⁶⁶ On declaring this to be constitutional, the Constitutional Court stated the following: “The offences specified in article 3 as being unrelated to service [...], therefore set the limits of the operative benchmark, as derived from *ius cogens*, beyond which military jurisdiction cannot be extended without violating the Constitution and international humanitarian law”.²⁶⁷ Another significant prohibition contained in the Constitution has also been incorporated into the code: “Under no circumstances shall civilians be investigated or tried by military criminal justice”.²⁶⁸

Despite this progress, many gaps remained. Other types of serious human rights violation, such as extrajudicial executions, rape and sexual abuse, and unlawful searches (*allanamiento ilegal*)²⁶⁹, were not excluded from the jurisdiction of military courts. The Military Criminal Code also categorized offences such as devastation, plundering and pillage as “offences against the civilian population”.²⁷⁰ Furthermore, it retained the notion of due obedience.²⁷¹ In practice, in order to seize jurisdiction over serious human rights violations, the military courts have continued to rely on the idea of a service-

263 Such as offences against discipline (insubordination, disobedience, attacking a superior or subordinate), offences against the Service (abandonment of post or command, abandonment of service, sentinel offences, etc.), offences against the interests of the Armed Forces, offences against honour (cowardice, trading with the enemy, contempt and calumny), and offences against the security of the Armed Forces (attacking a sentinel, false alarm, revelation of secrets, improper use of Armed Forces uniforms and insignias, sabotage, manufacture or possession of explosive and munitions, causing panic).

264 Injuries to the person, robbery, fraud, the unlawful issue or transfer of cheques, etc.

265 Embezzlement, influence peddling, etc.

266 1999 Military Criminal Code, article 3. [Spanish original, free translation.]

267 Ruling N° C-368 (Ref.: File D-2546) of 29 March 2000. [Spanish original, free translation.]

268 1999 Military Criminal Code, article 5. [Spanish original, free translation.]

269 Ibid., article 187.

270 Ibid., article 174. [Spanish original, free translation.]

271 Ibid., article 34.

related act (*acto de servicio*) and, in the case of the offences over which article 3 of the Code states that they do not have jurisdiction, they have begun to assign different legal names to the unlawful acts in question. An example of this is the Mapiripán massacre: a General, against whom evidence existed that he was involved either as the mastermind (*autor intelectual*) or accessory (*cómplice*), was tried in a military court for having falsified a document. When ruling on the conflict of jurisdiction raised by the case, the Supreme Council of the Judiciary considered that the conduct of which the General was accused was “directly related to service”.²⁷²

The Military Criminal Code established the rules of procedures for courts martial (*Corte Marcial*) and the special procedure. Although in principle two tiers of jurisdiction are involved in criminal proceedings conducted by military courts, there are several exceptions.²⁷³ The court-martial procedure, which is conducted by a trial judge assisted by a clerk, is used for offences committed by persons who are unfit to plead and offences which are not appropriate for submission to the special procedure. The special procedure is reserved for offences against the service (*delitos contra el servicio*), the escape of prisoners and the improper use of armed forces uniforms and insignias, as well as for “breaking into the home of another” (“*violación de habitación ajena*”), bodily harm, larceny, robbery, fraud, the unlawful issuing or transfer of cheques and damaging the property of another. The special procedure is swift and of a summary nature. It should be noted that, in all trials conducted by military courts, it is the military criminal authorities who have sole responsibility for bringing prosecutions.

Another positive innovation contained in the new Military Criminal Code was the reintroduction of the concept of the civil party (*parte civil*).²⁷⁴ However, it was to be regulated *sui generis* since, by contrast with the role of the civil party under ordinary criminal legislation, the purpose of allowing civilians to be parties to criminal proceedings in military courts was not so that the damage caused as a result of the offence could be repaired or compensated. Article 305 of the Military Criminal Code states that “[t]he sole object of allowing the participation of a civil party in a military criminal trial is as a procedural stimulus to help discover the truth about the events in question”.²⁷⁵ Contrary to this professed aim, the Code specifically states that the civil party shall not have access to “classified or confidential documents belonging to the security forces (*Fuerza Pública*) which may be called for in a military criminal trial”.²⁷⁶ To obtain reparation or compensation for any

272 Embezzlement, influence peddling, etc.

273 1999 Military Criminal Code, article 207.

274 *Ibid.*, article 305 and following.

275 *Ibid.*, article 305. [Spanish original, free translation.]

276 *Ibid.*, article 310. [Spanish original, free translation.]

damage caused as a result of such offences, the victims or their successors have to bring a claim against the State under administrative law.²⁷⁷

Jurisprudence on military jurisdiction and human rights violations

In the absence of any clear legal provisions limiting military jurisdiction over human rights violations, with the exception of the partial limitation contained in article 3 of the 1999 Military Criminal Code, the jurisprudence developed by the courts when ruling on conflicts of jurisdiction between ordinary and military courts has played a key role in this area. Judges have construed the scope of military jurisdiction to be closely bound up with the concept of a 'service-related act' (*acto del servicio*) since both the 1986 and 1991 Constitutions and the military criminal codes issued in 1958, 1988 and 1999 state that military courts have jurisdiction over ordinary criminal offences committed as a result of service. Successive courts - the Disciplinary Tribunal (1972-1987), the Supreme Court of Justice (1987- 1989), the Disciplinary Tribunal (1989-1991) and, most recently, the Supreme Council of the Judiciary (1991 to date) - have been responsible for settling conflicts of jurisdiction between the ordinary courts and military courts. However, the Constitutional Court, which was set up under the 1991 Constitution, has also played a crucial role in terms of its monitoring of constitutionality as well as the judgments it has handed down in response to requests for protection of rights (*recursos de tutela*). Historically speaking, it is possible to identify two distinct interpretations of the scope of military jurisdiction: a broad interpretation, as typified by the rulings of the Disciplinary Tribunal and the Supreme Council of the Judiciary, and a restrictive interpretation, as embodied in the findings of the Supreme Court of Justice and the Constitutional Court.

Until 1983, as far as ordinary offences committed by police or military personnel were concerned, the Disciplinary Tribunal held two different interpretations of the scope of military jurisdiction, depending on whether or not a state of siege was in place at the time. It took the view that, in peacetime, such offences should be tried in ordinary courts. However, it believed that, under a state of siege, any offence committed by police or military personnel, be it ordinary or military, fell to the jurisdiction of the military justice system. In several of its decisions, the Court based its view on the assumption that, when the country was under a state of siege, all offences could be considered to have been committed as a result of service. Bringing military or police personnel to trial in ordinary courts was only ever hypothetical since an almost continuous state of siege was in place from 1958 onwards.

²⁷⁷ Ibid., article 320.

However, it was in 1983, after complaints had been filed by the *Procuraduría General de la Nación* against 59 officers and non-commissioned officers from the Army and Police involved in the paramilitary group known as “*Muerte a secuestradores*” (MAS), “Death to Kidnappers”, and several proceedings had been opened by examining magistrates in the ordinary courts, that the Disciplinary Tribunal, in addressing the issue, came to establish an extremely broad interpretation of military jurisdiction. The offences under investigation by the ordinary courts included, among others, murder, torture (bodily harm), forced disappearance (kidnapping) and paramilitary activities (conspiracy). In all cases, the Disciplinary Tribunal decided that the military courts were the only ones competent to try the offences of which those concerned were accused. It took the view that, given that they spent 24 hours a day serving their country, any offence committed by them could be deemed to be ‘service-related’. Thus, in a decision concerning an officer and a non-commissioned officer from the Army charged with belonging to MAS as well as attempted murder and bodily harm, the Court ruled that, “[e]ven though at the time the infractions were committed the two [soldiers] were not carrying out any task in particular”, the military courts were competent to hear the case “given that, in the opinion of this court, soldiers on active service are rendering permanent service”.²⁷⁸ All subsequent criminal proceedings against military personnel were dismissed by the military courts. Although there had been some precedents in the jurisprudence of the Disciplinary Tribunal²⁷⁹, the decisions it made in the case of the soldiers from MAS became the touchstone for its doctrine on ordinary offences committed by military personnel.

With regard to members of the National Police, the Disciplinary Tribunal took a more nuanced position. It did not consider police personnel to be serving their country on a permanent basis. Therefore, any ordinary offences committed by them outside of working hours or when on leave should be tried by the ordinary courts. However, the Court also maintained that there was still the possibility that an ordinary offence committed outside of working hours or when on leave might be service-related, in which case the military courts had sole jurisdiction. As a consequence, the idea of a service-related act gradually came to include any kind of unlawful conduct.

Upon reacquiring responsibility for settling conflicts of jurisdiction in 1987, the Supreme Court of Justice adopted a diametrically opposed position and

278 Ruling dated 20 May 1983 by the Disciplinary Court, Judge Rapporteur Gabriel Sonmy Londoño Jaramillo, in *Justicia Penal Militar - Jurisprudencia*, Ministerio de Defensa Nacional, Bogotá, 1983, No. 6, p.21. [Spanish original, free translation.]

279 A month earlier, the court had given the military courts jurisdiction in a case involving the alleged theft of fuel by a soldier (Ruling dated 29 April 1983).

established a restrictive interpretation of the scope of military jurisdiction. It stated that “for soldiers who commit offences in situations that are unconnected with service, trial by an ordinary court of justice is the proper course of action”²⁸⁰ and limited military jurisdiction over ordinary offences to occasions when such offences were committed in the course of performing service-related acts. However, the Court went on to establish objective legal criteria for determining whether an act could be considered to be service-related. These were clearly spelled out in the “Armed Forces Garrison Regulations” (“*Reglamento de Guarnición de las Fuerzas Armadas*”) and the disciplinary procedures used by the Military Forces and National Police.²⁸¹ In some cases submitted to it, the Court consequently ruled that soldiers or police involved in forced disappearances should not be tried by military courts because forced disappearance could not be deemed to be a service-related act. Similarly, in the case of extrajudicial executions committed by members of the military or police, the Court considered that such acts could not be deemed to have been committed “within the sphere of service” and that jurisdiction over such offences fell to the ordinary courts.²⁸² Nevertheless, it should be noted that, in some cases, the Court did rule that military courts were competent to try human rights violations. For example, in the case of the arrest and subsequent forced disappearance of a civilian at the hands of soldiers, the Court took the view that the events had taken place within the framework of a military investigation and that therefore the military courts were competent.²⁸³ Similarly, in a case related to a massacre of civilians perpetrated by a paramilitary group acting in complicity with military and police commanders, the Court referred the proceedings to a military court on the grounds that the acts of which the local Army and Police commanders were accused constituted a “breach of the legal duty to come to the aid of the population” and were acts which were an intrinsic part of service.²⁸⁴

In 1989, upon regaining responsibility for settling conflicts between different courts, the Disciplinary Tribunal continued to systematically reiterate its broad interpretation of the scope of military jurisdiction.

The Supreme Council of the Judiciary, when justifying the grounds for military jurisdiction, abandoned the Disciplinary Tribunal’s argument that

280 Supreme Court of Justice of Colombia, Criminal Division, ruling dated 11 October 1988. [Spanish original, free translation.]

281 Ruling dated 3 May 1988 (Judge Rapporteur Carreño Lenguas).

282 Rulings dated 13 March 1989 (Judge Rapporteur E. Saavedra Rojas) and 20 April 1989 (Judge Rapporteur G. Gómez Velásquez). [Spanish original, free translation.]

283 Ruling dated 27 April 1989 (Judge Rapporteur Dávila Muñoz).

284 Ruling dated 15 February 1989 (Judge Rapporteur Dávila Muñoz). [Spanish original, free translation.]

military personnel were serving on a permanent basis. Instead, it focused its interpretation of the scope of military jurisdiction on the establishment of a “circumstantial link of a modal, temporal and spatial nature” between the offence and military or police duties so that whether or not military jurisdiction was appropriate depended on whether there was a direct or indirect link between the offence and those duties.²⁸⁵ This resulted in a broad interpretation of the reach of military jurisdiction, especially in cases where senior officers were facing prosecution. Nevertheless, in some cases of serious human rights violations, especially those involving lower-ranking and non-commissioned officers, the Supreme Council granted jurisdiction to the ordinary courts. One of the most controversial cases in which it ruled in favour of military jurisdiction was that of the rape of a female police officer by the Commander of a Police Department.²⁸⁶ The grounds it gave for the decision were that, given that the victim had been raped in a police facility and during working hours, it fell into the category of ordinary offences committed as a result of service. Similarly, in 1995, the Supreme Council ruled that the military courts were competent to try a case of forced disappearance involving members of the Police on the grounds that they were carrying out “acts befitting their function”.²⁸⁷ What was paradoxical about both these cases was that the military courts had previously declared themselves incompetent to try them on the grounds that they were ordinary offences which were not in any way related to police service. In 1997, when ruling on the conflict of jurisdiction arising from the case of the forced disappearance, torture and murder of Isidro Caballero and María del Carmen Santana, the first case in which Colombia was convicted by the Inter-American Court of Human Rights, the Supreme Council found in favour of the military courts as far as the offences attributed to an Army General were concerned and in favour of the ordinary courts as far as the offences attributed to the other commissioned officers, non-commissioned officers and soldiers involved in the case were concerned.²⁸⁸ Even though the ordinary courts had been investigating the General for his possible involvement in the offence as the mastermind (*autor intelectual*) or accessory (*cómplice*), the Council took the view that the events under investigation fell within the service sphere. In its reasoning, the Council dismissed several pieces of evidence, in particular, the testimony of a well-known paramilitary leader. Another case of double standards was that of the massacre at Los Uvos, in which the Council at first assigned jurisdiction

285 Rulings dated 11 November 1993 (file N° 806/141) and 15 June 1995 (file N° 4943A). [Spanish original, free translation.]

286 Ruling dated 6 July 1995 (file N° 5188A).

287 Ruling dated 11 May 1995 (file N° 4720/145). [Spanish original, free translation.]

288 Ruling dated 10 April 1997 (file N° 13362 A), Judge Rapporteur Miryan Donato de Montoya.

to the ordinary courts²⁸⁹ but, when some officers became involved in the proceedings, transferred it to the military courts.²⁹⁰

The Constitutional Court has ruled on the bounds of military jurisdiction on several different occasions. In a 1995 ruling, it took the view that “[a] service order is an order whose objective aim is to carry out the purposes for which the institution has been created. An order which ostensibly goes against those purposes or against the overriding interests of society cannot legitimately elicit obedience. The order to sexually assault or inflict torture on another person under no circumstances deserves to be called a service order. Such actions, which are given by way of illustration, are completely extraneous to the object of the public role entrusted to the military and their legal duties as a whole”.²⁹¹ But it was in 1997, when it delivered its momentous ruling on the lack of constitutionality of several articles of the 1988 Military Criminal Code, that the Constitutional Court would unequivocally set the limits of military jurisdiction with regard to human rights and the concept of the ‘service-related act’. The Constitutional Court recalled that “the law indicating which offences it is appropriate to try under [military criminal] jurisdiction must respect the constitutional law under which both the fundamental content of military jurisdictional authority as well as its restrictive and special nature are determined. [...] The extension [of military jurisdiction] beyond the limits envisaged in the Constitution would undermine ordinary [criminal] jurisdiction which, by order of the same Constitution, has been established as the jurisdiction with general competence (*‘juez natural general’*) and, as a final blow, would also be in breach of the principle of equality which can only be achieved through a restrictive interpretation of the exceptions to standard judicial protection”.²⁹² The Court specified that the term *‘servicio’* (‘service’), used in article 221 of the 1991 Constitution, “alludes to the specific activities which are directed towards carrying out or achieving the rightful aims of the military forces - to defend the sovereignty, independence and integrity of the national territory and the constitutional order - and the national police - to maintain the conditions necessary for rights and public freedoms to be exercised and for peaceful coexistence”.²⁹³ The Court also stated that article 221 of the Constitution “starts from the premise that a member of the security forces (*Fuerza Pública*), while fulfilling that role, also has a role as a person and a citizen. As is also the case with anyone else, the duties of a

289 Ruling dated 2 October 1992.

290 Ruling dated 23 September 1996 (file N° 6973B/222 C).

291 Ruling C-578 of 1995. [Spanish original, free translation.]

292 Ruling N° C-358/97 of 5 August 1997 (Ref: File N° D-1445). [Spanish original, free translation.]

293 Ibidem. [Spanish original, free translation.]

member of the security forces are not entirely directed at or bound up with public service. As a consequence, not all acts or omissions on the part of a member of the security forces should be covered by military jurisdiction”.²⁹⁴ As well as laying down the objective legal criteria to be applied when determining whether or not an ordinary offence should be considered to have been committed “in connection with service itself”, the Court concluded that “the types of conduct which constitute crimes against humanity are clearly contrary to human dignity and the rights of the person and therefore have no connection with the constitutional role of the security forces (*Fuerza Pública*) to the extent that an order to commit an act of that kind does not deserve to be obeyed in any way. [...] a crime against humanity is so foreign to the constitutional role of the security forces (*Fuerza Pública*) that it can never be related to acts that are properly connected with service, since the very commission of such criminal acts severs whatever link there may have been between the conduct of the agent and discipline and the rightful role of the military or police, as a result of which responsibility for trying such offences lies with the ordinary courts”.²⁹⁵ Lastly, the Court ruled that: “Given that military criminal jurisdiction is an exception to the general rule, military courts shall have jurisdiction only in cases in which it is abundantly clear that the exception to the principle of general competence (*juéz natural general*) should be applied. This means that in situations in which there is any doubt about which court is competent to conduct a particular trial, the decision must go the way of ordinary jurisdiction on the grounds that it has not been possible to fully demonstrate that the case in question was an exception”.²⁹⁶

However, the 1997 ruling by the Constitutional Court was disregarded by the Supreme Council of the Judiciary and the military courts failed to comply with it. In 1998, for example, when ruling on the conflict of jurisdiction arising from the case of a General and Lieutenant Colonel facing prosecution for paramilitary activities, the Supreme Council of the Judiciary considered that the conduct attributed to the two officers had taken place within the framework of the performance of their duties - namely, “to preserve national sovereignty and independence, the security of the territory and constitutional order” - and that therefore authority to try the case lay with the military courts.²⁹⁷

Nevertheless, in July 2000, the Supreme Council of the Judiciary completely reversed its position on military jurisdiction and fully complied with the 1997

294 Ibidem. [Spanish original, free translation.]

295 Ibidem. [Spanish original, free translation.]

296 Ibidem. [Spanish original, free translation.]

297 Ruling dated 19 November 1998 (File N° 19981033A). [Spanish original, free translation.]

ruling by the Constitutional Court. In the case of the forced disappearance, torture and murder of Nydia Erika Bautista de Arrellana, the Supreme Council of the Judiciary granted jurisdiction to the ordinary courts by invoking the ruling handed down by the Constitutional Court.²⁹⁸

Lastly, in a 2001 ruling, the Constitutional Court, as well as reaffirming its 1997 jurisprudence, stated that “the types of conduct which openly disregard the principle of human dignity and flagrantly entail violation of the constitutional rights of citizens shall never be considered to be service-related acts”.²⁹⁹ In this ruling in response to an application for protection of rights (*recurso de tutela*), the Constitutional Court ordered the proceedings against the General in connection with events that had taken place during the Mapiripán massacre to be returned to the ordinary courts and overturned the decision by the Supreme Council of the Judiciary in which jurisdiction had been assigned to the military courts. The Court took the view that the conduct attributed to the General could not be considered to be a “service-related” act, as the Supreme Council of the Judiciary had found. The Court made the following comment on this issue: “The military forces have an absolute obligation to prevent ignorance of international humanitarian law ([which is] an absolute constraint, even under a state of emergency, according to the provisions of article 214 of the Constitution) and the rights which, under the international treaties ratified by Colombia, cannot be suspended during such periods [...]. To allow them to occur, either because they are actively involved in them or because they have neglected their state duty to protect the rights of citizens, constitutes a flagrant violation of their position as guarantor of the minimum basic conditions of social organization and they can therefore never be considered to be service-related acts”.³⁰⁰ The Court also said the following: “The fact that [the security forces (*Fuerza Pública*)] are in this position of guarantor means that, regardless of the type of involvement in the offence (as principal or accessory), how far advanced the offence was in its execution (attempted or completed) or what the motivation was (intent or negligence), the nature of the liability concerns crimes against humanity or gross human rights violations in general. The nature of the offence is not affected by the internal construction of the liability; the latter does not change because the person involved (or, as the case may be, the person who was negligent) simply facilitated commission of one of the main acts involved or because the act in question was not completed”.³⁰¹

298 Ruling dated 21 July 2000 (File N° 10443 B).

299 Ruling N° SU-1184-2001 (Ref: File T-282730). [Spanish original, free translation.]

300 Ibidem. [Spanish original, free translation.]

301 Ibidem. [Spanish original, free translation.]

11. Congo (The Republic of the)

History

After a tortuous journey, the Republic of the Congo finally achieved independence on 15 August 1960. Although a constitution had already been adopted in 1958, the first Constitution of the Republic of the Congo as a fully independent state was adopted on 2 March 1961. The 1961 Constitution made no reference at all to military courts. Between 1964 and 1989, five successive constitutions and two basic laws were adopted. Eventually, in 1992, another new Constitution was adopted and remains in effect today. It too contained no mention whatsoever of military courts. In 1992, the Congolese authorities launched a process of institutional reform, particularly focusing on legal matters, which is yet to be completed.

The current situation

Military criminal jurisdiction is regulated under the Code of Military Justice and the Law on the Organization of the Judiciary, both of which were introduced in 1992 and amended in 1999. It consists of military tribunals, military examining magistrates and the Public Prosecutor's Office. However, it should be noted that other courts from the ordinary criminal justice system also play a role in military justice matters. For example, the Courts of Appeal hear appeals against judgments handed down by the Military Tribunals.³⁰² Each Court of Appeal has a special division to deal with such matters. The Courts of Appeal can also be turned into 'criminal courts' to try misdemeanours and offences committed by military personnel.³⁰³ However, for these purposes, according to the Law on the Organization of the Judiciary, the 'criminal courts' within the Courts of Appeal must be composed in a special way so that the judges who try military personnel in 'military courts' and the judge representing the Public Prosecutor's Office are members of the military. Lastly, the Supreme Court of Justice is responsible for settling conflicts of jurisdiction between military tribunals and ordinary courts³⁰⁴ and for hearing applications for annulment.³⁰⁵

The Law on the Organization of the Judiciary stipulated that a military tribunal should be set up for each military region or each garrison. However,

302 Law on the Organization of the Judiciary, article 48.

303 Law on the Organization of the Judiciary, article 56.

304 Law on the Organization of the Judiciary, article 144.

305 Article 4 of Law N° 17-99 of 15 April 1999, which amends Laws N° 025-92 and N° 30-94 on the organization and operation of the Supreme Court.

military tribunals can have jurisdiction over several military regions or garrisons. Military tribunals are made up of either civilian or military judges who are appointed by the President of the Republic on the basis of proposals put forward by the Supreme Council of the Judiciary and with the prior consent of the Ministry of Defence. Under the Law on the Organization of the Judiciary, military courts must be presided by a civilian judge assisted by two military judges. In certain circumstances, the court can be presided by a military judge. In wartime, the presiding judge must be a member of the military.

Military examining magistrates are military judges appointed by the President of the Republic on the basis of names put forward by the Higher Council of the Magistracy and with the prior consent of the Ministry of Defence.

Prosecutorial duties in military courts come under the charge of the Attorney-General and are performed by prosecutors acting on his behalf who must be military judges.

Clerks to military tribunals are members of the military who are appointed to the post by the Ministry of Defence.

Military tribunals have jurisdiction over misdemeanours and disciplinary matters as well as criminal matters. Their jurisdiction encompasses the offences listed in the Code of Military Justice, offences against the laws and customs of war committed on Congolese territory, ordinary offences committed as a result of service and ordinary offences committed inside military installations.³⁰⁶ In the case of disciplinary matters, military courts are also competent to hear cases of criminal infractions committed by juveniles under 18 years of age or students at military training colleges.

In times of war and emergency, the jurisdiction of military courts is extended. When a state of siege is in place, military courts are competent to try any offences committed during the emergency period which are related to it. In wartime, military courts have sole jurisdiction for trying all ordinary criminal offences.

12. Costa Rica

The Republic of Costa Rica has had no armed forces since the enactment of the Constitution of 1 December 1948, which is still in force today. Article 12 of the Constitution³⁰⁷ bans the Army as a standing institution and states that “military forces shall be organized solely by continental agreement or for

306 Law 19 of 15 August 1999.

307 The Constitution has been amended several times, notably in 1968, 1975, 1989 and 2001.

national defence”.³⁰⁸ Consequently, there is no system of military justice. As Daniel González Álvarez has pointed out, “[w]ith the abolition of the army on 1 December 1948, military criminal justice ceased to have any real, effective or true force in [Costa Rica]”.³⁰⁹

However, if the hypothesis raised by article 12 of the Costa Rican Constitution was to come to pass, it is possible that the 1898 Code of Military Justice³¹⁰ and the ‘Ordinance for the Republican Army’ (*Ordenanza para el Ejército de la República*)³¹¹, which were the last military justice laws in force before the new Constitution came into effect, would once more become officially applicable. González Álvarez points out that the “Code of Military Justice from that period is ‘self-sufficient’ from a legal perspective in that it possesses the three basic elements that are required to ensure that military criminal justice works properly. In fact, Book One could be equated to a Basic Law on Military Justice, Book Two to a Criminal Code, with a general part and a special part, and Book Three to a Code of Criminal Procedure”.³¹²

González Álvarez believes that the 1898 Code of Military Justice would be officially applicable because “[t]he four ordinary Criminal Codes promulgated during this century have repealed all the criminal laws relating to offences specified in those codes except, in the case of all four codes, the provisions that are of a military criminal nature”.³¹³ He therefore concludes that “none of the ordinary Criminal Codes issued after the Code of Military Justice was introduced sought to repeal it”.³¹⁴

13. Cuba

History

Compared with other Latin American countries, the Cuban movement seeking emancipation from Spain was one of the last to get under way, beginning

308 Constitution of 1 December 1948, article 12. [Spanish original, free translation.]

309 “*La Vigencia Formal de la Justicia Penal Militar en Costa Rica*” in *Revista de la Asociación de Ciencias Penales de Costa Rica*, Costa Rica, December 1989, Year 1, N° 1, on web page: <http://www.poder-judicial.go.cr/alatercera/revista/REVISTA%2001/GONZAL01.htm>.

310 Law N° 23 of 23 June 1898.

311 Law N° 18 of 10 June 1898.

312 “*La Vigencia Formal de la Justicia Penal Militar en Costa Rica*”, op. cit. [Spanish original, free translation.]

313 Ibidem. They are the Criminal Codes of 1918 (art. 438), 1924 (art. 561), 1941 (art. 434) and 1970 (art. 414), which is currently in effect. [Spanish original, free translation.]

314 Ibidem. [Spanish original, free translation.]

only in 1868. The war of independence lasted several years and, in 1878, a peace treaty, which did not include independence, was signed in El Zanjón. The Cuban pro-independence troops were not unanimous in their support for the agreement and a group led by General Antonio Maceo carried on fighting. It should be pointed out that, in 1869, the first Cuban Constitution, known as the Constitution of the Republic in Arms, had been approved but it ceased to have effect once the Treaty of Zanjón had been signed.³¹⁵

In May 1895, the struggle for independence was relaunched under the leadership of José Martí. On 15 February 1898, the sinking of the US battleship *Maine*, which was anchored in the port of Havana, led to war between the United States of America and Spain. In 1898, the United States and Spain signed the Treaty of Paris. As a result of the treaty, Cuba ceased to be a colony of Spain but became a kind of protectorate of the United States. On 1 January 1899, the United States took official possession of Cuba and the country was administered by a US military governor. In 1902, Cuba went from having an administration run by a US military governor to being a republic under the protection of the United States. The following year saw the adoption of the Constitution of the Republic of Cuba to which the Platt Amendment was appended.³¹⁶ Between 1900 and 1933 Cuba was occupied by United States troops on four occasions. In 1933 a new Constitution was enacted only to be repealed a few months later and replaced once again by the 1901 Constitution.

During the Spanish colonial period as well as under the US military occupation and even during the 1930s, Spanish legislation, including laws promulgated by the Crown as well as by Spanish republican governments, remained in force. Similarly, some regulations issued under the US military administration were still in effect.³¹⁷ But in about 1930 national laws began to emerge. For example, in 1936 a Military Code³¹⁸ was promulgated and remained in force for several decades. In 1938, a criminal statute known as the Code of Social Defence (*Código de Defensa Social*) replaced the Spanish Criminal Code of 1870 which had been in force in Cuba until then. In 1940, a new Constitution that included significant advances in the field of social rights

315 Constitution of the Republic in Arms, adopted on 10 April 1869 in Güarimo. See Derecho Constitucional, Facultad de Derecho, Universidad de La Habana, Ed. Ministerio de Educación Superior, Havana (date not given), p. 160.

316 Through the so-called Platt Amendment, the United States arrogated to itself many rights and powers over Cuban territory.

317 For example, the Postal Service Code (*Código Postal*) promulgated under Order N° 115 of 21 July 1899 remained in force until 1987 when it was expressly repealed in the penultimate article of the Criminal Code (Law N° 62 of 1987).

318 Francisco Jiménez y Jiménez, Introducción al derecho penal militar, Ed. Civitas, Madrid, 1987, p.129.

was adopted. In the area of military jurisdiction, the Constitution removed responsibility for trying military offences from the ordinary criminal courts.

In 1952, General Fulgencio Batista led a military coup. In 1959, General Batista was overthrown by the rebel forces led by Fidel Castro. It is important to point out that, prior to achieving power, the rebel movement had equipped itself with an embryonic system of military criminal law, namely, Regulation N° 1 of the Rebel Army, issued by the High Command in the Sierra Maestra on 21 February 1958. This specified several military offences and stipulated how they were to be punished. Regulation N° 1 of 1958 was to lay the foundations for the system of military criminal law later established by the Cuban Government.

The 1959 revolution and Cuba's subsequent transformation into a socialist state would also have far-reaching consequences for military justice. However, two clear stages can be distinguished: the first, lasting from 1959 until 1976, and the second, which began with the 1976 Constitution. In 1959 the new government introduced a Constitutional Law which retained many features of the 1940 Constitution. From 1959 onwards, a process of institution-building and legal reform got under way. Nevertheless, during the first stage, many norms which existed before the new government came to power remained in force and many new rules and regulations were adopted in an *ad hoc* way. As pointed out by the Inter-American Commission on Human Rights, "[t]he legislation promulgated by the Revolutionary Government in the first few months after its installation recognized Regulation N° 1 issued by the High Command in the Sierra Maestra on 21 February 1958 as the main penal law and treated the substantive and procedural laws issued by the Republic of Cuba in Arms which had been in force during the war of independence from Spain as supplementary to it while, at the same time, giving similar supplementary though lesser status to the Code of Social Defence and the Law on Criminal Proceedings (*Ley de Enjuiciamiento Criminal*). Apart from the legislation already mentioned, the Cuban Government has promulgated other laws of a penal nature which have extended and changed the list of recognized offences contained in the laws in force before the revolution".³¹⁹

During this first stage of its life, the new government set up the Revolutionary Tribunals (*Tribunales Revolucionarios*). This was done despite the fact that articles 174 and 175 of the Constitutional Law granted the ordinary courts jurisdiction over all offences except for military ones and prohibited the setting up of special courts to try matters which fell to ordinary

319 Report on the Situation of Human Rights in the Republic of Cuba, document of the Organization of American States OEA/Ser.L/V/II.4, doc. 2, 20 March 1962. [Spanish original, free translation.]

criminal jurisdiction. The Constitutional Law itself, under additional transitory provision No 3, allowed for the Constitutional Law to be suspended in cases that were subject to the jurisdiction of the Revolutionary Tribunals. To start with, the tribunals were authorized to try offences established under Regulation No. 1 of the Rebel Army and committed by military personnel or civilians working for the government of General Batista. Within a few months responsibility for trying such offences was transferred from the Revolutionary Tribunals to the ordinary courts. However, the Constitutional Reform Law (*Ley de Reforma Constitucional*) of 29 October 1959 amended article 174 of the Constitutional Law and reintroduced the Revolutionary Tribunals to conduct “trials and cases which had been or may be opened for offences defined in law as counter-revolutionary, whether committed by civilians or members of the military”.³²⁰ A supplementary law was passed stating that the Revolutionary Tribunals had sole jurisdiction for trying such offences.³²¹

In 1976, the Constitution of the Republic of Cuba, which remains in force today, was adopted.³²² The Revolutionary Tribunals were abolished. A main feature of this second stage was the passing of numerous domestic laws. That same year saw the adoption of the Law on the Military Prosecutor’s Office (*Ley de la Fiscalía Militar*).³²³ In 1977, the Law on the Organization of the Judicial System (*Ley de Organización del Sistema Judicial*)³²⁴ and the Code of Criminal Procedure (*Código de Procedimiento Penal*) were issued.³²⁵ As far as military justice was concerned, that same year saw the adoption of the Law on Military Courts (*Ley de los Tribunales Militares*) and the Law on Military Criminal Procedure (*Ley Procesal Penal Militar*).³²⁶ In 1978, the regulations governing the operation of the Attorney-General’s Office (*Reglamento de la Fiscalía General de la República*) were adopted.³²⁷ Lastly, in 1979, the Law on Military Offences (*Ley de los Delitos Militares*) and the Criminal Code (*Código Penal*) were introduced.³²⁸ It should be

320 Constitutional Reform Law of 29 October 1959. [Spanish original, free translation.]

321 Law No. 634 of 20 November 1959.

322 The Constitution was amended in 1992.

323 Law N° 1310 of 21 August 1976.

324 Law N° 4 of 1977. Although a law on this matter had already been issued in 1973 (Law N°1250 of 1973). In 1997, the 1977 law was partially replaced by the Law on the People’s Courts (*Ley de los Tribunales Populares*).

325 Law N° 5 of 1977. The Code was later amended by Decree-Law N° 151 of 1994.

326 Law N° 6 of 8 August 1977.

327 This was replaced in 1997 by the Law on the Attorney-General’s Office (*Ley de la Fiscalía General de la República*) (Law N° 83 of 1997).

328 Law N° 21 of 15 February 1979. In 1987, a new Criminal Code was adopted (Ley N° 62 de 1987).

noted that the ordinary Criminal Code also contained some military offences.³²⁹

The current situation

The Cuban Constitution of 1976 makes no mention of military courts. Article 120 of the Constitution states that “[t]he duty to dispense justice stems from the people and is performed on their behalf by the People’s Supreme Court (*Tribunal Supremo Popular*) and any other courts established by law. The law stipulates the main objectives of the work of the judiciary and regulates the organization of the courts, the scope of their jurisdiction and competence, their powers and the way in which they must be exercised, the requirements which judges must fulfill, the way in which judges are to be elected and the grounds and procedures for their removal or dismissal from duty”.³³⁰ In addition, article 121 states that “[t]he courts are a system of state bodies, the structure of which is operationally independent of any other and hierarchically subordinate to the National Assembly of Popular Power (*Asamblea Nacional de Poder Popular*) and the Council of State (*Consejo de Estado*) [which is part of the executive]”.³³¹ Under current law, the justice system consists of: the People’s Supreme Court, Provincial People’s Courts (*Tribunales Provinciales Populares*), Municipal People’s Courts (*Tribunales Municipales Populares*) and Military Courts (*Tribunales Militares*). Thus Cuban military justice has its basis in law and, like the rest of the justice system, is dependent on the executive and the legislature.

Cuban military criminal legislation consists of the Law on Military Courts, the Law on Military Offences, the Law on Military Criminal Procedure and the Law on the Military Prosecutor’s Office. Some provisions of the Law on the Organization of the Judicial System³³², the Law on the People’s Courts (*Ley de Tribunales Populares*)³³³, the Law on the Attorney-General’s Office (*Ley de la Fiscalía General de la República*)³³⁴, the Criminal Code³³⁵ and the Code of Criminal Procedure³³⁶ also apply to military criminal matters.

The military court system is made up of the People’s Supreme Court, the Territorial Military Courts (*Tribunales Militares Territoriales*) and the

329 Francisco Jiménez y Jiménez, *Introducción al derecho penal militar*, Ed. Civitas, Madrid, 1987, p.129.

330 Constitution of 1976, article 120. [Spanish original, free translation.]

331 *Ibid.*, article 121. [Spanish original, free translation.]

332 This was amended in 1997 by the Law on the Attorney-General’s Office.

333 Law N° 82 of 1997.

334 Law N° 83 of 1997.

335 Law N° 62 of 1987. Some amendments were made to the Code in 1999.

336 Law N° 5 of 1977 and amended by Decree-Law N° 151 of 1994.

Military Prosecutor's Office. The first level of jurisdiction is provided by the Territorial Military Courts. The prosecutorial function in military courts is discharged by the Military Prosecutor's Office. Although it forms part of the structure of the Attorney-General's Office, its organization, structure and functioning is determined by the Law on the Military Prosecutor's Office.³³⁷ The latter is directed by the Deputy General Prosecutor (*Vicefiscal General*) and is made up of a number of military prosecutors who are responsible for monitoring and protecting legality as well as instigating and conducting public criminal action on behalf of the State.

The People's Supreme Court is responsible for scrutinizing the work of the military courts and for settling conflicts of jurisdiction between the People's Courts and the Military Courts. The People's Supreme Court, sitting in full session, is authorized to conduct criminal proceedings against Ministers of the Revolutionary Armed Forces and the Minister of the Interior, from which there is no right of appeal. The Military Division of the People's Supreme Court is the trial court for cases involving deputy ministers and senior officials from the Ministries of the Revolutionary Armed Forces and Interior and the commanders of the main branches and corps of the Armed Forces. In these cases, appeals can be brought before the Special Division of the People's Supreme Court.³³⁸ The Military Division also hears applications for annulment and review and other types of appeal with regard to judgments handed down by military courts. The President and the other members of the Military Division are elected by the National Assembly on the basis of proposals put forward by the Ministers of Defence and Interior. The members of the Military Division, including the President, can be professional or lay judges but in all cases they must be members of the military on active service.³³⁹

Military criminal jurisdiction is wide-ranging. For example, article 5 of the Code of Criminal Procedure establishes the scope of the jurisdiction *ratione materiae* and *ratione personae* of military courts in the following terms: "It falls to the military courts to conduct criminal proceedings resulting from the commission of any punishable act imputed to a member of the military, even when some of those involved or the victim are civilians".³⁴⁰ Similarly, from the perspective of jurisdiction *ratione loci*, military courts are competent to try any offence committed in a military zone, regardless of whether the perpetrator is a civilian or a member of the military. The military courts therefore

337 Article 9 of the Law on the Attorney-General's Office.

338 Article 24 of the Law on the People's Courts.

339 Article 74 of the Law on the Organization of the Judicial System. See also articles 20, 42, 45 and 66 of Law N° 82 of 1997, Law on the People's Courts.

340 Code of Criminal Procedure, article 5. [Spanish original, free translation.]

have jurisdiction over offences under both military criminal law and ordinary criminal law on the grounds that the perpetrator is a member of the military or because the place where the offence has been committed is of a military nature. Absolute military jurisdiction is therefore built into the system.

