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Military jurisdiction and international law

Military courts and gross human rights violations [vol.1]

INTERNATIONAL COMMISSION OF JURISTS
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Index

Part II
Military Jurisdiction and National Law

Introduction

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

Dalmo De Abreu Dallari[1]

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

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1 Dalmo De Abreu Dallari, *"Jurisdicciones nacionales y derechos humanos"*, in "Jornadas Internacionales contra la Impunidad, Comisión Internacional de Juristas y Comisión Nacional Consultiva de Derechos Humanos de Francia, Geneva, 1993, p.209. [Spanish original, free translation.]

2 The Situation of Human Rights in Cuba: Seventh Report, document of the Organization of American States OEA/Ser.L/V/II.61, doc. 29, rev. 1, 1983, p.67, paragraph 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Federico Andreu-Guzmán
Senior Legal Adviser
International Commission of Jurists

PART I

MILITARY JURISDICTION AND INTERNATIONAL LAW

Section I
The General Framework

1. International Law and Military Jurisdiction

With the exception of the Declaration on the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on Forced Disappearance of Persons, there are no specific norms, of either a treaty-based or declaratory nature, within international human rights law relating to military offences, military jurisdiction or military "justice". Other fields of international law do contain provisions on military jurisdiction, most of them relating to aspects of international, military[1] or judicial cooperation, or extradition. In the case of extradition, several treaties talk about the notion of a "purely military offence"[2] or "essentially military crimes"[3] while others talk about "offences under military law which are not offences under ordinary criminal law".[4] While in multi-lateral treaties extradition does not apply in principle to military offences[5], this principle has become somewhat tempered

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

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

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

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

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

with the emergence of a large number of bilateral[6] and multi-lateral[7] treaties which include military offences on the list of extraditable offences. The same can be said for judicial cooperation where all texts remit to domestic legislation whenever the treaty in question does not define what is to be understood by a "military offence".[8]

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

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

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

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

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

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

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

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

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

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

12 Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, held at the Netherlands Institute of Human Rights - Studie-en Informatiecentrum Menserecten, (SIM), Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, University of Limburg, Maastrich, special SIM publication, Nº 12, p. 17.

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

2. The State's Duty of Guarantee

In the international sphere, from the moment that the human being was deemed to be a "legal person, endowed with the capacity to have rights and to make use of them before the authorities"[16], the notion that a duty of guarantee was incumbent on the State – as a full international legal person – began to emerge. Dating back to the precedents set by the Treaty of Los Olivos in 1660 and later on the various conventions agreed between States in order to protect their subjects when on foreign territory,[17] each human being is nowadays recognized under international law as a legal person[18]. In the branch of

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

14 *General Comment Nº 29, "States of Emergency (Article 4)"*, adopted on 24 July 2001 during the 1950th meeting, paragraph 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 Inter-American Court of Human Rights, *Judgment of 29 July 1988, Velázquez Rodríguez Case*, in Series C: Decisions and Judgments, Nº 4, paragraphs 166 and 174.

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

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

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

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

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

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

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

30 Inter-American Commission on Human Rights, Report Nº 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 October 1992, paragraph 52.

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

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

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

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

3. The Administration of Justice

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

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

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

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

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

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

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

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

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

38 Resolution 46/120 of 17 December 1991.

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

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

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

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

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

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

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

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

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

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

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

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

45 Resolution AG/Res. 1044 (XX-0/90) of 1990. [Spanish original, free translation.]
46 Resolution N° 2000/47, 25 April 2000.

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

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

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

48 Decision of 13 November 1995, Communication Nº 563/1993, *Case of Nydia Erika Bautista* (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8.2. See also the the Decision of 29 July 1997, Communication Nº 612/1995*, Case of José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.2.

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

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

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

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

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

52 Ibidem.

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

cle 2.3, "constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective."[54] The Committee considers that "[i]t is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights".[55] The Inter-American Court of Human Rights considered that judicial remedies designed to protect non-derogable rights were themselves non-derogable.[56]

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

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

55 Ibid., paragraph 15.

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

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

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

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

5. The Obligation to Investigate

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

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

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

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

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

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

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

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

63 Decision dated 13 November 1995, Communication Nº 563/1993, *Case of Nydia Erika Bautista*, (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8.6. See also the Decision dated 29 July 1997, Communication Nº 612/1995, *Case of José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.8.

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

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

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

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

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

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

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

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

70 Ibid, paragraph 177.

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

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

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

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

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

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

75 Concluding Observations - Venezuela, 26 April 2001, United Nations document CCPR/CO/71/VEN, paragraph 8; Concluding Observations - Kyrgyz Republic, 24 July 2000, document CCPR/C0/69/KGZ, paragraph 7; Concluding Observations - Chile, 30 March 1999, document CCPR/C/79/Add.104, paragraph 10; Concluding Observations - Belarus, 19 November 1997, document CCPR/C/79/add.86, paragraph 9; Concluding Observations – Former Yugoslav Republic of Macedonia, 18 August 1998, document CCPR/C/79/Add.96, paragraph 10; Concluding Observations - Cameroon, 4 November 1999, United Nations document CCPR/C/79/Add.116, paragraph 20; Concluding Observations - Sudan, 19 November 1997, document CCPR/C/79/Add.85, paragraph 12; Concluding Observations – Mauritius, 4 June 1996, document CCPR/C/79/Add.60, literal E; Concluding Observations - Brazil, 24 July 1996, document CCPR/C/79/Add.66, paragraph 22; Concluding Observations - Germany, 18 November 1996, document CCPR/C/79/Add.73, paragraph 11; Concluding Observations - Bolivia, 1 May 1997, document CCPR/C/79/Add.74, paragraph 28; Concluding Observations - Kuwait, 27 July 2000, document CCPR/CO/KWT, paragraph 13; Concluding Observations - Sri Lanka, 23 July 1995, document CCPR/C/79/Add.56, paragraph 30; Concluding Observations - Yemen, 3 October 1995, document A/50/40, section N° 5; Concluding Observations - Guyana, 25 April 2000, document CCPR/C/79/Add.121, paragraph 10; Concluding Observations - Algeria, 18 August 1998, document CCPR/C/79/Add.95, paragraphs 6, 7 and 9; and Concluding Observations - Peru, 25 July 1995, document CCPR/C/79/Add.67, paragraph 22.

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

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

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

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

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

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

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

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

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

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

83 Ibid., paragraph 10 (d).

Arbitrary and Summary Executions set the criteria to be applied in complying with the duty to investigate and stipulate that "thorough, prompt and impartial investigation" is required (Principle 9). The Special Rapporteur on extrajudicial, summary or arbitrary executions has taken the view that failure to abide by the norms laid down in these Principles constitutes an "indicator of government responsibility" even when it cannot be proved that government officials were directly implicated in the summary or arbitrary executions in question.[84] The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[85] stipulates that any act of torture or cruel, inhuman or degrading treatment must be the subject of "impartial investigations" (Principle 7). The same Body of Principles also stipulates that, in the case of the death or disappearance of a person who has been deprived of liberty, "an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case" (Principle 34). The United Nations Rules for the Protection of Juveniles Deprived of their Liberty[86] stipulate that "[u]pon the death of a juvenile in detention, there should be an independent inquiry into the causes of death" (Principle 57). The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which States have been recommended to observe by the United Nations General Assembly,[87] stipulate that "States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial".[88]

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

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

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

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

87 Resolution 55/89 of December 2001.

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

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

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

6. The Obligation to Prosecute and Punish

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

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

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

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

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

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

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

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

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

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

94 Decision dated 13 November 1995, Communication Nº 563/1993, *Case of Nydia Erika Bautista*, (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8.6. See also the Decision of 29 July 1997, Communication Nº 612/1995*, Case of José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8.8.

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

responsible for human rights violations[96]. The Inter-American Court recalled that, in light of its obligations under the American Convention on Human Rights: "The State has a legal duty to […] use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment […]".[97] The Inter-American Court recalled that "punishing those responsible is an obligation incumbent upon the State whenever there has been a violation of human rights, an obligation that must be discharged seriously and not as a mere formality".[98] The Inter-American Court therefore deemed that "the State must ensure that domestic proceedings designed to … punish those responsible for the deeds […] produce the desired effects and, in particular, must refrain from resorting to mechanisms such as amnesties, statutes of limitations or the establishment of measures designed to eliminate responsibility".[99] Along the same lines, the Inter-American Court pointed out that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation… [of] serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law".[100]

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

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

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

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

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

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

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

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

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

103 Ibid, paragraph 173.

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

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

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

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

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

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

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

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

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

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

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

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

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

7. The Right to Reparation

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

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

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

114 See Report of the International Law Commission – 53rd session (23 April to 1 June and 2 July to 10 August 2001), Official Documents of the General Assembly, 56th session, Supplement Nº 10 (A/56/10).

