

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

www.lrwc.org; lrwc@portal.ca; Tel: +1 604 738 0338; Fax: +1 604 736 1175

3220 West 13th Avenue, Vancouver, B.C. CANADA V6K 2V5

Right to Trial by Civilian Courts: International law on the use of military tribunals to determine the rights of civilians

Working Paper

Prepared by Erika Chan LLB, Gail Davidson LLB, and Catherine Morris BA. JD. LLM.

Lawyers' Rights Watch Canada (LRWC) is a committee of Canadian lawyers who promote human rights and the rule of law by campaigning internationally for lawyers and human rights defenders in danger and through education and research. LRWC is an NGO in Special Consultative Status with the Economic and Social Council (ECOSOC) of the United Nations (UN).

This paper examines the major concerns about military tribunals' jurisdiction over civilians, drawing on treaties and other instruments, comments and jurisprudence of international courts and treaty bodies, and expert and academic opinions. Reports and jurisprudence in the UN human rights system, regional human rights systems and national courts demonstrate a pressing need for continued scrutiny of the use of military tribunals to determine the rights of civilians.

Military courts are sometimes used to prosecute or determine the rights of civilians for the purpose of asserting executive control over independent judicial decision-making and allowing for procedures that deviate from standards applied by regular civilian courts. Exceptional circumstances are often cited as justification. There is international consensus that trials of civilians by military tribunals contravene the non-derogable right to a fair trial by a competent, independent and impartial court to the extent that they violate rights guaranteed by *Universal Declaration of Human Rights* (UDHR)¹ and the United Nations (UN) *International Covenant on Civil and Political Rights* (ICCPR).² Regional courts and treaty bodies, including the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the Inter-American Commission on Human Rights (IACHR) and the African Commission on Human and Peoples' Rights (ACHPR) are unanimous that military tribunals lack authority to try civilians.³

¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Articles 7-11, available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 12 December 2014].

² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 12 December 2014].

³ Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006), Report submitted by the Special Rapporteur of the Sub-Commission on the

More fundamentally, military courts must not be used to undermine an independent judiciary. Military courts are a division of the armed services and thus part of the executive branch of government and are not part of the independent judicial branch of government. Without access to competent, independent and impartial tribunals, there is no means of enforcing state duties to ensure internationally protected rights in accordance with treaty obligations, and no meaningful access to remedies for violations. As the *Basic Principles on the Independence of the Judiciary*, endorsed in 1985 by the General Assembly,⁴ state:

Everyone has the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals (para. 5).

Main Concerns

Military tribunals have been criticized for failing to adhere to fair trial standards set out in ICCPR Article 14. The main concerns include:

- lack of independence, arising from the fact that military tribunals are formed and governed by military bodies within the executive branch of government and are not part of the independent judicial branch;
- the use of military tribunals to enable exceptional procedures that do not comply with normal standards of justice;
- lack of actual or perceived impartiality associated with lack of independence;
- lack of adherence to due process safeguards;
- lack of proper authority in constitutions or laws;
- removal of access to properly constituted, “competent, independent and impartial” civilian courts “established by law” (ICCPR Article 14);
- failure of military tribunals to ensure that hearings are held in public in open court;
- failure of military tribunals to respect the presumption of innocence; and
- failure of military tribunals to fully ensure rights related to the ability of the defendant to prepare and present a full defense.

Norms Prohibiting Military Trials of Civilians: History

The UDHR and the ICCPR

In 1948, the UDHR set out basic principles of the right of everyone to a fair trial in Article 10, which provides:

Promotion and Protection of Human Rights, Emmanuel Decaux to the UN Commission on Human Rights in 2006 [*Decaux Principles*]. Available at: <http://www1.umn.edu/humanrts/instree/DecauxPrinciples.html>

⁴ *Basic Principles on the Independence of the Judiciary*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 5, para 21, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of this rights and obligations and of any criminal charge against him.

The ICCPR, which came into force in 1976, by Article 14, guarantees:

In the determination of any criminal charges against him, or his rights and obligation in a suite at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Rights specifically guaranteed by the ICCPR as part of fair trial rights include rights to:

- “to be presumed innocent until proved guilty according to law” (Article 14.2);
- “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing” (Article 14.3 (a));
- “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (Article 14.3(d)) [emphasis added].

