# INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

*" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "*


## Human Rights and the Administration of Justice Through Military Tribunals

## Geneva, 26-28 January 2004

***Wednesday 28 January 2004***

***<u>Session</u>: Armed Forces abroad, peacekeeping operations and military tribunals"***


*Françoise HAMPSON*
*Human Rights Centre, University of Essex*


**I. Introduction**

• Distinction between substantive rules, rules of procedure & special tribunals. The possible permutations are almost infinite.

e.g. State A may subject members of armed forces to normal civilian courts, with the normal rules of criminal procedure but with special offences that can only be committed by members of the armed forces and/or with penalties unique to members of armed forces; e.g. loss of rank. State B may subject members of armed forces to normal civilian courts, but with the special rules of procedure and/or with special offences that can only be committed by members of the armed forces and/or with penalties unique to members of armed forces. State C may subject members of armed forces to normal civilian courts where the alleged offence is committed within national territory (applying special rules and/or special procedures and/or special penalties) but to a special tribunal where the alleged offence is committed outside national territory. In the latter case, the tribunal could apply normal criminal law rules or special rules; normal or special procedures and/or normal or special penalties. State D may only use special tribunals during times of conflict but use them for offences within and outside national territory. State E may only use special tribunals during times of conflict but use them only for offences outside national territory.

• A tribunal may be special on account of the nature of the basis of jurisdiction, its location, the composition of the court (particularly where the judges are serving members of the armed forces) or for other reasons.

• How a State handles offences committed by its armed forces abroad, including offences committed by or against members of the armed forces on peacekeeping operations, will depend, to a very significant extent, on how it handles offences committed by its armed forces generally or specifically when they are serving overseas. That will be the starting point of the State in any discussions. The starting point will *not* be some abstract notion of how offences committed by armed forces taking part in peacekeeping operations *should* be handled.

• The reasons underlying the State's current approach to these issues will depend, *inter alia,* on the history of the use of the State's armed forces (historically, have they often been deployed overseas and, if so, for what purpose) and the type of legal system which the State has adopted, in particular as reflected in its rules on criminal jurisdiction (common law systems tend to rely almost exclusively on a territorial basis of jurisdiction, which means that civilian criminal courts might well not have jurisdiction over members of armed forces for acts committed overseas).

**2. Armed Forces *stationed* overseas** (i.e. based there on a regular basis)

• Inconceivable that the armed forces would be stationed overseas on a regular basis without there being a Status of Forces Agreement (SOFA) or an agreement with the host country that fulfils a similar function.

• The function of a SOFA is to determine a. in what circumstances the sending State (State from which the soldier comes) and the receiving State (State in whose territory the soldier is stationed) can exercise jurisdiction and b. the extent of immunity of the foreign contingent and its members from the criminal and/or civil jurisdiction of the receiving State.

• The rules on the exercise of criminal jurisdiction by the receiving State in the SOFA may *appear* complicated. It is not uncommon to find a rule that the receiving State has jurisdiction, that it can waive its jurisdiction on a general basis and that, in certain circumstances, it may recall its waiver of jurisdiction. What matters is the practice. *In practice,* does the sending State usually exercise jurisdiction over its armed forces, subject to the right of the receiving State to exercise jurisdiction in certain defined circumstances (e.g. if the victim is a national and the offence occurred outside the military base).

• In certain cases, the armed forces are stationed in territory which geographically belongs to the receiving State but which legally does not (e.g. sovereign base areas in Cyprus). In that case, there is no need for a SOFA. The only State which can exercise jurisdiction for an offence committed on the base is the sending State and it will be exercising territorial jurisdiction.

• Where the territory where the forces are stationed is leased to the sending State (as opposed to "belonging" to them), the lease may provide for the exclusive criminal jurisdiction of the sending State (e.g. Guantanamo Bay). In that case, again, no SOFA would be necessary. It would probably be exercising territorial jurisdiction.

• Where the sending State can exercise jurisdiction, its national law will determine whether persons accused of having committed criminal offences are brought before a civilian criminal court, authorised to act outside national territory, or a special tribunal, usually a military court.

• Where the receiving State can exercise jurisdiction, its national law will determine whether persons accused of having committed criminal offences are brought before a civilian criminal court or a special tribunal, usually a military court. Generally speaking, the receiving State would probably bring the accused person before a civilian criminal court.

• The SOFA will determine *who* may be subject to the jurisdiction of the sending State/receiving State. The four possible categories of persons are a. members of the armed forces; b. civilians attached to the armed forces (e.g. possibly aircraft maintenance personnel); c. dependants of members of the armed forces; d. other civilians (e.g. schoolteacher in a school run by the sending State for the child dependants of members of the armed forces and civilians attached to the armed forces).

• As States increasingly privatise or civilian-ise functions which used to be performed by members of armed forces, the need for the sending State to exercise criminal jurisdiction over its civilian nationals stationed overseas is going to become more problematic, particularly if the sending State relies on military courts.
• The US Supreme Court has ruled that it is unconstitutional for civilians to be subject to court martial. In that case, who has jurisdiction over civilians accompanying the armed forces or the dependants of US military personnel in Germany? British dependants of members of armed forces stationed overseas are subject to court martial jurisdiction (until the European Court of Human Rights determines, in a case against the UK, that it is a violation of the Convention). When the serviceman is stationed in the UK, his dependants are subject to the local criminal law and not to trial by court martial. Even that can lead to anomalies: soldiers subject to British military law are subject, in effect, to English criminal law, even if serving in Scotland. In those circumstances (i.e. serving in Scotland), the dependants would be subject to Scottish criminal law.

**3. Peacekeeping operations and military tribunals**
• Peacekeeping/peace enforcement operations may consist of UN forces or non-UN forces with a UN mandate or non-UN forces with no UN mandate. There may be two different types of forces with two different mandates (e.g. Liberia; Georgia). The lawfulness of such operations is not at issue in this context. In addition to the presence of military personnel, other international civilian personnel may be present, particularly in the case of UN operations. In some such operations, the highest authority in theatre may be the SRSG.
• *SOFA*
In traditional peacekeeping operations, there will almost invariably be a SOFA. In peace enforcement operations the situation varies. In some cases, there will be a SOFA with all contingents; in others, a SOFA with some contingents but not with others; in other situations, there will be an agreement on the application of the UN Model SOFA and, in yet other situations, there will be no SOFA. In addition, issues of sovereign immunity may also arise for the receiving State.
• *Foreign Military Personnel*
Such personnel may commit offences a. only involving other members of their own contingent; b. against members of other contingents and c. against persons in the territory of the receiving State.
• *Foreign Civilian Personnel*
They include persons attached to a foreign military contingent and probably subject to its jurisdiction. In addition, there may be a large number of foreign civilians attached to foreign/international NGOs (e.g. ICRC; MSF; SCF) or to other organisations (e.g. journalists). They are clearly subject to the jurisdiction of the territory, but it may not be functioning effectively, if at all. If they commit a criminal act against foreign military personnel, are they subject to the jurisdiction of the State of such personnel? If so, does that include military jurisdiction?
• *International Civilian Personnel*
This category includes not only UN personnel but personnel working for regional organisations (e.g. OSCE) and the UN specialised agencies. A further distinction may need to be drawn between employees of such organisations, contract personnel and those seconded to the organisation from their own civil service (very common with the OSCE). They would expect to have the immunity from local jurisdiction which international civil servants usually enjoy.
• *CIVPOL*

CIVPOL members may be a. seconded serving police, still subject to the disciplinary system of their own country; b. seconded recently retired police, possibly still subject to the disciplinary system of their own country or c. contracted personnel

• Where the criminal courts of the territory do not have jurisdiction, do the courts of the country from which the person comes? That may depend on the basis of jurisdiction. Common law countries usually exercise jurisdiction on the basis of territoriality and not nationality. Where the State has a court martial jurisdiction, it may have jurisdiction over its armed forces but not over CIVPOL of its nationality or civilian personnel of its nationality. Civilians working with international organisations may be further protected by diplomatic immunity.

• Where the courts of their home country exercise jurisdiction over nationals, does that extend to members of CIVPOL? Nationals working with international organisation may be protected by sovereign immunity.

• Just because jurisdiction exists in theory does not mean that it is exercised in practice.

• Where members of CIVPOL are sent home because they are suspected of having committed a criminal offence, is there any follow-up to ensure that they are prosecuted in their own country, where that is possible? What if it is not possible?

• What happens, in practice, to international civil servants?

• Where the criminal courts of the receiving country are not functioning, what happens to citizens of that country suspected of having committed offences against the peace-enforcement forces? Large numbers of persons have been detained in Afghanistan and Iraq by foreign forces. They do not appear, as yet, to have been brought before *any* tribunal. Do they come within the criminal jurisdiction of the State of the foreign forces? If so, can they be brought before military criminal courts or only before civilian criminal courts?

**"Armed forces abroad, peacekeeping operations and military tribunals"**

*Lieutenant-Colonel Michael R. GIBSON*
*Director, Military Justice Policy and Research*
*Canadian Forces Office of the Judge Advocate General, Canada*

I am the Director of Military Justice Policy and Research for the Canadian Forces Office of the Judge Advocate General. What that entails is that I have to regularly address the sort of questions that have been posed at this conference.

Before I begin, I wanted to thank Ms Hampson for her excellent presentation.

When we were offered the invitation to speak at this conference, the initial suggestion was that we should speak on the topic of the experience of the Canadian Forces in Somalia and the lessons to be derived from that. That is certainly a very useful topic, but what we suggested is that it might be even more useful to describe not only our immediate experience but also what we built on from that very painful experience. That suggestion was accepted, and I have been asked to speak about both what happened to the Canadian Forces in Somalia, and what we did with that experience.

What we did with that is to attempt to create what we describe as a "leading edge" military justice system, that is to say, our goal was to have one of the best or the best military justice system in the world. I will attempt in the short time available to describe for you what we have tried to do to accomplish that. You can judge for yourself to what extent we have actually achieved that.

I should start by describing what happened to us in Somalia in 1993. Somalia was a country where many of the Western militaries came to grief in one fashion or another. In our experience, it certainly highlighted many of the deficiencies in our military justice system. Basically, what happened was that there were a number of incidents, and one in particular that involved two Canadian soldiers in a drunken state torturing and killing a Somali teenager. This, of course, is so profoundly at odds with our perception of who we are and how we conduct ourselves that it had a shocking effect on the Canadian public, on the Canadian military and on the Canadian government. It highlighted a number of weaknesses in the maintenance of discipline in the operation in Somalia, as well as certain structural deficiencies within our system. That is what we are trying to address. So, before I get into describing some of the changes that we have implemented, I would like to offer you a few lessons learned or a few conclusions that we have come to from that experience.

First of all, the fall-out from that experience was really the catalyst for changes which, in retrospect, we realized, everybody knew had to be made. Many of the deficiencies in our system were evident to anybody who had followed the experience of other countries. But, obtaining a place in the legislative agenda to make those changes in a Parliamentary democracy can be difficult. But if I can offer a suggestion to you, it is this: don't wait for the catalyst. I think it is far better to be proactive than reactive, and to make changes in a considered fashion rather than under the pressure of reaction when things have gone wrong.

Secondly, what I would suggest to you is that if you intend to deploy your forces globally, certainly, if you contemplate the prospect of them being engaged in combat or near-

combat operations, you need to have a deployable, effective court martial system. I realize that many countries have taken another path. They have chosen to essentially eliminate their military justice system, at least in peacetime. Our experience suggests that this is a mistake. If you are going to be engaged in peacekeeping operations around the world, you need to have an effective court martial system. Sooner or later, if you don't, you are going to pay the price for that.

In March of last year I was invited to Japan to speak to the Japanese National Institute of Defence Studies. As you will be aware, Japan has a constitution which essentially prohibits the establishment of such military courts, but Japan is embarking upon a new phase of global engagement in operations around the world and this was a question of great interest to them. My suggestion to them was that they do need such a system.

Why do we have a separate military justice system? Is it because we are inherently smarter or fairer than civilians? It would be hard to maintain this assertion with a straight face. The real reason, in our view, for the need of a separate military justice system is to enhance and support operational effectiveness You have to start with the presupposition that the existence of a military that you are going to employ for useful, legitimate purposes in the world is a given. If you are going to have a military justice system, you've got to do it properly. Certainly one of the lessons is that it has to be effective, transparent and accountable.

One of the conclusions I will reach at the end is that any legal system, to be effective, must have the support of its parent society. That is one of the painful lessons learned from the Somalia experience: it is not a given that the parent society will give support to your system if it is not demonstrably effective. You have to earn that trust, and you have to work hard to maintain it. And the only way you maintain it is by being accountable and transparent.

To get back to my central thesis: the reason why we have a military justice system is to maintain operational effectiveness. If you have a military, it has to work: otherwise, it is an expensive toy. The ability of the armed forces to carry out its mission is critical, because they constitute the State's means of last resort: we cannot fail. But without discipline, our forces can become dangerous, not only to ourselves, but to other people. And that is one of the things that happened in Somalia. Concerning Somalia, the great majority of the members of the Canadian Airborne Regiment Battle Group who were deployed there feel that they conducted themselves honorably and that they accomplished their mission extremely well in very difficult circumstances. Objectively speaking, that is true, but many now feel embittered because that legacy has been washed away by the attention that was focused on the actions of the small number who were ill- disciplined and who misconducted themselves so egregiously. Looking back, it became evident that the people who were the central actors in this drama were people who had a long record of disciplinary misconduct. And it was impossible not to ask the question: why did we send these particular people there? What transpired there was an essence of failure to maintain effective discipline. You have got to be rigorous in scrutinizing the people that you send on such deployments abroad because you know it is going to be extremely challenging. The one thing you know for certain is that something is going to transpire that you never anticipated. So you have got to have a system sufficiently robust and sound to be able to deal with that, and you don't send your weakest people under that circumstance because you are setting yourself up for failure.

