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Item 3: Administration of Justice

## Oral Intervention

Mr Chairman,

The International Commission of Jurists (ICJ) would like to congratulate Mr. Louis Joinet for his report on the administration of justice through military tribunals (E/CN.4/Sub.2/2002/4). This subject goes beyond legal matters and is at the centre of the prevalence of the rule of law and human rights. Reality teaches us that, usually, military tribunals do not comply with international standards on the independence and impartiality of the administration of justice and fair trial. Military justice is too often a source of various injustices, violations of rights and impunity.

The ICJ considers that, taking into account the evolution of international jurisprudence and doctrine, a consensus has emerged on the incompatibility of the trial of civilians by military tribunals with international law [1]. In this regard, the ICJ supports the conclusion of the Special Rapporteur on the Independence of Judges and Lawyers, affirming that "international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice" [1]. The Inter-American Court of Human Rights stated that "military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviours that violate military duties. 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 due process are violated. The right to due process, in turn, is intimately linked to the very right of access to the courts" [3]. The European Court of Human Rights has also reached similar conclusions [4].

The ICJ also believes that gross violations of human rights -such as extrajudicial executions, torture and forced disappearance- committed by military or police officers must not be treated as military offences or those related to military functions or duties, but rather must be regarded as crimes to be judged by the ordinary courts. Experience tells us that, in such cases, the trial of military or police officers by military tribunals is a source of impunity. Such trials also impede the right to truth and do not fulfil States' obligations to investigate and punish perpetrators of gross human rights violations. The Human Rights Committee [5], the Committee against Torture [6], the mechanisms of the United Nations Commission on Human Rights [7] and the Inter-American Commission on Human Rights [8] have unanimously considered this practice to contravene international human rights law. The Inter-American Court of Human Rights stated that such practice was incompatible with the international obligations of a State, and constitutes a violation of the right to an effective remedy for victims and their relatives. The Court considered that "In a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offences that by its own nature attempt against legally protected interests of military order [...] [9]"

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One of the most frequent practices is to resort to states of emergency to excessively broaden the scope of military justice. In several cases, such as recently in the United States of America, such extraordinary powers have been used to create pseudo-judicial bodies, such as military commissions, which in fact are organs which, while enjoying judicial powers, belong to the executive branch. Such practice is contrary to elemental principles on the independence of the judiciary. In its General Comment No 29 on States of emergency, the Human Rights Committee recalled that even during states of emergency: "Only a court of law may try and convict a person for a criminal offence" [10]. Additionally, the Inter-American Commission on Human Rights in its resolution "Terrorism and Human Rights", stated that "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" [11]. The European Court of Human Rights has indicated that State Security Courts, that include military judges, are incompatible with the right to fair trial [12].

The rights of military or police officers judged by military courts for military offences or acts related to military functions or duties are frequently violated by national criminal military law. Thus, for example, the right to fair trial is tested when military tribunals are composed of military officers who are forced to comply with principles of due obedience and military discipline, both of which are inherent to military life. Not without reason, in 1969, the Special Rapporteur of this Sub-Commission, Mr. Mohamed Ahmed Abu Rannat, concluded that "it is pertinent to ask if the (military) personnel is able to enjoy absolute freedom of action and judgement, taking into account that it is dependant on its superiors on issues such as assessment of efficiency, promotion, assignments and leaves" [13]. The European Court of Human Rights has dealt with this problem in several occasions [14]. In its ruling *Findlay vs. the United Kingdom*, the court concluded that the way in which the military courts operated in the United Kingdom violated the right to a fair trial by an independent and impartial tribunal. Prompted by this decision, the United Kingdom has started a process, still to be finished, of reform of its military criminal law.

Furthermore, military criminal law in many States allows military courts to enjoy extraterritorial jurisdiction and to judge military or police officers when they commit crimes in the context of peace operations of the United Nations or other intergovernmental organisations. Many of these crimes are committed against civilians and, in some cases, amount to war crimes, crimes against humanity or gross human rights violations. Most of the registered cases have been judged by military courts of the national army concerned. Maybe the only exception was the case of Canadian soldiers operating in Somalia as part of the Unified Task Force (UNITAF) [15]. Although, initially the establishment of a military board of inquiry was ordered and some soldiers were also court-martialled for their actions in Somalia, the military board of inquiry was eventually replaced by a civilian one, following a recommendation of the Canadian Commission of inquiry on these facts. The Commission found "the military justice system to be inadequate in handling such cases and recommended that military judges be replaced by civilian judges." [16]

For a long time, military tribunals have been a source of concern for the universal human rights system. This is confirmed by the numerous resolutions of the United Nations Human Rights Commission [17] and this Sub-Commission [18]. The ICJ encourages the expert in charge of drafting the study on the administration of justice through military tribunals to identify and propose principles on jurisdiction, functioning and structure of military tribunals, in the light of this significant corpus iuris and international law. As a contribution to the work of the expert, the ICJ is drafting studies on military tribunals. The ICJ considers that a regulation of military courts in compliance with international human rights law is essential for the appropriate administration of justice, the full respect of the right to fair trial, and to eradicate impunity.