The UN Human Rights Committee (HR Committee), through Concluding Observations on States’ reports, General Comments interpreting the ICCPR and Views regarding complaints, has concluded that “the jurisdiction of military tribunals is restricted to offences of a strictly military nature committed by military personnel.”⁵ In 1984, the HR Committee affirmed in its General Comment 13 that military tribunals are prohibited from trying civilians except in extraordinary, objectively determined and narrowly defined circumstances such as cases where fair, independent and impartial civilian courts are unavailable.⁶ The HR Committee noted:

the existence, in many countries, of military or special tribunals which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Art 14.⁷

The HR Committee stated in its 2007 General Comment 32 that ICCPR Article 14 applies to “all courts and tribunals within the scope of that article, whether ordinary or specialized, civilian or military.”⁸ The HR Committee commented that whenever a State tries a civilian

⁵ *Dcaux Principles*, *supra* note 3.

⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984, paragraph 4 [CCPR General Comment No. 13], available at: <http://www.refworld.org/docid/453883f90.html> [accessed 16 December 2014].

⁷ *Ibid*, para 4.

⁸ UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32 [General Comment No. 32], paragraph 22, available at: <http://www.refworld.org/docid/478b2b2f2.html> [accessed 12 December 2014].

before a military or another special tribunal, it must offer the due process standards under Art 14 of the ICCPR. States are also required to provide objective reasons for trying civilians in a military court and why ordinary courts cannot be used.⁹

Other instruments and statements: Emergence of the *Decaux Principles*

In addition to treaty-based norms, a number of instruments and statements of international principles prohibit trials of civilians in tribunals other than ordinary courts.

The *Basic Principles on the Independence of the Judiciary*, endorsed by the UN General Assembly in 1985,¹⁰ affirm in Principle 5 that:

everyone has the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

Since the 1985 endorsement of the *Basic Principles on the Independence of the Judiciary*, a number of expert groups have elaborated principles that apply to military tribunals.¹¹ An expert statement developed in 1985, the *Paris Minimum Standards of Human Rights Norms in a State of Emergency (Paris Standards)* Article 16, paragraph 4, provides that even in a state of emergency,

civil courts shall have and retain jurisdiction over all trials of civilians for security or related offences; initiation of any such proceedings before or their transfer to a military court or tribunal shall be prohibited. The creation of special courts or tribunals with punitive jurisdiction for trial of offences which are in substance of a political nature is a contravention of the rule of law in a state of emergency.¹²

The *Singhvi Declaration*, endorsed by the UN Commission on Human Rights in 1989,¹³ and the 1995 *Beijing Statement of the Principles of the Independence of the Judiciary*

⁹ *Ibid.*

¹⁰ *Basic Principles on the Independence of the Judiciary*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

¹¹ *Basic Principles on the Independence of the Judiciary*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

¹² Richard B. Lillich and American Society of International Law, "The Paris Minimum Standards of Human Rights Norms in a State of Emergency" (1985) 79 Am. J. Int'l L. 1072.

¹³ Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur on the Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, endorsed by Commission on Human Rights resolution 1989/32 (the "Singhvi Declaration"), Principle 5(f), available at: <http://www.cristidanilet.ro/docs/Shingvi%20Declaration.pdf>. Note that the Commission on Human Rights was abolished in 2006 and replaced with the UN Human Rights Council.

(*Beijing Statement*), endorsed by numerous Chief Justices in the Asia Pacific region,¹⁴ both stipulate that the jurisdiction of military tribunals must be limited to military offences.

The *Singhvi Declaration* states the foundational principle that the judiciary “shall be independent of the Executive and Legislature” (Para 4). Paragraph 5 goes onto state:

5.

[...]

(f) The jurisdiction of military tribunals shall be confined to military offences. There shall always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or a remedy by way of an application for annulment.

[...]

(h) The Executive shall not have control over the judicial functions of the courts in the administration of justice.

The *Beijing Statement* similarly affirms that:

44. The jurisdiction of military tribunals must be confined to military offences. There must always be a right of appeal from such tribunals to a legally qualified appellate court of tribunals to a legally qualified appellate court or tribunal or other remedy by way of an application for annulment.

