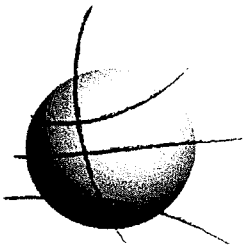

INTERNATIONAL
COMMISSION
OF JURISTS

Military Jurisdiction and International Law

International Jurisprudence and Doctrine on Human Rights

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(Chapters 1-7)

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Chapter 1 - The United Nations Treaty Bodies

1. Introduction

The *International Covenant on Civil and Political Rights*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on the Rights of the Child* do not contain any specific provisions concerning the trial of civilians by military courts. Nevertheless, the Human Rights Committee, the Committee against Torture and the Committee on the Rights of the Child have repeatedly taken the view that civilians should not be tried in military courts.

2. The Human Rights Committee

Article 14, paragraph 1, of the *International Covenant on Civil and Political Rights* states that "[a]ll persons shall be equal before the courts and tribunals [and] [i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". Article 14 also lists the judicial guarantees to which anyone subject to the criminal jurisdiction of a State is entitled. Although the Covenant does not explicitly refer to military courts, article 14 nevertheless constitutes the mainstay of the Human Rights Committee's doctrine on military courts.

Human Rights Committee doctrine on the trial of civilians by military courts has developed significantly over the past fifteen years. Traditionally, the Committee did not believe that doing so was incompatible *per se* with the provisions of the International Covenant on Civil and Political Rights and article 14 in particular. Thus in 1984, in General Comment N° 13, "Equality before the courts and the right to a fair and public hearing by an independent court established by law", the Human Rights Committee had said the following on the subject of article 14 of the Covenant:

> "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]

However, this position has been abandoned and the Human Rights Committee now takes the view that the practice of trying civilians in military courts is not compatible with obligations under the International Covenant on Civil and Political Rights and, in particular, those arising from article 14. Examination of the periodic reports submitted by the States Parties on their implementation of the Covenant, as well as individual communications, gradually led the Human Rights Committee to change its position.

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 confined to strictly military offences committed by military personnel.

In its observations to **Egypt**, the Human Rights Committee believed 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".[2] Nine years later, the Committee would reiterate this view, stating that there were no guarantees that Egyptian military courts were independent and their decisions could not be the subject of appeal to a higher court.[3]

In its concluding observations to the **Russian Federation**, the Human Rights Committee expressed concern "over the jurisdiction of the military courts in civil cases".[4] The Committee also expressed concern "that such a situation may cause miscarriages of justice, particularly in the light of the Government's acknowledgement that the army, even at the highest levels, is not familiar with international human rights law, including the Covenant".[5]

In its concluding observations to **Kuwait**, the Human Rights Committee expressed concern "about the number of persons still detained under prison sentences handed down in 1991 by the Martial Law Courts in trials which did not meet the minimum standards set by article 14 of the Covenant, in particular the principles of equality before the courts, the impartiality of the tribunal, the presumption of innocence, the right to have adequate time and facilities for the preparation of the defence, and other rights of due process under article 14, paragraphs 3 and 5, of the Covenant".[6] The Committee recommended that "[t]he cases of persons still held under sentences [of that kind] should be reviewed by an independent and impartial body, and compensation should be paid pursuant to articles 9, paragraph 5, and 14, paragraph 6, of the Covenant, where appropriate".[7]

In its concluding observations to **Slovakia**, the Human Rights Committee expressed

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[1] Human Rights Committee, General Comment No 13, "Equality before the courts and the right to a fair and public hearing by an independent court established by law" (article 14 of the Covenant), paragraph 4, adopted at the 21st session, 1984, in United Nations document HR1/gen/1/Rev.3, p.17.

[2] United Nations document CCPR/C/79/Add.23, 9 August 1993, paragraph 9.

[3] Concluding observations of the Human Rights Committee : Egypt, United Nations document CCPR/CO/76/EGY, 1 November 2002, paragraph 16.

[4] Concluding observations of the Human Rights Committee : Russian Federation, United Nations document CCPR/C/79/Add.54, 26 July 1995, paragraph 25.

[5] Ibidem.

[6] Concluding observations of the Human Rights Committee : Kuwait, United Nations document CCPR/CO/69/KWT, 27July 2000, paragraph 17.

[7] Ibid., paragraph 18.

concern "that civilians may be tried by military courts in certain cases, including betrayal of State secrets, espionage and State security".[8] The Committee therefore recommended "that the Criminal Code be amended so as to prohibit the trial of civilians by military tribunals in any circumstances".[9]

In its concluding observations to **Uzbekistan**, the Human Rights Committee noted "with concern that military courts have broad jurisdiction. It is not confined to criminal cases involving members of the armed forces but also covers civil and criminal cases when, in the opinion of the executive, the exceptional circumstances of a particular case do not allow the operation of the courts of general jurisdiction. The Committee notes that the State party has not provided information on the definition of 'exceptional circumstances' and is concerned that these courts have jurisdiction to deal with civil and criminal cases involving non-military persons, in contravention of articles 14 and 26 of the Covenant".[10] The Committee urged the Uzbek authorities to "adopt the necessary legislative measures to restrict the jurisdiction of the military courts to trial of members of the military accused of military offences".[11]

In its concluding observations to **Venezuela**, the Human Rights Committee expressed concern at the possibility that, under that country's legal system, "civilians may be tried by military courts".[12]

In its concluding observations to **Cameroon**, the Human Rights Committee expressed concern about "the jurisdiction of military courts over civilians and about the extension of that jurisdiction to offences which are not *per se* of a military nature, for example all offences involving fire-arms. The Committee is further concerned about reports whereby a person who was discharged by civilian judicial authorities may be brought before a different tribunal for trial, in contravention of article 14 paragraph 7".[13] The Committee urged the State Party to "ensure that the jurisdiction of military tribunals be limited to military offences committed by military personnel. It must also avoid that any person be liable to be tried or punished again for an offence for which he/she has already been finally convicted or acquitted of".[14]

In its concluding observations to **Algeria**, the Human Rights Committee expressed doubts "about respect for due process, especially before military tribunals, about the real possibilities for implementing the right to a fair trial, about the numerous cases of torture and ill-treatment which have been brought to its attention, and about the restrictions on rights to freedom of opinion and expression and freedom of the press". The Committee also took the view that "in the light of the provision of article 6 requiring States parties which have not abolished the death penalty to reserve it for the most serious crimes, it is contrary to the Covenant to impose the death penalty for crimes which are of an economic

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[8] Concluding observations of the Human Rights Committee : Slovakia, United Nations document CCPR/C/79/Add.79, 4 August 1997, paragraph 20.

[9] Ibidem.

[10] Concluding observations of the Human Rights Committee : Uzbekistan, United Nations document CCPR/CO/71/UZB, 26 May 2001, paragraph 15.

[11] Ibidem.

[12] Concluding observations of the Human Rights Committee : Venezuela, United Nations document CCPR/C/79/Add.13, 28 December 1992, paragraph 8.

[13] Concluding observations of the Human Rights Committee : Cameroon, United Nations document CCPR/C/79/Add.116, 4 November 1999, paragraph 21.

[14] Ibidem.

nature".[15]

In its concluding observations to **Nigeria**, the Human Rights Committee recommended "that all the decrees establishing special tribunals or revoking normal constitutional guarantees of fundamental rights or the jurisdiction of the normal courts (such as State Security (Detention of Persons) Decree No. 2 of 1984, the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994, Civil Disturbances (Special Tribunal) Decree No. 2 of 1987, Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986) which violate some of the basic rights under the Covenant, be abrogated and that any trials before such special tribunals be immediately suspended".[16] The Committee also recommended that "urgent steps be taken to ensure that persons facing trials are afforded all the guarantees of a fair trial as explicitly provided in article 14 (1), (2) and (3) and to have their conviction and sentence reviewed by a higher tribunal in accordance with article 14 (5) of the Covenant".[17]

In its concluding observations to **Poland**, the Human Rights Committee pointed out that, despite the limitations placed on military criminal procedure, "military courts have jurisdiction to try civilians".[18] The Committee said that it did 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".[19] The Committee therefore recommended that "[t]hese provisions of the Code of Criminal Procedure [...] be amended or repealed".[20]

The Human Rights Committee examined the anti-terrorist legislation from **Peru** under which cases of treason were tried in military courts, regardless of whether the accused was a civilian or a member of the armed forces or security forces. The Committee expressed "its deep concern that persons accused of treason are being tried by the same military force that detained and charged them, that the members of the military courts are active duty officers, that most of them have not received any legal training and that, moreover, there is no provision for sentences to be reviewed by a higher tribunal. These shortcomings raise serious doubts about the independence and impartiality of the judges of military courts".[21] The Committee emphasized that "trials of non-military persons should be conducted in civilian courts before an independent and impartial judiciary".[22] Four years later, with regard to innocent prisoners in Peru who had been convicted of terrorism in military courts on the basis of insufficient evidence, many of whom were later pardoned, the Human Rights Committee recommended that the State Party "establish an effective mechanism for the review of all sentences imposed by the military courts for the offences of terrorism and treason, which are defined in terms that do not

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[15] Concluding observations of the Human Rights Committee : Algeria, United Nations document CCPR/C/79/Add.1, 25 September 1992, paragraph 5.

[16] Concluding observations of the Human Rights Committee : Nigeria, United Nations document CCPR/C/79/Add.64, 3 April 1996.

[17] Ibidem.

[18] Concluding observations of the Human Rights Committee : Poland, United Nations document CCPR/C/79/Add.110, 29 July 1999, paragraph 21.

[19] Ibidem.

[20] Ibidem.

[21] Concluding observations of the Human Rights Committee : Peru, United Nations document CCPR/C/79/Add.67, 25 July 1996, paragraph 12.

[22] Ibidem.

clearly state which conduct is punishable".[23] The Committee also deplored the fact "that the military courts continue to have jurisdiction over civilians accused of treason, who are tried without the guarantees provided for in article 14 of the Covenant".[24] The Committee recalled that "the jurisdiction of military courts over civilians is not consistent with the fair, impartial and independent administration of justice".[25]

In its concluding observations to **Lebanon**, the Human Rights Committee expressed "concern about the broad scope of the jurisdiction of military courts in Lebanon, especially its extension beyond disciplinary matters and its application to civilians".[26] The Committee recommended that the Lebanese State "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".[27]

In its concluding observations to **Chile**, the Human Rights Committee took the view that "the continuing jurisdiction of Chilean military courts to try civilians does not comply with article 14 of the Covenant".[28] The 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".[29]

In its concluding observations to **Syria**, the Human Rights Committee took the view that military courts did not respect the judicial guarantees required under article 14 of the Covenant.[30]

In its observations to **Morocco**, the Human Rights Committee expressed concern that "there is no review by higher courts of decisions handed down by special courts like the Permanent Court of the Royal Armed Forces and the Special Court of Justice".[31] In 1991, when examining Morocco's periodic report, many members of the Committee asked why "articles 78 to 81 of the Constitution did not provide guarantees of a regular nature" and called into question the military courts.[32]

While not having ruled specifically on the question of the trial of civilians by military judges as such, the Human Rights Committee has repeatedly taken the view that the jurisdiction of military courts should be confined to military offences committed by military personnel. For example, in 1992, in its observations and recommendations to **Colombia**, the Human Rights Committee recommended limiting "the competence of the military courts to internal issues of discipline and similar matters".[33] In its observations to the **Dominican Republic**, where the police have their own criminal courts, the Human

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[23] Concluding observations of the Human Rights Committee : Peru, United Nations document CCPR/CO/70/PER, 15 November 2000, paragraph 11.
[24] Ibidem.
[25] Ibidem.
[26] Concluding observations of the Human Rights Committee : Lebanon, United Nations document CCPR/C/79/Add.78, 1 April 1997, paragraph 14.
[27] Ibidem.
[28] Concluding observations of the Human Rights Committee : Chile, United Nations document CCPR/C/79/Add.104, 30 March 1999, paragraph 9.
[29] Ibidem.
[30] United Nations document CCPR/CO/71/SYR, paragraph 17.
[31] Concluding observations of the Human Rights Committee : Morocco, United Nations document CCPR/C/79/Add.113, 1 November 1999, paragraph 18.
[32] United Nations document A/47/40, 23 October 1991, paragraph 58.
[33] United Nations document CCPR/C/79/Add.2, 25 September 1992, paragraphs 5 and 6.

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 Human Rights Committee therefore urged the country's authorities to "ensure that the jurisdiction of the police tribunals is restricted to internal disciplinary matters".[34]

Similarly, the Human Rights Committee has viewed the limiting of military jurisdiction to strictly military offences committed by military personnel as a positive step that allows the International Covenant on Civil and Political Rights to be correctly implemented. For example, it took this position in the case of **El Salvador**.[35]

As far as the examination of individual communications is concerned, the Human Rights Committee addressed the question of civilians being tried by military courts at a very early stage. Initially, it focused its analysis on whether the judicial guarantees required under article 14 of the Covenant had been respected by military courts.[36] Certainly, in early cases involving the trial of civilians in military courts, most of them from Uruguay, the violation of judicial guarantees was so apparent that the Committee initially avoided addressing the question of whether or not a military court could be deemed to be independent and impartial. In a decision on a case concerning several civilians who had been tried by a military court under a state of siege decree in **Colombia**, the Committee expressly refrained from examining that aspect of military courts. The Committee argued that the charge made by the author of the communication that the military courts lacked independence and impartiality was too general and related to constitutional law. The Committee said that it was not competent to "deal with questions of constitutionality" but could rule on "the question [of] whether a law is in conformity with the Covenant".[37] In another decision concerning a student tried by a military court in **Uruguay**, despite the fact that the author of the communication had challenged the military proceedings in their entirety on the grounds that they constituted a breach of the right to be tried by an independent and impartial court, the Committee refrained from taking a position on that aspect of the case on the grounds that the legal proceedings had not yet come to an end.[38]

However, in 1987, when examining a communication concerning a civilian who had been tried and convicted by a military court in **Uruguay**, the Human Rights Committee concluded that there had been a breach of article 14, paragraph 1, of the Covenant because the right to "a fair and public hearing by a competent, independent and impartial tribunal" had been denied.[39] Although, in that decision, the reasons for reaching that conclusion were not given, it was the first time that the Committee had made specific

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[34] United Nations document CCPR/CO/71/DOM, 26 April 2001, paragraph 10.

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

[36] See, among others: Decision of 15 August 1979, Communication N° 5/1977, Case of *Moriana Hernández Velentini de Bazzano v. Uruguay*; Decision of 3 April 1980, Communication N° 8/1977, Case of *Ana María Lanza de Netto v. Uruguay*; Decision of 23 July 1980, Communication N° 4/1977, Case of *William Torres Ramírez v. Uruguay*; Decision of 29 July 1980, Communication N° 6/1977, Case of *Miguel A. Millán Sequeira v. Uruguay*; Decision of 29 July 1980, Communication N° 281/1978, Case of *Luciano Weinberger Weisz v. Uruguay*; Decision of 31 March 1981, Communication N° 32/1978, Case of *Lucía Sala de Touron v. Uruguay*; Decision of 29 March 1982, Communication N° 10/1977, Case of *Altesor v. Uruguay*; Decision of 1April 1982, Communication N° 70/1980, Case of *Elsa Cubas v. Uruguay*; and Decision of 8 August 1986, Communication N° 156/1983, Case of *Luis Alberto Solorzano v. Venezuela.*

[37] Decision of 27 July 1982, Communication N° 46/1979, Case of *Orlando Fals Borda et al v. Colombia*, paragraph 13.3.

[38] Decision of 5 July 1985, Communication N° 147/1983, Case of *Lucía Arzuaga Gilboa v. Uruguay*, paragraph 7.2.

[39] Decision of 27 October 1987, Communication N° 159/1983, Case of *Raúl Cariboni v. Uruguay*, paragraph 10.

reference to the need for an independent and impartial court in the context of the trial of civilians before military judges. Later, in a decision on a member of an armed opposition group who had been tried before a special military court, a "tribunal of faceless judges" (*"tribunal de jueces sin rostro"*) that had been established under anti-terrorist legislation in **Peru**, the Human Rights Committee took the view that the right to an independent and impartial court as well as judicial guarantees had been violated. Among other things, the Committee argued that "[i]n a system of trial by 'faceless judges', neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established *ad hoc*, may comprise serving members of the armed forces".[40]

States often invoke special or emergency powers in order to subject civilians to the jurisdiction of organs of "military justice", whether they be military courts or organs of the executive that have been invested with "judicial functions". In this connection, the Human Rights Committee has specified, in General Comment 29 on states of emergency (art. 4 of the Covenant), that, even in times of war or in a state of emergency, "[o]nly a court of law may try and convict a person for a criminal offence".[41] The Committee also took the view that "States parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for example [...] by deviating from fundamental principles of fair trial, including the presumption of innocence".[42] In the opinion of the Committee, "[s]afeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations".[43]

3. The Committee against Torture

The Committee against Torture has studied the practice of trying civilians in military courts when examining the periodic reports submitted by States parties to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.* It has expressed its concern about this practice and has recommended that it be abolished.

For example, in its recommendations to **Peru**, the Committee was "concerned by the subjection of civilians to military jurisdiction" and recommended that the military courts "be regulated to prevent them from trying civilians and to restrict their jurisdiction to military offences, by introducing the appropriate legal and constitutional changes".[44] The Committee expressed this concern again in 1999[45] and once again emphasized "that the State party should return jurisdiction from military courts to civil courts in all matters concerning civilians".[46]

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[40] Decision of 6 November 1997, Communication N° 577/1994, Case of *Víctor Alfredo Polay Campos v. Peru*, United Nations document CCPR/C/61/D/577/1994, 9 January 1998, paragraph 8.8.

[41] United Nations document CCPR/C/21/Rev.1/Add.11, 31 August 2001, paragraph 16.

[42] United Nations document CCPR/C/21/Rev.1/Add.11, 31 August 2001, paragraph 11.

[43] United Nations document CCPR/C/21/Rev.1/Add.11, 31 August 2001, paragraph 16.

[44] Conclusions and recommendations of the Committee against Torture : Peru, United Nations document A/50/44, 26 July 1995, paragraphs 62-73.

[45] Conclusions and recommendations of the Committee against Torture : Peru, United Nations document A/55/44, 15 November 1999, paragraph 59.

[46] Ibid., paragraph 62.

The Committee said the following with regard to civilians convicted by military courts in **Jordan**: "The Committee is further concerned that during 1993 and 1994 political detainees were sentenced to death or imprisonment in trials before the State Security Court on the basis of confessions allegedly extracted after torture. [...] The Committee expects the Jordanian 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".[47]

In some national contexts the Committee has been able to establish a link between the practice of subjecting civilians to military courts and torture. For example, with regard to the system of military jurisdiction in **Chile**, which allows civilians to be tried in military courts, the Committee considered that "some aspects of the legislation in force, such as the rules of the criminal prosecution system and the subjection of civilians to military jurisdiction, are not helpful as far as the prevention of torture is concerned".[48]

4. The Committee on the Rights of the Child

Article 40 (2) of the Convention on the Rights of the Child stipulates that every child or minor under 18 years of age "alleged as, accused of, or recognized as having infringed the penal law has at least the following guarantees: [...] To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; [...] [and that] If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law".

The Committee on the Rights of the Child has repeatedly recommended that minors should not be subject to the jurisdiction of military courts. For example, in its concluding observations to the **Democratic Republic of the Congo**, the Committee urged "the State party, in keeping with its ban on the recruitment of children as soldiers, to ensure that no child is tried by a military tribunal".[49] In its concluding observations to **Turkey**, the Committee noted "with concern that the minimum legal age for criminal responsibility is 11 and that the Juvenile Courts Law covers children only between the ages of 11 and 14, while children between 15 and 18 are subject to the Penal Law. Further, it also notes with concern that even children between 11 and 14 may not be subject to the Juvenile Courts Law if they are accused of having committed a crime falling under the jurisdiction of State security courts or military courts or if they live in areas under a state of emergency. The fact that detention is not used as a measure of last resort and that cases have been reported of children being held incommunicado for long periods is noted with deep concern".[50]

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[47] Concluding observations of the Committee against Torture : Jordan, United Nations document A/50/44, 26 July 1995, paragraphs 159-182.

[48] Conclusions and recommendations of the Committee against Torture : Chile, United Nations document A/50/44, 26 July 1995, paragraphs 52-61.

[49] Concluding observations of the Committee on the Rights of the Child : Democratic Republic of the Congo, United Nations document CRC/C/15/Add.153, 9 July 2001, paragraph 75.

[50] Concluding observations of the Committee on the Rights of the Child : Turkey, United Nations document CRC/C/15/Add.152, 9 July 2001, paragraph 65.

With regard to anti-terrorist legislation in **Peru**, the Committee expressed concern "about the application of Decree 895 (*Ley contra el Terrorismo Agravado*) and Decree 899 (*Ley contra el Pandillaje Pernicioso*), both establishing lower legal minimum ages for criminal responsibility than the one contained in the Code and therefore not in line with the principles and provisions of the Convention. In this regard, the Committee takes note of the enactment of Law 27235, which modifies Decree 895, transferring the jurisdiction of cases of terrorism from military to civilian courts, but retaining the provision regarding lower legal ages of criminal responsibility. The Committee recommends that the State party consider developing alternative measures and programmes to deal with the problems addressed by Decrees 895 and 899 in order to bring them into line with the Convention on the Rights of the Child and the Children and Adolescents Code".[51]

In its concluding observations to **Turkey**, the Committee on the Rights of the Child expressed concern that "even children between 11 and 14 may not be subject to the Juvenile Courts Law if they are accused of having committed a crime falling under the jurisdiction of State security courts or military courts or if they live in areas under a state of emergency".[52]

[51] Concluding observations of the Committee on the Rights of the Child : Peru, United Nations document CRC/C/15/Add.120, 22 February 2000, paragraph 11.

[52] Concluding observations of the Committee on the Rights of the Child : Turkey, United Nations document CRC/C/15/Add.152, 9 July 2001, paragraph 65.

Chapter 2 - The Comission on Human Rights

1. Introduction

The Commission on Human Rights has addressed the question of the trial of civilians by military courts. In several of its resolutions, the Commission on Human Rights has urged or recommended that the jurisdiction of military courts be confined to military offences committed by military personnel. The Commission has also, on several occasions, recommended that the practice of trying civilians in military courts be brought to an end. Different thematic and country mechanisms of the Commission on Human Rights have also examined the problem within the framework of their respective mandates and have made recommendations on the issue.