But if the primary *raison d'être* of a separate military justice system is to maintain discipline and thus operational effectiveness, then it has to work. It must incorporate all the safeguards of judicial guarantees, but it must retain a sufficient military character to justify its existence. I think that one of the best articulations for the reason for existence of military justice systems was given by the Supreme Court of Canada in the 1992 case of *R. v. Genereux*. I think it is worth repeating this because it crystallizes in judicial pronouncement why we think we need a separate military justice system. In that case, Chief Justice Lamer, writing for the majority of the Court, said: "The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military." So, analytically, philosophically, on first principles, that is our point of departure.

Now, the next quotation is a quotation from the United States Department of Defense's study in 1960 that concluded ultimately that it is a mistake to talk of discipline and justice as being separate concepts. You have to have both because, once again, in a democratic society, the relevant audience for your military justice system is not only your internal audience, it is your parent society. Good soldiers want discipline. But, they must believe that discipline is achieved and maintained fairly. If they don't believe that, the system cannot function effectively.

So, what are the core attributes for a military justice system that you need, particularly if you are planning to go on peacekeeping or peace support operations?

First of all, it has to be portable. We don't conduct most of our courts martial in courts houses. We often conduct them in the field, sometimes in very rudimentary physical circumstances where we feel the legal system employed is sophisticated, but the venue of the trial may be as simple as a tent.

It has to be deployable. If you are going to conduct operations around the world it will not function effectively as a system for the maintenance of discipline if you are going to try to bring all those trials back to your home state. It is a long way from Afghanistan to Canada, and the delay inherent to trying to always do that will erode the effectiveness of your system.

It has to be expeditious. If there is one basis upon which we could say we are better than the civilian justice system, it is that we are faster. In Canada, as I am sure in many Western countries, there is always the question of balances of resources, of allocation of resources from the government to maintain the justice system. Our civilian justice system works well but I don't think it could be said that it always works speedily. In fact, that is one of the great challenges, to try to maintain a person's constitutional right to an

expeditious trial. We need to have expeditious trials, fair but also expeditious, or it won't function just to maintain discipline.

I have already spoken about the need to maintain discipline, but would also like to highlight the concurrent need to maintain the confidence of one's parent society. In our view, the military justice system has to be able to deal not only with minor disciplinary-type offences, but also criminal offences, particularly abroad, for the very reasons which were articulated by Ms Hampson.

Now, this brings me to the question of jurisdiction. In our case, jurisdiction is determined by a combination of jurisdiction over the person and jurisdiction over the offence. In Canadian law, the military justice system has concurrent jurisdiction with the civilian justice system for criminal offences committed within Canada. We have a Code of Service Discipline laid out in statute which prescribes a number of uniquely military offences. But, we have jurisdiction over offences considered to be "service offences." We don't break it down in our law between military and non-military offences. A "service offence" includes any offence under the *National Defence Act*, but also any offence under the *Criminal Code of Canada*, or indeed under any other act of Parliament. The way that we decide who is going to exercise jurisdiction, whether it would be the civilian or the military system, for an offence committed within Canada, is to look at the question of military nexus. By nexus, I mean that that event has to have a substantial connection with the need to maintain discipline. Since a 1996 decision of the Court Martial Appeal Court of Canada we haven't had a nexus doctrine as a jurisdictional requirement in the sense that the Americans do, but it is a principled basis on which to make the decision of which system will exercise jurisdiction. Let me give you an example of a case of sexual assault.

Let's consider the example of a service member who is in civilian clothes, who goes downtown, meets a civilian woman in a bar, gets on well with her, they go back to her place, something happens, and there is a subsequent allegation of sexual assault. There is no military nexus in that, there is nothing central to the maintenance of discipline in prosecuting that particular offence. That alleged offence will, quite appropriately, be prosecuted in the civilian justice system. But say that if in an alternative circumstance you have a sexual assault on a ship committed by one crew member against another or a sexual assault committed on operations in the field by one member of the Forces against another, there will be a substantial military nexus or direct connection with the need to maintain discipline that would require that we would exercise jurisdiction. So what happens when there is dispute? It is a matter of negotiation between the military prosecutorial authorities and the civilian. The safeguard is that both systems have concurrent jurisdiction. If one felt profoundly that the case should be tried or not tried in a given jurisdiction, there will be nothing to prevent the charge being laid in the other system. Of course, you need to respect the principle that a person cannot be convicted twice for the same offence, but there is that safeguard to prevent abuse.

Canada is a common law country, in respect of its criminal law. Generally speaking, with only a few exceptions, Canadian law does not apply extraterritorially. There is thus the need for us to have the special military justice system to exert jurisdiction abroad over our personnel and also over civilians accompanying our forces abroad.

Who would be the civilians in our system who would be subject to that jurisdiction? To be tried in the military justice system, one has to be a person subject to the Code of Service Discipline. There is a very limited class of civilians who would fall into that category. First of all, persons who accompany the Forces: spouses, teachers, dependants of service

members, and contractors. An alleged spy for the enemy, and persons under an engagement with the Minister of Defence who agree to be bound by the Code, could also be civilian persons subject. If you have people who are not directly working with your forces but are operating in support of them, that can have a profoundly negative effect on your operational effectiveness if they are perceived by the host nation to be out there running amok and effectively being accorded impunity. So, the way that we attempt to address that is, if we anticipate that those people will be operating indirectly in support of us, then we want to have them enter into an agreement with the Department of National Defence whereby they agree to be bound by the Code of Service Discipline . Nobody forces them to take that employment, but they agree with full knowledge of what they are signing themselves up to and thereby we have a mechanism to exercise control.

In terms of the applicable law, the *Canadian Charter of Rights and Freedoms*, which incorporates all of the judicial guarantees in Article 14 of the ICCPR, is always applicable to courts martial. We have a statutory Code of Service Discipline set out in the *National Defence Act* which prescribes the procedure and the offences that we operate under. And, we have subordinate legislation in a variety of regulations.

We have a two-tier system in a classic British model: that is, we have summary trials for relatively minor offences, and courts martial to try more serious offences. There are four types of courts martial: Standing Court Martial (trial by military judge alone), Disciplinary and General Courts Martial ( which consist of a military judge with a panel of either 3 or 5 members) and we have Special General Courts Martial for the trial of civilians. We have civilian appellate judges. The Court Martial Appeal Court of Canada is composed entirely of civilian justices of appeal. There is a further appeal from that Court to the Supreme Court of Canada.

So, the system we had at the time we went to Somalia, was essentially along the lines of the classic British system. It was a convening authority system. All charges were laid by the chain of command and the commanding officer had the power to dismiss those charges. In other words, it was caught in the same difficulties with the convening authority system that were discussed in respect to the *Findlay* decision. We did learn from that. Along came the Somalia experience and the fallout from that was profound. It led to something of a crisis of confidence on the part of the Canadian public in our military justice system. We had a variety of inquiries and working groups, including a Special Advisory Group, a Commission of Inquiry created by the Government, and a couple of other reports. What flowed out of this was a recognition that the chain of command had to be responsible for maintaining discipline, but that there needed to be measures taken to enhance fairness and independence. The major changes that were made as a result of this included the creation of the National Investigation Service, a portion of the military police which is entirely independent of the chain of command. One of the problems with the fallout from Somalia was a perception that investigations were not conducted with sufficient independence or sufficient rigour or sufficient competence to fully get out the facts of all the events that had occurred. If you are going to have a justice system that maintains confidence, you have to have, as a necessary prerequisite, a system which has a sufficiently independent and effective investigatory mechanism that the public and the Forces can be satisfied that those cases that should be tried, are actually getting to court. We repealed our three-year limitation period to ensure that we could deal with more historical alleged offences. Commanding Officers can decide to proceed or not proceed with charges which are referred to them, but they are no longer the final authority. Basically, we imposed an obligation to obtain legal advice from a legal advisor before the chain of command made significant decisions in respect of charges. We created an

independent Director of Military Prosecutions, who is essentially the Director of Public Prosecutions for the Canadian Forces. He or she has the discretion as to which charges will actually proceed to court martial.

We took some significant measures to enhance judicial independence of our judges. We decided that military judges would in all instances decide the sentence at court martial. We repealed the death penalty. Although we have not had any actual executions since the Second World War, this was a significant symbolic step. So, the key consequences of the reform in our view were to achieve an institutional separation of the key actors in the military justice system: investigators, charge laying authorities, referral authorities, prosecutors, defence counsel, and judges.

Moreover, we needed strengthened mechanisms for oversight and review. As I said, amongst the key attributes we were striving to achieve were transparency and accountability. One of the ways that we achieve transparency and accountability is with the statutory responsibilities of the Judge Advocate General. The JAG is, in essence, the Attorney General for the military justice system. He is statutorily responsible for the superintendence of the administration of military justice. He is required by statute to regularly conduct reviews of the military justice system. He must report annually to the Minister of National Defence on the administration of military justice (the report is also available on our website). The Minister tables that report in Parliament. So, there is direct accountability to Parliament through the Minister, and to the Canadian public more generally, by having this available for anybody to look at it at any time. We have an independent Director of Military Prosecutions and also an independent Director of Military Defence Counsel Services. We think that military defense counsel, if given sufficient guarantees of independence, can actually be more effective as an option in providing defence counsel services for accused persons. It is crucial that people have a choice between military and civilian counsel, but military defence counsel certainly have an important and useful role to play. I will try to wrap up shortly but I do want to touch on the role of military judges.

We don't think that having a civilian judge advocate is the best way to go. That is certainly one possible model, and what is attractive about this model is that it certainly enhances the appearance of independence. Another possible model would be like the American system in which you have military trial judges who are part of the chain of command. What we are striving to do is to achieve a balance. We want to have military judges who bring to bear their military experience because we think that is the most effective way to maintain operational effectiveness, but those judges have to have sufficient objective guarantees of independence to be credible. So what we have striven to do is to create an independent Office of the Chief Military Judge which is not subordinate to the JAG and is sufficiently independent from the Executive. The situation of those judges has to satisfy the requisites of judicial independence identified by the Supreme Court of Canada, that is to say security of tenure, financial security and sufficient institutional independence, to be seen to be independent. With regard to security of tenure, they are appointed for a fixed term, and they cannot be removed by the Executive except for cause following the recommendation of a judicial Inquiry Committee. Their pay is determined by an independent salary commission, a civilian commission which makes recommendations to the government, which is exactly the way that is done for the civilian judges and, institutionally, they are entirely separate from the chain of command. So, that is the way that we have attempted to balance the requisites of independence with having an effective system that enhances our operational effectiveness.

There is also a need for regular review. So, what the statutory amendments of 1998 did was to provided that every five years there was to be an independent review of the operation of the military justice system. We have just gone through the first such review process. The former Chief Justice of the Supreme Court of Canada, the Right Honourable Antonio Lamer, was the independent review authority. We made submissions to him, and he also received submissions from a variety of other sources. At the end of the day, he concluded that Canada has a very fair and effective military justice system in which Canadians can have pride and confidence. He made 58 recommendations for further improvements to the military justice system, many of which adopted the recommendations which we had made to him. We are now studying and considering how to legislatively implement his recommendations.

So, to come back to my main topic, what I am going to suggest to you is that the lesson we have learned from this experience is that we still very much need a military justice system. We did not choose to abandon that. We just chose to try to strengthen it and reinforce it. It has to be more effective, it has to be credible, accountable and transparent, and it has to be portable. One of the most profound realizations we have come to is, as our Judge Advocate General Major-General Pitzul has said, reform of the military justice system is not a one-time event, but an ongoing process. It is beneficial to have a statutorily-required regular review of your system and rigorously scrutinize how your system works. That way, hopefully one can be proactive and you don't need a catalyst to force you to make beneficial changes.

Thank you.

**« Forces armées à l'étranger, opérations de maintien de la paix et juridictions militaires »**

*Eric DAVID*
*Professeur, Université libre de Bruxelles*

Conformément aux indications données au soussigné par les organisateurs de la présente Conférence, la présente note examinera très brièvement :

- le traitement de la question des juridictions militaires aux Nations Unies (**I**) ;
- la pratique des juridictions militaires dans les opérations de maintien de la paix (**II**).

## I. Le traitement de la question des juridictions militaires aux Nations Unies (NU)

Avant le rapport du Prof. E. Decaux (*infra*), la question des juridictions militaires n'avait guère été abordée comme telle aux NU. Ainsi, on constate que ni le rapport du Groupe d'étude sur les opérations de paix de l'ONU [1], ni celui établi par le Secrétaire général des NU sur la mise en œuvre des conclusions du Groupe d'étude [2] ne parlent des juridictions militaires dans le cadre des opérations de maintien de la paix : ces études ne portent que sur les moyens de réorganiser les opérations de maintien de la paix afin de leur assurer une meilleure efficacité.

En revanche, l'excellent rapport du Prof. E. Decaux sur l'administration de la justice par les tribunaux militaires, rapport destiné à la Sous-Commission de la promotion de la protection des droits de l'homme [3], apporte des éléments d'information tout à fait pertinents qu'il importe de rappeler.

Le rapport montre clairement que la pratique et la doctrine se méfient des tribunaux militaires.

Ainsi, en matière de disparitions forcées, la Déclaration de l'AGNU du 18 décembre 1992 (art. 16 § 2) et la Convention interaméricaine du 9 juin 1994 (art. IX) excluent la compétence des juridictions militaires pour connaître de ce type de fait.