The 1996 *Johannesburg Principles*, developed by a group of international law experts and referred to several times by the UN Commission on Human Rights, provides in Principle 22 regarding the right to trial by an independent tribunal that “[i]n no case may a civilian be tried for a security-related crime by a military court or tribunal.”¹⁵

In 2006, Emmanuel Decaux, the UN Special Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights, prepared *Draft Basic Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)*.¹⁶ The *Decaux Principles* were created in consultation with human rights experts, jurists and military personnel from around the world and are based on the foundational principle that military justice should be an integral part of the normal judicial system and should operate in a way that guarantees full compliance with internationally protected human rights.

In 2006, the UN Commission on Human Rights reviewed and affirmed the *Decaux Principles*, which state:

¹⁴ Beijing Statement of the Principles of the Independence of the Judiciary (19 August 1995) Principle 44, available at: <http://lawasia.asn.au/objectlibrary/26?filename=Beijing%20Statement.pdf>

¹⁵ Article 19, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995 [*Johannesburg Principles*], available at: <http://www.refworld.org/docid/4653fa1f2.html> [accessed 18 December 2014]. These Principles were endorsed by Mr. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, in his reports to the UN Commission on Human Rights in 1996, 1998, 1999 and 2001. The Commission referred to the Johannesburg Principles in its annual resolutions on freedom of expression each year from 1996. See e.g. U.N. Doc. E/CN.4/1996/39 (1996).

¹⁶ *Decaux Principles*, *supra* note 3. .

Military courts should, in principle, have no jurisdiction to try civilians. The State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts”¹⁷ and that no tribunals may be created that “displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”¹⁸

The *Decaux Principles* further state that even when trying military personnel, military tribunals must always be conducted “within the framework of the general principles of the administration of justice” and apply fair trial standards in accordance with international human rights law and international humanitarian law.¹⁹ In October 2013, the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, called for the adoption of the *Decaux Principles* by the Human Rights Council (the successor body to the UN Commission on Human Rights) and endorsement by the General Assembly.²⁰

In July 2014, the UN Working Group on Arbitrary Detention (WGAD) stated that in its experience, “military tribunals are often used to deal with political opposition groups, journalists and human rights defenders.”²¹ The WGAD concluded that:

Judges should always be independent and impartial. In contrast, two of the core values of a military officer are obedience and loyalty to her or his supervisors. Under international law, military tribunals can only be competent to try military personnel for military offences.²²

Military courts should not try military officers if civilians have also been indicted in the case and if civilians are among the victims. All sentences issued by military courts should be reviewed by a civil court, even if they have not been appealed. Military courts should never be competent to impose the death penalty.²³

The WGAD requested the Human Rights Council to consider the adoption of a set of principles to be applied to military courts. In its report, the WGAD set out the following “minimum guarantees”:

- (a) Military tribunals should only be competent to try military personnel for military offences;
- (b) If civilians have also been indicted in a case, military tribunals should not try military personnel;
- (c) Military courts should not try military personnel if any of the victims are civilians;

¹⁷ *Decaux Principles*, principle 5, para 20, *supra* note 3.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Gabriela Knaul, quoted in “Military tribunals need stronger regulation, says UN expert on the independence of the judiciary,” UN News Centre 28 October 2013, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13911&>

²¹ UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 30 June 2014, A/HRC/27/48, para available at: <http://www.refworld.org/docid/53eb29a04.html>. The WGAD has considered issues of military justice in a number of its reports available at:

<http://www.ohchr.org/EN/Issues/Detention/Pages/Issues.aspx>

²² *Ibid.*, para. 85.

²³ *Ibid.*, para. 86.

- (d) Military tribunals should not be competent to consider cases of rebellion, the sedition or attacks against a democratic regime, since in those cases the victims are all citizens of the country concerned;
- (e) Military tribunals should never be competent to impose the death penalty.²⁴

Regional Human Rights Systems and National Courts

Problems regarding the use of military courts in cases determining the rights of civilians have generated a large body of jurisprudence not only from UN treaty bodies but also from the European Court of Human Rights (ECtHR), the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights (IACtHR) and the African Commission of Human and Peoples' Rights (ACHPR).