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

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

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

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

8. The Right to the Truth

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

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117 See, for example, the Judgment by the Inter-American Court of Human Rights dated 29 July 1988 in the *Velásquez Rodríguez Case* (paragraph 174 and following) and the Judgment by the European Court of Human Rights dated 31 January 1995 in the case of *Papamichalopoulos v. Greece (Article 50),* in Series A, Nº 330-B , 1995, p. 36.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. Impunity

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

139 Judgment of 8 March 1998, *Paniagua Morales and Others Case,* paragraph 173.
140 United Nations document E/CN.4/Sub.2/1997/20/Rev.1, Annex.

human rights violations (civil and political) and currently under consideration by the United Nations Commission on Human Rights. In article 18, impunity is defined as "a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations".[141] The draft set of principles has been frequently cited by many international human rights mechanisms, in particular, the Inter-American Court of Human Rights[142] and the Inter-American Commission on Human Rights, in their decisions on individual communications.[143]

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

141 Ibidem, Principle 18.

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

143 The Inter-American Commission on Human Rights has used the draft principles drawn up by Independent Expert Louis Joinet as an indispensable referent in the following cases: Report N°136/99, Case 10,488 *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999; Report N° 37/00, Case 11,481 (El Salvador), *Monsignor Oscar Arnulfo Romero y Galdámez*; Report Nº 45/00, Case 10,826 *Manuel Mónago Carhuaricra and Eleazar Mónago Laura* (Peru), 13 April 2000; Report Nº 44/00, Case 10,820, *Américo Zavala Martínez* (Peru) 13 April 2000; Report Nº 43/00, Case 10,670, *Alcides Sandoval and others* (Peru) 13 April 2000; Report Nº 130/99, Case 11,740, *Víctor Manuel Oropeza* (Mexico), 19 November 1999; Report Nº 133/99, Case 11,725, *Carmelo Soria Espinoza* (Chile), 19 November 1999; and Report Nº 46/00, Case 10,904, *Manuel Meneses Sotacuro and Félix Inga Cuya* (Peru), 13 April 2000.

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

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

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

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

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

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

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

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

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

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

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

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

152 Inter-American Commission on Human Rights, Report N° 36/96, Case 10,843 (Chile), 15 October 1996, paragraph 50. See also: Report N° 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 50; Report N° 25/98, Cases 11,505, 11,532, 11,541, 11,546, 11,549, 11,569, 11,572, 11,573, 11,583, 11,585, 11,595, 11,652, 11,657, 11,675 and 11,705 (Chile), 7 April 1998, paragraph 42; Report Nº 136/99, Case 10,488 *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, paragraph 200; Report Nº 1/99, Case 10,480 *Lucio Parada Cea and others* (El Salvador), 27 January 1999, paragraph 107; Report Nº 26/92, Case 10,287 *Las Hojas Massacre* (El Salvador), 24 September 1992, paragraph 6; Report Nº 28/92, Cases 10,147, 10,181, 10,240, 10,262, 10,309 and 10,311 (Argentina), 2 October 1992; and Report N° 29/92 (Uruguay), 2 October 1992.

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

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

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

154 Ibid., paragraph 43.

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

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

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

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

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

10. Military Jurisdiction

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

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

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

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

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

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

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

160 Resolution 1994/67, "Civil Defence Forces", paragraph 2.
161 Resolution 1994/39, paragraph 21.
162 United Nations document E/CN.4/Sub.2/1998/19, Annex.

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

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

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

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

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

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

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

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

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

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

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

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

Section II
International Jurisprudence and Doctrine on Human Rights

A. The Universal System of Human Rights Protection

1. Human Rights Treaty Monitoring Bodies

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

1.1. The Human Rights Committee

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

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

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

> "The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. […] In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14".[1]

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

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

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

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

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

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

2 United Nations document CCPR/C/79/Add.2, 25 September 1992, paragraph 393.
3 United Nations document CCPR/C/79/Add.8, 25 September 1992, paragraph 8.

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

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

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

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

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

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

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4 United Nations document CCPR/C/79/Add.13, 28 December 1992, paragraph 7.
5 Ibid., paragraph 10.
6 United Nations document CCPR/C/79/Add.15 - A/48/40, 28 December 1992, paragraph 369.
7 United Nations document CCPR/C/79/Add.66, 24 July 19996, paragraph 10.
8 United Nations document CCPR/SR.1519 and CCPR/C/SR.1521.
9 United Nations document CCPR/SR.1519, paragraph 49.
10 United Nations document CCPR/C/SR.1521, paragraph 6.

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

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

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

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

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

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

12 Ibid., paragraph 34.

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

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

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

> "the law be amended so as to restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature".[16]

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

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

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

13 United Nations document CCPR/C/79/Add.78, 1 April 1997, paragraph 14.
14 Ibidem.
15 United Nations document CCPR/C/79/Add.104, 30 March 1999, paragraph 9.
16 Ibidem.
17 United Nations document CCPR/CO/71/DOM, 26 April 2001, paragraph 10.

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

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

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

18 United Nations document CCPR/CO/72/GTM, 27 August 2001, paragraph 10.
19 Ibid., paragraph 20.
20 United Nations document CCPR/C/79/Add.74, paragraph 11.
21 United Nations document CCPR/C/79/Add.34, 18 April 1994, paragraph 5.
22 United Nations document CCPR/C/79/Add.92, 18 August 1998, paragraph 7.

court system, they had not lost jurisdiction over cases of military personnel accused of violating human rights. In its Observations to Guinea, the Human Rights Committee welcomed the fact that military courts had been abolished as a result of the Basic Law with constitutional status adopted by referendum on 23 December 1990.[23]

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

It is important to stress that, in several of its observations and recommendations to countries, the Human Rights Committee has taken the general view that the jurisdiction of military courts should be limited to offences which are strictly military in nature and which have been committed by military personnel. For example, in its observations to Egypt, the Human Rights Committee considered that "military courts should not have the faculty to try cases which do not refer to offences committed by members of the armed forces in the course of their duties".[25] In its observations to Chile, the Human Rights Committee stated that "the continuing jurisdiction of Chilean military courts to try civilians does not comply with article 14 of the Covenant. Therefore: The Committee recommends that the law be amended so as to restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature".[26] In its observations to Poland, the Human Rights Committee was "concerned at information about the extent to which military courts have jurisdiction to try civilians (art. 14); despite recent limitations on this procedure, the Committee does not accept that this practice is justified by the convenience of the military court dealing with every person who may have taken some part in an offence primarily committed by a member of the armed forces".[27] In its observations to Cameroon, the Human Rights Committee recommended that the State party

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

24 Decision dated 29 July 1997, Communication Nº 612/1995, Case of *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, United Nations document CCPR/C/60/D/612/1995, 19 August 1997, and the decision dated 13 November 1995, Communication Nº 563/1993, Case of *Nydia Erika Bautista* v. Colombia, United Nations document CCPR/C/55/D/563/1993.

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

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

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

"ensure that the jurisdiction of military tribunals be limited to military offences committed by military personnel".[28] In its observations to Morocco[29], Syria[30], Kuwait[31], the Russian Federation[32], Slovakia[33] and Uzbekistan[34], the Human Rights Committee considered that military courts did not meet the requirements of article 14 of the International Covenant on Civil and Political Rights. In these observations, the Human Rights Committee also recommended that the jurisdiction of military courts be restricted to trying members of the armed forces accused of military offences. In its 1999 observations to Lesotho, while not specifically commenting on military courts, the Human Rights Committee was "concerned about the continuing influence of the military in civilian matters and in particular about the climate of impunity for crimes and abuses of authority committed by members of the military. The Committee strongly urges that measures be taken by the State party to ensure the primacy of civil and political authority".[35]

1.2. The Committee against Torture

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

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28 United Nations document CCPR/C/79/Add.116, 4 November 1999, paragraph 21.
29 United Nations document A/47/40, 23 October 1991, paragraph 57.
30 United Nations document CCPR/CO/71/SYR, paragraph 17.
31 United Nations document CCPR/CO/69/KWT, paragraph 10.
32 United Nations document CCPR/C/79/Add.54, 29 July 1995, paragraph 25.
33 United Nations document CCPR/C/79/Add.79, paragraph 20.
34 United Nations document CCPR/CO/71/UZB, 26 April 2001, paragraph 15.
35 United Nations document CCPR/C/79/Add. 106, paragraph 14.
36 Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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

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

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

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

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37 United Nations document A/50/44, 26 July 1995, paragraph 69.
38 Ibid., paragraph 73.
39 United Nations document A/55/44, 16 November 1999, paragraph 61.
40 Ibid., paragraph 62.
41 United Nations document A/51/44, 9 July 1996, paragraph 76.
42 Ibid., paragraph 80.

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

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

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

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

1.3. The Committee on the Rights of the Child

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

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

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

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

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

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

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

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

2. The Commission on Human Rights

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

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

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

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

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

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

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

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

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

In his 1983 report to the Commission on Human Rights, the Special Rapporteur presented a general picture of the situations in which extrajudicial executions had tended to occur between approximately 1965 and 1983.[53] The Rapporteur noted that death sentences were almost always passed by a special tribunal, special military tribunal or revolutionary tribunal which did not comply with procedural norms. According to the Special Rapporteur, in many countries, special tribunals, such as military tribunals, had been set up after the fall of the previous government. Such courts imposed death sentences without following appropriate procedures. The Rapporteur described how, in one country, following an attempted coup to overthrow the head of government, special military tribunals had been set up to try those believed to be responsible for the coup attempt as well as for the deaths of government officials that had occurred during it. Executions went on for a year and hundreds of people were allegedly executed on the orders of the said tribunals with total disregard for procedural safeguards.[54]

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

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

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

54 Ibid., paragraphs 75 to 76.

55 Ibid., paragraph 78.

56 Ibid., paragraph 82.

57 Ibidem. [Spanish original, free translation.]

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

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

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

58 Ibidem.

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

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

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

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

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

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

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

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

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

65 Ibid., paragraph 186.

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

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

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

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

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

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

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

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

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

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

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

> ted offences while in service, regardless of the nature of the offence".[70]

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

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

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

In the same report, the Special Rapporteur said that:

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

70 Ibid., paragraph 50. [Spanish original, free translation.]
71 Ibid., paragraph 98. [Spanish original, free translation.]
72 Ibid., paragraph 99. [Spanish original, free translation.]
73 United Nations document E/CN.4/1995/111, 16 January 1995, paragraph 89.