Under the Code of Criminal Procedure, jurisdiction is the prerogative of the military courts. Cases that fall to their jurisdiction can only be tried by the People's Courts if a military prosecutor or a military court withdraws in their favour.³⁴¹

14. Ecuador

History

Article 160 of the Ecuadorian Constitution of 1948, as amended in 1960, stated that “military jurisdiction applies to members of the Armed Forces on active service”.³⁴² In the section devoted to the judiciary, no reference was made to military or police jurisdiction. The vast majority of the laws concerning military and police criminal jurisdiction date from that period. For example, the Military Criminal Code, the Code of Military Criminal Procedure and the Basic Law on the Armed Forces Justice Service (*Ley Orgánica de Servicio de Justicia en las Fuerzas Armadas*) were adopted in 1961. The Criminal Code³⁴³ and Code of Criminal Procedure for the National Civil Police (*Policía Civil Nacional*) both date from 1960. With some amendments, these laws on military and police jurisdiction remain in force today.

In 1979, a new Ecuadorian Constitution came into effect. The new Constitution, which was amended in 1984, included specific provisions on military and police jurisdiction. For example, article 131 expressly states that “[m]embers of the *Fuerza Pública* [the Armed Forces and National Police] enjoy special jurisdiction, they can only be prosecuted or deprived of their rank, honors and pensions for the reasons and in the manner specified by law, except for ordinary infractions which shall be tried under ordinary jurisdiction”.³⁴⁴ In addition, article 132 states that “[m]ilitary and police leadership and jurisdiction shall be exercised in accordance with the law”.³⁴⁵ Article 165 of the 1996 amended version of the Constitution reproduced the provisions of article 131 in identical terms. The rules concerning the special jurisdiction

341 Ibidem.

342 Constitution of 1948, as amended in 1960, article 160. [Spanish original, free translation.]

343 Although the whole of Book 3 was repealed in 1998 as a result of Law N° 109.

344 Constitution of 1979, article 131. [Spanish original, free translation.]

345 Ibid., article 132. [Spanish original, free translation.]

enjoyed by members of the Armed Forces and National Police were contained in section VI on the *Fuerza Pública*. Both were special jurisdictions which lay outside of the structures of the judiciary and formed part of the Ecuadorian State executive. These constitutional provisions were supplemented by Law N° 275 of 1979 or the ‘Law on National Security’ (*Ley de Seguridad Nacional*), which extended the jurisdiction of the military courts.³⁴⁶

Despite the constitutional provisions on military and police jurisdiction, members of the military and police were tried in military or police courts, as the case may be, for human rights violations that constituted criminal offences.³⁴⁷ This was established by the Inter-American Commission on Human Rights during its on-site visit to Ecuador. The Commission pointed out that “[i]ndividuals seeking judicial recourse against a member of the security forces of the State may be impeded by the misuse of tribunals of special jurisdiction. The exercise of such jurisdiction on the part of police and military courts is not limited to cases involving conduct in the line of duty of the members of those institutions. Police and military defendants are frequently tried in special courts in relation to charges concerning common crimes. The Commission was told that these processes are not made public, hearings before these instances are closed, and the results are not easily accessible. [...] In fact, a November 1995 accounting from the Subsecretary of the Police to the President of the Human Rights Commission of the Congress of actions within the jurisdiction of the police courts indicated that almost none had resulted in the issuance of a sentence. Of the 4,568 cases initiated since 1985, only 46 had resulted in provisional sentences, and only 5 had resulted in final sentences. The majority remained in process or had been archived. More than 50 had been declared prescribed”.³⁴⁸

The Ecuadorian authorities themselves recognized this problem in their report to the United Nations Human Rights Committee: “The majority of the cases of arbitrary deprivation of life committed by members of the police or the armed forces have been brought before regional human rights protection bodies. The most serious difficulty the State has encountered in the punishment of some cases of criminal liability has been the existence of the ‘police jurisdiction’ or the ‘military jurisdiction’, under which public officials who commit offences in the performance of their respective duties must be brought before their own courts and under their own criminal procedures. The

346 Especially articles 144 and 145.

347 In August 1990, the *Centro Ecuaménico de Derechos Humanos, CEDHU*, and the *Frente Ecuatoriano de Derechos Humanos, FEDHU*, told the Permanent People’s Tribunal that military jurisdiction for members of the Army and Police was one of the main mechanisms of impunity.

348 Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997.

problem lies in the fact that representatives of public order have committed crimes of deprivation of life and forced disappearance, not only in the performance of their respective duties, but also outside that framework. Many of the criminal courts of the police force and the armed forces claim competence even when the crimes in question have not been committed in the performance of the specific duties of their members. The most serious problem which has arisen in practice is that the majority of these special courts, notwithstanding the existence of weighty evidence of guilt, have dismissed the charges, protecting or covering the accused; this situation has given rise to total impunity”.³⁴⁹ “Complaints of torture brought against police officers and members of the armed forces, like those relating to arbitrary deprivation of life and forced disappearances, have encountered the same obstacles as those mentioned earlier on account of the existence of special police and military jurisdictions. In some of those cases punishment could not be inflicted because the proceedings and penalties were extinguished by prescription on account of the protection given by those courts”.³⁵⁰

On 5 June 1998, a new Constitution was adopted in Ecuador. As in the previous constitutions, matters relating to military and police jurisdiction were dealt with in Chapter 5, entitled “On the *Fuerza Pública*”, under Section VII, entitled “On the Role of the Executive”. Article 187 establishes that “[m]embers of the *Fuerza Pública* shall be subject to special jurisdiction for the trial of offences committed in the exercise of their professional work. In the case of ordinary offences, they shall be subject to ordinary jurisdiction”.³⁵¹ However, an important change was introduced into the new Constitution. Article 19 of Section VIII, entitled “On the Role of the Judiciary”, stated that “[responsibility for] the exercise of judicial power shall fall to the organs of the judiciary. Jurisdictional unity shall be established”.³⁵² Transitional provision 26 also stated that “[a]ll judges and magistrates who are answerable to the executive shall move to the judiciary and, as long as not otherwise provided by law, shall be subject to their own basic laws. This provision includes military judges, police judges [...] Administrative staff who at present work in military, police and juvenile tribunals and courts and whose posts are secure shall move to become part of the judiciary. The assets and budgets of those offices shall also be transferred to the judiciary”.³⁵³

Despite the new constitutional provisions restricting military and police jurisdiction and incorporating them into the judiciary, no fundamental changes

349 United Nations document CCPR/C/84/Add.8, 17 December 1998, paragraph 67.

350 United Nations document CCPR/C/84/Add.8, 17 December 1998, paragraph 82.

351 Constitution of 1998, Chapter V, Section VII, article 187. [Spanish original, free translation.]

352 Ibid., Chapter V, Section VIII, article 19. [Spanish original, free translation.]

353 Ibid., transitional provision 26. [Spanish original, free translation.]

have been made to the situation of military and police courts. They still try human rights violations committed by military or police personnel that constitute criminal offences. The organs of military and police justice are still governed by, and continue to apply, the legislation that was in force prior to the introduction of the new Constitution. They are still in fact special jurisdictions subject to a different legal system from that which applies to the judiciary.

At the beginning of the 1990s, public administration in Ecuador began a process of modernization and in 1995 reform of the country's justice system got under way.³⁵⁴ In that context, *ProJusticia*, the National Program to Support Reform of the Administration of Justice in Ecuador (*Programa Nacional de Apoyo a la Reforma de la Administración de Justicia del Ecuador*), was set up and as a result important changes have been made to the legal system.³⁵⁵ Within the context of this program, as well as that of the National Human Rights Plan and the 1998 Constitution, the Ecuadorian authorities announced the adoption of measures to limit the jurisdiction of military and police courts. Among other things, the aim was to tackle the problem of impunity for human rights violations caused by the military and police courts.³⁵⁶ However, no substantial changes have been made to military and police criminal legislation and military and police courts are still *de facto* organs of the Executive. In April 2002, the National Council of the Judiciary (*Consejo Nacional de la Judicatura*) called on Congress to expedite the draft bills that sought to reform "military and police justice".³⁵⁷

The Current Situation

So far, in terms of the organization, structure, scope of jurisdiction and procedures which existed prior to the introduction of the 1998 Constitution, no substantial changes have been made to military criminal jurisdiction in Ecuador. Military jurisdiction is therefore regulated through the Military Criminal Code, the Code of Military Criminal Procedure, the Basic Law on the Armed Forces Justice Service, the Law on Military Rank and Promotion (*Ley de Situación Militar y Ascenso*)³⁵⁸ and the Armed Forces Personnel Law (*Ley de Personal de las Fuerzas Armadas*).³⁵⁹

354 The Inter-American Development Bank and the World Bank were partners in this program from the start.

355 On 13 January 2000 a new Code of Criminal Procedure was issued, a new Basic Law on the Role of the Judiciary was enacted, etc.

356 See, for example, United Nations document CCPR/C/84/Add.8, 17 December 1998, paragraphs 69 and 82.

357 See the web page of the Andean Commission of Jurists, <http://www.cajpe.org.pe/cronolog/abrilc6.htm>.

358 From 1961.

359 Law 118 of 1991.

The following are organs of military jurisdiction: the Court of Military Justice (*Corte de Justicia Militar*), courts martial, Area Chiefs (*Jefes de Zona*) and military examining magistrates. There is also the Judge Advocate's Office (*Auditoría de Guerra*) and the Military Justice Service or Judge Advocate Corps (*Servicio de Justicia Militar*).

The highest court within the military justice system is the Court of Military Justice. It is made up jointly of judges (*Ministros*) from the Third Division of the Supreme Court of Justice and three serving or retired Armed Forces officers, who are appointed by the President of the Republic for a two-year period. The Court also has a prosecutor (*Ministro Fiscal*). The clerk of the Court is a captain on active service attached to the Military Justice Service who is appointed by the Court on the basis of proposals put forward by the Minister of National Defence. The Court of Military Justice acts as an appellate court and also settles conflicts of jurisdiction between different military courts or between the military courts and the ordinary criminal courts.

Courts martial and Area Commanders (*Comandantes de Zona*) hear cases in the first instance, depending on the grade and rank of the accused and the type of criminal offence involved. Courts martial are made up of panel members chosen by lot from a list of 20 officers drawn up each year by the Minister of National Defence and have jurisdiction throughout Ecuadorian territory. Area Commanders, who are officers from the operational military corps and are not attached to the Military Justice Service, have authority in the territory or military unit under their command and jurisdiction. They perform both an operational and a jurisdictional role.

In order to be a military examining magistrate, it is necessary to be a practising lawyer or have a degree in law and be a justice official on active service. Military examining magistrates are responsible for the investigative stage of the proceedings, the terms of which vary depending on whether it is peacetime or wartime.

The Judge Advocate's Office comes under the direction of the Judge Advocate General (*Auditor General de Guerra*), who has to be a general or superior officer on active service and a lawyer.

The Prosecutor's Office (*Ministerio Público*) comes under the charge of a superior or general officer attached to the Military Justice Service. It is made up of: the Prosecutor (*Ministro Fiscal*), who is appointed by the Court of Military Justice and must be a retired or serving superior or general officer who has worked for at least ten years in the Military Justice Service; the Military Attorney-General (*Fiscal General Militar*), who must be a lawyer and officer on active service; and the military prosecutors for each area (*fiscales de zona*). The latter represent the Prosecutor's Office in each of

the military trial courts (*juzgados de instrucción penal militar*) and must be practising lawyers or law graduates as well as officers on active service.

Military courts in Ecuador have wide-ranging jurisdiction. In the case of military offences or ordinary criminal offences committed in the line of duty, it encompasses military personnel who are on active service or in the active reserve of the Armed Forces and civilian personnel working with the Armed Forces or bodies attached or answerable to the latter.³⁶⁰ So, despite what is stipulated in the Constitution and the fact that article 81 of the Military Criminal Code states that “acts punishable under ordinary [criminal] laws which are not laid down in this Code shall be tried and punished according to those same laws”³⁶¹, the military courts claim jurisdiction over ordinary criminal offences committed by military personnel by asserting the concept of the ‘service-related act’ (*acto del servicio*). Article 81 of the Military Criminal Code makes an exception to the principle of restricted jurisdiction by stating that “if the said acts are also listed in this Code, they shall be judged under military laws if they have been carried out in the line of military duty or as a result of performing such duties”.³⁶² It should also be remembered that the National Security Law remains in force. Under its provisions, civilians can be tried by military courts, as happened during the state of emergency in July 1999, even though no provision for this is made in the Code of Military Criminal Procedure. In this regard, the Inter-American Commission on Human Rights considered that “the provisions of the National Security Law are particularly incompatible with, and in breach of, the American Convention in that they denote suspension of rights which are non-derogable in all circumstances, such as the judicial guarantees enshrined in articles 8 and 25 of the American Convention. This is the case in that, when direct jurisdiction is given to military criminal justice for a large number of situations involving civilians, the right to be judged by an independent and impartial court is affected because the armed forces take on a dual role: on the one hand, they are active actors during the state of emergency and, on the other hand, military courts become responsible for dispensing justice with regard to acts affecting civilians which have no connection with military duty”.³⁶³ During the state of emergency in July 1999, police and civilian judges refused to try the cases of demonstrators who had been arrested and referred them to the military judge who in turn refused to handle them. This

360 Supreme Court of Justice of Ecuador, Resolution N° 62-2000, Trial N° 22-2000, 27 June 2000, in *Gaceta Judicial*, Ecuador, Series XVII-N°3, Year CI, May - August 2000, p.769 and following.

361 Military Criminal Code, article 81. [Spanish original, free translation.]

362 Ibidem. [Spanish original, free translation.]

363 Organization of American States, Inter-American Commission on Human Rights, *Follow-up Report on the Situation of Human Rights in Ecuador*, 1999, paragraph 48. [Spanish original, free translation]

gave rise to a conflict of jurisdiction in which the Court of Military Justice, basing its decision on the National Security Law, found in favour of the military courts.³⁶⁴

Police jurisdiction is regulated under the 1960 National Civil Police Criminal Code and the National Police Code of Criminal Procedure. It covers both the criminal and disciplinary spheres.³⁶⁵ Its organs of ‘justice’ form part of the National Civil Police.

Article 4 of the National Civil Police Criminal Code states that “the jurisdiction covering members of the National Civil Police applies solely to offences committed when carrying out duties which are specifically incumbent on them as members of that institution and constitute offences under this Code or the rules of discipline. Ordinary judges shall be competent to try any other offences committed by members of any branch of the National Civil Police through application of the ordinary Criminal Code and the Code of Criminal Procedure”.³⁶⁶ The list of offences specified in the National Civil Police Criminal Code is quite long. It includes typically military offences, ‘offences against international law’³⁶⁷, offences against public administration, ‘police’ offences, etc. It is important to note that the National Civil Police Criminal Code includes ‘offences against political rights and constitutional guarantees’³⁶⁸ which means that human rights violations fall within the remit of police courts. Several ordinary criminal offences committed against civilians, such as murder³⁶⁹, bodily harm³⁷⁰, offences against property³⁷¹ and sexual offences³⁷² are also categorized as ‘police’ offences in the Code. Offences committed against police personnel in the course of duty are also subject to police jurisdiction.³⁷³ For example, in a ruling handed down in

364 Gina Benavides “*Medidas de excepción en Ecuador*”, Fundación Regional de Asesoría en Derechos Humanos, INREDH, Ecuador, September 1999, photocopy, p.13.

365 Articles 1, 3 and 4 of the National Civil Police Criminal Code and the Rules of Discipline of the National Civil Police. The National Civil Police Criminal Code itself regulates many of the disciplinary aspects of police jurisdiction.

366 National Civil Police Criminal Code, article 4. [Spanish original, free translation.]

367 Ibid., Book Two, Chapter II. The offences established there are a strange mixture of typical war crimes and classic political offences.

368 Ibid., Book Two, Section II, articles 137 to 155. Such offences include torture (art. 145 “*tormentos corporales*”), kidnapping (art. 146), the use of violence or threats to obstruct the exercise of political rights (art. 137), attacks on freedom of worship and expression (art. 139 and 140), various types of arbitrary detention (arts. 142 and following) and unlawful breaking and entering (art.149).

369 Ibid., articles 226 to 239.

370 Ibid., articles 240 to 249.

371 Ibid., articles 286 to 315.

372 Ibid., articles 259 to 271.

373 Ibid., articles 4 and 6.

September 1998 after the new Constitution had entered into force, the Second Division of the Constitutional Court considered that a case in which a civilian had been tortured and killed by members of the Police should be tried in a police court rather than in an ordinary criminal court.³⁷⁴

15. France

History

The *Montdidier* order issued by Philippe VI of Valois on 1 May 1347 is perhaps the oldest known document on the subject of military jurisdiction in France.³⁷⁵ It stipulated that sergeants and soldiers of the castle guard could be tried by the feudal lords. The first document to establish the principle that jurisdiction should be shared between ordinary courts and special courts appeared a century later in 1467. It was known as the “Montil-les-Tours Ordonnance (*l’ordonnance de Montil-les-Tours*)” and was issued by Louis XI. It decreed that ordinary courts should try infringements committed by ‘men-at-war’ (*gens de guerre*) when they were off duty while any ‘acts of war’ (*faits de guerre*) committed by them should fall to the remit of the special courts. Nevertheless, the concept of what constituted an ‘act of war’ was somewhat vague. An ordinance issued by François 1 in 1540 attempted to clarify what was meant by it.

Military jurisdiction, as it is generally understood, came into being in the reign of Louis XIV. The concept of the court martial first appeared in 1661 and a procedure was established in 1665. Up until then, military jurisdiction had been exercised by the ‘war lord’ (*chef de guerre*) but, with the advent of the court martial, a bench of judges made up of military officers was introduced. A court martial could be convened by the commanding officer or the governor of a military garrison who was responsible for appointing members to the bench. Responsibility for conducting the proceedings fell to a regimental major and no officer could be tried without the King’s prior consent. Several other ordinances and regulations were later incorporated into the system.³⁷⁶ The organs of military jurisdiction consisted of the *Tribunal de la Connétablie* (Constabulary Court), the courts martial (*conseils de guerre*), the

374 Constitutional Court of Ecuador, Ruling dated 28 September 1998, Case N° 154-97-RA.

375 Jean Pariselle, *La Justice militaire française à la lumière de son histoire*, in *Revue de droit militaire et de droit de la guerre*, book XIX, vol. 3-4, Brussels 1980, p.291 and following.

376 The Ordinance of 1666, the 1720 Declaration by Louis XV and the regulations of 1740 and 1753.

provosts (*prévôts*) and the officers of the military troop. The way jurisdiction was distributed between the different bodies was complicated and was often imposed from above and, therefore, frequently changed. The Constabulary Court was responsible for trying military and ordinary offences committed by military personnel. The courts martial had jurisdiction over officers and military offences which were committed 'soldier on soldier'. The Provost Courts tried any "oppression, excesses or other crimes" committed by the troop (*'gens de guerre'*) but they did not have jurisdiction over officers. Officers of the military troop tried 'soldier on soldier' offences as well as other offences committed by the troop, such as desertion. Although the concept of civil party already existed in ordinary criminal justice, there was no provision for it in military court proceedings. Furthermore, it was not possible to appeal against sentences handed down by the courts martial or the Provost Courts.³⁷⁷

Throughout this period of history, although a distinction was made between military offences and ordinary offences in order to determine whether jurisdiction should go to the military courts or the ordinary courts, there were no legal texts in which military offences as such were clearly defined. The law of 1790 which established courts martial simply defined military offences as 'breaches of military law'. In any case, the notion of the military offence was linked to the notion of military discipline: "once a breach of military duty appeared to be sufficiently serious to be brought before a court martial, it became an offence".³⁷⁸

Military courts were also in operation during the French Revolution. The years following the taking of the Bastille saw a succession of different courts, including 'military tribunals' (*'tribunaux criminelles militaires'*), courts martial (*'cours martiales'*) and, lastly, 'military commissions' (*'commissions militaires'*). All these types of military jurisdiction replaced the courts martial (*conseils de guerre*) which existed under the *Ancien Régime* and were, in fact, special courts. From the very start, military jurisdiction had operated on the basis of the principle of hierarchy implicit in military structure which meant that a subordinate could not stand in judgment over a superior. However, during the revolutionary period, this principle was temporarily set aside after a law was passed to permit the creation of 'military councils' (*'conseils militaires'*), made up, "whatever the rank of the accused, of three officers, three non-commissioned officers and three soldiers". These councils were later abolished and the principle of hierarchy was reintroduced. However, it was not until 1857 that it was specifically incorporated into the wording of the law.

377 Jean Pariselle, *op. cit.*, p.297.

378 François Breurec, "*Regards sur une évolution de la justice militaire en France*", in *Revue de droit militaire et de droit de la guerre*, T. XIX, Vol. 3-4, Brussels 1980, p.330. [French original, free translation.]

Article 13 of the Constitution of 3 September 1791, under Title IV entitled “Concerning the Security Forces”, stated that “the army of the land and sea, and the troops devoted to internal security, are subject to special laws, whether it be to maintain discipline or to determine the type of proceedings or nature of the penalties applicable where military offences are concerned”.³⁷⁹ During the revolutionary period, several attempts were made to change the law in order to separate military offences from those which, strictly speaking, were ordinary criminal offences. After a series of rather inadequate attempts to draft such legislation, a list of military offences was eventually established for the first time in a law dated 19 October 1791. Shortly afterwards, the ordinary criminal courts were granted jurisdiction to try ordinary offences committed by military personnel.³⁸⁰ However, the unrest and turbulent events during that period resulted in something quite different: military and special courts came to prevail over all other types of judicial bodies. It was also during that period that it became possible to lodge appeals in military cases³⁸¹ but the principle of two-tier jurisdiction did not remain in place for long. The Constitution of 24 June 1793 did not enter into the question of military jurisdiction but article 31 of the *Declaration of the Rights of Man and of the Citizen*, which was incorporated into it, stated that “[c]rimes committed by those appointed by the people or their agents must never go unpunished. No one has the right to claim to have greater right to immunity than other citizens”.³⁸² Under article 290, Title IX, entitled “Concerning the Armed Forces”, of the Constitution of 22 August 1795, also known as the Constitution of the 5 *fructidor* Year III, military jurisdiction was regulated in a similar way to the Constitution of 3 September 1791. Article 85 of the Constitution of 13 December 1799, also known as the Constitution of the 22 *frimaire* Year VIII, stipulated that “military offences are subject to special courts and particular forms of trial”.³⁸³ While, historically speaking, as François Breurec points out, military jurisdiction had developed as an “extension of disciplinary authority”, with the corollary that the competence of military courts was limited, the French Revolution created an ambiguous situation.³⁸⁴ During the revolutionary period, due to incessant and untimely changes to the law, the distinction between military offences and ordinary criminal offences became blurred and military courts ended up with jurisdiction over all kinds of offences as a result of the widespread application of the

379 See Maurice Duverger, *Constitutions et documents politiques*, Presses universitaires de France, 7th edition, Paris, 1974, p.33. [French original, free translation.]

380 Law of 12 May 1793.

381 Law of 22 October 1790.

382 See Maurice Duverger, *op.cit.*, p.73. [French original, free translation.]

383 *Ibidem*, p.118. [French original, free translation.]

384 François Breurec, *op.cit.*, p.327.

principle of personal jurisdiction, in other words, jurisdiction based on the status of the person concerned.

With the advent of the Napoleonic Empire, circumstances within France and the wars of territorial expansion meant that the scope of military jurisdiction remained ambiguous. The distinction between strictly military offences and ordinary offences was maintained. The former fell to the jurisdiction of the courts martial while the latter, which were known in law as ‘civil offences’ (*délits civils*), came under the remit of the ordinary courts. The fact that there was a state of war until 1815, as well as a vast array of different laws, meant that during the Napoleonic era military courts tried all offences committed by members of the military, regardless of whether the offence in question was military or ordinary in nature.

During the First Napoleonic Empire, a widespread process of codification was begun in all spheres. Article 63 of the 1814 Constitution abolished “extraordinary commissions and courts”, whatever name they had been given. The distinction between strictly military offences and ordinary criminal offences was given constitutional status by means of a rider to the 1815 Constitution. Article 55 of the rider stipulated that “only military offences shall fall to the jurisdiction of the military courts”³⁸⁵ and “all other offences, even when committed by military personnel, shall come under the jurisdiction of the civilian courts”.³⁸⁶

In the course of drafting the ordinary Criminal Code of 1810, attempts were made to limit the jurisdiction of the military courts. However, the proposed reform and codification of military jurisdiction launched by Napoleon never materialized. It was based on the principle that the Imperial Courts, namely, the ordinary courts, would try all offences committed within the territory belonging to the Empire and, in the event that the offence was considered to be of a military nature, once the investigative stage of the proceedings had been completed, it would be referred to the military courts. “There is only one justice [system] in France; one is a French citizen before being a soldier”, Napoleon argued. “If, within the country, one soldier murders another, he has undoubtedly committed a military offence but he has also committed a civil offence. All offences must therefore first be subject to ordinary jurisdiction...”³⁸⁷

The re-establishment of the Republic did not lead to any major changes as far as military criminal matters were concerned. The 1848 Constitution expressly

385 See Maurice Duverger, op.cit., p.131. [French original, free translation.]

386 Ibidem. [French original, free translation.]

387 Jean Pariselle, op.cit., p. 300. [French original, free translation.]

retained the military courts, together with their existing forms of organization and attributes.³⁸⁸ Restoration of the monarchy in 1851 also did not lead to changes in the regulations on military jurisdiction.

The Code of Military Justice and the Code of Maritime Justice

It would not be until the middle of the 19th century that military jurisdiction would first have its own corpus of regulations. The first Code of Military Justice for the Army was issued on 9 June 1857 followed by the Code of Maritime Justice for the Navy in 1858.

In the description of the reasoning behind the Code of Military Justice for the Army, it was asserted that the sole purpose of military jurisdiction was to maintain discipline. As one commentator pointed out at the time, “The certain, swift, calm, reasonable but firm repression of the most minor offence involves the question of obedience, in other words discipline, in other words the entire strength of armies”.³⁸⁹ The idea that discipline was at the heart of military jurisdiction was retained in *La Grande Encyclopédie*, which described military justice, plainly and simply, as an adjunct to disciplinary action and the military courts as the “guardians of discipline”. Nonetheless, despite this, the 1857 Code of Military Justice did not retain the distinction between military offences and ‘civil offences’ when attributing jurisdiction to the military courts. The Code gave formal recognition to the principle of personal jurisdiction. The military courts were granted general jurisdiction *ratione personae*, thus enabling them to try any criminal offence committed by a member of the military, regardless of whether or not it was an ordinary or military offence and whether or not it had been committed in the line of duty.

The 1857 Code of Military Justice established a system of courts martial in which senior officers with no legal training sat in judgment. The functions of prosecuting authority (*ministère public*) and examining magistrate were carried out by officers with no legal qualifications. The Code of Maritime Justice (*Code de Justice Maritime*) established councils of justice (*conseils de justice*) for minor offences and courts martial (*conseils de guerre*) for serious offences. Ship captains were also granted extensive punitive powers. The fact that military jurisdiction was seen as a disciplinary tool of the military leadership and was at the same time endowed with extremely broad powers placed military courts in a contradictory situation.³⁹⁰ Military jurisdiction, an instru-

388 Article 88 of the 1848 Constitution.

389 Victor Foucher, *Commentaires sur le Code de Justice Militaire pour l’Armée de Terre*, Paris 1858, p. 2. [French original, free translation.]

390 François Breurec, *op.cit.*, p. 327.

ment for the use of military commanders, was being called on to play the role of the judiciary in respect of the troops but, as pointed out by François Breurec, without one of the crucial features of the judiciary: independence.

The Codes of 1928 and 1938

At the end of the 19th century, strong anti-militarist sentiment developed in connection with several different situations, especially the trial of Captain Alfred Dreyffus. Military jurisdiction came in for fierce criticism. Some changes were introduced, such as the 1897 and 1899 amendments on safeguards for defendants, but the system essentially remained the same. The actions of the military criminal courts during the First World War incurred heavy criticism, especially from former combatants. Several proposals were put forward calling for the abolition of military courts. In this context, work got under way in 1921 to reform the Code of Military Justice, culminating with the issuing of the Code of Military Justice for the Land Army on 9 March 1928. In 1938, the second Code of Military Justice for the Navy was also issued.

The new codes restored jurisdiction for ordinary offences committed by military personnel to the ordinary criminal courts and restricted the jurisdiction of the military courts to military offences. Although the criterion of jurisdiction *ratione materiae* was reintroduced, the Code of Military Justice also established the criterion of jurisdiction *ratione loci* which meant that the military courts could try any offence committed in a military installation. In 1939 the jurisdiction of the military courts was extended to include any ordinary offences committed by military personnel within the context of service. In the case of the army, the courts martial were replaced by Permanent Armed Forces Courts (*Tribunaux Permanents des Forces Armées - TPFA*), presided by civilian judges. Additional judicial safeguards were provided for military personnel facing prosecution. The new Code also sought to separate the function of commander from that of judge by creating an autonomous body within the armed forces for military magistrates. These military magistrates, who were responsible for the investigative phase of proceedings, came under the authority of the Government Commissioner (*Commissaire du Gouvernement*), who was responsible for discharging the prosecutorial function and directly answerable to the Minister of Defence. However, those sitting on the TPFAs, including the presiding judges, remained under the hierarchical authority of military officers with operational command. Despite the fact that the presidents of the TPFAs were civilian judges, they were incorporated into the ranks of the military and subject to the military hierarchy. These changes to military jurisdiction could not disguise the role played by the executive in the 'justice' system.

In the context of the colonial wars, the French military courts underwent a vast process of expansion under “a raft of special laws which would noticeably change the face of the military jurisdictional organs [and] lead to the creation of a range of different types of special military jurisdiction”.³⁹¹ The main feature of the work undertaken by the military courts was its incorporation into the war effort, both as a means of punishing those fighting for independence and in order to ensure that the excesses committed by the colonial troops, which provoked widespread criticism in France itself, would go unpunished. In Indochina, the conduct of the Saigon Temporary Maritime Court, which was presided over by a lieutenant commander and consisted of French naval officers with no legal training whatsoever, was widely criticized, including by their own peers. For example, Jean Pariselle, a former Government Commissioner responsible for bringing prosecutions before the naval courts, said that “the absurd judgments [handed down by that court] seriously damaged the reputation of the military courts”.³⁹² The death sentences handed down against members of the pro-independence movement in Madagascar by the French military courts in that country also provoked fierce criticism back in the mother country.

However, it was the struggle for national independence in Algeria (1954-1962) which probably demonstrated most blatantly the way in which French military criminal jurisdiction had expanded. In Algeria, from 1954 onwards, military jurisdiction was increasingly used to put down the struggle for Algerian independence, mainly by resorting to emergency powers and legislation. The military justice system was structured around the TPFAs but it also had its own military court of review (*Cour de cassation militaire*), which was set up in 1955, and a military prosecution service, which was established in 1960. The work of the French military courts was gradually geared towards achieving three objectives: subduing the Algerian national movement by prosecuting its members in military courts; supporting - in other words, legalizing - the methods used by the French army intelligence services to gather information, including the systematic use of torture; and maintaining the operational capacity and morale of the French troops by ensuring that a significant number of the abuses committed went unpunished. Although, in the early stages, both the ordinary courts and the military courts were involved in the crackdown on the independence movements, the military courts gradually took over the whole area of criminal justice. As the historian Sylvie Thénault has pointed out, “justice gradually [became] subject to a war logic [that was]

391 Francisco Fernández Segado “*La competencia de la jurisdicción militar en tiempo de paz*”, in Consejo General del Poder Judicial, *Poder Judicial*, 2a. época, N° 36, Madrid, December 1994, p.70. [Spanish original, free translation.]

392 Jean Pariselle, *op. cit.*, p.314. [French original, free translation.]

mobilized in the fight against the enemy [and] remodelled, shaped and altered according to the wishes of the military command [...]”.³⁹³ In the context of an intensification of the conflict in 1957, General Salan, the head of the French troops in Algeria talked about “the failure of the juridical and legislative apparatus to adapt to a form of war which had not been anticipated in legal texts [and the need] for an effective counter-revolutionary war tool”.³⁹⁴ Within that framework, the military courts were endowed with even broader powers as well as additional human and material resources. The main focus of their work was to put down the independence movements. In 1960, the figure of military prosecutor, responsible for the investigative stage of proceedings, was introduced. A 1961 directive from the Military Attorney-General instructed the military prosecutors not to interfere in the work of the military intelligence services. The directive specifically stated that “an operational investigation [by the military intelligence services] takes precedence over a judicial investigation [by the military prosecutors]”.³⁹⁵

The military courts operated as a mechanism to achieve impunity as far as human rights violations committed by French troops were concerned. The vast majority of complaints lodged with the military courts concerning the torture, execution and disappearance of civilians were either dismissed or simply not processed by the TPFAs. Only in a few cases that had been picked up by the media in the motherland was any punishment meted out but most of the penalties imposed were derisory compared to the seriousness of the offences involved. Impunity was not the natural consequence of the inherent *esprit de corps* of military justice but the result of clear political intent as evidenced by the numerous directives and instructions issued to military justice officials. For example, military commanders issued instructions stating that cases should be dealt with at the disciplinary level so that the military courts would not be overloaded in their counter-insurgency work.³⁹⁶ In a 1961 circular to military prosecutors, Military Attorney-General Malaval stated that no excesses should be tolerated but he also reminded them that “they were officers subject to the principle of hierarchical subordination to the Commander [and that] [i]t would be a mistake on the part [of the military

393 Sylvie Thénault, *Une drôle de justice - Les magistrats dans la guerre d'Algérie*, Ed. La Découverte, Paris, 2001, p.7. [French original, free translation.]

394 Cited in Sylvie Thénault, *Une drôle de justice - Les magistrats dans la guerre d'Algérie*, op. cit., p.68. [French original, free translation.]

395 Paragraph 7 of the general instruction concerning the general service of military attorneys-general and prosecutors, 2 June 1961, cited in Sylvie Thénault, *Une drôle de justice - Les magistrats dans la guerre d'Algérie*, op. cit. [French original, free translation.]

396 Sylvie Thénault, *Une drôle de justice - Les magistrats dans la guerre d'Algérie*, op. cit., p.70.

prosecutors] to see themselves as members of a parallel hierarchy that was placed alongside the Army to watch over it and monitor its work".³⁹⁷

The 1965 Code of Military Justice

In 1965 a new uniform Code of Military Justice applicable to all the armed forces was issued.³⁹⁸ The process of unifying the military justice system had gradually got under way in the years prior to that. Already in 1949, the judicial functions of the Secretary of State for the Navy had been transferred to the Armies Ministry (*Ministère des Armées*) and the Directorate of Maritime Justice (*Direction de la justice maritime*) had been incorporated into the Joint Armed Forces Military Justice Service (*Service commun des justices militaires des forces armées*). In 1953, the offices of the respective attorneys-general, the investigation offices and the secretariats of the naval and military courts had been amalgamated and in 1956, a single corps of military justice officials was created.

The main changes to the military justice system that came about as a result of the new law concerned the composition and operation of the military courts. The most significant feature was the increase in the number of civilian judges working in the military courts. This was reinforced in 1966 as a result of Law N° 66-1037 which stipulated that the duties of examining magistrate and prosecutor should be carried out by judges from the judiciary on assignment to the Ministry of Defence. The 1966 law meant the demise of the single corps of military justice officials which had been set up in 1956.

The new Code of Military Justice entered into force on 1 January 1966. The two legal corps, one attached to the Army and the other to the Navy, ceased to exist. Four organs of military jurisdiction were established under the new code: the Permanent High Court of the Armed Forces (*Haut tribunal permanent des Forces armées*), the Permanent Armed Forces Courts (*Tribunaux permanents des Forces armées - TPFA*), the Military Army Courts (*Tribunaux militaires aux armées - TME*) and the Provost Courts (*tribunaux prévôtaux*). The TMEs replaced the courts that had previously been convened on board ship under the naval justice system. The Permanent High Court of the Armed Forces, which was responsible for trying Marshals of France

397 Paragraph 7 of the general instruction concerning the general service of military attorneys-general and prosecutors, 2 June 1961, cited in Sylvie Thénault, *Une drôle de justice - Les magistrats dans la guerre d'Algérie*, op.cit., p.213. [French original, free translation.]

398 Law N° 65-542 of 8 July 1965.

(*maréchaux de France*), admirals and generals, was never convened.³⁹⁹ Examining magistrates and prosecutors completed the system.

The Permanent Armed Forces Courts (TPFAs) were divided into two chambers, one responsible for trials and the other responsible for supervising the pre-trial investigation phase. The former consisted of a civilian judge from the Court of Appeal, appointed by the Ministry of Justice, together with three members of the military.⁴⁰⁰ Another civilian judge from a first instance court within ordinary jurisdiction, appointed by the president of the Court of Appeal, also acted as judge advocate to the TPFAs. The chamber responsible for supervising pre-trial investigations consisted of the civilian judge advocate and a superior military officer. Nevertheless, towards the end of the 1970s, a TPFA made up solely of civilian judges was set up in Bordeaux.⁴⁰¹ TPFAs had jurisdiction within French territory in peacetime. In wartime, their jurisdiction was extended and changes were made to their composition so that they were presided by a military judge and the civilian judge advocate was replaced by a member of the military.

The Military Army Courts (TMEs) and the Provost Courts had jurisdiction outside of French territory in peacetime. In wartime, both had jurisdiction within French territory. Their powers were not clearly defined in the 1965 Code of Military Justice and were only clarified in the subsequent code.

The examining magistrates and prosecutors were civilian judges who had been assigned to the Ministry of Defence.⁴⁰² Depending on their position on the judicial ladder, they were assigned a particular military rank, usually that of major.⁴⁰³ Though with some special conditions attached, they remained subject to the disciplinary rules applicable to the judiciary. The prosecutors came under the direction of the Government Commissioner, who was in turn answerable to the Ministry of Defence.

The Code of Military Justice did not substantially alter the scope of jurisdiction that had been established in the 1928 and 1938 codes. When troops were outside French territory or if war had been declared, military jurisdiction was extended to include all kinds of offences, regardless of whether they were of

399 Charles-Edouard de Fresart, "*La justice militaire en France; survol de la loi du 8 juillet 1965 (sic) Loi du 21 juillet 1982*", in *Revista de Derecho Militar y Derecho de la Guerra*, volume XXXI, year N° 1-2-3-4, Brussels 1992, p.451.

400 A superior officer, a lower-ranking officer and a non-commissioned officer.

401 Jean Pariselle, *op. cit.*, p.311.

402 Article 1 of Law N° 66-1037 of 29 December 1966.

403 Law of 29 September 1966.

a military or ordinary nature.⁴⁰⁴ In peacetime, military courts had jurisdiction over military offences, ordinary offences committed on military sites and any criminal offence committed while on duty.

Following tradition, the 1965 Code of Military Justice still failed to allow a civil action (*action civile*) to be brought or the right of appeal. Although it did not use the words '*action civile*', article 55 stipulated that the military courts could only rule on criminal proceedings. The military authorities had sole responsibility for instituting criminal proceedings. However, a 1979 case in which a female student in a military college was murdered by one of her peers gave rise to a widespread debate about the non-existence of the right to bring a civil action in military criminal proceedings. The Code still did not allow applications for appeal against sentences but it did allow appeals against decisions made during the investigative phase. This meant that judgments on the merits of a case could only be challenged by submitting applications for annulment or review (*recours en cassation ou révision*) or opposition appeals (*recours en opposition*).

The 1982 Code of Military Justice

In 1980 a major reform of military criminal jurisdiction was launched. The question of whether or not military justice should be retained was at the heart of the parliamentary debates. The process culminated on 21 July 1982 with the adoption of Law N° 82-621, which amended the Code of Military Justice and the ordinary Code of Criminal Procedure. It is worth recalling that in 1981 the death penalty had been abolished for all offences, including those contained in the Code of Military Justice.⁴⁰⁵ The amended Code of Military Justice, like the 1965 version, regulated both the structure and operation of the military justice system as well as matters relating to offences and military criminal proceedings.