De manière plus large, le Comité des droits de l'homme exprime sa méfiance vis-à-vis des juridictions militaires pour juger des civils (observation générale n° 13, 12 avril 1984) [4]. Le Prof. Decaux souligne aussi les préoccupations de certains experts sur le jugement de mineurs par de telles juridictions [5]. Il rappelle aussi la conclusion du Rapporteur spécial sur l'indépendance des juges et des avocats qui écrit en 1998 qu' « un consensus se dégage en droit international quant à la nécessité de limiter cette pratique radicalement [le recours à des tribunaux militaires], ou même de l'interdire » [6].

---

1 Doc. ONU A/55/305 – S/2000/809, 21 août 2000, 67 p.
2 Doc. ONU S/2000/1081, 20 oct. 2000, 31 p.
3 Doc. ONU E/CN.4/Sub.2/2003/4, 9 juillet 2003, 24 p.
4 Citée *ibid.*, § 16.
5 *Ibid.*, § 19.
6 *Ibid.*, § 17.

De fait, l'Ensemble de principes pour la protection et la promotion des droits de l'homme par la lutte contre l'impunité exclut la compétence des juridictions militaires pour connaître des violations des droits de l'homme eu égard au lien hiérarchique qui lie les membres de ces juridictions aux autorités militaires (principe 31) [7].

Peut-on déduire de ces précédents l'existence d'une règle générale de droit positif excluant la compétence des juridictions militaires à l'égard des violations des droits de l'homme ?

En dehors de règles spécifiques adoptées par les Etats comme en matière de disparition forcée (*supra*, Déclaration de l'AGNU de 1992 et Convention interaméricaine de 1994), il semble difficile de dire que le droit international général interdit aux juridictions militaires de s'occuper de violations des droits de l'homme ou qu'il nie toute valeur aux jugements rendus en la matière par ces juridictions. Il existe incontestablement une tendance doctrinale favorable à une règle de ce genre, mais l'existence coutumière de la règle paraît plus difficile à affirmer. Ainsi, il est significatif que les Conventions de Genève (CG) du 12 août 1949 reconnaissent expressément aux tribunaux militaires de la Puissance belligérante le droit de connaître des infractions commises, soit, par des prisonniers de guerre ennemis (art. 84/III), soit, par des civils ennemis en territoire occupé (art. 66/IV). Ces règles n'ont pas été remises en question dans les Protocoles du 8 juin 1977 additionnels (PA) aux CG.

Il est toutefois certain que les juridictions militaires sont, au même titre que les juridictions ordinaires soumises aux règles du droit au procès équitable, en temps de paix (Pacte relatif aux droits civils et politiques, art. 14) comme en temps de guerre (*ibid.*, eu égard à l'observation n° 29 du Comité des droits de l'homme qui voit en l'art. 14 une norme de *jus cogens* [8] ; CG de 1949, art. 99-109/III, 71-75/IV ; 1er PA, art. 75 ; 2e PA, art. 6). Autrement dit, le droit international n'interdit pas aux juridictions militaires de s'occuper de violations des droits de l'homme, à condition, bien sûr, que comme les juridictions ordinaires, elles répondent aux standards de toute justice digne de ce nom, à savoir, qu'elle se caractérise notamment, par le respect des principes d'indépendance et d'impartialité de la magistrature (Pacte relatif aux droits civils et politiques, art. 14 § 1 ; Principes fondamentaux relatifs à l'indépendance de la magistrature, art. 1-7 [9]).

## II. La pratique des juridictions militaires dans les opérations de maintien de la paix

A la connaissance de l'auteur, il n'existe pas d'information disponible de caractère général sur la pratique des juridictions militaires dans les opérations de maintien de la paix. On ne dispose que d'informations parcellaires sur certaines situations. Pour disposer d'une information exhaustive et sérieuse, il faudrait faire une enquête par questionnaire adressé à un échantillon représentatif d'armées nationales ayant participé à des opérations de maintien de la paix. Une telle enquête exige au moins une année de préparation et ne

---

7 *Ibid.*, § 44.

8 Comité des droits de l'homme, observation n° 29, 24 juillet 2001, *Rapport du Comité des droits de l'homme*, doc. ONU A/56/40, fr. 2001, p. 191 ; dans le même sens, TPIY, app., aff. IT-94-1-A-AR77, *Vujin/Tadic*, 27 févr. 2001, www.un.org/icty/tadic/appeal/vujin-f/vuj-aj010227f.htm.

9 Ces principes ont été adoptés par le 7e Congrès des NU pour la prévention du crime et le traitement des délinquants ; l'AGNU a accueilli ces principes « avec satisfaction » et à « invit[é] les gouvernements à les respecter », A/Rés. 40/146, 13 déc. 1985, consensus.

pouvait être menée à bien avant la présente intervention. On se bornera, donc, à dire quelques mots sur la pratique belge qui est la seule connue du soussigné.

La Belgique a participé à des opérations de maintien de la paix, e.a., en Somalie (1992-1993), au Rwanda (1993-1994), en Slavonie orientale (1996-1998). Au cours de ces opérations, la juridiction militaire était représentée par des cellules judiciaires mobiles [10] comprenant généralement un conseiller en droit de la guerre, un substitut de l'auditorat militaire, un greffier et des membres de la police militaire.

A diverses reprises, des membres des forces armées belges ont dû répondre, devant la juridiction militaire, de faits que l'on peut qualifier de violations des droits de la personne. En voici quelques exemples qui n'ont pas été limités au seul cas des opérations de maintien de la paix :

- condamnation, en 1966, d'un sergent pour avoir abattu une ressortissante congolaise désarmée, au Congo, à l'époque des rébellions dans l'est du Congo [11] ;
- condamnation, en 1972, de para-commandos belges qui, à l'occasion de manœuvres militaires, avaient torturé d'autres militaires belges, à titre d' « exercice » (!) [12] ;
- condamnation, en 1991, de membres de la police militaire belge qui, de nouveau, à l'occasion de manœuvres militaires, avaient torturé des militaires belges [13] (il s'agissait encore d'exercices …) ;
- poursuites mais acquittement, en 1995, d'un militaire belge de l'ONUSOM prévenu d'avoir tiré dans les jambes d'un enfant somalien qui n'avait pas tenu compte des avertissements et coups de semonce qui lui avaient été adressés pour qu'il n'entre pas dans la zone de sécurité dont ce militaire devait assurer la garde [14] ;
- poursuites mais acquittement, en 1996, d'un colonel belge prévenu d'homicide involontaire pour avoir mal évalué les risques que couraient les 10 para-commandos belges de la MINUAR massacrés au Rwanda par les forces armées rwandaises au début du génocide rwandais, le 7 avril 1994 [15] ;
- condamnation en 1997 de membres belges de l'ONUSOM pour des coups et blessures portés à un enfant somalien [16].

Ces quelques exemples tendent à montrer que la juridiction militaire a rempli le rôle qu'elle est supposée jouer dans un Etat de droit et elle l'a fait de manière sereine et indépendante pour assurer le respect des droits de la personne.

Faut-il s'en étonner ?

Une force de maintien de la paix n'étant pas véritablement impliquée dans la situation de troubles ou de conflit dans laquelle elle intervient, la justice risque moins d'être soumise aux pressions nationalistes ou partisanes de la rue et peut garder une

---

10 HORVAT, S., « La juridiction militaire en droit comparé », *RDM et D. Guerre*, 2001, p. 218.

11 Cons. guerre Bruxelles, 18 mai 1966 et Cour milit., 14 juillet 1966, *RDPC*, 1972-73, pp. 806-812.

12 Cons. guerre Liège, 20 nov. 1972, *JT*, 1972, p. 148.

13 Cour milit., 17 déc. 1991, *RDPC*, 1992, pp. 946-947.

14 *Id.*, 24 mai 1995, cité par FOBE, M., « Intervention sur la question de l'incidence sur les règles d'engagement d'une situation de conflit armé », *RDM et* D. Guerre, 1997, pp. 200-201; GOSSIAUX, C., « Les règles d'engagement, norme juridique nouvelle ? », *ibid.*, 2001, p. 172.

15 *Id.*, 4 juillet 1996, *RDPC*, 1997, pp. 115-130.

16 Cour militaire, 17 déc. 1997, *Coelus et Baer*t, *JT*, 1998, 289; pour un commentaire, WEYEMBERGH, A., « La notion de conflit armé, le droit international humanitaire et les forces des N. U. en Somalie (à propos de l'arrêt de la Cour militaire du 17 décembre 1997) », *RDPC*, 1999, pp. 177-201.

vision objective de la réalité. Le risque de réflexes du genre *right or wrong my country* est clairement moins élevé.

En guise de conclusion, on observera qu'en théorie, la juridiction militaire n'est pas, en soi, synonyme de justice partiale. *A priori*, il s'agit d'une justice qu'on pourrait qualifier de professionnelle comme il en existe dans d'autres branches du droit : il suffit de penser aux juridictions du travail en matière sociale ou aux juridictions commerciales. Ce n'est pas parce que les spécialistes qui siègent dans ces juridictions ne sont pas des magistrats classiques qu'ils ignorent les règles du droit au procès équitable et d'indépendance de la justice.

Réciproquement, il peut arriver que des juges professionnels classiques ne rendent qu'une caricature de justice. Il suffit de songer au cas de l'Allemagne nazie [17] et des régimes totalitaires en général.

En Belgique, comme dans d'autres Etats démocratiques, la justice militaire a fonctionné de manière correcte car il s'agit d'Etats où la justice se trouve sous le feu croisé du regard des autres pouvoirs : parlement, médias, opinion publique.

Il peut, toutefois, arriver que, même dans un Etat démocratique, l'esprit de corps puisse fragiliser davantage la justice militaire que la justice civile en termes d'indépendance et d'impartialité.

Il est, par exemple, inquiétant de noter que, dans certains systèmes judiciaires, les victimes ne peuvent se constituer partie civile auprès de la juridiction militaire : c'était le cas de la Belgique. Aujourd'hui, la question ne se pose plus dans ce pays, du moins pour le temps de paix, puisque les juridictions militaires y sont abolies en temps de paix depuis le 1er janvier 2004 [18].

Il en allait de même en France, avant 1992. Dix ans plus tôt, en 1982, le Garde des Sceaux (R. Badinter) s'en était expliqué en invoquant « la possibilité d'entreprises de déstabilisation de l'armée républicaine » [19] … En 1992, on n'a plus craint l'esprit subversif des victimes, mais on a quand même limité leur zèle « aux 'cas de décès, de mutilation ou d'infirmité permanente' (art. 689-2 du code de procédure pénale) » [20]. On n'est jamais trop prudent …

Toujours en 1982, lorsqu'il avait été question de réviser le droit pénal militaire, le même Garde des Sceaux de l'époque (R. Badinter) avait rappelé qu'on ne devait pas modifier ce droit en temps de guerre, car

> « Dans le temps de l'exception, l'impératif de survie de la collectivité nationale l'emporte sur toute autre considération. » [21]

---

17 *Cfr.* Nuremberg, US Mil. Trib., *Justice Trial*, 4 Dec. 1947, *Ann. Dig.*, 1947, pp. 278-290.

18 Loi du 10 avril 2003, *MB*, 7 mai 2003.

19 Cité *in Rapport au nom de la Commission de la défense nationale et des forces armées sur le projet de loi (n° 677) portant réforme du code de justice militaire*, par le député J. Michel, doc. n° 959, 3 juin 1998, I, A, 1, a (3) *in* www.assemblee-nat.fr/rapports/r0959.asp

20 Cité *ibid.*

21 Cité *ibid.*, I, A, 2.

Des mots plutôt inattendus dans la bouche du père de l'abolition de la peine de mort en France et de la reconnaissance du droit de recours individuel devant la Commission européenne des droits de l'homme …

Ce sont finalement moins les qualités civiles ou militaires d'un magistrat qui importent que les valeurs portées par la société dont fait partie ce magistrat. La démilitarisation de la justice n'est pas, en soi et par essence, la garantie d'une meilleure administration de la justice. Celle-ci n'est jamais que le reflet des idéologies dominantes. La démocratie et l'état de droit restent, en principe, la meilleure garantie de la qualité de la justice, mais il faut rester vigilant car même les sociétés démocratiques – on vient de le voir – ne sont pas à l'abri de certains errements. Ainsi, lorsqu'une société limite à la hiérarchie militaire le pouvoir de mettre en mouvement la justice militaire, lorsque cette société fait de sa propre sauvegarde la valeur suprême et subordonne le droit au procès équitable aux nécessités de l'heure, lorsque *salus patriae suprema lex* est érigé en critère de jugement, la justice, civile ou militaire, risque fort de se retrouver, au hasard des contingences de l'Histoire, au service des violations des droits les plus élémentaires de la personne.

## *Session: Conscientious objection and military tribunals*

### « The case of Conscientious Objection to Military Service »

*Rachel BRETT*
*Representative (Human Rights & Refugees)*
*Quaker UN Office, Geneva*

The question of decision-making about a claim of conscientious objection to military service raises some specific issues which do not otherwise arise in relation to military tribunals. This is because the issue to be decided is precisely whether or not the person is, or should continue to be, a member of the armed forces.

Conscientious objection has been recognised as a right by the United Nations Commission on Human Rights[22] and the Human Rights Committee,[23] deriving from the right to freedom of thought, conscience and religion enshrined in Articles 18 of the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.[24]

The question of how and by whom any decision on claims of conscientious objection to military service should be taken has been under consideration in the United Nations since the 1980s and in the Council of Europe since the 1970s. The Parliamentary Assembly of the Council of Europe made the following recommendations in 1977:

> "1. Persons liable for military service should be informed, when notified of their call-up or prospective call-up, of the rights they are entitled to exercise.
>
> "2. Where the decision regarding the recognition of the right of conscientious objection is taken in the first instance by an administrative authority, the decision-taking body shall be entirely separate from the military authorities, and its composition shall guarantee maximum independence and impartiality.
>
> "3. Where the decision regarding the recognition of the right of conscientious objection is taken in the first instance by an administrative authority, its decision shall be subject to control by at least one other administrative body, composed likewise in the manner prescribed above, and subsequently to the control of at least one independent judicial body.
>
> "4. The legislative authorities should investigate how the exercise of the right claimed can be made more effective by ensuring that objections and judicial appeals have the effect of suspending the armed service call-up order until the decision regarding the claim has been rendered.