> includes anything that a member of the armed forces may do while in uniform".[74]

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

> "Explicitly excluding from military jurisdiction the crimes of extrajudicial, summary or arbitrary execution, torture and enforced disappearance".[75]

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

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

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

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

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74 Ibid., paragraph 90.

75 Ibid., paragraph 120 (f).

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

77 Ibid., paragraph 343.

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

> "In the vast majority of alleged extrajudicial, summary or arbitrary executions brought to the attention of the Special Rapporteur over the past three years, sources report that either no investigation at all has been initiated, or that investigations do not lead to the punishment of those responsible. In many countries where perpetrators of human rights violations are tried before military courts, security forces personnel escape punishment due to an ill-conceived *esprit de corps*. […]
>
> The reports and allegations received indicate that breaches of the obligation to investigate alleged violations of the right to life and punish those responsible occur in most of the countries the Special Rapporteur is dealing with in the framework of his mandate. The Special Rapporteur reiterates his appeal to all Governments concerned to provide for an independent civilian justice system with an independent and competent judiciary and full guarantees for all those involved in the proceedings. Where national legislation provides for the competence of military tribunals to deal with cases involving violations of the right to life by members of the security forces, such tribunals must conform to the highest standards required by the pertinent international instruments as concerns their independence, impartiality and competence. The rights of defendants must be fully guaranteed before such tribunals, and provision must be made to allow victims or their families to participate in the proceedings".[79]

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

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

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78 Ibid., paragraphs 125 and 183 respectively.

79 Ibid., paragraphs 402 and 403.

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

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

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

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

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

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

82 Ibid., paragraph 81 (a).

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

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

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

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

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

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

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

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

84 United Nations document E/CN.4/1999/39, 6 January 1999, paragraph 67.
85 United Nations document E/CN.4/1999/39/Add.1, 6 January 1999, paragraph 62.
86 Ibid., paragraphs 66, 72, 172 and 216 respectively.
87 United Nations document E/CN.4/2000/3/Add.3, 25 November 1999, paragraph 44.

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

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

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

2.2. The Special Rapporteur on Torture

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

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

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

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

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

90 Ibid., paragraph 62.

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

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

In his 1988 report to the Commission on Human Rights, when referring to his visit to Uruguay[93], the Special Rapporteur said he had received information confirming that one of the reasons why, under the military dictatorship, civilian judges were often powerless to defend the human rights of citizens was that military courts had jurisdiction over 'crimes' which were considered to be related to domestic security. Following the return to democracy, the Supreme Court restored the old law, which stated that "all offences mentioned in the Penal Code must be tried in the civil courts with no account being taken of whether the persons who committed them were civilians or members of the military, while the jurisdiction of the military courts is restricted to typically military offences".[94]

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

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

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

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

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

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

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

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

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

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97 Ibid., paragraph 187(b). [Spanish original, free translation.]
98 United Nations document, E/CN.4/1990/17, paragraph 212.
99 Ibid., paragraph 216(e). [Spanish original, free translation.]
100 Ibid., paragraph 235.
101 Ibid., paragraph 249. [Spanish original, free translation.]
102 Ibid., paragraph 254 (c).

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

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

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

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

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

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

106 Ibid., paragraph 274 (d).

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

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

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

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

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

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

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

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

108 Ibid., paragraph 80 (k).

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

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

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

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

> "As for the military justice system, measures must be taken in order to ensure its conformity with the standards of independence, impartiality and competence required by the pertinent international instruments. Due regard should be given, in particular, to the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985, and endorsed by the General Assembly in resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Thus, an important step forward would be a substantial reform of the code of military justice, along the lines suggested, *inter alia*, by the *Procuraduría General*. These reforms would need to include the following elements: […]
>
> "(f) Explicitly excluding from military jurisdiction the crimes of extrajudicial, summary or arbitrary execution, torture and enforced disappearance.
>
> "Furthermore, the organ deciding in conflicts of competence between the civilian and the military justice systems should be composed of independent, impartial and competent judges".[112]

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

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

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

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

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

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

In his report on his visit to Romania, having found that responsibility for investigating cases of torture and ill-treatment committed by the police fell to military prosecutors who, according to Law Nº 54/1993, could only be military officials on active service, the Special Rapporteur recommended that:

> "Legislation should be amended to transfer the power to investigate claims of police abuse and torture from military to civilian prosecutors". [116]

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

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

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

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

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

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

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

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

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

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

117 United Nations document E/CN.4/2000/9 /Add.2, 11 November 1999, paragraph 59.
118 Ibid., paragraph 78.
119 United Nations document E/CN.4/2001/66/Add.2, 30 March 2001, paragraph 156.

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

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

2.3. The Working Group on Enforced or Involuntary Disappearances

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Working Group recommended that the Sri Lanka authorities:

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

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

125 United Nations document E/CN.4/1989/18/ Add. 1, paragraph 136.
126 United Nations document E/CN.4/1991/20/Add. 1, paragraph 166.
127 United Nations document E/CN.4/2000/64/Add.1, 21 December 1999, paragraph 29.
128 Ibid., paragraph 63.

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

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

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

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

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

129 United Nations document E/CN.4/2002/79, 18 January 2002, paragraph 364.
130 United Nations document E/CN.4/1998/39/Add.1, paragraph 79.
131 Ibid., paragraph 133.

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

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

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

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

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

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

132 Ibid., paragraph 80.
133 Ibid., paragraph 133.
134 United Nations document E/CN.4/1998/39/Add.2, 30 March 1998, paragraph 130.
135 Ibidem.
136 Ibid., paragraph 132.

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

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

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

Lastly, the Special Rapporteur concluded that:

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

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

137 Ibid., paragraph 133.
138 Ibid., paragraph 140.
139 Ibidem.
140 Ibid., paragraphs 170 and 172.
141 United Nations document, E/CN.4/2002/72/Add.1, 24 January 2002, paragraph 78.

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

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

2.5. The Working Group on Arbitrary Detention

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

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

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

142 Ibid., paragraph 192 (d).

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

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

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

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

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

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

145 Ibid., paragraph 35 (i).
146 United Nations document E/CN.4/2002/77/Add.2, 5 March 2002.
147 Ibid., paragraphs 77 and 115.

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

> "The parties responsible, by commission or omission, for violations of the rights of human rights defenders should be tried by the ordinary justice system and punished. Appropriate compensation to the victims should be awarded. The fight against impunity should also imply the strengthening of judicial institutions by guaranteeing the competence, efficiency, security and independence of all institutions and persons in charge of investigation, prosecution and judicial examination of complaints of human rights violations.
>
> "[…] the Government [should] guarantee the independence of the judiciary and adopt special measures to strengthen the protection mechanisms for judges, prosecutors, investigators, victims, witnesses and threatened persons. Ruling No. C-358 of 1997 and No. C-361 of 2001 of the Constitutional Court should be fully implemented so that cases involving violations of human rights and humanitarian law no longer be sent to military courts".[149]

2.7. Country Mechanisms

2.7.1. Guatemala

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

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

148 United Nations document E/CN.4/2002/106/Add.2, 17 April 2002, paragraph 183.
149 Ibid., paragraphs 286 and 297.

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

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

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

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

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

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

152 Ibidem. [Spanish original, free translation.]

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

> "the strict limitation of military jurisdiction to the hearing and trial of cases involving military offences".[154]

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

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

2.7.2. Equatorial Guinea

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

> "Restrict the scope of military jurisdiction to cases involving strictly military offences, committed by military personnel". [157]

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

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153 United Nations document E/CN.4/1995/15, 20 December 1994, paragraph 57.
154 Ibid., paragraph 186.
155 United Nations document E/CN.4/1996/15, 5 December 1995, paragraph 129.
156 United Nations document E/CN.4/1994/56, paragraph 56.
157 Ibid., paragraph 103.
158 United Nations document E/CN.4/1996/67, paragraph 85.

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

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

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

159 United Nations document E/CN.4/1997/54, paragraph 98.
160 United Nations document E/CN.4/2000/40, paragraph 69.
161 Ibid., paragraph 71.
162 Ibid., paragraph 137.

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

2.7.3. Somalia

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

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

Throughout its work, the Sub-Commission on the Promotion and Protection of Human Rights[168] has addressed the issue of military courts and, in particular, the question of the use of military or special tribunals to try military and police personnel for human rights violations. Perhaps one of the first forays into this area was undertaken by the Sub-Commission's Special Rapporteur on Equality in the Administration of Justice, Mr. Mohammed Abu Rannat, in his 1969 study on equality in the administration of justice. When addressing the issue of military courts being made up of armed forces officials who are

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

164 United Nations Security Council Resolution 794 (1992).

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

166 Ibid., paragraph 115.

167 Ibid., paragraph 120.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

176 United Nations document E/CN.4/Sub.2/1995/18, 28 June 1995, paragraph 17.
177 United Nations document E/CN.4/Sub.2/1996/18.
178 United Nations document E/CN.4/Sub.2/1997/20/Rev.1, paragraph 38.
179 United Nations document E/CN.4/Sub.2/1997/20/Rev.1, Annex.
180 Ibidem.