Although in general terms Law N° 82-621 reproduced the contents of the 1965 code, it also introduced significant changes to the system of military justice.⁴⁰⁶ For example, the following innovations are worth highlighting: military courts were abolished within French territory in peacetime; outside of French territory, in peacetime, the organs responsible for conducting trials, carrying out pre-trial investigations and discharging prosecutorial functions were to be composed of civilian judges; it became possible to bring a civil action in the course of military criminal proceedings; the rules of procedure

404 Article 66 of the Code of Military Justice.

405 Law N° 81-908 of 9 October 1981.

406 Charles-Edouard de Fresart, op. cit., p.461.

for military proceedings were brought into line with those used in the ordinary courts; and the power of military courts to try juveniles was restricted. Even though military jurisdiction no longer existed on French territory in peacetime, the ordinary Code of Criminal Procedure⁴⁰⁷ allowed military courts to be set up under a state of siege, emergency or alert (*mise en garde*) or when there was a general call-up of troops. In 1992, victims and their successors were allowed to have greater involvement in military trials. As well as being able to bring a civil action, both in peacetime and wartime, as had been established in Law N° 82-621, in 1992 they were granted the power to start a criminal action in cases of death, mutilation or permanent invalidity.⁴⁰⁸

In peacetime, outside of French territory, military jurisdiction consisted of the Army Courts (*tribunaux aux armées*) and the Provost Courts (*tribunaux prévôtaux*). In wartime, it consisted of the Armed Forces Territorial Courts (*tribunaux territoriaux des forces armées*) and the High Court of the Armed Forces (*Haut tribunal des forces armées*) and, outside of French territory, the Military Army Courts (*tribunaux militaire aux armées*) and a type of provost court (“*tribunal prévôtal*”). The *Cour de Cassation*, the highest court within ordinary jurisdiction, was responsible for hearing applications for military court judgments to be quashed.

The Army Courts, which replaced the TPFAs, consisted of a presiding judge and six other judges from the judiciary, all of whom were civilians. Like the TPFAs, the Army Courts were made up of two chambers, one of which was responsible for conducting trials and the other for supervising the pre-trial investigation phase. The prosecutorial function (*Ministère Public*) was discharged by the Government Commissioner (*Commissaire de Gouvernement*), who was answerable to the Ministry of Defence. The existence of military courts in peacetime outside of French territory is not hypothetical. France has signed numerous treaties with eight African countries⁴⁰⁹, giving French military courts the authority to try offences committed by French troops on those territories. For these purposes, Law N° 82-621 established an Armed Forces Court in Paris (*tribunal des forces armées à Paris*). An army court was also set up in Baden-Baden in Germany on the basis of treaties agreed through the North Atlantic Treaty Organization (NATO).⁴¹⁰

407 Articles 699-1 and 700 of the ordinary Code of Criminal Procedure.

408 Law N° 92-1336 of 16 December 1992.

409 Burkina-Faso, Ivory Coast, Djibuti, Gabon, Madagascar, Central African Republic, Senegal and Togo.

410 The London Convention of 19 July 1951 and the Agreement between the Parties to the North Atlantic Treaty regarding the status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany of 3 August 1959

Under the 1982 law, the army courts were to have virtually total jurisdiction outside of French territory in peacetime. In terms of jurisdiction *ratione materiae*, they were empowered to try all offences committed by military personnel or civilians accompanying the troops and any offence committed by a civilian against the armed forces or against military equipment or installations.⁴¹¹ As far as jurisdiction *ratione personae* was concerned, they had the authority to try career service personnel, members of the military “who are serving under contract”, members of the National Gendarmerie, personnel who have been conscripted under certain conditions, crew members of military ships or aircraft, juveniles of under 18 years of age who are members of the armed forces or nationals of an occupied or enemy state, and, in the case of certain offences, civilians. However, in the cases of the eight African countries and the Baden-Baden Army Court, they had even greater powers under the provisions of the respective international agreements in question.

Provost courts were to consist of a single person, a captain of the gendarmerie, who had the authority to try police offences as well as minor offences and breaches of discipline committed by civilians and prisoners of war who belonged to the rank and file. They followed a simplified procedure in which it was possible for the victim to pursue a civil action. The powers of judge, investigator and prosecutor were concentrated in the captain of gendarmerie. Several legal commentators consider the provost courts to be an anachronism left over from the Middle Ages.⁴¹²

Each Armed Forces Territorial Court was to consist of a president, an advisor who was a judge and member of the judiciary and three military judges from the branch of the services in question. For defendants with the rank of colonel, captain or higher, the 1982 law called for an Armed Forces High Court to be set up in Paris. Their composition was to be based on the same principle as that of the territorial courts but the members had to be higher in rank than the accused. The Army Military Courts were to be made up of a president, who had to be a judge, and four military judges chosen from among the injured or the combatants.

The 1999 reforms

Military criminal law and the ordinary procedural code were once again amended as a result of Law N° 99-929 of 10 November 1999. The reforms, which began in 1997, marked a boost for the change in direction for military justice initiated in 1982. As pointed out in the parliamentary report on the draft legislation, the main purpose was “to bring general criminal law and

411 Articles 59, 64 and 65 of the Code of Military Justice.

412 See, among others, Charles-Edouard de Fresart, op. cit., p.476.

military criminal law closer together [... in response to] a trend, which can be called historic, towards reducing the differences between the specific attributes of military law and those of ordinary law [...].⁴¹³ The reforms mainly concerned military jurisdiction in peacetime and outside of French territory. Some of the most significant innovations made to the military justice system included the application of the rules of procedure used in the ordinary courts to the military courts operating in peacetime outside of French territory, the establishment of a second tier of jurisdiction under the responsibility of the ordinary criminal courts and the fact that the Prosecutor's Office (*Ministère Public*) was no longer dependent on the Ministry of Defence.

As a result of the 1999 reforms, in the case of offences committed outside of French territory, military jurisdiction in peacetime consisted of the Paris army court (*tribunal aux armées de Paris*), the Paris Appeal Court (*cour d'appel de Paris*) and the *Cour de Cassation*, the supreme court of review within the ordinary justice system. The three tiers of jurisdiction were therefore cut loose from military auspices: the first tier was to consist of civilian judges while the other two tiers were courts which already existed within ordinary justice system. Nevertheless, the scope of military jurisdiction did not fundamentally change. With a few exceptions, the procedures to be followed were those stipulated in the ordinary Code of Criminal Procedure. The *Procureur de la République*, a civilian judge who is subordinate to the Minister of Justice, carries out the prosecutorial function (*Ministère Public*) before the Paris army courts, thus making the post of Government Commissioner (*Commissaire de Gouvernement*), who was answerable to the Ministry of Defence, redundant. As well as allowing the victims and their successors to pursue a civil action, the 1999 law also enabled them to instigate criminal proceedings.

The delay in disbanding the French Forces based in Germany, which was originally due to happen on 1 July 1999, meant that the 1999 law temporarily continued to apply to the Baden-Baden Army Court. But the law itself authorized dissolution of the court to be implemented by means of a decree, subject to a report from the Ministries of Justice and Defence.⁴¹⁴ As far as the agreements with various African countries were concerned, responsibility for trying the offences referred to in such international agreements was entrusted to the Paris Army Courts.

The regulations applicable in wartime under the Code of Military Justice were not substantially changed. The provisions allowing military courts to be

413 French Senate document, "N° 226 - Sénat, Session ordinaire de 1998-1999, Annexe au procès verbal de la séance du 17 février 1999", available on web page: <http://www.senat.fr/rap/a98-226/a98-2260.html> [French original, free translation.]

414 Article 65 of Law N° 99-929 of 10 November 1999.

set up in emergency situations or when there is a general military call-up were also retained. Nevertheless, it should be noted that in wartime, the *Procureur de la République* carries out the duties previously undertaken by the *Commissaire de Gouvernement*. Lastly, under the 1999 law, operation of the provost courts was restricted to war situations.

As a result of the reforms of 1988 and 1999, military offences, ordinary offences committed as a result of service and any criminal offence committed by members of the military in peacetime on French territory come under the jurisdiction of the ordinary criminal courts.

Reform of the French military criminal system has not come to an end with Law N° 99-929 of 1999, article 66 of which specifically states that the Code of Military Justice must be amended before 31 December 2002.

16. Germany

History

The predominant feature of the German Empire of the 18th and 19th centuries was the militarized nature of the State and society. Mirabeau's wellknown comment that Prussia was not a country with an army but an army with a country is often quoted.⁴¹⁵ With the coming to power of Emperor Friedrich Wilhelm IV, the combined authority of the monarchy and the military became the pivot around which the Prussian State system revolved.⁴¹⁶ The Prussian Code of Military Criminal Procedure of 1845 was introduced into the Armed Forces of the Northern German Confederation in 1867 and, in 1871, into the Imperial Forces, under the name of Imperial Military Law (*Reichsmilitärgesetz*). The Code was characterized by the extensive powers given to military commanders, the excessive jurisdiction granted to military courts, the lack of separation between the military courts and the public prosecutors and the arbitrary nature of its procedures. In 1862, the Code was roundly criticized by the Congress of German Jurists which called for the jurisdiction of the military courts to be curbed, especially as far as ordinary criminal offences were concerned.⁴¹⁷ At the end of the 19th century, military

415 William L. Shirer, *Le Troisième Reich, des origines à la chute*, Ed. Stock, Paris, 1960, Volume I, p.125.

416 Manfred Messerschmidt, "The Reform of the German Military Criminal Procedure - Army, Politics and Public Opinion in the Second Half of the 19th Century", in *Revue internationale de droit militaire et de droit de la guerre*, International Society for Military Law and the Law of War, Volume XIX-3-4, Brussels, 1980, p.381.

417 *Ibid.*, p.382.

criminal legislation was the subject of much heated debate and several attempts were made to reform it.

Following Germany's defeat in the First World War, the Imperial Army was dissolved and the Weimar Republic emerged. The Constitution of the Weimar Republic of 1919 abolished military criminal jurisdiction in peacetime. It was only permitted in wartime. In 1920, a law was passed authorizing military courts to try offences committed on board warships in peacetime.

With the advent of Nazism and the creation of the Third Reich in 1933, "military justice" was re-established. The system for dispensing justice set up by the Nazi government was complex and varied depending on the nationality of the accused and the victim, the nature of the offence and the territory on which the offence was committed (whether on German soil or in the occupied territories, and, in the case of the latter, whether in the East or the West). All criminal cases "which referred to German citizens or 'State members', ethnic Germans or persons of German origin"⁴¹⁸ fell to the jurisdiction of the German courts and German law was to be enforced. In the occupied territories, the local judicial authorities continued to exercise jurisdiction in principle. However, they did not have jurisdiction over German subjects, serious offences or offences committed against the German State, the National Socialist Party or its affiliated organizations, regardless of the nationality of the accused. In such cases, the German courts had exclusive jurisdiction. In some cases, the local courts had jurisdiction over serious offences but, in all cases, their decisions were subject to review by the German courts. Nevertheless, for a certain period, there were parts of the occupied territories which were not subject to the jurisdiction of the German courts.⁴¹⁹ However, in general a "germanization of the local justice system" existed in the occupied territories.⁴²⁰

According to Arnold Toynbee, whether or not German military courts took precedence over the other ordinary German courts in the occupied territories depended in large measure on how the latter were administered, namely, whether they formed part of a Protectorate, whether they were subject to the Reich Commissioners, the German civilian administration, or whether they were under the military command of the German army (the *Wehrmacht*). However, it also hinged on other factors such as the extent of resistance with-

418 Arnold J. Toynbee, *La Europa de Hitler*, Ediciones Sarpe, Madrid, 1985, p.109. [Spanish original, free translation.]

419 For example, during the first three years of the occupation of Denmark, the Danish courts exercised jurisdiction without the restrictions the Third Reich imposed on the other occupied territories.

420 Arnold J. Toynbee, *La Europa de Hitler*, op. cit., pp.108 and 109. [Spanish original, free translation.]

in those territories. In Norway, it seems that at first only an ordinary German court was set up whereas in France and Belgium it was the German military courts which played the predominant role and special legal powers were conferred on military commanders. Nevertheless, whatever the case, this did not affect the jurisdiction of the Wehrmacht military courts. Toynebee also points out that “a distinct feature of the German administration of justice in the occupied territories was the use of the so-called ‘state of civil emergency’” to transfer responsibility for trying many offences from the ordinary German courts to the German military courts or special courts.⁴²¹ In particular, these measures were applied to the *Standgerichte*, a “civilian equivalent of the military courts” of the Wehrmacht, which were made up of SS or police officers and conducted summary proceedings with no right of appeal and in which the accused had no right to legal representation. Special Courts (*Sondergericht*), Special Army Courts and Police Courts Martial were also set up to deal with certain offences connected with forms of resistance to the Nazi occupation. In some countries in the East, both *Standgerichte* and *Sondergericht* were established without resorting to the introduction of a “state of civil emergency”.

The system used to dispense military justice in the Third Reich was complex. It included not only the traditional military courts (*Wehrmachtgericht*) used by the army and established under the German Military Criminal Code but also a wide range of other military or special courts: the Special Army Courts, which were set up by decree, the SS and Police Courts (*SS-Und Polizeigerichte*), the *Sondergericht* and the *Standgerichte*. These tribunals had extensive jurisdiction including, as the case may be, even offences such as stealing crops, spreading information ‘hostile’ to the Third Reich, inciting others to strike and holding unlawful meetings. As the Nazis came to occupy more and more territory and the world conflict intensified, these courts proliferated and their jurisdiction was extended to all kinds of offences.

The splitting of Germany into two sovereign States, the Federal Republic of Germany and the Democratic Republic of Germany, also affected matters relating to military criminal jurisdiction. In the Federal Republic of Germany, major changes were made to military criminal jurisdiction as a result of the “dismantling of the military organization imposed under the peace treaties” after the Second World War.⁴²² Until it was amended in 1956, the German Constitution banned the existence of armed forces. That year saw the begin-

421 *Ibid.*, p.112. [Spanish original, free translation.]

422 Francisco Fernández Segado “*La justicia militar en el Derecho comparado*”, in Consejo General del Poder Judicial, *Poder Judicial*, 2a. época, N° 23, Madrid, September 1991, p.71. [Spanish original, free translation.]

ning of a series of legal reforms⁴²³ which culminated in the adoption in 1957 of the Military Criminal Law to replace the Military Criminal Code of 1871. The 1957 law was the subject of a succession of amendments and, in 1974, a new Military Criminal Law⁴²⁴ was adopted and, with some changes, remains in force today.⁴²⁵ In the Democratic Republic of Germany, the 1957 Military Criminal Law was replaced by the 1968 Criminal Code in which military offences were listed as punishable crimes. It was amended in 1974, 1977 and 1979. As in most socialist countries, German military courts were incorporated into the “ordinary judicial apparatus”,⁴²⁶ so that, in terms of subject matter and procedures, military and civilian judges shared the same legislation and were subject to the authority of the same supreme court. On 3 October 1990, the Treaty of Reunification uniting the German Democratic Republic (GDR) and the Federal Republic of Germany (FRG) entered into force. Under article 3 of the treaty, the Constitution of the FRG would in future apply to the whole of the former territory of the GDR, except with regard to some financial matters.⁴²⁷

The current situation

Military courts are regulated under section IX of the Basic Law⁴²⁸ on the judiciary. According to article 96 of the Basic Law, the Federation can establish military courts. Nevertheless, the same article states that such courts, which have the status of federal courts, can only exercise criminal jurisdiction over members of the armed forces who have been sent abroad or who are on board warships or while a state of defence exists. In such circumstances, the military courts come under the authority of the Federal Ministry of Justice, the judges who preside over such courts must meet the usual requirements to be able to sit as a judge and the Federal Court of Justice acts as the military supreme court. There are therefore no military criminal courts in peacetime.

423 The law dated 19 March 1956, known as the “Soldiers’ Law”, and the law dated 21 July 1956, known as the “Military Service Law”.

424 Law of 24 May 1974.

425 Law of 26 January 1998.

426 Fritz Gorlé, “*L’évolution actuelle de la justice militaire dans les pays communistes*”, in *L’évolution actuelle de la justice militaire - Huitième Congrès international, Ankara 1979*, Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, Tom. VIII, Vol. II, p.166. [French original, free translation.]

427 Michel Fromont, *Les institutions de la République fédérale d’Allemagne*, published by *Documentation française* in a series entitled *Documents d’études: droit constitutionnel et institutions politiques*, N° 1.11, 1993 edition, Paris 1993, pp. 23 and 24.

428 The Basic Law was enacted in 1949 and has been amended on several occasions, especially as a result of the 1990 Treaty of Reunification. In July 2002, article 96, which governs military courts, was amended in view of the establishment of the International Criminal Court.

In the event that either military or ordinary criminal offences are committed by military personnel in peacetime, they are dealt with by the ordinary courts.

Nevertheless, despite the limitation imposed under article 96 of the Basic Law, the 1974 Military Criminal Law applies to both career and conscripted military personnel, and, in a limited way, in the case of certain offences⁴²⁹, to civilians. However, in peacetime, the offences contained in the Military Criminal Law come under the jurisdiction of the ordinary courts and are subject to ordinary criminal procedure, since there is no provision for the existence of military courts.

17. Iran

History

Iran's pursuit of military power goes back a long way. During the reign of Shah Nadir (1736-1747), Iranian army rule stretched as far as India.⁴³⁰ The 18th and 19th centuries were marked by wars and the development of militarism in the region. The legal system was essentially based on customary law. As the 20th century dawned, the first written laws appeared. In 1905, under the Ghadjar dynasty, the first Iranian Constitution was adopted. The original Constitution did not envisage the existence of military courts. However, in 1906, some supplementary principles were appended to the Constitution. Principle N° 87 allowed military courts to be created throughout Iranian territory through the enactment of special laws.

In 1921, the Army Commander, General Reza Pahlavi, led a *coup d'état*. That same year, a Criminal Code and a Code of Criminal Procedure were issued. As far as military justice was concerned, two laws were passed, one concerning the organization of military courts and the other describing the principles to be applied to military trials. A year later, in 1922, a Military Criminal Law was enacted. In 1925, a parliamentary monarchy was established under the new Shah Reza Pahlavi and was to last until 1979. A host of laws were introduced under the government of Shah Reza Pahlavi.⁴³¹ In 1940, a Code of Military Justice was issued to replace the laws on military criminal jurisdiction that had been adopted in 1921 and 1922 as well as various legal provisions that had been introduced during the 1930s.

429 For example, aiding or abetting the commission of a military criminal offence.

430 Core document forming part of the reports of States parties : Islamic Republic of Iran, United Nations document HRI/CORE/1/Add.106, 1 July 1999.

431 The Penal Code in 1925, the Civil Code in 1928 and 1935 and the Code of Civil Procedure in 1939.

The 1940 Code of Military Justice, which remained in force until 1979, underwent numerous changes and many supplementary provisions were added to it. The Code regulated the organizational and structural aspects of military criminal jurisdiction as well as the substantive and procedural laws applicable to military courts. It distinguished between military criminal jurisdiction in peacetime, emergency situations and wartime so that there were separate military courts and procedures for each of those situations. A Military Court of Review and a Military Prosecutor's Office completed the structure. Applications for a judgment to be quashed were not permitted in the case of military offences, only for ordinary criminal offences. Furthermore, the Shah, as Commander of the Armed Forces, had extensive powers where military criminal matters were concerned. The Code also determined how discipline was to be imposed within the Army and created disciplinary courts together with rules of procedure. The Judicial Organization for the Armed Forces was created to operate in parallel with the military justice structures set up under the Code of Military Justice. Later, another similar organization was created for the Gendarmerie.⁴³² Military jurisdiction was broad. It not only applied to members of the Armed Forces, Gendarmerie and Police who had committed military or ordinary offences but also to civilians, especially where political or other related offences were concerned.

On 11 February 1979, the government of the Pahlavi monarchy was overthrown by the movement headed by the Ayatollah Khomeini. That same year the Islamic Republic of Iran was established. In December, the Constitution of the Islamic Republic of Iran, an amended version of which is still in force today, was adopted. Article 4 of the new Constitution declared that all civil, penal, financial, economic, administrative, military and political laws and regulations should be based on Islamic law. Article 61 also stipulated that judicial power should be exercised by courts of justice which must act in accordance with Islamic precepts and implement *Hodoud* (punishments applicable under Islamic law).⁴³³ According to the Constitution, the head of the judiciary is appointed by the Leader who has the responsibility and authority to determine the general policies to be followed by the country, supervise the proper implementation of those policies, issue decrees and pardon condemned persons or commute their sentence. It is the head of the judiciary who appoints judges.⁴³⁴ As far as military justice was concerned, article 172 established military courts and stated that they should have jurisdiction to

432 A. Azmayesh, "*Le droit pénal militaire en Iran*", in *Revue internationale de droit militaire et de droit de la guerre*, International Society for Military Law and the Law of War, Book XXX, Volume 1-2-3-4, Brussels 1991, p.29 and following.

433 *Core document forming part of the reports of States parties : Islamic Republic of Iran*, United Nations document HRI/CORE/1/Add.106, 1 July 1999.

434 *Ibidem*.

try offences committed by members of the Army, Police, Gendarmerie and Islamic Revolution Guard Corps “specifically in connection with military duties”.⁴³⁵

With the arrival of the new Islamic government in Iran, the Code of Military Justice of 1940 ceased to apply. There was a wave of reaction against military justice which, in the time of Shah Pahlavi, epitomized repression of the opposition. One of the first acts by the new authorities was therefore to quash convictions for political offences handed down by military courts between 1953 and 1979.⁴³⁶ A decree issued on 1 May 1979 restored responsibility for trying ordinary offences to the ordinary criminal courts.⁴³⁷ Broadly speaking, the offences concerned were political offences and offences related to drugs trafficking. The same decree stated that the jurisdiction of the military courts was to be limited solely to “specifically military cases” and also ordered that offences committed by members of the Police and Gendarmerie should remain subject to the jurisdiction of the ordinary courts.⁴³⁸ A later decree clarified that “specifically military cases” meant service-related acts.⁴³⁹ In August 1979, a Military Criminal Code was issued.⁴⁴⁰ In reality, it was an amended version of the 1940 Code of Military Justice: the references to the King were removed from the text, the Military Prosecutor became answerable to the Prosecutor General before the Supreme Court and the military rank required to be a judge or prosecutor was changed. In 1981, the Judicial Organization for the Armed Forces, the courts and the military prosecutors were all incorporated into the judiciary.⁴⁴¹ In 1985, the Law of Procedure of the Armed Forces of the Islamic Republic of Iran,⁴⁴² which was amended in 1990, was adopted. Under it, a new system of military justice was established.⁴⁴³

It is important to point out that responsibility for dealing with political offences, as well as with other ordinary criminal offences, was given to the Revolutionary Courts which had been established when the new government first came to power. As Professor Azmayesh has written, “the revolutionary courts [...] took over from the military courts as far as political offences were

435 Constitution of the Islamic Republic of Iran, article 172. [Spanish original, free translation.]

436 Decree dated 27 March 1979 amended by a decree dated 30 January 1980.

437 Decree dated 1 May 1979.

438 A. Azmayesh, “*Le droit pénal militaire en Iran*”, op. cit., pp. 37 and 67.

439 Decree dated 23 November 1979.

440 Decree dated 23 August 1979.

441 Law dated 20 November 1981.

442 Law dated 12 May 1985.

443 Law dated 12 May 1985.

concerned”.⁴⁴⁴ In addition, at the end of 1979, a Special Revolutionary Court for the Army was set up. This special court, which operates outside of the military criminal structure, is empowered to try cases involving military plots and offences against state security committed by members of the Army, Police and Gendarmerie. It follows the same rules of procedure as the Revolutionary Courts and is a court of sole instance whose decisions cannot be the subject of any kind of appeal. It is made up of a cleric, a military officer and a civilian. It is assisted by a Special Prosecutor who is appointed by the Minister of Defence and has full authority to carry out investigations, bring charges and make arrests.

*The Situation of Military Justice in 1991*⁴⁴⁵

As Professor Azmayesh has written, Iranian military criminal law is “a mixture of constitutional provisions and provisions of ordinary law”.⁴⁴⁶ The main sources of law for matters concerning military justice are article 172 of the Constitution, Koranic law (*Charia*)⁴⁴⁷, the Law of Judicial Organization of the Armed Forces⁴⁴⁸, the Law of Procedure of the Armed Forces⁴⁴⁹ and the Law of Military Justice.⁴⁵⁰ As far as procedures are concerned, the provisions of the Code of Criminal Procedure apply. As far as substantive law and forms of punishment are concerned, many of the provisions of the 1940 Code of Military Justice still apply. The main feature of the military justice system is that it is a uniform system which makes no distinction between peacetime, emergency situations and wartime.

The military justice system is run by the Organization of Military Justice (OMJ).⁴⁵¹ The OMJ is part of the general system of justice under the direction of the Head of the Judiciary and has no ties with the army command. The creation of military courts and military prosecutor’s offices, the appointment and removal of military judges and prosecutors and the OMJ budget all depend on the Head of the Judiciary. The president of the OMJ is appointed

444 A. Azmayesh, “*Le droit pénal militaire en Iran*”, op. cit., p.38 [French original, free translation.]

445 No information from after 1991 is available.

446 A. Azmayesh, “*Le droit pénal militaire en Iran*”, op. cit., p.42 [French original, free translation.]

447 “*Hodoud*”, “*ta’zirat*”, “*qesas*” and “*diyat*”.

448 Law dated 20 November 1981 with amendments adopted in 1982 and 1990.

449 Law dated 12 May 1985, amended in 1990.

450 Law dated 1985.

451 This organization has changed its name several times. Initially it was called the Judicial Organization of the Armed Forces, then it became the Organization of Military Justice and later the Organization of Armed Forces Procedures.

by the Supreme Council of the Judiciary. It is staffed by both military and civilian personnel but the system gives a certain degree of precedence to military officials, especially military jurists. In any event, military officials who work with the OMJ are subject to the regulations that apply to civilian officials as well as those that apply to the military.

The OMJ has its headquarters in Teheran as well as branches in each administrative division of the country. The military justice system is made up of first degree and second degree military tribunals and the Office of the Military Prosecutor. The distinction between the first and second degree military tribunals is not the same as that which exists between different tiers of jurisdiction in other systems (first and second instance). The concept of degree refers to the nature of the offence and the respective penalties to be applied. For example, the first degree military tribunals try all offences that are considered to be serious and punishable under *Charia (hodoud)* and which incur the harshest penalties.⁴⁵² The second degree military tribunals try all other crimes and minor offences. There are also autonomous second degree military tribunals in areas where, due to the low number of cases, there is no branch of the OMJ. In such cases, the autonomous military tribunals have broader jurisdiction than the ordinary second degree military tribunals. In any event, the jurisdiction of the first degree military tribunals takes precedence over that of the second degree ones. It should be noted that, despite their name, first and second degree military tribunals do not consist of a panel of judges but of a single judge. In the case of first degree military tribunals, the judge can be assisted by a legal adviser. In practice, the Teheran First Degree Military Tribunal is the highest authority since it is presided by the President of the OMJ who has extensive powers with regard to military criminal matters and is responsible for supervising the work of the military courts.

The prosecutorial function is discharged by the military prosecutor's offices which are attached to each branch of the OMJ and to each military court. They are responsible for carrying out pre-trial investigations and bringing charges and also represent the public interest at trial. They are directed by the Prosecutor before the Supreme Court and are preferably made up of military jurists.

Military jurisdiction is limited to "specifically military offences".⁴⁵³ Nevertheless, this concept goes beyond that of "typically military offences"

452 For example, execution, stoning, hanging, mutilation or 10 years' imprisonment.

453 Law concerning the incorporation of the Judicial Organization of the Army into the Judiciary of the Islamic Republic of Iran of 1981 and the Law concerning Military Justice of 1985.

since it has been defined as “those offences which members of the Armed Forces commit when carrying out military orders or duties”.⁴⁵⁴ Military courts therefore have jurisdiction over both military offences and ordinary offences committed as a result of service. Ordinary criminal offences which are not service- or duty-related and offences committed by justice officials fall to the jurisdiction of the ordinary courts. From the point of view of jurisdiction *ratione personae*, the following come under the jurisdiction of the military courts: members of the Army, Islamic Revolution Guard Corps, Gendarmerie, Police, Judicial Police and Committees of the Islamic Revolution, as well as any member of a “legal armed force”. Civilians who are employed by these bodies are also subject to the jurisdiction of the military courts.

In terms of procedures, the provisions of the ordinary Code of Criminal Procedure apply. Judgments handed down by the military courts can be reviewed under certain conditions.⁴⁵⁵ First degree military tribunals are responsible for reviewing the decisions of second degree military tribunals. The Supreme Court is responsible for reviewing the decisions of the first degree military tribunals.

18. Italy

History

Italian military justice dates back to the Roman Empire. Some authors believe that a good deal of military criminal law originated in that period.⁴⁵⁶ While such an eurocentric view of human history is now most definitely a thing of the past, it is nevertheless true that, given Rome’s military expansionism, methods of dispensing justice within its various armies were in existence from very early on.

Most legal scholars believe that it was in the 19th century, when the Italian peninsula was undergoing a process of unification and the nation state was being built, that the contemporary model of Italian military justice began to emerge. In the early 19th century, military justice in the peninsula had come in for strong criticism. For example, the report on the draft Military Criminal Code of the Kingdom of the Two Sicilies of 1816 stated that “it was important to emphasize that a military justice [system] with a class-based

454 Article 1, note 1, of the Law concerning Military Justice of 1985.

455 Law dated 6 October 1988.

456 Francisco Jiménez y Jiménez, *Introducción al derecho penal militar*, Ed. Civitas, Madrid, 1987, p.178.

jurisdiction for men at arms had been transformed into a special jurisdiction for trying purely military offences committed by the military”.⁴⁵⁷

With the advent of the Kingdom of Piedmont and Sardinia in the 19th century and its gradual territorial expansion throughout the Italian peninsula, the administrative machinery and the military forces began to evolve and become more uniform. The Sardinian Military Criminal Code of 1859 was to have a major influence on that process. A system of military criminal jurisdiction which was separate from that of ordinary criminal jurisdiction was established. The powers of the military courts gradually grew.⁴⁵⁸ They were authorized to try cases of banditry (*brigantaggio*) as well as to crack down, usually under emergency powers (*stato di assedio interno*), on the popular protest movements that were emerging as a result of the serious political and economic crisis that existed at the time. The military justice system was characterized by the fact that it was an integral part of the military hierarchy and provided few judicial guarantees for those who were subject to its jurisdiction.⁴⁵⁹

During the fascist régime of Benito Mussolini (1922-1945), Peacetime and Wartime Military Criminal Codes⁴⁶⁰, which regulated substantive as well as procedural aspects of military justice, were adopted. Both Codes, which have been amended or supplemented on several occasions, are still in force today. One of the main organs of military justice in the fascist period seems to have been the Special Tribunal for the Defence of the State, which was later abolished.

In 1945, at the end of the Second World War, Extraordinary Military Tribunals were set up with the power to try cases of armed robbery in which the perpetrator had been caught *in flagrante delicto*. They were abolished shortly afterwards.

The system of military criminal jurisdiction established in the 1941 Codes was made up of territorial military tribunals, military tribunals on board ship and the Military Supreme Court. It was a special jurisdiction with the Supreme Military Court at its apex as the final court of review. Military crim-

457 Cited in Francisco Jiménez y Jiménez, *Introducción al derecho penal militar*, Ed. Civitas, Madrid, 1987, p.81. [Spanish original, free translation.]

458 Antonio Intelisano, “*La Giurisdizione penale militare in Italia: sguardo retrospettivo e attuali tendenze evolutive*”, in *Revue de droit militaire et de droit de la guerre*, XIX-3-4, Brussels 1980, p.423.

459 Antonio Intelisano, “*La Giurisdizione penale militare in Italia: sguardo retrospettivo e attuali tendenze evolutive*”, en *Revue de droit militaire et de droit de la guerre*, XIX-3-4, Brussels 1980, pp. 424-425.

460 Royal decrees Nos. 303 and 1022 of 1941.

inal jurisdiction was not only totally separate from the judiciary but in a position of primacy and privilege vis-à-vis ordinary criminal jurisdiction. For example, article 264 of the Peacetime Military Criminal Code gave special dispensation to the military courts when there was a conflict of jurisdiction with an ordinary court. The territorial military tribunals were made up of a president (an officer with the rank of Brigadier-General), three military judges, two of whom had to be superior officers, and a judge rapporteur (an officer with the rank of colonel). Only the judge rapporteur, being the only proper ‘military judge’ involved in such courts, had to have any legal training. The military tribunals on board ship were not permanent organs and were set up whenever circumstances required it. They were made up of a president (an officer with the rank of captain or lieutenant commander, as appropriate) and four panel members, two of whom had to be superior officers. The jurisdiction *ratione personae* of military courts was extensive and encompassed military personnel, people attached to the armed forces, members of civilian bodies of a military nature and civilians. The Peacetime Military Criminal Code authorized the military courts to try ordinary offences committed by military personnel.⁴⁶¹ Lastly, there were only two tiers of jurisdiction in the military court system.

The 1947 Constitution

The Italian Constitution of 1947 deals with military jurisdiction under Title IV on the Judiciary, article 103 of which states that, in peacetime, military courts shall have jurisdiction solely over military offences committed by members of the Armed Forces. The Constitution does not set the limits of military jurisdiction in wartime but article 103 defers to law. As Fernández Segado points out, that article of the Constitution sets clear subjective and objective limits on military criminal jurisdiction in peacetime. “As a consequence, from the day that the current Constitution entered into force, the military courts could not try civilians in peacetime or members of the military charged with ordinary offences”.⁴⁶²

The Constitution also banned extraordinary and special jurisdictions and stipulated that performance of the judicial function should be governed by the principle of jurisdictional unity.⁴⁶³ Although it is implicit in that principle that the jurisdictional function should only be exercised by ordinary judges, the Constitution left the door open to military justice by stating in article 102

461 Article 21 of the Peacetime Military Criminal Code.

462 Francisco Fernández Segado “*La justicia militar en el derecho comparado*”, in Consejo General del Poder Judicial, *Poder Judicial*, 2a. época, N° 23, Madrid, September 1991, p.62. [Spanish original, free translation.]

463 Article 102 of the Constitution.

that special departments, made up of citizens who were not on the bench, could be set up as courts within the justice system to deal with specific issues. Despite the constitutional bar on special jurisdiction and the fact that in peacetime military justice came under the supervision of the Supreme Court (*Corte Suprema di Cassazione*), wartime military courts escaped the control of the latter as a result of article 111 of the Constitution which stated that the Supreme Court could hear applications for the quashing of any judgment or court ruling on personal liberty issued by the courts, including peacetime military courts, but not of judgments handed down by wartime military courts. Several authors have pointed out that, given this provision with regard to wartime, military justice in fact constitutes a special jurisdiction.

It should be remembered that the Peacetime and Wartime Military Criminal Codes then in force predated the Constitution. This state of affairs meant that there were numerous inconsistencies between what was laid down in the Constitution and the 1941 military criminal structure and legislation. This problem has been gradually resolved both by introducing a series of amendments to military criminal legislation, in particular those of 1956⁴⁶⁴ and 1985,⁴⁶⁵ as well as by means of jurisprudence⁴⁶⁶ and the monitoring of constitutionality.⁴⁶⁷

From the structural point of view, the territorial military tribunals, military tribunals on board ship and the Supreme Military Court were abolished in 1981⁴⁶⁸ and a new military justice structure was introduced. Despite the fact that abolition of the Supreme Military Court and the transfer of its powers to the Supreme Court had been determined in the 1947 Constitution, it was only as a result of the 1981 reforms that it became a reality. It was also in 1981 that military judges ceased to come under the authority of the Military Attorney-General. In 1988, the structures of military justice were supplemented by the Council of Military Judges (*Consiglio della Magistratura Militare*).⁴⁶⁹

464 Law N° 167 dated 23 March 1956.

465 Law N° 689 dated 26 November 1985.

466 Antonio Intelisano, op. cit., pp. 422 and 423.

467 The Constitutional Court has declared a considerable number of the articles of the Peacetime Military Criminal Code to be unconstitutional. The monitoring role played by the Constitutional Court is exercised by means of a plea of unconstitutionality that can be triggered *ex officio* or through an *ex parte* application made in the course of judicial proceedings.

468 Law N° 180 dated 7 May 1981.

469 Law N° 561 dated 30 December 1988. It was later supplemented by Decree N° 158 of 24 March 1989.

As far as jurisdiction *ratione personae* and *ratione materiae* and the classification of offences were concerned, Laws N° 167 of 1956 and N° 689 of 1985 amended many of the provisions of the Peacetime Military Criminal Code. In particular, Law N° 167 of 1967 abolished military jurisdiction for ordinary offences committed by military personnel. In 1994, the death penalty for offences specified in both the Peacetime and Wartime Military Criminal Codes was abolished by law and replaced with life imprisonment.⁴⁷⁰

Curbs were first placed on the law giving military jurisdiction primacy and privilege over ordinary jurisdiction⁴⁷¹ via the jurisprudential route. The Supreme Court settled the problem of the inconsistencies between the provisions of law and the requirements of the Constitution by ruling that the ordinary courts should have preferential jurisdiction. It considered that “the jurisdiction of the military courts must now be seen as confined solely to cases which fulfill both the objective and subjective requirement that a military offence has been committed by a member of the military, with there being no possibility of extending such jurisdiction to cases connected with people outside of the military or ordinary offences”.⁴⁷² Law N° 167 of 1956 went on to amend the relevant article of the Peacetime Military Criminal Code by establishing the primacy of ordinary criminal jurisdiction as a principle.

Lastly, in 1989, with the entry into force of a new ordinary Code of Criminal Procedure that abolished the position of examining magistrate, the equivalent position within military justice was also abolished and peacetime military procedures were brought into line with the ordinary rules of procedure although there is still an abundance of procedural regulations within the military justice system.

The Current Situation

The distinguishing features of Italian military criminal legislation are the fact that it provides for two distinct systems (one for peacetime and another for wartime) and that military criminal jurisdiction in peacetime has gradually

470 Law N° 589 dated 13 October 1994. See also the Fourth periodic report from Italy to the United Nations Human Rights Committee, United Nations document CCPR/C/103/Add.4, 28 May 1997, paragraph 27.

471 Article 264 of the Peacetime Military Criminal Code.

472 Ruling by the Supreme Court of Cassation dated 26 June 1948, cited in Francisco Fernández Segado “*La justicia militar en el Derecho comparado*”, op. cit., p.62. [Spanish original, free translation.] See also “*Evoluzione attuale della giustizia militare in Italia*”, in L'évolution actuelle de la justice militaire - Huitième Congrès international, Ankara 1979, Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, Book VIII, Vol. II, pp.790 and 791.

been brought into line with - indeed been incorporated into - ordinary jurisdiction. Nevertheless, it should be appreciated that the Ministry of Defence has extensive powers as far as the organization, geographical distribution and operation of military courts are concerned.