2. The Special Rapporteur on the Independence of Judges and Lawyers

The Special Rapporteur on the Independence of Judges and Lawyers[1] has examined the general problem of military criminal jurisdiction and, more specifically, the issue of trying civilians before military courts within the framework of his mandate. When looking at the general question of military jurisdiction, the Special Rapporteur took the view 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 laws. 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'."[2]

The Special Rapporteur has reached the conclusion that "[i]n regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice".[3] He expressed reservations about General Comment N° 13 of the Human Rights Committee on article 14 of the International Covenant on Civil and Political Rights which states that, although the Covenant does not prohibit military courts, the prosecution of civilians by such courts should only take place in exceptional circumstances in which it is truly possible for the guarantees stipulated under article 14 to be fully enforced. The Special Rapporteur based his reservations on "current development of international law which is towards the

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1 Mandate created by the Commission on Human Rights through resolution 1994/41 of 4 March 1994.
2 United Nations document E/CN.4/1998/39/Add.1, Section II.B, paragraph 6.
3 Ibid., paragraph 5.

prohibition of military tribunals trying civilians".[4] However, it should be pointed out that, as soon as General Comment N° 13 had been adopted and these reservations expressed, the Human Rights Committee changed its position.[5] Although it has still not amended General Comment N° 13, in every single one of the "observations and recommendations" it has made with regard to reports submitted by States parties to the Covenant in which the trying of civilians before military courts has been an issue, the Human Rights Committee has repeatedly stated that such a practice is contrary to the Covenant and has recommended that such jurisdiction should be abolished. These days the Special Rapporteur and the Human Rights Committee both agree that civilians should not be subject to the jurisdiction of military courts.

The Special Rapporteur addressed the issue in his very first report to the Commission on Human Rights in 1995 when he said the following: "Understanding of, and respect for, the principle of the separation of powers is a *sine qua non* for a democratic State and is, therefore, of cardinal importance for countries in transition to democracy - which heretofore have been typically characterized by precisely the absence of a separation of powers".[6] The Special Rapporteur also said that:

> "Aside from those issues which may require some clarification, it is evident that some standards will have to be further elaborated in terms of the specificities of their application in certain contexts or situations, while other questions of principle will require the elaboration of entirely new standards in order to fill existing gaps. In relation to the former, it is to be observed that the criterion of 'independence' is not always assured with respect to military courts, revolutionary tribunals, or similar special courts. In these cases, the extent of the criterion of independence is at issue and requires a clear and sufficient response in terms of application of existing standards".[7]

The Special Rapporteur has expressed concern about the practice of trying civilians before military courts on several occasions when addressing specific situations. He has done so, for example, with regard to Cameroon[8], Lebanon[9], Nigeria[10] and the Democratic Republic of the Congo.[11]

The Special Rapporteur has also examined the practice in his reports on country visits. For example, in his report of his visit to Peru, he reported that the Government had enacted "wide-ranging anti-terrorism legislation amending the existing criminal procedure for the prosecution of civilians charged with treason and/or terrorist-related crimes. This legislation included the use of 'faceless' judges on civil and military tribunals to try such offences".[12] He also found that article 173 of the 1993 Constitution authorized military courts to try civilians accused of terrorism and treason. After examining the composition and operation of the "faceless" military courts, the Special Rapporteur concluded that "[t]he use of 'faceless' tribunals raised problems regarding standards of independence and impartiality"[13] and that the measures taken to protect judges "should be consistent with

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[4] Ibidem.
[5] See the chapter on "The United Nations Treaty Bodies".
[6] United Nations document E/CN.4/1995/39, 6 February 1995, paragraph 55.
[7] Ibid., paragraph 57.
[8] United Nations document E/CN.4/2001/65, 1 February 2001, paragraph 65.
[9] United Nations document E/CN.4/1998/39, 12 February 1998, paragraph 104.
[10] United Nations document E/CN.4/1999/60, 13 January 1999, paragraph 126.
[11] United Nations document E/CN.4/2001/65, 1 February 2001, paragraph 86.
[12] United Nations document E/CN.4/1998/39/Add.1, 19 February 1998, Section I.A, paragraph 6.
[13] Ibid., Section II.B, paragraph 2.

other international obligations of the Government and they should not impair the right of the accused to due process".[14] However, the Special Rapporteur did not confine himself solely to examining the issue of the "faceless" judges. He also looked at the trial of civilians by military courts. With regard to this, the Special Rapporteur found that "[w]hile 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 superiors, or are at least perceived to be so. Thus, critics argue that their independence and impartiality are suspect".[15] The Special Rapporteur concluded that "[i]n regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit that practice".[16]

In a report compiled jointly with the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions regarding their visit to Nigeria, the two Special Rapporteurs found that civilians were tried by military courts. They also found a serious imbalance between the ordinary courts and military criminal jurisdiction as far as remuneration and the resources assigned to them were concerned. While the former operated in difficult material conditions with low pay, military judges enjoyed a privileged status.[17] Although the members of military courts did not always have legal qualifications, the material resources available to them meant that trials took place with a degree of speed and flexibility that the ordinary courts did not have.[18] The Special Rapporteurs found that this situation was invoked "to justify the existence of these tribunals and to attack the delays in the ordinary courts, and thereby undermining public confidence in them".[19] The Special Rapporteurs pointed out that "[t]he separation of power and executive respect for such separation is a *sine qua non* for an independent and impartial judiciary to function effectively".[20] Lastly, the Special Rapporteurs recommended that "[a]ll decrees which establish special tribunals or oust the jurisdiction of the ordinary courts should be abrogated".[21] They also recommended that "[t]hose who have been convicted and sentenced by special tribunals in which there have been violations of the right to a fair trial, such as those convicted by the Special Military Tribunal in the so-called coup plotters' trial, should be pardoned and immediately released from detention [and] compensated for the injuries they have suffered as a result of these violations".[22]

3. The Working Group on Arbitrary Detention

For reasons that are obvious from its mandate, the Working Group on Arbitrary Detention has been dealing with the question of the trial of civilians by military courts ever since it was set up. After over ten years of work, the Working Group has reached the conclusion that military justice is a constant cause of arbitrary detention. In the past few years, the Working Group has also been recommending that military courts should not have

[14] Ibid., Section II.B, paragraph 1.
[15] Ibid., paragraph 7.
[16] Ibid., paragraph 5.
[17] United Nations document E/CN.4/1997/62/Add.1, 24 March 1997, paragraphs 60 and 61.
[18] Ibid., paragraph 62.
[19] Ibidem.
[20] Ibid., paragraph 72.
[21] Ibid., paragraph 77.
[22] Ibidem.

jurisdiction over civilians. The Working Group has expressly agreed with the Special Rapporteur on the Independence of Judges and Lawyers in calling for international consensus on the need to prohibit the practice.

a. General doctrine

In its 1994 report to the Commission on Human Rights, the Working Group said that, as far as military courts were concerned, it shared "the view of the Human Rights Committee that the provisions of article 14 of the International Covenant on Civil and Political Rights apply to all kinds of courts, whether ordinary or emergency courts. Undoubtedly, the Covenant does not prohibit military courts, even when they try civilians, but conditions reveal no less clearly that trials of civilians by such courts must be exceptional and must be held under conditions of full respect for all the guarantees set out in article 14".[23] However, the Working Group said that "in terms of principles, the name given to a special court is less important than whether or not it meets the requirements of article 14 of the Covenant. In the light of its experience, the Group notes that in almost all cases military courts involve serious risks of arbitrariness, on the one hand because of the procedure applicable and on the other because of the corporative nature of their membership, and all too often they give the impression that a double standard is being applied, depending on whether the person being tried is a civilian or a member of the military".[24]

In its 1995 report to the Commission on Human Rights, the Working Group again expressed its "concern over the existence in many countries of special, ideologically inspired courts, operating under various designations".[25] The Working Group stated that while military courts "do not appear to be formally prohibited by the Universal Declaration of Human Rights or by the International Covenant on Civil and Political Rights, [they] often fail to meet the 'independent and impartial' requirement laid down in article 14 of the Covenant".[26]

Between 1996 and 1998, the Working Group examined the practice of civilians being tried by military courts in the context of individual cases and decisions as well as of field missions. This led it to conclude that the practice was in conflict with the requirements of the right to a fair trial recognized both in the Universal Declaration of Human Rights (arts. 10 and 11) and in the International Covenant on Civil and Political Rights (art. 14) and gave rise to arbitrary detentions. For example, in its 1999 report to the Commission on Human Rights, the Working Group agreed with the reservation expressed by the Special Rapporteur on the Independence of Judges and Lawyers[27] with regard to General Comment N° 13 of the Human Rights Committee.[28] Referring back to previous recommendations, the Working Group drew up the following general recommendation:

"[...] if some form of military justice is to continue to exist, it should observe four

[23] Report of the Working Group on Arbitrary Detention, United Nations document E/CN.4/1994/27, 17 December 1993, paragraph 35.
[24] Ibidem.
[25] Report of the Working Group on Arbitrary Detention, United Nations document E/CN.4/1995/31, 21 December 1994, paragraph 44.
[26] Ibidem.
[27] In his report the Special Rapporteur stated that "[i]n regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit this practice" (United Nations document E/CN.4/1998/39/Add.1, paragraph 78).
[28] Report of the Working Group on Arbitrary Detention, United Nations document E/CN.4/1999/63, 18 December 1998, paragraph 79.

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 [from] imposing the death penalty under any circumstances".[29]

In its 2000 report to the Commission on Human Rights, the Working Group would reiterate this general recommendation.[30] It recalled that, in its experience, "the excesses of military justice [are] a regular cause of arbitrary detention and impunity for human rights violations".[31] It also repeated its recommendation for "the holding of a conference, if necessary at intergovernmental level, with a view to the promotion of agreements to limit the actual powers of the military justice system".[32]

b. Field Missions

In its country visits, the Working Group on Arbitrary Detention has recommended the respective authorities to confine the jurisdiction of military courts to strictly military offences committed by military personnel. For example, with regard to military courts in Indonesia, the Working Group recommended that the "competence [of military courts] should be limited strictly to offences committed under the Code of Military Justice by military personnel. Cases involving non-military victims, especially in the field of human rights, should be excluded from the military jurisdiction".[33]

In its report on its mission to Nepal in 1996, the Working Group found that military courts were made up solely of members of the military and were authorized to try civilians for offences committed against military personnel and to hear cases of offences committed by military personnel against civilians. It also found that only the military police could carry out investigations and that, as a general rule, military courts conducted their deliberations behind closed doors without a lawyer in attendance. The Working Group found this situation to be incompatible with the right to a fair trial established under article 14 of the International Covenant on Civil and Political Rights.[34] The Working Group recommended "[a]daptation of 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 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".[35]

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[29] Ibid., paragraph 80.

[30] Report of the Working Group on Arbitrary Detention, United Nations document E/CN.4/2000/4, 28 December 1999, paragraphs 67 and 68.

[31] Ibid., paragraph 67.

[32] Ibidem.

[33] Report of the Working Group on Arbitrary Detention on its visit to Indonesia (31 January to 12 February 1999), E/CN.4/2000/4 /Add.2, 12 August 1999, paragraph 103, Recommendation 9.

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

[35] Ibid., paragraph 35 (i).

In its mission to Peru in 1998, the Working Group found that "[t]he 1979 Constitution provided that military courts could try civilians only in the case of evasion of compulsory military service and treason during a war with another country" but that this important limitation had been brought to an end as a result of various laws passed after the Constitution had been adopted, in particular, Law N° 25,659 which stated that "certain offences, such as treason, which are committed by civilians and in which no exclusively military interest is at stake may be transferred to military courts".[36] The Working Group also found that article 173 of the Constitution allowed military courts to try terrorist offences. After studying the operation of military criminal jurisdiction in Peru, the Working Group said the following: "The situation of military justice is particularly serious. The Working Group is of the opinion that this sector, in Peru as in many other countries, does not meet the requirements of General Comment No. 13 adopted by the Human Rights Committee to guarantee due process of law".[37] The Working Group concluded that, as far as arbitrary detentions were concerned, "the lack of independence of judges and prosecutors, especially military ones, the changes to the rules of due process and the inappropriate description of criminal acts have led to a number of 'innocent prisoners', i.e. persons arbitrarily deprived of their liberty, according to Commission on Human Rights resolutions 1991/42 and 1997/50 and its own methods of work".[38] The Working Group recommended that, were some form of military justice to continue, it should observe, among others, the following rules: "Incompetence to try civilians [and] Incompetence to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves the risk of jeopardizing a democratic regime".[39]

c. Decisions and opinions

In the case of 26 civilians tried by a military court in Sudan, the Working Group believed that the events in question constituted arbitrary detention. The 26 civilians had challenged the jurisdiction of the military court in the Constitutional Court on the grounds that civilians should not be tried by a military court. The Constitutional Court had interrupted the session of the military court responsible for passing judgment in order to rule on the claim that the proceedings were unconstitutional. Even in those circumstances, the opinion of the Working Group was that the "deprivation of liberty of [the 26 accused] contravenes articles 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, and is of such gravity as to give the character of arbitrariness to the deprivation of liberty (category III)".[40]

In the case of the chief editor of an independent Nigerian newspaper (The Diet) who was arrested, prosecuted and convicted by a military tribunal under Decree N° 1 of 1986 on treason and other offences, the Working Group took the view that it constituted a case of arbitrary detention. Before appearing before the military tribunal, the chief editor had not

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[36] Report of the Working Group on Arbitrary Detention on its visit to Peru, E/CN.4/1999/63/Add.2, 11 January 1999, paragraph 56.
[37] Ibid., paragraph 170.
[38] Ibid., paragraph 172.
[39] Ibid., paragraph 180.
[40] Opinion N° 29/1999 (Sudan), Opinions adopted by the Working Group on Arbitrary Detention, United Nations document E/CN.4/2001/14/Add.1, 9 November 2000.

been informed of the charges against him and did not have access to a lawyer or to relatives. The military court sentenced him, at a trial held *in camera*, to life imprisonment. The Working Group concluded that "[t]he deprivation of liberty of [...] is arbitrary, as being in contravention of article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights, and falls within category II of the categories applicable to the consideration of cases submitted to the Working Group".[41]

In the case of several civilians and former soldiers convicted by a Special Military Tribunal in Nigeria of crimes ranging from treason to the publication of articles critical of the government, the Working Group concluded that the detentions were arbitrary. The Special Military Tribunal was made up exclusively of military officers. The accused did not have the right to appoint a lawyer of their choice, they were not allowed to address the court with regard to their own defence, they were not allowed to call witnesses on their own behalf or to have access to details of the charges against them and the trial was held *in camera*. The Working Group deemed the detentions to be arbitrary on the grounds that, *inter alia*, they contravened articles 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.[42]

In the case of the former director of a psychiatric hospital in Egypt who was convicted by a military court for issuing a certificate of insanity for a patient who was later implicated in several murders, the Working Group adjudged his imprisonment to be arbitrary. Among other things, it considered the fact that a civilian had been tried by a military court.[43]

The Working Group deemed the case of two civilians who had been tried and convicted of murder by a State Security Court in Palestine to constitute arbitrary detention because, *inter alia*, the right to a fair trial (art. 10 of the Universal Declaration of Human Rights) had been violated. The State Security Court had been made up of military judges and the accused did not have the right to have a lawyer present.[44]

In the case of the PKK leader, Abdullah Öcalan, who was tried and convicted by a State Security Court in Turkey, the Working Group deemed it to constitute arbitrary detention. The State Security Court was initially made up of military judges. Later on, the court was "demilitarized" but one of its members was a military judge who had sat on the first court. The "demilitarized" court continued with the trial of Öcalan while still taking into account the entire proceedings that had been conducted before the military court. Citing jurisprudence developed by the European Court of Human Rights, the Working Group found the presence of a military judge on the tribunal to be a violation of the right to a fair trial.[45]

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[41] Opinion N° 6/1999 (Nigeria), Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2000/4/Add.1, 17 December 1999.
[42] Decision N° 6/1996 (Nigeria), Decisions adopted by the Working Group on Arbitrary Detention, United Nations document E/CN.4/1997/4/Add.1, 29 October 1996.
[43] Opinion N° 10/1999 (Egypt), Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2000/4/Add.1, 17 December 1999.
[44] Opinion N° 14/1999 (Palestine), Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2000/4/Add.1, 17 December 1999.
[45] Opinion N° 35/1999 (Turkey), Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2001/14/Add.1, 19 November 2000.

The Working Group has also examined the practice of bringing civilians to trial before secret or "faceless" military courts. In several decisions concerning Peru, it has taken the view that the trial of civilians by "faceless" military courts constitutes "such a serious violation of the rules of due process as to confer on the deprivation of liberty an arbitrary character".[46] In Decision N° 37/1996 (Nigeria), the Working Group adjudged the trial of a civilian by a secret military court resulting in a life sentence to constitute arbitrary detention. In the view of the Working Group, "the detention of the above-mentioned persons is arbitrary since, on the one hand, it is in violation of all or part of the international provisions relating to the right to a fair trial of such gravity that it confers on this detention an arbitrary character (article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights)". The Working Group also found that "this detention was imposed in violation of these persons' right to freedom of opinion and expression (article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights)".[47] In another case from Nigeria in which the deputy director of a weekly magazine called *Tell* was arrested, tried in secret and sentenced to life imprisonment by a military court for "publishing materials which could obstruct the work of the coup plotters tribunal" and for "misleading the public", the Working Group concluded that it was a case of arbitrary detention. It declared the detention to be arbitrary, "being in contravention of articles 10 and 19 of the Universal Declaration of Human Rights and articles 14 and 19 of the International Covenant on Civil and Political Rights to which the Federal Republic of Nigeria is a party, and falling within categories II and III of the principles applicable in the consideration of the cases submitted to the Working Group".[48]

The Working Group has also examined the practice of using military courts to suppress peaceful forms of political or social opposition and to restrict freedom of association or expression. For example, in a case from Myanmar, the Working Group said the following: "From the fact that such [military] courts are being used to try civilians who are political leaders, human rights activists, journalists and students, and this under emergency legislation which has been in force since 1950, the Working Group draws the conclusion [...] that what is really held against the persons mentioned in the communication is the fact that they have opposed the political regime in power in their country. It is not reported that in doing so they have used violence or called upon others to do so. In short it is evident that they were or are being detained solely for having exercised freely and peacefully their right to freedom of opinion and expression, a right guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights".[49]

4. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

The Special Rapporteur has examined the practice of trying civilians before military courts mainly from the perspective of summary and arbitrary executions.

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[46] Opinion N° 22/1998 (Peru), Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2000/4/Add.1, 17 December 1999. See also: Opinion N° 23/1998 (Peru), Opinion N° 24/1998 (Peru), Opinion N° 25/1998 (Peru) and Opinion N° 26/1998 (Peru).

[47] Decision N° 37/1996 (Nigeria), United Nations document E/CN.4/1998/44/Add.1, 3 November 1998.

[48] Decision N° 38/1996 (Nigeria), United Nations document E/CN.4/1998/44/Add.1, 3 November 1998.

[49] Decision N° 62/1993 (Myanmar), Decisions adopted by the Working Group on Arbitrary Detention, E/CN.4/1995/31/Add.1, 5 October 1994.

a) General reports

In his 1983 report to the Commission on Human Rights, the Special Rapporteur, Amos Wako, gave a general picture of the main contexts in which extrajudicial executions had occurred between 1965 and 1983.[50] He pointed out that death sentences passed by special, military or revolutionary courts almost always resulted from proceedings which did not meet the requirements of due process. The Special Rapporteur commented that, in one country, following an attempted coup to overthrow the head of government, it was announced that special military tribunals were to be set up to try those believed to be responsible for the coup attempt and for the deaths of government officials during the coup. Executions went on for a year and hundreds of people were reportedly executed on orders issued by such courts with complete disregard for procedural safeguards.[51] The Special Rapporteur also pointed out that, in many countries, trials before military courts were conducted *in camera* and executions were often carried out in secret.[52] He also said that, in many countries, such courts were presided by judges who were not qualified to do so and who were not independent.[53] In fact, sentences were handed down by special courts made up of military personnel who were not members of the judiciary and did not have the necessary training for such a task. The Special Rapporteur said that "[i]t would appear that the most serious deficiency lay in the very structure and institutional position of these types of courts or tribunals".[54] In most cases, they were not part of the judiciary but of the executive and, furthermore, given the way they were appointed, it was not possible for them to be considered independent of the executive. The Special Rapporteur pointed out that the decisions made by such courts were political in nature and that their judgments were based on guidelines given to them by the executive, thus turning such trials into a mere formality for rubberstamping decisions that had already been made.[55] In his general conclusions and recommendations, the Special Rapporteur said the following:

> "Although certain basic standards for determining arbitrary or summary executions exist and are relatively clear, further standard-setting work needs to be done in the long term in some areas, including: [...] 2. Clarification of the minimum substantial and procedural guarantees to be observed by military, special, or revolutionary tribunals during public emergency or situations of internal disturbance or tension and the qualification and tenure of such tribunals".[56]

In his 1984 report to the Commission on Human Rights, the Special Rapporteur carried out an analysis of situations in which arbitrary or summary executions tend to occur.[57] The analysis devoted particular attention to military courts.[58] The Special Rapporteur pointed out that one of the characteristic factors that can lead to the creation of conditions in which summary or arbitrary executions may occur is the existence of special courts.

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[50] United Nations document, E/CN.4/1983/16, Chapter VII(A), paragraph 73.
[51] Ibid., paragraphs 75 to 76.
[52] Ibid., paragraph 78.
[53] Ibid., paragraph 82.
[54] Ibidem.
[55] Ibidem.
[56] United Nations document, E/CN.4/1983/16, paragraph 230.
[57] United Nations document, E/CN.4/1984/29. See also: United Nations document, E/CN.4/1985/17, paragraphs 41 to 45.
[58] United Nations document. E/CN.4/1984/29, paragraphs 75 to 86.