[22] Culminating in the extensive provisions of Resolution 1998/77.

[23] Human Rights Committee General Comment No. 22, adopted in 1993. Since then it has regularly questioned States on this subject when they report under the International Covenant on Civil and Political Rights, and has included it in a number of its Concluding Observations on States' reports under the Covenant.

[24] It has also been the subject of recommendations and resolutions by the Council of Europe and the European Parliament, and is included in the Charter of Fundament Rights of the European Union.

"Applicants should also be granted a hearing and be entitled to be represented and to call relevant witnesses."[25]

The seminal UN work on the subject of conscientious objection to military service, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities Report prepared by Asbjørn Eide and Chama Mubanga-Chipoya in 1985, states in relation to this issue:

"101. In some States, these tribunals consist only of military personnel, who are often disinclined to allow for conscientious objection. In other countries, tribunals are composed of military and civilian personnel, but there are also some countries in which only civilians participate in the tribunal.[26]

"102. In several, but not all, countries there is a right to appeal against the decision of the tribunal, either to a higher tribunal or to a regular court. But there are some countries in which the decision of the first tribunal is final and cannot be appealed against.

"103. The procedural system established for obtaining conscientious objector status is likely to have a strong influence on the outcome of the request."

The authors conclude, "The material collected indicates that some countries have developed impartial institutions or use the regular civilian courts, with the application of normal legal safeguards, to determine the issue. In other cases, military tribunals are used and may not be sufficiently impartial with regard to the issue of conscientious objection. In still other cases, the decision is left to the discretion of individuals within the military administration, with no possibility of appeal. It seems reasonable, if conscientious objection is recognised in some but not all cases, that an impartial tribunal should take the decision and that information on the right to objection should be available to all." And they recommended:

"2(a) States should maintain or establish independent decision-making bodies to determine whether a conscientious objection is valid under national law in any specific case. There should always be a right of appeal to an independent, civilian judicial body.
(b) Applicants should be granted a hearing and be entitled to be represented by legal counsel and to call witnesses."

This was taken up again in the Report[27] on the "Issue of the administration of justice through military tribunals" submitted to the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003. Mr Emmanuel Decaux addressed this issue in paragraphs 38 and 39 and Recommendation No. 11.

"38. … certain offences should be excluded from military jurisdiction. Such is the case of conscientious objection insofar as, in its resolution 1998/77, the Commission on Human Rights calls upon States to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held. By definition, military tribunals would be both judges and parties in such cases.

[25] Council of Europe, *Twenty-ninth Ordinary Session of the Parliamentary Assembly* (Second part, 5-13 October 1977), Strasbourg, recommendation 816 (1977), p.2.
[26] The old name of the now "UN Sub-Commission on the Promotion and Protection of Human Rights".
[27] E/CN.4/Sub.2/2003/4 of 27 June 2003.

Conscientious objectors are civilians, who should be subject to civil proceedings. When the right to conscientious objection, which is an integral part of the right to freedom of thought, conscience and religion as contained in the Universal Declaration of Human Rights, is not recognized by the law, the conscientious objector is treated as a deserter and the military criminal code is applied.

"39. At the very least, as stipulated in recommendation No. R (87) 8 of the Committee of Ministers of the Council of Europe regarding the procedure for recognizing the status of conscientious objector:

> '5. Consideration of the application should contain all the guarantees necessary for a fair trial;
> '6. The applicant must be able to appeal the first-instance decision;
> '7. The appeals body should be separate from the military administration and its composition should ensure its independence.'"[28]

Recommendation 11 reads: "Conscientious objector status should be determined under the supervision of an independent and impartial civil court when the 'conscientious objectors' are civilians. When an application for conscientious objector status is made during the course of military service, it should not be punished as an act of insubordination or desertion but considered in accordance with the same procedure."[29]

This has also been addressed in the relevant resolutions of the UN Commission on Human Rights. In particular resolution 1998/77, which however goes further in welcoming and hence encouraging the acceptance of claims of conscientious objection without requiring this to be judged by an external authority (such as in Finland, for example)[30]:

> "Welcomes the fact that some States accept claims of conscientious objection as valid without inquiry; (OP2)
>
> "Calls upon States that do not have such a system to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held in a specific case … "(OP3).[31]

These provide an important recognition of the fact that the adjudication of any claim as a conscientious objector to military service should be determined by an independent and impartial *civilian* body, whether this claim is being exercised at the time of any initial call-up or during service in the armed forces, or on recall from reserve duty or similar

---

[28] Report by Mr. Dick Marty, entitled "Exercise of the right of conscientious objection to military service in Council of Europe member States", Parliamentary Assembly of the Council of Europe, document 8809, 13 July 2000.

[29] UN document E/CN.4/Sub.2/2003/4, para.84.

[30] In Finland, conscientious objection to military service was first recognised in 1922. In 1972 the examination board (which examines the convictions of conscientious objectors) was moved from the Ministry of Defence to the Ministry of Justice.[30] Since 1987, applications for conscientious objection are not examined; all applicants are accepted for alternative service, and claims can be made at any time after reaching conscription age, whether before being drafted, during service or afterwards.

[31] Recommendation No. R (87) 8 of the Committee of Ministers of the Council of Europe, adopted in 1987, also stressed the importance of "the necessary guarantees for a fair procedure", including "the right to appeal against the decision at first instance", and that "the appeal authority shall be separate from the military administration and composed so as to ensure its independence."

circumstances. This is the case in, for example, Germany where the same civilian body is responsible for applications from draftees, serving soldiers and reservists.[32]

The importance of independent and impartial civilian determination of all such claims cannot be overstated. The rationale, as Mr. Decaux points out in his Report is that the military is a party to the matter under consideration and, therefore, should not also be the judge of it: "independent" clearly means independent of the armed forces. As stated in the Bangalore Principles of Judicial Conduct 2002, 1.2 "A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate". As already noted, the point at issue in claims of conscientious objection to military service is precisely whether the person concerned is, or should continue to be, a member of the armed forces.

Furthermore, the hierarchical and disciplinary nature of the armed forces, means that conscientious objectors, unrecognised conscientious objectors or those who are considered to have infringed the terms of their alternative service, are often charged with military offences, such as refusal to obey an order, insubordination, or going absent without leave, and tried by a military tribunal. For example, Amnesty International's recent report on Greece[33] instances a number of cases where charges of insubordination were brought against persons seeking to exercise their right to conscientious objection to military service on initial call-up, or who were refused recognition because they were already in the Greek armed forces or had served in other armed forces before becoming pacifists.

It is important to note that Conscientious Objectors fall into different categories. The principal divisions are (a) between pacifists and selective objectors of one variety or another, and (b) between

1. those who are civilians who are called up for compulsory/obligatory military service, and claim the right not to serve on the basis of a conscientious objection;
2. those who are military personnel because they are already in the armed forces and become conscientious objectors during service, whether initially conscripts or volunteers;
3. those who are reservists and are recalled for active service who have developed a conscientious objection since their initial service.

Those in Category One are and should be treated as civilians. Their claim as objectors is precisely to being part of the military, and the logic is that they should not be held by the military, nor should their claim be adjudicated by the military. Unfortunately, this is not always the case. For example, the most recent report of the UN Special Representative on Bosnia and Herzegovina and the Federal Republic of Yugoslavia[34] notes that "In the Republika Srpska, no independent civilian commission exists to handle applications [for conscientious objection to military service]; instead, applications are dealt with by the Ministry of Defence, in contravention of international standards." The UN Special Rapporteur on Freedom of Religion or Belief had raised the issue of conscientious objectors being sentenced by military courts in the Republic of Korea[35] but this has now changed so that they are tried by civil courts under provisions of the Military Service Act. Although as of December 2001, 1,640 Conscientious Objectors were in prison there, some

[32] Kriegsdienstverweigerungsgesetz as amended – information provided by Evangelische Arbeitsgemeinschaft zur Betreuung der Kriegsdienstverweigerer (EAK) to the Office of the UN High Commissioner for Human Rights in response to UN Commission on Human Rights resolution 2002/45.

[33] *Greece- To be in the army or choosing not to be: The continuous harassment of conscientious objectors* (EUR25032003).

[34] E/CN.4/2003/38, para. 23.

[35] E/CN.4/2003/66, paras 65-68.

of whom had been sentenced by military courts.[36] However, one of the problems is that even first-time conscripts being called up may be considered, and treated, as military personnel, for example, under Israeli law, every Israeli citizen becomes a member of the Israeli Defence Force as soon as he or she received the draft and those who refuse to enlist are thus subject to court martial.[37]

Those in Category Two: active service personnel who become conscientious objectors are in a more difficult position since they *are* military personnel. Nevertheless, the international standards clearly recognise that an individual may develop a conscientious objection to military service. UN Commission on Human Rights resolution 1998/77 states "persons performing military service may develop conscientious objections",[38] nor is this limited to those performing *compulsory* military service. This is recognised for example in Germany (which still has conscription) and by the United Kingdom, which has all-volunteer armed forces, but nevertheless recognises the right of conscientious objection for both serving soldiers and reservists.

It is understandable that the military might see this as a military issue to be handled by them. However, this is particularly problematic since the refusal to serve often involves acts which also contravene military discipline – such as the refusal to carry out an order, or to wear a military uniform. The question of the actual as well as the perceived lack of independence and impartiality of any military tribunal to adjudicate on such cases is obvious. Indeed, it becomes critical that the adjudication of the claim of conscientious objection is completely independent of the military, with the question of any military offence only coming into play if and when the claim of conscientious objection is rejected.

Category Three: reservists and others in similar positions are in-between the previous two categories, being perhaps less clearly either civilian or military personnel. However, the issues are more akin to those in Category Two as those who are already in a relationship with the military who are now seeking recognition as conscientious objectors.[39]

In addition to questions of principle, many practical problems arise:

1. The lack of independence and impartiality of military tribunals adjudicating on conscientious objection are often compounded by inadequate information on the standards being applied (if any), by the lack of reasoned decisions or even a record of proceedings available to the claimant; and the question of (independent) legal representation for the claimant.

[36] There is as yet no recognition of the right of conscientious objection to military service in the Republic of Korea.

[37] *Israel: Conscientious Objected Tackled by Military Justsice: Ben Artzi Trial,* Report of Mission of Observation (7-10 October 2003): The Observatory for the Protection of Human Rights Defenders, No. 376/2 December 2003 (FIDH, OMCT).

[38] In 1992, Sub-Commission expert Dumitru Mazilu, in his final report on human rights and youth (E/CN.4/Sub.2/1992/36 of 18 June 1992) pointed out that "conscripts should have the right to claim conscientious objector status at any time, since the claim is an exercise of the fundamental right to freedom of thought, conscience and religion." (para.104). However, it is not only conscripts who have the right since even a person who initially volunteered may become a conscientious objector.

[39] A number of Israeli reservists have specifically refused to serve in the Occupied Territories, or have refused to return to service in the Israeli Defence Force because they see its current role as that of an occupying force, but in fact there are Israeli claimants to Conscientious Objection in all three Categories: see War Resisters International: "Conscientious objection to military service in Israel: an unrecognized human right", (3 February 2003).

2. The possibility of appeal from the military refusal of recognition of conscientious objection to a civilian court - at all, and which is further hampered if the tribunal does not take and make available reasoned decisions on the basis of specified grounds.[40]

The conclusion is that *no* claims of conscientious objection to military service should be adjudicated by military tribunals, whether at the time of initial registration or drafting into the armed forces, or of serving military personnel or of reservists and others liable to be recalled for military service. This should apply whether the applicants are civilians (and are recognised as such), or military personnel, or their status is unclear or ambiguous. In all cases, the same underlying considerations apply: the point at issue is the requirement to undertake or to continue in military service. Therefore, even with the best will in the world, the military are a party to the matter and should not also be the judge of it. The recognised need for an "independent and impartial" tribunal requires that it should be a civilian one. The exception is, of course, where no external adjudication is made but the conscript has the free choice between military or civilian alternative service.

26 January 2004

[40] A specific issue which arises in Israel because of its conscription of women is the fact that two separate "Conscience Committees" exist: one to deal with male claimants and one to deal with female ones. The two Committees appear to apply different rules and standards, so that women are much more readily recognised as conscientious objectors than men are.

**"Objection de conscience et tribunaux militaires : le cas Suisse"**

*Antonio ABATE[41] et Marie-Claire CORMINBOEUF[42]*

Monsieur le Président,
Mesdames, Messieurs,
Cher collègues et invités,

C'est pour moi un plaisir et en même temps un honneur d'être parmi vous aujourd'hui pour aborder le sujet de l'objection de conscience en rapport avec les tribunaux militaires. C'est un défi, car il s'agit d'un thème sur lequel beaucoup de personnes ont écrit et qui a occupé de nombreuses instances politiques à tous les niveaux et dans tous les pays.

J'aimerais vous présenter comment les objecteurs ont été traités jusqu'à présent en Suisse en faisant en premier lieu un petit tour en arrière historique. Je mettrai dès lors moins l'accent dans mon exposé sur la définition de l'objecteur de conscience ; je ne parlerai pas de ses motifs éthiques, politiques ou religieux.

Au cours des 50 dernières années, les dispositions légales déterminantes pour le traitement des objecteurs de conscience ont été adaptées à plusieurs reprises à l'évolution de la société:

1) Dans sa version de 1927, le code pénal militaire sanctionnait l'objection de conscience par une peine d'emprisonnement exclusivement, quelles qu'en étaient les raisons.