In peacetime, military criminal jurisdiction comprises the Military Tribunals (*Tribunali Militari*), the Military Court of Appeal (*Corti Militari di Appello*) and the Military Supervisory Courts (*Tribunali Militari di Sorveglianza*). The Supreme Court (*Corte Suprema di Cassazione*), the highest organ within ordinary jurisdiction, is the highest military court in peacetime and constitutes the third tier of jurisdiction. The military justice system is completed by the Military Attorney-General's Office. It is made up of the military prosecutors at the Military Tribunals, the general military prosecutors (*Procura Generale Militare*) at the Military Court of Appeal (*Corte Militare di Appello*) and the general military prosecutors at the Supreme Court.⁴⁷³ There are also the Council of Military Judges (*Consiglio della Magistratura Militare*), the Office of the Military Judge advocate (*l'Ufficio del Pubblico Ministero Militare*) and the Military Judicial Police, who assist the military judges and courts in the investigation of crimes.

Military Tribunals are courts of first instance or trial courts. They consist of a military appellate judge (*magistrato militare d'appello*), who presides, and two other members. One of the two must be a military judge while the other must be a member of the military of the same rank or higher than the accused. He must be an officer and, having been chosen by lot, must sit as a judge for a two-month period. There are nine military tribunals and their jurisdiction is determined by where the offence was committed. The Military Tribunal for Rome is also the trial court for military offences committed abroad. Each military tribunal has a military prosecutor who must be a military judge and is responsible for bringing charges. Offences are investigated by military judges assigned to each military tribunal with responsibility for carrying out preliminary investigations.

The Military Court of Appeal constitutes the second tier of jurisdiction and hears appeals against rulings and verdicts handed down by the military tribunals. It is the only court which has jurisdiction throughout Italian territory. It has five members, three of whom must be military judges (one of whom presides) and two of whom must be members of the military of the same rank

473 See the web page of the Italian Justice Ministry, <http://www.giustizia.it/guidagiustizia/spagnolo.htm>; Fernando Fernández Segados, "La justicia militar en el Derecho comparado", op. cit., p.66 and following, and Senate of the French Republic, [Les documents de travail du Sénat. Série Législation comparée. La Justice Militaire](#), p.16 and following.

or higher than the accused and in any event not lower than that of lieutenant colonel. However, the court is split into two sections, one located in Verona and the other in Naples, each made up of a military appellate judge, who presides, and two military judges. The prosecutorial function is performed by the general military prosecutors at the Military Court of Appeal.

The Supreme Court constitutes the third level of jurisdiction and hears appeals against verdicts handed down by the military tribunals. The prosecutorial function is discharged by the General Military Prosecutor before the Supreme Court. The latter directs the work of the Office of the General Military Prosecutor, which is made up of military prosecutors who are qualified military appeal judges. As Fernández Segado points out, “when the Supreme Court hears appeals against rulings made by military judges, the opinion of the Attorney-General’s Office is voiced by an independent representative who is part of the military justice structure”.⁴⁷⁴

The Military Supervisory Courts are responsible for ensuring that sentences are properly enforced.

Lastly, it should be noted that the Council of Military Judges is the disciplinary organ for military judges. It also advises the Ministry of Defence on questions relating to the organization, geographical distribution and operation of the military courts.⁴⁷⁵ It consists of the President of the Supreme Court, the General Military Prosecutor at the Supreme Court, five military judges and two jurists who do not sit on the bench of military judges.

In terms of composition, Italian military criminal jurisdiction is made up of professional soldiers and military judges. The latter are recruited through a selection process and must hold a degree in law. Military judge-advocates and military judges from the trial courts and appeal courts as well as military appeal judges all fit into this category. Depending on whether they are assigned to a court or a military prosecutor’s office, military judges come under the authority either of the President of the Military Court of Appeals or the General Military Prosecutor at the Military Court of Appeals. The General Military Prosecutors at the Supreme Court come under the supervision of the Military Attorney-General. Professional military judges are subject to the disciplinary jurisdiction of the Council of Military Judges while military judges who are professional soldiers are subject to the disciplinary authority of the military hierarchy.

474 Fernando Fernández Segados “*La justicia militar en el Derecho comparado*”, op.cit., p.68. [Spanish original, free translation.]

475 Decree N° 158 of 1989, article 2.

In wartime, military criminal jurisdiction is exercised by Wartime Military Courts which replace Peacetime Military Courts and the third level of jurisdiction is no longer provided by the Supreme Court. Wartime Military Courts can be regular or extraordinary courts.

The jurisdiction *ratione personae* and *ratione materiae* of military criminal courts varies depending on whether it is peacetime or wartime. In peacetime, military courts only have jurisdiction over offences contained in the Peacetime Military Criminal Code that are committed by military personnel. The interpretation of who constitutes a member of the military is broad and includes both members of the army, navy and air force and members of the *Carabinieri*. It also includes members of the military on active service, members of the military on weapons duty, *de facto* members of the military, people attached to the military (for example, military chaplains), members of civilian bodies run on a military basis and military personnel on indefinite leave.⁴⁷⁶ Within the category of “civilian bodies organized on a military basis” is the Finance Police (*Guardia di Finanza*), which is attached to the Ministry of Finance and has judicial police powers. The Peacetime Military Criminal Code contains both typically military offences and ordinary offences that have been ‘militarized’. It should be remembered that the military courts are not empowered to try ordinary offences committed by members of the military. In wartime, however, military courts have far broader jurisdiction.

19. The Netherlands

Dutch military justice is several centuries old, its salient feature being that it was originally a jurisdiction based on class privilege. During the 20th century, military criminal jurisdiction in the Netherlands was regulated under the Military Criminal Code of 1923, several provisions of which were amended in 1972 and 1978.⁴⁷⁷ In 1982, substantial changes were made to the ‘military justice’ system. A law dated 2 July 1982 determined that ‘military justice’ should be dispensed by special military divisions within the ordinary court system. Such divisions were to be made up of a military jurist and two

476 Articles 3 and following of the Peacetime Military Criminal Code. Law N° 167 of 1956 clarified and defined the rule on who constituted a member of the military on indefinite leave for the purposes of military justice.

477 Francisco Jiménez y Jiménez, *Introducción al derecho penal militar*, Ed. Civitas, Madrid, 1987, p.130.

members of the legal profession.⁴⁷⁸ As far as military justice within Europe was concerned, the Dutch reform marked an important milestone in the trend towards incorporation into the ordinary criminal system or indeed complete abolition.

The Dutch Constitution of 1983 makes no reference whatsoever to military courts. The Military Criminal Code Amendment Act, which was passed on 1 January 1991, reformed military law and abolished the death penalty for offences under military criminal law.⁴⁷⁹ According to the Dutch authorities, this law formed part of a package of legislation which had been the outcome of a 20-year review process looking at the criminal law, criminal procedure and disciplinary procedures applicable to members of the armed forces.⁴⁸⁰

According to information supplied to the United Nations Human Rights Committee by the Dutch Government, as a result of this new legislation, “[s]eparate military criminal courts, and therefore the court martial system and Supreme Military Court, have been abolished. Military personnel will now be tried by civilian courts. In principle, the general rules of civilian criminal procedure apply. However, a number of specific rules have been introduced. For instance, in appropriate cases the armed forces will send a representative to sit on Full Bench Divisions, both at district courts and at courts of appeal. This will ensure that military expertise is brought to bear on the case. The normal rules governing appeal apply. The Military Full Bench Division of the district court will also act as a court of appeal for disciplinary cases. [...] The Military Prosecutions Department has also been abolished. Its duties have been taken over by the public prosecutors at the district courts and courts of appeal. [...] [and] [p]rovisions have been made for the establishment of mobile courts, which can operate in areas where war is being waged or a state of emergency has been declared”.⁴⁸¹

The new legislation also did away with “[t]he so-called ‘open standards’ system, governing disciplinary offences... All such offences are defined. Both substantive and procedural provisions have been laid down to restrict the use of disciplinary procedures for offences which are not strictly speaking of a disciplinary nature - actually minor criminal offences”.⁴⁸²

478 Francisco Fernández Segado, “*La justicia militar en el Derecho comparado*”, in Consejo General del Poder Judicial, Poder Judicial, 2a. época, N° 23, Madrid, September 1991, p.60.

479 Law of 14 June 1990, Diario de leyes, ordenanzas y decretos, 1990, N°368, AB 1990 N° 61.

480 Third periodic report of the Netherlands to the Human Rights Committee, United Nations document CCPR/C/NET/99/3, 25 August 2000, paragraph 102.

481 *Ibid.*, paragraphs 106, 107 and 109.

482 *Ibid.*, paragraph 104.

20. Norway

In Norway, there is no military criminal jurisdiction in peacetime. Military courts are only permitted in wartime. However, in peacetime the military criminal regulations relating to both substance and procedure are applied by the ordinary courts. Until 1996 when it was repealed, article 89 of the Norwegian Constitution stipulated that in peacetime the Supreme Court, consisting of two officials appointed by the King, constituted the court of second and last resort for “all military matters related to life or honour” or which entailed a prison sentence of over three months.⁴⁸³

As pointed out by Ivar Follestad, “criminal jurisdiction is military in wartime and civilian in peacetime but discipline is always military”.⁴⁸⁴ In peacetime, therefore, military criminal law is applied by ordinary judges on all military personnel in active service, civilians employed by the armed forces and passengers on board ships on military expeditions. In wartime, military criminal legislation is applied by military courts. In addition to the categories covered in peacetime, military jurisdiction extends to anyone in the service of the armed forces, anyone accompanying the troops, prisoners of war and anyone who commits acts of treason in war or crimes against state security or the independence and Constitution of Norway, as well as certain offences committed in the theatre of military operations.

The regulations governing military jurisdiction consist of the Military Criminal Code of 22 May 1902, the Law of Military Criminal Procedure in Peacetime of 1921 which amended the Code of Ordinary Criminal Procedure of 1887 and the Code Military Criminal Procedure of 1900. The law distinguishes between military offences committed in peacetime and those committed in wartime.

Military criminal jurisdiction only operates in wartime and has three tiers of jurisdiction. The military court of first instance or trial court provides the first tier. It consists of a professional judge and two members of the military. The second tier is provided by the Military Courts of Appeal, which are presided by a professional judge and consist of two professional judges and four members of the military. They are also the trial courts for certain serious offences. Lastly, at the apex is the Supreme Court which has the authority to resolve issues relating to the interpretation of law, review sentences and act as an

483 Constitution, article 89. [Spanish original, free translation.]

484 Ivor Follestad, “*Aperçus sur le droit pénal, la procédure criminelle et le droit disciplinaire militaires en Norvège*” in *Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, Premier Congrès International - Action pénale et action disciplinaire*, Bruxelles, 14 -16 mai 1959, Strasbourg, 1960, p.169. [French original, free translation.]

appeal court for judgments handed down in the first instance by the military courts of appeal.

The system of military criminal jurisdiction in wartime is completed by the Judge Advocate's Office which is run by military lawyers. In principle, they are civilian judges attached to the Ministry of Justice who take up the post in the event of a military call-up.

In wartime, the military commander or military judge advocate is responsible for initiating criminal proceedings. The military courts have sole jurisdiction for offences envisaged in military criminal legislation. Ordinary offences can go either to the ordinary courts or to the military courts, depending on the decision made by whoever is responsible for bringing the action. The official concerned may also decide that the behaviour in question should not be handled by the criminal courts but should be treated as a disciplinary matter.

In certain extreme cases in wartime, it was possible to establish a summary military court (*standrett*) for capital offences in which the perpetrator had been caught in the act. It was made up of a 'war judge', five military officers, two non-commissioned military officers and three soldiers. The death sentence could only be imposed if the verdict was unanimous. If that was not the case, the defendant had to be acquitted. The procedure was extremely swift, lasting a maximum of 24 hours, and no investigative phase was permitted beforehand.

21. Paraguay

History

Even though Paraguay achieved independence in 1811, the Military Ordinances issued by King Carlos III in 1768 were enforced in independent Paraguay until 1887. It was not until then, following the 'War of the Triple Alliance' (1865-1870) against Brazil, Argentina and Uruguay, that the first Military Criminal Code and Military Code of Criminal Procedure were issued. They were both strongly influenced by Italian legislation.⁴⁸⁵ In 1917, the Code of Military Criminal Procedure was amended as a result of Law N° 270. Following the adoption of a new Paraguayan Constitution in 1940, legislation was enacted to allow Special Military Courts (*Tribunales Militares Extraordinarios*) to be set up in the event of internal upheaval, with

485 Francisco Jiménez y Jiménez, *Introducción al derecho penal militar*, Ed. Civitas, Madrid, 1987, p.137.

the power to try civilians and impose considerably heavier sentences.⁴⁸⁶ The fact was that since 1939 the country had been living under a state of siege. It should be remembered that, apart from a few short periods in 1946 and 1947, Paraguay was under an almost permanent state of siege until February 1989 when the *de facto* government of General Alfredo Stroessner was overthrown.

In 1967, the *de facto* government of General Stroessner (1954-1989) promulgated a new Paraguayan Constitution, article 43 of which established that “(a) Military Courts shall be set up to judge offences and disciplinary breaches of a military nature that are defined as such in law. (b) In the event that an offence has been established and is punishable under both ordinary criminal law and military criminal law, it shall not be treated as a military offence unless it has been committed by a soldier on active service and is of a military nature. (c) If there is any doubt as to whether it is a military offence or an ordinary one, it shall be treated as an ordinary offence”.⁴⁸⁷ However, as a result of the state of siege legislation, this clause of the Constitution and the provisions on *habeas corpus* and human rights had become dead letters. In December 1980, a new Military Criminal Code, a new Code of Military Criminal Procedure and a Basic Law on Military Courts (*Ley Orgánica de los Tribunales Militares*) were introduced.⁴⁸⁸ A particular feature of the new legislation was the creation of the Supreme Court of Military Justice. Under the *de facto* government, the jurisdiction of the military courts underwent a significant process of expansion.

In 1992, following the return to democratic rule, a new Paraguayan Constitution was adopted. Article 174 of the new constitution, entitled “Concerning Military Courts”, specifies that “[m]ilitary courts shall only try offences or disciplinary breaches of a military nature that are defined as such in law and which have been committed by military personnel on active service. Appeals against their decisions shall be brought before the ordinary courts. [...] In the event that an offence has been established and is punishable under both ordinary criminal law and military criminal law, it shall not be treated as a military offence unless it has been committed by a soldier on active service while carrying out military duties. If there is any doubt as to whether it is an ordinary offence or a military one, it shall be treated as an ordinary offence. Such courts shall only have jurisdiction over civilians and retired military personnel in the event of international armed conflict and in

486 Decree-Law N° 2,379.

487 Spanish original, free translation.

488 Law N° 840/80.

the manner determined by law".⁴⁸⁹ As a result of the introduction of the new constitution, reform of the justice system got under way. A new Criminal Code was issued in 1997 and a new Code of Criminal Procedure in 1998. An important feature of the new Criminal Code is that torture and forced disappearance have been classified as offences.⁴⁹⁰ However, no fundamental changes were made to the military justice system and the 1980 military criminal legislation remains in force.

The Current Situation

The Paraguayan system of 'military justice' performs two distinct functions. On the one hand, it performs an administrative role in the shape of the Directorate of the Military Justice Service (*Dirección del Servicio de Justicia Militar*). This consists of undertaking academic study, providing legal advice and running military secure units and prisons. On the other hand, it performs a more strictly jurisdictional function in the shape of the military courts. This involves both prosecuting offences and punishing breaches of discipline. The 'military justice' system, in both its forms, is an integral part of the high command of the armed forces and its members are military personnel. For this reason, the Supreme Court of Justice has stated that the system of military criminal jurisdiction is both an "administrative and jurisdictional organ".⁴⁹¹

There is provision for military courts both in peacetime and wartime. However, their composition varies according to the situation. Thus, in peacetime, Paraguayan military criminal jurisdiction consists of the Supreme Court of Military Justice, military trial judges (*jueces de primera instancia militar*), military examining magistrates (*jueces de instrucción militar*) and the prosecution service (*Ministerio Público*) for which the Military Attorney-General (*Fiscal Militar General*) and military prosecuting officers (*Agentes Fiscales Militares*) are responsible. In wartime, in addition to the organs of military justice which operate in peacetime, military criminal jurisdiction consists of Special Military Courts for the Trial of Generals (*Tribunales Militares extra-*

489 Spanish original, free translation.

490 Law N° 1160 of 1997.

491 Supreme Court of Justice, Decision and Verdict N° 84, 17 April 1998, Hearing regarding the "Record of the Preliminary Investigation conducted against Major General (Mr) Lino César Oviedo Silva, Brigadier General (Mr) Sindulfo Fernando Ruíz Ramírez and Colonel (Mr) José Manuel Bobeda Melgarejo concerning alleged offences against the order and security of the Armed Forces of the nation and insubordination which took place on 22 and 23 April 1996 in various military units of the Republic". [Spanish original, free translation.]

ordinarios para juzgar a Generales)⁴⁹², Wartime Military Courts (*Tribunales Militares en tiempo de guerra*)⁴⁹³ and Special Wartime Military Courts (*Tribunales Militares extraordinarios en tiempo de guerra*).⁴⁹⁴

The Supreme Court of Military Justice is made up of three general or superior officers who are appointed by the executive. It has jurisdictional as well as governmental and administrative functions. In its jurisdictional role, it is responsible for settling conflicts of jurisdiction between military judges (trial judges and/or examining magistrates) and hearing appeals against final and interlocutory judgments handed down by the trial courts (*juzgados de primera instancia*). As far as governmental matters are concerned, the Supreme Court of Military Justice puts forward recommendations to the executive in connection with the appointment and removal of military judges, the Military Attorney-General and other military prosecutors, as well as other ‘military justice’ officials. The Supreme Court of Military Justice plays a supervisory role with regard to the managerial, disciplinary, consultative and financial aspects of all the functions performed by the organs of military justice.

Although the Special Military Courts for the Trial of Generals were designed to be set up in situations of war, the Supreme Court of Justice has taken the view that it would not be unconstitutional or unlawful for them to be set up in peacetime. It considered it to be incorrect to claim that “for the purposes of trying general officers in peacetime, special military courts constitute *ex post facto* courts”.⁴⁹⁵

Article 31 of the Code of Military Criminal Procedure stipulates that military courts have jurisdiction *ratione materiae* over “offences and disciplinary breaches of a military nature which affect the Armed Forces of the Nation” and “offences and disciplinary breaches which affect the law and interests of the Armed Forces of the Nation [...] committed by serving military personnel or military employees on duty during disembarkation, periods spent abroad

492 Made up of five general officers appointed by the executive, using a brief summary proceeding whose decisions cannot be appealed (Code of Military Criminal Procedure, arts. 290 to 295).

493 To be set up by the Commander in Chief in the Theatre of Operations, either inside or outside the country, who is responsible for appointing the trial judge, the examining magistrate, the prosecutors, defence counsel and clerks.

494 This is an expedited proceeding to be used in cases in which those responsible have been caught in the act or where there has been a public outcry or the facts are well-known.

495 Supreme Court of Justice, Decision and Verdict N° 84, 17 April 1998, Hearing regarding the “Record of the Preliminary Investigation conducted against Major General (Mr) Lino César Oviedo Silva, and others”. [Spanish original, free translation.]

[and] on aircraft or ships belonging to the military or to a private company but which have been leased to military institutions”.⁴⁹⁶ According to article 174 of the Constitution and the Code of Military Criminal Procedure, civilians can only be tried by military courts “in the event of an international armed conflict”.⁴⁹⁷

Ordinary offences committed by members of the armed forces fall to the jurisdiction of the ordinary courts. It is important to highlight that, in an *obiter dictum* related to one of its rulings, the Supreme Court of Justice specifically stated that the existence of military justice “does not imply the existence of an exclusive personal jurisdiction for military personnel, in violation of the principle of equality before the law and the courts, since they are subject to such jurisdiction by virtue of the special nature of the matter, namely, solely in the case of military misdemeanours and offences; as far as other matters to be judged in which they are involved are concerned, responsibility for dealing with them lies with the ordinary courts”.⁴⁹⁸

22. Peru

History

Like most former colonies, upon freeing itself from the Spanish Crown, the newly-established Republic of Peru continued to enforce the military criminal legislation which had been introduced by the mother country. This state of affairs was expressly acknowledged in the first Peruvian Constitution adopted in 1823. Article 121 stated that “[a]ll laws introduced prior to the Constitution of 1823 which are not contrary to the system of independence and the principles established herein, remain valid and in force until Civil, Criminal, Military and Commercial Codes have been organized”.⁴⁹⁹ Military courts were established very early on by the liberating army of Simón Bolívar, especially to deal with “the proliferation of bands of delinquents and robbers”.⁵⁰⁰

496 Code of Military Criminal Procedure, article 31. [Spanish original, free translation.]

497 Article 174 of the Constitution. [Spanish original, free translation.]

498 Supreme Court of Justice, Agreement and Ruling N° 84, 17 April 1998, Hearing regarding the “Record of the Preliminary Investigation conducted against Major General (Mr) Lino César Oviedo Silva, and others”. [Spanish original, free translation.]

499 Constitution of 1823, article 121. [Spanish original, free translation.]

500 Web page of the Supreme Court of Military Justice: <http://www.mindef.gob.pe/consejo.htm>. [Spanish original, free translation.]

In 1834, with the enactment of a fresh Constitution, the foundations for a Peruvian system of military criminal jurisdiction were set through the establishment of the Supreme Council of War (*Consejo Supremo de Guerra*) as the highest organ of military justice with the power to appoint the members of military courts. The 1839 Constitution abolished the Supreme Council of War and jurisdictional authority over military criminal matters passed to the President of the Republic. However, legislative steps to provide Peru with its own military criminal legislation only began in 1863 when a commission was set up “in order to codify military laws and ordinances, ensuring that they were in line with the Constitution and criminal legislation”.⁵⁰¹ As a result of this initiative, a Peruvian Code of Military Justice was drafted. However, due to a change of government, it never entered into force.

At the end of the 19th century, under the government of President Nicolás de Piérola and with the aid of the French Military Mission, a process of army reorganization began and a commission was set up to draft a Code of Military Justice. The code was approved by Congress on 10 December 1898 and entered into force on 20 January 1899. The main feature of the 1898 Code of Military Justice was that it gave broad powers to the military courts. Their jurisdiction was expanded even further as a result of legislation passed by the *de facto* governments of General Benavides and General Oría. Military courts were not only responsible for trying military and ordinary offences committed by members of the armed forces but also several offences committed by civilians. Nevertheless, it is worth noting that in 1917, with the enactment of Law N° 2442, military jurisdiction in peacetime was restricted to “infractions committed [by military personnel] in acts of service as established in the Code of Military Justice”.⁵⁰²

The restrictive interpretation of military jurisdiction established in Law N° 2442 of 1917 was reiterated in the Constitution of 1920, article 156 of which stipulated that “military justice shall not on any grounds extend its jurisdiction to people who are not serving in the Army, except in the event of National War”.⁵⁰³ But in 1927, this article was amended through Law N° 5862 which granted the military courts the authority to try National Police personnel. In 1930, under Law N° 6881, the broad military jurisdiction that had been established in the 1898 Code of Military Justice was reinstated and remained in force until 1939 when new laws on military justice were enacted. Later, in 1950 and 1963, further legislation on military justice was intro-

501 Web page of the Supreme Court of Military Justice: <http://www.mindef.gob.pe/consejo.htm>. [Spanish original, free translation.]

502 Law 2442 of 1917. [Spanish original, free translation.]

503 Constitution of 1920, article 156. [Spanish original, free translation.]

duced. In 1950, the Judge Advocate Corps (*Cuerpo Jurídico Militar*) was created.⁵⁰⁴

The Revolutionary Government of the Armed Forces (*Gobierno Revolucionario de la Fuerza Armada - GRAF*) which overthrew President Fernando Belaúnde Terry in 1968 convened a Constituent Assembly in 1978. The Assembly drafted a new Constitution and called a presidential election for 1980 which resulted in the re-election of Belaúnde Terry. The new constitution was promulgated in 1979 and fully entered into force in 1980.⁵⁰⁵ In 1980, “the present cycle of armed political violence in Peru began”⁵⁰⁶ with the eruption of military action by the Communist Party of Peru - Shining Path (*Partido Comunista del Perú - Sendero Luminoso*) and later, in 1984, the Tupac Amaru Revolutionary Movement (*Movimiento Revolucionario Tupac Amaru - MRTA*). One of the darkest pages of Peruvian history was beginning. As well as the violence and forms of terrorism used by the armed opposition groups, the period was characterized by the permanent existence of states of emergency and the trial of civilians in military courts as well as the waging of a ‘dirty war’ (*‘guerra sucia’*).⁵⁰⁷ According to the Inter-American Commission on Human Rights, “[f]rom 1980 to 1992, a period that saw a sharp rise in the violence, 24,250 people died due to political violence in Peru; of these, 2,044 were members of the security forces, 10,171 were civilians, 11,773 were persons alleged to be members of armed dissident groups and 262 were allegedly linked to drug-trafficking”.⁵⁰⁸

The 1979 Constitution

The new Constitution established that military courts were to be independent from the judiciary. Article 233 stated that “[t]he following are guarantees for

504 Brig. Gen.”R” Eduardo Pacheco Subauste, “*Creación del Servicio Jurídico del Ejército*”, in *Revista Peruana de Derecho Militar*, Number 1, Year 1, Lima, 1986, p.17.

505 Although some provisions of the Constitution entered into force in July 1979. See Marcial Rubio Correa, “*Fuerzas Armadas y Constitución en el Perú: 1979-1988*”, in Comisión Andina de Juristas, *La Constitución diez años después*, Lima, 1989, p.223 and following.

506 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Peru*, document of the Organization of American States, OEA/Ser.L/V/II.83, Doc. 31, 12 March 1993, chapter I, “Background”, paragraph 3.

507 Francisco José Eguiguren Praeli, “*El estado de emergencia y su aplicación en la experiencia constitucional peruana 1980-1988*”, in Comisión Andina de Juristas, *La Constitución diez años después*, Lima, 1989, p.261 and following.

508 Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, document of the Organization of American States, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, Introduction, “Background”, paragraph 5.

the administration of justice: [...] 1. The uniform nature and exclusivity of the jurisdictional function. No independent jurisdiction exists nor can such be established other than for arbitrational or military matters”.⁵⁰⁹ Carlos Serquen Jiménez justified this provision of the constitution by arguing that “[t]he Armed Force is maintained through discipline, for which the President of the Republic has, as a fundamental tool, the Code of Military Justice [...] [and] delegates that power to the military courts. [...] The President of the Republic does not exercise judicial functions because these have been entrusted to the Judiciary; what he exercises is a form of administrative justice which cannot be shared with that body [...] The purpose of military justice is not to guarantee rights but to secure discipline”.⁵¹⁰

Article 282 of the 1979 Constitution also extended military jurisdiction by establishing that *‘delitos de función’* (offences committed in the line of duty) by members of the armed forces and police fell within the remit of military courts. In addition, it stipulated that those who failed to comply with the regulations on compulsory military service were subject to military criminal legislation. The jurisdiction of military courts was to be even more drastically extended through the enactment of new military criminal legislation as well as numerous measures introduced under emergency powers. In 1980, the Code of Military Justice⁵¹¹ and the Basic Law on Military Justice (*Ley Orgánica de Justicia Militar*)⁵¹² were issued and are still in force today with some amendments.

The Supreme Court developed and maintained an extremely broad interpretation of what constituted a *‘delito de función’*. As Professor Kai Ambos points out, the interpretation went far beyond the causal relationship between an unlawful act and a specific military duty.⁵¹³ The Court considered that such offences “[...] were not solely confined to offences committed by a soldier in the course of doing his job [...] but also all those related to it or which affected the duties or activities incumbent on each soldier as a result of belonging to the armed institutions” [and that] “consequently it should not be necessary for there to be [...] causality between the offence and the job, it is sufficient for there to be simply opportunity (*ocasionalidad*)”.⁵¹⁴

509 Constitution of 1979, article 233. [Spanish original, free translation.]

510 Carlos Serquen Jiménez in *Revista Peruana de Derecho Militar*, No 1, Year 1, Lima, 1986, pp.13 and 14. [Spanish original, free translation.]

511 Decree Law N° 23214 dated 24 July 1980.

512 Decree Law N° 23201 dated 19 July 1980.

513 Kai Ambos, *Impunidad y el Derecho penal internacional*, Ed. Ad-Hoc, 2nd edition, Buenos Aires, 1999, p.211.

514 Criminal Division of the Supreme Court of Justice, Jurisdiction Dispute 5-85, Judgment dated 10 April 1985.

But it was mainly under the emergency legislation adopted during the 1980s that the jurisdiction of military courts underwent unrestrained growth.⁵¹⁵ Law N° 24150 of 1985 on emergency zones and political-military commands marked a milestone in the expansion of military jurisdiction. Under article 10, members of the armed forces and police serving in an area in which a state of emergency had been declared were to come under exclusive military jurisdiction except in the case of conduct which had no “link with service”.⁵¹⁶ This extension of military jurisdiction was confirmed by the Supreme Court of Justice. In 1985, in the case of an army lieutenant-commander accused of killing 50 people, the Court considered that “the armed force, when operating in an emergency zone, does so on a round-the-clock basis and therefore the concept of the service-related offence applies to the alleged act since it has been brought about because of, or in the course of, performing military duty”.⁵¹⁷

The tragic events that occurred at several prisons in Lima and Callao in 1986 were also used to justify a further swingeing expansion of military jurisdiction on the same grounds. On 18 June 1986, simultaneous riots led by inmates who were awaiting trial or serving sentences for terrorism broke out in El Frontón, Santa Barbara and Lurigancho Prisons. As a result of the military operations to put down the riots, approximately 300 inmates died, most of them the victims of extrajudicial execution, and many others disappeared.⁵¹⁸ When the military operations were over, the government of President Alan García, using emergency powers, declared the prisons to be a “restricted military area”⁵¹⁹ under the exclusive jurisdiction of the armed forces and to which the judicial authorities were not allowed access. The military courts took over the case and “military judges authorized bodies to be exhumed and reburied secretly, with no regard for the proper legal procedures and usurping the powers of the judiciary”.⁵²⁰ A challenge was made to the authority of the military courts, provoking a conflict of jurisdiction with the ordinary courts. On 27 August 1986, the Supreme Court ruled in favour of the military courts.

515 Defensoría del Pueblo (Ombudsman’s Office), *Lineamientos para la reforma de la justicia militar en Perú*, Lima, July 1997, p.24 (PDF version).

516 Law 24150 of 1985, article 10. [Spanish original, free translation.]

517 Criminal Division of the Supreme Court of Justice, Jurisdiction Dispute 5-85, Judgment dated 10 April 1985. [Spanish original, free translation.]

518 See the “Report to Congress of the events that took place on 18 and 19 June 1986 in the prisons of Lurigancho, El Frontón and Santa Barbara” compiled by the Peruvian Congress Commission of Inquiry (*Comisión Investigadora del Congreso de Perú*), presided by Senator Rolando Ames, Lima, December 1987, and the Inter-American Commission on Human Rights, Judgment of 16 August 2000, *Durand and Ugarte Case (Peru)*.

The 1993 Constitution and the Fujimori era

In 1990, Alberto Fujimori assumed the Peruvian presidency and what was described by the Inter-American Commission on Human Rights as a gradual process of “impairment of the rule of law in Peru”⁵²¹ began. In 1992, the Fujimori government carried out a virtual coup d’état from inside the State. By means of Decree Law N° 25418, it set up a Government of Emergency and National Reconstruction (*Gobierno de Emergencia y Reconstrucción Nacional*). The judiciary was taken over, there was no longer any separation of the State powers and the political system became one in which the leading role was played by the executive and the armed forces. In 1993 a new Constitution was introduced.

The 1993 Constitution, which is still in force today, kept military justice as a special jurisdiction outside of the judiciary and further extended its powers. Article 139 states that “[t]he principles and rights of the jurisdictional function are: [...] 1. The uniform nature and exclusivity of the jurisdictional function. No independent jurisdiction exists nor can such be established, other than for military or arbitrational matters”.⁵²² Article 173 of the Constitution described military jurisdiction as follows: “In the case of service-related offences, members of the Armed Forces and National Police are subject to the appropriate jurisdiction and the Code of Military Justice. [...] Those who fail to comply with the regulations on Compulsory Military Service are also subject to the Code of Military Justice”.⁵²³ Article 173 extended military jurisdiction to include the trial of civilians for “offences of treason against the motherland” and terrorism.⁵²⁴ With regard to appeals, article 141 of the Constitution established that the Supreme Court of Justice would hear applications “to quash judgments handed down under military jurisdiction”.⁵²⁵ However, it expressly stated that applications for a judgment to be quashed could only be lodged in cases in which the military courts had imposed the death penalty.

519 Supreme Decree N° 006-86-JUS dated 19 June 1986. [Spanish original, free translation.]

520 Francisco José Eguiguren Praeli, “*El estado de emergencia y su aplicación en la experiencia constitucional peruana 1980-1988*”, in Comisión Andina de Juristas, *La Constitución diez años después*, Lima, 1989, p.274-275. [Spanish original, free translation.]

521 Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Peru, document of the Organization of American States, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, Chapter II, “Administration of Justice and the Rule of Law”, paragraph 238.

522 Constitution of 1993, article 139. [Spanish original, free translation.]

523 Ibid., article 173. [Spanish original, free translation.]

524 Ibidem. [Spanish original, free translation.]

525 Ibid., article 141. [Spanish original, free translation.]

But it was the anti-terrorist legislation which further expanded the jurisdiction of the military courts. Under emergency legislation they were empowered to try civilians. One measure it is particularly worth mentioning was Decree Law No 25659 of 1992 which allowed a system of 'faceless' military courts (*tribunales militares 'sin rostro'*) to be set up to try civilians accused of 'betraying the motherland'. Another decree law, N° 25708 of 1992, stipulated that, in such cases, the summary procedure established under the Code of Military Justice for trials held in the theatre of operations should apply. It also ruled that it was not possible to apply for a writ of *habeas corpus* in connection with such proceedings.

The anti-terrorist legislation was extended so that types of behaviour normally seen as related to common crime or 'public safety' (*'seguridad ciudadana'*) issues were treated as terrorist conduct that threatened 'national security'. As a result of a series of decrees issued in 1998, the military courts were therefore given the authority to try civilians, including juveniles. Legislative Decree N° 895 of 1998, also known as the "Law against Aggravated Terrorism" (*"Ley contra el Terrorismo Agravado"*), together with other supplementary measures⁵²⁶, therefore militarized the fight against organized crime and gave the military courts responsibility for bringing suspects to trial through the use of a special type of procedure, which was swift and summary in nature and characterized by a substantial reduction in judicial guarantees and a draconian punishment régime (consisting of compulsory 'continuous cell isolation'). Legislative Decree N° 895 also lowered the qualifying age for prosecution from 18 to 16 years of age, thereby permitting juveniles to be tried by military courts and making them subject to the same rules of procedure and prison regulations as adults. Although in 1999 Legislative Decree N° 895 was amended as a result of Law N° 27235 so that the authority to try those suspected of 'aggravated terrorism' was transferred to the ordinary courts, proceedings which were already under way or being reviewed within the military justice system remained in the hands of the military courts.

Human rights violations committed by military or police personnel continued to come under the jurisdiction of the military courts on the grounds that they were service-related acts or offences committed in the line of duty (*'delitos de función'*) and/or, as in the 1980s, through the use of emergency legislation. While it is true that, in a few cases, the perpetrators of human rights violations were tried and sentenced by military courts, it is also the case that those involved were members of the rank and file or non-commissioned officers whereas any officers involved in such illegal acts remained immune to military criminal prosecution. As the Inter-American Commission on Human

526 Decrees N° 896, 987, 898, 899 and 900 of 1998.

Rights has stated, the actions of the military courts in this area resulted in impunity.⁵²⁷

As far as human rights violations were concerned, the Supreme Court of Justice persisted in its broad interpretation of what constituted a '*delito de función*', thereby favouring military jurisdiction.⁵²⁸ In some cases where there was a conflict of jurisdiction, the Supreme Court ruled in favour of the military courts because of where the offence had been committed or because the perpetrators and victims were members of the military. For example, in the case of Leonor La Rosa Bustamente, a sub officer from the National Intelligence Service (*Servicio de Inteligencia Nacional - SIN*), who was tortured by SIN personnel in a military barracks, leaving her quadriplegic, the Supreme Court ruled in favour of the military courts. It based its decision on the fact that both the victim and the perpetrators of the offence were members of the military on active service and that the place where the offence was committed was of a military nature.⁵²⁹

Nevertheless, given that it was possible to give a variety of legal interpretations to the term '*delito de función*', some judges from the Supreme Court of Justice tried to argue that the ordinary courts should have jurisdiction for trying military and police personnel who had been accused of serious human rights violations. However, their efforts were stymied by the enactment of legislation that was designed to ensure that such cases would remain within the remit of military justice. The case of the massacre at 'La Cantuta' is a case in point. It involved the kidnap and murder of nine university students and one lecturer in 1992 by a covert operations group working on behalf of the army and the National Intelligence Service. Both the Supreme Council of Military Justice (*Consejo Supremo de Justicia Militar*) and the ordinary courts took cognizance of the case, thereby triggering a conflict of jurisdiction. On 3 February 1994, the dispute reached the Criminal Division of the Supreme Court of Justice. However, the Criminal Division did not obtain the necessary number of votes for the case to be referred to military jurisdiction. Two of the five judges took the view that such offences could not be deemed to be service-related acts or '*delitos de función*' and that jurisdiction therefore

527 Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Peru, document of the Organization of American States, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, Chapter II "Administration of Justice and the Rule of Law", paragraph 209 and following.

528 Francisco José Eguiguren Praeli, "*El estado de emergencia y su aplicación en la experiencia constitucional peruana 1980-1988*", in Comisión Andina de Juristas, La Constitución diez años después, Lima, 1989, p.274.

529 Supreme Court of Justice, Criminal Division "C", Dispute over Jurisdiction N° 12-97, 18 July 1997.

lay with the ordinary courts. The two judges said that “such unlawful acts neither concern strictly military juridical rights nor have any connection with the operational realm of the military institutions since they constitute infringements of such fundamental juridical rights as life, personal security and liberty, [and] personal safety and, as such, should always be tried in the ordinary courts because they are indispensable pre-requisites for the communal life of society as a whole and not that of a particular class or institution”.⁵³⁰ Given this state of affairs, in a marathon session which began on the night of 7 February and ended in the early hours of 8 February, Congress passed Law N° 26291, which changed the number of votes required by the court to settle conflicts of jurisdiction from four to three. On 11 February, the Supreme Court of Justice settled the conflict of jurisdiction in favour of the military courts.⁵³¹

Impunity became institutionalized on 16 June 1995 when a general amnesty was granted to members of the armed forces and police for violations of human rights committed between 1980 and 1995.⁵³² However, the legality of the measure was contested. Judge Antonia Saquicuray at the 16th Criminal Court in Lima, who was handling the case of the Barrios Altos massacre carried out in 1991 by a covert operations force (‘the Colina group’) from the National Intelligence Service, ruled that, under the terms of the Peruvian Constitution and Peru’s international commitments under the American Convention on Human Rights, the amnesty did not apply and ordered the criminal proceedings to go ahead.⁵³³ This ruling by a judge from the ordinary court system was challenged by the Attorney-General’s Office in the Supreme Court of Justice. On 28 June, before the latter had ruled on the appeal, Congress issued Decree Law N° 26492, otherwise known as the ‘amnesty law interpretation law’ (*Ley de interpretación de la ley de amnistía*) making it “obligatory for the courts of justice to apply” the amnesty law.⁵³⁴ Decree Law N° 26492 also deprived people of the right to challenge the legality of the Amnesty Law in the courts. Decree Law N° 26,618 later

530 Dissenting vote of Judges Almenara Bryson and Sivina Hurtado, Criminal Division of the Supreme Court, Conflict of Jurisdiction N° 07/94. [Spanish original, free translation.]