The Special Rapporteur made the following observation:

> "In a considerable number of situations special courts and tribunals, such as revolutionary courts and security tribunals, were set up outside the normal judicial system of the country. In a number of situations the military courts also tried civilians outside the control of the judiciary. Such special courts and tribunals were empowered to try 'political', 'security' or 'antirevolutionary' offenders, and in most cases, they were not bound to follow the established procedures of ordinary courts. The safeguards for a fair trial have often been ignored by these special courts and the right of defence has been extremely limited. In some cases legal representation was not allowed in the special court. In other cases accused persons were not informed of their charges until the opening of trials, allowing no adequate preparation for defence. Cross-examination of prosecution witnesses was also not allowed. Evidence presented by the prosecution could often not be contested. The right of appeal to a higher court was frequently denied. The judges of the courts and tribunals were not necessarily independent persons with legal backgrounds but often military personnel. The courts and tribunals were controlled by and answerable to the executive or the military. In some situations special courts were set up on an *ad hoc* basis by decision of the government or military. Trials were often held *in camera* and sentencing was often not the result of application of the law, but was dictated by political exigencies. Capital punishment was made mandatory for a large number of offences by decrees issued by the executive power which were applied retroactively. The offences for which the death penalty was made applicable by the special courts were murder, terrorism, sabotage, treason, other 'security crimes' and, in some countries, moral and economic crimes. Executions were often carried out immediately or shortly after sentencing".[59]

According to the Special Rapporteur, another of the characteristic features that can give rise to summary or arbitrary executions is when the executive or the military have control over the judiciary. For example, he said that: "In a considerable number of situations the independence of the court has been severely curtailed [...] In a number of instances ordinary courts have been deprived of jurisdiction over certain categories of cases without any legal justification. Those cases were tried by military courts or special courts".[60]

In his 1987 report to the Commission on Human Rights, the Special Rapporteur said that, according to reports he had received, special courts, set up outside of the ordinary judiciary, were often responsible for sentencing people to death following trials that lacked procedural safeguards for the rights of the accused.[61] The Special Rapporteur classed State Security Courts, revolutionary tribunals, special courts martial and military tribunals as special courts.[62] He called on governments to review the rules of procedure applicable to courts, including special courts, in order to ensure that they contained adequate safeguards to protect the rights of the accused, as stipulated in the relevant international instruments.[63]

In his 1996 and 1997 reports to the Commission on Human Rights, Special Rapporteur

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[59] United Nations document. E/CN.4/1984/29, paragraph 130.
[60] United Nations document. E/CN.4/1984/29, paragraph 131.
[61] United Nations document. E/CN.4/1987/20.
[62] Ibid., paragraph 186.
[63] Ibid., Paragraph 246 (a)(iv).

Bacre Waly Ndiaye, the successor to Amos Wako, expressed his concern at the imposition of the death penalty by special courts such as military tribunals. He concluded that, in general, such courts lacked the necessary independence for justice to be properly dispensed, among other things, because such courts were made up of judges who were answerable to the executive or of military officers on active service who were subject to the army chain of command.[64] The Special Rapporteur also pointed out that the expedited procedures used in military courts greatly affected the rights and judicial safeguards available to the accused.

Asma Jahangir, who succeeded Bacre Waly Ndiaye in the post, went on to examine the issue. She concluded that "[t]he practice of setting up special tribunals or jurisdictions in response to situations of internal conflict or other exceptional circumstances may also have serious implications for the defendants' right to fair trial. The judges appointed to such tribunals are often closely connected and at times directly accountable to the law enforcement authorities or the military. Such tribunals are often established in order to expedite trials, which may result in hastily imposed death sentences".[65]

b) Observations regarding specific countries

In his report of his visit to Peru, the Special Rapporteur found that civilians accused of treason were being tried by military courts. In response to the argument put forward by some Peruvian authorities that the military courts were more efficient than the ordinary courts, the Special Rapporteur took the view "that if the civilian courts do not function in a satisfactory way, the authorities should try to resolve the root causes rather than simply transfer jurisdiction over [...] people accused of treason to military courts [...] since in such courts fair trial safeguards for those accused of treason are limited [...]".[66] Lastly, the Special Rapporteur recommended that the Peruvian authorities take steps to ensure that military courts prosecute and try "exclusively [...] those members of the security forces that commit military crimes".[67]

When examining military criminal jurisdiction in Chile, the Special Rapporteur considered that "[m]ilitary 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".[68]

5. The Special Rapporteur on Freedom of Opinion and Expression

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has examined the practice of trying civilians before military courts within the framework of his mandate. In particular, the Special Rapporteur has been able to establish that, in several countries, trying civilians in military courts is a practice that has often been used to suppress freedom of opinion and expression and, in

[64] United Nations document E/CN.4/2001/9, 11 January 2001, paragraph 89. See also United Nations documents E/CN.4/200/3 of 25 January 2000, paragraph 66, and E/CN.4/2002/74 of 9 January 2002, paragraph 122.
[65] United Nations document E/CN.4/2001/9, 25 January 1996, paragraph 550. See also United Nations document E/CN.4/1997/60, 24 December 1996, paragraph 85.
[66] United Nations document E/CN.4/1994/7/Add.2, 15 November 1993, paragraph 98. [Spanish original, free translation.]
[67] Ibid., paragraph 99. [Spanish original, free translation.]
[68] United Nations document E/CN.4/1995/61, 4 December 1994, paragraph 93.

particular, peaceful forms of political or social opposition, as well as to prevent journalists from exercising their profession.

For example, in his 1999 report to the Commission on Human Rights, the Special Rapporteur reported the use of military courts as a means of stifling journalism in Nigeria and Turkey.[69] In his 2000 report to the Commission on Human Rights, the Special Rapporteur pointed out that, in the Syrian Arab Republic, the editor-in-chief of a monthly magazine and Secretary General of the Committee for the Defence of Democratic Freedoms in Syria was sentenced by a military court to ten years' forced labour for belonging to an unauthorized organization and disseminating false information.[70] In his 2001 report to the Commission on Human Rights, the Special Rapporteur said that a journalist working for *Danas*, an independent newspaper, as well as the *Agence France Presse* news agency, and who was also a member of the Helsinki Human Rights Committee, had been sentenced by a military court in the Federal Republic of Yugoslavia to five years' imprisonment for espionage and a further two years for dissemination of false information following a trial held *in camera*. The basis of the charge was that he had published articles about offences committed by the Yugoslav Army during the North Atlantic Treaty Organization intervention in Kosovo.[71]

On his mission to Turkey, the Special Rapporteur found that, according to the Press Law, a State Security court made up of a member of the military and two civilian judges could order distribution of a newspaper or magazine to be halted. He also found that the Public Prosecutor's Office could order distribution to be halted even without having first obtained such a court order.[72] On his mission to Sudan, the Special Rapporteur found that military courts were used to prosecute civilians who criticized the military authorities. For example, the Special Rapporteur highlighted the case of Father Hillary Boma, Chancellor of the Archdiocese of the Roman Catholic Church of Khartoum and an open critic of government policies, another Catholic priest, Father Lino Sebit, and 25 other people, all of whom were court-martialled for conspiracy and sabotage. Following a legal challenge, the proceedings were adjourned. In August 1999, the Sudanese Constitutional Court ordered a new trial for some of the detainees and voted unanimously to refer the suspects for trial by an ordinary military court instead of the court-martial before which they had first appeared.[73]

On his mission to Tunisia, the Special Rapporteur found that a journalist had just served a one-year prison sentence for publishing an article criticizing the military court system.[74]

6. Other thematic mandates

Other thematic mandates established by the Commission on Human Rights have examined the practice of trying civilians in military courts. For example, the Special Rapporteur on the question of torture has, on several occasions, examined the relationship between the practice of torture and the subjection of civilians to military jurisdiction. During his visit to Turkey, the Special Rapporteur looked at the system of preventive

[69] United Nations document E/CN.4/1999/64, 29 January 1999, paragraphs 88 and 113 respectively.
[70] United Nations document E/CN.4/2000/63, 18 January 2000, paragraph 174.
[71] United Nations document E/CN.4/2001/64 13 February 2001, paragraph 313.
[72] United Nations document E/CN.4/1997/31/Add.1, 11 February 1997, paragraph 31.
[73] United Nations document E/CN.4/2000/63/Add.1, 3 March 2000, paragraphs 85 and 86.
[74] United Nations document E/CN.4/2000/63/Add.4, 23 February 2000, paragraph 32.

detention to which civilians tried by State Security Courts with jurisdiction over terrorist offences were subjected. The Special Rapporteur concluded that the system of preventive detention under which detainees were held in incommunicado detention for long periods "places the detainee at serious risk".[75] In his 1999 report to the Commission on Human Rights, the Special Rapporteur received reports that civilians being held in custody pending trial before military courts had been tortured. For example, according to the Special Rapporteur, this had happened in Bahrein, the Democratic Republic of the Congo, Egypt, Israel, Myanmar, Romania and Turkey.[76] On his visit to Chile in 1995, the Special Rapporteur found that civilians accused of terrorism and tried by courts martial were quite frequently subjected to torture and ill-treatment. He reported that "[o]f the 11 prisoners being held for terrorist-related offences (men and women) with whom the Special Rapporteur had the opportunity to speak, eight said that they had been tortured, providing details, in the days following their respective arrests".[77] The Special Rapporteur also mentioned the case of two civilians who had been convicted in the first instance of belonging to an armed group on the basis of confessions obtained under torture when they were being questioned by the military prosecutor. Both cases were dismissed on appeal.[78]

In her first report, the Special Representative on the situation of human rights defenders[79] decided to give particular attention to "[t]he situation of human rights defenders subjected to prosecution and judicial investigation under such laws and their sentencing after unfair trials".[80] Within that framework, the Special Representative has analyzed the use of military courts to curb or punish the work of human rights defenders. In her 2002 report to the Commission on Human Rights, she reported that, in several countries, including Iran, Israel and Turkey, several lawyers and members of NGOs had been tried by military courts in retaliation for their legitimate activities in defence of human rights.[81] In addition, on examining the legal provisions in the United States of America which allow non-citizens to be tried before military commissions subject to the executive, the Special Representative took the view that such measures "seriously undermine human rights and the rule of law".[82] In her report to the United Nations General Assembly, the Special Representative analyzed the use of anti-terrorist and national security legislation in several Asian countries to grant military courts jurisdiction over civilians. The Special Representative said that: "Normal criminal activity but also political opposition and criticism of Governments are being treated under the anti-terrorism laws. Trials by military courts and special tribunals are increasingly being adopted. Secrecy has seeped into legal and administrative processes wherever such laws have been enforced. Defenders are finding it increasingly difficult to gain access to information in cases of arrest and detention of persons accused under these laws, affecting their work of monitoring State practices".[83]

7. The Rapporteur and Representative on Equatorial Guinea

This mandate is of particular relevance to the issue of civilians being tried in military courts. First of all, it was the first country mandate established by the Commission on

[75] United Nations document E/CN.4/1999/61/Add.1, 27 January 1999, paragraph 48.
[76] United Nations document E/CN.4/1999/61, 12 January 1999, paragraphs 66, 179, 193, 222, 378, 384, 492, 604 and 719.
[77] United Nations document E/CN.4/1996/35/Add.2, 4 December 1996, paragraph 21.
[78] Ibid., paragraph 65.
[79] Mandate established in resolution 2000/61 of the Commission on Human Rights.
[80] United Nations document E/CN.4/2001/94, 26 January 2001, paragraph 89 (f).
[81] United Nations document E/CN.4/2002/106, 27 February 2002, paragraphs 214-215, 217 and following, and 378 respectively.
[82] Ibid., paragraph 100.
[83] United Nations document A/57/182, 2 July 2002, paragraph 61.

Human Rights[84] and one of the first to examine the question of the trial of civilians before military courts. Secondly, it was as a result of its reports that the Commission on Human Rights adopted its first resolutions on the issue.

In his 1994 report to the Commission on Human Rights, the Special Rapporteur, Alejandro Artucio, found that "the legal system is very unreliable mainly because of the inadequate functioning of the judiciary, the failure to publish the laws enacted, the lack of proper legislation and the broad powers vested in the military courts".[85] He also found that death sentences had been passed on civilians following extremely summary military trials and carried out immediately without the accused being given the opportunity to appeal or ask for clemency and that some prisoners had been sentenced to long periods of imprisonment following politically-motivated trials that had been handled by military courts "of doubtful legality".[86] On examining military jurisdiction, the Special Rapporteur found that "it is apparently unlimited in criminal affairs and covers offences that are not of a specifically military nature, even when it is not military personnel, but ordinary civilians who are involved. The decisions of the courts-martial do not allow appeals to the Supreme Court, even in cases involving the death penalty. As a rule, the highly summary proceedings compels detainees to choose defence counsel from among the officers of the military garrison where the court sits. In some cases, persons convicted by courts-martial said there had been no dialogue between them and their court-appointed defence counsel during the trial".[87] The Special Rapporteur concluded that "[i]n 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".[88] Lastly, the Special Rapporteur called on the authorities to "[r]estrict the scope of military jurisdiction to cases involving strictly military offences, committed by military personnel".[89]

In his 1995 report to the Commission on Human Rights, the Special Rapporteur found that "[t]he unlimited encroachment of military jurisdiction into criminal matters continues to be a serious and very disturbing matter. Military jurisdiction continues to apply to offences that are not of a specifically military nature, such as homicide, theft and fraud. In some cases, military jurisdiction applies simply because the victim or injured party is a member of the armed forces; in others, because the perpetrator is a member of the armed forces. However, there is a third category of cases in which neither the offence nor the perpetrators nor the victims have anything to do with the military, but which are nevertheless taken up by the military courts. The Special Rapporteur has insisted that the scope of military jurisdiction should be severely restricted by law to cases involving purely military offences committed by military personnel".[90]

In his 1996 report to the Commission on Human Rights, the Special Rapporteur repeated his recommendation "to restrict their jurisdiction to trying strictly military offences

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[84] This mandate was established, in the form of an Independent Expert, under resolution 33 (XXXVI) of the Commission on Human Rights dated 11 March 1980. It was later changed to a Special Rapporteur and lastly to a Special Representative. In 2002, for very questionable reasons, this country mandate was curtailed by the Commission on Human Rights (Resolution 2002/11).

[85] United Nations document E/CN.4/1994/56, paragraph 14.

[86] Ibidem.

[87] Ibid., paragraph 55.

[88] United Nations document E/CN.4/1994/56, paragraph 56.

[89] Ibid., paragraph 103.

[90] United Nations document E/CN.4/1995/68, 10 January 1995, paragraph 24

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".[91] It was again reiterated in 1997, together with the additional recommendation that "[a]ny offences involving slander or insults against the Head of State or any other dignitary should be tried by the ordinary criminal courts".[92]

In his 1999 report, the Special Rapporteur took the view that "[m]ilitary court proceedings in Equatorial Guinea, given their very summary nature and the restrictions placed on the right of defence, in particular with regard to the production of exculpatory evidence by the defendants and communication between lawyers and their clients, tend to affect strict compliance with due process of law".[93] He yet again recommended that "[t]he military courts should be limited to trying strictly military offences committed by military personnel ".[94]

His successor, Gustavo Gallón, in his first report as Special Representative in 2000, found that "[m]ilitary 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".[95] 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".[96] He 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. [...] 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".[97] In his second report in 2001, the Special Representative reiterated these recommendations.[98]

In his 2002 report, the Special Representative found that military courts were still trying civilians and giving rise to "arbitrary detentions, inhuman treatment and torture [...] as if they were perfectly normal".[99] He was also concerned because, even in legal proceedings before ordinary courts, it was the military authorities who were responsible for conducting investigations of crimes. He had found "clear evidence that, even on those occasions when formally carried out by a judicial authority, such enquiries are in fact conducted not by the judiciary, but by the executive branch, through its security agencies

[91] United Nations document E/CN.4/1996/67, paragraph 85.
[92] United Nations document E/CN.4/1997/54, paragraph 98
[93] United Nations document E/CN.4/1999/41, 25 January 1999, paragraph 30.
[94] Ibid., paragraph 63 (3).
[95] United Nations document E/CN.4/2000/40, paragraph 69.
[96] Ibid., paragraph 71.
[97] Ibid., paragraph 137.
[98] United Nations document E/CN.4/2001/38, paragraph 69
[99] United Nations document E/CN.4/2002/40, 24 January 2002, paragraph 24.

and military and police officials".[100] The Special Representative said in this regard that "[a] point that must be emphasized is that the independence of the judiciary must be guaranteed not only during the trial stage, but also, and most particularly, during the preliminary investigation or criminal inquiry stage".[101]

8. The Special Rapporteur on Nigeria

The Special Rapporteur on the situation of human rights in Nigeria examined the issue of military courts in that country. In particular, he analyzed a series of decrees which effectively suspended the jurisdiction of the ordinary courts in favour of military courts. The Special Rapporteur believed that this situation perpetuated "the lack of independence of the judiciary".[102] He reiterated the need to repeal these provisions, in particular, the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986, if the rule of law was to be restored in Nigeria. The Special Rapporteur pointed out that, under Decree 1/96 and other decrees which allowed rights and obligations to be determined by military tribunals or tribunals with a military presence, a fair trial was not guaranteed.[103] He said that "[d]etermination of the rights and obligations of persons and in particular the determination of any criminal charge against a person should be made by regular courts of law. All legal proceedings must be conducted in public before independent courts whose proceedings conform to international norms of due process".[104]

The Special Rapporteur also said that civilians who had been convicted by military courts in trials which fell short of international fair trial standards should be released unconditionally or retried before independent tribunals which adhere to international norms of due process.[105] The Special Rapporteur recommended that "Decree 1/96 and other decrees which permit determination of rights and obligations by military tribunals, or by tribunals, which have a military presence, should be repealed".[106]

9. The Special Rapporteur on Myanmar

The Special Rapporteur on the situation of human rights in Myanmar examined the practice of trying civilians before military tribunals in that country. The Special Rapporteur found that "[i]n July 1989, SLORC [State Law and Order Restoration Council] Order No. 1/89 established military tribunals and SLORC Order No. 2/89 established the procedures for adjudication through military tribunals of persons contravening any SLORC Order".[107] Executive and legal powers were also conferred on some military chiefs in their respective military regions. Under these provisions, military tribunals were authorized to impose prison terms of three years and above, life imprisonment and the death penalty. According to information gathered by the Special Rapporteur, such tribunals consisted of one "judge". Sentences were often handed down without any evidence being heard. In the same court session the charges would be read

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[100] Ibid., paragraph 27.
[101] Ibidem.
[102] United Nations document E/CN.4/1999/36, 14 January 1999, paragraph 10.
[103] Ibid. paragraph 82.
[104] Ibid., paragraph 100.
[105] Ibid., paragraphs 18 and 95.
[106] Ibid., paragraph 104.
[107] United Nations document E/CN.4/1993/37, paragraph 69.

out and the sentence announced. The defendants were generally not informed in advance of the date of trial, did not have access to lawyers and were not allowed to conduct their own defence.[108] Later on, in 1992 and 1993, the Governing Junta ordered the release of a significant number of convicted prisoners[109], abolished the military tribunals[110] and commuted all death sentences passed by military tribunals between 18 September 1988 and 31 December 1992 to transportation for life.[111] The Special Rapporteur concluded that judicial guarantees had not been respected in those trials. He recommended that "political leaders including the elected political representatives, students, workers, peasants and others arrested or detained under martial law after the 1988 and 1990 demonstrations, or as a result of the National Convention, should be tried by a properly constituted and independent civilian court in an open and internationally accessible judicial process. If found guilty in such judicial proceedings, they should be given a just sentence, alternatively, they should be immediately released, with the responsibility of the Government to refrain from all acts of intimidation, threat or reprisal to them and their families".[112]

In his 1994 report to the Commission on Human Rights, following the release of several detained political leaders, the Special Rapporteur found that, despite the fact that the trial of civilians in military tribunals had been halted,[113] the licences of ten lawyers had been revoked by the High Court because they had been convicted of various offences by military tribunals.[114] The Special Rapporteur reiterated his recommendation that political dissidents be brought before a legally constituted and independent court or released immediately. The Special Rapporteur went on to repeat this recommendation again in 1995[115] and 1997.[116]

In his 2000 report, the Special Rapporteur found that, although the military tribunals set up in 1989 to try civilians under special summary procedures had been abolished in 1992, the administration of justice remained entirely in the hands of the military government.[117] In the view of the Special Rapporteur, "[t]he administration of justice is greatly marked by constraints which are inconsistent with judicial independence and characteristic of a military dictatorship".[118] Having examined how the courts operated, the Special Rapporteur found that they were largely accountable to the organs of military intelligence. The Special Rapporteur even pointed out that "[t]here have been reported instances where Military Intelligence has passed sentences orally at the time of arrest, before any trial had taken place".[119] He concluded that "the courts have become a mere instrument to provide formal and apparent, but clearly not substantive, legitimacy to the regime's systematic repression of the civil and political rights which constitute the very basis of the rule of law, democracy and democratic governance".[120] The Special Rapporteur therefore found ordinary civilian jurisdiction to be a kind of virtual reality

[108] Ibid., paragraph 119.
[109] SLORC Order 92/11 of April 1992.
[110] SLORC Order 12/92 of 6 September 1992
[111] SLORC Order 1/93 of 1 January 1993.
[112] United Nations document E/CN.4/1993/37, paragraph 242.
[113] United Nations document E/CN.4/1994/57, 16 February 1994, paragraph 11.
[114] Ibid., paragraph 46.
[115] United Nations document E/CN.4/1995/65, 12 January 1995, paragraph 155.
[116] United Nations document E/CN.4/1997/64, 6 February 1997, paragraph 108.
[117] United Nations document E/CN.4/2000/38, 24 January 2000, paragraphs 19 and 20.
[118] Ibid., paragraph 22.
[119] Ibid., paragraph 24.
[120] Ibid., paragraph 23.

behind which in fact the military authorities were sheltering.

10. The Special Rapporteur on the Democratic Republic of the Congo

In his first report to the Commission on Human Rights in 1995, the Special Rapporteur on the Democratic Republic of the Congo[121], Roberto Garretón, found that while "[i]n principle, the military courts deal only with offences committed by servicemen", they also have jurisdiction over civilians who have committed certain offences. For example, the Special Rapporteur pointed out that, according to articles 127 *et seq.*, 431 and 457 of the 1972 Code of Military Justice, "the following are also subject to military jurisdiction: civilians accused of belonging to 'rebel bands'; those who incite servicemen to commit offences; co-perpetrators or accomplices of servicemen; persons accused of treason; and persons accused of the illegal possession of military weapons".[122] The Special Rapporteur also found that many civilians who had been tried or convicted by military courts had been the victims of gross human rights violations.