2) La révision de 1950 a apporté les premières mesures permettant une atténuation des peines. Pour autant que les objecteurs de conscience agissaient pour des motifs religieux, deux innovations avaient été introduites: l'abandon de la privation des droits politiques en tant que peine accessoire et la compétence du juge à faire exécuter la peine d'emprisonnement sous la forme d'arrêts.

3) En 1967, la situation particulière des objecteurs de conscience pour des motifs religieux a été étendue aux objecteurs de conscience pour des motifs éthiques. En outre, la durée de la peine d'emprisonnement a été limitée à six mois.

4) En 1977, ensuite de l'initiative de Münchenstein, et en 1984, ensuite de l'initiative populaire "pour un authentique service civil fondé sur la preuve par l'acte", le peuple et les cantons rejettent clairement l'introduction du service civil.

5) En 1991 est entrée en vigueur la loi dite "lex Barras", qui a permis aux objecteurs de conscience pour des raisons religieuses ou éthiques d'accomplir un service **d'astreinte au travail d'intérêt public** pendant une période de 1,5 fois plus longue par rapport à la durée du service militaire. Le refus de servir a été décriminalisé, c'est-à-dire qu'il n'a plus été inscrit au casier judiciaire. Comme par le passé, les cas ont toutefois été traités et jugés par les tribunaux de division militaires.

[41] Chef du service juridique, Office de l'auditeur en chef, Département suisse de la Défense
[42] Cheffe suppléante, Centre régional du service civil de Suisse Romande

6) Enfin, le 17 mai 1992, le peuple suisse a accepté une modification de l'art. 18 de la Constitution fédérale de 1874 : « Chaque Suisse est tenu au service militaire. La loi prévoit l'organisation d'un service civil. ». Cette loi sur le service civil est entrée en vigueur le 1er octobre 1996. La compétence de statuer sur l'admission d'une personne à accomplir un service civil n'y est plus attribuée aux tribunaux militaires, mais à un organe d'exécution indépendant, soit **l'Organe d'exécution du service civil** qui fait partie du Département fédéral de l'économie.

Ce bref rappel historique démontre que la législation concernant la répression des objecteurs de conscience a constamment été adaptée à l'évolution de la société. Ces adaptations ont permis d'éviter qu'apparaisse une grande divergence entre les valeurs sociales et juridiques. Le jugement des objecteurs de conscience a dès lors toujours reposé, et repose encore, sur une légitimation démocratique.
Le 30 novembre 1998, le conseiller national **Peter Vollmer** a déposé une motion 98.3537 demandant la réhabilitation des anciens objecteurs de conscience. Selon lui, ces personnes, qui ont été condamnées à de lourdes peines de prison, devraient être réhabilitées afin que les graves préjudices sociaux et personnels qu'ils ont subis puissent être réparés. Le Conseil fédéral et le Conseil national ont rejeté cette motion pour deux arguments principaux. La législation pénale a toujours été adaptée à l'évolution de l'opinion publique. Ce n'est pas parce que la loi pénale change qu'il faut réhabiliter les personnes ayant été condamnées sous l'ancien droit. Ce serait ouvrir la porte à d'autres catégories d'infractions.

Mais, me direz-vous, aujourd'hui comment sont traités en Suisse les objecteurs de conscience ?
Il sied tout d'abord de rappeler qu'en Suisse il existe, à côté du Code pénal ordinaire, un Code pénal militaire (CPM), qui est applicable même en temps de paix. La Suisse est donc un pays où existe une juridiction militaire.
L'article 81 du code pénal militaire réprime le refus de servir et la désertion. L'alinéa premier de cette disposition prévoit que « *celui qui, **dans le dessein de refuser le service militaire**, ne participe pas au recrutement, ne se présente pas au service militaire, bien qu'il y ait été convoqué, abandonne sa troupe ou son emploi militaire sans autorisation, ou ne rejoint pas sa troupe après une absence justifiée, sera puni de **l'emprisonnement jusqu'à 18 mois**.* ».
L'alinéa 6 de l'article 81 dispose cependant que l'auteur ne sera pas punissable s'il est admis au service civil, s'il est affecté au service sans arme ou s'il est déclaré inapte au service et que l'inaptitude existait déjà lors du refus de servir.
Cette version de l'article 81 est entrée en vigueur le 1er octobre 1996, soit en même temps que la loi sur le service civil. Mme Corminboeuf vous en touchera quelques mots tout à l'heure. Depuis cette date, les condamnations des objecteurs de conscience par les tribunaux militaires ont radicalement diminué.
Selon la Constitution fédérale suisse, le service militaire est obligatoire pour tous les citoyens suisses de sexe masculin. Le service civil n'est qu'un service de remplacement. Il n'existe donc actuellement pas de libre choix pour les citoyens entre le service militaire et le service civil.
Donc, celui qui est aujourd'hui intéressé à accomplir du service civil à la place du service militaire doit démontrer qu'il ne peut concilier sa conscience avec le service militaire. Ce n'est qu'après avoir passé le recrutement qu'il pourra déposer une demande d'admission. Toute personne qui dépose une telle demande au moins trois mois avant un prochain service militaire ne reçoit pas d'ordre de marche le convoquant à ce service. Si ces trois mois ne sont pas respectés et qu'il n'entre pas au service militaire (école de recrues ou cours de répétition), une enquête pénale sera ordonnée contre lui. Le juge d'instruction militaire a cependant la faculté de suspendre cette enquête jusqu'à droit connu sur la

demande au service civil. Si la demande est acceptée, la procédure se terminera par un non-lieu ou un acquittement en vertu de l'article 81 alinéa 6 du code pénal militaire. Si la demande au service civil est rejetée, la procédure reprend son cours et la personne en cause risque une condamnation. J'ai dit « risque une condamnation » parce qu'il se peut très bien que cette personne soit déclarée inapte au service. Je vous rappelle que les personnes inaptes sont également acquittées en vertu de ce même alinéa 6 que je vous ai cité tout à l'heure.
Je peux vous dire que les condamnations des objecteurs de conscience, c'est-à-dire de ces personnes aptes au service dont la demande au service civil a été rejetée, se comptent aujourd'hui sur les doigts de la main. Je ne peux malheureusement pas vous fournir de chiffre exact, car nos statistiques comptent également ce qu'on appelle les refus de servir partiels, c'est-à-dire les personnes qui font défaut à un service d'avancement (école de sous-officiers). Selon la jurisprudence des tribunaux militaires, confirmée par le Tribunal militaire de cassation, les quelques objecteurs de conscience qui sont condamnés risquent en moyenne une peine d'emprisonnement de six à huit mois ferme.
En l'an 2000, un objecteur qui avait été condamné à huit mois d'emprisonnement ferme a demandé la grâce au Conseil fédéral. Le gouvernement suisse a admis partiellement sa requête et réduit sa peine à six mois. Cette peine pouvait dès lors être exécutée en semi-détention. Concrètement, cette personne a pu rester chez elle avec un bracelet électronique à la cheville. Cette décision est publiée dans la JAAC qui est la Jurisprudence des autorités administratives de la Confédération au numéro 67.9.
En **procédure pénale militaire**, aucun régime plus sévère n'est réservé aux objecteurs de conscience. Ils bénéficient des mêmes droits et garanties procédurales que les autres prévenus.
Les peines d'emprisonnement des objecteurs de conscience ne sont pas non plus exécutées plus sévèrement que les autres personnes condamnées. L'exécution militaire est abolie ; ce sont les cantons qui sont chargés de l'exécution des jugements. Celle-ci est la même que l'exécution des jugements pénaux de la juridiction civile ordinaire.

En conclusion, on peut dire que le traitement de l'objection de conscience par la Suisse est non seulement fondé démocratiquement, mais également satisfaisant.
Merci de votre attention.

**Complément à l'exposé de Monsieur Abate présenté par Madame Corminboeuf**

**"Service civil : La solution du législateur suisse à l'objection de conscience"**

Je vais vous parler de la procédure d'admission au service civil. L'organe d'exécution du service civil, qui s'occupe donc des objecteurs de conscience, fait partie du Département de l'économie et n'a donc plus rien à voir avec le Département de la défense. Ensuite, les personnes qui désirent déposer une demande d'admission au service civil parce qu'elles objectent pour des raisons de conscience doivent passer devant une commission d'admission qui est formée de civils et de gens qui sont complètement indépendants de l'administration. Ce sont des personnes qui ont leur activité professionnelle et qui viennent siéger une à deux fois par mois pour auditionner les objecteurs de conscience et pour essayer de déterminer si ces personnes ont vraiment un motif de conscience qui fait qu'elles ne peuvent pas effectuer leur service militaire. Toute personne astreinte au service militaire peut déposer une demande en tout temps. Il y a une nouveauté depuis cette année : les personnes qui n'ont pas encore été recrutées peuvent également déposer une demande avant le recrutement et ensuite être auditionnées pendant le recrutement.
Il faut également souligner que les personnes qui n'ont pas encore effectué un service militaire peuvent déposer une demande et que les personnes en cours d'école de recrue ou de service militaire peuvent également déposer une demande à ce moment-là. Leur demande est traitée en priorité.

Concernant la procédure avec la justice militaire, si, durant une période de service, il y a un refus d'ordre, le juge d'instruction peut suspendre la procédure militaire et nous envoyer le dossier pour examiner si la personne a un problème de conscience.

Lorsque les personnes sont admises au service civil, elles doivent accomplir une fois et demi la durée du service militaire (le soldat est astreint à 260 jours de service militaire et le « civiliste » à 390 jours de service civil). Elles doivent le faire dans des institutions d'intérêt public et reconnues par le service civil (c.f liste ci-dessous)

**Bases légales**

Constitution suisse
• Art. 59 cst. Service militaire et service de remplacement :
Tout homme de nationalité suisse est astreint au service militaire. La loi prévoit un service civil de remplacement.

Loi sur le service civil (LSC ; RS 824.0)
• Art. 1 al.1 LSC. Principe
Les personnes astreintes au service militaire, qui démontrent de manière crédible qu'elles ne peuvent concilier le service militaire avec leur conscience, doivent accomplir un service civil conformément à la présente loi.

• Art. 1, al.2 et 3 LSC. Conflit de conscience
Al.2 : Le conflit de conscience au sens de l'al.1 est caractérisé par le fait que la personne concernée se prévaut d'une ***exigence morale*** qui engendre, de son point de vue, un conflit ***insoluble*** entre sa conscience et l'obligation de servir dans l'armée Al.3 : Cette exigence morale est conforme au sens moral de la personne concernée.

• Art.3 LSC. Travail d'intérêt public
Un travail est réputé d'intérêt public lorsque la personne astreinte effectue son service civil dans une institution publique ou dans une instiution privée exerçant une activité d'utilité publique.

• Domaines d'activité (art. 4 LSC)
Santé, service social, conservation des biens culturels, protection de la nature et de l'environnement, entretien du paysage, entretien des forêts, agriculture, coopération au développment et aide humanitaire, aide en cas de catastrophe et de situation d'urgence

• Art. 18 LSC. Commission d'admission
Une commission d'admission décide de l'admission du requérant au service civil et arrête le nombre de jours de service qu'il doit accomplir.

• Art. 18*a* LSC. Audition personnelle
La commission d'admission entend le requérant lors d'une audition personnelle.

# *Conclusions*

## ICJ Report

*Cordula DROEGE*
*Legal Officer*
*International Commission of Jurists*

The following report is a summary of the presentations and discussions held at the conference on 'Human Rights and the Administration of Justice through Military Tribunals' held in Geneva on 26-28 January 2004. The dialogue focused on the existence of different national systems of military justice and on international human rights standards with regard to the administration of justice. This short summary cannot reflect all the issues discussed or accurately describe all the national systems discussed. Rather, it tries to cluster the discussion into a few areas of particular importance. It therefore focuses less on the different existing domestic system, but rather on the questions posed from the point of view of international law, as international law must find common criteria, standards, and mechanisms on the administration of justice through military tribunals.

The conference aimed at starting a discussion on the rules of international law applicable to military tribunals - especially human rights law and humanitarian law - so as to identify the international legal framework within which military tribunals have to operate. It was also intended to recall the already existing international *corpus juris* concerning military tribunals as a basis for this discussion. For the ICJ, it is indispensable that the competence, the composition, the functioning and the procedures of military tribunals be in conformity with the international norms and principles on fair trial.

In this sense, the many topics of discussion will be clustered into three main areas:

1. What are military tribunals and what is their *raison d'être*?
2. What is the personal and material scope of military jurisdiction or what should it be?
3. Which legal standards on the administration of justice, and particularly on the right to a fair trial, must military tribunals comply with?

Beyond these questions, two themes emerged as important normative and practical backgrounds of the conference: on the one hand, the legal background of international human rights law, outlined in the beginning by the expert of the Sub-Commission in charge of the study on the administration of justice by military tribunals, Professor Decaux, and, on the other hand, the work and functioning of military jurisdiction in practice, invoked time and again during the discussion.

## I. Normative and practical backgrounds

### Legal framework of international standards on the administration of justice

The legal framework was outlined by Professor Decaux at the beginning of the conference. The rule of law comprises some fundamental general principles, material and procedural, flowing from the relevant sources of international law, like the Universal Declaration, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the European Convention on Human Rights and the African Charter on Human and People's Rights. These instruments are further complemented by the United Nations Declarations and Codes of Principles on the administration of justice, the reports of Special Rapporteurs, the works of the Sub-Commission on the administration of justice, and the jurisprudence of the human rights bodies and courts both at UN and at regional level.