531 See Supreme Court of Justice, Criminal Division, Conflict of Jurisdiction N° 07-94, between the Supreme Council of Military Justice and the Sixteenth Criminal Court of Lima, 11 February 1994. See also Inter-American Commission on Human Rights, Report N° 42/99, Case N° 11,045 (La Cantuta - Peru), 11 March 1999, paragraphs 20, 21 and 22, and the Special Rapporteur on the Independence of Judges and Lawyers, “Report of the visit to Peru”, United Nations document E/CN.4/1998/39/Add.1, paragraph 133.

532 Decree-Law N° 26479 concerning amnesty.

533 Sixteenth Criminal Court of Lima, ruling dated 16 June 1995.

534 Article 3 of Decree Law N° 26492. [Spanish original, free translation.]

extended the amnesty to perpetrators of human rights violations who had not yet been the subject of complaints or legal proceedings.

It should be pointed out that during this period virtually the whole of the Code of Criminal Procedure (*Código Procesal Penal*) of 1991 was suspended.⁵³⁵ Article 14 of the Code restricted the jurisdiction of the military courts to “offences directly linked to military or police functions, to the extent that they concern exclusively military juridical rights and the disciplinary order of the Armed Forces or National Police”.⁵³⁶ The Code should have applied from 1 May 1992 but its entry into force was delayed until 1 May 1994.⁵³⁷ However, on 30 April 1994, under Law N° 26299, its application was halted and the Code, including article 14, never entered into force.

In 1998, Congress passed Law N° 26926 which made genocide, torture and forced disappearance offences under the Criminal Code, under the heading of ‘Crimes against humanity’. Article 5 of the law specified that such offences should be prosecuted “in the ordinary way and under ordinary jurisdiction”.⁵³⁸ In 1987, a previous attempt had been made to legislate on the issue and a bill on torture, murder, secret detention and rape had been brought before Congress but to no avail.⁵³⁹ However, Law N° 26926 has not been fully complied with by the military courts and some cases of torture have continued to be dealt with under military jurisdiction.

The return to democratic institutions

After over eight years of disruption of the rule of law in Peru, the Fujimori government came to a spectacular end in November 2000 and in December a transitional government was set up with Valentín Paniagua Corazao as President. The new transitional government as well as the subsequent government of Alejandro Toledo introduced a series of measures that sought to re-establish the rule of law in Peru. Among the most significant were the establishment of a Truth Commission to examine the violations of human rights and international humanitarian law which had taken place over the previous two decades and a variety of initiatives on judicial reform.

Nonetheless, reform of the military justice system is still pending. Many anti-terrorist laws from the Fujimori era also remain in force. However, it should

535 Legislative Decree N° 638 dated 27 April 1991.

536 Code of Criminal Procedure of 1991, article 14. [Spanish original, free translation.]

537 Legislative Decree N° 25461 date 29 April 1992.

538 Law 26926 of 1998, article 5. [Spanish original, free translation.]

539 Bill introduced by Senator César Delgado Barreto. The bill was approved by the Senate in 1987 but it never got taken up by the Chamber of Deputies.

be noted that since the end of 2001 several bills to amend military criminal legislation have been under scrutiny.⁵⁴⁰ In addition, in 2001, the Constitutional Court declared the anti-terrorist provisions that permit the military courts to try civilians, including juveniles, to be unconstitutional.⁵⁴¹

The current system of military criminal jurisdiction

Military criminal jurisdiction in Peru is regulated under articles 173, 141 and 139 of the 1993 Constitution as well as the 1980 Code of Military Justice⁵⁴² and the Basic Law on Military Justice⁵⁴³ from the same year. The two latter have since undergone several amendments.⁵⁴⁴

Peruvian military justice is separate from the judiciary and is a special jurisdiction accountable to the executive. According to the Basic Law on Military Justice, “[t]he military courts of Military Justice constitute a high-level body within the Armed Institutions”.⁵⁴⁵ The President of the Republic can order military criminal proceedings to be opened.⁵⁴⁶ As far as the composition of military courts is concerned, military criminal legislation distinguishes between peacetime and wartime.

Military criminal jurisdiction in peacetime consists of the Supreme Council of Military Justice, Armed Forces Courts Martial, Higher Councils of Justice of the National Police (*Consejos Superiores de Justicia de la Policía Nacional*), examining magistrates, the Office of the Military Judge Advocate (*Auditoría de la Justicia Militar*), military prosecutors and the Judge Advocate Corps (*Cuerpo Jurídico Militar*). The Supreme Court of Justice also has some duties with regard to military criminal matters: it is the third tier of jurisdiction as far as applications for annulment are concerned and it is responsible for settling conflicts of jurisdiction between the ordinary courts and the military courts. As an auxiliary body of military justice, the Military Police have certain duties: they act as judicial police with regard to the investigation of offences and are also in charge of military prisons and detention

540 Draft bills Nos 0163, 0209, 1107, 1108, 1203, 1204 and 1245 of 2001 and Nos 1006, 1666, 2111 and 2550 of 2002.

541 Constitutional Court, Ruling dated November 2001, Case N° 005-2001-AI/TC, declaring several articles of legislative decrees Nos 895 and 897 and Law N° 27235 to be unconstitutional.

542 Decree Law N° 23214 of 24 July 1980.

543 Decree Law N° 23201 of 19 July 1980.

544 Noteworthy among these is Law N° 26677 of 1996.

545 Article 1 of Decree Law N° 23201 of 1980. See also the web page of the Supreme Council of Military Justice: <http://www.mindef.gob.pe/consejo.htm>. [Spanish original, free translation.]

546 Articles 378 and 427 of the Code of Military Justice.

centres.⁵⁴⁷ Lastly, the Ministry of Defence has a Public Prosecutor's Office (*Procuraduría Pública*) with the authority to institute legal proceedings.

The Supreme Council of Military Justice is “the highest court within the military system and exercises jurisdiction over the Armed Forces and National Police throughout the territory of the Republic”.⁵⁴⁸ It consists of ten general officers and admirals on active service in the Armed Forces and National Police, eight of whom sit on the Council and at least three of whom must belong to the Judge Advocate Corps.⁵⁴⁹ The members of the Supreme Council of Military Justice are appointed by the President of the Republic on the basis of proposals put forward by the Ministries of Defence and the Interior and are subject to the approval of the Supreme Court of Justice. The Supreme Council is the court of original and sole jurisdiction for trials involving general officers and admirals of the Armed Forces and National Police and other superior officers⁵⁵⁰, it hears appeals against judgments handed down by other military courts and it settles conflicts of jurisdiction within the military court system. It is also responsible for managing and maintaining discipline within the military justice system. In its managerial role, among other things, it draws up and administers the budget and funding allocated to military justice. In its disciplinary role, it has disciplinary jurisdiction “of a judicial nature over all military justice officials and staff”.⁵⁵¹

Armed forces courts martial are permanent bodies. Each branch of the services has its own courts martial: six for the Army, one for the Navy and one for the Air Force. The naval and air force courts martial have jurisdiction throughout the country but the army ones are restricted to a particular geographical area or ‘judicial area’. These courts martial are subordinate in the hierarchy to the Supreme Council of Military Justice. Each one consists of three officers on active service in the branch of the services in question: a colonel or captain, who presides, and two other members with the rank of lieutenant-colonel, naval commander or air force commander, one of whom must belong to the Judge Advocate Corps. Court martial members are appointed by means of a supreme resolution which must be endorsed by the Ministry of Defence. Courts martial are the court of original jurisdiction for the Armed Forces. However, they are also the appeal court for offences of

547 Articles 42 and following of Decree Law N° 23201 of 1980.

548 Web page of the Supreme Council of Military Justice: <http://www.mindef.gob.pe/consejo.htm>. [Spanish original, free translation.]

549 Article 6 of Decree Law N° 23201 of 1980.

550 Namely, officers with the rank of colonel and captain. But also the members, judge-advocates and prosecutors on courts martial and Higher Councils as well as examining magistrates.

551 Article 12 (19) of Decree Law N° 23201 of 1980. [Spanish original, free translation.]

simple desertion, offences against the national heritage, offences which harm the military service or discipline of the armed institutions and offences involving betrayal of public trust (*delitos contra la fé pública*).

The Higher Councils of Justice of the National Police are permanent courts made up of officers on active service in the National Police. There are five Higher Councils set up on a territorial basis to cover a particular 'judicial area'. They are also subordinate to the Supreme Council of Military Justice in the hierarchy. Each Council consists of three officers: a colonel, who presides, and two members with the rank of commander, one of whom must belong to the Judge Advocate Corps. Members are appointed by means of a supreme resolution which must be endorsed by the Ministry of Defence. The Higher Councils are the courts of original jurisdiction for police personnel. However, they are also the appeal court for offences of simple desertion, offences against the national heritage, offences which harm the military service or discipline of the armed institutions and offences involving betrayal of public trust.

The examining magistrates (*jueces instructores*) are officers on active service in the Armed Forces and National Police who are attached and subordinate to the courts martial and higher councils. They have jurisdiction within the judicial area over which the court to which they are attached has authority. There are two types of examining magistrate, permanent ones and substitutes. The permanent ones are officers with the rank of lieutenant-colonel, lieutenant-commander or commander who are members of the Judge Advocate Corps and appointed by the executive.⁵⁵² The post of substitute exists in case one is needed. Substitutes are appointed by the President of the Council in which they work. Although they must meet the same conditions as the permanent ones, officers who do not belong to the Judge Advocate Corps can be appointed as substitutes. Examining magistrates are responsible for investigating cases and preparing them for trial. However, they can also try and judge certain offences in the first instance. Permanent examining magistrates may try the following offences: simple desertion, offences against the national heritage, offences which harm the military service or discipline of the armed institutions and offences involving betrayal of public trust. The jurisdictional power of substitute examining magistrates is confined to offences of simple desertion.

The Office of the Judge Advocate for Military Justice is made up of the Judge Advocate General at the Supreme Council of Military Justice and by the judge advocates at the War Division of the Supreme Council and those attached to the court martials and higher councils. Both the Judge Advocate

⁵⁵² Article 31 of Decree Law N° 23201 of 1980.

General and the other judge advocates are officers on active service who are qualified lawyers and belong to the Judge Advocate Corps. The Judge Advocate General must be a General or Admiral and the other judge advocates must be colonels or captains. It is the role of the Office of the Judge Advocate for Military Justice to provide legal advice to the Supreme Council, the courts martial and the higher councils. The Judge Advocate General and the other judge advocates can participate in, but not vote on, the deliberations of those courts and they have the same prerogatives as the members of such courts.

The military prosecutors fulfill the prosecutorial role (*Ministerio Público*) in the military courts. The Attorney-General (*Fiscal General*) does so before the Supreme Council of Military Justice and the military prosecutors do so before the War Division of the Supreme Council, the courts martial, higher councils and examining magistrates. Both the Attorney-General and the other prosecutors must be officers on active service who are qualified lawyers and belong to the Judge Advocate Corps. The Attorney-General must be a General or Admiral, the prosecutor at the War Division of the Supreme Council must be a colonel or captain, prosecutors at the other courts must be lieutenant-colonels, lieutenant-commanders or commanders and those prosecuting cases heard by examining magistrates must be majors or lieutenant-commanders. It is the responsibility of the prosecutors to set criminal proceedings in motion, put the case for the prosecution in military criminal trials and monitor the legality of proceedings and the enforcement of sentences. Military prosecutors participate in all military criminal proceedings.

The Judge Advocate Corps is made up of officers on active service in the Armed Forces and National Police who are qualified lawyers and subject to the Law on Military Status (*Ley de Situación Militar*) or the Police Statute.⁵⁵³

All those who work within the military court system are officers on active service in the Armed Forces or National Police. As such, they are subject to the principle of hierarchy. With the exception of those working in the Judge Advocate Corps, military law does not require those sitting in judgment on a case to have any legal training.

In wartime, the military courts established for peacetime continue to operate but the following also have jurisdictional functions: the commanders of theatres of operation, the commanders of regions, divisions, corps, ships and aircraft who have independent authority, the Review Boards (*Consejos de Revisión*), special courts martial, examining magistrates and the provosts (*Prebostes*).

553 Articles 62 and following of Decree Law N° 23201 of 1980.

The commanders of theatres of operation and the commanders of regions, divisions, corps, ships and aircraft who have independent authority can act as trial judges, convene special courts martial and review boards, appoint their members and designate examining magistrates.

Special courts martial must be made up of the three longest-serving officers on active service. Their rank depends on the rank of the accused. For example, if the accused is a colonel, the court martial must be made up of one general officer and two colonels. Special courts martial only have the authority to try military and police personnel whose rank is no higher than that of colonel or captain.

A second tier of jurisdiction is provided by the Review Boards. These are attached to each theatre of operations and are made up of “the five most distinguished commanding officers”.⁵⁵⁴ It is not necessary for the prosecutor on a review board to be a lawyer. Although in principle they should receive advice from a judge advocate, they can decide to dispense with such advice.

The provosts are responsible for trying offences committed by civilian personnel working with the Armed Forces and the National Police in operational areas and “have jurisdiction over anyone who has been detained”⁵⁵⁵ in those areas. Any sentence imposed by the provosts which exceeds five days’ detention can be appealed to the military or police commanding officer in the place in question. With regard to military offenders, provosts only have the powers of capture and arrest.

Military courts in Peru have extensive jurisdiction. From the point of view of jurisdiction *ratione personae*, they have authority over the whole of the Armed Forces and National Police; civilians suspected of ‘betraying the motherland’, terrorism or offences against the Military Service Law; reservists when in service; prisoners of war; and people who are treated as members of the military (*asimilados a militar*). For the purposes of military justice, the Code of Military Justice considers the following to be *asimilados a militar*: any member of an armed force working on behalf of the State, civilian personnel working for the Armed Forces or National Police and students at military or police colleges. In terms of jurisdiction *ratione loci*, the military courts are authorized to try any offence committed by members of the Armed Forces or National Police in military or police installations, areas, establishments or sites. In addition, in wartime, the jurisdiction of the military courts can be extended by means of orders from the executive or the military commanders and, in particular, military edicts issued by the commanders of theatres of operation.

554 Article 51 of Decree Law N° 23201 of 1980. [Spanish original, free translation.]

555 Article 59 of Decree Law N° 23201 of 1980. [Spanish original, free translation.]

In terms of jurisdiction *ratione materiae*, many types of conduct, ranging from typically military offences through ‘militarized’ offences to ordinary offences, are classified as offences under military criminal jurisdiction.⁵⁵⁶ The military courts also try any ordinary offence committed in the line of duty in which members of the military are involved, either as the victim (*sujeto pasivo*) or the perpetrator or accessory (*sujeto activo*) of an unlawful act.⁵⁵⁷ The Code of Military Justice therefore gives a broad interpretation to the term ‘*delito de función*’. This has meant that serious human rights violations committed by military or police personnel against civilians have been left to the jurisdiction of the military courts. Several human rights violations have also been categorized as military offences or treated as military offences (*delitos asimilados a militares*) in the Code of Military Justice. For example, the unnecessary use of violence (art. 180), the unlawful prolongation of prison terms, the unlawful holding of detainees in incommunicado detention and the unlawful search of a home (art. 181) are all treated as abuses of authority.

Despite the fact that Law N° 26926 of 1998 incorporated genocide, forced disappearance and torture into the ordinary Criminal Code, with the stipulation that they should be handled “in the ordinary way and under ordinary jurisdiction”, by relying on the notion of ‘*delito de función*’ and, in particular, the offence of ‘abuse of authority’, the military courts have continued to try cases of torture.⁵⁵⁸ Until June 2001, torture was classified in the Code of Military Justice as a form of abuse of power, under the label of ‘*imposición de tormentos*’ (‘infliction of torments’) (art. 180.1). It was removed from the Code of Military Justice a result of Law N° 27760 of 2001.

Several types of proceedings are specified in the Code of Military Justice: an ordinary procedure, a special procedure (a hearing held in cases of simple desertion), a summary criminal procedure, an extraordinary procedure to be used in the case of flagrant offences and a trial in the theatre of operations.

556 The following offences are defined in the Code of Military Justice: offences against the security and honour of the nation (treason, espionage, disloyalty, violations of the law of nations and insults against the nation, arts. 78 to 1000), offences against constitutional order and state security (rebellion, sedition, mutiny, attacking the sentry, illegal organization of armed groups, looting, devastation, sabotage and kidnapping, arts. 101 to 141), offences which affect the discipline of the armed institutions (insulting a superior, insubordination, disobedience, arts. 142 to 178), offences against the duties inherent to one’s post (abusing and usurping authority, arts. 179 to 205), offences which affect military service (arts. 206 to 275), offences against the national heritage (arts. 276 to 293) and offences involving a breach of public trust (arts. 294 to 306).

557 Article 324 of the Code of Military Justice.

558 Law 26926 of 1998. [Spanish original, free translation.]

In some proceedings, the Code of Military Justice permits the injured party to join a civil action to the criminal action.⁵⁵⁹ He or she is only allowed to seek payment of damages (“*resarcimiento del daño*”). It is not possible for them to “specify the offence or request the penalty”.⁵⁶⁰

23. Poland

Poland had a system of military justice during the socialist period and still has one today. Although it has been amended, the system does not appear to have changed substantially.

In terms of substantive law, military criminal law was a special part of ordinary criminal law in the socialist era. Military crimes and misdemeanours were specified in the ordinary Criminal Code of 1969. However, prior to that, just as in Hungary, Yugoslavia and Bulgaria, military offences in Poland had been regulated under military criminal legislation - the Military Criminal Code of 21 October 1932 - which was distinct from the ordinary criminal justice system. The incorporation of military offences into the ordinary criminal codes was something which took place in several socialist countries with Poland being one of the last to introduce such a change.⁵⁶¹ According to Teofil Lesko, “the basic reason for this incorporation was the more broadly accepted principle that in the socialist system soldiers are not isolated from society [...] and that there is no valid separation between them and civil society; and therefore it was not necessary to establish a special penal system”.⁵⁶² Despite this, members of the military were subject to special rules of procedure in that they were subject to the jurisdiction of the military courts. Military criminal jurisdiction was regulated by means of the Criminal Code and the Code of Criminal Procedure, both from 1969, the 1972 law on the organization of the military courts and a law dated 28 May 1975.

Military offences in peacetime were defined in the 1969 Criminal Code.⁵⁶³ For offences committed in war time, other norms applied. In parallel to the Criminal Code, a law dated 21 November 1967 on the general duty to defend the People’s Republic of Poland gave military courts jurisdiction over a series

559 Article 382 of the Code of Military Justice.

560 Article 605 of the Code of Military Justice. [Spanish original, free translation.]

561 A similar process took place in Czechoslovakia (1950), Bulgaria (1951), Yugoslavia (1951), Albania (1952), Hungary (1961), Roumania (1968) and the German Democratic Republic (1968).

562 Teofil Lesko, “*Droit pénal militaire*”, in Igor Andrejew, *Droit pénal polonais*, Académie Polonaise des Sciences - Comité des Sciences Juridiques, Warsaw, 1982, pp.237-238 [French original, free translation.]

563 Articles 289 to 331.

of criminal offences committed in peacetime and wartime. In wartime and in the event of a general mobilization, they had the authority to try several offences committed by civilians.

The Code of Criminal Procedure⁵⁶⁴ authorized the military courts to try any offences committed by civilians which constituted an attack on the fundamental interests of the People's Republic of Poland.

Until 1975, military jurisdiction was made up of the military courts, the Military Supreme Court and the Military Prosecutor who was attached to the office of the Attorney-General (*Prokuratura*). As a result of the reforms introduced on 28 May 1975, it consists of garrison military courts, regional military courts and the Military Division of the Supreme Court of Justice.⁵⁶⁵ All members of the court system, both judges and magistrates, were career service personnel on active service. The garrison military courts and regional military courts were administratively accountable to the Ministry of Defence while the Military Division of the Supreme Court of Justice answered to the President of that court.⁵⁶⁶ For its part, the Office of the Military Prosecutor answered to both the Office of the Attorney-General and the Ministry of Defence due to the fact that its staff were members of the military on active service.

In terms of jurisdiction *ratione personae*, the military courts were authorized to try all armed forces personnel, civilian employees of the armed forces and prisoners of war. They were also empowered to try civilians in cases of incitement or assistance in the commission of military offences, espionage and refusal to do military service. In the event of a conflict of jurisdiction, the military courts themselves decided whether they were the competent court or whether the case should be heard by an ordinary court.

As far as procedures were concerned, it was a condition of the Criminal Code that criminal proceedings for certain offences could only be instituted at the request of the commander of the military unit to which the accused was attached. This meant that the military commander could choose whether to

564 Law of 19 April 1969.

565 Marian Cieslak, "*Procédure pénale*", in Igor Andrejew, op. cit., p.139.

566 *Recueils de la Société Internationale de Droit Pénal et de Droit de la Guerre, Huitième Congrès International - Ankara, 11-15 octobre 1979, L'évolution de la Justice militaire*, Brussels 1981, Book VIII, Volume II, p.849.

567 Teofil Lesko, "*Droit pénal militaire*", in Igor Andrejew, op. cit., and *Recueils de la Société Internationale de Droit Pénal et de Droit de la Guerre, Huitième Congrès International - Ankara, 11-15 octobre 1979, L'évolution de la Justice militaire*, Brussels 1981, Book VIII, Volume II, p.847.

exercise his disciplinary powers or pass the matter to the military courts.⁵⁶⁷ The rules contained in the Code regarding the circumstances in which a case against military personnel could be dismissed were more generous than those applicable to civilians and a special - even privileged - set of rules existed with regard to arrest and detention. The investigative phase of proceedings involved organs from the Militia, the Domestic Military Service or Military Gendarmerie, and other state security bodies, as well as the Office of the Military Prosecutor. Military prosecutors were responsible for investigating cases and starting criminal proceedings. In certain cases, delegates from soldiers' collectives or organizations founded on military discipline could be involved in proceedings. The victim of an offence could also prefer charges jointly with the military prosecutor or join a civil action to the criminal proceedings.

In 1997, a new Constitution of the Republic of Poland was adopted by the Polish National Assembly and subsequently approved by referendum. That same year also saw the introduction of a new Criminal Code and Code of Criminal Procedure which entered into force on 1 September 1998. Under the new constitution, justice in Poland is dispensed by the Supreme Court, ordinary criminal courts, administrative courts and military courts. Thus, “[m]ilitary courts administer justice within the armed forces of the Republic, in penal cases, as well as in other cases, reserved for them by statute. The lower military courts are called garrison courts and the higher ones are district courts. Their modes of action are laid down in the statute on military courts”.⁵⁶⁸ The Supreme Court, the highest jurisdictional body, monitors judgments handed down by military courts. Military prosecutors are responsible for bringing charges before the military courts. The military courts still have the authority to try civilians who have been involved in any way in offences committed by members of the armed forces.⁵⁶⁹

24. Romania

Although there are no specific provisions concerning military criminal jurisdiction in the 1991 Romanian Constitution, they are contained in a series of laws. The three laws that determine how the military justice system is to operate are Law N° 92 of 1992 on judicial organization, Law N° 56 of 1993 on the Supreme Court of Justice and Law N° 160 of 1993 on the organization of the military courts and prosecuting authorities.

568 United Nations document HRI/CORE/1/Add.25/Rev.1, 7 April 1999, paragraph 46.

569 Human Rights Committee, “Concluding Observations - Poland”, CCPR/C/79/Add.110, 29 July 1999, paragraph 21.

The military justice system is made up of military courts, the Territorial Military Court, the Military Court of Appeal⁵⁷⁰ and the Military Division of the Supreme Court of Justice.

The military courts try offences committed by members of the military up to and including the rank of captain, offences committed by civilians working with the military forces and offences committed by civilians. The latter include failure to enlist, refusal to do military service and offences against military goods and property.

The Territorial Military Court is the court of original jurisdiction for offences committed by superior officers and serious offences (such as manslaughter, kidnapping, rape, banditry and corruption) committed by military personnel up to and including the rank of captain, and civilians working with the military forces. It also hears certain types of appeal against decisions handed down by the military courts.

The Military Court of Appeal hears appeals against the decisions of the military courts and the Territorial Military Court. It is also the court of original jurisdiction for offences against national security and offences against peace and humanity (advocating war or genocide) committed by members of the military or civilians working with the military forces.

Both military judges and military prosecutors must be professional judges as well as members of the military on active service. Their salaries are paid by the Ministry of Defence and they are promoted according to Ministry rules. In addition, as expressly stated in Law 160 of 1993, they are subject to the obligations incumbent on them due to their rank. Military judges cannot be investigated, detained or arrested without prior authorization from the Ministry of Justice.

The Supreme Court of Justice has a Military Division which has the authority to hear and rule on appeals against decisions handed down by the military courts.⁵⁷¹ The president, judges and assistant judges sitting in that court must be members of the military on active service. The president must hold the rank of general, the judges that of colonel and the assistant judges that of major. Their salaries are paid by the Ministry of Defence.⁵⁷² The Military Division is the court of original jurisdiction for criminal proceedings brought against admirals and generals as well as against judges from the military courts and the Military Court of Appeal.

570 Law N° 160 of 1993, article 2.

571 Law N° 56 of 1993, article 21.

572 Law N° 56 of 1993, article 66 and Law N° 160 of 1993, article 30.

The prosecutorial function within the military justice system is performed by military prosecutors assigned to each military court.

In their fourth periodic report to the Human Rights Committee, the Romanian authorities acknowledged that the investigation of allegations of torture and ill-treatment inflicted on civilians by police or prison staff came under the jurisdiction of the military prosecuting authorities and that it was the military courts which were responsible for trying the perpetrators of such offences.⁵⁷³

25. Spain

History

The first “glimpses of a primitive form of military law”⁵⁷⁴ are to be found in the *Siete Partidas* (Seven Parts) of Alfonso El Sabio. The first *corpus iuris* of military criminal law consisted of the *Ordenanzas del Rey En Pere* (Ordinances of King En Pere) of 1340, the Royal Order of Navigation in the Indies (*Orden Real de la Navegación en Indias*) and the Ordinances and Instructions issued by the Duke of Parma and Plasencia in 1567 for the States of Flanders. This was the first system of military justice that existed specifically as a service provided by the army and it was headed by the Supreme Chief of the Forces who was assisted by a Judge Advocate General.

In the eighteenth century, military jurisdiction was organized into a proper structure as a result of the first General Ordinances issued by Felipe V, the provisions of which replicated the rules on military justice used by the French king, Louis XIV. The concept of the court martial (*Consejo de Guerra*) came into being at this time⁵⁷⁵. The Royal Decree of 27 April 1714 established the Supreme Council (*Consejo Supremo*)⁵⁷⁶ as the highest court of justice within the military and naval jurisdictions. The Supreme Council, presided by the Sovereign, was made up of military advisers and jurists. The military justice system therefore had an hierarchical structure made up of the Supreme Council, the courts martial and the military courts (*juzgados militares*). The Supreme Council ruled on disagreements and motions arising from the courts martial and acted as the appeal court for cases tried in the military courts, which consisted of the military officer in authority and a judge advocate. The

573 United Nations document CCPR/C/95/Add.7, 29 April 1997, paragraph 58.

574 Benito E Trillo Figueroa., “*Competencia, organización y atribuciones de los tribunales militares españoles - estudio histórico*”, in *Revue de droit militaire et de droit de la guerre*, XIX-3-4, Brussels 1980, p.390. [Spanish original, free translation.]

575 The so-called Flanders Ordinances of 28 December 1701.

576 The Supreme Council was established by the Royal Charter of 21 May 1594.

scope of military jurisdiction was at that time extremely broad and covered both criminal and civil matters.

During the reign of Carlos III, the military justice system underwent several fundamental changes⁵⁷⁷, especially with regard to the powers of the military courts. As a result of the establishment of the principles of jurisdiction *ratione personae* and *ratione materiae*, the military courts were empowered to try civilians. In terms of jurisdiction based on personal attributes, all troops as well as, in certain circumstances, retired members of the military came under military jurisdiction, as did members of the Civil Guard and the Police (*Carabineros*) and even people working in military administration. At that time military jurisdiction was seen as a privilege and military courts alone therefore had exclusive responsibility for hearing all cases, whether civil or criminal, in which members of the army were defendants or suspects. In criminal matters, their jurisdiction also extended to retired personnel and the children, wives, widows and servants of those covered by military privilege.

In parallel with these broad privileges, there were grounds on which such privileges could be withdrawn. Furthermore, it was not possible to assert privilege in the case of capital crimes committed by the accused prior to entering the armed forces. Similarly, members of the army did not enjoy special privilege with regard to matters handled by the ecclesiastical tribunals of the Holy Office (*Tribunal del Santo Oficio*) or the Inquisition (*Tribunal de la Inquisición*).

Under the 1768 Army Ordinances and subsequent provisions, jurisdiction based on the nature of the offence in question was granted to the military courts without taking into account whether or not the perpetrator of the offence was a member of the military. This meant that military courts had the power to try offences committed by civilians. For example, even when committed by civilians, offences such as encouraging or helping someone to desert, attacking military property or facilities, insulting a member of the military and threatening state security or the life of the King all fell to the remit of the military courts.

From the point of view of structure, there were two types of jurisdiction: ordinary military jurisdiction (*jurisdicción ordinaria de guerra*) and extraordinary military jurisdiction (*jurisdicción extraordinaria de guerra*). The former was exercised by the military courts within which there was a regular form of jurisdiction as well as several special types. The regular jurisdiction applied to both civil and criminal matters. Special ordinary military jurisdiction referred to a variety of privileges enjoyed by members of specific arms or

577 This had its legal basis in the Army Ordinances of 22 October 1768.

corps of the army, namely, the artillery and engineers, on the one hand, and the *Guardias Valonas* (Walloon Guards), halberdiers and others, on the other. It was exercised by a general court (*Juzgado General*), which acted as the appellate court, and trial courts within each regiment or corps, made up of the officer in charge and the corresponding judge advocate. This vast array of jurisdictions was later abolished.⁵⁷⁸ Extraordinary military jurisdiction was exercised by the courts martial. These varied in type and operation according to the category of military personnel involved. Although there were two separate stages - the investigative stage and the hearing - proceedings in courts martial were noted for their speed in that each stage had to be handled within 24 hours at the most. The following types of court martial existed: ordinary courts martial (*consejos de guerra ordinario*), which were used for all personnel subordinate to officers as well as for civilians, courts martial for general officers (*consejos de guerra de oficiales generales*), sole instance courts martial (*consejos de guerra únicos*) and special courts martial (*consejos de guerra especiales*)⁵⁷⁹, which were used for certain types of offences, such as rebellion and kidnapping, even when committed by civilians.

The 1812 Constitution of Cádiz was a victory for liberal ideas and brought about a fundamental change. It introduced the modern idea that there should be a single jurisdiction for all, namely, the principle of jurisdictional unity. As a result, the idea of military jurisdiction as a privilege was strongly called into question. However, the principle of jurisdictional unity was not really translated into a new body of law which would lead to the abolition of military privilege. Nevertheless, several issues came to the fore during the debate about military jurisdiction. They included the problems caused by the separation of powers between the administration and the judiciary, the need to substantially curb the jurisdiction of military courts, the need to distinguish between what could properly be seen to be their judicial functions and their disciplinary functions, etc. It was along these lines that the first attempts were made to rein in military jurisdiction and make it simply a tool for the armed service. For example, the 1821 law establishing the Army (*Ley Constitutiva del Ejército*) considered “[m]ilitary jurisdiction [to be] an onerous exception and not a privilege [...] it shall be reduced to the narrowest limits and to cases in which it is absolutely essential for the proper discharge of obligations”.⁵⁸⁰

578 Decree of 16 April 1869.

579 It is important to point out that one special type of court martial, used for offences that were particularly damaging to the army, was the oral court martial (*consejo de guerra verbal*) which had to be completed within 24 hours.

580 1821 law establishing the Army. [Spanish original, free translation.]

Several decades later, on 6 December 1868, a decree bringing all jurisdictions together into a single unit (*el Decreto de Unificación de Fueros*) was adopted, followed by the Royal Decree of 19 July 1875 which took jurisdiction over civil matters away from the military courts.⁵⁸¹ In describing the reasoning behind the former, emphasis was placed on the fact that military jurisdiction is not granted for the benefit of the military but of society and that, “the more liberal a state’s constitution is, the more effective and severe its methods of punishing excesses must be, excesses which are all the more serious when perpetrated by members of the military”.⁵⁸² The power of the military courts to conduct criminal proceedings against retired military personnel and the children, wives, widows and servants of those covered by military privilege was also removed.

The special jurisdictions for the artillery and engineering arms were also abolished, as were ordinary military jurisdiction and the type of courts martial which operated as a sole instance military court.⁵⁸³

In the last two decades of the 19th century, reforms were made to military jurisdiction on several occasions, mainly in an attempt to bring military criminal legislation together into a single corpus. Among these were the Law on the Organization and Powers of the Military Courts (*Ley de Organización y Atribuciones de los Tribunales Militares*) of 10 March 1884 and the Military Trial Law (*Ley de Enjuiciamiento Militar*) of 29 November 1886. These laws gave extensive jurisdiction to the military courts enabling them to try any offence committed by a member of the military. Nevertheless, their jurisdiction was slightly reduced in as much as some offences, such as the forgery of currency and adultery, which had until then fallen to the remit of military courts, were transferred to the ordinary courts. The military courts retained jurisdiction over certain offences regardless of whether the perpetrators were members of the military or civilians. Several procedural innovations were also introduced.

In 1890, the regulations on military jurisdiction were again revised. This reform, which was followed by further additional provisions in 1905 and 1919, constituted a conservative response on the part of the Army to the different initiatives that had been introduced in the wake of the Cádiz Constitution. In the words of the Minister of War, the justification for adopting the new 1890 Code was “[t]o restore prestige to the military classes and

581 Except for civil matters relating to troops based in military garrisons in North Africa and in specific cases involving military wills.

582 Quoted by Salvador Esteban Ramos in “*Evolución de la Justicia Militar en España*”, in *Revue de Droit Pénal Militaire et de Droit de la Guerre*, XIX-3-4, Brussels 1980, pp. 417-418.

583 Royal Decree of 19 July 1875.

guarantees, which are the strongest means of supporting military jurisdiction, to the armed institution".⁵⁸⁴ The new Code reasserted broad jurisdiction for military courts based both on the personal attributes of the accused and the place where the offence was committed. Their jurisdiction was extended to include offences involving insults or slander directed at members of the military or military authorities and institutions.⁵⁸⁵ It was a reaction to the enormous wave of anti-militarist sentiment that was sweeping through the Iberian peninsula at that time.

In contrast to earlier laws, the new legislation defined the criteria to be applied in settling conflicts of jurisdiction. For example, in the event that the perpetrators included both members of the military and civilians, the competent courts of jurisdiction were the ordinary courts as long as a state of war had not been declared, in which case the competent courts were the military courts. In fact, during this period, given that declarations of war were frequent and that war edicts (*Bandos de Guerra*) tended to give the military courts jurisdiction over any new offences, their powers increased enormously.

They grew even further under the government of Primo de Rivera.⁵⁸⁶ Military courts were authorized to try 'crimes against the security and unity of the motherland', armed robbery committed against business establishments and banks and all offences involving the use of explosives.

With the proclamation of the Spanish Republic, military jurisdiction was totally transformed. Before the new Constitution was adopted, and as a kind of foretaste, fundamental reforms were made to military jurisdiction. On 11 May 1931, a decree was issued declaring that the jurisdiction of the military courts (*Tribunales de Guerra*) was limited to acts or offences which were essentially military in nature and abolishing all forms of jurisdictions based on considerations related to the attributes of the person or place where the offence was committed. Shortly afterwards, article 95 of the new Constitution established that "military jurisdiction shall be limited to military offences, the armed services and the discipline of all the armed institutions. No type of jurisdiction shall be established on the grounds of person or place. The case of war is exempt, in accordance with the Public Order Law".⁵⁸⁷

Fundamental changes were made to the structure of military jurisdiction. The military authorities no longer had anything to do with legal proceedings.⁵⁸⁸

584 Minister of War. [Spanish original, free translation.]

585 Law of Jurisdictions of 23 March 1905.

586 Royal Decrees of 18 September 1923, 13 April 1924 and 25 December 1925.

587 Draft Constitution, article 95. [Spanish original, free translation.]

588 Decrees of 11 May 1931 and 2 June 1931, law of 12 September 1932.

These became the responsibility of the Judge Advocate, a position which had no kind of military connection or standing. The process of change later intensified when the Supreme Council of Military Justice (*Consejo Supremo de Justicia Militar*) was abolished to be replaced by the Military Division of the High Court of Justice (*Tribunal Superior de Justicia*). Substantial changes were also made to the procedures in force up until then. For example, it became possible to bring a private action. However, in 1935 military jurisdiction was reformed once again.⁵⁸⁹ Private actions were abolished, jurisdiction was returned to the military authorities, both in peacetime and wartime, and it became a specific requirement for members of the Judge Advocate Corps (*Cuerpo Jurídico*) to be military officials. A few months later the Civil War broke out. Following the victory of the troops of General Francisco Franco, the military legislation in place prior to 1931 was reinstated.⁵⁹⁰

On 17 June 1945, a new Code of Military Justice was issued by the government of General Franco. In many respects, the new law took its inspiration from the 1890 Code. It granted extensive jurisdiction to the military courts. For example, they were the competent courts for all offences committed by military personnel, whether or not they were committed while on duty, and all military and ordinary offences and misdemeanours committed in military places or on territory where a “state of war” had been declared. Later on, the military courts were given jurisdiction over civilians in cases concerning public order and terrorism.

The Current Situation

In the Spanish Constitution of 1978, military courts are established in Section VI entitled “Concerning the Judiciary”. Article 117 (5) states that “[t]he principle of jurisdictional unity is the basis for the organization and operation of the Courts. The law shall regulate the exercise of military jurisdiction within the strictly military sphere and in the event that there is a state of siege, in accordance with the principles of the Constitution”.⁵⁹¹ This was further developed in Basic Law 6/1985 on the Judiciary, dated 1 July 1985, article 3 (2) of which states that “[t]he authority of military jurisdiction shall remain limited to the strictly military sphere in respect of offences which are classified as military in the Military Criminal Code and in the event that there is a state of siege, in accordance with the declaration announcing such a state [of siege] and the Basic Law regulating it, without prejudice to the provisions of article 9, paragraph 2, of this law”.⁵⁹² Paragraphs 2 and 3 of article 9 go on to

589 Laws of 30 January and 17 July 1935.

590 Laws of 12 July 1940 and 29 March 1941.

591 Constitution of 1978, Section VI, article 117 (5). [Spanish original, free translation.]

592 Basic Law 6/1985 on the Judiciary, article 3 (2). [Spanish original, free translation.]

say that: “2. The civilian tribunals and courts shall try, apart from the matters that pertain to them, all those [matters] which have not been attributed to another jurisdiction. [...] 3. The [courts] from the system of criminal jurisdiction shall be granted cognizance of criminal proceedings and trials, with the exception of those which fall to military jurisdiction”.⁵⁹³

It should be noted that Basic Law 2/86, which expressly authorized the ordinary criminal courts to try all offences committed by members of security forces and bodies, was passed in 1986. However, it was declared unconstitutional by the Constitutional Court in 1990.⁵⁹⁴ It is also worth noting that, under a recent law⁵⁹⁵, responsibility for trying individuals over 18 and under 21 years of age for offences and misdemeanours provided for under military criminal legislation was taken away from the jurisdiction of the military courts. In such cases, the competent courts of jurisdiction are the Juvenile Courts (*Jueces de Menores*).