In his 1998 report to the Commission on Human Rights, the Special Rapporteur said that "[a] military court was established by Decree-Law No. 19, thus only making matters worse: (i) it is not justice that is being pursued, but the need to complete operations to consolidate positions conquered by the 50th Brigade of the armed forces; (ii) it can try civilians, but under military rules of procedure; (iii) its decisions cannot be appealed against or contested".[123] The Special Rapporteur also expressed his concern at "the announcement by the President of the establishment of another emergency military criminal court to try the '*inciviques*' and persons who attack the civilian population".[124]

In his 1999 report to the Commission on Human Rights, the Special Rapporteur found that "the Military Court (COM), which was established in 1997 to try cases involving crimes committed by soldiers and police officers and armed robbery, is trying all types of cases, including those under the jurisdiction of the Court of State Security. The understanding of the COM, which has no basis in law, is that such matters come under its jurisdiction because the 'state of war' in effect since 1997 has not been lifted. The COM has tried cases totally unrelated to its mandate, such as violation of the ban on political parties [...]; treason against the State and establishment of private militias [...]; visiting a political prisoner [...]; [and] alleged cooperation with rebels during the occupation by Rwandan troops [...]".[125] The Special Rapporteur also said that he had received reports that the COM had been used to persecute civilians for ethnic reasons.[126] He also found that the legal safeguards needed for a fair trial were not available to those tried by the COM.[127] The Special Rapporteur recommended "cessation of the operation of the Military Court and the restoration of the right to a fair trial are of particular importance".[128]

In his 2000 report, the Special Rapporteur pointed out that the COM had passed many death sentences in 1999, both on servicemen and civilians, and had also been used as a

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[121] The mandate was established through resolution 1994/87 of the Commission on Human Rights.
[122] United Nations document E/CN.4/1995/67, 23 December 1994, paragraph 55.
[123] United Nations document E/CN.4/1998/65, 30 January 1998, paragraph 163.
[124] Ibid., paragraph 164.
[125] United Nations document E/CN.4/1999/31, 8 February 1999, paragraph 90.
[126] Ibidem.
[127] Ibid., paragraph 91.
[128] Ibid., paragraph 137.

tool of reprisal against people who had cooperated with the United Nations. The Special Rapporteur indicated that "[o]ver 130 executions were reported, some for such petty reasons as refusing to eat the food served up, which was considered a 'military revolt'."[129] The Special Rapporteur also found that many critics of the Kinshasa Government, including political and social leaders as well as "journalists for crimes of opinion"[130], had been arrested and tried by the COM. Indeed, "[t]he President of the Military Court (COM) himself, Kukuntu Kiyana, was arrested in August 1998 and tried by that very court for links with the rebels. The Special Rapporteur visited him in February in prison and in September at the Court, where, once more as a judge, he was preparing to resume the COM Presidency".[131] The Special Rapporteur said that "[t]he Military Court does not escape the criticism levelled at military courts all over the world, that they do not meet the requirements for an independent and impartial trial. [...] the Military Court had been granted 'exorbitant powers' in breach of international standards on the administration of justice and it was added that, in practice, it had 'increased its exorbitant practices'."[132] The Special Rapporteur said that it was impossible to claim that the COM complied with all the provisions of article 14 of the International Covenant on Civil and Political Rights because "[i]t is not possible to uphold the right to a defence when the trial is held a few hours after the crime and the accused is not given the opportunity to see a lawyer and has no time to prepare a defence or gather evidence".[133] The Special Rapporteur concluded that "the existence of a Military Court (COM) which does not guarantee the rights of the accused"[134] and "the Military Court's method of conducting trials genuinely undermines the rule of law".[135] The Special Rapporteur also stated that, in territory under their control, rebel forces had set up an operational court martial, similar to the COM, in which trials were held in secret but where there was a right of appeal and the death penalty was not applied.[136]

In his 2001 report to the Commission on Human Rights, the Special Rapporteur reported that many persons arrested for political reasons were regarded as traitors and sentenced as such and that over 35 journalists had been arrested for exercising their rights to freedom of expression and opinion.[137] "Journalists, lawyers, religious leaders, human rights workers, politicians, trade union leaders and others are detained, generally on charges of 'collusion with the rebels' or violating the ban on political activities. [...] Often no charges are filed against the prisoner, although detainees are sometimes transferred to the Court of State Security or the Military Court".[138] The Special Rapporteur said that "[c]riticisms of the Military Court regarding procedural irregularities (summary judgements, sole jurisdiction, etc.) are still absolutely valid. Detainees are held for long periods of time awaiting trial. Major political leaders and journalists who are detained are charged with the crime of 'betraying the homeland in time of war' for the merest expressions of dissidence".[139] The Special Rapporteur recommended that the authorities

[129] United Nations document E/CN.4/2000/42, 18 January 2000, paragraph 48.
[130] Ibid., paragraph 62.
[131] Ibid., paragraph 56.
[132] Ibid., paragraph 62.
[133] Ibidem.
[134] Paragraph 121.
[135] Paragraph 146.
[136] Paragraph 93.
[137] United Nations document E/CN.4/2001/40, 1 February 2001, executive summary.
[138] Paragraph 80.
[139] Paragraph 89.

"eliminate the Military Court [and] release all political prisoners and journalists unconditionally, guaranteeing them the fullest possible freedom of action".[140]

In 2002, Special Rapporteur Iulia Motoc went on to reiterate the concerns of her predecessor, Roberto Garretón, regarding the Military Court. She found that "[o]ffences committed by civilians (such as conflicts over land and threats to State security) are still brought before the Military Court".[141] Having studied the trial of the alleged killers of President Laurent Désiré Kabila conducted by the COM, the Special Rapporteur said that it "demonstrates the weakness of the judiciary".[142] Of the 135 accused, 95 were brought to trial, only five of whom had defence lawyers. While being held in custody for over a year, the accused were not permitted any contact with lawyers. The Military Court was a court of first and last instance and the "[t]he right of all defendants to appeal to a higher court is not respected".[143] The Special Rapporteur concluded that "[i]ts statute contains provisions incompatible with human rights"[144] and recommended that "[t]he Military Court must stop trying civilians".[145]

11. Other country mandates

In his first report to the Commission on Human Rights in 1994, the Special Rapporteur on the situation of human rights in Sudan[146], Gáspár Bíró, stated that several civilians had been tried *in camera* by military courts. Some hearings apparently only lasted a few minutes, the accused were not permitted defence counsel and had no right of appeal and the military judges had no legal training.[147] In his 1996 report, the Special Rapporteur said that he had received reports of summary executions following secret trials before military courts.[148] The Special Rapporteur recommended that the authorities "close down all secret detention centres [and] ensure that all accused persons are granted due process of law and lawyers and family members are allowed to visit them".[149] In his 1997 report, after establishing that several trials of civilians had taken place in military courts, the Special Rapporteur reiterated this recommendation and called for the "release [of] all political detainees and prisoners".[150] Special Rapporteur Leonardo Franco, who took over the mandate in 1998, also found that military courts were used to try civilians.[151] In the case of a priest and recognized government critic and other civilians tried by a special military court, the Special Rapporteur found the trial to have been "marred by irregularities and lack of due process of law at the time of arrest and during detention". [152]

In his first report to the Commission on Human Rights in 1994, the Special Rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967,[153] René

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[140] Paragraph 176.
[141] United Nations document A/57/437, 26 September 2002, paragraph 39.
[142] Ibidem.
[143] Ibidem.
[144] Paragraph 78.
[145] Paragraph 81.
[146] The mandate was established as a result of resolution 1993/60 of the Commission on Human Rights dated 10 March 1993.
[147] United Nations document E/CN.4/1994/48, 1 February 1994, paragraph 55.
[148] United Nations document E/CN.4/1996/62, 20 February 1996, paragraph 9.
[149] Ibid., paragraph 104(c).
[150] United Nations document E/CN.4/1997/58, 3 February 1997, paragraph 59 (c).
[151] United Nations document E/CN.4/1999/38/Add.1, 17 May 1999, paragraph 124.
[152] Ibid., paragraph 127.
[153] The mandate was established as a result of resolution 1993/2A of the Commission on Human Rights.

Felber, said that "[o]ne priority should be the release of all political detainees accused or found guilty of non-violent political offences and of persons imprisoned without a fair trial, particularly those tried by military tribunals before the introduction of the right of appeal".[154]

[154] United Nations document E/CN.4/1994/14, 28 January 1994, paragraph 42.

Chapter 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 Rights[1] has addressed the issue of military courts and in particular the question of civilians being tried before them.

1. The Special Rapporteur on Equality in the Administration of Justice

One of the earliest precedents set on this subject was probably the study on equality in the administration of justice carried out in 1969 by the Sub-Commission's Special Rapporteur on equality in the administration of justice, Mohammed Abu Rannat. When addressing the practice of subjecting civilians to the jurisdiction of military courts, the Special Rapporteur pointed out the dangers inherent in doing so as far as discrimination was concerned.[2] When addressing the problem raised by military courts being made up of armed forces officers who are subject to the principle of hierarchical obedience and military discipline, the Special Rapporteur concluded that "[i]t is questionable whether the personnel mentioned can always exercise complete freedom of judgement and action if they are dependent on their commanding officer for their efficiency ratings, promotions, allocation of duties and leave rights".[3] He went on to conclude that military criminal procedure tended not to afford the same guarantees as the criminal procedure applied in civilians courts.[4]

In his conclusions, the Special Rapporteur pointed out that there was evidence of a tendency "[t]o substitute special tribunals, often of a military nature, for the normal legal procedure, with the professed object of expediting the adminstration of justice".[5] The Special Rapporteur also said that, even though in exceptional circumstances such a practice may be reasonable to protect society from certain types of offences, it nevertheless depended on whether such courts possessed the characteristics required for them to be deemed independent and impartial. The Special Rapporteur considered that "[t]he subjection of persons accused of political offences to trial by military courts is certainly to be avoided".[6]

2. The Special Rapporteur on States of Emergency

The Special Rapporteur, Nicole Questiaux, addressed the issue of the trial of civilians by military courts in her study on human rights and states of emergency in 1982. In the study, the Special Rapporteur pointed out that in a state of emergency it was common practice to place the judiciary under the charge of the executive. She said that one way in which this was done was to change the criteria for assigning jurisdiction and, in so doing, gradually removing "matters from the competence of the ordinary courts [and]

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[1] Formerly the Sub-Commission on Prevention of Discrimination and Protection of Minorities.
[2] Study on equality in the administration of justice, United Nations document E/CN.4/Sub.2/296, 10 June 1969, paragraph 140.
[3] Ibid., paragraph 195.
[4] Ibid., paragraph 552.
[5] Ibid., paragraph 538.
[6] Ibidem.

transferring them to that of emergency courts".[7] The Special Rapporteur concluded that one of the consequences of this was that the principle of separation of powers was replaced by the "hierarchical structuring of powers" so that "[t]he civilian power itself, even when retaining certain prerogatives, is subordinated to the military power".[8] The Special Rapporteur considered that such practices amounted to a real "transformation of the rule of law", and had "a profound effect on the substantive criminal law (definition of offences and scale of penalties) and on the procedural criminal law (procedural guarantees) as well as on the rules governing competence".[9] She cited the example of the military courts with jurisdiction over civilians that had been established in Turkey under emergency legislation. After analyzing emergency legislation in several different countries, the Special Rapporteur pointed out that the right to a fair trial becomes flawed "to the point of [being] non-existent [...] when every stage of the trial [...] is exclusively in the hands of the military and when the sentence often has to be confirmed by the higher military authorities, which are empowered to increase it".[10]

Her successor, Leandro Despouy, in his 1989 report, recommended that the best way for States to prevent a state of emergency having a negative impact on the enjoyment of human rights was to "maintain the powers of the non-military courts and limit the competence of military courts to military crimes and offences".[11] In his 1991 report, the Special Rapporteur put forward "Guidelines for the development of legislation on states of emergency".[12] Guideline N° 7 added to the list of rights and freedoms that could not be affected by emergency measures the right to a fair trial before a competent, independent and impartial tribunal. In addition, guideline N° 9 proposed that "[t]he legislation should provide that nothing done pursuant to a state of emergency should diminish the jurisdiction of the courts [...] iv) over criminal matters including offences related to the emergency".[13] In his commentary on this guideline, the Special Rapporteur cited Principle N° 5 of the United Nations Basic Principles on the Independence of the Judiciary and said that the proposed provision "reflects the accumulated experience of competent international bodies that transferring criminal competence from ordinary courts, which are independent and impartial, to special or military courts, has consequences which are difficult to control and tend to go far beyond those which are formally recognized".[14] In particular, the Special Rapporteur pointed to the granting of jurisdiction to special or military courts to enable them to try crimes against security committed by civilians. He said that this practice not only violated procedural guarantees but that "[t]he lack of such guarantees, together with the dependence and partiality of the tribunal, too often cumulates in denial of the elemental right to a fair trial".[15]

In his last report, presented in 1997, the Special Rapporteur, on examining the impact of states of emergency on institutions and the public authorities, pointed out that a common practice that was negatively affecting the judiciary was when jurisdiction over civilians

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[7] 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.
[8] Ibid., paragraph 159.
[9] Ibid., paragraph 163.
[10] Ibid., paragraph 192.
[11] United Nations documents E/CN.4/Sub.2/1989/30/Rev.1, 7 February 1990, paragraph 33 (b) and E/CN.4/Sub.2/1989/30/Rev.2, 18 December 1990, paragraph 35 (b).
[12] United Nations document E/CN.4/Sub.2/1991/28/Rev.1, 21 November 1991, Annex I.
[13] Ibid., Guideline N° 9.
[14] Ibid., Guideline N° 9, Commentary, p.48.
[15] Ibid., Guideline N° 9, Commentary, pp.48 and 49.

accused of political offences was transferred to military courts.[16] In that connection, the Special Rapporteur reiterated his recommendation that emergency legislation should not "[r]estrict the authority of the courts [...] iv) to try criminal cases, including offences connected with the state of emergency".[17]

3. The Special Rapporteurs on the Right to a Fair Trial

In their study on "The right to a fair trial: current recognition and measures necessary for its strengthening", Stanislav Chernichenko and William Treat addressed the issue of trying civilians in military courts only briefly. However, they made several comments on the need for all courts to be independent and impartial. In their final report in 1994, the two Special Rapporteurs said that "[t]he concept of 'a fair trial' concerns both criminal and civil proceedings. Each type of proceeding has its own character. Nonetheless, certain principles can be applied in any court - whether it be an emergency court, a military tribunal, a juvenile court, etc. If those principles are not observed in accordance with a modern concept of justice, the trial cannot be fair".[18] The two Special Rapporteurs found that in several States different "systems of legal procedure" existed, one for peacetime and others for abnormal or emergency situations. They pointed out that "[s]ome States deviated from standard procedures in emergency situations which threaten national security or when the offence is political in nature. In some States, jurisdiction is lodged in special or military courts, while in others regular criminal courts try the cases but with remarkable deviation from the State's fair trial norms. While these problems do not exist in many countries, the problems indicate the need for greater international protection for the right to a fair trial and a remedy - particularly during periods of public emergency".[19]

Within the framework of their study, the Special Rapporteurs drew up a "draft body of principles on the right to a fair trial and a remedy". Though not adopted, the draft contained some interesting provisions. It is worth mentioning, for example, Principle 17 which reads as follows: "Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals"[20] and Principle 19 which states: "A court shall be independent from the executive branch. The executive branch in a State shall not be able to interfere in a court's proceedings and a court shall not act as an agent for the executive against an individual citizen".[21] However, Principle 44 of the proposed draft said: "Military courts do not have legal authority over civilians except in narrowly defined circumstances, for example, when the civilian has committed an offence in a military facility".[22]

4. The Special Rapporteur on the Independence and Impartiality of the Judiciary

The Special Rapporteur on the independence and impartiality of the judiciary, Louis Joinet, on examining the factors which have a negative impact on the independence and impartiality of the judiciary, considered that granting military courts jurisdiction over civilians had negative consequences for the administration of justice. In his 1991 report, he found that in Myanmar such courts were made up exclusively of military personnel,

[16] United Nations document E/CN.4/Sub.2/1997/19, paragraph 149.
[17] Ibid., paragraph 151.
[18] United Nations document E/CN.4/Sub.2/1994/24 , 3 June 1994, paragraph 58.
[19] Ibid., paragraph 162.
[20] Ibid., Annex II, Draft body of principles on the right to a fair trial and a remedy.
[21] Ibidem.
[22] Ibidem.

had broad discretionary powers with regard to evidence and their judgments could not be challenged.[23] The Special Rapporteur recalled the Draft Universal Declaration on the Independence of Justice, and especially principle 5 f), which stipulates that the jurisdiction of military courts should be confined to military offences.[24] In his 1992 report, on examining the practice of trying civilians in military courts in the territories occupied by Israel, the Syrian Arab Republic and Turkey, the Special Rapporteur found that such courts and the procedures used in them violated basic judicial safeguards.[25]

5. The Special Rapporteur on the Administration of Justice through Military Tribunals

In 2000, the Working Group on the administration of justice began a study of the "Administration of justice through military tribunals and other exceptional jurisdictions".[26] As stated by the Special Rapporteur responsible for the study, Louis Joinet, "[t]he essential goal would be to reduce the incompatibility noted between the status of military courts and the international standards analyzed in the study".[27]

At the 2001 session of the Sub-Commission, the Special Rapporteur presented a provisional report on the administration of justice through military tribunals[28] to the Working Group on the administration of justice.[29] In his report to the Working Group, the Special Rapporteur proposed that trends should be identified and, secondly, that guidelines or criteria should be drawn up for governments engaged in reforming their systems of military justice.[30]

In his 2002 report, the Special Rapporteur on the administration of justice through military tribunals concluded that, as far as the trial of civilians by military courts is concerned, "[t]here is a growing consensus [within the mechanisms of the Commission on Human Rights] on the need to limit the role of military tribunals, or even abolish them".[31] The Special Rapporteur also found that the jurisprudence developed by the treaty bodies was unanimous on this issue and that "[m]ore and more constitutions and fundamental laws strictly limit the jurisdiction of military tribunals [over civilians]".[32] He also pointed out that experience had shown that when the various criteria for assigning jurisdiction are interpreted broadly, particularly when a state of war or emergency has been declared, military courts try civilians. In this regard, he said that military tribunals generally tried members of armed opposition groups but that it was becoming increasingly common for them also to try civilian opponents who were peacefully exercising their rights, particularly in the areas of freedom of association and expression.[33]

The Special Rapporteur also found that, at the national level, the administration of justice by military tribunals was being gradually 'demilitarized'. He reported that the measures

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[23] United Nations document E/CN.4/Sub.2/1991/30, paragraph 277.
[24] Ibid., paragraph 283.
[25] United Nations document E/CN.4/Sub.2/1992/25, 15 June 1992, paragraphs 98 and following.
[26] 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.
[27] Ibid., paragraph 43.
[28] United Nations document E/CN.4/Sub.2/2001/WG.1/CRP.3.
[29] United Nations document E/CN.4/Sub.2/2001/7, 14 August 2001, paragraphs 28 to 39.
[30] Ibid., paragraph 30.
[31] United Nations document E/CN.4/Sub.2/2002/4, executive summary, p.3.
[32] Ibidem.
[33] Ibid., Section I.A, paragraph 6.

being adopted by many countries in that connection included: the abolition of military tribunals in peacetime, the inclusion of civilian judges on military tribunals and the transfer of appeals and cases of members of the armed forces acused of serious human rights violations to the ordinary courts.[34] The Special Rapporteur believed that the long-term objective should be to abolish military tribunals and, as a first measure, military tribunals with jurisdiction in peacetime.[35] In particular, the Special Rapporteur recommended that minors under the age of 18, whatever their status - soldier, combatant or member of a military or civilian academy - should not be tried by military tribunals.[36]

[34] Ibid., paragraph 28.
[35] Ibid., paragraph 29.
[36] Ibid. paragraph 37.

Chapter 4 - The Inter-American Commission on Human Rights

1. Introduction

From its early days, the Inter-American Commission on Human Rights (IACHR) began to examine the practice of using military courts to try civilians and to study the composition, operation, procedures and powers of military criminal courts operating in the American hemisphere. It has done so both in the context of the general comments and observations contained in its annual reports and reports of on-site visits to various countries of the region as well as in its decisions on individual cases. The phenomenon has been analyzed both in the light of the provisions of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights as well as of international instruments that are universally applicable, such as the International Covenant on Civil and Political Rights and the Basic Principles on the Independence of the Judiciary. The IACHR has reached the conclusion that, over and above the breaches of judicial safeguards that are to be found in the procedures used by the different national systems of military justice, the trial of civilians by military courts is in itself a violation of the right to an independent and impartial tribunal as well as of the principle of the competent (or natural) judge or tribunal. The IACHR took the view that:

> "Even though no international treaty contains an express provision prohibiting the trial of civilians by military courts, there is international consensus that the jurisdiction of such courts needs to be restricted".[1]

2. General considerations

The IACHR has long taken the view that military courts do not meet the standards of independence and impartiality required under both the American Convention and the American Declaration, a view that it has reiterated on many occasions. It believes that trying civilians in military courts, especially for political offences, violates the right to be tried by an independent and impartial tribunal.[2]

In its 1972 annual report, the IACHR warned that "in several countries the removal of citizens from their natural judges shows [...] a deplorable oversight of the traditional fair trial norms that are the essential basis of the rule of law. It is also the case that people who are constitutionally exempt from military jurisdiction have been subjected to it".[3]

In its 1973 annual report, the IACHR found that "socio-political conflicts have sometimes prompted the adoption of measures such as the declaration of a state of siege or internal war, the implementation of martial law [...]. In many cases, military jurisdiction has been

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[1] Second Report on the Situation of Human Rights in Peru, Organization of American States document OEA/Ser.L/V/II.106, doc. 59 rev., 2 June 2000, Chapter II "Administration of justice and rule of law", paragraph 152.

[2] See Report on the Situation of Human Rights in Nicaragua, cited in United Nations document E/CN.4/Sub.2/1992/Add.2, paragraph 103, Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.53, doc. 22, and Report on the Situation of Human Rights in Chile, OEA/Ser.l/V/II.17.