All these sources converge into certain fundamental principles: the principle of legality (particularly the prohibition of retroactive criminal laws); the right to be tried by a competent tribunal previously established by law, the principle of equality before the law and tribunals, and the right to a remedy (such as the remedies of *amparo*, *tutela*, *habeas corpus*, *etc.*).

Another basic principle that must inform any discussion on military tribunals is the right to a fair trial, whose components are set out in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and the equivalent provisions of other instruments: the right to an independent and impartial tribunal, which presupposes a real separation of powers within the State; equality of the parties; the presumption of innocence; the right to defend oneself and to judicial assistance, which presupposes the independence of the bar; access to all relevant material; the right to be tried within a reasonable delay; the right to a public process; and the right to appeal. It is to be noted that limitations based on reasons of national security are only acceptable to the extent that this concept is understood as 'national security in a democratic society', which implies that the doctrine of national security must be anchored in the democratic structure of the State.

The further legal framework to be taken into account is related to the rights of the victim, particularly of victims of human rights violations and serious violations of international humanitarian law: the right to justice, the right to truth, the right to an independent and impartial investigation, and the right to reparation.

### Functioning and work of military tribunals

Another recurring theme throughout the conference was the reality of military tribunals and the meta-juridical questions that must inform the discussion on military tribunals: What is the doctrine of national defence? What is the relationship between the armed forces and civil society?

In this sense, the political context in which military tribunals operate must be taken into account. Although the military justice systems in the Latin American dictatorships have perhaps been the trigger for the discussion on military tribunals and the administration of justice, the discussion is of relevance in all

regions of the world. It was mentioned in this regard that many African countries are authoritarian or military regimes. Equally, the military justice systems of democratic countries and, even more so of certain unstable democracies such as Turkey and Russia, pose serious issues of human rights and have come under scrutiny of international bodies for shortcomings in compliance with human rights standards. How, then, does a democracy arm itself with mechanisms to deal with human rights violations and what are the remedies? Further, the role of military tribunals in the context of transitional justice must be addressed and clarified.

## II. Concept and *raison d'être* of military jurisdiction

### Defining military tribunals

When talking about military justice, it is important to define those bodies that can be considered as military tribunals. While it is beyond doubt that courts martial constitute military tribunals, questions remain open with regard to other bodies, such as, for instance, the special tribunals in Africa or the state security courts in Turkey. There seemed to be agreement in the discussion that the military commissions set up by the United States Government to try foreigners who are suspected of terrorist crimes cannot be regarded as military tribunals, as they are entirely incorporated in the framework of the executive branch.

The question on the defining criteria of military tribunals will have to be further explored. Is it dependent on whether military representatives sit on it? Is it only a tribunal if it has a certain degree of independence? This question becomes all the more pressing when one considers the ample variety of models of military jurisdiction that exist in the world. Models of military jurisdiction vary according to their relationship with civil jurisdiction. Thus, there are countries with no military courts, countries with civilian courts incorporating military elements, countries with military chambers within civil courts, countries with civilian elements within military courts and entirely military tribunals. Military jurisdiction also varies according to the composition of courts at different instances: sometimes there may be mixed tribunals at all instances, sometimes, like in the United Kingdom, the last instance is a civil court. The models also differ as to the function of the judges within the military: in some systems, military judges are lawyers of the army but not in the direct chain of command of the unit of the accused, whereas the more frequent model consists of military tribunals where the judge is the commander of the unit of the accused. In all constellations, the relationship between the judge or the prosecutor with the executive power becomes a crucial question, as the independence of these institutions depends on it.

### Practical need for military tribunals

Many practical arguments were put forward to explain the need for military courts, of which the most frequent was perhaps that military life is different from civilian life: soldiers are asked to put their lives at risk, which leads to a reinforced, very strong need for discipline. Members of the army may more readily accept a judgment by a military court or a court martial than a judgment by a civilian court.

Military jurisdiction was also described, in a certain sense, as a specialized jurisdiction, in which the judges, who are members of the armed forces, have a specialized knowledge of military life and particularly of the law of armed conflict. Against this argument, on the other hand, it was mentioned that - with the exception of juvenile courts, which have the purpose to offer greater guarantees and less harsh punishment to the accused – military jurisdiction is the only 'specialized' jurisdiction with a competence to sentence someone to a prison sentence or even to death penalty.

Another practical aspect mentioned was the interest of victims to see crimes tried in military tribunals as they are often more efficient. Against this, however, it was argued that this depends on the context: victims of gross human rights violations may rather want to see the crimes committed against them to be tried in ordinary courts, as trial of members of the armed forces for gross human rights violations in military courts often leads to their impunity from prosecution.

Great emphasis was put on the need for military jurisdiction in times of increasing overseas interventions, peacekeeping operations and the like. Indeed, in many common law countries, military tribunals may be the only competent courts for offences committed overseas, as civilian courts have no extra-territorial jurisdiction. Even in those countries in which the ordinary courts have extra-territorial jurisdiction, it is often not exercised, as it is cumbersome to try offences committed at great distance from the tribunal's seat. The advantage of military courts is that they can be easily deployed, they operate where the offence was committed, and the accused and witnesses do not have to be brought all the way home. If military tribunals do not exercise jurisdiction over crimes committed overseas, then those crimes may remain unpunished.

**III. Issues of jurisdiction**

A crucial question of the seminar concerned the scope of jurisdiction that military tribunals have or should have. Should jurisdiction only cover military offences? Should it be a merely disciplinary jurisdiction or also a criminal jurisdiction? Should it be applied at all times or only in times of armed conflict? Over whom should it have jurisdiction: only permanent members of the armed forces, civilians, conscientious objectors, children?

There is a multitude of models for competences of military tribunals; amongst them, there are, for example:

- Generally defined competences: military tribunals have jurisdiction over all offences committed by a member of the armed forces or against a member of the armed forces or military property.
- *Ad hoc* competences: certain systems allow for the possibility to extend the jurisdiction of military tribunals over certain offences at certain times or under certain circumstances
- Restricted competences: some military tribunals only have competence for military offences committed by military personnel: but the question arises as to what a military offence is, and if it should include disciplinary offences.
- Competences varying in war or peace time.

- Competences differentiating between criminal and disciplinary offence.

There are also variations in the definition of military offences, as they vary from country to country. It is uncontroversial that offences that can only be committed by a member of the armed forces, such as desertion or mutiny, constitute military offences. The situation is less clear with regard to crimes against the State, such as treason or espionage. It was argued that in times of military dictatorship those accused of these crimes are at an exceptionally high risk to receive an unfair trial. Also, the relationship between ordinary crime and military crime remains to be clarified. It was recalled, in this context, that in some countries ordinary crimes have been militarized only to fight political opposition. Moreover, the difficult distinction between disciplinary offence and criminal military offences needs clarification. Lastly, it is critical to define which body has the competence to decide on the qualification of the offence as military or civil, and to assign the matter to the military or the ordinary tribunals.

With regard to the issue of jurisdiction, three areas were discussed in particular: Should military tribunals have jurisdiction over gross violations of human rights? Should they have jurisdiction over civilians, and, if so, for which offences? And does the deployment of troops overseas make it necessary that they exercise jurisdiction?

**Jurisdiction over gross violations of human rights**

Here again, the discussion must be seen against the background of the Latin American experience, but also the African context, since it is mainly in the context of these regions that international human rights bodies have pronounced themselves on this particular question. Against the trial of gross violations of human rights before military tribunals, both practical and legal arguments were expressed.

The main practical argument is an argument arising from experience. The experience in Latin America showed that the trial of gross violations of human rights may lead to flagrant impunity for the perpetrators. For example, the judgments against members of the armed forces for gross human rights violations in Argentina, Guatemala or El Salvador were all handed down by civilian courts, while the military was reluctant to admit any fault in its own ranks.

A similar experience was mentioned with regard to war crimes, where military tribunals around the world have not exercised the due diligence to prosecute, try and punish, despite their obligation to do so under the Geneva Conventions. The same holds true for crimes committed in overseas interventions.

Some discussion arose concerning the fact that the culture of impunity was not a necessary attribute of military tribunals, that, much to the contrary, gross human rights violations are functionally ineffective within the military, and that therefore, the military has an interest in trying them. Against this, however, it was contended that in some armed forces, and particularly in times of internal

conflict, human rights were often seen as an obstacle to the exercise of military functions.

The problem of impunity within the military jurisdiction can also be attributed to some weakness in many military codes or procedural rules of military tribunals. Indeed, many codes contain the defence of superior orders, and many do not provide for responsibility of superior command. These two legal restrictions pose a major obstacle to criminal accountability of perpetrators.

The legal arguments against the trial of perpetrators of gross human rights violations by military tribunals are very clearly formulated by the Inter-American Court and Commission on Human Rights. These bodies, in many cases, have developed a fundamental criterion to define the scope of military jurisdiction, namely a criterion of *functionality*: the military justice system has its raison d'être the maintaining order and discipline within the military; therefore, it should be confined to offences committed in relation to the military function, in other words: military offences committed by the military. Gross violations of human rights, according to this opinion, are not part of the functions of any military force in the world. The UN Human Rights Committee has followed a similar line of argumentation.

It was argued by the Inter-American human rights bodies that the judgment of gross violations of human rights by military tribunals constitutes a violation of the victim's rights: the victim has a right to an effective, independent and impartial investigation; the State has a positive obligation to bring to justice the authors of gross violations, and justice must be guaranteed by an independent and impartial tribunal, failing which the victim's right to a remedy is being violated. In the cases before the Inter-American bodies the investigations, prosecutions and judgments conducted by the military were in violation theses rights: the 'judges' were not independent from the military hierarchy and were sometimes even subordinates of those who have given the orders for certain violations; they had no judicial training; they had no stability of tenure; there existed an erroneous *esprit de corps*.

Some international instruments specifically prohibit the judgment of specific gross violations of human rights by military tribunals, such as Article IX of the Inter-American Convention on Enforced Disappearances or Article 16 of the Declaration on the Protection of All Persons from Enforced Disappearance. Also, it was mentioned that many other international human rights bodies (such as the Human Rights Committee, the Committee against Torture, the Working Group on Enforced Disappearances and others) have held that the perpetrators of gross violations of human rights should be tried by the competent civil courts and not the military jurisdiction.

**Jurisdiction over civilians**

As a second crucial issue concerning the scope of jurisdiction of military tribunals, the question of jurisdiction over civilians was discussed. The jurisprudence of three bodies was particularly mentioned in this context: the UN bodies, the African Commission on Human and People's Rights and the Inter-American Court of Human Rights.

In its General Comment 13 concerning the right to a fair trial, the UN Human Rights Committee considered that the judgement of civilians before military tribunals should be very exceptional. In the past decade, mainly in its comments on state reports, and in some individual cases, it has more clearly stated that the trial of civilians by military tribunals is incompatible with Article 14 of ICCPR.

The UN General Assembly has criticized the trial of civilians by military tribunals in the context of Chile and more recently with regard to the Democratic Republic of Congo.

The UN Working Group on Arbitrary Detention has equally developed a doctrine on this subject: on the basis of its experience, it has found that in almost all military tribunals there is a risk of lack of impartiality for civilians. It has made four recommendations in this respect: that military tribunals should not judge civilians; that military tribunals should not have jurisdiction over military personnel when there are civilian victims; that the offences of rebellion, sedition, or other political offences should not be tried in the military forum; and that military tribunals should not impose the death penalty.

Within the United Nations system, the trial of civilians by military courts has also repeatedly come under criticism by the Special Rapporteurs, both thematic and country Rapporteurs.

The African Commission on Human and People's Rights has criticized the judgment of civilians by military courts in many cases. It has criticized the lack of independence of military tribunals through shortcomings in their designation, the security of their mandate, and the guarantees against outside pressures. It has held that the composition of a tribunal gives the measure for its impartiality; further, that the training of the magistrates is also crucial for their impartiality. As for procedural guarantees, it has applied similar criteria to other human rights bodies.

An extremely important step in this area was taken by the African Commission in 2003 when it adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. In these Principles, the prohibition for military courts to have jurisdiction over civilians is enshrined as a general rule and becomes a right of the civilian. The argument is a functional argument, joining that of the Inter-American Commission, since the Principles affirm that the purpose of military jurisdiction is to determine an offence of a military nature committed by military personnel.

The Inter-American Court has held that military tribunals who judge civilians are not impartial for two reasons: the judges are designated by the executive; and when they are immersed in the battle against insurgent groups, they cannot be impartial. It has also outlined the material legal argument against the trial of civilians by military courts: military justice serves the purpose to maintain order and discipline within the military; therefore it should apply to members of the military forces who have committed military offences. Furthermore, the judgment by military tribunals deprives civilians of their *juge naturel*, as they cannot commit military offences. Here again, the functional argument was determining for the Inter-American Court.

The European Court of Human Rights, in a series of cases concerning state security courts in Turkey, has criticized the fact that the judges were members of the armed forces and subject to the executive power, that the judges were subject to military discipline and that their nomination was controlled by the administration and the army. In such circumstances, the independence and impartiality of the courts were not guaranteed.

In order to define jurisdiction, the category of 'civilians' must be clarified. The concept of 'civilians attached to the armed forces' is too narrow in the context of the development of overseas operations, in which the increased civilian participation creates a whole new and substantial civilian infrastructure surrounding the operation. Other categories whose status as civilians is still unclear are: recruits, mercenaries, retired military personnel, civilians who participate in a military offence. The same question arises with regard to conscientious objectors; there seems to be a tendency, particularly in the Human Rights Committee and within the Council of Europe, to try to restrict military jurisdiction over conscientious objectors, which indicates that they may rather be considered as civilians.

Also, certain situations remain unclear – and have not been addressed in depth by the above-mentioned human rights bodies – such as the situation of belligerent occupation (and offences against the security of the occupying forces) or exceptional situations when law and order in a state has broken down.