3.3. The Expert on the right to reparation

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

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

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

3.4. Special Rapporteurs on the right to a fair trial

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

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

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

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

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

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

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

3.6. The Sessional Working Group on the Administration of Justice

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

During the 2001 session of the Sub-Commission, the Rapporteur submitted an interim report on the administration of justice through military courts[189] to the Working Group on the Administration of Justice.[190] In his report to the Working Group, the Rapporteur sought to identify trends and, secondly, to elaborate guidelines or benchmarks for governments engaged in reforming their systems of military justice.[191]

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

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

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

186 Ibid, paragraph 283.

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

188 Ibid., paragraph 43.

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

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

191 Ibid., paragraph 30.

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

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

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

4. Other Mechanisms

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

4.1. ONUSAL

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

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

193 Ibid., p. 5.

194 Ibid., paragraph 30.

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

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

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

4.2. MINUGUA

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

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

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

4.3. OFACONU

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

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

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

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

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

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

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

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

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

201 Ibid., paragraph 121.

202 Ibid., paragraph 164.

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

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

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

B. The European System of Human Rights Protection

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

203 United Nations document E/CN.4/1999/8, 16 March 1999, paragraph 61.
204 Ibid., paragraph 63.

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

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

In another case[206], the European Court considered that, while impartiality normally denotes the absence of prejudice or bias, its existence or otherwise could be tested in two ways. "A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect." However, these are not enough on their own. The European Court, opting for the second approach, considered that the fact that a judge had participated at an earlier stage, albeit in a different capacity to that of trial judge, for example, as a member of the public prosecutor's department, could raise well-founded doubts about whether he had dealt with the case impartially.

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

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

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

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

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

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

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

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207bis Ibid., paragraph 72.

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

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

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

C. The Inter-American System of Human Rights Protection

Neither the American Declaration on the Rights and Duties of Man nor the American Convention on Human Rights contain any specific provisions on the question of military courts. Nevertheless, it is worth noting that the right to a fair trial and the right to a simple and prompt judicial remedy are enshrined in both the Declaration and the Convention.[211] The Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women also do not contain any provisions relating to military courts. However, the inter-American system of human rights protection stands out as being the only one with a treaty that specifically restricts military jurisdiction over human rights violations. The Inter-American Convention on Forced Disappearance of Persons[212] expressly states that members of the military or other state actors involved in forced disappearances shall not enjoy military jurisdiction. Article IX states:

> "Persons alleged to be responsible for the acts constituting the offence of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.
>
> "The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties".

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

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

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

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

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

1. The Inter-American Court of Human Rights

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

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

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

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

214 Ibid., paragraph 84.

215 Ibid., paragraph 85.

216 Ibid., paragraph 88.

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

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

> "declare that the enforceability of Article 54, paragraphs 2 and 3 of the Military Code of Justice analyzed in confidential Report Nº 29/93, is incompatible with the purpose and objective of the American Convention on Human Rights, and that it must be adjusted to the latter in conformity with the commitments acquired pursuant to Article 2 thereof".[218]

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

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

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

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

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

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

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

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

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

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

> "In a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offences that by its own nature attempt against legally protected interests of military order. […]
>
> "In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate death toll. Thus, the actions which brought about this situation cannot be considered as military felonies, but common crimes, so investigation and punishment must be placed on the ordinary justice, apart from the fact that the alleged active parties had been military or not".[222]

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

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

223 Ibid., paragraph 122.

224 Ibid., paragraph 125.

225 Ibid., paragraph 126.

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

1.2. Military jurisdiction and civilians

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

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

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

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

226 Ibid., paragraphs 131 and operative paragraph 5.

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

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

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

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

> "[…] under Peru's Code of Military Justice, military courts are permitted to try civilians for treason, but only when the country is at war abroad. A 1992 decree-law changed this rule to allow civilians accused of treason to be tried by military courts regardless of temporal considerations. In the instant case, DINCOTE was given investigative authority, and a summary proceeding 'in the theatre of operations' was conducted, as stipulated in the Code of Military Justice".[230]
>
> "[…] several pieces of legislation give the military courts jurisdiction for the purpose of maintaining order and discipline within the ranks of the armed forces. Application of this functional jurisdiction is confined to military personnel who have committed some crime or were derelict in performing their duties, and then only under certain circumstances. This was the definition in Peru's own law (Article 282 of the 1979 Constitution). Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes

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

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

> jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.[231] […]
>
> "In the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have. Moreover, under the Statute of Military Justice, members of the Supreme Court of Military Justice, the highest body in the military judiciary, are appointed by the minister of the pertinent sector. Members of the Supreme Court of Military Justice also decide who among their subordinates will be promoted and what incentives will be offered to whom; they also assign functions. This alone is enough to call the independence of the military judges into serious question".[232]

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

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

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

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

231 Ibid., paragraph 128.
232 Ibid., paragraph 130.
233 Ibid., paragraph 129.
234 Ibid., paragraph 132.

> Convention, which refers to the right to a fair trial before a competent, independent and impartial judge".[235]

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

2. The Inter-American Commission on Human Rights

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

2.1. General Considerations

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

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

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

236 Ibid., paragraph 112.

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

238 Ibid., Conclusions, paragraph g.

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

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

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

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

240 Ibid., Chapter IV, paragraph 19.

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

242 Ibid., Conclusions, paragraph No 5.

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

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

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

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

244 Ibidem.

245 Ibid., Recomendation No 4, paragraph 2.

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

247 Ibid., paragraph 140.

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

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

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

> "9. Adopt the following measures concerning procedural and defence guarantees during trial:
>
> a) Provide those brought to trial before military courts with guarantees for a fair trial, especially the right of the accused to be defended by a lawyer of his choice.
>
> b) Appoint a commission of qualified lawyers to study the trials

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

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

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

252 Ibidem. [Spanish original, free translation.]

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

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

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

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

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

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

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

256 Ibidem.

257 Annual Report of the Inter-American Commission on Human Rights - 1998, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Report Nº 20/99, Case 11,317, *Rodolfo Robles Espinoza and children (Peru),* paragraph 151.

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

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

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

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

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

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

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

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

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

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

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

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

a. Brazil

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

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

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

263 Ibid., Chapter VII, Section 3.

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

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

b. Colombia

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

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

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

265 Ibid., Chapter III, Conclusions.

266 Ibid., Chapter III, paragraph 95.

267 Ibidem.

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

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

The Commission concluded that in Colombia:

> "The military tribunals do not guarantee that the right to a fair trial will be observed, since they do not have the independence that is a condition *sine qua non* for that right to be exercised. Moreover, their rulings have frequently been biased and have failed to punish members of the security forces whose involvement in very serious human rights violations has been established".[270]

In its Third Report on Colombia in 1999, the Commission pointed out that the "problem of impunity is aggravated by the fact that the majority of cases involving human rights violations by members of the State's public security forces are processed by the military justice system. The Commission has repeatedly condemned the military jurisdiction in Colombia and in other countries for failing to provide an effective and impartial judicial remedy for violations of Convention-based rights, thereby insuring impunity and a denial of justice in such cases. In Colombia specifically, the military courts have consistently failed to sanction members of the public security forces accused of committing human rights violations"[271] and added that "cases of human rights violations tried in the military courts are protected by impunity".[272]

The Commission went on to say that the "problem of impunity in the military justice system is not tied only to the acquittal of defendants. Even before the final decision stage, the criminal investigations carried out in the military justice system impede access to an effective and impartial judicial remedy. When the military justice system conducts the investigation of a case, the possibility of an objective and independent investigation by judicial authorities which do not form part of the military hierarchy is precluded. Investigations into the conduct of members of the State's security forces carried out by other members of those same security forces generally serve to

269 Ibid., p.96.

270 Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, Doc. 39 rev. 14 October 1993, pp. 237-238.

271 Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 Rev. 1, 26 February 1999, Chapter V, paragraph 17.

272 Ibid., paragraph 18.

conceal the truth rather than to reveal it. Thus, when an investigation is initiated in the military justice system, a conviction will probably be impossible even if the case is later transferred to the civil justice system. The military authorities will probably not have gathered the necessary evidence in an effective and timely manner. In those cases which remain in the military justice system, the investigation will frequently be conducted in such a manner as to prevent the case from reaching the final decision stage".[273]

The Commission concluded that "[t]he military criminal justice system has several unique characteristics which prevent access to an effective and impartial judicial remedy in this jurisdiction. First, the military justice system may not even be properly referred to as a true judicial forum. The military justice system does not form part of the judicial branch of the Colombian State".[274] Furthermore, judges within the military justice system are generally members of the army in active service. In 1995, the Constitutional Court interpreted the Constitution as only allowing retired officers to serve on courts martial. The Court said in this context that "the social conflict situation faced by the country for the last several years places members of the forces of public order . . . in a situation where they must participate in the different repressive actions required to subdue the enemies of the [institutional] order and, at the same time, serve as judges of the excesses committed in the course of those actions which constitute crimes".[275]

The Commission pointed out that under military justice "the proceeding takes place within the hierarchy of the security forces. The members of the courts martial respond hierarchically to their superiors in almost all aspects of their lives as soldiers or police officers [...] It is thus difficult, if not impossible, for these individuals to become independent and impartial judges free from the influence of their commanders or other superiors. As noted above, their commanders may also have ordered and directed the very operation which they are asked to analyze as members of a court martial. Their commanders may face responsibility if any irregularities are found. This situation may lead to pressure by commanders on the courts martial or outright orders designed to obtain a verdict absolving soldiers of all responsibility for any acts they allegedly committed in violation of human rights".[276] "Also, throughout the proceedings in the military justice system, members of the military are engaged in judging the actions of their military colleagues, making impartial-

273 Ibid., paragraph 19.
274 Ibid., paragraph 20.
275 Ibid., paragraph 21.
276 Ibid., paragraph 25.

ity difficult to achieve. Members of the military often feel bound to protect their colleagues who fight by their side in a difficult and dangerous context".[277]

The Commission pointed out that "certain crimes truly relating to military service and military discipline may be tried in military tribunals with full respect for judicial guarantees […] The Commission considers, however, that various state entities have interpreted excessively broadly the notion of crimes committed in relation to military service".[278]

As to the fact that military courts, rather than civilian ones, usually carried out investigations into cases of the extrajudicial execution of minors attributed to the National Police, the Commission considered that it constituted a denial of the rights to "due process and judicial protection… [of] the victims and their families" [and that] "[m]ilitary courts are not independent courts that carry out serious and impartial investigations of flagrant human rights violations committed by members of the military or the police, such as the extrajudicial killing of street children".[279]

Lastly, the Commission recommended the Colombian State to adopt "all measures necessary and consistent with its international legal obligations to ensure that the jurisdiction of the military justice system is limited to crimes truly related to military service. In this regard, the State should ensure that cases involving serious human rights violations are not processed by the military justice system".[280]

c. Chile

In its 1985 report on Chile, the Commission pointed out that "the scope of military criminal jurisdiction in Chile was particularly broad. Three reasons have been adduced to explain this fact: first, that the classification of criminal acts in the Code of Military Justice includes crimes that may be committed by civilians; second, that it may include common crimes committed by military personnel or by civilians employed by the Armed Forces, under a given set of circumstances; and third, that military law extends to civilians as partners in

277 Ibid., paragraph 26.

278 Ibid., paragraph 27.

279 Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter XIII, paragraph 44.