European Union: The European human rights system

The jurisprudence of the ECtHR emphasises article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), which states:

6. Right to a Fair Trial

- 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.²⁵

The ECtHR has confirmed the analysis of the HR Committee in several cases,²⁶ including *Ocalan v. Turkey* in 2003:

The ECtHR points out that in [several previous] judgments [...] it noted that certain aspects of the status of military judges sitting in the State Security Courts that had convicted the applicants in those cases raised doubts as to the independence and impartiality of the courts concerned. The applicants in those cases had had legitimate cause to fear that the presence of a military judge on the bench might have resulted in the courts allowing themselves to be unduly influenced by considerations that were not relevant to the nature of the case.²⁷

Organization of American States: The Inter-American Human Rights System

Articles 8 and 9 of the *American Convention on Human Rights*, which came into force in 1969 (ACHR),²⁸ mirror and expand upon the fair trial rights guaranteed by the ICCPR.

²⁴ *Ibid*, para. 69.

²⁵ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at:

<http://www.refworld.org/docid/3ae6b3b04.html> [accessed 19 December 2014]

http://www.echr.coe.int/Documents/Convention_ENG.pdf.

²⁶ *Incal v Turkey*, ECtHR 1998; *Çiraklar . Turkey*, ECtHR 1998; *Gerger v Turkey*, ECtHR 1999; *Karataş v Turkey*, ECtHR 1999. In these cases, the Turkish military jurisdiction represented by the National Security Court comprised of one military and two civilian judges, thus extending the jurisdiction of the military body.

²⁷ *Ocalan v. Turkey*, ECHR, 12 March 2003 (para. 114).

²⁸ Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969, available at:

http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

The *Inter-American Convention on Forced Disappearance of Persons*,²⁹ which came into force in 1994, adds to these fair trial rights by specifically restricting jurisdiction to try people charged with forced disappearances to regularly constituted courts. Article IX states:

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

The Inter-American human rights system stands out as the only system of human rights protection that specifically restricts military jurisdiction over cases involving allegations of human rights abuses of civilians by military personnel as expressed by decisions of the IACHR and IACtHR.³⁰

Peru

In the 1997 case of *Loayza Tamayo v. Peru*,³¹ the IACtHR found that military courts failed to fulfill the ACHR requirements of independence because the judges were military personnel subject to military discipline. In the 1999 case of *Cesti Hurtado v. Peru*,³² IACtHR concluded that the defendant should not be judged by the military courts and that his trial violated the right to be heard by a competent tribunal. In 2000, in the case of *Cantoral Benavides v. Peru*, the ACtHR restricted the jurisdiction of military tribunals to matters involving order and discipline within the military when it stated:

military jurisdiction is established in several laws, in order to maintain order and discipline within the armed forces. Therefore, its application is reserved for military personnel who have committed crimes or misdemeanors in the performance of their duties and under certain circumstances.³³

In the 1999 case of *Castillo Petruzzi et al. v. Peru*,³⁴ the IACtHR determined that the trial of a civilian by a military tribunal violates due process and fair trial rights:

In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal

²⁹ Organization of American States (OAS), *Inter-American Convention on Forced Disappearance of Persons*, 9 June 1994, available at: <http://www.refworld.org/docid/3ae6b38ef.html> [accessed 19 December 2014].

³⁰ Andreu-Guzmán, *Military Jurisdiction*, available at: <http://www.cdn.com/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf>

³¹ *Loayza Tamayo v. Peru*, Judgment of September 17, 1997, Series C No. 33

³² *Cesti Hurtado v. Peru*, Judgment of September 29, 1999, Series C No. 56

³³ IACtHR, *Cantoral Benavides v. Peru*, Judgment of August 18, 2000, Series C No. 69., at para. 112, available at: <http://www1.umn.edu/humanrts/iachr/C/69-ing.html>

previously established by law and, a fortiori, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.

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

This Court has held that the guarantees to which every person brought to trial is entitled must be not only essential but also judicial. “Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency.”
[...]