[3] Annual Report of the Inter-American Commission on Human Rights - 1972, Organization of American States document OEA/Ser.L/V/II/.27, doc. 11 rev., 6 March 1972, Part II, "Areas in which steps need to be taken towards full observance of the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights", paragraph 2. [Spanish original, free translation.]

extended to cover civilians and the right to apply for a writ of *habeas corpus* has been abolished temporarily or even for long periods [...] The replacement of the ordinary courts by military courts has usually meant a severe decline in the guarantees that all defendants should enjoy, both as a result of the subordination of military judges to the political authority and because they lack technical training. If one adds to this the fact that it is common to find that, during the investigation stage of the proceedings, military or police officials are usually the only witnesses appearing in many trial dossiers, one is forced to conclude that what are made to look like trials lack many of the essential elements of the normal workings of justice".[4] The IACHR recommended: "set[ting] time limits, as far as possible, on the implementation of constitutional mechanisms for maintaining order and security in times of emergency or subjecting civilians to military jurisdiction, even in cases where constitutional provisions authorize such measures to be taken".[5]

In its 1992-1993 annual report, when looking at what measures were necessary to enhance the autonomy, independence and integrity of members of the judiciary, the IACHR recommended, among other things:

> "- guaranteeing that the executive and legislative branches will not interfere in matters that are the purview of the judiciary; [...]
> "- ensuring the exclusive exercise of jurisdiction by the members of the judiciary, and eliminating special courts;
> "- preserving the rule of law; and declaring states of emergency only when absolutely necessary, in keeping with Articles 27 of the American Convention on Human Rights and Article 4 of the International Covenant of Civil and Political Rights, structuring this system in such a way that it does not affect the independence of the different branches of government;
> "- guaranteeing due process of law -- indictment, defence, evidence and conviction -- in public trials;
> "- returning to judges the responsibility for disposition and supervision of persons detained;
> "- guaranteeing that judges will be immediately notified of all facts and situations in which human rights are restricted or suspended, regardless of the legal status of the accused; [...]".[6]

In its 1996 annual report, as one of the steps required to advance and consolidate the administration of justice, the IACHR went on to recommend:

> "That member states that have not already done so take the legislative and other measures necessary, pursuant to Article 2 of the American Convention, to ensure that civilians charged with criminal offences of any kind be tried by ordinary courts which offer all the essential guarantees of independence and impartiality,

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[4] Annual Report of the Inter-American Commission on Human Rights - 1973, Organization of American States document, OEA/Ser.L/V/II.32, doc. 3 rev. 2, 14 February 1974, Part II, "Areas in which steps need to be taken towards full observance of the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights", paragraph 2. [Spanish original, free translation.]

[5] Ibid., recommendation N° 3. [Spanish original, free translation.]

[6] Annual Report of the Inter-American Commission on Human Rights, 1992-1993, Organization of American States document OEA/Ser.L/V/II.83, doc. 14, 12 March 1993, Chapter 5, "Areas in which steps need to be taken towards full observance of the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights", Point I, "Measures necessary to enhance the autonomy, independence and integrity of the members of the judicial branch", "Conclusions and Recommendations".

> and that the jurisdiction of military tribunals be confined to strictly military offences".[7]

In its 1997 and 1998 annual reports, the IACHR reminded member states that:

> "citizens must be judged pursuant to ordinary law and justice and by their natural judges. Thus, civilians should not be subject to Military Tribunals. Military justice has merely a disciplinary nature and can only be used to try armed forces personnel in active service for misdemeanors or offenses pertaining to their function".[8]

In its Resolution on "Terrorism and Human Rights", the IACHR said the following:

> "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".[9]

In its recent study entitled "Report on Terrorism and Human Rights"[10], the IACHR systematized its existing doctrine and jurisprudence on the subject of the trial of civilians by military courts. In the study, the IACHR said the following: "It has been widely concluded in this regard that military tribunals by their very nature do not satisfy the requirements of independent and impartial courts applicable to the trial of civilians, because they are not a part of the independent civilian judiciary but rather are a part of the Executive branch, and because their fundamental purpose is to maintain order and discipline by punishing military offences committed by members of the military establishment. In such instances, military officers assume the role of judges while at the same time remaining subordinate to their superiors in keeping with the established military hierarchy".[11] The IACHR clarified that "[t]his is not to say that military tribunals have no place within the military justice systems of member states"[12], adding that "military courts can in principle constitute an independent and impartial tribunal for the purposes of trying members of the military for certain crimes truly related to military service and discipline and that, by their nature, harm the juridical interests of the military, provided that they do so with full respect for judicial guarantees".[13] Nevertheless, the IACHR took the view that "[m]ilitary tribunals may not, however, be used to try violations of human rights or other crimes that are not related to the functions that the law

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[7] Annual Report of the Inter-American Commission on Human Rights - 1996, Organization of American States document OEA/Ser.L/V/II.95, doc. 7 rev., 14 March 1997, Chapter VII, Point 1, "That the member states take the steps to advance and consolidate the administration of justice in their domestic legal systems".

[8] Annual Report of the Inter-American Commission on Human Rights - 1997, Organization of American States document OEA/Ser.L/V/II.98, doc. 6, 17 February 1998, Chapter VII, Point 1. See also Annual Report of the Inter-American Commission on Human Rights - 1998, Organization of American States document OEA/Ser.L/V/II.102, doc. 6 rev., 16 April 1999, Chapter VII.

[9] Resolution on "Terrorism and Human Rights", 12 December 2001.

[10] Organization of American States document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002.

[11] Ibid., paragraph 231.

[12] Ibidem.

[13] Ibidem.

assigns to military forces and that should therefore be heard by the regular courts".[14] Lastly, it made the following recommendation:

> "Member states must comply with certain fundamental and non-derogable due process and fair trial principles and standards when proscribing terrorist-related conduct under their criminal laws and prosecuting individuals for those crimes. In particular, member states must : [...] (c) refrain from the use of *ad hoc*, special, or military tribunals or commissions to try civilians".[15]

3. Reports on the human rights situation in specific countries

a) Argentina

The IACHR examined the practice of trying civilians in military courts in Argentina following the breakdown of constitutional order and the coming to power of the Military Junta as the *de facto* government on 24 March 1976.[16] The Military Junta went on to promulgate several laws "on the sentencing and punishment of persons charged by military courts with involvement in subversive activities".[17] The Inter-American Commission stated that "[t]he very day of the military takeover, Law 21,264 was promulgated. This law creates Special Standing Military Tribunals [*Consejos de Guerra Especiales Estables*] throughout all of Argentina, which are described in Article 483 of the Code of Military Justice, on extraordinary procedures during times of war. Along with Permanent Military Tribunals for Subordinate Personnel of the three Armed Forces, these special tribunals have the power to pass judgment on crimes covered in this law. The law also deals with summary judgment in time of peace for the application of the law to those 16 years of age and older and the use of the death penalty pursuant to the Military Code and its regulations".[18] In November 1976, several regulations granting the Special Standing Military Tribunals jurisdiction over "subversive crimes" were issued.[19]

During its on-site visit to Argentina, the IACHR found that "a large number of persons detained for subversive activity had been judged and sentenced by military courts. The sentences were as high as 25 years in prison. The alleged criminals were not allowed to choose their own defence attorneys but were assigned official military defenders who are not licensed lawyers. These circumstances and the fact that civilians were made subject to military jurisdiction under the prevailing legislation were serious infringements of the right to defence inherent in due process".[20] It also stated that "Military Courts composed of officers involved in the repression of the same crimes they are judging, do not offer guarantees of sufficient impartiality. This is aggravated by the fact that in a military court, the defence is in the hands of a military officer, meaning that the defence is taken over by a person who is part of, and has strong disciplinary ties to, the same force responsible for investigation and repressing the acts with which the accused is charged".[21]

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[14] Ibidem

[15] Ibid., paragraph 10 of the Recommendations, Recommendation E, "Right to Due Process and to a Fair Trial".

[16] Report on the Situation of Human Rights in Argentina, Organization of American States document OEA/Ser.L/V/II.49, doc. 19, 11 April 1980.

[17] Ibid., Chapter VI, "The Right to a Fair Trial and Due Process", Point C, "Military Tribunals", paragraph 1.

[18] Ibidem.

[19] Laws 21,461 and 21,463 of 1976 and Decree 2963 of 1976.

[20] Report on the Situation of Human Rights in Argentina, Doc. Cit., Chapter VI, "The Right to a Fair Trial and Due Process", Point C, "Military Tribunals", paragraph 2.

[21] Ibid., Point D, "Guarantees for the Administration of Justice", paragraph 4 (c).

In its conclusions, the IACHR expressed its concern that "numerous serious violations of fundamental human rights, as recognized in the American Declaration of the Rights and Duties of Man, were committed in the Republic of Argentina during the period covered by this report – 1975 to 1979. In particular, the Commission considers that these violations have affected: [...] the right to a fair trial and due process, by virtue of the limitations the Judiciary is encountering in exercising its functions; the lack of proper guarantees in trials before military courts, and the inefficacy that has been demonstrated, in practice and in general, with respect to writs of Habeas Corpus in Argentina, all of which is aggravated by the serious difficulties encountered by defence counsels in their work on behalf of persons in detention, for reasons of security or public order (*l'ordre publique*), some of whom have died, disappeared or are presently in prison for having taken on defence work of this kind".[22] The IACHR recommended the Argentinian authorities:

> "To take the following steps with regard to due process guarantees and legal defence:
>
> a) To assure legal due process guarantees to persons who are brought to trial before military courts, especially the right to a defence by an attorney of the defendant's choosing.
>
> b) To appoint a Commission of qualified jurists to study the trials conducted by military tribunals during the state of siege, and to make pertinent recommendations in those cases where due process guarantees were lacking.
>
> c) To guarantee and facilitate an effective judicial investigation of the cases of persons detained under the security laws.
>
> d) To facilitate the provision of an effective defence by attorneys providing legal services to defendants".[23]

b) Bolivia

Following the military coup of 17 July 1980 which brought General Luis García Meza Tejada to power, the IACHR carried out an on-site visit to Bolivia. The *de* facto government issued a proclamation entitled "Participation of the Armed Forces in the [*sic*] currently political process". "With this proclamation, such measures as the following were adopted: [...] to place the government of National Reconstruction in the hands of a junta composed of the commanders of the country's three armed forces [... and] to declare the militarization of the entire national territory, by putting military law into full effect [...]".[24] The Governing Military Junta therefore "assumed the functions of the executive, legislative and judicial powers and also exercised the constituent power".[25] The IACHR went on to report that one of the consequences of militarizing the country was that "Military Codes [became] applicable to civilians and [...] competence to hear cases involving criminal acts provided for under criminal laws [was transferred] from the regular judges to military judges".[26] Although, at the time its report was published, it did not yet have information about the "systematic,

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[22] Ibid., "Conclusions and recommendations", Point A, "Conclusions", paragraph 1.
[23] Ibid., Point B, "Recommendations", paragraph 9.
[24] Report on the Situation of Human Rights in the Republic of Bolivia, Organization of American States document OEA/Ser.L/V/II.53, doc.6, 1 July 1985, Chapter I, "The Political and Legal System in Bolivia", Point C, " The Current Legal System and Restrictions on Individual Rights and Guarantees", paragraph 2.
[25] Ibidem.
[26] Ibid., Point E, "Other Laws", paragraph 1.

arbitrary or prolonged application of the standards of military criminal justice in trying civilians",[27] the IACHR reported that hundreds of civilians had been detained and were being held in military custody without charge or trial. The IACHR went on to recommend that the Bolivian Government "transfer detainees exclusively to official detention centers intended for that purpose; [...] [t]hat it order that detainees be told of the charges against them, that they be given access to an attorney, and that they be brought under the jurisdiction of the competent judge within the deadlines provided in the law [...]".[28]

c) Colombia

In its report on its first on-site visit to Colombia in 1980, the IACHR examined the practice of bringing civilians to trial in military courts.[29] The Code of Military Criminal Justice in force at that time was adopted by means of Decree No. 250 of 11 July 1958 which was issued by the Military Junta under the powers granted to it as a result of the state of siege and later became national law as a result of Law 141 of 16 December 1961. Under the Code but mainly by virtue of a vast array of emergency legislation[30], military courts were authorized to try civilians for: political offences, various common law offences and offences against the life or personal integrity of members of the Armed Forces (the Military and Police), civilians employed by them and members of the Department of Administrative Security (*Departamento Administrativo de Seguridad*). In principle, the procedure followed in military courts was that of an oral court martial (*consejo verbal de guerra*) but for some offences a summary or shortened procedure was used. Military courts heard cases not only against members of armed opposition groups but also members of political movements and social organizations, trade unionists, university lecturers, students, peasants and members of indigenous populations. Some proceedings bore the hallmarks of mass trials. The IACHR went on to report that:

> "procedural irregularities that prevent adequate functioning of the [military court] system have been observed. The competence of the military justice system has been expanded by giving it the power to try a number of crimes, which, in the Commission's opinion, should be decided by the common justice system, which provides greater procedural guarantees of due process. Complaints have been heard regarding the manner of conducting the interrogations in particular, attorneys have not been allowed to be present at them, the interrogations are conducted at military installations and military persons conduct them. In addition, the legal status of the accused person is not defined within the time periods set by law. The very great number of persons being tried in a court-martial [...] makes it impossible to conduct a trial that extends full procedural formalities due to the problems inherent in a trial this size. These problems refer to the defence of the accused, the taking of evidence, and the juridical assessment of the investigations

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[27] Ibidem.

[28] Report on the Situation of Human Rights in the Republic of Bolivia, doc. cit, "Conclusions and recommendations", point B (c), "Recommendations".

[29] Report on the Situation of Human Rights in the Republic of Colombia, Organization of American States document OEA/Ser.L/V/II.53, doc. 22, 30 June 1981.

[30] Between 1965 and 1980 32 decrees authorizing military courts to try civilians were promulgated. Decrees N° 90, 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 and decree N° 1923 of 1978, known as the "Security Statute" (*"Estatuto de seguridad"*).

> and, in general, the direction and thrust of the trial. All of this works to the detriment of persons who are proven innocent after a long period of detention".[31]

In its conclusions, the IACHR went on to take the view "that the conditions deriving from the state of siege which has been in effect almost without interruption for several decades have become an endemic situation which has hampered, to a certain extent, the full enjoyment of civil freedoms and rights in that, among other things, it has permitted trials of civilians by military courts".[32] The IACHR also said that "[a]lthough the Security Statute [state of siege decree N° 1923 of 1978] is exceptional in nature, it grants military and police authorities the power to impose penalties, it permits trials of civilians by military courts, restricts the right to a fair trial and other constitutional guarantees, and includes types of lengthy punishments that are inconsistent with the exceptional nature of the Statute".[33] The IACHR went on to conclude that:

> "As concerns the right to a fair trial and due process, the Commission believes that the ordinary system of justice is operating normally and in accordance with the laws governing it. The military justice system does not offer sufficient guarantees because its rules contain restrictions on the right to a fair trial and in practice, procedural irregularities that impede due process have occurred".[34]

The IACHR therefore made the following recommendation: "The new Code of Military Procedure should be issued as soon as possible and this new code should either eliminate or, if this is not possible, limit military trials of civilians to crimes that truly affect state security".[35] Nevertheless the practice continued until 5 March 1987 when the Supreme Court of Justice declared the trial of civilians by military courts to be unconstitutional. The 1991 Constitution prohibited the trial of civilians by military even in times of emergency (*estado de conmoción interior*, state of internal upheaval).

d) Cuba

In its first five reports on Cuba[36], the IACHR examined the trial of civilians by the Revolutionary Tribunals which had been set up by the new government in 1959. Even though article 175 of the Constitution forbade the setting up of *ad hoc* tribunals, the article was suspended by means of a transitional provision "for people subject to the jurisdiction of the Revolutionary Tribunals; members of the armed forces, of the repressive groups of the Government of General Batista; people under investigation or arrest by the military authorities who are accused of committing offences in support of the establishment and defence of the government of General Batista or against the national economy or the treasury".[37] Many of the offences over which such tribunals had jurisdiction were laid down in Regulation N° 1 of the Rebel Army, a kind of military

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[31] Report on the Situation of Human Rights in the Republic of Colombia, Organization of American States document OEA/Ser.L/V/II.53, doc. 22, 30 June 1981, chapter V, "Right to a Fair Trial and Due Process", end of paragraph 7.
[32] Ibid., "Conclusions and recommendations", point A, "Conclusions", paragraph 2.
[33] Ibid., "Conclusions and recommendations", point A, "Conclusions", paragraph 3.
[34] Ibid., "Conclusions and recommendations", point A, "Conclusions", paragraph 9.
[35] Ibid., "Conclusions and recommendations", point B, "Recommendations", paragraph 7 (c).
[36] Organization of American States documents: OEA/Ser.L/V/II.4,doc. 2, 20 March 1962 (first report); OEA/Ser.L/V/II.7, doc. 4, 17 May 1963 (second report); OEA/Ser. L/V/II.17, Doc. 4, 7 April 1967 (third report); OEA/Ser.L/V/II.23, doc. 6, 7 May 1970 (fourth report); and OEA/Ser.L/V/II.38, doc. 12, 25 May 1976 (fifth report).
[37] Report on the Situation of Human Rights in Cuba, Organization of American States document OEA/Ser.L/V/II.4, doc. 2, 20 March 1962. [Spanish original, free translation.]

criminal code. Although the jurisdiction of the Revolutionary Tribunals was extended as a result of the Constitutional Reform Law of 5 May 1959, the tribunals were later suspended through Law 425 of 7 July 1959. However, as the IACHR pointed out, "Law 425 did not declare the Revolutionary Tribunals to be dissolved, thus allowing the Council of Ministers to authorize the transfer of proceedings that had already been or might be started for offences included in the law [425] to the jurisdiction of such special courts, should the defence of the Revolution require it".[38] The Revolutionary Tribunals were re-established as a result of an amendment to article 174 of the Constitution and granted jurisdiction over "trials or proceedings that had already been or might be started for offences that are described in law as counter-revolutionary, whether they be committed by civilians or members of the military".[39] Law N° 634 of 20 November 1959 gave the Revolutionary Tribunals exclusive jurisdiction for the offences referred to in Law 425, namely, the so-called counter-revolutionary offences. The tribunals applied a summary procedure in which pre-trial release was not permitted, an application for review (*recurso de revisión*) could only be made to the court that had conducted the trial and appeal was automatic only in the case of a death sentence. Some of the trials were held *in camera* while others were televised. The Revolutionary Tribunals were made up of members of the Armed Forces. The IACHR took the view that:

> "the members [of Revolutionary Tribunals] lack independence to carry out their functions because they are members of the Armed Forces who are obliged to obey the orders of their superiors, which means that the sentences handed down by them are ordered by the military authorities, even though they are in breach of the provisions of law. [...] The so-called Revolutionary Tribunals are made up of members of the Armed Forces who are freely appointed and removed by the military leaders, without taking into account their professional, moral or intellectual capabilities. Most of the members of such Tribunals have no kind of legal training at all [...]. In practice, the Revolutionary Tribunals 'do not try' cases but simply hand down sentences under the orders of senior military leaders. Penalties are therefore imposed on the accused not in light of how the trial has evolved or the evidence provided but in compliance with orders handed down by the military leaders".[40]

The IACHR later concluded that "in political trials, the Revolutionary Tribunals have acted and urged more on the basis of their belief in the values of the revolution rather than on proper judicial procedures. Moreover, the evidence would indicate that the sentences have always been fully in accord with the Executive's idea of proper justice".[41]

The Law on the Organization of the Judicial System (*Ley de Organización del Sistema Judicial*) of 1973, which was replaced by another law with the same name in 1977, abolished the Revolutionary Tribunals and established a People's Supreme Court (*Tribunal Supremo Popular*) and Provincial People's Courts (*Tribunales Provinciales Populares*), Municipal People's Courts (*Tribunales Municipales Populares*) and Military Courts (*Tribunales Militares*). Responsibility for dealing with counter-revolutionary

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[38] Ibidem. [Spanish original, free translation.]
[39] Constitutional Reform Law of 29 October 1959. [Spanish original, free translation.]
[40] Report on the Situation of Human Rights in Cuba, (third report), Organization of American States document OEA/Ser. L/V/II.17, Doc. 4 (Spanish), 7 April 1967, "G. Breaches of judicial procedure by the People's Courts and Revolutionary Tribunals", paragraph 6. [Spanish original, free translation.]
[41] Situation of human rights in Cuba - Seventh Report, Organization of American States document OEA/Ser.L/V/II.61, Doc.29 rev. 1, 4 October 1983, paragraph 33.

offences passed from the Revolutionary Tribunals to the Supreme People's Court and the Provincial People's Courts.

e) Chile

In its First Report on the Situation of Human Rights in Chile in 1974, one of the issues of greatest concern to the IACHR was the operation of military justice 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'."[42] The Military Junta which overthrew the Constitutional President of Chile, Dr. Salvador Allende, issued a decree that, for the purposes of military justice, put a state of siege on a par with a state of war.[43] As a result, military courts were given inordinate jurisdictional powers that allowed them to try the vast majority of crimes and to subject civilians to summary trials envisaged for use in wartime. Another consequence was that General Pinochet, as General in Chief of the Army, was granted the status of supreme military judge. The IACHR was to find that several detainees were executed following summary trials. After carrying out a thorough study of the wartime military courts or War Councils, including their composition, operation and procedures, the IACHR concluded that fair trial safeguards were seriously affected. It pointed out that already "[i]n many cases the right to be tried by a court that had been legally established prior to the facts of the case and the right to a fair trial in general had been and were being violated [...] [and that] statements made by the accused under the pressure of physicial or psychological torture, in the presence of the arresting authority and not the trial judge, had been taken as 'confessions'."[44] The IACHR concluded that:

> "The way in which the War Councils operated constituted a massive violation of the guarantees of due process".[45]

In its Fourth Report on Chile in 1985, the IACHR found that the ordinary courts were subjugated to the military courts. It pointed to "the failure of the Supreme Court of Chile to take a decision on appeals against sentences of Courts Martial"[46] and said that "this serious self-limitation of the Supreme Court left persons who had been submitted to wartime military courts without recourse. The military court proceedings were characterized by extremely serious violations of the guarantees of due process, [...]. The position taken by the Supreme Court in this matter made it possible to exclude military courts from its jurisdiction in the above-mentioned Article 79 of the 1980 Constitution".[47] The IACHR also stated that the *de facto* government had extended the jurisdiction of the military courts and "criminalized new acts and made them subject to the jurisdiction of the military courts".[48] The IACHR found:

> "a clear and sustained tendency to expand the jurisdiction of the military courts in Chile. That jurisdiction, comprehensive in and of itself in the period prior to September 11, 1973, has been covering a wide range of acts, especially when they

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[42] 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 Military Courts", paragraph 1.