280 Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, Doc. 9 Rev. 1, 26 February 1999, Chapter V, Recommendation No. 6.

crime, accessories or by means of a combination of crimes".[281] The Commission concluded that the process of expansion of military justice in Chile:

> "has gradually eroded the jurisdiction of the ordinary courts and has been marked by a clear ambivalence. On the one hand, it has incorporated into military jurisdiction a group of political acts performed by civilians—such as clandestine entry into the country or activities connected with the recess of political parties, for example—through the corresponding characterization or the introduction of new forms of assignment of subject-matter jurisdiction. Furthermore, jurisdiction over common crimes has been transferred to the military courts for the sole fact that they have been executed by military personnel or members of the security forces or because they have been committed in military or police establishments. This ambivalence cannot but adversely affect the exercise of the right to a fair trial, especially if it is collated with the changes introduced into the composition of the military courts and the way in which they have decided certain cases submitted to them".[282]

The Commission also pointed out that:

> "[t]he widespread and virtually routine intervention of 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".[283]

The Commission added that "the serious limitations peace-time military courts suffer from are further accentuated in the case of war-time courts. The lack of independence of those who exercise military jurisdiction in this case is obvious and there is a complete lack of permanent tenure or legal training.

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281 Inter-American Commission on Human Rights : Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc. 17 rev.1, 9 September 1985, Chapter VIII, Right to a Fair Trial and Due Process, paragraph 108.

282 Ibid., paragraph 138

283 Ibid., paragraph 143.

For its part, the Supreme Court declared it[self] incompetent to try on appeal the judgments handed down by the Courts Martial, as explained in this chapter. The lengthy period during which they were in operation, added to the acts submitted to their jurisdiction pursuant to provisions issued by the Government Junta, show the serious violation of the right to a fair trial resulting from the exercise of the jurisdiction assigned to them".[284] The Commission referred to "the ambivalence that has marked the process through which the jurisdiction of the military courts has been progressively extended" [and which] "results, on the one hand, from the inclusion of political acts into the ambit of military jurisdiction, although they are performed by civilians, and submits to it, on the other hand, common crimes that are committed by personnel of the security forces or in military or police establishments. The consequence of this phenomenon has been a differentiated treatment by the military courts according to the agent they are charged with trying".[285]

In the same report, the Commission pointed out that, bearing in mind "the extension of military jurisdiction in Chile, the composition and functions assigned to Military Courts and the way in which they have decided some cases", [it has been possible to conclude] "that the system established violates the right to a fair trial and radically affects the principle of equality before the law". The Commission was also of the opinion that "the actions of those courts have served to provide a veil of formal legality to the impunity enjoyed by the members of the Chilean security forces when they have been involved in flagrant violations of human rights".[286] It also pointed to the fact that it was not possible to appeal against judgments handed down by military courts in Chile and considered that such courts "affect[…] the guarantees of due process, in that the power to try and apply the law is given, as pointed out in the preceding section, to a court composed of military personnel without legal training of any kind who, in addition, lack an essential attribute of every judge; permanent tenure and, consequently, independence". The Commission added that the fate of the accused depended on "the judgment of a general in active service, in command of troops and directly subordinate to the President. This military chief, furthermore, may convert an acquittal into a verdict of guilty".[287]

Lastly, the Commission believed that the tendency to extend the jurisdiction of military courts in Chile, together with the nature of their composition and functions and the manner in which they had decided certain specific cases,

284 Ibid., paragraph 149.
285 Ibid., paragraph 150.
286 Ibid., paragraph 165.
287 Ibid., paragraph 173.

made it possible "to conclude that the established system violates the right to justice and profoundly affects the principle of equality before the law".[288] The Commission also believed that "in practice, the actions of these courts have served to provide veneer legality to cover-up the impunity, which the members of the Chilean Security Forces enjoy when they are found to be involved in flagrant violations of human rights".[289] The Commission also concluded that "with regard to… the right to due process, in practice, the Chilean Government has committed serious violations of fundamental principles related to the observance of that right",[290] because "[t]he procedures carried out by both kinds of military tribunals [peace-time and war-time] charged with judging a broad range of offences are in blatant contradiction […] with the international instruments to which Chile is party [...] All the above permits the Commission to declare that the rule of law, at present, does not exist in Chile, which has permitted the occurrence of the serious violations which have been described in this report".[291]

In its 1987-1988 Annual Report, the Commission pointed out, that "regarding cases of torture and ill-treatment, it must be said first of all that the judicial proceedings are continuing in many cases without any responsibility being fixed. These cases are still handled by the military courts when it is found that the charges involve security personnel. This was why the Commission, the Government of Chile having signed the American Convention for the Prevention and Punishment of Torture, asked that Government to take the necessary steps to have the cases transferred to the civilian courts".[292]

In the conclusions to its 1990 report on Chile, the Commission concluded that "military courts do not guarantee the exercise of the right to justice since they lack the independence that is a basic requirement of the exercise of that right; in addition, they have shown marked partiality in the judgments they have handed down. Thus, the grave sanctions imposed on persons who have committed acts deemed attempts against the security of the State have been in manifest contrast with the total lack of sanctions imposed on members of the security forces who have been involved in extremely serious violations of human rights".[293] The Commission stated that "[t]he independence of the

288 Ibid., paragraph 180.

289 Ibidem.

290 Ibid., paragraph. 181

291 Ibidem.

292 Annual Report of the Inter-American Commission on Human Rights , 1987-1988, OEA/Ser.L/V/II.74, Doc. 10 rev. 1, Chapter IV, Chile, 16 September 1988.

293 Report on the Situation of Human Rights in Chile; OEA/Ser.L/V/II.66, doc. 17 rev.1, OAS, 1985, The Right to Due Process and Military Jurisdiction in Chile, Recommendation 8.

courts and judges from the Executive is one of the fundamental conditions of the administration of justice. Permanent tenure (*inamovilidad*) and appropriate professional training are prerequisites for ensuring independence".[294] The Commission also considered that a military officer in active service, as well as being "subordinate to his authorities and, therefore, lacking functional independence […] also lacks permanent tenure and, in addition and for reasons of his profession, […] does not have the legal training required of a judge".[295]

The Commission concluded that "in practice, the actions of these courts have served to provide veneer legality to cover-up the impunity, which the members of the Chilean Security Forces enjoy when they are found to be involved in flagrant violations of human rights".[296]

d. Ecuador

In 1997, the Commission recommended that the State of Ecuador should adopt "the internal measures necessary to limit the application of the special jurisdiction of police and military tribunals to those crimes of a specific police or military nature, and to ensure that all cases of human rights violations are submitted to the ordinary courts".[297]

Two years later, referring to the National Security Law, which established that during a state of emergency acts resulting in certain breaches of that law and punishable with imprisonment should be tried under the provisions of the Military Criminal Code, the Commission noted that the latter gave military courts total jurisdiction over civilians. The Commission considered this to be incompatible with, and in breach of, article 27 (2) of the American Convention which states that certain rights and freedoms, together with "the judicial guarantees essential for the protection of such rights", cannot be suspended.[298] The Commission pointed out that "giving the military criminal

294 Ibid., paragraph 139.

295 Ibid., paragraph 140.

296 Ibid., paragraph 180.

297 Inter-American Commission on Human Rights : Report on the Situation of Human Rights in Ecuador; OEA/Ser.L/V/II.96, Doc. 10 Rev. 1, 1997, Chapter III, The Right to Judicial Recourse and the Administration of Justice in Ecuador.