The Court has established that the military proceedings against the civilians accused of having engaged in crimes of treason were conducted by “faceless” judges and prosecutors, and therefore involved a number of restrictions that made such proceedings a violation of due process. In effect, the proceedings were conducted on a military base off limits to the public. All the proceedings in the case, even the hearing itself, were held out of the public eye and in secret, a blatant violation of the right to a public hearing recognized in the Convention.³⁵

Bolivia: The UN Committee against Torture

In 2012, the UN Committee against Torture applauded the Plurinational Constitutional Court of Bolivia’s decision in 2012 to resolve the jurisdictional dispute regarding the case of Second Lieutenant Grover Beto Pruma Guanto by referring that case to a civilian court and urged Bolivia

to amend its Military Criminal Code, Code of Military Criminal Procedure and the Military Justice Organization Act in order to establish that military courts do not have jurisdiction over cases involving human rights violations, including acts of torture and ill-treatment committed by members of the armed forces.

The State party should ensure that the conduct of members of the armed forces who are suspected of having committed acts of ill-treatment or torture against military personnel is thoroughly investigated, that persons suspected of committing such acts are tried in civilian courts and that, if found guilty, they are punished appropriately³⁶

Colombia

In the *Puerto Lleras massacre* case, the IACHR in 1999 pointed out that, according to the jurisprudence of the Colombian Constitution Court, an offence will fall under the

³⁶ Concluding observations on the second periodic report of the Plurinational State of Bolivia as approved by the Committee at its fiftieth session (6–31 May 2013), CAT/C/BOL/CO/2 (2013) at para. 12. Available at: <http://tb.ohchr.org/default.aspx?country=bo>

jurisdiction of the military criminal justice system only if “a clear link should be made, from the outset, between the offence and the activities of military service.”³⁷ The indiscriminate attack against unarmed civilians could not be considered linked to the functions of the Armed Forces, and even if such a link were present, the seriousness of the violations of fundamental rights committed would have rendered the exercise of military jurisdiction inappropriate and severed that link.³⁸

In the 2001 case of the *Riofrio Massacre*,³⁹ the IACtHR recalled that when a State claims that the petitioner has failed to exhaust domestic remedies, it bears the burden of demonstrating that remedies not exhausted are adequate to rectify the alleged violation.⁴⁰ The IACtHR held that military courts were not a suitable remedy for investigating, bringing to trial and punishing the conduct in question because Colombia’s military criminal justice system does not form part of the judicial branch of the Colombian State and the decision-makers are not trained judges.⁴¹ Thus, the IACtHR determined that given their nature and structure, the military courts do not meet the requirement of independence and impartiality imposed under Article 8(1) of the ACHR.

In 2010, the HR Committee expressed concern that the military justice system in Colombia continued to assume jurisdiction over cases of extrajudicial executions of civilians in which the alleged perpetrators are members of the security forces.⁴² The HR Committee emphasized that such crimes should remain clearly and effectively outside the jurisdiction of military courts.

In 2012, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, noted, “While a significant number of cases have been transferred from the military justice system to the ordinary penal system, the continuous attempts by the [Colombian] military justice system to claim jurisdiction over cases continue to be of great concern.” Mr. Heyns also expressed concern about reports of “reprisals and pressure against military judges who have sought to collaborate with the ordinary justice system, and that the military body responsible for defending the accused (*Defensoría Militar* (DEMIL)) has obstructed investigations.”⁴³

Mexico

In the 2009 case of *Radilla-Pacheco v. Mexico*, the IACtHR determined that

³⁷ *Annual Report of the Inter-American Commission on Human Rights – 1998*, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Report N 61/99, *Jose Felix Fuentes Guerrero*, Case 11,519 (Columbia), paragraph 47.

³⁸ *Ibid.*, para. 48.

³⁹ *Annual Report of the Inter-American Commission on Human Rights – 2000*, OEA/Ser.L/V/II. 111, Doc. 20 Rev., 16 April 2001, Report N 62/01, *Riofrio Massacre*, Case 11,654 (Columbia), para 29.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, para 70.