[43] Decree Law N° 5 of 12 September 1973, article 1 of which stipulated that, in the context of interpreting article 418 of the Code of Military Justice, a state of siege was to be equated with a state of war.

[44] Ibid., Conclusions, paragraph No 5. [Spanish original, free translation.]

[45] Ibidem. [Spanish original, free translation.]

[46] Report on the Situation of Human Rights in Chile, Organization of American States document OEA/Ser.L/V/II.77.rev.1, doc. 18, 8 May 1990, paragraph 37. The report had originally been published in 1985 with the index number OEA/S.R.L./V/II.66.

[47] Ibid., paragraph 38.

[48] Ibid., paragraph 107. See also paragraphs 108 and following.

> are performed under the state of siege. This process 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".[49]

The IACHR also found "new methods of assigning jurisdiction to military courts, especially when the Military Prosecutor typifies a specified act as a military offence, which is sufficient to substitute the natural judge".[50] In fact, under Decree Law N° 3,425 of 1980 which replaced article 11 of the Code of Military Justice, it was established that "[m]ilitary courts shall have jurisdiction to try not only the perpetrator of a crime covered by the military jurisdiction but also the other persons responsible for it, even though they are not subject to that jurisdiction. They shall also have jurisdiction to try related crimes, even though independently they belong to the common jurisdiction, without prejudice to the legal exceptions. Jurisdiction shall not be changed when a military court, in handing down a judgment, determines a fact that was considered a military crime during the proceedings to be a common crime." The same decree ruled that any crime, even if it was a common law offence, could be defined as a military crime by the military investigating magistrate by substituting the court required by law to try it.

Upon analyzing the composition of peace-time military courts, the IACHR found that a military judge was "a military officer in active service, subordinate to his authorities and, therefore, lacking functional independence, especially if account is taken of the fact that the executive, legislative and constituent powers are concentrated in the Commander-in-Chief of the Armed Forces. In his capacity as an official in active service he also lacks permanent tenure and, in addition and for reasons of his profession, this officer does not have the legal training required of a judge".[51] The IACHR pointed out that the "limitations deriving from the structure and composition of the military courts can only be justified by the truly exceptional nature of the situations in which these courts must act. The widespread and virtually routine intervention of peace-time 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. None of these elements are present in Chile today and hence the exercise of the right to justice is seriously impaired as a result of the broad role these peace-time military courts are called upon to play".[52]

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[49] Ibid., paragraph 138.
[50] Ibid., paragraph 125.
[51] Ibid., paragraph 140.
[52] Ibid., paragraph 143.

Upon analyzing the composition of war-time military courts, the IACHR concluded 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".[53] The IACHR also pointed out that "[t]he lengthy period during which they were in operation, added to the acts submitted to their jurisdiction pursuant to provisions issued by the Governing Junta, show the serious violation of the right to a fair trial resulting from the exercise of the jurisdiction assigned to them".[54]

Lastly, in its Conclusions, the IACHR went on to say:

> "The right to justice has also been affected by the fact that the jurisdiction of the military courts has been significantly increased by subsuming cases of new political offences when committed by members of the opposition, or common crimes when committed by personnel of the Chilean security forces. In addition, this increase in the jurisdiction of the military courts has occurred because of the introduction of new ways of assigning judicial competence.
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> "These 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".[55]

f) Ecuador

In its annual report, the IACHR reported that, during the state of emergency decreed in July 1999, many civilians were tried by military courts. The IACHR took the view that "[s]ince the guarantee of justice through the normal channels was not possible, the majority of persons detained during the protests were subjected to military justice, without the guarantees of due process. The application of the rules of the National Security Law for the prosecution of civilians, based on the military code, violates the right to be prosecuted by independent and impartial tribunals. Also, the military courts dispense justice over matters that are not within the military sphere and affect civilians".[56]

g) Guatemala

In its second report on Guatemala in 1983, the IACHR analyzed the Special Courts (*Tribunales de Fuero Especial*) set up under Decree Law 46-82 of 1 July 1982 by the Military Governing Junta presided by General Efraín Ríos Montt. By means of Decree Law 24-82 of 26 April 1982, the *de facto* government had repealed the 1947 Constitution, article 53 of which stated that "The defence of persons and their rights shall not be violated. No one shall be tried by a commission or Special Tribunals".[57] The new

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[53] Ibid., paragraph 149.
[54] Ibidem.
[55] OEA/S.R.L./V/II.66, doc. cit, paragraphs 7 and 8 of the "Conclusions".
[56] Annual Report of the Inter-American Commission on Human Rights - 1999, OEA/Ser.L/V/II.106, Doc. 3 of 13 April 2000, Chapter IV, "Human Rights Developments in the Region", Ecuador, paragraph 50.
[57] Spanish original, free translation.

Constitution introduced by the military government, known as the "Basic Government Statute" ("*Estatuto Fundamental de Gobierno*"), did not envisage the creation of Special Courts. The IACHR found that "[t]he Special Courts were governed by Decree Laws 46-82, 111 and in addition, insofar as they do not violate such provisions, by the Law of the Judicial Branch and the Code of Criminal Procedure. In addition to being governed by the legal provisions mentioned, all of which were made public, the Special Courts adjusted their activities, performance and functions to secret military rules, regulations and orders. Consequently, no one knew or could learn who sat on these courts, how many they were, where they operated, when they met, and whether the whereabouts of their records would someday be made known".[58] The Special Courts, both at the trial and appeal levels, were made up of civilians and Guatemalan Army officers who were appointed "directly by the President, who could also remove them at any time, without giving a cause or reason".[59] The Special Prosecutors (*Fiscales Especiales*) were also civilians or military officers appointed by the President. The jurisdiction of the Special Courts was broad and covered a large number of offences and "as regards the accused, the Special Courts had jurisdiction when crimes attributed to him were acts or omissions that tended to subvert or destroy the juridical, political, social and economic organization of the country".[60] They applied a summary procedure that was draconian in its curtailing of judicial safeguards. The IACHR found that the accused usually only had access to a lawyer at the time of the trial hearing and that the only evidence on which convictions were based were confessions obtained as a result of torture. The Special Courts were authorized to double the sentence laid down by law and to impose the death penalty.[61] The IACHR also reported that "[p]ublicity of the [...] trials in the plenary stage, which should be the rule, was not even the exception. No such case occurred, and [...] the Special Courts continued [...] to be secret courts operating in official clandestinity, in violation of [...] the basic principles of juridical security and due process".[62]

In the opinion of the IACHR, "the Special Courts did not provide the most elementary guarantees of due process".[63] Furthermore, having studied the proceedings conducted by a Special Court which culminated in the first execution by firing squad carried out in Guatemala under the government of General Ríos Montt, the IACHR concluded that the defendants sentenced to death had not been given "the right of being placed under the jurisdiction of a competent, independent and impartial court".[64] Even though, by the time its report was published, the Special Courts had been abolished as a result of Decree 93-83 of 12 August 1983, the IACHR wished "to go on record noting that those procedures, carried out without respect for the minimal 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".[65] The IACHR concluded that "The Special

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[58] Report on the Situation of Human Rights in Guatemala, Organization of American States document OEA/Ser.L/V/II.61, doc. 47, 3 October 1983, Chapter IV, "Right to Justice and Due Process", point C, "Special Courts", paragraph 7.
[59] Ibid., paragraph 9.
[60] Ibid., paragraph 11.
[61] Ibid. paragraph 12.
[62] Ibid., paragraph 21.
[63] Ibid., paragraph 31.
[64] Ibid. paragraph 33.
[65] Ibid., paragraph 36.

Courts—whose secret status the government continued to maintain, even after the state of siege had been lifted, and whose procedures violated the most elementary guarantees of due process—were antijuridical agencies whose composition, actions and rulings violated basic provisions of the American Convention on Human Rights, to which Guatemala is a state party".[66] The IACHR also recommended that the Guatemalan authorities "[o]rder a complete review of the trials of the Special Courts".[67]

h) Haiti

In its second report on Haiti in 1979, the IACHR found that, while article 18 of the Constitution in force at that time stipulated that "[n]o one may be denied access to the judges to whom the Constitution or the law assigns him [and that] [a] civilian may not be tried by a Military Court, nor may a military person be denied access to a court of ordinary law, in an exclusively civil matter, except when a state of siege has been declared by law", many civilians were tried and convicted by the State Security Tribunal.[68] The latter had jurisdiction to try crimes and offences against internal and external State security as well as "infractions whose ends and motives are political".[69] The judges sitting on the State Security Tribunal were appointed by presidential decree and the Public Prosecutor's Office included, among others, a member of the Haitian Armed Forces on active duty. The IACHR took the view that, in such circumstances, "[t]here is no clear-cut separation of powers in Haiti. Legal guarantees are seriously restricted by virtue of the 'state of siege' that are in effect on an almost permanent basis, and by virtue of the Security Court [...] establishing procedures with limited guarantees as to the right of a legal defence. The Judiciary does not appear to have the independence necessary to exercise its functions".[70] In its third report in 1988, following the collapse of the Duvalier government and the arrival of a new military government, the IACHR recommended that "the justice system [...] be demilitarized" in order to improve the administration of justice in Haiti.[71]

As military coup followed military coup and against a background of a serious ongoing economic crisis, the Haitian state apparatus collapsed. In addition, the serious and systematic violation of human rights - extrajudicial executions, torture and rape - and the means of repression that relied more on semi-official structures - such as the *tontons macoutes* and the *attachés* - as well as on the quasi-judicial section chief (*chef de section*) system led to the disappearance of the practice of trying civilians in military courts. However, as the IACHR pointed out, "[s]ince the 1991 *coup d'état*, the judiciary was directed by the military, who installed most of the justices of the peace, judicial officers, including administrative staff, and quasi-judicial personnel such as the section chiefs".[72]

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[66] Report on the Situation of Human Rights in Guatemala, Organization of American States document OEA/Ser.L/V/II.61, doc. 47, 3 October 1983, "Conclusions and recommendations", "Conclusions", paragraph 3 (c).

[67] Ibid., point B, "Recomendation", paragraph 2.

[68] Law of 25 August 1977. [Free translation from Spanish.]

[69] Report on the Situation of Human Rights in Haiti, OAS document OEA/Ser.L/V/II.46, doc. 66 rev. 1, 13 September 1979, Chapter III, Right of protection from arbitrary arrest and right to due process of law, paragraph 4.

[70] Report on the Situation of Human Rights in Haiti, Organization of American States document OEA/Ser.L/V/II.46, doc. 66 rev. 1, 13 September 1979, "Conclusions", paragraph 4.

[71] Report on the Situation of Human Rights in Haiti, Organization of American States document OEA/Ser.L/V/II.74, doc. 9 rev. 1, 7 September 1988, Chapter III, "The right to life, liberty and security", paragraph 42.

[72] Report on the Situation of Human Rights in Haiti, Organization of American States document OEA/Ser.L/V/II.85, doc. 9 rev., 11 February 1994, paragraph 274.

Although the quasi-judicial section chief system cannot be equated to military courts, section chiefs - many of whom were members of the Military Police - "took upon themselves powers far beyond their mandates and virtually established their own local government system, performing the functions of the police, the public prosecutor's office, and the courts, and collecting illegal taxes from the people".[73] Among other things, the IACHR recommended substantial reform of the justice system and demilitarization of the prison administration.[74]

i) Nicaragua

In its 1979 report on Nicaragua, the IACHR examined the suspension of constitutional rights in September 1978 and the use of the 1974 Martial Law by the *de facto* government of General Anastasio Somoza. In particular, it looked at the impact of these measures on the administration of justice and the right to a fair trial. The IACHR found that, when constitutional rights were suspended, article 197 of the Constitution in force at that time prohibited trials by judges other than those designated by law. However, the Martial Law authorized military courts to try crimes against internal and external State security as well as public order offences. It also stipulated that trials before ordinary courts were to be transferred to military courts if they involved offences that had given rise to the decree that restricted or suspended constitutional rights. Article 6 of the Martial Law established a presumption of criminal responsibility which, in the view of the IACHR, transcended all bounds of legal rationality in that it collectivized the carrying out of crimes solely on the grounds that people who had nothing to do with committing them were present, at the time they were carried out, in places where acts considered to have disrupted public order had occurred.[75] The IACHR pointed out that, under the Martial Law, "a series of preventive measures and executive decrees can be carried out arbitrarily, including [...] the power of military tribunals to hear cases of crimes against [...] security".[76] The IACHR believed that such measures "which make up the emergency regime prevailing in Nicaragua, create in the socio-political reality of the country, a legal structure from the formal point of view, but from the material point of view, this turns into a legal abnormality, since it lends itself to a systematic and generalized violation of human rights established in the American Declaration of the Rights and Duties of Man".[77]

The IACHR found that civilians could be tried under two types of special jurisdiction: trial before a police judge, in accordance with the 1880 Police Regulations, and trial before a military court, in accordance with the Martial Law. On examining the composition and operation of police jurisdiction, the IACHR found that the function of police judge was discharged by police commanders as well as by National Guard Commandants so that "the judicial function is merged into the authority of military bodies".[78] It also found that sentences handed down under police jurisdiction could be

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[73] Ibidem.
[74] Ibid., paragraphs 310 and 314.
[75] Report on the Situation of Human Rights in Nicaragua, Organization of American States document OEA/Ser.L/V/II.45, doc. 16 rev. 1, 17 November 1978, Chapter I, "The State of Emergency in Effect in Nicaragua". Article 6 stipulated that "[e]very person present in places in which acts contrary to the public order are committed is considered responsible for the crimes that have been committed at that time. The same presumption shall fall on those that are apprehended, fleeing after having been with the rebels or subversives, at the time when those acts are committed [...]".
[76] Ibidem.
[77] Ibidem.
[78] Ibid., Chapter IV, "Physical Freedom and the Administration of Justice".

overturned by military courts and that civilians convicted by police judges could be retried before military courts. With regard to military jurisdiction, the IACHR reported that it consisted of the Military Court of Permanent Investigation (*Corte Militar de Investigación Permanente*), the Convening Authority (*Autoridad Convocadora*) and the Special War Council (*Consejo de Guerra Extraordinario*), all of them made up of military personnel. The IACHR concluded that:

> "The physical liberty of the people is [...] aggravated by the administration of the judicial system which exists in Nicaragua, and by the powers enjoyed by Police Judges, some of whom are also Commanders of the National Guard, who may impose penalties of up to six months of jail, without any procedure other than listening to the accused, and by the powers of the military courts to judge civilians during periods of emergency. The foregoing shows that there have been violations to the right of protection against arbitrary detention and to due process, and, in particular to the right to an adequate defence".[79]

In its second report on Nicaragua in 1981, the IACHR examined the Special Tribunals set up by the Government of National Reconstruction following the overthrow of the government of General Somoza by the Sandinista National Liberation Front (*Frente Sandinista de Liberación Nacional*). After promulgating the Law on the Maintenance of Order and Security and the National Emergency Law, the new government first of all created Special Emergency Tribunals (*Tribunales Especiales de Emergencia*).[80] According to the findings of the IACHR, these tribunals "never actually functioned; they were never even set up".[81] They were replaced by Special Tribunals (*Tribunales Especiales*),[82] authorized "to hear cases of crimes described in the Penal Code, committed by members of the military, officials and civilian employees of the previous regime, and any other individual, who, protected because of his or her association with them, participated in the commission of crimes, either as authors of, or accomplices or accessories thereto [...]".[83] When the Supreme Court of Nicaragua was consulted about the bill creating this special jurisdiction, it expressed its disagreement with the measure and recommended that such jurisdiction be placed with the ordinary courts.[84] The special jurisdiction consisted of first and second instance special tribunals, each made up of three judges, one of whom had to be an attorney or a law student. Although they were not technically military courts, the military authorities were responsible for the preliminary investigation and preparation of the indictment. The prosecution function was discharged by the Office of the Special Prosecutor (*Fiscalía Especial de Justicia*),[85] which was attached to the executive branch of government. The procedure followed by the Special Tribunals was summary in nature and in breach of numerous judicial safeguards. Irrespective of these infringements of the guarantees of due process, the IACHR considered that:

> "The creation of the Special Tribunals [...] constitutes a violation of this principle [the right to a competent, independent and impartial tribunal, previously

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[79] Ibid., "Conclusions", paragraph g.
[80] Decree No. 34 of August 1979.
[81] Report on the Situation of Human Rights in Nicaragua, Organization of American States document OEA Ser. L/V/II 33, 30 June 1981, Chapter IV, "Right to a Fair Trial and to Due Process", point C, "The Special Emergency Tribunals", paragraph 3.
[82] Decree No. 185 of 29 November 1979.
[83] Report on the Situation of Human Rights in Nicaragua, Organization of American States document OEA Ser. L/V/II 33, 30 June 1981, Chapter IV, "Right to a Fair Trial and to Due Process", point D, "The Special Tribunals", paragraph 1.
[84] Supreme Court Opinion No. 3032 of 23 November 1979.
[85] Decree 186 of 29 November 1979.

established by law] [and] meant that judges, who were not the judges sitting on the Courts before the events, were called on to pronounce judgment on the accused Somocists, rather than allowing the existing courts to take the cases, as was appropriate, and as was recommended by the Supreme Court.
"Violation of the guarantee of a fair trial by the establishment of Special Tribunals [...] meant submitting the accused Somocists to the legal judgment of people, some of whom at least, were not lawyers; to the judicial decision of people who were not judges; to the verdict of political enemies and to the judgment of people, influenced by the psychology of their victory, who were more inclined to be severe rather than fair".[86]

j) Panama

In its 1989 report on Panama, the IACHR reported the existence of a type of police jurisdiction which tried civilians: the system of *Corregidores*. According to its findings, *Corregidores* were special police officials, freely appointed and removed by the mayors, who had jurisdiction over a wide range of offences, such as petty theft and the misappropriation and swindling of small amounts. *Corregidores* were also authorized to try those who participated in opposition political demonstrations, on the grounds that they had disobeyed or wronged members of the Panamanian Defence Forces. The proceedings were very brief and could result in a sentence of up to one year's imprisonment. Sentences could be appealed to the Mayor. The IACHR believed that "the Executive Power is thus usurping responsibilities that ought to belong exclusively to the Judiciary. This makes for abuse and political persecution".[87] The IACHR concluded that "the system of *Corregidores* violates the requirements of due process established in the American Convention on Human Rights".[88]

k) Peru

In its report of its on-site visit to Peru in 1991, the IACHR briefly examined the changes that had been made to the institutional legal structure, particularly with regard to the administration of justice, following the 'self-coup' (*autogolpe*) led by President Alberto Fujimori. The subsequent process of breaking with democratic institutionality began on 5 April 1992 when the government announced the reorganization of the judiciary and the Public Prosecutor's Office, ordered the dismissal of judges and tribunal members and removed members of the Supreme Court of Justice and the Court of Constitutional Guarantees (*Tribunal de Garantías Constitucionales*), as well as many court officers. The government also introduced a host of anti-terrorist legislation including the introduction of "faceless judges" ("*jueces sin rostro*")[89], both civilian and military, and the subjection of various offences to military jurisdiction.[90] However, in the opinion of the IACHR, the institutional and legal changes affecting the administration of justice "have effectively collapsed the separation of powers, which are now concentrated in the Executive Branch"

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[86] OEA Ser. L/V/II 33, doc. cit., Chapter IV, "Right to a Fair Trial and to Due Process", Point F, "Guarantees for the Administration of Justice and the Special Tribunals", paragraphs 7 and 8.
[87] Report on the Situation of Human Rights in Panama, Organization of American States document OEA/Ser.L/V/II.76, doc. 16 rev. 2, 9 November 1989, Chapter IV, "The Right to a Fair Trial and Due Process of Law".
[88] Ibid., "Conclusions and recommendations", point I, "Conclusions", paragraph 6.
[89] Decree Law 25475 of 6 May 1992.
[90] For example, Decree Law 25659 on treason and the Decree Law on the illegal possession of ammonium nitrate and its use in terrorist acts.

and that "[t]he result of such measures has been to subordinate the Judiciary even more to the dictates of the Executive [...]".[91] The IACHR concluded that "[i]n consequence of elimination of the separation of powers [...] which situation has been made worse by the promulgation of decree laws whose provisions have placed the exercise of human rights in an extremely precarious situation [...] this process is creating the institutional and legal conditions to justify arbitrary rule".[92]

In its 2000 report on Peru, the IACHR examined the trial of civilians before military courts. It took the view that "[e]ven though no international treaty contains an express provision prohibiting the trial of civilians by military courts, there is international consensus that the jurisdiction of such courts needs to be restricted".[93] The IACHR reaffirmed that, according to its own doctrine and the jurisprudence developed by the Inter-American Court, "military justice can only be applied to members of the military who have committed service-related offenses, and that military courts do not have the necessary independence and impartiality for sitting in judgment of civilians".[94] In the opinion of the IACHR, "[m]ilitary jurisdiction cannot be considered a real judicial system, as it is not part of the Judicial branch, but is organized instead under the Executive".[95] It also stated that military justice 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".[96] The IACHR concluded that "[t]he growing usurpation of the jurisdiction by the military courts has led to a growing militarization of criminal procedure [which, together with the erosion of the independence of the judiciary, has resulted in] [t]he impairment of the rule of law in Peru".[97] Lastly, the IACHR recommended that the Peruvian authorities "[e]nd the trial of civilians by military courts".[98]

l) Suriname

In its first report on Suriname in 1983, the IACHR analyzed the trial of civilians by military courts. Following a *coup d'état* in 1980, a "National Military Council" and later a "Military Authority" assumed power and, in 1982, a body known as the "Political Centre" (*Beleidscentrum*) was created under the control of the "Military Authority".[99] On 11 March 1982, the "Military Authority" imposed a state of war by means of General Decree A-7. Under this decree and other laws, the jurisdiction of the military courts was extended. The IACHR reported that "crimes of civilians together with military personnel now come under the jurisdiction of Military Justice. It has also been established that in the event of war or exceptional situations those citizens trying to overthrow the civilian or

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[91] Report on the Situation of Human Rights in Peru, Organization of American States document OEA/Ser.L/V/II.83, doc. 31, 12 March 1993, paragraph 84.
[92] Ibid., paragraph 85.
[93] Second Report on the Situation of Human Rights in Peru, Organization of American States document OEA/Ser.L/V/II.106, doc. 59 rev., 2 June 2000, Chapter II, "Administration of justice and rule of law", paragraph 152.
[94] Ibid., paragraph 155.
[95] Ibid., paragraph 211.
[96] Ibid., paragraph 155.
[97] Ibid., paragraphs 236 and 238.
[98] Ibid., paragraph 245 (7).
[99] Decree No. C-64 of 25 March 1982.

military authority will be tried by Court Martial".[100] The military justice system was made up of Courts Martial and the High Military Court, the highest court within military jurisdiction.