Spanish military criminal jurisdiction is governed by Basic Law 4/1987 on the Jurisdiction and Organization of Military Courts⁵⁹⁶, the Military Criminal Code⁵⁹⁷ and several other norms.⁵⁹⁸ It exercises both penal and disciplinary functions. Military courts therefore deal with criminal offences as well as breaches of discipline.

From the point of view of jurisdiction *ratione temporis*, Miguel Alía Plana points out that the Constitution “envisages the involvement of military jurisdiction from two different perspectives, depending on whether the State is in a period of constitutional normality or undergoing a state of emergency”.⁵⁹⁹ However, there are three types of jurisdiction *ratione temporis*, namely: peacetime, a state of emergency or siege and wartime. In addition to the dichotomy brought about by article 117, paragraph 5, of the Constitution, one also arises from articles 12 and 13 of Basic Law 4/1987.

In peacetime, Spanish military criminal jurisdiction is limited “to the strictly military sphere” and “in respect of offences which are classified as military in

593 Ibid., article 9 (2) and (3). [Spanish original, free translation.]

594 Constitutional Court, ruling dated 28 March 1990.

595 Basic Law 5/2000 of 12 January regulating criminal responsibility for juveniles.

596 Basic Law 4/1987 of 15 July 1987.

597 Basic Law N° 13/1985 of 9 December 1985.

598 In particular, Law 44/1998 on the staffing and territorial organization of military courts - which repealed Law 9/1988 of 21 April 1988 - and Order 277/1999 of 3 December listing the headquarters and addresses of the organs of military justice.

599 Miguel Alía Plana, “*Aproximaciones a la jurisdicción militar española*”, on web page: <http://www.derechomilitar.info/artidoc/aprox05.htm>. [Spanish original, free translation.]

the Military Criminal Code”. Article 12 of Basic Law 4/1987 sets out the limits of military criminal jurisdiction in peacetime. As Fernández Segado points out, “the first notable feature is the bringing back of jurisdiction to the sphere of subject matter, with the resultant exclusion of the personal sphere (*ratione personae*) and the territorial sphere (*ratione loci*)”.⁶⁰⁰ However, apart from the fact that there are “quite a few exceptions”⁶⁰¹ to this rule, as Fernández Segado acknowledges, it should not be forgotten that when Spanish troops are abroad and no treaty on the subject exists, the criteria used to determine whether the military courts are competent concern jurisdiction *ratione personae* (the nationality of the accused) and *ratione loci* (whether the site where the offence is committed is of a military nature).

Article 12 (1) of Basic Law 4/1987 stipulates that, in peacetime, the military courts have jurisdiction over any offence or breach of discipline defined in the Military Criminal Code. For its part, article 20 of the Military Criminal Code succinctly describes military offences as those “deliberate or negligent acts and omissions punishable under this Code”.⁶⁰² It is a “purely formal” definition⁶⁰³ and, in the technical sense, as Captain Alía Plana points out, very few of the offences defined in the Code are strictly military in nature.⁶⁰⁴ From the point of view of the juridical right protected, many of the types of conduct specified in the Military Criminal Code constitute more than one offence in that they are an attack on juridical rights protected under ordinary criminal law as well as juridical rights of a military nature. From that perspective, Rodríguez-Villasante y Prieto points out that six types of offence are criminalized in the Military Criminal Code: offences that are strictly military; offences which violate both ordinary and military juridical rights but in which the military juridical right is deemed to be the overriding one; ‘assimilated’ ordinary offences (*delitos comunes asimilados*), that is to say, ordinary offences which are treated as military offences due to the circumstances in which they have been committed; ordinary offences in which there are insufficient military circumstances for them to be characterized as military offences but which have nevertheless been included in the Code; ordinary offences which have been ‘militarized’ (*delitos comunes militarizados*) on the grounds that punishment is more severe under military law, and ordinary offences which have nothing to do with the military but which have been ‘militarized’ and included in the Military Criminal Code solely at the discre-

600 Francisco Fernández Segado, “*La competencia de la jurisdicción militar en tiempo de paz*”, in Consejo General del Poder Judicial, *Poder Judicial*, 2a. época, N° 36, Madrid, December 1994, p.18. [Spanish original, free translation.]

601 *Ibid.*, p.21. [Spanish original, free translation.]

602 Military Criminal Code, article 20. [Spanish original, free translation.]

603 *Ibid.*, p.19. [Spanish original, free translation.]

604 Miguel Alía Plana, *op.cit.*

tion of the legislators.⁶⁰⁵ In the view of Captain Miguel Alía Plana, however, military jurisdiction in Spain in peacetime encompasses all offences specified in the Military Criminal Code, even when, if they are also offences under the ordinary criminal code, the latter calls for a more severe punishment in which case the ordinary code is the one which should be applied. Although other forms of classifying Spanish military criminal jurisdiction exist, the fact is that it applies to a wide range of offences and is not confined solely to offences which can properly be described as military. The concept of the service-related act (*acto de servicio*) figures in several definitions of offences contained in the Military Criminal Code and is used to justify giving the military courts the power to try certain ordinary offences. In peacetime, civilians can also be treated as the perpetrators (*sujetos activos*) of certain offences from the Military Criminal Code and can therefore be tried in military courts.⁶⁰⁶

The wide range of offences over which the military courts have jurisdiction, the fact that the ordinary criminal code and the military criminal code can both be applied to the same acts and the existence of ‘assimilated’ and ‘militarized’ offences, as well as those which have been committed in the course of carrying out an “act related to armed service” (*acto del servicio de armas*), have given rise to many conflicts of jurisdiction between the ordinary courts and military courts. This has led jurisprudence to try to interpret what is meant in the Constitution when it states that military criminal jurisdiction is limited to the “strictly military sphere”. According to several authors, it should be interpreted as applying solely to “typically military offences and those associated with them, [and] those committed in a military place, in the protection of the interests of the Armies and anything which is detrimental to service or the [Armies’] effectiveness”.⁶⁰⁷ Others, such as

605 José Luis Rodríguez-Villasante y Prieto, “*El principio de especialidad - Comentario al artículo 5º del CPM*”, in Ramón Bleuca Fraga and José Luis Rodríguez-Villasante y Prieto, *Comentarios al Código Penal Militar*, Ed. Civitas, 1988, pp.136 and 137.

606 For example, the offences of: breaking into a military facility (art. 61), “disobeying military edicts in wartime or during a state of siege” (art. 63), “offences against the sentinel, the Armed Forces or Military Police” (art. 85), inciting another to abandon his post or desert (art. 129) and “offences against the administration of military justice” (arts. 180 and 182 to 188).

607 Miguel Alía Plana, op. cit. [Spanish original, free translation.]

Millán Garrido, believe that, in the case of ordinary offences committed in the line of duty or in a military place, such offences, even though they may be detrimental to the effective operation of the armed forces, go beyond just the military sphere and should be left to the jurisdiction of the ordinary criminal courts.⁶⁰⁸

The Constitutional Court believes that the phrase ‘strictly military sphere’, contained in article 117 (5) of the Constitution, should be interpreted restrictively.⁶⁰⁹ In one of its rulings, the Constitutional Court said the following: “As a special [type of] criminal jurisdiction, military jurisdiction must be limited in scope to the hearing of offences which can be deemed to be strictly military, a concept which must, by necessity, be tied to the nature of the offence committed [and] the juridical right or interests protected under criminal law, which, in keeping with the constitutionally-established aims of the Armed Forces and the means placed at its disposal to carry them out, must be strictly military, [as well as] to the military nature of the obligations and duties which, if breached, would constitute an offence and, in general, to whether or not the perpetrator of the offence is considered *uti miles*, as a result of which the fact that the perpetrator of the offence is a member of the military must also be a relevant factor in defining the concept of what is strictly military”.⁶¹⁰

The Conflicts of Jurisdiction Division of the Supreme Court, when settling one particular case in which there was a conflict of jurisdiction between the ordinary and military courts, took the following view: “To solve the conflicts of jurisdiction which have arisen in connection with military jurisdiction it is not sufficient just to give a grammatical or systematic interpretation of the substantive and procedural precepts that may be at odds with each other. It is necessary to go deeper into the conflicting juridical situations in order to examine whether strictly military interests have been damaged or, on the other hand, whether there are other juridical rights which may be found to be worthy of preferential protection under ordinary jurisdiction [...]. In this case, the juridical right under attack is of an essentially military nature and jurisdiction should therefore be granted to the military courts”.⁶¹¹

608 Antonio Millán Garrido, “*Algunas consideraciones generales sobre la Ley Orgánica 4/1987, de 15 de julio, de la competencia de la jurisdicción militar*”, in REDEM, N° 53, Volume I, January-June 1989, p.117.

609 See, among others, ruling N° 75/1982 by the Constitutional Court dated 13 December 1982.

610 Ruling N° 60/91 of 14 March 1991, Question of unconstitutionality N° 545/1990.[Spanish original, free translation]

611 Ruling of 2 April 1990 handed down when settling conflict N° 9/1989. [Spanish original, free translation.]

However, the Constitutional Court has asserted that the ‘strictly military sphere’ is a vague constitutional concept.⁶¹² It has repeatedly called on the legislature to adopt a law, as called for in article 117 of the Constitution, which would define the ‘strictly military sphere’.

When a state of siege is in place, military criminal jurisdiction can be extended. Basic Law 4/1981, which regulates states of alert, emergency and siege, and, in particular, article 35 of that law, as well as article 12 of Basic Law 4/1987 stipulate that any expansion of the jurisdiction of military courts is to be done in the state of siege declaration itself. Thus, in the event of a state of siege, the Chamber of Deputies must determine, in the declaration itself, which offences are to be subject to military jurisdiction while it is in force. As several other authors have pointed out, a state of siege declaration can transfer ordinary criminal offences that are committed while the state of emergency is in place to the jurisdiction of the military courts. Nevertheless, “the widening of the jurisdictional powers of the military courts shall only take place within the framework of an officially declared state of siege and under the terms of a declaration which has been sanctioned by the Congress of Deputies [...] [and any such widening must be] established in accordance with the principles of the Constitution”.⁶¹³ Even though it is a temporary measure to be applied only for a limited period in keeping with the temporary nature of the state of emergency, once the state of siege has been lifted and institutional normality has been restored, the military courts retain jurisdiction over any offences committed while the state of emergency was in force until a verdict has been reached with regard to the proceedings in question.⁶¹⁴

In wartime, the jurisdiction of the Spanish military courts is substantially expanded. Article 13 of Basic Law N° 4/1987 specifies that in wartime, in addition to the offences for which they have jurisdiction in peacetime, the military courts shall have the power to try any offences specified in treaties that are entered into with an allied power or organization, any ordinary criminal offences for which jurisdiction has been legally assigned to them by the courts or the government, any offences under Spanish law which are committed outside of national territory by members of the Spanish military or persons accompanying Spanish forces or units, and any offences committed by prisoners of war. Together with the “significant increase in the penalties”, Fernández Segado notes that types of conduct which constitute offences

612 Ruling 60/1991 of 14 March 1991.

613 Miguel Alía Plana, *op.cit.* [Spanish original, free translation.]

614 Francisco Fernández Segado, *op. cit.*, p.29.

under ordinary criminal law when committed by a civilian “become military offences classified as such in the Military Criminal Code”.⁶¹⁵

In wartime, the jurisdiction of military courts should also remain within the ‘strictly military sphere’. Nevertheless, the nature and limits of this sphere seem to be different from those that apply in peacetime and under a state of siege. This was confirmed by the Military Division of the Supreme Court when it took the view that “in wartime military jurisdiction can be strengthened [...] [as a] logical consequence of article 117.5 of the Constitution itself, since what is ‘strictly military’ also increases”.⁶¹⁶

It is important to point out that, in terms of jurisdiction *ratione personae*, the military justice system in Spain has jurisdiction over members of the Civil Guard. This body, which carries out police functions, is answerable to both the Ministry of Defence and the Ministry of the Interior. Basic Law N° 2/1986 on the Security Force and Corps states that the Civil Guard is “an armed institution of a military nature”, subject to the Armed Forces penal system and rules of discipline.⁶¹⁷ The subjection of Civil Guard personnel to the jurisdiction of the military courts has been specified in law⁶¹⁸ and confirmed by the Military Division of the Supreme Court.⁶¹⁹

Spanish military criminal jurisdiction is considered to be “a specialist jurisdiction due to the sphere in which it operates and the specific law it applies [...] [and] military justice is an integral part of the single State Judiciary, in accordance with the principle of jurisdictional unity enshrined in article 117 of the Constitution”.⁶²⁰ Although military criminal jurisdiction has been set up as a specialist jurisdiction, its highest organ is the Supreme Court, the senior body within ordinary criminal jurisdiction, which acts as the court of appeal (*tribunal de casación*) for military matters. In ruling 115/2001 of 10 May 2001, the Spanish Constitutional Court stated that military criminal jurisdiction “is exercised at present by military courts and tribunals (*juzgados*

615 Francisco Fernández Segado, *op.cit.*, p.16. [Spanish original, free translation.]

616 Supreme Court, Military Division, ruling dated 24 June 1991. [Spanish original, free translation.]

617 José María López Viadero, “*La Guardia Civil, cuerpo de naturaleza militar, con un régimen disciplinario específico*”, in Manuel Ramírez, *Constitución y Jurisdicción Militar*, Cuadernos Lucas Mallada N°2, Ed. Libros Pórtico, Zaragoza, 1997, p.122. [Spanish original, free translation.]

618 Law 17/1989 of 19 July 1989, “Regulations for Professional Military Staff”, article 4 (3).

619 Supreme Court, Military Division, ruling dated 10 February 1989.

620 Web page of the Spanish Ministry of Defence: <http://www.mde.es/mde/fuerzas/justicia.htm>. [Spanish original, free translation.] See also the Senate of the French Republic, *Les documents de travail du Sénat. Série Législation comparée. La Justice Militaire*, p.9. [Spanish original, free translation.]

togados y tribunales militares) which carry out of their jurisdictional function independently and are completely divorced from the military command”.⁶²¹

However, many authors have questioned whether Spanish military criminal jurisdiction can be considered to be an integral part of the judiciary and some believe that it is really a type of administrative ‘justice’ system attached to the executive.⁶²² The following are some of the main points that have been made. All members of the military courts, whether they be judges or prosecutors, are military personnel on active service and are therefore subject to the principles of military discipline and obedience. Those acting as judges, tribunal members and prosecutors in military courts are members of the Judge Advocate Corps. The latter is a department within the Ministry of Defence, “whose members devote themselves, depending on the post they hold, either to jurisdictional responsibilities or to tasks involving the provision of legal advice within the sphere of the Ministry of Defence and the autonomous bodies attached to it, [functions] which should never be performed simultaneously, since they are subject to the military system of promotion and the rules of discipline of the Armed Forces”.⁶²³ It should also be stressed that not all members of military courts, for example, tribunal members (*vocales*), have legal training.

Basic Law 4/1987 of 15 July on the Powers and Organization of Military Jurisdiction regulates the military court system in Spain. The following are organs of military justice: the Fifth Chamber of the Supreme Court, the Central Military Tribunal (*Tribunal Militar Central*), the Territorial Military Tribunals (*Tribunales Militares Territoriales*) and the Military Courts (*Juzgados Togados Militares*).

The Fifth Chamber of the Supreme Court, or Military Division, is made up of senior judges from both ordinary and military jurisdiction. It hears applica-

621 Spanish Constitutional Court, ruling N° 115/2001, 10 May 2001, paragraph 10. [Spanish original, free translation.]

622 See, among others, R. Canosa Usera., “*Configuración constitucional de la Jurisdicción Militar*”, in *Revista del Consejo del Poder Judicial*, N° 34, pp.9 to 37, and “*A propósito de la Independencia del Juez Militar*”, in *Revista del Consejo del Poder Judicial* n° 37; C. García Lozano, “*Principios fundamentales del ejercicio de la potestad jurisdiccional*”, in *Comentarios a las leyes procesales militares*, Vol. I, pp.63 to 164; J.M. Ramírez Sineiro, “*La estructura orgánica de la Jurisdicción Militar: consideraciones acerca de su constitucionalidad con arreglo a la doctrina del Tribunal Europeo de Derechos Humanos*” in *La Jurisdicción Militar*, Madrid: Consejo general del poder judicial, 1992; A Millán Garrido, “*Algunas consideraciones generales sobre la L.O. 4/1987 de Competencia y Organización de la Jurisdicción Militar*”, *REDM*, N° 53, January-June 1989; and R. Parada Vázquez, “*Toque de silencio por la Justicia Militar*”, in *Revista de Administración Pública*, N° 127, January-April 1992.

623 Miguel Alía Plana, op. cit.[Spanish original, free translation.]

tions for review and annulment and is the trial court for those subject to its special jurisdiction.⁶²⁴

The Central Military Tribunal, based in Madrid, has jurisdiction throughout the whole country as well as outside of it. It is assisted by two Central Military Courts (*Juzgados Togados Militares Centrales*) which prepare the cases that fall within its jurisdiction. The Central Military Tribunal is made up of a presiding judge advocate (*Auditor Presidente*) with the rank of Counsellor General (*General Consejero Togado*), four members with legal training (*Vocales Togados*), who are judge advocates with the rank of general (*Generales Auditores*) and military members (*Vocales Militares*) with the rank of Brigadier-General or Rear-Admiral. It is divided into two Chambers, the Chamber of Justice (*Sala de Justicia*) and the Chamber of Government (*Sala de Gobierno*). The Territorial Military Tribunals are attached to each of the five territorial jurisdictions into which Spanish territory is divided. Among other things, they try any offences committed within their territory which are subject to military jurisdiction but which do not fall to the remit of the Military Division of the Supreme Court or the Central Military Tribunal. Each Territorial Military Tribunal is made up of a presiding judge advocate, with the rank of Colonel Judge Advocate, four members with legal training (*Vocales Togados*), one with the rank of lieutenant-colonel and the others with the rank of commander judge advocate (*Comandante Auditor*), and military members (*Vocales Militares*) with the rank of commander or lieutenant commander.

The Military Courts (*Juzgados Togados Militares*) act as trial courts. There are military courts attached to the Central Military Tribunal and territorial military courts (*juzgados togados militares territoriales*) attached to the Territorial Military Tribunals.

The prosecutorial function (*Ministerio Público*) within the military justice system is ensured by the Military Prosecutor's Office (*Fiscalía Jurídico Militar*), which is answerable to the Attorney-General (*Fiscal General del Estado*). The Military Prosecutor's Office is responsible for bringing prosecutions before the military courts as well as for taking the necessary action to defend legality and the rights and interests protected by law, either as a matter of course or at the request of those concerned, and ensuring that the organs of military justice are independent. The Military Prosecutor's Office has prose-

624 They are: field marshals (*Capitanes Generales*), lieutenant generals, admirals, members of the Central Military Tribunal, military prosecutors (*Fiscal Togado*), prosecutors from the Fifth Chamber of the Supreme Court and the prosecutor at the Central Military Tribunal.

cuting offices within each organ of military criminal jurisdiction.⁶²⁵ They are staffed by military personnel.⁶²⁶

The victims of offences that are subject to military jurisdiction, or their successors, can in principle bring a private prosecution or a civil action for damages in the course of military criminal proceedings. However, this is expressly prohibited “when the victim and the accused are members of the military and there is an hierarchical relationship of subordination between them”.⁶²⁷

26. Switzerland

History

One of the earliest records of Swiss military criminal legislation dates from the 14th century. Wars against foreign armies led the Swiss authorities to adopt a type of military procedural code in order to maintain discipline within the ranks of the Swiss troops on the battlefield.⁶²⁸ Thus, in 1393, the first war decree, known as the “*ordonnance de Sempach*”, was issued. As Professor Eric David points out, from the 15th and 16th centuries onwards, with the consolidation of the European states and the gradual disappearance of “private wars” waged by feudal lords, there emerged a “new type of mercenary force”,⁶²⁹ consisting of the temporary provision of military conscripts from one sovereign to another in exchange for remuneration, usually financial. The troops were not only provided to fight wars but also for security purposes. This practice was translated into a system of licenses and contracts, in other words, “pacts through which one state committed itself to supplying a certain number of soldiers to another state for a specific period of time in return for

625 The Office of the Military Prosecutor at the Fifth Chamber of the Supreme Court, the Military Prosecutor’s Office at the Central Military Tribunal and the Military Prosecutor’s Office at the Territorial Military Tribunals.

626 The role of military prosecutor is performed by a Counsellor General (*General Consejero Togado*). The role of prosecutor at the Central Military Tribunal is performed by a General Judge Advocate (*General Auditor*). The role of prosecutor at each Territorial Military Tribunal is performed by a Colonel Judge Advocate (*Coronel Auditor*).

627 Article 108, paragraph 2, of Basic Law 4/1987 of 15 July, on the Powers and Organization of Military Jurisdiction and article 127, paragraph 1, of Basic Law 2/1989 of 13 April on Military Procedure. [Spanish original, free translation.]

628 See Office of the Armed Forces Attorney-General, “*Historique*”, on the web page of the Swiss Army: <http://www.vbs.admin.ch.internet/OA/histoire.htm>.

629 Eric David, *Mercenaires et volontaires internationaux en droits des gens*, Centre de droit international, Ed. Université de Bruxelles, Belgium 1978, p.10. [French original, free translation.]

payment.”⁶³⁰ The Swiss cantons turned this practice into a veritable industry by putting their cantonal troops at the service of foreign kings and queens from the 15th until the 19th century. Even though the Swiss Confederation claimed to be neutral from the 16th century onwards and the 1815 Vienna Conference had recognized its neutrality, the contracts system was not questioned. By 1816, E. Nys points out, 23,000 Swiss soldiers were in the service of France, the Netherlands and Prussia.⁶³¹

Although they were working for a foreign country, Swiss soldiers marched under their own flag, wore Swiss uniforms and were under the command of Swiss officers. Such soldiers were commonly known as *Reissläufer*, meaning mercenary. The Swiss Guard at the Vatican is a vestige of that practice.⁶³² In the 17th century, an edict aimed at regulating the situation of such soldiers was proclaimed. It stipulated that they should be tried by their own judges and in accordance with Swiss law or, more specifically, the law of the particular canton they came from. The *Reissläufer* were therefore under the penal authority of their commander, who was a Swiss military officer, and not that of the State or the Lord for whom they were fighting. The 1663 military covenant between the Confederation and King Louis XIV of France contained a specific clause on this issue. The accepted principle was that Swiss judges had sole jurisdiction over any troops serving a foreign army.

Internally, the situation was more complex. Alongside the Confederation Army, there were cantonal armies which were subject to their own organs of military criminal jurisdiction. The restructuring of the State, which involved the adoption in 1874 of the Federal Constitution of Switzerland⁶³³, resulted in the centralization of the army. Although, under certain circumstances, the Constitution allowed cantons to have their own military force⁶³⁴, it also gave the federal authorities responsibility for all matters relating to the Army and military affairs and stipulated that the cantonal troops should be incorporated into the Federal Army.⁶³⁵ Military jurisdiction is not regulated in the Constitution. However, despite this, it is important to highlight that article 112 stipulates that the Federal Court, the highest court in the ordinary crimi-

630 Ibidem. [French original, free translation.]

631 Cited by Eric David, Mercenaires et volontaires internationaux en droits des gens, op. cit. p.34.

632 The Swiss Guards, or Papal Guard, were put at the disposal of the Pope at the end of the 14th century. Later, a contract was signed between Pope Leo XII and the Canton of Lucerne in 1825 and confirmed in 1850 by Pope Pius IX.

633 A new constitution has been adopted in 1998.

634 Article 19 of the Constitution.

635 Articles 18 to 22, 85 (6 and 9) and 102 (11) of the Constitution.

nal justice system, is responsible for trying crimes and offences against the law of nations and offences committed by officials at the federal level.

As far as military criminal jurisdiction was concerned, the process of restructuring and unifying the Swiss Army was completed with the issuing in 1889 of the Law on Judicial Organization and the Code of Military Criminal Procedure for the Federal Army.⁶³⁶ This was how the Swiss system of military justice came into being. Like the old French system, the Swiss system made no provision for a second tier of jurisdiction. Military criminal jurisdiction consisted of Divisional Courts, the Special Military Court (for trying superior officers) and the Military Supreme Court.

During the First World War, there was a great deal of criticism of Swiss military justice. At the end of the war, a process of review was launched. In the course of it, a first attempt was made to abolish military criminal jurisdiction but the initiative was rejected by referendum in 1922.⁶³⁷ Later on, in 1973 and again in 1990, there were further unsuccessful moves to abolish military justice in peacetime.

The process of review culminated in 1927 with the publication of a Military Criminal Code which entered into force in 1928.⁶³⁸ That Code and the 1889 law would form the basis in law for military criminal jurisdiction. The system established in the 1889 law was amended in 1979 with the adoption of the Law on Military Criminal Procedure⁶³⁹ and the Military Criminal Justice Order,⁶⁴⁰ which came into force in 1980. The 1927 Military Criminal Code underwent several amendments.⁶⁴¹ It is worth mentioning the 1950 and 1967 amendments which empowered the Swiss military courts to punish grave breaches of the Geneva Conventions as well as the 1995 amendments on cooperation with the International *Ad hoc* Tribunals for the Former Yugoslavia and Rwanda. Several of the amendments introduced between 1992 and 1996 related to the situation of conscientious objectors to military service.

As a result of the 1967 amendments, the military courts acquired the authority to try and judge those responsible for war crimes committed both in wartime and peacetime, whether they be civilians or members of the military

636 Law of 28 June 1889.

637 J. van WijnKoop, "*La justice Militaire Suisse*", p.8, on the web page of the Swiss Army: <http://www.vbs.admin.ch.internet/gst/kvr/fi/justice-mil.htm>.

638 Federal law of 13 June 1927.

639 Law of 23 March 1979.

640 Order dated 24 October 1979.

641 The Code was amended in 1941, 1950, 1967, 1968, 1974, 1975, 1979, 1981, 1982, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1997 and 1999.

and regardless of nationality. In such cases, the exercise of jurisdiction by the military courts is conditional on the presence in Switzerland of the suspects. In 1994, the first trial for war crimes began. It involved a Serbian citizen accused of committing grave breaches of the Third and Fourth Geneva Conventions and their Additional Protocols against prisoners of war. Although the defendant was acquitted, for the first time a Swiss military court had recognized that it had jurisdiction over grave breaches of the Geneva Conventions.⁶⁴² In a second trial, involving the former mayor of Nyionteze (Rwanda) accused of organizing massacres of Tutsis, the court convicted the defendant for breaching the Geneva Conventions.⁶⁴³

The Current Situation

At present, Swiss military criminal jurisdiction is governed by the 1927 Military Criminal Code and its respective amendments, the Law on Military Criminal Procedure and the Military Criminal Justice Order as well as other rules concerning military matters.⁶⁴⁴

Swiss military justice operates outside of the ordinary criminal justice system. Some authors consider it to be a specialized jurisdiction. However, it should be stressed that the military justice system is made up solely of career members of the military or those doing military service. The so-called 'specialist' functions such as court clerk, examining magistrate, judge advocate and presiding judge are performed by military personnel who have served in operational units of the Army and who have a certain amount of legal experience. The positions of examining magistrate, judge advocate and presiding judge can only be held by officers. The position of court clerk can only be held by non-commissioned officers and soldiers. The other judges are chosen from amongst the staff of the operational military units. Military criminal jurisdiction comes under the auspices of the Ministry of Defence through the Military Attorney-General, who has disciplinary authority over all military justice officials. The Military Attorney-General assigns responsibilities to the staff working in the military justice system. With the exception of the Military Attorney-General, no member of the military justice system holds his or her post as their main job. Some authors therefore believe that military criminal jurisdiction constitutes a specialized branch of the Federal Army.

642 Divisional Court 1, *Grahez Case*, Judgment dated April 1997.

643 Divisional Court 2, *Nyionteze Case*, Judgment dated April 1999.

644 Federal Law on the Army and Military Administration dated 3 February 1995, Military Service Order dated 20 September 1999, Military Controls Order dated 7 December 1998, Swiss Army Regulations of 22 June 1994, Military Traffic Order dated 17 August 1994 and the Order dated 9 September 1998 on medical issues related to fitness for military service.

From the structural point of view, military criminal jurisdiction makes no distinction between peacetime and wartime. The military justice system consists of the Divisional Courts, Military Courts of Appeal, the Military Supreme Court, the Military Attorney-General, military examining magistrates and military judge advocates. The Military Police and the cantonal Judicial Police help the examining magistrates from the military courts with their investigations. The Federal Court settles conflicts of jurisdiction between military justice and the ordinary courts.

Each of the Divisional Courts, which provide the first tier of jurisdiction, are attached to a military unit and have jurisdiction over any member of the military belonging to the unit who is facing prosecution, regardless of where the offence was committed. Each is made up of a presiding judge, who must be a colonel or lieutenant colonel, and four other judges (two officers and two non-commissioned officers). All members of the court are appointed by the Federal Council, the highest organ of executive government, and must belong to the military units over which the court in question has jurisdiction.

The Military Courts of Appeal provide the second tier of jurisdiction. There are three Military Courts of Appeal, one for each of the languages spoken in Switzerland (German, French and Italian). The composition of these courts is similar to that of the Divisional Courts, except that to hold the position of judge, a person “must, as a general, rule, have legal knowledge”.⁶⁴⁵

The Military Supreme Court provides the third tier of jurisdiction and is at the same level in the hierarchy as the Federal Court. It also rules on conflicts of jurisdiction between military courts.⁶⁴⁶ It consists of a presiding judge with the rank of colonel and four other judges (two officers and two non-commissioned officers), all of whom are appointed by the Federal Assembly. Unlike the other courts, to sit as a judge on the Military Supreme Courts, it is necessary to have a cantonal lawyer’s licence or to have fully completed a course in law.⁶⁴⁷

The Military Attorney-General, who is the head of the military justice system, is appointed for a four-year period by the Federal Council and must have the rank of brigadier. He is directly answerable to the Ministry of Defence. As well as having a managerial role within the military justice system, the Military Attorney-General performs the prosecutorial role in military court proceedings and has extensive powers with regard to procedural matters. The

645 Article 12 of the Law on Military Criminal Procedure. [Spanish original, free translation.]

646 Article 32 of the Law on Military Criminal Procedure and article 26 of the Military Criminal Justice Order.

647 Article 13 of the Law on Military Criminal Procedure.

Military Attorney-General can assign cases which in principle should fall to the jurisdiction of another court to a Divisional Court⁶⁴⁸ and can also take decisions on certain kinds of conflicts of jurisdiction between military courts.⁶⁴⁹ He can also close cases and, as a party to the proceedings, can make applications for appeal, annulment and review. The Military Attorney-General is responsible for hearing and settling complaints against decisions handed down by the examining magistrates, except for those relating to the holding in custody of the defendant.

Examining magistrates, military judge advocates and military court clerks come under the authority of the Military Attorney-General. Examining magistrates are attached to each military court and are responsible for investigating offences. They also act as advisers to the troop commanders on points of military law. The position of examining magistrate must be held by an officer with the rank of captain. The judge advocates are responsible for bringing charges before the military courts. They also have jurisdictional powers and act as sole judge in the case of offences punishable with a maximum of one month's imprisonment or a fine of up to 1000 Swiss francs. The position of judge advocate must be held by an officer with the rank of major.

Although, unlike other countries, the Swiss system does not have a judge advocate corps as such, it has "military justice officers, non-commissioned officers and soldiers", who are said to have "specialist duties". To be a military justice officer it is necessary to have a cantonal lawyer's license, to have fully completed a course of law or to have an appropriate level of legal knowledge, as well as to have served as an officer in the Federal Army.⁶⁵⁰ Military justice non-commissioned officers and soldiers act as court clerks in the military courts. It is necessary to be a "military justice officer" to be an examining magistrate or a judge advocate.

The Swiss military justice system provides for an ordinary military criminal procedure which takes place in two stages: an investigation stage followed by a trial. The investigation is the responsibility of a military examining magistrate under the supervision of the Military Attorney-General. In the case of an offence committed in the course of service, the commander of the operational unit to which the suspect belongs has the power to order an investigation. If he does not do so and the examining magistrate believes it is necessary, the Military Attorney-General can order an investigation to be opened. The military commander can also order the suspect to be taken into custody and

648 Article 31 of the Law of Military Criminal Procedure.

649 Article 26 of the Military Criminal Justice Order.

650 Article 2 of the Law of Military Criminal Procedure. [Spanish original, free translation.]

take steps to ensure that any evidence is preserved. If an offence is committed by someone who is off duty, it is the Military Attorney-General who is responsible for ordering an investigation to be opened. Once the investigation has been completed, it is up to the judge advocate to bring the charges before the appropriate military court or to send the case to the Military Attorney-General for dismissal. Where it is decided that charges should be brought, a hearing is opened, culminating in a judgment. Some changes have been made to the ordinary military criminal procedure in the case of defendants who are tried *in absentia*.

Under Swiss military criminal law, it is possible for the victims or their successors to add a civil action for damages to the criminal proceedings in the case of offences listed in the Military Criminal Code. They must do so at the beginning of the investigation stage. At that time, they can submit documentation supporting their claims and stating the amount of compensation expected and participate in the court hearing. However, they only have limited access to the trial dossier.⁶⁵¹

As far as jurisdiction is concerned, the Swiss military justice system distinguishes between peacetime and wartime. In peacetime, the military courts are competent to try offences committed by military personnel both on and off duty as long as they are committed within the framework of their military duties. It is important to stress that the Military Criminal Code contains a long list of offences, including standard military offences⁶⁵² as well as offences against the law of nations.⁶⁵³ However, the Code also contains a wide variety of ordinary offences such as manslaughter, kidnapping, sexual violence, fraud, the falsification of documents, offences against the administration of justice and offences against the national heritage. In certain circumstances, it also allows the military courts to prosecute and pass sentence on civilians who have committed certain offences⁶⁵⁴, civilian officials, staff and others carrying out work for the army who are suspected of committing acts against national defence, civilians who have been enlisted into the army and civilians employed by a military troop.

In wartime, the jurisdiction of the military courts is extended to include civilians accompanying troops; civilians suspected of treason, espionage, looting, carrying out attacks with explosives or incendiary devices on military property or committing offences against the law of nations; prisoners of war;

651 Article 164 of the Law on Military Criminal Procedure.

652 For example, insubordination (art. 61 and following) and abuse of service authority (art. 66 and following).

653 Articles 108 to 114 of the Military Criminal Code.

654 See articles 2 and 3 of the Military Criminal Code.

“enemy members of parliament”; and civilians interned in areas where war is taking place or which are under occupation.⁶⁵⁵ The Military Criminal Code interprets war as including situations in which there is an “imminent danger of war”.⁶⁵⁶

27. United Kingdom

History

Historically, the British system of military justice was associated with war situations or armed forces stationed abroad. The British codes of military justice or Articles of War were issued by royal prerogative and did not apply to British territory in peacetime.⁶⁵⁷ In principle, offences committed by the military within Great Britain were tried under the ordinary criminal law system. In 1689, the English Parliament passed the Mutiny Act which established military criminal jurisdiction in peacetime. It introduced the concept of the court martial which was authorized to try cases of mutiny, sedition and desertion. As Fernández Segado points out, “the organization of courts martial was based on the idea of judgment by one’s peers”.⁶⁵⁸ Each court martial was made up of 13 members and at least nine votes in favour were required when the death penalty was imposed.⁶⁵⁹ It is the commonly-held view among legal scholars that the 1689 Mutiny Act was the starting point for the system of military justice currently in operation in Great Britain.⁶⁶⁰ But it was to be in the 18th century that the system would take shape when, given the particular characteristics of common law, the role of manuals of military law was brought to the fore.⁶⁶¹

Thus there were two distinct sets of military criminal legislation in existence: one for the armed forces based abroad for use in wartime, which was regulated under the Code of Military Justice, and another for the armed forces based on British territory in peacetime and regulated under the Mutiny Act. In 1881, steps were taken to start standardizing military criminal legislation. In that

655 Article 4 of the Military Criminal Code.

656 Article 5 of the Military Criminal Code. [Spanish original, free translation.]

657 Fernando Fernández Segado, “*La justicia militar en el Derecho comparado*”, op. cit., p.51.

658 Ibidem. [Spanish original, free translation.]

659 John Gilissen, “*Rapport général*”, in *L’évolution actuelle de la justice militaire - Huitième Congrès international, Ankara 1979, Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre*, Book VIII, Vol. I, p.49.

660 Ibidem and see also Fernando Fernández Segado, op. cit., p.51.

661 One of the most important being *Military Law and Practice of Courts Martial*, by Judge Advocate General Tyler, published in 1806.

year, the Army Act was passed. Later, in 1886, the Naval Discipline Act was enacted and followed, in 1917, by the Air Force Act. The intention of these laws was to regulate the system of military justice within each of the three branches of the Armed Forces. The provisions of each of them were broadly similar.

After the Second World War further legislation on military justice was gradually introduced. In 1951, the Courts Martial (Appeals) Act was passed. Prior to that, the system for challenging the decisions handed down by courts martial had been completely inadequate. Their decisions could only be challenged through an application to the Crown who, through the exercise of royal prerogative, could review and quash the judgments rendered by such courts. The 1951 law established a mechanism by which appeals could be made to a higher court for use by the whole military justice system. The law was amended in 1968.⁶⁶² Nevertheless, it should be noted that the Crown's royal prerogative to review and quash court martial judgments was not fundamentally affected. The 1968 law restricted itself to stating that the prerogative should be exercised before an appeal could be submitted to, and accepted by, the Courts Martial Appeal Court.⁶⁶³

In 1955, the Army Act and Air Force Act came into force, to be followed by the Naval Discipline Act in 1957. Although the latter contains some specific features, the three acts are broadly similar as far as military justice is concerned. They are jointly known as the Service Discipline Acts.⁶⁶⁴ They have to be renewed by Parliament every five years by means of amendments, known as Armed Forces Acts, which incorporate changes and update them. Of these, the 1971 and 1976 Armed Forces Acts and the 1975 Queen's Regulations are worth mentioning. The 1976 Armed Forces Act set up the Standing Civilian Court, a trial court with jurisdiction over civilians connected with the Services, including dependants and British civilians working for the Ministry of Defence or otherwise under the command of an officer outside the United Kingdom.⁶⁶⁵ Together with these laws, there are specific procedural codes for each branch of the armed forces.⁶⁶⁶ However, despite these changes, and as some authors have pointed out⁶⁶⁷, the British military justice system is known for being one of the most traditional and enduring.

662 Courts Martial (Appeals) Act of 1968.

663 Article 54 of the Courts Martial (Appeals) Act of 1968.

664 Explanatory Notes to Armed Forces Discipline Act, 2000, chapter 4, paragraph 4.

665 Aspals Legal Pages, "Types of Court"
(<http://www.anisol.users.btopenworld.com/aspals4.htm#SCC>).

666 The Rules of Procedures (Army) of 1972, Rules of Procedures (Air Force) of 1972, and the Naval-Court Martial General Orders (Royal Navy).

667 See, among others, John Gilissen, "*Rapport général*", op. cit., p. 49.

Historically, a main feature of British military justice has been the existence of the system of courts martial and judge advocates, in which the executive, through the convening officer and confirming officer, among others, has a key role. It should be pointed out that British courts martial were, and continue to be, of an *ad hoc* nature in that they are convened and set up on a temporary basis to try each particular case. They were made up exclusively of military personnel on active service. There were different types of courts martial depending on the rank of the accused (soldier, non-commissioned officer or officer), the nature and seriousness of the offence and where it was committed.