**Jurisdiction overseas**

The question of jurisdiction over offences committed in relation to overseas operations imposes itself from the perspective of a failure to ensure adequate and effective jurisdiction. Indeed, as already mentioned, the failure of military tribunals to effectively try offences overseas leads to impunity for the perpetrators, due to the fact that in most common law countries civil courts do not have extra-territorial jurisdiction and in those countries which have extra-territorial jurisdiction, it is not effectively enforced because of the distance between the place of offence and the courts. The advantages of military jurisdiction in this context lie in their being deployable and expeditious. On the other hand, it was mentioned that alternatives to this jurisdiction may be found.

The need for jurisdiction overseas also imposes itself from the point of view of human rights, as States have a positive obligation to prosecute violations of humanitarian law and gross violations of human rights law.

However, many questions remain open in this regard. It is not clear what substantive law military tribunals will apply, particularly whether local law or the law of the State which deploys the armed forces applies. This is further complicated in international or peacekeeping operations, in which many judicial systems have to be integrated; also, for such operations rules of engagement have sometimes been unclear or even non-existent.

## IV. Fair trial standards in military jurisdiction

The question of fair trial standards to be applied in military tribunals was present throughout the conference. It was more particularly addressed with regard to some specific areas, namely the trial of members of the armed forces and the conduct of proceedings in times of armed conflict.

The basic paradigm is that any member of the armed forces has a right to a fair trial in the same way as any other person tried for a criminal offence. The specific safeguards on fair trial in criminal proceedings apply whenever there is a 'criminal charge' against the individual. It is important in this respect – and particularly in the context of disciplinary trials – that the domestic classification of an offence is relevant but not determining for the threshold of 'criminal charge': it is the autonomous international interpretation must define the existence of a criminal charge; the international criterion is a material one, namely the punitive character of the charge and the penalty.

### Trial of members of the armed forces by military tribunals

The case law on the standards of fair trial in military jurisdiction become particularly clear when members of the armed forces are tried by military tribunals, as this is the classical application of military jurisdiction. The European Court of Human Rights has given many indications on the rights by which military jurisdictions must abide.

The European Court of Human Rights has held that military courts must comply with the right to an independent and impartial tribunal. The impartiality, in particular, is assessed both in a subjective and in an objective way: not only must the judge be subjectively impartial, but, furthermore, the law must guarantee sufficient safeguards to exclude any legitimate doubt. In the particular cases decided by the Court the criterion of objective appearance was crucial for the question of impartiality. The Court found shortcomings in the safeguards against the appearance of impartiality on many levels. Particularly, it expressed concern over the fact that members of the court were subject to military discipline and that they were subordinate to the "convening officer", who at the same time exercised the function of prosecutor and of "confirming officer". It also criticized the lack of legal training of the members of the court, as well as the absence of a civilian judge advocate and of a right to an appeal to a higher tribunal offering sufficient guarantees of independence and impartiality.

Another right of critical importance mentioned repeatedly in the discussion was the right to counsel. Views diverged on whether this should be a civilian or a military counsel and what measure of independence military counsel have. It this context it was mentioned that Article 14 ICCPR guarantees the accused the right to 'legal assistance of his own choosing'.

### The situation of armed conflict

Military tribunals have an outstanding role in situations of armed conflict. Here again, it is important to clarify the standards of fair trial by which military tribunals have to comply with.

Firstly, humanitarian law guarantees some minimum standards on the right to a fair trial, particularly as enshrined in Art. 75 of the First Additional Protocol, which also reflects customary law, Common Article 3 to the Geneva Conventions, Article 105 of the Third Geneva Convention, particularly in conjunction with Article 130, or Article 6 of the Second Additional Protocol. Also, prisoners of war are entitled to the same trials as members of the armed forces of the detaining country.

Human rights law equally applies in times of armed conflict. Some human rights are non-derogable, and the Human Rights Committee has made clear in its General Comment 29 that amongst these are the presumption of innocence and the right to an effective remedy. The Human Rights Committee has further stated that the right to an independent and impartial tribunal is absolute and can tolerate no exceptions. However, it remains unclear to which extent and in which aspects the right to a fair trial is non-derogable. It was suggested, in this respect, that an indication could follow from the minimum standards of humanitarian law. It would be useful to have further clarification through an updated General Comment on Article 14 of the ICCPR and the planned study on customary law from the ICRC.

Lastly, the discussion also revolved around the military commissions set up in the United States to try foreigners suspected of terrorist activities. As already mentioned, the nature of the commissions as military tribunals was widely rejected. It was contended, moreover, that the commissions did not comply with the basic rights to a fair trial such as the right to an independent and impartial tribunal, the right to a tribunal to determine the status of prisoner of war according to Article 5 of the Third Geneva Convention, the right to counsel (including counsel of one's choosing and including the right to communicate confidentially with counsel), the rights to adequate time and facilities for the preparation of the defence (including communication with counsel and access to relevant pieces of evidence), the right to a public trial, the right to review of criminal conviction, etc.

***

The discussion at the conference highlighted issues that need further discussion. In many areas, the standards on the administration of justice through military tribunals remain to be clarified.

The offences over which the military should have jurisdiction must be more precisely defined, particularly as regards the differentiation between disciplinary and criminal jurisdiction.

The position of military tribunals within the state organisation and the safeguards in the process must be clarified, particularly with regard to the membership of the tribunal, the qualification of judges, the independence of the court (notably when judges or the jury are within a chain of command), the impartiality of the court, and finally the fair trial procedures.

Viable mechanisms must be found or consolidated to embed the relationship between the military and civilian branches of jurisdiction in a democratic structure; in this respect, a dialogue on the role of the military in democracies, and particularly in countries in transition, must take place.

*Conclusions d' Emmanuel DECAUX*
*Expert*
*Sous-Commission de la promotion et de la protection des droits de l'homme*

Nous avons, pendant ces trois jours, parcouru un vaste panorama de la justice militaire, de l'Argentine à la Suisse, du Canada au Kenya. D'autres continents auraient pu être évoqués afin de « dérégionaliser » la problématique. Il aurait ainsi été intéressant d'avoir des juges militaires venant du continent asiatique. Il ne s'agit cependant que d'une première étape, déjà très riche et contrastée, et j'espère que d'autres suivrons.

Nous avons également balayé le temps. Nous sommes conscients du passé, notamment de tragédies historiques, qui sont souvent très récentes, notamment en Amérique latine. Le but de cet exercice est également de se tourner vers l'avenir pour prendre en compte les nouveaux problèmes du XXIème siècle notamment avec l'implication de plus en plus large des Nations Unies dans des opérations de maintien de la paix. Il y a là un élément concret qui doit lui aussi être présent à notre esprit.

Nous avons également bénéficié d'une grande diversité des approches puisque nous sommes passés de la « sociologie militaire » avec l'intervention de l'expert espagnol à des questions très techniques, comme la « micro-gestion » de l'objection de conscience dans les cantons suisses. Un aspect fascinant de notre réunion a été de voir les différences culturelles énormes qui existent, y compris entre juristes, par exemple entre les juristes français attachés aux grands principes et les juristes britanniques privilégiant les garanties concrètes, l'effectivité.

Nos travaux ont été enrichis par la diversité des participants et je suis très reconnaissant à la CIJ d'avoir su réunir un panel aussi varié. Je crois que ce séminaire a constitué un moment rare, une rencontre unique, dans un climat très libre. Les ONG ont peut-être trouvé qu'il y avait trop de militaires parmi les participants et les juristes militaires trop d'ONG. Mais je suis sûr que nous avons tous appris à dépasser les préjugés, les idées toutes faites. Personnellement, j'ai pris encore plus conscience de la complexité d'un sujet, très riche et très foisonnant. Cela a été très utile pour moi d'écouter tout ce qui a été dit ici et ce sera également très utile pour cadrer ou recadrer le prochain rapport.

De nombreuses pistes sont à creuser et ne concernent pas seulement le rapport sur l'administration de la justice par les tribunaux militaires mais pourraient concerner d'autres rapporteurs. Je pense en particulier à tout ce qui a été dit sur l'amont de la justice. Pour que le juge puisse intervenir, il faut qu'il y ait une enquête préliminaire, une investigation. Quel est le rôle de la police militaire ou de la gendarmerie militaire ? Comment sont recueillies les preuves ? La loyauté dans le recueil des preuves est une piste à avoir à l'esprit.

De même, en aval, tout ce qui concerne la réparation, la vérité et la justice. On ne répétera jamais assez que c'est quelque chose de très important. De même, sur les types de sanctions, y compris l'organisation des prisons militaires, de nombreuses questions ont fait jour. Y a-t-il des sanctions militaires spécifiques, qu'est-ce que cela implique en matière de dégradation ou de rétrogradation ? La suggestion d'Eric David d'avoir un questionnaire serait très utile. Vous savez que dans le premier rapport fait par Louis Joinet, il y avait un questionnaire d'ensemble, une sorte de grille de lecture servant de trame pour l'étude. Aujourd'hui, on pourrait avoir un questionnaire né de ces nouvelles

préoccupations pour pouvoir donner des coups de projecteurs sur la pratique des Etats, sur la jurisprudence.

La dernière idée qui m'a frappé est la notion de réexamen périodique indépendant (*independent review*). Je crois qu'il serait très utile aussi d'avoir une dernière recommandation demandant aux Etats de revoir leur système, de le compléter, de l'adapter aux besoins présents, de vérifier si la liste des délits militaires est adaptée à un contexte moderne et également de voir si les garanties du procès équitable sont conformes aux standards agréés universellement aujourd'hui. Cette idée de réexamen périodique indépendant est quelque chose de très séduisant pour moi.

Je n'approfondirai pas ces questions. Ce que je vais essayer de faire, c'est de prendre un peu de recul pour revenir aux enjeux essentiels à partir de l'idée de justice. C'était l'origine de l'exercice lancé par Louis Joinet. C'était un défi, un tabou à soulever mais cela correspond à la fois à un choix de principe et à un choix de méthode.

I – Les enjeux de principe de la justice militaire.

Le choix de principe est le refus des positions extrêmes. Nous avons vu que le manichéisme n'a pas de sens. Considérer que la justice militaire est un monde à part, au-dessus des lois et des normes communes, est quelque chose d'indéfendable. Considérer que la justice militaire en soi est un oxymore, quelque chose d'impossible, de contradictoire dans les termes n'est pas plus défendable. Le fil d'Ariane que nous devons suivre est celui des principes de la justice, en partant du fait que la justice militaire doit être une justice ordinaire. Quand, en guise d'introduction, j'ai rappelé les grands principes du droit, j'ai insisté sur la dialectique entre justice et Etat de droit. J'ai l'impression aujourd'hui, après vous avoir écouté, que j'ai omis une autre dimension très importante : la démocratie. La démocratie est à la fois la séparation des trois pouvoirs mais aussi - ce qu'on dit moins dans les textes internationaux, si ce n'est dans les documents de référence de l'OSCE - la primauté des civils sur les militaires, alors que dans de nombreux systèmes, il y a, de manière officielle ou implicite, un renversement complet de ce principe essentiel, le *Cedant arma togae* de Cicéron. Un autre élément fondamental de toute démocratie est le rôle du public, de l'opinion publique. Le triptyque évoqué par le Lieutenant-Colonel Gibson - effectivité, transparence et responsabilité au sens général d' *accountability*, le fait de rendre compte - est quelque chose de très important. Encore une fois, la justice militaire ne doit pas être rendue en vase clos, à huis clos. Une des rares lacunes de nos débats est peut-être de ne pas avoir insisté suffisamment sur cette notion de secret militaire, de huis clos, qui peut être étendue très loin si on considère qu'un écologiste mettrait en cause le « secret-défense » d'un Etat.

Le choix de principe est donc de dire que la justice militaire doit être une justice comme les autres. C'est le refus du tout ou rien qui serait simpliste et démagogique. Louis Joinet l'avait dit de manière implicite dans son rapport en souhaitant une méthode de petits pas, tout en laissant ouverte la possibilité d'une abolition finale, par évolution et non pas par révolution. Donc, le but de la réforme aurait été de civiliser complètement la justice militaire jusqu'à supprimer toute différence entre la justice militaire et la justice civile. C'était une dialectique de la réforme entre le court terme et le long terme, tout en gardant cet objectif ultime qui reste particulièrement mobilisateur pour les défenseurs des droits de l'homme.

Dans mon rapport, j'ai été plus explicite encore en ne retenant pas cet objectif, sans pour autant le récuser, bien sûr. Mais dans le cadre technique où nous devons nous situer, il est

très difficile de vouloir tout uniformiser. Il faut tenir compte des variantes. En même temps, il faut avoir des normes pour tous les Etats et nous ne travaillons pas seulement pour des démocraties. Nous travaillons pour tous les membres des Nations Unies. Il faut avoir des standards généraux, pour s'appliquer partout, y compris là où les choses vont mal, et en même temps assez précis pour être clairs et utiles. Je me sens conforté dans cette démarche initiale en ayant entendu nos débats.

II – La dialectique entre banalisation et spécialisation.

Le cœur du problème est une contradiction fondamentale entre la banalisation d'une part et la spécialisation de l'autre. La banalisation est cette idée de démilitarisation, de « civilisation » de la justice militaire qui deviendrait une justice comme les autres. Quelles sont les différences entre les juridictions militaires et les juridictions civiles ? On retrouve la question préalable de la définition. Comment définir les tribunaux militaires ? Certains m'ont invité à élargir le sujet en disant qu'il fallait renforcer l'indépendance de la magistrature comme telle. Là aussi, il y a les rapports de Leandro Despouy, nouveau Rapporteur spécial sur l'indépendance des juges et des avocats. Je crois qu'il est utile d'avoir des recommandations qui visent la justice militaire en soi, tout en la situant dans un tableau d'ensemble, comme l'a suggéré Rodolfo Mattarollo, et donc de faire en sorte que la justice soit une image en creux dans cet ensemble, avec des obligations communes aux juges militaires et aux juges civils, mais aussi, inversement, dans certains cas, un statut différencié. Dans le recueil de documents de Federico Andreu, on voit très bien que dans certains pays, comme cela a été rappelé au cours des débats, la justice militaire a plus de moyens matériels, un statut plus grand et plus respecté et devient du coup plus efficace pour le justiciable, ce qui peut avoir des effets pervers.