The IACHR found that General Decree A-7A had authorized 'army cadres' to summarily try civilians and impose the death penalty. For example, General Decree A-7A stipulated that "military personnel and civilians who individually or collectively, during time of war or state of siege, attempt to overthrow by force the legitimate military or civilian authority, will be tried first by the 'cadres of the national army'. These can, after hearing the accused, sentence him to death or decide that the accused be placed under Military Court. The decision to impose the death penalty is mandatory and unappealable. The death penalty is carried out by firing squad".[101] The IACHR took the view that "Decree A-7A constitutes a flagrant violation of the international obligations of Suriname deriving from the International Covenant on Civil and Political Rights and also, with regard to minimum judicial guarantees [...]".[102]

The IACHR also found that jurisdiction over state security crimes had been transferred to the Military Courts whose decisions could only be appealed to the High Military Court. The IACHR 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".[103] In its conclusions, the IACHR stated that "serious violations of important human rights provided in the Declaration of the Rights and Duties of Man have occurred in Suriname".[104] In particular, the IACHR highlighted the violation of the "Right to Justice and Due Process, given that there is no truly independent judicial power" and "the lack of judicial authority over cases involving crimes which allegedly threaten state security".[105]

m) Uruguay

In its 1978 report on Uruguay, the IACHR examined the trial of civilians by military courts. A process of institutional collapse had started in Uruguay in 1972 with the declaration of a "state of internal war" (*"estado de guerra interno"*) and the suspension of constitutional guarantees and culminated in the dissolution of parliament and the Armed Forces taking control of the State. A "state of internal war" was proclaimed and laws suspending constitutional guarantees were promulgated in April 1972. In July, the Law on the Security of the State and Public Order (*Ley de Seguridad del Estado y el Orden Público*), also known as the "National Security Law" (*"Ley de Seguridad Nacional"*), was promulgated. It established new crimes against the security of the State, suspended procedural safeguards for those accused of such offences and transferred jurisdiction over civilians accused of such offences to the military courts. That same year, the so-called *"delitos de lesa Nación"*, crimes of "lèse majesty", were added to the Military Penal

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[100] Report on the Situation of Human Rights in Suriname, Organization of American States document OEA/Ser.L/V/II.61,doc. 6 rev. 1, 6 October 1983, Chapter I, "The Regulatory and Political System of Suriname", paragraph 60.
[101] Ibid., Chapter III, "Other Human Rights", Point C, "Right to Justice and Due Process", paragraph 8.
[102] Ibidem.
[103] Ibid., paragraph 11.
[104] Ibid., "Conclusions", paragraph 1.
[105] Ibid., paragraph 3.

Code.[106] Military courts were given jurisdiction over civilians accused of a wide range of offences, including crimes of "lèse majesty", crimes against the security of the State, certain crimes specified in the ordinary Penal Code[107] and "crimes affecting the moral fibre of the Army and Navy" (*"delitos que afectan la fuerza moral del Ejército y la Marina"*).[108] Judicial safeguards for the accused were drastically curtailed and even suspended.[109] In 1975, the military courts were granted sole and retroactive jurisdiction for crimes of "lèse majesty".[110] Lastly, in 1977, Institutional Act N° 8 of 1 July 1977 amended the Constitution by eliminating the organic autonomy of the judiciary and making all organs of ordinary and administrative justice subordinate to the Executive Power. The IACHR concluded that the measures adopted by the military government with regard to the administration of justice had eliminated "the organic autonomy of the judiciary and [made] all organs of ordinary and administrative justice subordinate to the Executive Power".[111]

The IACHR went on to carry out a thorough study of how the military justice system operated.[112] With regard to the impartiality of judges within the military justice system, the IACHR pointed out that "[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 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".[113] The Commission pointed out 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".[114]

4. Decisions on individual cases

[106] Law 14,068 of 10 July 1972. The *"delitos de lesa Nación"* comprised various types of conduct such as crimes against the Constitution (*"Atentado contra la Constitución"*), belonging to a subversive organization (*"Asociaciones subversivas"*) and association to usurp public authorities (*"Asociación Usurpadora de Autoridades Públicas"*).

[107] Public incitement to commit a crime (*"Instigación Pública a Delinquir"*), the praising of acts classified as crimes (*"Apología de Hechos Calificados como Delitos"*) and association to commit crime (*"Asociación para Delinquir"*).

[108] Article 58 of the Military Penal Code.

[109] Decrees N°. 140/973 of 16 February 1973 and N° 231/973 of 31 March 1973.

[110] Law 14,493 of 29 December 1975 and Chapter VI bis of the Military Penal Code.

[111] Report on the Situation of Human Rights in Uruguay, Organization of American States document OEA Ser. L/V/II.43, 31 January 1978, Chapter I, "Legal Norms relating to Human Rights", paragraph 29.

[112] Ibid., Chapter VI, "Right to Fair Trial and Due Process of Law".

[113] Ibid., Chapter VI, "Right to Fair Trial and Due Process of Law", paragraph 29.

[114] Ibid., Chapter VI, "Right to Fair Trial and Due Process of Law", paragraph 30.

In a case of a civilian arrested and tried by a Special Military Tribunal (*Consejo de Guerra Especial Estable*) in Argentina and held in incommunicado detention, the IACHR considered that "such acts are very serious violations of the right to liberty and personal security (Art. I); of the right to a fair trial (Art. XVIII); of the right to protection against arbitrary arrest (Art. XXV) and of the right to due process (Art. XXVI) of the American Declaration of the Rights and Duties of Man".[115]

In a decision concerning the trial of a former General by a Special Military Tribunal in Paraguay for crimes against order and security in the Armed Forces and for insubordination when the accused was Commander of the Army, the IACHR, in its *obiter dictum*, reiterated "its doctrine that military justice may be applied only to military personnel who have committed crimes in the line of duty, and that military courts do not possess the independence and impartiality required to try civilians".[116]

5. Armed conflict and the trial of civilians in military courts

On several occasions, the IACHR has analyzed the issue of trying civilians before military courts in situations of armed conflict. In fact, it tackled this question early on in its existence. For example, in its 1973 annual report, it reported that some States had declared a 'state of internal war' under which civilians had been subjected to the jurisdiction of military courts and the right of *habeas corpus* had been limited or revoked. The IACHR considered that, in so doing, those States had "denied their citizens the minimum benefits guaranteed to them under Article 3 of the Third Geneva Convention of 12 August 1949, making their situation worse than that of a foreign aggressor in an international war".[117]

In its 1983 report on Suriname, the IACHR found that, under Decree A-7A, military personnel and civilians who, in wartime or under a state of siege, attempted to overthrow the legitimate civilian or military authorities through the use of arms were tried in the first instance by 'national army cadres' and that in such cases the death penalty was obligatory and not subject to appeal. The IACHR deemed this to be a violation of Common Article 3 of the Geneva Conventions.[118] The IACHR pointed out that the decree in question did not allow suspects the right to legal counsel, a competent court, the possibility of amnesty or pardon or commutation of sentence. It also concluded that "[t]he only established guarantee, that the accused be heard, is flagrantly insufficient in light of the prescribed international obligations [under the International Covenant on Civil and Political Rights and the Geneva Conventions]".[119]

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[115] Resolution No. 22/78, Case 2266 (Argentina), 18 November 1978, operative paragraph 2.
[116] Report N° 88/99, Caseo 12,013, *Lino César Oviedo (Paraguay)*, 27 September 1999, paragraph 30.
[117] Annual Report of the Inter-American Commission on Human Rights - 1973, Organization of American States document, OEA/Ser.L/V/II.32, doc. 3 rev. 2, 14 February 1974, Part II, "Areas in which steps need to be taken towards full observance of the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights", paragraph 2. [Spanish original, free translation.]
[118] Report on the Situation of Human Rights in Suriname, Organization of American States document OEA/Ser.L/V/II.61,doc. 6 rev. 1, 6 October 1983, Chapter III, "Other Human Rights", Point C, "Right to Justice and Due Process", paragraph 9.
[119] Ibid., paragraph 10.

In its recent study entitled "Report on Terrorism and Human Rights"[120], the IACHR took the view that "Member states should refer to and consider pertinent provisions of international humanitarian law as the applicable *lex specialis* in interpreting and applying human rights protections in situations of armed conflict".[121] The IACHR made a distinction on two counts: firstly, between civilians - as defined in international humanitarian law - and combatants and, secondly, between international and non-international armed conflicts.

With regard to civilians involved in armed conflicts, the IACHR recalled that "international human rights law prohibits the trial of civilians by military tribunals".[122] It took the view that the "most fundamental fair trial requirements cannot justifiably be suspended under either international human rights law or international humanitarian law".[123] The IACHR therefore considered that such requirements "apply to the investigation, prosecution and punishment of crimes, including those relating to terrorism, regardless of whether such initiatives may be taken in time of peace or times of national emergency, including armed conflict".[124] It stressed that, even in cases of terrorism imputable to civilians, the "right to be tried by a competent, independent and impartial tribunal in conformity with applicable international standards" requires:

> "trial by regularly constituted courts that are demonstrably independent from the other branches of government and comprised of judges with appropriate tenure and training, and generally prohibits the use of *ad hoc*, special, or military tribunals or commissions to try civilians".[125]

The IACHR further recommended that, "in situations of international armed conflict, when an individual has committed a belligerent act and falls into the hands of an adversary and a doubt arises as to their status as a privileged or unprivileged combatant or civilian, [member states] convene a competent tribunal to determine the status of the detainee, and ensure that such persons enjoy the protections of the Third Geneva Convention and, where applicable, of Additional Protocol I until such time as their status has been determined. These obligations should be respected regardless of whether the individual is suspected to have engaged in acts of terrorism".[126]

In contrast with the situation of civilians, the IACHR stated that, in time of international as well as non-international armed conflict, "while international human rights law prohibits the trial of civilians by military tribunals, the use of military tribunals in the trial of prisoners of war is not prohibited".[127] As far as international armed conflicts are concerned and citing article 84 of the Third Geneva Convention, the IACHR recalled that the competent jurisdiction for trying prisoners of war is the military one, except when "existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to

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[120] Organization of American States document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002.
[121] Ibid., Chapter IV, "Recommendations", point A, "Identifying and applying pertinent international legal obligations", paragraph 2.
[122] Organization of American States document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paragraph 256.
[123] Ibidem, paragraph 261.
[124] Ibidem.
[125] Ibidem, paragraph 261 (b).
[126] Ibid., Chatper IV, "Recommendations", point E, "Right to due process and to a fair trial", paragraph 10 (g).
[127] Organization of American States document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paragraph 256.

have been committed by the prisoner of war".[128] The IACHR also took the view that "[d]uring armed conflicts, a state's military courts may also try privileged and unprivileged combatants, provided that the minimum protections of due process are guaranteed".[129] With regard to combatants in non-international armed conflicts, the IACHR recalled that "Common Article 3 prohibits the 'passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all of the judicial guarantees which are recognized as indispensable by civilized peoples'."[130] It also recalled that article 6 of Additional Protocol II explicitly spells out the fair trial guarantees that are applicable. However, the IACHR stated that "[a]lthough the provisions of international humanitarian law applicable to unprivileged combatants, including Article 75 of Additional Protocol I, do not specifically address the susceptibility of such combatants to trial by military courts, there appears to be no reason to consider that a different standard would apply as between privileged and unprivileged combatants. In any event, the standards of due process to which unprivileged combatants are entitled may in no case fall below those under Article 75 of Additional Protocol I".[131]

6. Military criminal investigations and civilians

On various occasions, the IACHR has examined the question of the Armed Forces being given Judicial Police powers, in other words, the authority to carry out criminal investigations, and the impact that has on the trial of civilians by military personnel. It should also be remembered that the IACHR has repeatedly considered that the practice of conferring Judicial Police powers on the Armed Forces gives rise to serious human rights violations.[132]

In its first report on the situation of human rights in Peru, the IACHR expressed its concern at the fact that the bodies responsible for carrying out investigations were accountable to the military authorities, thereby seriously limiting the investigation work the prosecutors from the Office of the Government Attorney were able to do.[133] In its second report on Peru, the IACHR considered that the exercise of judicial police powers by bodies that are part of the executive, such as the Intelligence Services (*Servicios de Inteligencia - SIN)* or the National Counter-Terrorism Division (*Dirección Nacional Antiterrorista - DINCOTE*), which are neither independent nor impartial, was an anomaly which seriously distorted the work of the judiciary.[134] The IACHR pointed out that investigations carried out by the judicial police, which is not a judicial body, in fact

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[128] Ibid., paragraph 256.
[129] Organization of American States document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002.
[130] Ibid., paragraph 255.
[131] Ibid., paragraph 232.
[132] Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, paragraph 351 and 421; Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97, Doc.29 rev.1, 29 September 1997, paragraph 86; First Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.83, Doc. 31, 12 March 1993, paragraph 24; Second report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paragraph 210; Fifth Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.111, Doc. 21 rev., 6 April 2001, paragraph 31; Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993.
[133] First Report on the Situation of Human Rights in Peru, Organization of American States document OEA/Ser.L/V/II.83, Doc. 31, 12 March 1993, paragraph 24.
[134] Second Report on the Situation of Human Rights in Peru, Organization of American States document OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paragraph 100.

determined which courts were to have jurisdiction (the civilian courts or the military courts). For this reason, among others, the IACHR recommended that the Peruvian authorities should "render without effect the Legislative Decrees, especially Nos. 895, 897, and 904, which grant excessive powers to the National Police and to the Intelligence Service in the investigations".[135]

In a decision on a Peruvian case, the IACHR stated that, under article 12 of Decree Law N° 25475, "Peru's National Police is charged with investigating terrorist crimes through the DINCOTE, its National Anti-Terrorist Directorate. The DINCOTE is empowered to decide whether the evidence it gathers is enough to bring charges. In addition, it also decides what charges are to be brought and whether the defendant is to appear before a civilian or a military court".[136] The IACHR took the view that "[t]his situation is obviously anomalous, in that it implies that the police--which is not a judicial body, nor independent, nor impartial--is performing jurisdictional functions".[137]

On analyzing the situation of human rights in Guatemala, the IACHR pointed out that "[d]eficiencies in the system for administering criminal justice begin at the initial stage of investigation, which in turn prejudices the chances for effective prosecution. This affects the right of victims of common crime and human rights violations to judicial protection and redress, and the right of any person implicated to mount an adequate defence".[138] Among these deficiencies, the IACHR highlighted "the participation of military intelligence in criminal investigations", aggravated by "the lack of transparency of such participation, which is not subject to civilian control or oversight". In the opinion of the IACHR, this practice placed the rights of civilians at risk.[139] In light of these considerations, the IACHR recommended that the Guatemalan State should "[i]mmediately put an end to military participation in any activity of criminal investigation, consistent with domestic law and its commitment to separate police and military functions".[140]

In its second report on the situation of human rights in Colombia, the IACHR expressed its concern about the granting of judicial police powers to the military even in emergency situations. It said the following: "The Commission was particularly disturbed by the fact that members of the military were to be allowed to perform functions ordinarily performed by the criminal investigations police in investigations conducted by prosecutors into cases involving civilians. When prosecutors use military personnel as criminal investigators, citizens' rights can be violated, evidence can be faked or even concealed when it is incriminating to the armed forces, which is frequently accused of alleged human rights violations. And so the Commission was gratified to see that this measure was never put into effect since the Constitutional Court declared it unconstitutional in the compulsory review it must make of all decrees issued in exercise of emergency powers".[141] The IACHR also recalled that: "An independent judicial system

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[135] Ibid., paragraph 244.
[136] Report N° 49/00, Case 11,182, *Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo, Marco Antonio Ambrosio Concha and Carlos Florentino Molero Coca (Peru)*, 13 April 2000, paragraph 92.
[137] Ibid., paragraph 112.
[138] Fifth Report on the Situation of Human Rights in Guatemala, Organization of American States document OEA/Ser.L/V/II.111, Doc. 21 rev., 6 April 2001, paragraph 31.
[139] Ibid., paragraph 33.
[140] Ibid., paragraph 63 (2).
[141] Second Report on the Situation of Human Rights in Colombia, Organization of American States document OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993, Chapter III, "The Political and Legal System in Colombia", letter F ("States of emergency under the existing legal system").

must be organized that ensures proper administration of justice, the guarantees of due process and full exercise of human rights. Jurisdictional functions must be exercised by specialized, technical civilian bodies, and the justice system must be removed from under the influence of military justice [including military bodies that discharge judicial police functions]".[142] In the same report, when considering the creation of the Office of the Prosecutor General (*Fiscalía General de la Nación*) under the new Constitution and its role in criminal investigations, it recommended that the Colombian State "establish a very modern police corps. Its members must have a solid background in law and civil rights to ensure that they are mindful and respectful of human rights when conducting criminal investigations. Members of military and police intelligence should not be members of this police corps, as they have so often been accused of abusing private citizens and violating fundamental rights."[143]

In its third report on Colombia, the IACHR expressed its concern at the fact that the armed forces had been granted judicial police powers "which allow the military to carry out investigations and arrests, even in emergency situations".[144] The IACHR considered that "[t]he mobilization of the armed forces to combat crime implies placing troops trained for combat against an armed enemy in situations which require specialized training in law enforcement and interaction with civilians. In addition, this situation creates serious confusion regarding the balance of powers and the independence of the judiciary. The authority usually granted to the judicial bodies to order or deny searches, to order and carry out arrests or to release individuals in detention is transferred to authorities which form part of the executive branch".[145]

[142] Ibid., Chapter IV, "The Right to a Fair Trial", letter G ("Final Observations").
[143] Ibid., "Conclusions and recommendations", paragraph N° 9.
[144] Organization of American States document OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, paragraph 75. See also Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993, pp. 61 and 62.
[145] Ibidem.

Chapter 5 - The Inter-American Court of Human Rights

1. Introduction

The Inter-American Court of Human Rights did not start examining the issue of the trial of civilians by military courts until 1997. The Court has taken the view that bringing civilians to trial before military courts violates the right to a fair trial and the principle of the 'natural' or competent judge or tribunal (*principio del juez natural*). Over and above the procedural irregularities and the breaching of judicial guarantees it has found in the cases submitted to it, the Court has examined the issue of military courts from the perspective of that principle.

2. The precedent-setting case of *Loayza Tamayo v. Peru*

In September 1997, the Court issued its judgment on the case of *Loayza Tamayo v. Peru*. The case concerned the trial and conviction for terrorism of a Peruvian citizen by a civilian court after she had been acquitted by a military tribunal for the very same offences which, under military jurisdiction, were classed as treason. As well as citing violation of the *non bis in idem* principle in its request to the Court, the Inter-American Commission considered that Peru had violated the right of Mrs Loayza Tamayo to due process of law in that she "was tried both in the military and civil court systems by "*'faceless judges' who were neither independent nor impartial*".[1] In its request, the Commission stated that Decree-Law N° 25,659, under which civilians were subject to military jurisdiction in cases of treason, "patently fails to observe the guarantees of due process and the right to be tried by a competent civil court".[2]

However, the Court decided not to comment on the lack of independence and impartiality of the military courts, given that Mrs Loayza "was acquitted by that military court and, therefore, the possible failure to meet those requirements did not cause her legal injury in that regard".[3] Nevertheless, the Court considered that "in applying Decree-Laws No. 25,659 (crime of treason) and No. 25,475 (crime of terrorism) enacted by the State, Peru's military courts violated Article 8(1) of the Convention with regard to the requirement to be tried by a competent court. Indeed, in rendering a final judgment acquitting the defendant Ms. María Elena Loayza-Tamayo of the crime of treason, the military court lacked jurisdiction to keep her in detention, let alone to declare in the verdict of acquittal of last instance, that '*there being evidence of the commission of the crime of terrorism, it orders the case file to be remitted to the civil courts, and the defendant to be placed in the custody of the competent authority*'. In so doing, the military tribunal acted *ultra vires*, usurped jurisdiction, and arrogated to itself the powers of the regular judicial organs, inasmuch as Decree-Law No. 25,475 (crime of terrorism) stipulates that the aforesaid crime is to be investigated by the National Police and the Ministry of the Interior, and tried in the civil courts. Further, the regular judicial authorities were the only organs with the

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[1] Inter-American Court of Human Rights, Case of *Loayza Tamayo v. Peru*, Judgment of 17 September 1997, Series C No. 33, paragraph 37 (a).
[2] Ibidem.
[3] Ibid., paragraph 60.

power to order the detention and imprisonment of the persons accused".[4] The Court ruled that the Peruvian State had violated, among others, the *non bis in idem* principle contained in article 8.4 of the American Convenion on Human Rights.

Despite the Court's deliberate decision not to comment on the lack of independence and impartiality of the military courts, the joint concurring opinion submitted 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".[5]

3. Military courts and the question of the competent judge or tribunal *(juez natural)*

It was to be in the case of *Castillo Petruzzi et al. v. Peru* that the Inter-American Court would adopt a clear and unequivocal position on the practice of trying civilians in military courts. The case concerned several civilians who had been tried and convicted by a Peruvian military court for treason (*'traición a la patria'*) which was classed as a terrorist offence under Peruvian law. Although, under the Peruvian Code of Military Justice, civilians could only be tried by military courts for treason at a time of war against an enemy state, this jurisdiction was extended, under Decree-Law N° 25,659 of 1992, to apply at all times. In the case in question, the civilians were tried and convicted under Decree-Law N° 25,659, in an extremely summary trial conducted under military jurisdiction.

In an *obiter dictum* contained in its judgment of 30 May 1999, the Court considered that "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".[6] The Court also found that, under Peruvian law, "[t]ransferring 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".[7] The Court went on to specify that:

> "When 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

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[4] Ibid., paragraph 61.
[5] Joint concurring opinion of Judges Cançado Trindade and Jackman, Inter-American Court of Human Rights, Case of *Loayza Tamayo v. Peru*, Judgment of 17 September 1997, Series C No. 33.
[6] Inter-American Court of Human Rights, Case of *Castillo Petruzzi et al. v. Peru*, Judgment of 30 May 1999, Series C No. 52, paragraph 128.
[7] Ibidem.