The power to convene a court martial lay with the ‘convening officer’. A convening officer was any senior officer with the necessary authorization to order a trial by court martial. The power to do so was delegated to the commanders of the main military units or forces by means of a warrant from the Crown. The commanders could in turn delegate this authority to other armed forces officers. The role of convening officer was performed by different authorities, depending on which type of court martial was being convened. In all cases, the convening officer had to be an officer on active service who was in command of a body of regular forces and of the same rank or higher than the accused.⁶⁶⁸ As well as having the power to convene a court martial, the convening officer personally appointed the president and the rest of the panel members, as well as the prosecuting officer, and could also order the court martial to be dissolved at any stage of the proceedings if justice so required.⁶⁶⁹ It was also the responsibility of the convening officer to check that the Judge Advocate General’s Office had appointed a judge advocate for trial. If this had not already been done, he could appoint one himself. As far as procedures were concerned, the convening officer had extensive powers: he was responsible for deciding the charges to be laid and the type of court martial required, ordering the accused to be taken into custody, checking that the accused had proper legal representation and ensuring that the witnesses for both the prosecution and the defence attended the hearing.

Any court martial decision had to be confirmed by a confirming officer for it to be legally binding. This role was usually also played by the convening officer. It allowed the confirming officer to confirm or change the sentence handed down by the court martial, substitute a new sentence or convene a new court martial. Only once it had been confirmed or amended could the sentence be appealed by petitioning the ‘reviewing authorities’. This function

668 European Court of Human Rights, Judgment dated 25 February 1997, Case of Findlay v. The United Kingdom, in *Reports of Judgements and Decisions 1997-I*, paragraph 36. (<http://hudoc.echr.coe.int/hudoc>).

669 Article 95 of the 1955 Army Act.

could be carried out by the Crown, the Defence Council for each branch of the services, *ad hoc* commissions or any officer of a higher rank than the confirming officer. The identities of the confirming officer and the reviewing authorities were not communicated to the person requesting the review. No reasons had to be given for the decisions of the reviewing authorities. It should be noted that the decisions of navy court martials did not need to go through the confirmation process. However, it was possible to lodge an appeal against them with the Court Martial Appeal Court.

The Office of the Judge Advocate General for the Army and Air Force was, and still is, under the charge of the Judge Advocate General. The latter had to be a lawyer of ten years' standing and was responsible for running the Judge Advocate General Service. The Judge Advocate General was appointed by the Queen for a five-year period on the basis of names put forward by the Lord Chancellor. The Judge Advocate General could be removed from office by the Crown. The Office of the Judge Advocate General was made up of an administrative division, a division of military affairs and a military justice division. Unlike other legal systems, the Office of the Judge Advocate General played no part in the prosecution of offenders. Its function was to provide legal advice on military justice issues to the Ministry of Defence, courts martial, the convening officer, the confirming officer and the reviewing authorities. While the Judge Advocate General himself was responsible for advising the Ministry of Defence, responsibility for advising the other bodies was in the hands of the judge advocates. In court martial proceedings, judge advocates acted as legal advisers and recorders. Initially, judge advocates did not need to have any specific legal qualifications but later on this did become a requirement. The Navy has its own Judge Advocate General's Office which is broadly similar to the one which services the Army and Air Force. Some authors believe that the British Office of the Judge Advocate General is a cross between a judicial and an administrative system.⁶⁷⁰

In that context it is clear that the British military justice system was subordinate to the military hierarchy, all the more so if we bear in mind that many members of courts martial were usually under the command of the convening officer and that, in any event, all were subordinate to him due to their rank and the principle of due obedience.

The 1996 and 2000 reforms

In 1996, in the context of several cases relating to the operation of military justice that had been referred to the European Court of Human

670 John Gilissen, "*Rapport général*", in *L'évolution actuelle de la justice militaire - Huitième Congrès international, Ankara 1979, Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre*, Book VIII, Vol. I, p.50.

Rights,⁶⁷¹ the British authorities set about significantly reforming the system of military justice. The Armed Forces Act that was passed that year and entered into force on 1 April 1997 made substantial amendments to the role of convening officer, so much so that it in fact ceased to exist, as well as to the role of the Judge Advocate General. The functions of the convening officer were distributed between three bodies, one for each branch of the services: the higher authorities, the prosecuting authorities attached to each branch's Legal Services and the court administration officers attached to the Defence Council for each branch. However, in the case of Field General Courts Martial, the position of convening officer was retained, though with some changes in powers and authority.

The higher authorities, who are the highest-ranking and longest-serving officers, decide how a case should be treated: whether it should be dealt with summarily or by a court martial, in which case it must be referred to the prosecuting authority or dropped altogether. Upon receipt of a case, it is the responsibility of the prosecuting authority for the branch of the services in question to decide whether or not court martial proceedings should be opened and, if so, which type of court martial should be used and what charges should be brought. Each branch of the services has its own Director of Legal Services who acts as the prosecuting authority and is appointed by the Queen. The officers who work under him or her are known as prosecuting officers and must be lawyers. Both the Director of Legal Services and the prosecuting officers are responsible for investigating a case and bringing charges but they do not give legal advice to the chain of command.⁶⁷² It is now the responsibility of Court Administration Officers, who are appointed by the Defence Council for each Service, to convene courts martial. They are civil servants who are independent both of the chain of command and the higher authorities and prosecuting authorities. Lastly, the 1996 Act abolished the role of confirming officer and it is no longer necessary for a sentence handed down by a court martial to be confirmed in order for it to be legally binding. However, the right of appeal rests solely with the accused.

The 1996 Act also substantially changed the functions of the Office of the Judge Advocate General. The Judge Advocate General no longer advises the Ministry of Defence on military justice matters. The role of the judge

671 The most well-known case was that of *Findlay v. The United Kingdom* (Judgment dated 25 February 1997, Case N° 110/1995/616/706). But also worth noting are the cases of *Coyne v. The United Kingdom* (Judgment dated 24 September 1997, Case N° 124/1996/734/942), *Hood v. The United Kingdom* (Judgment dated 18 February 1999, Communication N° 27267/95), and *Cable and others v. The United Kingdom* (Judgment dated 18 February 1999, Communications 24436/1994 and others).

672 *Aspals Legal Pages*, "Changes to the UK Court Martial System", *op. cit.*

advocates in courts martial has also substantially changed. Rather than providing legal advice and acting as recorder, the judge advocate now sits on the court martial. However, the degree of his or her involvement as a member of the court martial is limited.

Further changes were later made to the military justice system as a result of the 1998 Human Rights Act⁶⁷³, the purpose of which was to “give further effect to rights and freedoms guaranteed under the European Convention on Human Rights”.⁶⁷⁴ The Human Rights Act abolished the death penalty for all offences, including military ones, and replaced it with life imprisonment or any other punishment permitted under the Service Acts. The military justice system was therefore obliged to comply with the rights contained in the Human Rights Act as well as all the military laws. Thus in 2000 the Armed Forces Discipline Act was passed and entered into force on 2 October of the same year. As a result of the Act, significant amendments were made to the disciplinary system, particularly with regard to custody issues and the way in which members of courts martial are appointed. It also established a new appeals system for summary trials: the Summary Appeal Court. In the same year, several supplementary provisions to the Armed Forces Discipline Act were also adopted.

The Current System

The current British military justice system has several distinguishing features. Firstly, it is separate from the ordinary criminal justice system. Secondly, it is a fragmented network. There is no single military court system providing the first tier of jurisdiction. Each branch of the Armed Forces has its own legislation and courts martial. Nevertheless, at the second tier, the system becomes unified. From the point of view of composition, the courts are different at each level. At the first level, composition is mixed and both armed forces officers on active service and professional judges sit on courts martial. By contrast, the second tier of jurisdiction is made up solely of professional civilian judges. Thirdly, with a few exceptions, the courts are *ad hoc* in nature and are convened and assembled for each particular occasion and have no permanent status.

Lastly, the most salient feature of British military justice is that no clear distinction exists between criminal and disciplinary offences.⁶⁷⁵ The system is

673 “Army Discipline Procedure”, web page of the Ministry of Defence of the United Kingdom (<http://www.army.mod.uk/militarylaw>).

674 Preamble to the Human Rights Act.

675 Francisco Fernández Segado, *op. cit.*, p.53 and John Gilissen, *op. cit.*, pp. 44- 45.

based on the concept of the offence. However, it differentiates between two sets of offences according to their nature. Thus, there are military offences and civil offences. Military offences are defined under various laws and, in particular, under the acts relating to each branch of the armed services. For example, as far as the Army is concerned, military offences are often known as 'offences against the Army Act'. In any event, the concept of a military offence in the British system encompasses both military offences, as they are generally understood, and disciplinary offences or breaches. Which category an offence falls into hinges on its gravity (minor or serious) and, in principle, a different procedure applies to each: minor offences are dealt with by means of a summary trial while serious ones go to a court martial. Minor offences seem to equate to what other legal systems call breaches of discipline while serious offences are on a par with military offences. Nevertheless, this distinction is not clear because whether a summary trial is applicable not only depends on the offence being of a minor nature but also on the rank of the accused (whether he or she is a soldier or non-commissioned officer) and whether or not the latter has elected trial by court martial. Some authors believe that the consequence of this type of system is the creation of two forms of military jurisdiction, one for disciplinary matters and another for criminal matters. Nevertheless, it may be misleading to view the British system by extrapolating from "continental" systems.

In terms of structure, the British military justice system consists of court martials, a Court Martial Appeal Court, judge-advocates, prosecuting authorities and a Court Administration Office for each of the armed services. The House of Lords also plays a role in military justice matters as the third and final tier of jurisdiction. The military justice system is completed by the Standing Civilian Court and the organs responsible for summary trials, namely the "higher authorities"⁶⁷⁶ and the Summary Appeal Court.

The courts martial provide the first tier of jurisdiction. It should be noted that, although the system is generally homogeneous, there are specific rules on courts martial for each of the three services, namely, the Army, Air Force and Navy. There are several types of courts martial: General Courts Martial, District Courts Martial and Field General Courts Martial. It should be remembered that courts martial are not permanent courts but are convened by the Court Administration Office attached to the Defence Council for each branch of the services.

676 Prior to that, the summary trial referred to the Summary Court, namely, the hierarchical superior of the accused. Today the "Summary Court" has disappeared but the mechanism remains the same with a few modifications: it is the superior officer of the accused who is responsible for trying and punishing him or her by means of a summary trial.

Army and Air Force courts martial are regulated along similar lines. General Courts Martial consist of a president and four officers belonging to the branch of the forces in question, together with a judge advocate. Apart from the latter, who must be a professional judge, the other members of the court do not have to have any legal qualifications. The president must be an officer with the rank of general or colonel while the other four officers must hold the rank of captain or above. All must be on active service. General Courts Martial are authorized to try any officer, regardless of his or her rank, as well as members of the rank and file and non-commissioned officers, for offences punishable with two years' imprisonment or more.

The District Courts Martial are made up of a president, at least two officers on active service and a judge advocate. The members of the court do not need to have any legal qualifications, except for the judge advocate who must be a professional judge. District Courts Martial have the authority to try members of the rank and file and non-commissioned officers and can only impose sentences of up to two years' imprisonment.

Although the British system makes no distinction between peacetime and wartime for the purposes of the structure of military justice, in certain circumstances, Field General Courts Martial can be convened in theatres of operation. They are made up of a president and at least two officers on active service. In contrast to the other forms of court martial, they are established by the convening authority, namely, the Commander of the military unit in question.

Naval courts martial have some specific features. They must be made up of at least five, and not more than nine, naval officers who must hold the rank of at least lieutenant (equivalent to the rank of captain in the Army and Air Force) and belong to different ships or naval establishments. When the accused is a senior officer, the members of the naval court martial must be one grade higher. For example, in the case of an admiral, the president of the court martial must be an admiral and the other members captains (equivalent to the rank of colonel in the Army). A judge advocate must also participate in naval courts martial.

The Court Martial Appeal Court provides the second tier of jurisdiction and, as such, hears appeals against sentences handed down by courts martial. It is made up of an uneven number of senior professional judges and not less than three. They come from the ordinary justice system and are appointed by the President of the Criminal Division of the Court of Appeal, the Lord Chief Justice, with the agreement of the Lord Chancellor. A minimum of three judges hear the case and the panel must always have an odd number of judges. The panel normally consists of one Appeal Court judge or the Lord

Chief Justice and two judges from the High Court of Justice of England, although judges from Scotland and Northern Ireland may also sit on the court.⁶⁷⁷ The Courts Martial Appeal Court usually sits in London although it has the power to sit anywhere, both inside and outside the United Kingdom. It has the power to penalize courts or their representatives for contempt, non-appearance and disobedience.

Judge advocates on District or General Courts Martial are professional civilian judges appointed by the Lord Chancellor. Since the 1996 reform, judge advocates participate in courts martial as members rather than as legal advisers and recorders. However, their participation is limited in that they do not take part in deliberations on the guilt or innocence of the accused but they can vote on the type of sentence to be imposed.⁶⁷⁸ Nevertheless, the advice given by the judge advocate is now binding and must be heeded by the panel.

As far as summary trials are concerned, there are two tiers of jurisdiction, the first being the higher authority and the second the Summary Appeal Court. The former role is performed by the commander of the military unit to which the accused is attached. The British system allows any accused member of the Army or Air Force to elect the means of trial. Thus, he or she can request the case to go to court martial or a summary trial. The higher authority decides which of the two procedures to apply. In the case of a court martial, the higher authority refers the case to the Army Prosecuting Authority, which decides the type of court martial to be convened. Summary trials are reserved for minor offences committed by soldiers or non-commissioned officers and punishable with a maximum of 60 days' custody or a fine amounting to no more than 28 days' wages. In any event, the fact that the case has been assigned to a summary trial does not affect the right of the accused to opt for trial by court martial. A sentence imposed as a result of a summary trial can be appealed to the Summary Appeal Court. The latter is made up of a judge advocate, who presides, and two other officers. Any decision by the Summary Appeal Court can in turn be the subject of an appeal on points of law to the District Court.

Lastly, civilians working for the Armed Forces have their own court. It is called the Standing Civilian Court and was set up under the 1976 Armed Forces Act. It has jurisdiction only over civilians working for the Armed Forces and their dependants and British civilians who work for the Ministry of Defence or are under the command of a commanding officer outside the

677 Aspals Legal Pages, "Changes to the UK Court Martial System", op. cit.

678 Senate, Les Documents de travail du Sénat, Série législation comparée: La Justice Militaire, 5 December 2000.

United Kingdom.⁶⁷⁹ The Standing Civilian Court is made up of a senior judge advocate who usually sits alone without a panel.⁶⁸⁰ However, in cases involving juveniles, assessors also attend the hearing. Unlike the court martial system, the Standing Civilian Court, as its name indicates, is a permanent court. The maximum sentence it can impose is twelve months' imprisonment. Appeals against the decisions of the Standing Civilian Court go to a court martial.

In terms of jurisdiction *ratione loci*, under the British system, the question of military competence is determined by the place where the offence is committed. In the case of military or civil offences committed outside of Great Britain, it is the military courts which have jurisdiction. In principle, in the case of offences committed within Great Britain, civil offences fall to the remit of the ordinary courts while military offences come under the jurisdiction of the military justice system. However, this principle is not absolute because although it is up to the ordinary courts to decide where jurisdiction lies with regard to ordinary offences, they can waive that right and refer the case to the military courts. In practice, it is the military authorities who try military personnel for civil offences. It is also important to remember that ordinary criminal offences are considered to be military offences if the perpetrator is a member of the military.⁶⁸¹ Nevertheless, some serious offences, including treason, murder, manslaughter, rape and genocide, as well as those in which the victim is a civilian, are tried by the ordinary criminal courts. It should also be stressed that, under the Army Act and identical sections of the other two Services Acts, "a court martial cannot be convened in the United Kingdom to try a person for having committed a grave breach of one of the Geneva Conventions of 1949".

In terms of jurisdiction *ratione personae*, the military justice system encompasses both members of the Armed Forces and civilians working with them even though the two categories of defendant are tried by different courts. For the purposes of military justice, members of the Armed Forces are deemed to include all troops, non-commissioned officers and officers on active service in the Armed Forces as well as, in certain circumstances, reservists and retired officers.

679 Aspals Legal Pages, "Types of Court", (<http://www.anisol.users.btopenworld.com/aspals4.htm#SCC>).

680 Brig. Gen. Thomas Glynn, The United Kingdom Military System, (http://www.giustiziamilitare.difesa.it/seminario/delegati_internazionali/ENGLISH/Regno_unito_english.htm)

681 Article 70 (1) of the 1955 Army Act.

28. United States of America

History

Military criminal jurisdiction in the United States of America has its origins in English law. During the first century and a half of its life as an independent nation, the United States continued to enforce English military criminal regulations. In 1789, the United States Congress adopted the principles and norms which had applied to British troops in the 17th and 18th centuries and which were known as the “Articles of War”.⁶⁸² According to Major L.K. Hemperley and Captain K.L. Davies, the pro-independence rebel troops had already adopted the first “Articles of War” in 1775. These were amended by Congress one year later. To start with, the “Articles of War” applied solely to the Army and only in 1800 to the Navy. They remained in force, without any significant amendments, until 1920 when, as a result of the First World War, they were reviewed in order to incorporate important procedural changes. Later, in 1921, a Manual for Army Courts Martial⁶⁸³ and, in 1923, rules for naval courts and boards in the US Navy⁶⁸⁴ were published. After the Second World War, significant reforms were made to the military institution. The reform package included a review of the military justice system which had been severely criticized in several sections of the US press. In 1947, Congress adopted the National Security Act as a result of which the Ministry of War became the Department of Defence and the Air Force was separated from the Army. That same year, before the National Security Act had been adopted, the Army and Navy had submitted two bills to Congress containing regulations on military criminal jurisdiction. As a result of the changes made to the armed forces through the National Security Act, the Department of Defence decided to review the system of military justice and put forward a single set of laws to apply to all military bodies. As a consequence, in 1950, the Uniform Code of Military Justice came into force and in 1951 the Department of Defence issued a new Manual for Courts Martial.

Today the Uniform Code of Military Justice and the Manual for Courts Martial⁶⁸⁵ form the touchstone for military criminal jurisdiction in the United

682 Lauren K. Hemperley y Kirk L. Davies “*El sistema de Justicia Militar de las Fuerzas Armadas Estadounidenses: una introducción*”, March 2001, on web page <http://www.derechomilitar.info/artidoc/jusmilusa.htm> and in Francisco Fernández Segado, “*La justicia militar en el Derecho comparado*”, Consejo General del Poder Judicial, *Poder Judicial*, 2^o época, N^o 23, Madrid, September 1991, p.57.

683 The Manual was revised in 1928.

684 The rules of procedure for the Navy were revised in 1937.

685 Several amendments have been made to the Manual since then.

States. Nevertheless, for the United States, technically speaking, it is more appropriate to talk about a system of military jurisdiction rather than a system of military criminal jurisdiction since what is known as US ‘military justice’ covers both the criminal sphere and the disciplinary sphere, in other words, non-judicial punishment. Several authors have correctly pointed out that in this system no clear distinction is made between criminal offences and breaches of discipline.⁶⁸⁶

‘Military Justice’

Even though the United States Constitution makes no reference to military courts, it is the source of law for the system of military jurisdiction. The legal basis for military courts is article I (section VIII) of the Constitution, which regulates the powers of Congress. Under this provision, the US Congress has the authority to constitute tribunals inferior to the Supreme Court of Justice. This authority, which also includes the power to issue both substantive and procedural norms, is distinct from the powers conferred under article III of the Constitution.⁶⁸⁷ Given that, with regard to justice, military courts have their basis in article I of the Constitution and not article III, some legal experts have argued that, in contrast to the ordinary courts, which are known as “constitutional courts”, they are “legislative courts”.⁶⁸⁸

The system of military criminal justice in the United States has two main distinguishing features: the role played by the executive and the temporary status of military courts. The degree to which the system is subordinate to the executive - whether to the military commanders, the Department of Defence or the President - is excessive. Professor Robert Kogod Goldman has quite rightly pointed out that the military justice system in the United States is not part of the judiciary but of the executive.⁶⁸⁹ There are no permanent military courts in the United States, except for the Court of Military Appeals. Courts martial are established whenever an offence has been committed and pro-

686 John Gilissen, “*Action pénale et action disciplinaire en droit militaire - Etude de droit comparé, 2ème partie: la procédure*”, in *Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, Premier Congrès International - Action pénale et action disciplinaire*, Bruxelles, 14 -16 mai 1959, Strasbourg, 1960, pp.19-20. See also Francisco Fernández Segado, “*La justicia militar en el Derecho comparado*”, *Consejo General del Poder Judicial Poder Judicial*, 2º época, Nº 23, Madrid, September 1991.

687 Supreme Court, Case of Dynes v. Hoover, 20 How. 65,79 (1858).

688 For example, see Alain Levasseur, *Droit des Etats Unis*, Ed. Dalloz, 2nd edition, Paris 1994, p.33.

689 Robert Kogod Goldman, “*Un análisis de la orden militar de Bush: al margen de la ley*”, on web page: <http://www.pagina12.com.ar/2001/01-12/01-12-02/pag28.htm>. [Spanish original, free translation.]

ceedings have been opened following an investigation. They are convened on the orders of the military commanding officer of the alleged offender.

Scope of jurisdiction

The scope of jurisdiction of the US military justice system is determined by two basic criteria: the status of the individual offender and the nature of the offence. As Hemperley and Davies point out, “[b]efore charges can be brought in a criminal trial, a prosecutor (either civilian or military) must demonstrate both aspects of jurisdiction or the case cannot proceed. [...] in order to punish or discipline an individual under the Uniform Code of Military Justice, the military must have jurisdiction over the individual and the offence that has been committed”.⁶⁹⁰

The jurisdiction *ratione personae* of military courts varies depending on whether it is peacetime or wartime. In peacetime, military courts are competent to try members of the Armed Forces. For the purposes of military jurisdiction, those considered to be members of the Armed Forces are military personnel on active duty, people who are accountable to a regular component of the Armed Forces, members of the National Guard who are in federal service, cadets studying at military academies, retired members of the military in receipt of pay and members of reserve components who are undergoing training.⁶⁹¹ In principle, in peacetime, civilians cannot be subjected to military jurisdiction. Traditionally, the US Supreme Court has maintained that in peacetime a civilian cannot be removed from his natural judge, namely, a judge in an ordinary criminal court. In wartime, military jurisdiction is extended to civilians serving with the Armed Forces or accompanying the troops in the field, prisoners of war and, in the case of certain offences, civilians. Thus, the Uniform Code of Military Justice contains some offences which can be applied to civilians who therefore can be tried by military courts. Such offences include aiding the enemy (article 104) and espionage (article 106).

The jurisdiction *ratione materiae* of military courts is defined in the Uniform Code of Military Justice itself. Apart from the traditional military offences⁶⁹², according to the classification drawn up by Hemperley and Davies,⁶⁹³ it con-

690 Lauren K. Hemperley and Kirk L. Davies, *op. cit.* [Spanish original, free translation.]

691 Article 2 of the Uniform Code of Military Justice.

692 Such as, for example, desertion, failure to obey orders, insubordinate conduct, etc...

693 A doctrinal classification which does not exist as such in the Uniform Code of Military Justice.

tains various other categories of offence, such as ‘offences against law enforcement’, ‘conventional offences’ and offences described under General Article 134 of the Code. Under ‘offences against law enforcement’, they group “any type of conduct which directly contravenes law enforcement. This includes resisting arrest and escaping from custody. [...] it also prohibits more deceitful attempts to subvert the law, such as obstructing justice, giving false testimony and refusing to testify without legitimate reason”.⁶⁹⁴ The so-called ‘conventional offences’ are “those [offences] which are normally found in civilian criminal codes: murder, offensive behaviour, robbery, wrongful use of controlled substances, etc”.⁶⁹⁵ Also included in this category are sodomy, extortion and arson. They constitute, therefore, what in certain doctrinal circles, are known as “‘militarized’ ordinary offences”. Lastly, article 134 of the Uniform Code of Military Justice, known as the General Article, contains a general provision declaring “all disorders and neglects to the prejudice of good order and discipline in the armed forces” and “all conduct of a nature to bring discredit upon the armed forces” to be offences. Article 134 is open-ended and general but the Manual for Courts Martial lists the types of conduct that are punishable under the General Article. They include adultery, indecent assault, gambling with a subordinate, etc.⁶⁹⁶ However, the list is not exhaustive and other types of conduct can be punished by the military courts under General Article 134. For example, federal laws⁶⁹⁷ allow acts committed in military installations and classified as offences under the criminal legislation applicable in federal states to be punished within the military justice system under the general article, even when they not classified as offences in federal law or in the Uniform Code of Military Justice.

It is important to point out that jurisprudence has traditionally demanded that, apart from the question of the status of the accused (namely, whether he or she is a member of the military or is treated as such) and the stipulation that the offence should be triable under the Uniform Code of Military Justice, there should be some kind of link between the unlawful act and the service. Having originated in the field of law, this requirement does not appear in the Uniform Code of Military Justice. This meant that, in one case in 1969, for example, the US Supreme Court held that the offences for which the individual in question was facing trial were not service-related and that therefore he should not be tried by a court martial but by the ordinary courts.⁶⁹⁸ However,

694 Lauren K. Hemperley and Kirk L. Davies, *op. cit.* [Spanish original, free translation.]

695 *Ibidem.* [Spanish original, free translation.]

696 Manual for Courts Martial, Part IV, Section 60.

697 Federal Assimilative Crimes Act, 18 U.S.C. Section 13.

698 *Case of O’Callahan v. Parker*, 395 U.S. 258 (1969).

this requirement has been overruled in recent years by the Supreme Court itself.⁶⁹⁹

The Structure of the 'Military Justice' System

Responsibility for organizing and operating the US military justice system lies with two bodies: the 'convening authority' and the military courts or courts martial.

The commanding officer or officer in charge of the alleged offender is the 'convening authority'. This means that, given the temporary nature of US military courts, the authority has the authority to convene a military court to criminally prosecute the alleged offender. This authority can be exercised by the President of the United States of America, the Defence Secretary and the commander of the appropriate branch of the army, as well as other members of the armed forces.⁷⁰⁰ Proceedings conducted by special courts martial can also be convened on the orders of the commanding officer of the particular unit to which the alleged offender belongs or on the orders of any military officer to whom he or she is subordinate. The 'convening authority' plays a key role throughout the process of dispensing military justice. He or she has to decide whether an act of wrongdoing should be tried by a court martial or whether he or she, as the hierarchical superior of the offender, should treat it as a disciplinary matter. As well as ordering and conducting investigations, the convening authority also appoints the investigators. He or she also has the power to grant immunity to witnesses and pursue a pre-trial agreement. The convening authority also appoints the members who will sit on the court martial (whether it be a general, special or summary court martial). As Humperley points out, "the process for selecting members of the court can be unlawfully influenced by those in command (for example, attempts by the commanding officer or someone acting on his behalf to influence the course of the trial)".⁷⁰¹ Lastly, the convening authority can, either at his or her own discretion or at the request of one of the parties, reconsider or change the decision reached by the court martial and can even grant clemency. The convening authority is assisted by the Judge Advocate General for the branch of the services concerned.

Military criminal legislation provides for three categories of court martial: summary, special and general. The second tier of jurisdiction is ensured by the Court of Military Review and/or the Court of Military Appeals, depending on the nature of the sentence and the rank of the accused.

699 See the case of *Solorio v. United States*, 483 U.S. 435 (1987).

700 Articles 22, 23 and 24 of the Uniform Code of Military Justice.

701 Humperley and Davies, op. cit. [Spanish original, free translation.]

Responsibility for conducting summary courts martial lies with any commissioned officer who is a member of the military on active service with a higher rank than the accused. He or she does not have to have any legal qualifications. The jurisdiction of summary courts martial is limited to so-called 'minor offences', which are tantamount to what are known as 'breaches of discipline' in other systems of military justice. Commissioned officers, non-commissioned officers and cadets cannot be tried by this kind of court. Summary courts martial can be convened by any officer who is higher in rank than the accused. Rather than being a criminal court, it is a disciplinary tribunal for the rank and file.

Special courts martial must be made up of at least three military officials, the highest-ranking of whom assumes the presidency. They are authorized to conduct proceedings related to any offence specified in the Uniform Code of Military Justice as long as it not punishable by death, dishonourable discharge, confinement for more than six months, hard labour without confinement for more than three months, among others.⁷⁰² In practice, they have jurisdiction over any act which is considered sufficiently serious to be dealt with as a military criminal offence and not as a breach of discipline, such as one-off use of marijuana, being drunk on duty, abandoning one's post and going absent without leave.

The general courts martial form the backbone of the US military court system. Each one is made up of at least five military officers and also has a legal officer who provides legal advice to the court and assists its members. The legal officer, who must be a qualified lawyer practising before the Supreme Court or the federal courts, must be appointed by the Judge Advocate General. General courts martial have jurisdiction over "any offence listed in the [Uniform Code of Military Justice]".⁷⁰³ In practice, they try 'serious offences', leaving 'minor offences' to the jurisdiction of the special courts martial.⁷⁰⁴

Judgments handed down by courts martial against a general or admiral or which carry a certain type of sentence⁷⁰⁵ are reviewed by the Court of Military Review which is made up of at least three military officers or civilians appointed by the Judge Advocate General. Decisions made by the Court of Military Review can in turn be challenged before the Court of Military

702 Article 19 of the Uniform Code of Military Justice.

703 Hemperley and Davies, op. cit. [Spanish original, free translation.]

704 Ibidem. See also Francisco Fernández Segado, "*La justicia militar en el Derecho comparado*", Consejo General del Poder Judicial *Poder Judicial*, 2º época, Nº 23, Madrid, September 1991, p.59.

705 They are: the death penalty, dismissal, dishonourable discharge and confinement for over one year.

Appeals. The latter is made up of three civilian judges appointed for a 15-year period by the President of the United States with the prior consent of the Senate. It has a status all of its own: it is the only court within military criminal jurisdiction that consists of non-military personnel, it is permanent in nature and, as pointed out by Francisco Rodríguez Segado, it is “the only civilian organ created under federal law whose decisions are not appealable before the United States Supreme Court”.⁷⁰⁶ Nevertheless, even though it is not possible to appeal decisions handed down by the Court of Military Appeals, an application for review can be made to the Supreme Court of Justice by writ of certiorari.⁷⁰⁷

The President of the United States has a significant role within the ‘military justice’ system. Apart from having the ability to act as ‘convening authority’, no death sentence involving a general or an admiral can be implemented without his prior authorization. Sentences calling for the defendant to be discharged from the services have to be authorized in advance by the Department of Defence. The Uniform Code of Military Justice also gives extensive powers to the President with regard to the issuing of regulations on procedural matters and rules of evidence as well as those relating to proceedings conducted against military judges for any offences they may commit in the course of their work.⁷⁰⁸

Military Commissions

In parallel to the system of military justice established through the Uniform Code of Military Justice, the President of the United States can, in time of emergency or war, order ‘military commissions’ to be set up to try certain offences. The composition and operation of such commissions, as well as the rules of procedure and evidence, penalties and principles of substantive law to be applied by them, are determined by the President or, as delegated by him, the Secretary for Defence. Such military commissions vary in terms of characteristics, composition, operation, ‘jurisdiction’, principles of substantive law and rules of procedure according to the provisions of the presidential order by which they are created.

Although such commissions are frequently called military courts, in reality they are a kind of commission of the executive with judicial functions. Their ‘jurisdiction’ can extend to civilians. There are few precedents for the use of

706 Francisco Fernández Segado, “*La justicia militar en el Derecho comparado*”, op. cit., p.60. [Spanish original, free translation.]

707 Article 67a of the Uniform Code of Military Justice.

708 Articles 6.a, 17, 18, 19 and 20 of the Uniform Code of Military Justice.

military commissions in the recent history of the United States. One of the most well-known cases is that of the commando group⁷⁰⁹ which set out to enter US territory from a German submarine in order to sabotage factories, equipment and military installations in 1942. The incident took place at the height of the Second World War and, in the midst of declaring war, President Franklin D. Roosevelt set up a military commission to try the members of the commando for war crimes, in particular, for not displaying the necessary emblems to show that they were combatants. Those involved applied to the Supreme Court for a writ of *habeas corpus*. The Court concluded that the persons involved were unlawful combatants and that, therefore, it was appropriate for them to be tried by a military commission.⁷¹⁰ During the Second World War and later on, within the framework of the trials conducted against commanders of Axis troops for war crimes and crimes against humanity, several military commissions were set up in Germany and Asian countries. In the Yamashita case, the Supreme Court dismissed the applications for *habeas corpus* and review of the decisions handed down by a military commission based in the Philippines and stated that the commission had not violated any law, treaty or military order in asserting its competence and that its decisions could not be reviewed on procedural grounds.⁷¹¹

It would appear that the existence of an emergency situation should not suffice for such military commissions to be set up. For example, in the Milligan case⁷¹², the Supreme Court quashed an order issued by President Lincoln in September 1863, followed by an order suspending *habeas corpus*, which authorized alleged spies and collaborators to be tried by military commissions. The Court considered that martial rule could not be established when the ordinary courts were functioning in an adequate manner and their jurisdiction had not been obstructed. Four members of the Court took the view that it was Congress which should decide whether the civilian courts should be replaced by military courts, noting that such a prerogative should only exist in wartime. The Supreme Court also held that the trial by a 'military commission' of a civilian accused of disloyalty, an offence allegedly committed outside the theatre of military operations and in a place in which the ordinary courts were functioning normally, was contrary to the 5th and 6th amendments to the Constitution.⁷¹³ Furthermore, the Court maintained that it was for the courts to decide what territory could be deemed to constitute the theatre of operations.⁷¹⁴ In its ruling on the replacement of ordinary courts by

709 The commando group consisted of 7 Germans and one US citizen.

710 317 U.S. 1, 29-30, 35 (1942)

711 327 U.S.1 (1946)

712 4 Wall 2.

713 4 Wall. 2 (1866)

714 Ibid., 127

military courts in Hawaii in 1941, which was declared unconstitutional, the Court concluded that martial law had not sought to authorize the replacement of the ordinary courts by military courts.⁷¹⁵

On 13 November 2001, as a result of the 11 September attacks and within the framework of the Declaration of National Emergency by Reason of Certain Terrorist Attacks, which had been proclaimed on 14 September, President G.W. Bush approved an executive order allowing military commissions to be set up to try those responsible for the attacks as well as others. Without going into detail, since the subject goes beyond the remit of this study, it is worth citing what Robert Kogod Goldman said in this connection: “The Military Order issued by the President, as it stands, does not provide those basic procedural guarantees [namely, the right to an independent and impartial tribunal, the presumption of innocence, the right to defence counsel, the right to bring witnesses and to question the witnesses for the prosecution, the principle that criminal law cannot be applied retrospectively] and therefore does not comply with minimum international standards”.⁷¹⁶

29. Uruguay

History

Until 1943, when the Military Criminal Code was introduced, military criminal jurisdiction was governed by a law dating from 15 January 1919. Prior to that, the Military Code of 1884 had applied. During the 20th century, the Eastern Republic of Uruguay had four successive constitutions: those of 1934, 1942, 1952 and 1967.

In the mid-1970's, constitutional order began to break down and eventually a *de facto* ‘military-civilian’ government was installed (1973-1985). On 15 April 1972, a ‘state of internal war’ was proclaimed and several laws were passed to allow the temporary suspension of various constitutional guarantees. On 10 July of the same year, the Law on State Security and Public Order (*Ley de Seguridad del Estado y el Orden Público*), otherwise known as the ‘National Security Law’ (*Ley de Seguridad Nacional*), which replaced the declaration of a ‘state of internal war’, came into force. The new law suspended various rights for people accused of offences against state security and gave the military courts the authority to try civilians charged with those offences.

715 31 Stat. 141, 153

716 Robert Kogod Goldman, op. cit. [Spanish original, free translation.]

In 1973, the state structures were reorganized and the National Security Council (*Consejo de Seguridad Nacional - COSENA*) was established.⁷¹⁷ That same year, several constitutional guarantees were suspended indefinitely and authorization was given for people who were considered to be a threat to state security and public order to be detained indefinitely and for people suspected of being involved in 'subversive activities' to be kept in 'preventive custody'.⁷¹⁸ A few days later, the parliament was dissolved and the Armed Forces assumed *de facto* power, even though the President of the Republic remained in place. From 1976 onwards, a series of "Institutional Laws" ("*Actos Institucionales*") changing the state structures and limiting or suspending fundamental rights and liberties were passed.

In 1979, in an attempt to legitimize the break-up of the existing institutions that had been started in 1976, the military government introduced a draft bill calling for a Constituent Assembly to be convened to adopt a new Uruguayan Constitution. Under the proposal, the Constitution was to be adopted by 25 generals and 26 civilians chosen by the Armed Forces. The Political Affairs Committee of the Armed Forces drafted the Constitution and in June, the 'Council of State' (*Consejo de Estado*), the body which had replaced the Parliament and which was made up of 25 people appointed by the Armed Forces, voted in favour of the draft bill. The bill was adopted in July by the Council of the Nation (*Consejo de la Nación*), a body made up of 27 senior Armed Forces officers. Lastly, it was intended that the draft Constitution should be adopted by referendum in November of the same year. The text was published for the first time on 30 October. Despite the many laws preventing different categories of people and political sectors from exercising their right to vote, the majority of those who did vote rejected the document. That Constitution was therefore never adopted. Nevertheless, it is worth mentioning the provisions it contained with regard to military courts because they are a good illustration of how military justice was conceived at that time, not only in Uruguay and the Southern Cone but also in most countries of Latin America. For example, article 151 of the draft stated that "military jurisdiction shall cover military offences, offences against the State and any offences which are used as a means of action or are connected or linked in any way at all with subversion or are related to war. Such offences shall fall to the jurisdiction of the military criminal courts even when the perpetrator is a civilian.

717 This new body, which had not been established in the Constitution, was made up of the President of the Republic, the Ministers of the Interior, Foreign Affairs, National Defence and Economy and Finance, the Director of the Office of Planning and the Budget, and the Commanders-in-Chief of the Armed Forces. Their responsibilities included security issues (Decree N° 163/973 of 23 February 1973).

718 Decree N° 393 of 1 June 1973.

Ordinary offences committed in peacetime shall remain subject to the provisions of law".⁷¹⁹

Under the *de facto* government, military jurisdiction was drastically expanded. In 1972, the so-called 'offences against the State' (*'delitos de lesa Nación'*) were incorporated into the Military Criminal Code.⁷²⁰ The military courts had jurisdiction over such offences even if the perpetrators were civilians. Several offences contained in the ordinary Criminal Code were also transferred to the jurisdiction of the military courts⁷²¹ and, in addition, any civilians who committed 'offences that affect the morale of the Army and Navy' (*'delitos que afectan la fuerza moral del Ejército y la Marina'*), as specified in article 58 of the Military Criminal Code, were to be tried by them. The legal rights of the accused were drastically reduced or even suspended.⁷²² In 1975, the military courts were granted sole and retroactive jurisdiction over all 'offences against the State' specified in the Military Criminal Code.⁷²³ The legal right of the Supreme Court of Justice to visit prisons was suspended. Lastly, in 1977, the Constitution was amended under Institutional Law No. 8 of 1 July 1977 in order to abolish the organizational autonomy of the judiciary and make all organs of ordinary and administrative justice answerable to the executive. The ordinary justice system ceased to be an independent authority.