298 Annual Report of the Inter-American Commission on Human Rights 1998, OEA/Ser.L/V/II.102, Doc. 6 Rev. 16, April 1999, Chapter V(I), paragraph 46.

courts immediate jurisdiction over a wide range of situations involving civilians undermines the right to a trial before an independent, impartial court: this is because the armed forces play a dual role - first, they are active agents during the state of emergency and, second, the military courts administer justice with regard to actions affecting civilians that are not an inherent part of military functions".[299] The Commission urged the Ecuadorian State "to ensure that crimes involving civilians - and especially those alleging violations of basic rights by soldiers or police officers during the state of emergency - are dealt with by the civil courts and not by military justice in accordance with the rules of due legal process set forth in Articles 8 and 25 of the American Convention and, when applicable, to ensure that the perpetrators are punished and that the victims receive restitution for the human rights violations suffered". [300]

e. Guatemala

With regard to military courts in Guatemala, the Commission said that "the rights to a fair trial and judicial protection envisaged in articles 8 and 25 of the American Convention have also reportedly not been implemented or have been ineffective, due mainly to the fact that those who exercise judicial power are chosen and appointed by the same local military authorities against whom complaints and reports about human rights violations are being made".[301]

In its Report on the Situation of Human Rights in Guatemala, the Commission, when discussing the Special Courts set up by the government of General Efraín Ríos Montt, pointed out that such courts "did not provide the most elementary guarantees of due process".[302] At the same time, it added that "[w]ith regard to the right to counsel, […] none of the accused […] had counsel to guide them and give them legal advice and professional aid before their statement was taken. The families of the persons who were tried and executed endeavored unsuccessfully to appoint lawyers as counsel, without […] obtaining any results from their efforts".[303] "The other due process

299 Ibid., Chapter V(I), paragraphs 46 and 48.

300 Ibid., Chapter V(I), paragraph 49.

301 Annual Report of the Inter-American Commission on Human Rights, 1984-1985, p. 166, Guatemala. [Spanish original, free translation.]

302 Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.61 Doc. 47, 3 October 1983, Chapter IV(C), paragraph 31.

303 Ibid., Chapter IV(C), paragraph 32.

guarantees […] have also been violated" including "the right of being placed under the jurisdiction of a competent, independent and impartial court".[304]

In the view of the Commission, the Special Courts suffered from the following procedural defects, among others: "a) Their jurisdiction was very broad, since they covered both political crimes and common crimes related to political crimes, as well as all common crimes […] d) A system of Special Courts was established, with other factors determining their jurisdiction being unknown".[305]

The Commission concluded that trials conducted by the Special Courts, which failed to respect the minimum guarantees of due process, "truly constituted a farce and regardless of where they might occur the practice of appointing unqualified judges, defenders who do not defend, a Public Ministry unconcerned with the prompt, fair and effective administration of justice and Law Courts that really are courts martial, devoid of independence and impartiality, that function in secret under military auspices, in fact impede rather than foster justice."[306] The Commission recommended that the Guatemalan Government should "order a complete review of the trials of the Special Courts".[307]

In its 1996 annual report, the Commission welcomed the decision by the Guatemalan Congress to amend the Military Code so that it would not apply to members of the armed forces implicated in ordinary criminal offences. This measure was seen by the Commission as important in reducing the power of the military courts and ensuring that ordinary courts would have jurisdiction over military personnel who committed criminal offences contained in the Criminal Code. The jurisprudence developed by the Commission confirms that violations of human rights, in particular, rightfully pertain to the Penal Code and the jurisdiction of the ordinary criminal courts.[308]

f. Paraguay

In its report on Paraguay in 2001, the Commission pointed out that "Paraguay's international obligation as a State party to the American Convention, in line with Article 1(1), is to ensure the free and full exercise of

304 Ibid., paragraph 33.
305 Ibid., paragraph 35.
306 Ibid., paragraph 36.
307 Ibid., Recommendation N° 2 .
308 Annual Report of the Inter-American Commission on Human Rights - 1996, OEA/Ser.L/V/II.95, Doc. 7 rev. 1, Chapter V(3), paragraph 14.

the human rights enshrined in the Convention. […] This includes the obligation of the States to prevent, investigate, and punish any violation of the rights recognized in the Convention; to seek the restoration of the right violated; and, as appropriate, to compensate the harm caused by the human rights violation". At the same time, the Commission reiterated the view that:

> "Hemispheric experience suggests that in those States in which massive and systematic human rights violations take place, there has been a tendency for such crimes to go unpunished. In some cases, it is a question of *de facto* impunity, […] or because State organs that lack the necessary independence and impartiality are in charge of determining the responsibilities of their own members, as is the case of the military courts".[309]

g. Peru

In 1992, the Commission said that "[t]he scope of the military jurisdiction—which is exercised in respect of those who are *prima facie* responsible for violations of the human rights of the people, including members of the judiciary—in the emergency zones, i.e. in half of the country, is not compatible with the guarantee of trial by an independent and impartial court specified in Article 8(1) of the American Convention on Human Rights".[310]

In its analysis of the human rights situation in Peru in 2000, the Commission reiterated the doctrine that military justice can only be applied to military personnel who have committed offences in the line of duty (*'delitos de función'*) and that military courts do not have the independence and impartiality required to sit in judgment on civilians. The Commission recalled that the Inter-American Court had confirmed "that the purpose of the military jurisdiction is to maintain order and discipline in the Armed Forces; in this regard, it is a functional jurisdiction whose application should be reserved to those members of the military who have committed offences or violations in the performance of their duties, under certain circumstances". In the same vein, it pointed out that "principle (5)(f) of the Singhvi principles provides that the jurisdiction of military courts should be circumscribed to offences related to military service, and that one should have the right to appeal the decisions of

309 Third Report on the Situation of Human Rights in Paraguay, OEA/Ser./L/VII.110, 2001, Impunity and Human Rights Violations under the Dictatorship (1954-1989), paragraphs 21 and 22.

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

those courts to a legally qualified appellate court or to pursue a remedy to move for annulment".[311]

In response to the Peruvian State's assertion that exceptional jurisdictions were not prohibited under the American Convention on Human Rights and that the Inter-American Court had not indicated what the grounds were for establishing the doctrine that military courts lacked the independence and impartiality required to try civilians, the Commission referred to a paragraph in the Court's judgment on the case of *Castillo Petruzzi and others*, in which it warned that: "A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create '[t]ribunals that do not use the duly established procedures of the legal process [...] to displace the jurisdiction belonging to the ordinary courts or judicial tribunals'. In paragraph 130 of the same judgment, the Court notes: 'In the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have'." [312]

In the same report, the Commission added that the problem of impunity in Peru "is aggravated by the fact that most of the cases that involve human rights violations by the members of the State security forces are tried by the military criminal courts".[313] The Commission again said that:

> "the problem of impunity in military criminal justice is not linked exclusively to the absolution of the accused; the investigation of human rights violations by the military courts itself entails problems where it comes to having access to an effective and impartial judicial remedy. The investigation of the case by the military courts precludes the possibility of an objective and independent investigation carried out by judicial authorities not linked to the command structure of the security forces. The fact that the investigation of the case was initiated in the military justice system may make a conviction impossible, even if the case is passed on to the regular courts, as it is likely that the necessary evidence has not been collected in a timely and effective manner. In addition, the investigation of the cases that remain in the military jurisdiction may be conducted so as to

311 Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, "The Military Jurisdiction: Expansion", paragraph 150.

312 Ibidem.

313 Ibid., paragraph 209.

> impede them from reaching the final decision-making stage".[314]

The Commission pointed out that the system of military justice in Peru had "certain peculiar characteristics that impede access to an effective and impartial remedy in this jurisdiction. One of these is that the military jurisdiction cannot be considered a real judicial system, as it is not part of the Judicial branch, but is organized instead under the Executive. Another aspect is that the judges in the military judicial system are generally active-duty members of the Army, which means that they are in the position of sitting in judgment of their comrades-in-arms, rendering illusory the requirement of impartiality, since the members of the Army often feel compelled to protect those who fight alongside them in a difficult and dangerous context".[315] The Commission reiterated that "certain offences that are either service-related or have to do with military discipline may be judged by military courts with full respect for judicial guarantees" [316] but pointed out that "the Peruvian State has interpreted the concept of offences committed in relation to military service in overly-broad terms".[317]

Lastly, the Commission concluded that military justice should only be used "to judge active-duty military officers for the alleged commission of service-related offences, strictly speaking. Human rights violations must be investigated, tried, and punished in keeping with the law, by the regular criminal courts. Inverting the jurisdiction in cases of human rights violations should not be allowed, as this undercuts judicial guarantees, under an illusory image of the effectiveness of military justice, with grave institutional consequences, which in fact call into question the civilian courts and the rule of law".[318]

h. Suriname

In its Report on the Situation of Human Rights in Suriname (1983), the Commission expressed its concern at the fact that "crimes relating to the security of the State are no longer under the jurisdiction of Regular Courts of Justice but under Military Courts. The final decisions on proceedings instituted under Military Courts cannot be appealed to the courts but must be appealed to the High Military Court whose members are named by the

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314 Ibid., paragraph 210.

315 Ibid., paragraph 211.

316 Ibid., paragraph 212.

317 Ibidem.

318 Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, "Military Courts and Impunity", paragraph 214.

President and proposed by the Military Authority. During the Commission's visit to the Supreme Court, its current President indicated that the civil courts are totally prevented from hearing matters relating to the State security".[319]

2.3. Jurisprudence developed by the Commission

In numerous judgments on individual cases, the Inter-American Commission on Human Rights has reiterated that trying military and police personnel for human rights violations in military or police courts constitutes a violation of the right to an independent and impartial tribunal and the right to due process, as well as the right to an effective remedy.

In the case of *Aluisio Cavalcante et al. v. Brazil*, the Commission remarked that military justice had "the authority to try and judge members of the 'military' police accused of committing crimes, defined as military crimes, against the civilian population. This jurisdiction is governed by military criminal law […] which contains substantive penal standards and constitutes 'a set of legal provisions to ensure the accomplishment of the main purposes of military institutions, whose primary objective is the defence of the nation'. In this jurisdiction, 'rank and discipline prevail'."[320] The Commission considered that it was "a special legal system, with its own principles and guidelines, in which most of the provisions apply only to military personnel and civilians who commit crimes against military institutions, unlike the ordinary penal system, which is applicable to all citizens".[321]

The Commission also found that the power to bring a criminal action and to carry out investigations lay with the State Military Prosecutor's Office. The Commission called this a "legacy [of the] military regime" and considered it to be "a critical breakdown in the system of guarantees of police action, for it wrests from the civilian public ministry common police control activities (entrusted to the 'military' police), which are precisely the ones to whom are attributed the largest number of human rights violations".[322] The Commission pointed out that this special jurisdiction for the police came into being in 1977 under the military government in Brazil and in its wake the Federal Supreme Court considered that the state-level military justice system

319 Report on the Situation of Human Rights in Suriname, OEA/Ser.L/V/II.61, Doc. 6 Rev. 1, 6 October 1983, Chapter III – Other Human Rights. C. Right to Justice and Due Process, paragraph 11.