Les conséquences de cette banalisation sur le mandat sont doubles. Je crois qu'il faut être pratique et ne pas trop élargir le sujet. Il faut plutôt déminer le sujet sans vouloir aborder toute la question des juridictions d'exception. Dans le cas de la justice qui dépend directement de l'exécutif, celle-ci est hors du champ de l'étude, c'est déjà une raison de fond. En même temps, il faut être concret, c'est-à-dire évoquer des standards qui sont faits pour être respectés et avoir à l'esprit des conditions d'effectivité. Peut-être que jusqu'ici je me suis trop concentré sur les structures et les apparences sans voir quelles étaient les réalités concrètes. En même temps, il faut bien admettre que si on donne comme référence un tribunal indépendant et impartial, on vise une justice civile qui marche bien. Non par optimisme ou par aveuglement, mais parce que la référence doit être une justice civile qui fonctionne. Un critique littéraire a comparé les tragédies classiques du XVIIème siècle en disant que Corneille présentait les hommes tels qu'ils devraient être et Racine tels qu'ils sont. Quand on compare la justice militaire et la justice civile, c'est évidemment avec une justice civile telle qu'elle devrait être. La première voie est donc celle de la « banalisation » afin que la justice militaire soit une justice comme une autre.

En même temps, c'est le deuxième volet, s'impose la prise en compte de la spécialisation. Quelles sont les fonctions de la justice militaire ? Il y a des fonctions ou des finalités qui sont irréductibles. Historiquement, il y a une image très négative de la justice militaire, une sorte de péché originel qui est marqué en France par l'Affaire Dreyfus, les guerres coloniales. Mais, la justice en Algérie, qu'elle soit civile ou militaire, était identique. Il y a aussi les souvenirs de la guerre de 14-18. Le grand film de Joseph Losey, *King and Country*, qui en France a un titre encore plus significatif - *Pour l'exemple* - marque bien la conception de la justice militaire de l'époque, sans même parler de l'image des dictatures militaires. Pourtant, on s'aperçoit que lorsqu'on ôte tout ce qui n'est pas proprement militaire, il

reste une sorte d'irréductible militaire et donc des spécificités irréductibles. Cela n'implique pas qu'une justice spécialisée doive être une justice spéciale. Mais il faut envisager ses raisons d'être sous toutes leurs facettes.

III – Le « nœud » de la justice militaire.

Le point de départ est la question des structures. Il y a une dialectique évidente entre les causes et les conséquences. On peut discuter longtemps de typologies ou mesurer la mixité des tribunaux militaires. Dans certains cas, il s'agit d'un monde à part, ce qui peut poser des problèmes. La mixité dans les formations de jugement est quelque chose d'utile pour avoir justement ces regards croisés. L'existence d'une passerelle avec un appel devant un tribunal civil et une intégration ultime dans la justice civile est une bonne chose. Cependant, il faut voir que, dans d'autres systèmes, il y a une structure verticale à part. J'étais récemment à Ankara pour un colloque à la Cour de Cassation à l'occasion duquel le Président du Conseil d'Etat indiquait qu'en Turquie il y a deux ordres de juridictions administratives : la justice administrative civile, qui va jusqu'au Conseil d'Etat, et la justice administrative militaire. On pourrait élargir la réflexion en examinant si les structures ne préconditionnent pas tout le reste, surtout lorsque l'existence de la justice militaire se trouve consacrée dans la Constitution, avec les risques de justice à deux vitesses déjà évoqués. Ne peut-on, au contraire, partir des fonctions intrinsèques de la justice militaire, au lieu de partir des situations acquises, des structures qui peuvent être parfois très pesantes ?

La référence à une spécialisation implique de s'interroger également sur la formation des juges militaires. Quelle est l'expertise des juges ? J'ai noté une idée très intéressante évoquée dans nos débats: la qualification est un élément de l'impartialité. Il y a de nombreux aspects à cette question. Est-ce que les militaires connaissent le droit? Est-ce que les civils connaissent l'armée? C'est un argument qui peut jouer dans les deux sens. La notion de savoir a été disséquée. C'est vrai qu'il y a de nombreuses branches d'activité où des problèmes techniques ou d'éthique se posent. Quand un capitaine de la marine marchande échoue son navire ou pollue les mers, c'est également un problème technique. Il y a une expertise dans tout métier et donc une expertise pour tout tribunal. J'ai beaucoup apprécié la distinction britannique entre trois éléments : les faits qui sont appréciés par les jurés, le droit qui est évalué par des juges et cette expertise qui peut venir de techniciens.

Un autre élément de l'expertise est la durée avec des aspects structurels, notamment la permanence d'une juridiction (tribunal permanent opposé à tribunal *ad hoc*). Là aussi, la permanence est une condition de l'indépendance. En même temps, je comprends qu'il y ait des aspects pratiques et que, selon la taille d'un pays ou la taille des forces armées, il soit difficile d'avoir des juges militaires qui soient des juges à plein temps et donc qu'il y ait des systèmes d'alternance. Mais la permanence est une garantie de professionnalisme et, à défaut d'avoir la permanence des juridictions, il faudrait avoir la permanence du personnel qui permette une spécialisation. Cela peut être aussi bien la spécialisation de juge ordinaire que la spécialisation de juge militaire. Les médecins peuvent être spécialisés en médecine tropicale ou en médecine militaire. C'est un savoir-faire qui s'acquiert et ce n'est pas au moment d'une guerre et d'une catastrophe qu'on peut avoir des spécialistes de médecine traumatique. Là aussi, il doit y avoir une continuité dans l'expérience et cette expérience doit être acquise en temps de paix pour avoir des professionnels prêts à fonctionner. Encore une fois, ces arguments sur la formation peuvent jouer dans les deux sens. On peut très bien former des civils au droit des conflits

armés ou former des militaires aux *legal niceties*, aux subtilités du droit, mais je crois qu'il faut éviter l'amateurisme ou l'improvisation dans ces matières très difficiles.

La troisième facette à prendre en compte est la fonction du juge militaire. Nous nous rapprochons du coeur du sujet car c'est la fonction qui doit créer l'organe et non l'inverse. On revient à cette idée de « nœud militaire » (*militari nexus*) qui peut être tirée de la liste des crimes. Encore que sur ce terrain particulièrement complexe il reste toute une tâche de clarification à faire pour bien distinguer ce qui relève du pénal et du disciplinaire, du militaire et du « civiliste », ce qui est crime interne, ce qui est crime international, avec tous les problèmes de cumul de définitions. Sans doute faut-il que, dans les codes, on évite les cumuls, les doubles incriminations, afin que les infractions militaires soient irréductibles. En même temps, il y aura toujours des cumuls/conflits de juridictions notamment lorsque des militaires et des civils sont en cause. Et là on rencontre la question de savoir qui est le juge naturel et le juge naturel pour qui ? Est-ce que le juge naturel pour les militaires est le juge militaire? Ceci pose inversement des problèmes complexes de « déqualification ». Certains crimes sont-ils détachables des fonctions ? Est- ce, par définition, que des violations graves des droits de l'homme ne peuvent pas être aussi des délits de fonction, avec un cumul de la responsabilité pénale individuelle et de la responsabilité civile de l'Etat ? En même temps, s'il peut y avoir un cumul de responsabilités, quelle est la place faite aux victimes et aux parties civiles ?

Reste la quatrième piste, la recherche de ce qui est de nature purement militaire. Le Major Général Rogers a indiqué que la vie militaire avait des spécificités différentes du droit commun, avec cette notion de discipline face aux risques rencontrés et aux pertes assumées qui impliquait de contrôler les forces en jeu, à la fois pour assurer le respect des ordres donnés et pour avoir des sanctions efficaces. Je crois que la Cour interaméricaine des droits de l'homme a repris ces arguments dans l'affaire Benavides qui a été citée il y a un instant.

Je voudrais citer également une formule d'un juge britannique qui apparaît dans l'arrêt de la Cour européenne des droits de l'homme du 16 décembre 2003 dans l'affaire Cooper contre Royaume-Uni, où cette notion de spécificité militaire me semble quelque peu diluée. Le juge britannique déclare en effet que : « *A notre avis, la Cour doit garder à l'esprit, lorsqu'elle traite un recours de cette sorte, la compétence quelque peu hybride qu'elle exerce. En effet, celle-ci a toute latitude pour réparer une injustice mais elle doit aussi songer que ceux qui prononcent et confirment la peine, s'agissant d'une infraction de désertion, sont particulièrement bien placés, voire mieux placés que la cour d'appel pour apprécier la gravité de l'infraction dans le contexte de l'armée*» (§.46). Le juge ajoute qu'« *il faut tenir compte des facteurs propres à l'armée dont le jugement et l'expérience doivent à cet égard se voir accorder un grand poids. Un tribunal doit hésiter à modifier pareille décision rendue par les cours martiales en matière de peine (…) en évoquant non seulement l'infraction en elle-même mais aussi le caractère exemplaire, en citant la nécessité de dissuader.* » On a l'impression que la Cour d'appel n'exerce pas la plénitude de sa compétence en raison d'une certaine prudence s'agissant d'infractions n'ayant aucun équivalent dans le monde civil. Peut-on considérer qu'il y a un véritable appel devant une instance civile lorsqu'il y a cette réserve en invoquant le fait que le premier juge militaire est plus « expérimenté », mais aussi la nécessité de faire un exemple ?

J'ai l'impression qu'on risque de tomber dans ce que Monsieur Fobe appelait « un certain corporatisme » et qu'on s'éloigne des garanties d'un tribunal indépendant, impartial et compétent. La notion de spécificité doit sans doute être resserrée non pour viser de manière positive l'ensemble de la carrière des armes, avec les « grandeurs et servitudes de

la vie militaire », mais pour prendre en compte, de manière purement résiduelle, les circonstances où la justice ordinaire ne peut fonctionner.

Je crois qu'au-delà de ces débats de principe, l'impératif premier est ce souci pratique d'une « justice exportable » avec toutes les contingences qui ont été évoquées : l'urgence, la distance, la nécessité sur le terrain de maintenir la discipline, y compris dans l'intérêt des populations civiles locales ou des prisonniers de guerre. L'argument du coût est moins recevable. Toute justice a un coût et les moyens doivent être mis au service des fins, des principes, mais c'est aussi un problème, même si l'on veut éviter une justice au rabais. C'est plutôt ces considérations pratiques que des raisons d'essence supérieure ou de nature radicalement différente qui devraient être prises en considération.

A cet égard, la distinction entre temps de paix et temps de guerre est évidemment assez datée alors qu'il y a, malheureusement, toujours des guerres aujourd'hui. Cette approche binaire laisse passer toute une série de problèmes ou toute une série de situations, des situations internationales d'abord avec les opérations de maintien de la paix, les situations de présence de forces militaires sur un territoire extérieur, notamment dans le cadre d'une alliance ou d'occupation. Il y a là tout un cadre juridique qui devrait être clarifié et je fais confiance à Françoise Hampson pour prolonger ses réflexions dans cette direction. Cela implique des enjeux de principe, des difficultés pratiques sur le terrain et, on l'a dit, très souvent pour les militaires, ces opérations humanitaires sont une cause de frustration. Pour eux, trop souvent l'humanitaire devient l'« *humilitaire* », l'humiliation des militaires. C'est un piège pour les militaires qui sont pris en otage face aux provocations des parties en conflit et abandonnés face à des responsabilités qui les dépassent ou qu'ils n'ont pas les moyens d'assumer. Si on veut que les opérations de maintien de la paix se poursuivent, il faut avoir à l'esprit cette nécessité - non pas bien sûr d'avoir une forme d'impunité - mais trouver entre immunité et impunité une voie juste et non pas ce flou, ce vide juridique. Les développements du droit international pénal devraient être également pris en compte dans cet exercice, pour permettre une véritable mise à jour du droit des conflits armés.

A côté de ces situations internationales, il y a aussi des situations internes qui, elles, sont beaucoup plus ambiguës, s'agissant des crises internes, des tensions. On l'a vu hier avec la lutte contre la « subversion », contre « l'ennemi intérieur », on le voit aujourd'hui avec la lutte contre le terrorisme. En tout cas, il ne faudrait pas que les situations d'exception débouchent sur une justice sommaire qui n'aurait même pas les garanties de la justice militaire. Il ne faut pas se tromper de combat et diaboliser la justice militaire alors qu'aujourd'hui on fait pire. Parfois, il est très heureux d'avoir des juges militaires. Vous avez peut-être vu dans un article récent de *l'International Herald Tribune* que ce sont des avocats militaires en uniforme qui ont adressé à la Cour Suprême américaine un mémoire de 30 pages à propos de la situation de Guantanamo Bay pour dire qu'il s'agissait d'un « *trou noir juridique* ». Face à cette situation extrême, il ne faut pas qu'il y ait des juges extraordinaires. Il faut qu'il y ait des juges ordinaires qui exercent une véritable justice, une justice digne de ce nom.

La justice militaire doit cesser d'être une justice à part, soupçonnée de mettre l'arbitraire au service de la force armée, pour devenir une justice de droit commun dans un Etat de droit. Elle doit être une justice exemplaire, au lieu d'être une justice pour l'exemple.