In 1985, with the return to democratic institutions, the 1967 Constitution was fully reinstated. In 1986 the 'Expiry Law of the Punitive Powers of the State' (*'Ley de Caducidad de la Pretensión Punitiva del Estado'*) was passed.⁷²⁴ It declared all criminal action for offences committed by members of the armed forces and police prior to 1 March 1985, either for political reasons or in the course of duty, to be lapsed, thereby ensuring that the gross violations of human rights committed under the *de facto* government would go unpunished. In 1988, the Supreme Court of Justice declared the law to be constitutional and reaffirmed that it constituted an amnesty law.⁷²⁵

719 Draft Constitution of 1979, article 151. [Spanish original, free translation.]

720 Law 14,068 of 10 July 1972. 'Offences against the State' encompassed several different types of conduct, such as 'attacking the Constitution', 'subversive association' and 'conspiring to usurp public authority'.

721 'Public incitement to commit an offence', 'defending conduct that is considered to be an offence' and 'conspiring to commit an offence'.

722 Decrees N° 140/973 of 16 February 1973 and N° 231/973 of 31 March 1973. [Spanish original, free translation.]

723 Law 14,493 of 29 December 1975 and Chapter VI bis of the Military Criminal Code.

724 Law N° 15,848 of 22 December 1986.

725 Judgment N° 184 by the Supreme Court of Justice dated 2 May 1988.

The Current Situation

Military jurisdiction is regulated in the 1967 Uruguayan Constitution,⁷²⁶ article 253 of which states as follows: “Military jurisdiction is confined to military offences and to situations in which there is a state of war. Ordinary offences committed by members of the military in peacetime, wherever they are committed, shall be subject to ordinary jurisdiction”.⁷²⁷ In peacetime, on the other hand, military offences come under the jurisdiction of military courts.

Uruguayan military criminal jurisdiction is regulated through the 1943 Military Criminal Code, the Code of Military Criminal Procedure and the Military Court Organization Code. These three codes have been brought together into a single corpus of law, with Book I corresponding to the Military Criminal Code (articles 1 to 65), Book II to the Military Court Organization Code (articles 66 to 129) and Book III to the Code of Military Criminal Procedure (articles 130 to 514).

In terms of organization, military criminal jurisdiction, which is also called ‘military, naval or war jurisdiction’, varies depending on whether it is peacetime or wartime. In principle, all senior judges, judges and prosecutors within the military justice system must be members of the military on active service. However, retired military personnel and also, to a lesser extent, civilians can perform functions within the system. According to article 71 of the Military Court Organization Code, retired military personnel can undertake legal duties in the Supreme Court of Justice and the Supreme Military Court and can also hold the position of trial judge (*juez de primera instancia*), examining magistrate (*juez militar de instrucción*), court-appointed defence counsel and military prosecutor. In such circumstances, while they are carrying out legal duties and only for those purposes, retired military personnel are considered to be on active service, although they cannot be promoted. The military courts are also aided by legal advisers (*asesores letrados*). These are military officers with the rank of major who have been appointed by the executive and who have been practising as a lawyer or judge for at least four years. With some clear-cut exceptions, all employees of the military justice system are members of the military. This means that, even though article 12 of the Military Criminal Code asserts that military criminal jurisdiction “is part [...] of the country’s judicial body and its decisions are considered to have emanated from national justice”, as some experts on military law have admitted, it is in fact “an Armed Forces service whose fundamental objective is to

726 The Constitution has undergone several amendments, the most recent being in 1996.

727 Constitution of 1967, article 253. [Spanish original, free translation.]

maintain discipline and the material and moral strength of the armed institution”.⁷²⁸

In peacetime, military criminal jurisdiction consists of the Supreme Court of Justice, the Supreme Military Court, military trial judges, military examining magistrates, military prosecutors and investigating judges (*juces sumariantes*).⁷²⁹

The Supreme Court of Justice, for the purposes of military criminal jurisdiction, hears motions to quash [*recursos de casación*] and applications for the review [*recursos de revisión*] of judgments handed down by the military courts and rules on conflicts of jurisdiction between the civilian courts and the military courts. For these purposes, the Supreme Court of Justice consists of two superior officers from the Armed Forces who are appointed by the President of the Republic with the approval of the Senate.⁷³⁰

The Supreme Military Court, which has jurisdiction throughout the country, is made up of five judges (*Ministros*), of whom three are superior officers from the Army, one is a superior officer from the Navy and the other is either a civilian lawyer, who is assigned the rank and salary of a colonel, or a military lawyer who is a superior officer. They are appointed by the executive with the consent of the Senate for a period of four years. The highest-ranking and/or longest-serving judge presides over the court. The Supreme Military Court hears appeals against judgments handed down by the trial courts, gives its opinion on all orders for proceedings to be stayed and all trial court judgments which have not been the subject of appeal, deals with requests and enquiries from the Minister of Defence about military justice matters and rules on conflicts of jurisdiction between different military courts. The Supreme Military Court is also the governing authority of the military justice system in that it is responsible for “the managerial, disciplinary, consultative and financial oversight of the functions of military justice”.⁷³¹ The Supreme Military Court has “sole and exclusive” authority for conducting trials relating to the judicial responsibility of military judges, including the pre-trial

728 Néstor J. Bolentini, *Código Penal Militar, Ley de Seguridad del Estado, Código de Organización de los Tribunales Militares, Código de Procedimiento Penal Militar, Centro Militar - Biblioteca General Artigas, Volume N° 57, Montevideo, 1976, p.15* (commentary on article 12 of the Military Criminal Code). [Spanish original, free translation.]

729 Article 72 of the Military Courts Organization Code.

730 Article 508 of the Code of Military Criminal Procedure.

731 Article 76, paragraph 4 of the Military Courts Organizational Code. [Spanish original, free translation.]

impeachment proceedings (*antejuicio*),⁷³² and is the disciplinary body for judges who sit in the military justice system.

Trial judges are appointed by the executive for a four-year period. The post can be held by military lawyers with the rank of lieutenant colonel or commander as well as by colonels or captains who are not qualified as lawyers. In either case, the rank of the accused must not be higher than that of the judge. Trial judges are responsible for trying cases on the basis of indictments (*sumarios*) compiled by examining magistrates.

Military examining magistrates are appointed for a four-year period by the Military Supreme Court. They must be officers and lawyers with the rank of major or lieutenant commander or, if they are not lawyers, they must hold the rank of lieutenant colonel or commander. According to article 82, their task is to “prepare indictments against non-commissioned officers, officers and commanding officers from the Army and Navy accused of military offences to the point where it is possible to bring charges. They are also responsible for continuing and completing indictments relating to military offences committed by non-commissioned officers from the unit in question or officers which, in cases of obvious emergency, have been commenced by investigating judges”.⁷³³ Military examining magistrates draw up indictments at the request of the Ministry of National Defence.

The commander of each army or naval unit may appoint an officer as an investigating judge if a military offence is committed and it is not possible for an examining magistrate to attend or he or she is delayed. Investigating judges can only become involved on receipt of a written order from the unit commander and their role is confined to “gathering basic details about the offence so that the investigation does not go wrong and shall cease upon the arrival of the examining magistrate to whom he shall hand over the records of the proceedings”.⁷³⁴ The investigating judge is in fact a kind of “*ad hoc* examining magistrate”.

The prosecutorial role (*Ministerio público*) in military trials is performed by military prosecutors who are appointed by the executive. They must hold the rank of at least colonel or lieutenant colonel or their equivalent in the navy and they are attached to the Ministry of National Defence, which has responsibility for trying and punishing any breaches of discipline committed by military prosecutors in the course of their work. Military prosecutors bring criminal actions and participate in investigations. They can request custody

732 Ibidem, article 121.

733 Ibid., article 82. [Spanish original, free translation.]

734 Ibidem. [Spanish original, free translation.]

measures with regard to suspects and are responsible for ensuring “strict compliance with criminal laws and procedure” and “the proper administration of military justice”.⁷³⁵

The Code of Military Criminal Procedure establishes four stages of proceedings to be followed in peacetime: preliminary judicial interrogation of the person under arrest (*procedimiento ‘presumarial’*), an investigative phase (*instrucción*), a trial hearing and an appeal procedure. However, in the case of persons caught in the act of committing certain offences⁷³⁶ as well as “essentially military offences”⁷³⁷ punishable with 30 years’ imprisonment, the peacetime military courts can expedite the summary procedure that is available to the special wartime courts (*tribunales extraordinarios en tiempo de guerra*). It should be noted that included among such offences are “crimes and offences committed in the line of duty and when carrying out assignments”.⁷³⁸ The sentences passed as a result of such expedited proceedings, when conducted in peacetime, are reviewed by the Supreme Military Court and communicated to the Ministry of Defence.

In time of war, military criminal jurisdiction consists of special courts (*Tribunales Extraordinarios*). These can be convened by the Army in the field, by the Navy on board ship and “in any military garrison or militarized area under siege where there are no ordinary military courts and they shall function as such”.⁷³⁹ Special courts consist of court martial judges, an examining magistrate and a military prosecutor. The court martial judges, as well as the examining magistrate and the prosecutor, must all be members of the military. Special courts are competent to try “all cases of indictment for military offences which are submitted to military jurisdiction”.⁷⁴⁰ Courts martial are made up of three judges appointed by the commander of the military or naval unit, militarized area or naval ship in question. The commander of that unit also appoints the prosecutor. The Code of Military Criminal Procedure establishes an expedited summary procedure to be used by special courts, the decisions of which are reviewed *ex officio* by a review board (*Consejo de Revisión*). The Board is appointed by the Commander-in-Chief of the Forces, who also presides over it.

735 Ibid., article 90. [Spanish original, free translation.]

736 These are: serious insubordination, treason, rebellion, sedition, mutiny, crimes and offences committed in the line of duty, and other criminal offences.

737 Article 310 of the Code of Military Criminal Procedure.

738 Ibid., article 311. [Spanish original, free translation.]

739 Article 91 of the Military Courts Organization Code. [Spanish original, free translation.]

740 Ibid., article 94. [Spanish original, free translation.]

The Military Criminal Code gives a broad definition of what constitutes a military offence, stating that they are “acts which are punishable under this Code, military laws, military wartime edicts and the Army and Navy Regulations”.⁷⁴¹ As Colonel Bolentini has recognized, “rather than defining a military offence, the article points to the official sources for military offences in peacetime and wartime”.⁷⁴²

In terms of jurisdiction *ratione personae*, the military courts are competent to try military personnel and civilians employed by the Armed Forces (*los ‘equiparados’*) who commit military offences, military personnel who commit ordinary offences in the line of duty or while on duty, civilians who are involved in the commission of a military offence perpetrated by a member of the military, and any civilian or member of the military who commits an ‘offence against the State’⁷⁴³ or various other offences specified in the Military Criminal Code.⁷⁴⁴ To those should be added the jurisdictional powers conferred on them through military laws issued in peacetime or wartime and military edicts issued in wartime. In addition, when a member of the military commits an act which is both a military offence and an ordinary offence, it is the military courts which have jurisdiction

While in principle ordinary offences committed by military personnel come under the jurisdiction of the ordinary courts⁷⁴⁵, in reality, by invoking the concept of the “offence [...] committed for the purpose of, or on account of,

741 Article 1 of the Military Criminal Code. [Spanish original, free translation.]

742 Néstor J. Bolentini, *Código Penal Militar, Ley de Seguridad del Estado, Código de Organización de los Tribunales Militares, Código de Procedimiento Penal Militar*, Centro Militar - Biblioteca General Artigas, Volume N° 57, Montevideo, 1976, p.5 (commentary on article 1 of the Military Criminal Code). [Spanish original, free translation.]

743 As a result of Law N° 14068 of 10 July 1972 which amended the Military Criminal Code, jurisdiction for trying ‘offences against the State’ was transferred to the military courts. Such offences, which are established under article 330 of the Constitution, relate to attacks on the Constitution. They had not been defined as offences under ordinary law although they could have been seen as similar to what the Criminal Code calls ‘offences against the motherland’ (*‘Delitos contra la Patria’*). Under the military government, the notion of ‘offences against the State’ became one of the fundamental tools of repression used by the Armed Forces to put down any kind of political opposition, whether peaceful or armed. Offences against the State are defined in article 60 of the Military Criminal Code.

744 The Military Criminal Code lists several offences in which the perpetrator or principal can be a civilian. They include “violent action against or by those who perform military guard duties” (*“desafuero contra los que ejercen y por los que ejercen vigilancia militar”*) (article 46), “attacks on material strength” (*“ataques a la fuerza material”*) (article 51), “espionage” (article 54) and “attacks on moral strength” (*“ataques a la fuerza moral”*) (article 58).

745 Article 253 of the Constitution and article 4 of the Military Criminal Code.

service”⁷⁴⁶, the military courts seize jurisdiction over such offences. The Supreme Court of Justice had, on many occasions, found reliance on this concept to be unconstitutional.⁷⁴⁷ However, in 1970, it took the view that the norm on which it was based was constitutional because, in its opinion, military offences also encompassed ordinary offences committed by serving military personnel that were detrimental to military duties.⁷⁴⁸ This means that, from the perspective of jurisdiction *ratione materiae*, the military courts can try both standard military offences and ordinary offences which have been ‘militarized’.⁷⁴⁹

Criminal action with regard to military matters is public and responsibility for bringing such action lays with the Office of the Military Prosecutor (*Fiscalía Militar*). The Code of Military Criminal Procedure does not allow the victim or aggrieved party to introduce a civil action to the proceedings in the case of an “offence of a military nature” in his or her own right. However, they can participate as an auxiliary party but “their involvement shall always be subordinate to that of the [Military] Prosecutor”.⁷⁵⁰ Consequently, it is not possible for them to appeal against the dismissal of cases, court rulings on procedural matters or judgments on the merits of a case.

30. Venezuela

History

Following the invasion of Spain by Napoleon’s troops in 1808, the move towards independence accelerated. In 1810, the dignitaries of Caracas set up the Supreme Government Council to Protect the Rights of King Fernando VII (*Junta Suprema de Gobierno Defensora de los Derechos del Rey Fernando VII*), who was being held by the French. The Council convened a meeting of delegates from all the provinces of Venezuela. The Congress, which was held in 1811, declared independence and adopted the first Constitution of Venezuela. The 1811 Constitution implicitly recognized military jurisdiction.

746 Article 59, paragraph 3, of the Military Criminal Code. [Spanish original, free translation.]

747 Judgments N° 213 of 29 December 1952, N° 73 and 74 of 1954, N° 75, 101, 102 and 119 of 1957.

748 Judgment dated 30 October 1970.

749 The Military Criminal Code has a chapter entitled “Ordinary criminal offences which constitute military offences” (Chapter VI of the Special Part of the Code entitled “Concerning Offences”).

750 Article 133 of the Code of Military Criminal Procedure. [Spanish original, free translation.]

Article 176 stipulated that “No citizen of the provinces of the State, other than those employed in the Army, Navy or the Militia and who are in service at the time, shall be bound by military laws or suffer punishments stemming from such laws”.⁷⁵¹ Article 181 went on to state that: “There shall be no personal jurisdiction of any kind, the nature of the subject matter shall be determined solely by the judges who are competent to hear cases and, in cases relating to matters that are not relevant to their profession or career, the employees of any of the branches shall be subject to trial by the ordinary judges and courts in the same way as other citizens”.⁷⁵² The 1811 Constitution never really entered into force because, once the monarchy had been restored and Napoleon’s troops had been expelled, the Spanish Crown, whose armies in the General Captaincy of Venezuela, as it was then known, were headed by General Morillo, set about winning back the territory. In the case of Venezuela, the ‘reconquest’ lasted ten years.

In 1819, Venezuela’s independence was finally sealed and the Angostura Constitution, which was intended to govern both Venezuela and Colombia, was adopted. The 1819 Constitution established military jurisdiction. Article 11, under “General Provisions”, stated that, “Members of the military as well as the clergy have their special courts, their particular types of trial and orders which are binding only on them”.⁷⁵³ A special jurisdiction was also established for the Admiralty.⁷⁵⁴ Article 13 of the Constitution stipulated that “[a]ll jurisdiction is personal and can under no circumstances be extended to or encompass other individuals, however close their connections may be”.⁷⁵⁵ The Cúcuta Constitution, which unified Venezuela, Ecuador and Colombia, was adopted in 1821. However, in-fighting between the different factions and leaders eventually led to the three territories, which had once been amalgamated as the Viceroyalty of New Granada, breaking apart once and for all, thereby putting an end to Simón Bolívar’s dream of creating a single large South American state. In 1830, Venezuela finally became a sovereign republic under the leadership of General José Antonio Paéz. The Constitution adopted that year made no explicit reference to military jurisdiction. Venezuelan history during the 19th century was characterized by conservative or military governments and repeated *coups d’état*.⁷⁵⁶

751 Constitution of 1811, article 176. [Spanish original, free translation.]

752 Ibid., article 181. [Spanish original, free translation.]

753 Constitution of 1819, “General Provisions”, article 11. [Spanish original, free translation.]

754 Ibid., article 12.

755 Ibid., article 13. [Spanish original, free translation.]

756 Tulio Halperin Donghi, *Historia contemporánea de América Latina*, Alianza editorial, Madrid 1972, p.254 and following.

In 1933 the Code of Military and Naval Justice (*Código de Justicia Militar y Naval*) was issued but it did not apply for long because in 1938 the Code of Military Justice (*Código de Justicia Militar*) was introduced and remained in force, with some amendments⁷⁵⁷, until 1999. In 1947, a new constitution was adopted but, one year later, General Marcos Pérez Jiménez led a coup that resulted in the establishment of a military government which was to last until 1958. Once institutional normality had been restored, a new constitution was adopted in 1961 and remained in force until 1999. The 1961 Constitution made no reference to military courts but Title VII, entitled “Concerning the Judiciary and the Prosecuting Authority (*Ministerio Público*)”, implicitly allowed them.⁷⁵⁸ Military courts were instituted through the Code of Military Justice. They had broad jurisdiction which, through the concept of the service-related act (*acto de servicio*), encompassed any human rights violations committed by military personnel that constituted offences. As a result of the armed activities of rebel groups, between 1961 and 1971, emergency decrees were issued giving the military courts extensive jurisdiction over civilians.⁷⁵⁹ In 1976, the Basic Law on Security and Defence (*Ley Orgánica de Seguridad y Defensa*), granting the military courts the authority to try various offences in the event of a state of emergency, was passed.⁷⁶⁰

Under the 1961 Constitution, military criminal jurisdiction continued to be regulated through the 1938 Code of Military Justice. One of the most controversial aspects of the Code, apart from the fact that it was not possible to bring a civil action for damages and that military courts had jurisdiction over serious human rights violations perpetrated by military personnel, were the extensive powers conferred on the President of the Republic in his capacity as a military justice official. According to article 54 of the Code, the President of the Republic could suspend investigations and trials and order cases to be dismissed on grounds of public order or to suit “the interests of the Nation”. On several occasions these powers were used by the President of the Republic to halt proceedings which had been brought in connection with serious human

757 Especially those of 1958 and 1959.

758 Article 204: “Judicial authority is exercised by the Supreme Court of Justice and by the other Courts specified in the basic law”. [Spanish original, free translation.]

759 Luis Felipe Lanz Castellanos and others, “*Extension de la compétence de la juridiction militaire dans les situations d’exception et en temps de guerre*”, in *L’Évolution actuelle de la justice militaire - Huitième Congrès international, Ankara 1979*, Recueils de la Société Internationale de Droit Pénal Militaire et de Droit de la Guerre, Book VIII, Vol. II, p.1022.

760 The offences were: going on strike or stopping work in the public services or sectors of ‘socio-economic life’, revealing security or national defence information, undertaking construction work in security zones without the prior authorization of the Ministry of Defence, and refusing to enlist in the military or civil defence force in the event of a call-up (articles 33 to 39 of the Basic Law on Security and Defence).

rights violations. For example, in March 1992, the President of Venezuela issued decree N° 2166 ordering a stay of proceedings in the military trial of those allegedly responsible for the death of a civilian in January 1990 in San Cristóbal (Táchira State) and the release of nine members of the military who had been found guilty of murdering another civilian who had died on 10 November 1988.⁷⁶¹

As a result of a case that was submitted to the Inter-American Commission on Human Rights in connection with the massacre at El Amparo⁷⁶², a major debate began about that particular provision of the Code of Military Justice as well as about the fact that it was not possible to bring an action for damages in military trials and that human rights violations committed by military personnel were subject to military jurisdiction. On 10 February 1994, the Venezuelan State made a commitment in writing to the Inter-American Commission stating that it would take steps to amend the Code of Military Justice.

In 1998, the 1938 Code of Military Justice was replaced by the Basic Code of Military Justice (*Código Orgánico de Justicia Militar*).⁷⁶³ However, the new military statute was a virtual reproduction of the 1938 code in almost every respect. Rather than being a new code, it partially amended some of the provisions relating to the role of the military prosecutor's office (*Fiscalía*) and the principle of orality in trial proceedings. Despite the commitment that had been made to the Inter-American Commission in 1994, no amendments were made to any of the fundamental aspects of military jurisdiction. The powers conferred on the President under article 54 of the 1938 Code, the impossibility of bringing a civil action for damages and the ability of the military courts to try serious human rights violations all remained in place under the "new" military criminal legislation.

At the end of 1998, a new constitution was introduced: the Constitution of the Bolivarian Republic of Venezuela. It put limits on military jurisdiction as far as human rights violations committed by members of the Armed Forces were concerned. Article 261 states that: "Military criminal jurisdiction is an integral part of the Judiciary and its judges shall be selected through competition. The extent of their powers, their organization and working methods shall be regulated under the accusatorial system and in accordance with the provisions of the Basic Code of Military Justice. Ordinary offences, human rights viola-

761 Situación de los derechos humanos en Venezuela, Informe Anual octubre 1991 septiembre 1992, PROVEA, Caracas, 1992, p.54.

762 This involved the extrajudicial execution of 14 people by members of the security forces on 29 October 1988 in the state of Apure.

763 *Gaceta Oficial N° 5263 Extraordinario*, 17 September 1998.

tions and crimes against humanity shall be tried by the ordinary courts. The jurisdiction of the military courts is confined to offences of a military nature”.⁷⁶⁴ Article 29 of the Constitution also states that “[...] human rights violations and crimes against humanity shall be investigated and tried by the military courts. Such offences are exempt from any benefits that might ensue from their impunity, including pardon and amnesty”.⁷⁶⁵

Despite these clear constitutional provisions, the necessary legal changes have not been made to the military justice system and the 1998 Basic Code of Military Justice remains in force. Nevertheless, in an *obiter dictum* relating to a 2002 judgment, the Supreme Tribunal of Justice (*Tribunal Supremo de Justicia*), sitting in full session, took the view that “any proceedings conducted by the military courts, to the extent that they may not comply with the constitutional and legal provisions relating to the procedure to be followed in such courts, can be challenged by those concerned by making use of the remedies and actions the legal system provides for such purposes”.⁷⁶⁶

The Current Situation

For the most part, military justice is currently regulated under the Basic Code of Military Justice of 1998⁷⁶⁷ which entered into force on 1 July 1999.

Venezuelan military justice is fully incorporated into the executive branch of government. Under article 28 of the Basic Code of Military Justice, the following are military justice officials: the President of the Republic, the Minister of Defence, the Commander-in-Chief of the Army or the Navy in the field, the commanders of military or naval jurisdictions and other Armed Forces officials. The powers of the President of the Republic in his capacity as a military justice official are extremely broad. According to article 54 of the Code, he has the power to order the trial of generals and admirals; order military proceedings not to be opened in specific cases if he believes that doing so would be damaging to national interests; order military proceedings to be stayed at any stage, if he believes it to be necessary; grant pardons; and commute sentences. For his part, the Minister of Defence, in his capacity as a military justice official, has the power to order the trial of all other members of the military and is responsible for monitoring the administration of military justice.⁷⁶⁸ However, the Constitutional Division of the Supreme Tribunal of

764 Constitution of the Bolivarian Republic of Venezuela, article 261. [Spanish original, free translation.]

765 *Ibid.*, article 29. [Spanish original, free translation.]

766 2002 Judgment, Judge Rapporteur Dr. Rafael Pérez Perdomo. Case N° 2002-00018. [Spanish original, free translation.]

767 *Gaceta Oficial N° 5263 Extraordinario*, 17 September 1998

768 Basic Code of Military Justice of 1998, article 54.

Justice has challenged these powers. In a 2001 judgment on an application for enforcement of rights (*recurso de amparo*), it took the view that, in accordance with article 266, point 3, of the Constitution of the Bolivarian Republic of Venezuela, “only [this Supreme Tribunal of Justice sitting in] full session and no other body, not even the President of the Republic or the military authorities, can determine which officials or general officers or admirals from the National Armed Forces deserve to be brought to trial [...]”.⁷⁶⁹

The military courts have jurisdiction *ratione personae* and *ratione materiae* over: military offences committed by members of the military or civilians, jointly or separately; ordinary offences committed by military personnel in military units or installations while undertaking military duties or service-related acts or on assignment or because of them; and associated offences (*delitos conexos*) when the military offence carries the same or a heavier penalty than the equivalent ordinary offence.⁷⁷⁰ Ordinary offences committed by military personnel which are not linked to service come under the jurisdiction of the ordinary courts, except when the ordinary offence in question carries the same or a heavier penalty.⁷⁷¹ As for associated offences, the Basic Code of Military Justice stipulates that these are to be understood to mean offences committed simultaneously by two or more people working together; offences committed by two or more people in different places but planned together in advance; offences committed as a means of perpetrating other offences or in order to facilitate doing so; offences committed to ensure that other offences go unpunished; and any other offences that may have been committed by a defendant who is facing trial for any of the offences already mentioned.⁷⁷² However, in the case of associated offences, proceedings can only be started on the orders of the Minister of Defence or the commander of the military or naval jurisdiction where the offence carrying the highest sentence was committed. Lastly, it should be pointed out that the military courts are also authorized to try several offences specified in the ordinary Criminal Code⁷⁷³ and in the Basic Law on Narcotic and Psychotropic Substances (*Ley Orgánica sobre Sustancias Estupefácicas y Psicotrópicas*).

The Basic Code of Military Justice contains a long list of offences: offences against the integrity, independence and liberty of the Nation;⁷⁷⁴ offences

769 Judgment N° 151 of 9 February 2001. [Spanish original, free translation.]

770 Basic Code of Military Justice of 1998, article 123.

771 *Ibid.*, article 21.

772 *Ibid.*, article 133.

773 These are: offences against the independence and security of the Nation, armed uprising against the lawful authorities and piracy (articles 128 to 135, 138, 139, 144 and 153 of the Criminal Code).

774 The following offences come under this heading: betrayal of the motherland and espionage (articles 464 to 473 of the Code).

against international law;⁷⁷⁵ rebellion;⁷⁷⁶ offences against the order and security of the Armed Forces;⁷⁷⁷ offences against military duty and honour;⁷⁷⁸ offences against military decorum;⁷⁷⁹ offences against the military oath (*delitos contra la fé militar*);⁷⁸⁰ offences against military administration; and offences against the administration of military justice. It should be noted that the Code has a chapter entitled “Offences against People and Property”. Included under this heading are ordinary offences committed as a result of service. For example, article 573 calls for the punishment of any member of the military “who, while performing service-related acts or carrying out a service-related assignment, makes unnecessary use of weapons or any other form of violence against any person”.⁷⁸¹

In terms of the jurisdiction of military courts, the Basic Code of Military Justice distinguishes between peacetime and wartime or a state of emergency. It states that in all cases, at all times, the following shall come under military criminal jurisdiction: officers, specialists and individual members of the troop or ship’s company, whatever their position in the hierarchy and whatever the circumstances; students at the country’s military and naval colleges who commit offences which are not established or punishable under the rules of the college in question but are punishable under the Code or other military laws and regulations; persons treated as members of the military (*los asimilados a militar*); imprisoned military personnel; and employees and workers who are not formally attached to the military but who are working in military establishments or facilities and who commit an offence or misdemeanour on those premises.⁷⁸² In wartime or when guarantees have been suspended, the jurisdiction of the military courts shall be extended to include prisoners of war; anyone who for any reason or purpose is accompanying the troops and who commits an offence or misdemeanour on territory covered by the security

775 These consist of various grave breaches of the Geneva Conventions and the uses of war (articles 474 and 475 of the Code).

776 Basic Code of Military Justice of 1998, articles 476 to 487.

777 The following offences come under this heading: mutiny, uprising, false alarm, insulting a sentinel, the flag or the Armed Forces (articles 488 to 506 of the Code) and allowing prisoners to escape.

778 Usurping and abusing authority, insubordination, disobedience, desertion, abandonment of service, negligence, wilfully rendering oneself unfit for service (*inutilización voluntaria para el servicio*) and failure to offer assistance (articles 507 to 549 of the Code).

779 This includes cowardice.

780 These are forgery and misrepresentation (articles 567 to 569 of the Code).

781 Basic Code of Military Justice of 1998, article 573. [Spanish original, free translation.]

782 Ibid., article 124.

services; and persons not known to the army who commit certain offences in the area of operations.⁷⁸³

The jurisdiction *ratione loci* of the military courts encompasses “Venezuelan territory and territorial waters, ships and aircraft belonging to the National Armed Forces and any foreign territory occupied by national forces”.⁷⁸⁴ In occupied enemy territory, the military courts have the authority to try any offence committed by any person.⁷⁸⁵

In terms of the organization and powers of the military courts, the Basic Code of Military Justice distinguishes between peacetime, a state of war and periods when guarantees have been suspended. In peacetime, military justice consists of the Supreme Court of Justice (*Corte Suprema de Justicia*) - rechristened Supreme Tribunal of Justice (*Tribunal Supremo de Justicia*) in the new Constitution, the Martial Court (*Corte Marcial*), permanent courts martial (*consejos de guerra permanentes*), temporary courts martial (*consejos de guerra accidentales*), permanent military first instance judges (*jueces militares de primera instancia permanentes*) and temporary examining magistrates (*jueces accidentales de instrucción*).

The Supreme Tribunal of Justice (formerly the Supreme Court of Justice) hears applications for annulment on various grounds (*recursos de casación y de nulidad*) in connection with verdicts handed down by the military courts. The Supreme Tribunal also conducts pre-trial impeachment proceedings (*antejuicio*) against generals or admirals from the Armed Forces who are facing prosecution.⁷⁸⁶

The Martial Court is made up of five main members and ten substitute members who are appointed by the Supreme Court of Justice on the basis of proposals submitted by the Minister of Defence. Members of the Martial Court must be superior officers of the Armed Forces or lawyers who have been practising professionally for three years. Four of the main members must be superior officers of the Armed Forces and the one who is most senior in rank and service presides over the court. The Martial Court is the court of original

783 These include, among others, betrayal of the motherland, espionage, offences against international law, rebellion and offences against the order and security of the Armed Forces, as well as any offences stipulated in military edicts issued by military commanders.

784 Basic Code of Military Justice of 1998, article 123. [Spanish original, free translation.]

785 *Ibid.*, article 126.

786 Article 266 of the Constitution of the Bolivarian Republic of Venezuela. It should be noted that this type of procedure was established under the 1961 Constitution (article 215) but did not apply to generals and admirals.

jurisdiction for trials against army generals and naval admirals as well as for members of courts martial and judge advocates who have committed offences in the course of carrying out their duties. It is also the court of review and appeal for judgments handed down by the courts martial.

Permanent courts martial are made up of three panel members, two of whom must be officers with the rank of at least major. The third member can be a lawyer who is formally attached to the military. The highest-ranking and longest-serving officer presides over the court martial. The panel members are appointed by the Martial Court on the basis of names put forward by the Minister of Defence. Courts martial are the courts of original jurisdiction for all cases brought against superior and subordinate officers of the Armed Forces, members of the troop and civilians who are subject to military jurisdiction. They also hear appeals relating to proceedings conducted initially by the permanent military first instance judges. The permanent courts martial also perform the functions of sentencing tribunals (*tribunales de ejecución de sentencia*).

Permanent military trial judges must be members of the military on active service or lawyers who have been incorporated into the military and hold the rank of at least captain or, in the case of the navy, lieutenant. They are appointed by the respective court martial from a list of three officers and three lawyers submitted by the Minister of Defence for each court. Permanent military first instance judges have a dual role: they act as examining magistrate (*juez de instrucción*) for all offences for which courts martial are the competent court of original jurisdiction and the trial judge (*juez de la causa*) in cases of desertion, disobedience and types of insubordination which do not involve insulting or physically assaulting a superior. Permanent military courts of first instance (*juzgados militares permanentes de primera instancia*) also act as courts of preliminary investigation (*tribunales de control*).

The post of temporary examining magistrate is provided for in the event that no permanent military first instance judge is available for the jurisdictional territory in question. In such circumstances, the commander of the garrison concerned may appoint officers under his command to act as temporary examining magistrate and temporary prosecutor and swear them in.

For the purposes of military criminal jurisdiction, the Code interprets 'wartime' to mean when war has been declared as well as when it exists *de facto*. The suspension of constitutional guarantees through presidential decree is also treated in the same way as wartime. Under military criminal jurisdiction in wartime, the permanent peacetime military courts can carry on operating but only by implementing the extraordinary wartime procedures. Military criminal jurisdiction in wartime consists of the commanders-in-chief of the

main corps and units of the Armed Forces, the commanders of military units that are operating independently or are unable to communicate with central command, garrison commanders, the temporary courts martial and the Supreme Court Martial (*Consejo Supremo de Guerra*).

Temporary courts martial are set up for each specific case and are made up of three main members who are appointed by the commander of the military unit in question. There are three types of temporary court martial: one for the rank and file in the army or navy, one for noncommissioned officers and one for superior officers of the Armed Forces and generals and admirals. The main difference between them is the military rank which the members of the court martial and other military justice officials must hold.

The Supreme Court Martial is convened on a case-by-case basis and is made up of the five officers in the military unit in question who are most senior in rank and authority, all of whom are appointed by the head of the army. The Supreme Court Martial hears appeals against the verdicts of the temporary courts martial. Its decisions are not normally open to appeal but it is possible to request annulment on certain grounds (*recursos de casación y de nulidad*) as well as review (*recursos de revisión*). Amnesties and pardons can also apply to them.

The prosecutorial function within military criminal jurisdiction (*Ministerio Público*) is performed by the Office of the Attorney-General of the National Armed Force (*Fiscalía General de la Fuerza Armada Nacional*). The Military Attorney-General (*Fiscal General Militar*) fulfills this role in the Martial Court and the military prosecutors (*fiscales militares*) do so in the permanent courts martial. Military prosecutors are appointed by the President of the Republic. Military prosecutors in military courts, whether in the Martial Court or courts martial, must hold the same rank as the presiding judge of the court in question. In the case of temporary courts martial, the military prosecutor is appointed by the commander of the military unit in question. The Military Attorney-General and the military prosecutors represent military justice in all military criminal proceedings, are a party to such proceedings and can challenge the decisions taken by military courts. It is important to point out that, under a 2002 law, military prosecutors “are obliged to abide by the instructions and guidelines dispensed by the Attorney-General of the Republic and shall inform him, whenever requested to do so, about the current situation of any military trial”.⁷⁸⁷

⁷⁸⁷ Article 5 of the Basic Law on the Office of the Public Prosecutor (*Ministerio Público*), May 2002. [Spanish original, free translation.]

Military criminal jurisdiction has an Armed Forces Judge Advocates' Service (*Servicio de la Auditoría de las Fuerzas Armadas*). This consists of a Judge Advocate General (*Auditor General*), an Assistant Judge Advocate (*Auditor auxiliar*) and the judge-advocates attached to permanent courts martial and permanent military first instance courts. The President of the Republic is free to appoint and remove the Judge Advocate General and other judge advocates, all of whom must be lawyers who are formally attached to the military. In the case of temporary courts martial, the judge advocate is appointed by the commander of the military unit in question. The Armed Forces Judge Advocates' Service advises the President of the Republic, Ministry of Defence and military courts on military justice matters. The Judge Advocate General is also responsible for supervising the work of the courts, prosecuting authorities and defence counsel.

Lastly, the military justice system has its own Military Law School (*Escuela de la Judicatura Militar*) and, in terms of investigations, is supported by the Military Intelligence Directorate (*Dirección de Inteligencia Militar*) and the Military Police. The Military Intelligence Directorate was restructured following the introduction of the Basic Code of Military Justice to include an office of military criminal investigation, which is in turn made up of a crime investigation division, a criminology division and a forensic medicine division. The Military Police perform the functions of judicial police. The Military Law School provides legal training for Armed Forces officers so that they can carry out their military justice work.

Several types of proceedings are established in the Code: an ordinary procedure (*procedimiento ordinario*) (consisting of a preliminary investigation followed by a court hearing); a special procedure (*procedimiento especial*) for cases in which the accused has been caught in the act; a trial before the Martial Court with no right of appeal (*procedimiento en única instancia ante la Corte Marcial*) except to seek annulment (*recurso de casación*); and the extraordinary procedures (*procedimientos extraordinarios*) used by the temporary courts martial and the Supreme Court Martial which apply in wartime or when constitutional guarantees have been suspended. The latter are characterized by their speed and summariness. Several provisions of the ordinary Basic Code of Criminal Procedure (*Código Orgánico Procesal Penal*) also apply to military criminal jurisdiction where procedural matters are concerned.⁷⁸⁸

788 They are: Book Two, Book Three (except for Titles IV, VI and VII), Book Four and Book Five of the Basic Code of Criminal Procedure (Article 592 of the Basic Code of Military Justice).

The bringing of military criminal actions is public and undertaken at the initiative of the authorities except in cases where it is necessary for the action to be brought by a private party. However, in military criminal proceedings the investigative phase can only be opened on the orders of the competent authority which, as the case may be, could be the President of the Republic, the Minister of Defence, the heads of military regions, garrison commanders, the commanders of theatres of operations or the heads of military units in the field.

Conflicts of authority between military courts are resolved by the commander of the respective jurisdiction. In the case of conflicts between military courts attached to different military or naval jurisdictions, it is the Martial Court which decides. If there is a conflict between a military court and a civilian court, it is the Supreme Court of Justice which must rule. Under the Basic Code of Military Justice, military courts are given a kind of privileged position so that, in the case of ordinary offences for which punishment is the same or more severe under the Basic Code of Military Justice, all those implicated, whether military personnel or civilians, are subject to the military justice system.⁷⁸⁹ Military courts are also permitted to take certain procedural steps in cases which fall within the jurisdiction of the civilian courts.⁷⁹⁰

According to the Basic Code of Military Justice, any Venezuelan, whether civilian or military, can bring charges in cases of treason, espionage or ordinary offences committed by military personnel who are subject to military jurisdiction. The accuser is a party to the proceedings, must attend all sessions of the trial, can submit and rebut evidence and bring and question witnesses. However, the 'accuser' cannot claim any kind of compensation. Paradoxically, and contrary to the situation under ordinary criminal law, the Code does not recognize the concept of civil action (*parte civil*). It is therefore not possible to bring a civil action for the payment of damages caused by offences subject to the jurisdiction of the military courts, whether they be military or ordinary. This can only be done in the civilian courts, once the military courts have reached a verdict on the case in question.⁷⁹¹

789 Basic Code of Military Justice, article 128.

790 *Ibid.*, article 127.

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Lesotho (CCPR/C/79/Add.106);
Mauritius (CCPR/C/79/Add.60);
Morocco (A/47/40);
Nepal (CCPR/C/79/Add.42);
Peru (CCPR/C/79/Add.8, CCPR/C/79/Add.67 and CCPR/CO/70/PER);
Poland (CCPR/C/79/Add.110);
Romania (CCPR/C/79/Add.111);
Russian Federation (CCPR/C/79/Add.54);
Slovakia (CCPR/C/79/Add.79);
Sri Lanka (CCPR/C/79/Add.56);
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