320 Annual Report of the Inter-American Commission on Human Rights - 2000, OEA/Ser./L/V/II.111, doc. 20 rev., 16 April 2001, Report Nº 55/01, *Aluisio Cavalcante et al.,* paragraph 149.

321 Ibidem.

322 Ibid., paragraph 150.

had jurisdiction to judge the 'military' police, a state of affairs which had resulted in an increase in the number of crimes committed by 'military' police with impunity.[323] The Commission found that these military courts tended to be lenient with police accused of human rights violations and other criminal offences, thereby allowing the guilty to go unpunished.[324]

The Commission reiterated its position that "trying common crimes as though they were service-related offences merely because they were carried out by members of the military violates the guarantee of an independent and impartial court".[325] In support of its argument, it cited, together with its own doctrine, the concluding observations of the United Nations Human Rights Committee regarding Brazil as well as Principles 3 and 5 of the United Nations Basic Principles on the Independence of the Judiciary and article 16(4) of the Standard Minimum Rules on Human Rights in States of Emergency (Paris, 1984).[326]

In this case, the Commission considered that "the ineffectiveness, negligence, or omission in the development of the investigations and proceedings by the military justice system of São Paulo, which culminated in an unwarranted delay in the conclusion of the proceedings, […] is also a violation of Article XVIII of the Declaration and Articles 8 and 25 of the Convention, as it has deprived the victims' families the right to obtain justice within a reasonable time by means of a simple and prompt remedy. Article 1(1) of the Convention establishes that the States party undertake to respect the rights and liberties recognized in it, and to ensure their free and full exercise for all persons under their jurisdiction".[327]

This interpretation, namely, that the use of military courts to try military and police personnel for human rights violations is incompatible with the right to an effective judicial remedy, an independent and impartial court and due process of law, has been reiterated by the Commission in several cases. For example, in the cases of the *Riofrío Massacre* (Colombia), *Carlos Manuel Prada González and Evelio Antonio Bolaño Castro* (Colombia) and *Leonel De Jesús Isaza Echeverry and one other* (Colombia), the Commission again stated that:

> "military jurisdiction is not an appropriate forum and therefore does not offer adequate remedies for investigating, prosecuting, and punishing violations of human rights established in the

323 Ibid., paragraph 151.
324 Ibid., paragraph 152.
325 Ibid., paragraph 153.
326 Ibidem.
327 Ibid., paragraph. 165.

> American Convention, allegedly committed by members of the armed forces or with their collaboration or acquiescence".[328]

In the case of the *Ríofrío Massacre* (Colombia), the Commission recalled that, as established by the Inter-American Court, whenever a State claims that the petitioner has failed to exhaust domestic remedies, it bears the burden of demonstrating that the remedies which have not been exhausted are 'adequate' enough to rectify the alleged violation, in other words, that the functioning of those remedies within the domestic legal system is suitable to address an infringement of a legal right. In this particular case, which was being considered by the Colombian military courts, the Commission took the view that military criminal justice did not provide a suitable remedy for investigating, bringing to trial and punishing conduct of the type involved in the case in question and, therefore, the requirements set out in article 46(1)(a) and (b) did not apply.[329] The Commission remarked that:

> "The military criminal justice system has several unique characteristics which prevent access to an effective and impartial judicial remedy in this jurisdiction. First, the military justice system may not even be properly referred to as a true judicial forum. The military justice system does not form part of the judicial branch of the Colombian State. Rather, this jurisdiction is operated by the public security forces and, as such, falls within the executive branch. The decision-makers are not trained judges, and the Office of the Prosecutor General does not fulfill its accusatory role in the military justice system".[330]

The Commission considered that, in the case in question, since the execution of the victims resulted from the joint action of the army and the paramilitaries and its subsequent covering up, it did not constitute a legitimate service-related activity that justified the use of that forum to bring those responsible to trial. Consequently, the fact that the accused had been tried under military criminal jurisdiction contravened the right of the victims' families to have access to an independent and impartial tribunal, as well as the judicial protection due to them established in Articles 8(1) and 25 of the American

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328 Report Nº 62/01, *Ríofrío Massacre*, Case 11,654 (Colombia), paragraph 28. See also Report N° 63/01, Case 11,710, *Carlos Manuel Prada González and Evelio Antonio Bolaño Castro (Colombia),* and Report N° 64/01, Case 11,712, *Leonel De Jesús Isaza Echeverry and one other (Colombia*), 6 April 2001.

329 Annual Report of the Inter-American Commission on Human Rights - 2000, OEA/Ser./L/V/II.111, Doc. 20 Rev., 16 April 2001, Report Nº 62/01, *Ríofrío Massacre*, Case 11,654 (Colombia), paragraph 29.

330 Ibid., paragraph 70.

Convention.[331] The Commission recommended that the Colombian State should:

> "1. Conduct an impartial and effective investigation in ordinary jurisdiction with a view to prosecuting and punishing those materially and intellectually responsible for the massacre. […]
>
> "3. Take the necessary steps to prevent any future occurrence of similar events in accordance with its duty to prevent and guarantee the basic rights recognized in the American Convention as well as the necessary measures to give full force and effect to the doctrine developed by the Constitutional Court of Colombia and by the Inter-American Commission on Human Rights in investigating and prosecuting similar cases through the ordinary criminal justice system".[332]

In the case of *Ana, Beatríz and Celia González Pérez v. Mexico*, three sisters (one of them a minor) who were detained and raped by members of the army, a case in which the Office of the Attorney-General (*Procuraduría General de la República*) handed over jurisdiction to the Office of the Military Attorney-General (*Procuraduría General de Justicia Militar*), the Commission observed that, given the seriousness of the evidence submitted to the authorities, the Mexican State had a duty to "undertake a prompt, impartial, and effective investigation, in accordance with the guidelines stipulated in its own domestic legislation and the international obligations freely assumed".[333] The Commission found that the Office of the Military Attorney-General had completely ignored the evidence submitted by the victims. Given this state of affairs, the victims had refused to undergo another examination as part of the military investigation. Arguing that this denoted a "lack of interest, from a legal standpoint, of the victims and their representatives" and that "the criminal evidence is not in any way credible, nor is the probable liability of the military officers" [334], the Office of the Military Attorney-General had closed the case in September 1995.

The Inter-American Commission again stated that "when the State permits investigations to be conducted by the entities with possible involvement, independence and impartiality are clearly compromised". As a result, it is "impossible to conduct the investigation, obtain the information, and provide

331 Ibid., paragraph 72.

332 Ibid., Chapter IV, Recommendations.

333 Annual Report of the Inter-American Commission on Human Rights - 2000, OEA/Ser./L/V/II.111, Doc. 20 Rev., 16 April 2001, Report Nº 53/01, *Ana, Beatríz and Celia González Pérez*, Case 11,565 (Mexico), paragraph 69.

334 Ibidem.

the remedy that is allegedly available" and *de facto* impunity, which "has a corrosive effect on the rule of law and violates the principles of the American Convention", takes place. In particular, the Commission has determined that, given their nature and structure, military courts do not meet the requirements of independence and impartiality imposed under Article 8(1) of the American Convention.[335]

The Commission pointed out that the detention and rape of the González Pérez sisters "cannot in any way be considered acts that affect the legal assets of the military". Neither was it the case that the offences had been committed while the soldiers were carrying out legitimate duties entrusted to them under Mexican legislation since, as had been noted, there had been a series of violations beginning with the arbitrary detention of the four women. In other words, even if there had been no evidence of ordinary criminal offences that constituted human rights violations (and that was not the case here), there was no link to any armed forces activity which could have justified the military courts becoming involved. The Inter-American Commission stressed that "torture in all its forms is categorically prohibited by international law, and, for this reason, the investigation into the facts related to this case by the military courts is completely inappropriate".[336] The Inter-American Commission considered that the State had failed to fulfill its duty of guarantee under article 1(1) of the American Convention, which stipulates that States parties are obliged to guarantee that the rights and freedoms recognized in the convention can be exercised by all persons under their jurisdiction.[337]

In the case of *José Félix Fuentes Guerrero et al. v. Colombia*, the Commission pointed out that torture in all its forms is categorically prohibited under international law and that it was therefore totally inappropriate for investigation of the facts of this case to fall to military criminal jurisdiction.[338]

In the case of *Amparo Tordecilla v. Colombia*, the Commission considered that "the forced disappearance of a citizen can never be considered part of the legitimate functions of the agents who work with the security forces".

335 Ibid., paragraph 81.

336 Ibid., paragraph 82. See also: Annual Report of the Inter-American Commission on Human Rights - 1998, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Report Nº 61/99, *José Félix Fuentes Guerrero et al.,* Case 11,519 (Colombia), paragraphs 46 and 47.

337 Annual Report of the Inter-American Commission on Human Rights - 2000, OEA/Ser./L/V/II.111, Doc. 20 Rev., 16 April 2001, Report Nº 53/01, *Ana, Beatríz and Celia González Pérez*, Case 11,565 (Mexico), paragraph 85.