> due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts".[8]

The Court considered that "[i]n 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".[9]

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".[10] Citing the United Nations Basic Principles on the Independence of the Judiciary,[11] the Court said that "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'."[12]

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".[13]

The Court has gone on to reiterate this jurisprudence on subsequent occasions. For example, in the case of *Cantoral Benavides v. Peru*, concerning the trial and conviction of a civilian by a military court for treason, the Court again said that "[t]he transfer of jurisdiction from the regular courts to military courts, and the subsequent trying of civilians for the crime of treason against the fatherland in these courts, as in this case, excludes the appropriate judge from hearing such cases".[14] The Court also reaffirmed the jurisprudence it had developed in the Castillo Petruzzi case, stating that "[w]hen the military courts assume jurisdiction over a matter that should be heard by the regular courts, the right to the appropriate judge is violated, as is, *a fortiori*, due process, which, in turn, is intimately linked to the right of access to justice".[15] The Court also said the following:

> "In a democratic state of law, the criminal military jurisdiction is to be restricted and exceptional in scope and intended to protect special juridical interests linked to the duties assigned to the armed forces by law. Therefore,

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[8] Ibidem.
[9] Ibid., paragraph 130.
[10] Ibid., paragraph 129.
[11] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and confirmed by the General Assembly in resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[12] Inter-American Court of Human Rights, Case of *Castillo Petruzzi et al v. Peru*, Judgment of 30 May 1999, Series C No. 52, paragraph 129.
[13] Ibid., paragraph 132.
[14] Inter-American Court of Human Rights, Case of *Cantoral Benavides v. Peru*, Judgment of 18 August 2000, Series C No. 69, paragraph 112.
[15] Ibidem.

> civilians are not to be judged in this jurisdiction, and only military personnel are to be tried for crimes or misdemeanors which, by their very nature, harm the juridical interest of the military".[16]

The Court also considered "that in a case such as the present one, the impartiality of the judge is affected by the fact that the armed forces have the dual function of combating insurgent groups with military force, and of judging and imposing sentence upon members of such groups".[17]

The Court also considered that the imprisonment of Mr Cantoral Benavides by a military court, in breach of the principle of the competent or 'natural' judge and article 8.1 of the American Convention, had violated the right of any person detained to "be brought promptly before a judge or other officer authorized by law to exercise judicial power"[18] and, consequently, "the continuation of his detention by order of the military judges constituted arbitrary arrest, in violation of Article 7(3) of the Convention".[19]

4. Military courts and ex-servicemen

In the case of *Cesti Hurtado v. Peru*, the Court examined the question of the trial of an ex-serviceman under military jurisdiction. Mr. Cesti Hurtado, who had retired from the Army in 1984 and went on to become manager of a private firm which advised the Logistics Command of the Peruvian Army, was tried in 1996 under military criminal jurisdiction for a "crime against the duty and dignity of the service" ("*delito contra el deber y la dignidad de la función*"), as well as negligence and fraud, for acts allegedly committed when he was no longer a member of the armed forces. The Court considered that "[w]hen this proceeding [before a military court] was opened and heard, [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".[20] Consequently, the Court concluded that "the proceeding to which Gustavo Cesti Hurtado was submitted violated the right to be heard by a competent tribunal, according to Article 8(1) of the Convention".[21]

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[16] Ibid., paragraph 113.
[17] Ibid., paragraph 114.
[18] Ibid., paragraph 73.
[19] Ibid., paragraph 75.
[20] Inter-American Court of Human Rights, Case of *Cesti Hurtado v. Peru*, Judgment of 29 September 1999, Series C No. 56, paragraph 151.
[21] Ibidem.

Chapter 6 - The European Court of Human Rights

1. General observations

The European Court of Human Rights (ECHR) has addressed the question of civilians who are tried under military criminal jurisdiction or in courts on which military judges are sitting. Within that framework it has looked at whether such practices are compatible with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It has also looked at the trial of military personnel in military courts for military offences. Though outside the scope of this study, the conclusions reached by the ECHR are of interest. The judgment handed down in the case of *Findlay v. The United Kingdom* is particularly worth mentioning. In that case, the ECHR considered that the court martial which tried the petitioner was neither independent nor impartial because its members were hierarchically subordinate to the officer discharging the function of both "convening officer" and prosecutor and who, in his capacity as "confirming officer", was also authorized to change the sentence that had been imposed.[1]

The ECHR's examination of the trial of civilians by military courts is relatively recent. This is partly because, in many States parties to the European Convention on Human Rights, military courts do not have jurisdiction over civilians, at least in peacetime, or they have been abolished. The issue has been addressed by the ECHR mainly in cases against Turkey. However, technically, such cases do not concern military courts as such but courts on which both civilian and military judges sit. In this context, the ECHR has focused its analysis on whether the military judges sitting on such bodies can be deemed to be independent and impartial. In conducting its analysis, it has used its jurisprudence on the subjective determination of the independence of a court which states that it is not enough for a trial court to be objectively independent, it has to be perceived as such. It has also referred, in the course of its analysis, to its jurisprudence on testing the impartiality of a court in an objective manner in order to establish whether the judge offers guarantees that are sufficient to exclude any legitimate doubt on that score.[2]

2. National Security Courts in Turkey

The ECHR has examined the issue of the trial of civilians by military judges in Turkey on several different occasions. Within that context, two types of cases have been subjected to ECHR jurisdiction. The first type concern state of siege courts which were set up in 1963 and 1971 and abolished in 1993 and were in fact part of military criminal jurisdiction. The second type concern the National Security Courts which were set up in 1973, abolished in 1976 as a result of a judgment by the

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[1] European Court of Human Rights, Judgment dated 25 February 1997, Case of *Findlay v. The United Kingdom*, (N° 110/1995/616/706), paragraphs 74 to 77. See also the Judgment dated 24 September 1997, Case of *Coyne v. The United Kingdom* (N° 124/1996/743/942), paragraphs 56-58.

[2] See, among others, the Judgment dated 1 October 1982, Case of *Piersarck v. Belgium*, paragraph 30; Judgment dated 22 April 1994, Case of *Saraiva de Carvalho v. Portugal*, paragraph 33; and Judgment dated 20 May 1998, Case of *Gautrin et al v. France*, paragraph 58.

Constitutional Court and re-established under the 1982 Turkish Constitution. As far as the state of siege courts were concerned, the ECHR heard several petitions regarding the trial of civilians by such courts. However, in view of its jurisdiction *rationae temporis*, the ECHR refrained from pronouncing on the independence and impartiality of such courts because Turkey only recognized the jurisdiction of the ECHR in 1990 and then only for events that occurred after that date. Nevertheless, in several cases, the ECHR considered that it was competent to address situations which, though they may have begun prior to 1990, were still ongoing after the jurisdiction of the court had been accepted by Turkey. For example, in the case of two civilians who had been undergoing trial in a state of siege court since 1981 and were conditionally released in 1991, the ECHR ruled on the question of the length of the trial because it was still going on in 1996.[3] As far as the National Security Courts are concerned, until 1998 the ECHR had only ruled on breaches of judicial guarantees, such as matters relating to defence or the length of the proceedings.[4]

In June 1998, in the case of *Incal v. Turkey,* the ECHR examined the issue of the presence on a National Security Court of a military judge who was an officer on active service at the time. Mr. Brahim Incal, a lawyer and member of the executive committee of the Izmir section of the People's Labour Party (HEP), which was dissolved on 14 July 1993, was tried by a National Security Court on a charge of attempting to incite hatred and hostility through racist words for having distributed a leaflet criticizing measures taken by the local authorities. Mr. Incal, together with other members of his party, was convicted by a National Security Court which was made up of three judges, including a member of the armed forces attached to the Military Legal Service.

In accordance with its jurisprudence, the ECHR reiterated that, in order to establish whether a tribunal can be deemed to be 'independent', regard had to be had to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question of whether it presented an appearance of independence.[5] It also considered that the 'impartiality' of the tribunal needed to tested on two counts: firstly, by trying to determine the personal conviction of the judge in question and, secondly, by ascertaining "whether the judge offered guarantees sufficient to exclude any legitimate doubt"[6] about his impartiality.

On examining the status of the military judge sitting as a member of the National Security Court, the ECHR considered that there were several aspects of it which raised questions about his independence and impartiality. For example, the ECHR stressed that military judges "are servicemen who still belong to the army, which in turn takes its orders from the executive".[7] It also pointed out that they remain subject to military discipline and that the administrative authorities and the army are heavily involved in appointing them. The ECHR said that "[i]n this respect even appearances may be of a certain importance [since] [w]hat is at stake is the confidence which the

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[3] Judgment of 25 March 1996, Case of *Mitap and Müftüoglu v. Turkey* (N° 6/1995/512/595-596), paragraphs 25-28. See also the Judgment of 4 April 2000, Case of *Cankoçak v. Turkey* (N° 25182/94 y 26956/95).

[4] Judgment of 8 June 1995, Case of *Yagci and Sargin v. Turkey* (N° 6/1994/453/533-534), paragraphs 59-70 and the Judgment dated 25 November 1997, Case of *Zana v. Turkey* (N° 69/1996/688/880), paragraphs 66-85.

[5] Judgment of 9 June 1998, *Case of Incal v. Turkey* (N° 41/1997/825/1031), paragraph 65.

[6] Ibidem.

[7] Ibid., paragraph 68.

courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused".[8] The ECHR said that the standpoint of the accused was therefore very important when determining whether there was legitimate reason to fear that the court by which he was being tried was not independent and impartial. In this connection, the ECHR said that "[w]hat is decisive is whether his doubts can be held to be objectively justified".[9] Given the status of the military judge, the ECHR considered that "[i]t follows that the applicant could legitimately fear that because one of the judges of the 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".[10] The ECHR therefore concluded that "the applicant had legitimate cause to doubt the independence and impartiality of the National Security Court"[11] and that, accordingly, there had been a breach of Article 6 (1) of the European Convention on Human Rights.

The ECHR adopted a similar position in its 1998 judgment on the case of *Çiraklar v. Turkey*. Cengiz Çiraklar, a university student who had participated in a demonstration in 1990 to commemorate the deaths of seven students from Istanbul University in 1978 and the deaths of Kurds in the north of Iraq in 1988, was arrested by police and brought before a National Security Court, together with other demonstrators. Çiraklar and the others were charged with taking part in an unauthorized demonstration, disseminating separatist propaganda and offering violent resistance to the police. Çiraklar was sentenced to two years and six months' imprisonment. The National Security Court which tried and convicted Çiraklar was composed of two civilian judges and a military judge with the rank of colonel.

The ECHR's task was to determine whether the independence and impartiality of the National Security Court was affected by the participation of a military judge.[12] The ECHR considered that in order to establish whether the tribunal could be considered 'independent', it was necessary to take into account the manner of appointment of the judges and their term of office, the existence of safeguards against outside pressures and whether it presented an appearance of independence.[13] The ECHR also considered that the 'impartiality' of the tribunal had to be assessed on the basis of two tests: firstly, by trying to determine the personal conviction of the judge in question and, secondly, by ascertaining whether he offered guarantees sufficient to exclude any legitimate doubt about his impartiality.[14] In that connection, the ECHR found that it was not possible to dissociate 'independence' from 'impartiality', given that appearances were decisive for both.

The ECHR considered, in the case in question, the participation of a military judge on the tribunal was not in itself sufficient to doubt the independence and impartiality of the court. For the ECHR, the crux of the matter lay in determining whether the status of the military judge provided the accused with guarantees of independence and

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[8] Ibid., paragraph 71.
[9] Ibidem.
[10] Ibid., paragraph 72.
[11] Ibid., paragraph 73.
[12] European Court of Human Rights, judgment dated 28 October 1998, Case of *Çiraklar v. Turkey* (70/1997/854/1061), paragraph 37.
[13] Ibid., paragraph 38.
[14] Ibidem.

impartiality.[15] On examining this, the ECHR considered that, although certain aspects of the status of the military judge were similar to those of the civilian judges, there were nevertheless several other aspects which put his independence and impartiality in doubt. For example, the ECHR pointed out that military judges "are servicemen who still belong to the army, which in turn takes its orders from the executive".[16] They also remain subject to military discipline and the administrative authorities and the army are heavily involved in appointing them. The ECHR concluded that, given this state of affairs, the independence and impartiality of the tribunal were called into question. It also considered that the accused could legitimately fear that the presence of the military judge might lead to the court being unduly influenced by considerations which had nothing to do with the nature of the case.[17] The ECHR found that Mr. Çiraklar's perception that he had been tried and convicted by a court that was neither independent nor impartial was "objetively justified" and that there had therefore been a violation of article 6 (1) of the European Convention on Human Rights.

In the case of *Gerger v. Turkey*, the ECHR reiterated the jurisprudence established in the Incal and Çiraklar cases. Haluk Gerger, who was a journalist by profession, was tried and convicted by a National Security Court on a charge of disseminating separatist propaganda for having sent a message to a ceremony commemorating three Turkish student leaders who had been tried and executed in 1972. Mr. Gerger was sentenced to one year and eight months' imprisonment and a fine by the National Security Court which was composed of three judges, one of whom was a military judge. The latter dissented from the judgment of the court on the grounds that, in his view, the charge brought should have been that of 'non-public incitement to hatred or hostility' rather than disseminating separatist propaganda. With regard to the right to be tried by an independent and impartial tribunal, the ECHR stated that it was not its task to determine *in abstracto* whether or not, in the light of the justifications advanced by the Turkish Government, it had been necessary to set up National Security Courts and that it would confine itself to ascertaining whether the way in which such courts functioned had, in this particular case, infringed Mr. Gerger's right to a fair trial.[18] In this regard, the ECHR considered the presence as judge of a military officer on active service, who was subject to the military hierarchy and answerable to the executive branch of government, objectively justified the legitimate fears of the accused that the court by which he was being tried lacked independence and impartiality. The ECHR therefore concluded that there had been a breach of article 6(1) of the European Convention on Human Rights.[19]

The ECHR has, on several occasions, reiterated this jurisprudence in its judgments concerning the trial of civilians by National Security Courts in Turkey, including in

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[15] Ibid., paragraph 39.
[16] Ibidem.
[17] Ibid., paragraph 40.
[18] European Court of Human Rights, judgment of 8 July 1999, Case of *Gerger v. Turkey* (N° 24919/94), paragraph 61.
[19] Ibid., paragraphs 61 and 62.

the cases of Karatas[20], Baskaya and Okguoglu[21], Sürek and Özdemir,[22] Karakoç and others[23] and Demirel.[24]

[20] Judgment of 8 July 1999, Case of *Karatas v. Turkey* (N° 23168/94), paragraphs 61-63.
[21] Judgment of 8 July 1999, Case of *Baskaya y Okguoglu v. Turkey* (N° 23536/94 y 24408/94), paragraphs 78-80.
[22] Judgment of 8 July 1999, Case of *Sürek y Özdemir v. Turkey* (N° 23927/94 y 24277/94), paragraphs 77-78.
[23] Judgment of 15 October 2002, Case of *Karakoç and others v. Turkey* (N° 27692/95, 28138/95 y 28498/95), paragraphs 52-65.
[24] Judgment of 28 January 2003, Case of *Demirel v. Turkey* (N° 39324/98), paragraphs 68-71.

Chapter 7 - The African Commission of Human and People's Rights

1. General observations

The African Commission of Human and People's Rights (ACHPR) has, on many occasions, examined the question of the trial of civilians by military courts. It has analyzed the practice in the light of articles 7 and 26 of the African Charter on Human and Peoples' Rights which concern, respectively, the right to a fair trial and the obligation to ensure that courts are independent. In examining the issue, the ACHPR has also made use of the United Nations Basic Principles on the Independence of the Judiciary.

Generally speaking, the ACHPR has taken the view that "a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process. [However,] [w]e make the point that Military Tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process".[1] The ACHPR also considered that the fundamental question was to determine whether such courts met the standards of independence and impartiality required of any court. However, the ACHPR also defined the natural scope of the jurisdiction *ratione materiae* of the military court system, saying that it should be confined to military offences committed by military personnel. For example, in its 1999 "Resolution on the Right to Fair Trial and Legal Aid in Africa"[2], the ACHPR adopted the *Declaration and Recommendations on the Right to a Fair Trial in Africa,* approved by the Dakar Seminar on the Right to a Fair Trial in Africa. They stipulate that "the purpose of Military Courts is to determine offences of a purely military nature committed by military personnel".

More recently, the ACHPR adopted "Principles and guidelines on the right to a fair trial and legal assistance in Africa" which specifically prohibit the trial of civilians by military courts. For example, principle L, entitled "Right of civilians not to be tried by military courts", states that "[t]he only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel" and that "Military Courts should not in any circumstance whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within thejurisdiction of regular courts".[3]

In its General Recommendations as well as in its resolutions on countries and decisions on individual cases, the ACHPR has taken the view that the trial of civilians by military personnel is in breach of articles 7 and 26 of the African Charter and the United Nations Basic Principles on the Independence of the Judiciary. In its 1995 resolution on Nigeria, the ACHPR condemned the circumscribing of the independence of the judiciary as well as the setting up of "military tribunals lacking independence and due process to try persons suspected of being opposed to the

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[1] Decision of 7 May 2001, Communication 218/98 (Nigeria), paragraph 44.
[2] Adopted on 15 November 1999 at the 26th ordinary session of the ACHPR.
[3] African Union Doc. DOC/OS (XXX) 247.

military regimes".[4] The ACHPR also called on the Nigerian authorities to "[r]emove all military tribunals from the judicial system".[5]

2. Jurisprudence

In a decision relating to several soldiers and a civilian who were tried and sentenced to death by a court martial in Sierra Leone that had been especially established to try those responsible for an attempted *coup d'état* on a charge of treason, the ACHPR examined the composition of the court. The ACHPR considered that the fact that military officers on active service and without any legal training had been selected to sit as military judges on the tribunal in question constituted a violation of Principle 10 of the United Nations Basic Principles on the Independence of the Judiciary.[6] With regard to the civilian who had been tried and convicted, the ACHPR, recalling its Recommendation on the Right to Fair Trial and Legal Aid in Africa, considered that such courts should not try cases which fall to the jurisdiction of the ordinary courts.[7] The ACHPR also found that the right to be tried under ordinary jurisdiction had been violated and that therefore there had been a breach of principle 5 of the United Nations Basic Principles on the Independence of the Judiciary.[8] The ACHPR concluded that article 7 of the African Charter had been violated.

In a decision regarding Cameroon, the ACHPR examined the situation of a civilian who had been tried and convicted by a military court on a charge of participating in an attempted coup and who, unlike his fellow defendants who were members of the military, had been refused an amnesty. The ACHPR took the view that the fact that the civilian had been tried by a military court on the same charges as the military conspirators and then denied the benefit of the amnesty was incompatible with the principles of the proper administration of justice.[9] The ACHPR concluded that there had been a violation of the right to be tried by an independent and impartial tribunal.

In a decision on Nigeria, the ACHPR examined the trial and conviction of several civilians by special military tribunals set up under the Civil Disturbances Act. The members of such tribunals were appointed by the executive. Those convicted by them were unable to lodge an appeal in the ordinary courts and the body which was responsible for confirming the sentences was the Provisional Ruling Council (PRG), a body made up solely of members of the Armed Forces. The ACHPR considered that removing cases from the jurisdiction of the ordinary courts and placing them before an extension of the executive branch compromised the impartiality required of a court under the terms of the African Charter.[10] The ACHPR also considered that it was not safe to view the confirming authority, the PRG, as a competent judicial body in that it was neither independent nor impartial.[11] On this basis, the ACHPR concluded that neither the special tribunals nor the PRG were independent and that therefore Nigeria was in breach of its duty under article 26 of the African Charter to guarantee the

[4] Resolution on Nigeria, March 1995.
[5] Ibidem.
[6] Decision of 6 November 2000, Communication N° 223/98 (Sierra Leone), paragraph 60.
[7] Ibid., paragraph 62.
[8] Ibid., paragraph 64.
[9] Decision of ? April 1997, Communication N° 39/90 (Cameroon), paragraph 28.
[10] Decision of 31 October 1998, Communication N° 137/94, 139/94, 154/96 and 161/97 (Nigeria), paragraph 86.
[11] Ibid., paragraph 93.

independence of the courts.[12] The ACHPR also concluded that, in the case in question, the right to be tried by an impartial tribunal, among others, had been violated.

In another decision on special military tribunals in Nigeria, the ACHPR reaffirmed that provisions removing jurisdiction from the ordinary courts in favour of special tribunals were in violation of article 7 of the African Charter on the right to a fair trial.[13] The ACHPR also found that the existence of tribunals whose members were appointed by the executive and were mainly members of the military was in violation of articles 7 and 26 of the African Charter.[14] The ACHPR considered that such a parallel system undermined the court system and created the likelihood of unequal application of the laws.[15]

In another decision concerning Nigeria, the ACHPR considered that the trial of several journalists by a special military tribunal presided by an officer of the Armed Forces on active service and composed exclusively of military personnel constituted a violation of article 7 of the African Charter on the right to a fair trial and principle 5 of the United Nations Basic Principles on the Independence of the Judiciary.[16]

In a decision on Nigeria, the ACHPR examined the trial and sentencing to death of several civilians, under the Robbery and Firearms (Special provision) Decree No. 5 of 1984, by a special tribunal made up of a civilian judge, a member of the Armed Forces and a member of the Police.[17] The ACHPR considered that the composition of the tribunal alone, in that it included military and police personnel, created the appearance, if not "actual lack, of impartiality", thus violating article 7 of the African Charter.[18]

In another decision, the ACHPR examined the case of the trial and conviction of several civilians by a special tribunal set up under Civil Disturbances Decree N° 2 of 1987 and consisting of a judge and four members of the armed forces.[19] The ACHPR considered that the fact that the court consisted solely of military personnel created the appearance, if not "actual lack, of impartiality", thereby violating article 7 of the African Charter.[20]

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[12] Ibid., paragraph 95.
[13] Decision of 15 November 1999, Communication N° 151/96, paragraph 17.
[14] Ibid., paragraph 21
[15] Ibid., paragraph 23.
[16] Decision of 15 November 1999, Communication N° 206/97 (Nigeria), paragraph 15.
[17] Decision of 1995, Communication N° 60/91 (Nigeria).
[18] Ibid., paragraph 14.
[19] Decision of 1995, Communication N° 87/93 (Nigeria).
[20] Ibid., paragraph 14.