- [1] See, for example, Human Rights Committee: Preliminary Conclusions - Peru, 1996, CCPR/C/79/Add.67, paragraph 12; Concluding Observations- Lebanon, CCPR/C/79/Add.78, paragraph 14; Concluding Observations- Egypt, CCPR/C/79/Add.23; Concluding Observations- Slovakia CCPR/C/79/Add.79, paragraph 20; Concluding Observations- Chile, CCPR/C/79/Add.104, paragraph 9; Concluding Observations- Syria, CCPR/CO/ 71/SYR; ; Concluding Observations- Peru CCPR/CO/ 70/PER; and Concluding Observations- Kuwait, CCPR/CO/ 69/KWT; Report of the Special Rapporteur on extrajudicial executions on his visit to Peru in 1993, E/CN.4/1994/7/Add.2, paragraph 98; European Court of Human Rights, cases: : *Incal vs. Turkey* , *Ciraklar vs. Turkey* (28 October 1998) and *Gerger vs. Turkey* (8 July 1999); Inter-American Commission on Human Rights, Report on the Human Rights situation in Chile, 1985, Doc. OEA/S.R.L./V/II.66, paragraph 140; and Working Group on Arbitrary Detention (document E/CN.4/1997/4/Add.2, 26 November 1996, paragraph 29).
- [2] See, for example, Human Rights Committee: Preliminary Conclusions - Peru, 1996, CCPR/C/79/Add.67, paragraph 12; Concluding Observations- Lebanon, CCPR/C/79/Add.78, paragraph 14; Concluding Observations- Egypt, CCPR/C/79/Add.23; Concluding Observations- Slovakia CCPR/C/79/Add.79, paragraph 20; Concluding Observations- Chile, CCPR/C/79/Add.104, paragraph 9; Concluding Observations- Syria, CCPR/CO/ 71/SYR; ; Concluding Observations- Peru CCPR/CO/ 70/PER; and Concluding Observations- Kuwait, CCPR/CO/ 69/KWT; Report of the Special Rapporteur on extrajudicial executions on his visit to Peru in 1993, E/CN.4/1994/7/Add.2, paragraph 98; European Court of Human Rights, cases: : *Incal vs. Turkey* , *Ciraklar vs. Turkey* (28 October 1998) and *Gerger vs. Turkey* (8 July 1999); Inter-American Commission on Human Rights, Report on the Human Rights situation in Chile, 1985, Doc. OEA/S.R.L./V/II.66, paragraph 140; and Working Group on Arbitrary Detention (document E/CN.4/1997/4/Add.2, 26 November 1996, paragraph 29).
- [3] Inter-American Court of Human Rights. Judgement of 30 May 1999, Case Castillo Petrucci and others vs. Peru, Series C: Decisions and Judgements No. 52, paragraph. 128
- [4] European Court of Human Rights, Judgement of 25 September 2001, Case Sahiner vs. Turkey
- [5] United Nations documents: Concluding Observations and Recommendations - Colombia, CCPR/C/79/Add.2; Concluding Observations and Recommendations - Egypt CCPR/C/79/Add.23; Concluding Observations and Recommendations - Brazil, CCPR/C/79/Add.66; Concluding Observations and Recommendations - Bolivia, CCPR/C/CCPR/C/79/Add.74; Concluding Observations and Recommendations- Lebanon, CCPR/C/79/Add.78; and Concluding Observations and Recommendations - Chile , CCPR/C/79/Add. 104.
- [6] See also: A/50/44, 26 July 1995; A/55/44; 16 November 1999; A/50/44, 26 July 1997; A/53/44, 27 May 1998; A/51/44, 7 July 1996; and A/53/44, 21 November 1997
- [7] See also: Special Rapporteur on Summary Executions (documents E/CN.4/1986/21; E/CN.4/1989/25; E/CN.4/1990/22; E/CN.4/1991/36; E/CN.4/1992/CPR.1; E/CN.4/1993/46; E/CN.4/1994/7/Add.2 and E/CN.4/1995/6); Special Rapporteur on Torture (documents E/CN.4/1990/17; E/CN.4/1994/31; E/CN.4/1995/34; E/CN.4/1995/111; E/CN.4/1996/35/Add.2; E/CN.4/1998/38/Add.2 and E/CN.4/1999/61); Working Group on Disappearances (documents E/CN.4/1989/18/Add.1; E/CN.4/1991/20; E/CN.4/1991/20/Add.1 and E/CN.4/1992/18); and Working Group on Arbitrary Detention (document E/CN.4/1997/4/Add.2, 26 November 1996, paragraph 29).
- [8] See i.e. Inter-American Commission on Human Rights, Report on the human rights situation in Chile, 1985, OEA/S.R.L./V/II.66, paragraph 139; Annual Report, 1984-1985, page. 166; Second Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.84, Doc. 39 rev, 14 October 1993, pages. 96 and 237-238; and Second Report on the Human Rights Situation in Peru , OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paragraph 209.
- [9] Inter-American Court of Human Rights, Case Durand and Ugarte c Peru, Judgement 16 August 2000, Series C. No. 68, paragraphs 117 and 118.
- [10] United Nations Document, CCPR/C/21/Rev.1/Add.11, 31 August 2001, paragraph 16.
- [11] Resolution "Terrorism and Human Rights", 12 December 2001.
- [12] European Court of Human Rights, Judgement of 28 October 1998, Case Ciraklar vs. Turkey and judgement of 8 July 1999, Case Gerger vs. Turkey.
- [13] "Equality in the administration of Justice" Document E/CN.4/Sub.2/296 10 June 1969, paragraph 195. Free Translation from Spanish version.
- [14] Cases: *Duinhof and Duif and others vs. the Netherlands* (1984); and *van der Sluijs, Zuiderveld and Klappe vs. the Netherlands* (1984).
- [15] Resolution 794 (1992) of the United Nations Security Council.
- [16] Report on the Human Rights Situation in Somalia, by the Independent Expert, Ms. Mona Rishmawi, Document of the United Nations E/CN.4/1998/96, 16 January 1998, paragraph 109.
- [17] See, for example, Resolution 1989/32 and Resolution N° 1994/57.
- [18] See , for example, Resolution 1998/3, 20 August 1998.