338 Inter-American Commission on Human Rights : Annual Report for 1998, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Report Nº 61/99, *José Félix Fuentes Guerrero et al.,* Case 11,519 (Colombia), paragraphs 46 and 47.

Consequently, the fact that the criminal investigation had remained under military criminal jurisdiction for five years constituted a violation of articles 8 and 25 of the Convention.[339] The Commission considered it necessary to recognize the importance of this fact, given that the military justice system was not the appropriate forum for investigating, trying, and punishing grave human rights violations. "Nonetheless, it notes that the transfer, effectuated almost a decade after the disappearance was perpetrated, has come late and, predictably, it has yet to prove effective in clarifying the facts in determining the whereabouts of the remains, or in trying and punishing the persons responsible".[340] The Commission concluded that "the State has failed in its duty to provide adequate judicial protection as established at Articles 8 and 25 of the American Convention".[341]

In the cases of *los Uvos (Colombia)* and *Caloto (Colombia)*, two massacres of civilians, the Commission believed that the massacre of defenceless civilians could not be considered to form part of the legitimate functions of the security forces. Consequently, the fact that the authority to try those suspected of masterminding the grave violations committed had been granted to the military courts constituted a breach of articles 8 and 25 of the American Convention.[342]

The Commission also deemed that extrajudicial execution could not be considered to be a service-related act and should not therefore fall to military or police jurisdiction. Thus in the cases of *Santos Mendivelso Coconubo (Colombia)* and *Alvaro Moreno Moreno (Colombia),* the Commission considered that the "the summary execution of a person suspected of maintaining links with a dissident armed organization cannot be considered a legitimate function of the Colombian National Police. Therefore, the mere fact that a military court has assumed jurisdiction impedes access to the judicial protection enshrined in Articles 8 and 25".[343]

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339 Annual Report of the Inter-American Commission on Human Rights - 1999, OEA/Ser.L/V/II.106, Doc. 3, 13 April 2000, Report Nº 7/00, Case 10,337, *Amparo Tordecilla Trujillo (Colombia)*, 24 February 2000, paragraph 54.

340 Ibid., paragraph 56.

341 Ibid., paragraph 59.

342 Annual Report of the Inter-American Commission on Human Rights - 1999, OEA/Ser.L/V/II.106, Doc. 3, 13 April 2000, Report Nº 35/00, *Los Uvos,* Case 11,020 (Colombia), paragraph 61. See also: Report Nº 36/00, *Caloto*, Case 11,101 (Colombia), paragraph 56.

343 Annual Report of the Inter-American Commission on Human Rights - 1998, OEA/Ser.L/V/II.102. Doc. 6 rev.. 16 April 1999, Report Nº 62/99, *Santos Mendivelso Coconubo*, Case 11,540 (Colombia), paragraph 39. See also: Annual Report of the Inter-American Commission on Human Rights - 1997, OEA/Ser.L/V/II.98, Doc. 6, 17 February 1998, Report Nº 5/98, *Alvaro Moreno Moreno,* Case 11,019 (Colombia).

In the case of the *Puerto Lleras massacre (Colombia)*, the Commission pointed out that, according to the jurisprudence developed by the Colombian Constitutional Court, "[f]or an offence to come under the jurisdiction of the military criminal justice system, a clear link should be made, from the outset, between the offence and the activities of military service. In other words, the punishable act should occur as an excess or abuse of power that occurs in the context of an activity directly linked to the function particular to the armed forces. The link between the criminal act and the military service-related activity is broken when the offence is extremely serious, as is the case of crimes against humanity. In such circumstances, the case should be referred to the civilian justice system".[344] Consequently, the Commission concluded that "[t]he perpetration of an indiscriminate attack against unarmed civilians cannot be considered an activity linked to the functions of the Armed Forces. Even if such a link were present in this case, the seriousness of the violations of fundamental rights committed in Puerto Lleras severed that link and rendered inappropriate the exercise of military jurisdiction over this case. In other words, the matter should have been examined from the outset by the ordinary and not the military courts".[345]

In the case of *Hildegard María Feldman et al. v. Colombia*, the Commission considered that "the fact that it was military criminal justice that finally conducted the investigation and issued the final decision exonerating those responsible for the death of Hildegard María Feldman, Hernando García, and Ramón Rojas Erazo, constituted an openly unfavorable circumstance for obtaining a fair decision based on the collection and evaluation of the body of evidence put forward in the trials in an objective and impartial manner, as provided by the American Convention on Human Rights".[346] The Commission concluded that "[t]rial of military personnel by military courts does not provide the guarantee of impartiality and independence required by the Convention for victims".[347]

The Commission recommended the Colombian State to "adapt its domestic laws to the American Convention on Human Rights so that trials of Government agents involved in human rights violations be conducted by

344 Annual Report of the Inter-American Commission on Human Rights - 1998, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Report Nº 61/99, *José Felix Fuentes Guerrero*, Case 11,519 (Colombia), paragraph 47.

345 Ibid., paragraph 48.

346 Annual Report of the Inter-American Commission on Human Rights - 1995, OEA/Ser.L/V/II.91, Doc 7 rev., 28 February 1996, Report Nº 15/95, Case Nº 11.010, Colombia.

347 Ibidem.

regular courts and not by military penal courts, in order to guarantee that victims will have independent and impartial courts to decide on their cases". [348]

In the case of *Manuel Stalin Bolaños Quiñonez v. Ecuador*, the Commission recalled that "[i]t is the obligation of the Government to carry out a full, independent and impartial investigation into an alleged violation of the right to life. This obligation is incident to the Government's duty to protect and ensure the human rights recognized in the American Convention. Where the state allows investigations to be conducted by the organs potentially implicated, independence and impartiality are clearly compromised. Legal procedures compromised in this way are incapable of affording the investigation, information and remedy purportedly available. In this case, military authorities conducted an investigation into facts implicating responsibility on the part of members of the organization and the organization itself. Military authorities were not attributed with the legal authority to perform such functions in this case, nor could they possibly act with the requisite independence and impartiality. It is instructive to note in this regard that all the witnesses summoned to provide testimony in the military penal process carried out in the case were members of the military. The consequence of such compromise is insulation of those presumably responsible from the normal operation of the legal system. This type of *de facto* impunity is corrosive of the rule of law and violative of the principles of the American Convention".[349]

In the cases of *Honduras* and *La Negra (Colombia)*, two massacres attributed to paramilitary groups and members of the army, the Commission considered "[t]hat in a country in which a series of investigations on a single criminal act are conducted simultaneously and where, by law, when the actions constitute a violation of human rights and are attributed to soldiers on active service, the judicial investigations must be carried out by the military institute in question, it is symptomatic, although explainable, that this jurisdiction almost invariably fails to recognize the accusatory evidence presented and exonerates the soldiers involved from responsibility, hindering the truth and the punishment of the perpetrators, as in the present case, thus committing a serious act which directly affects the right of the victims and their families to justice".[350]

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348 Ibid., paragraph 5.

349 Annual Report of the Inter-American Commission on Human Rights - 1995, OEA/Ser.L/V/II.91, Doc 7 rev., 28 February 1996, Report Nº 10/95, Case 10,580 (Ecuador), paragraph 48.

350 Annual Report of the Inter-American Commission on Human Rights - 1993, OEA/Ser.L/V/II.85, Doc. 8 rev., 11 February 1994, Report Nº 2/94, Case 10,912 (Colombia), 1 February 1994, paragraph 4 (e) under 'Considering'.

In the case of *J.E. Maclean v. Suriname*, in which a person was tortured and killed by a military patrol, the Commission took the view "[t]hat it was impossible for the complainants to exhaust domestic remedies in this matter since the authorities that would have been responsible for the investigation, namely the military police, form part of the military establishment accused of the violations in question, and that it can reasonably be deduced that the inaction of the military in this and other cases clearly demonstrates an unwillingness to investigate, prosecute, and punish those responsible for the violations".[351]

In the case of *Rodrigo Rojas De Negri and Carmen Gloria Quintana Arancibia v. Chile*, in which two young people were detained by a military patrol and then beaten, doused in petrol and set on fire and which had been dealt with by the Chilean military courts, the Commission pointed to "[t]he various irregularities pertaining to legal process inherent in the military justice system in Chile" and stated that "the actions of these courts [military] have served to provide a veneer of legality to cover up the impunity which the members of the Chilean Security Forces enjoy when they are found to be involved in flagrant violations of human rights".[352] The Commission also stated that, in this case, "these irregularities pertaining to legal process inherent in Chilean military justice are reflected in the abusive recourse to secrecy in the conduct of the proceedings. The situation that has thereby arisen has made it virtually impossible to gain access to basic elements of the trial and allows the military authorities to control the evidence submitted. The Commission is, therefore, led to believe that the provisions of Article 37.2.b concerning the nonexistence of due process of law should be applied in this case".[353] In the same report, when talking about the use of military justice in cases of human rights violations, the Commission pointed to "[t]he very small proportion of military or police personnel who have been convicted in Chile for numerous denunciations of human rights violations, which gives reason to believe that the delay in judicial proceedings in this case could become yet another device for assuring the impunity of the perpetrators of a crime that is so reprehensible".[354]

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351 Annual Report of the Inter-American Commission on Human Rights, 1988 - 1989, OEA/Ser.L/V/II.76, Doc.10, 18 September 1989, Resolution 18/89, Case 10,116 (Suriname).

352 Annual Report of the Inter-American Commission on Human Rights, 1987-1988, OEA/Ser.L/V/II.74, Doc. 10 Rev. 1, 16 September 1988, Resolution Nº 01a/88, Case 9,755 (Chile), Considerings 7(c).

353 Ibidem.

354 Ibid., Considerings 7(d).