⁴² UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee - Colombia*, 4 August 2010, CCPR/C/COL/CO/6, available at: <http://www.refworld.org/docid/4efc6002.html> [accessed 23 December 2014]

⁴³ UN Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, 10 April 2012, A/HRC/20/22, available at: <http://www.refworld.org/docid/5006d0e92.html> [accessed 18 December 2014].

[...] taking into account the nature of the crime [enforced disappearance] and the juridical right damaged, military criminal jurisdiction is not the competent jurisdiction to investigate and, in its case, prosecute and punish the authors of violations of human rights but that instead the processing of those responsible always corresponds to the ordinary justice system.⁴⁴

The IACtHR directed Mexico to “adopt the appropriate legislative reforms in order to make Article 57 of the *Code of Military Justice* compatible with international standards and the *American Convention on Human Rights*.”⁴⁵

Subsequently, in 2011, the Supreme Court of Justice of Mexico ordered that “the military criminal jurisdiction shall have a restrictive and exceptional scope and be directed toward the protection of special juridical interests, related to the tasks characteristic of the military forces,” and that it could not be used to prosecute human rights abuses against civilians.⁴⁶ The federal executive branch stated that it would submit a bill to limit the scope of military courts’ jurisdiction.

In the case of *Bonfilio Rubio Villegas* in August 2012, the Mexican Supreme Court handed down a judgement which declared, in line with the jurisprudence established by four IACtHR judgements, that Article 57 of the *Mexican Code of Military Justice* was unconstitutional, thereby establishing that the ordinary courts have sole jurisdiction over cases involving allegations of human rights violations by military personnel.⁴⁷ Article 57, section II, paragraph (a) of the *Mexican Code of Military Justice* was particularly problematic because offences against military discipline were defined as including ordinary and federal offences when they are “personnel while on service or in the performance of acts thereof committed by military personnel when on service or in the performance of acts therefore.”⁴⁸ As a consequence of this open-ended wording, military personnel alleged to have violated the human rights of civilians were tried in military courts. This was a source of serious concern at a time when military personnel were serving as public security forces.⁴⁹

⁴⁴ *Radilla-Pacheco v. Mexico* I/A Court H.R., Preliminary Objections, Merits, Reparations, and Costs. Judgement of November 23, 2009. Series C No. 209, paragraph 273.

⁴⁵ *Ibid*, Operative para 10.

⁴⁶ *Radilla-Pacheco v. Mexico*, Suprema Corte de Justicia de la Nación. Judgement of July 14, 2011, para 272

⁴⁷ Combined fifth and sixth periodic reports of States parties due in 2010, submitted in response to the list of issues (CAT/C/MEX/Q/5-6) transmitted to the State party pursuant to the optional reporting procedure (A/62/44, paras. 23 and 24), Mexico, 20 September 2011, CAT/C/MEX/5.6 CAT/C/MEX/CO/5-6 (2012)

⁴⁸ IACHR in *Ana, Beatriz and Celia González Pérez v. Mexico*, Case 11.565, Report No. 53/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 1097 (2000), 4 April 2001 at para. 67.

⁴⁹ See e.g. Human Rights Watch, “[Mexico: Letter to Senate on Military Justice Reform](http://www.hrw.org/news/2012/04/10/mexico-letter-senate-military-justice-reform),” 10 April 2012, available at: <http://www.hrw.org/news/2012/04/10/mexico-letter-senate-military-justice-reform>; Catherine Daly, Kimberly Heinle, and David A. Shirk, *Armed with Impunity: Curbing Military Human Rights Abuses in Mexico*. San Diego: Trans-Border Institute, Joan B. Kroc School of Peace Studie and University of San Diego, July 2012, https://justiceinmexico.files.wordpress.com/2014/01/120807_armed_with_impunity.pdf.

During the 2013 visit of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions to Mexico,⁵⁰ three judgments were issued by the IACtHR again calling on Mexico to reform the military justice system.⁵¹

In April 2014 Mexico's Cámara de Diputados (Chamber of Deputies) voted to reform the *Mexican Code of Military Justice*. The reform has been long awaited by many human rights advocates and victims, especially the transfer of jurisdiction over criminal investigations and prosecutions to the ordinary judicial system in cases concerning human rights abuses allegedly committed by members of the armed forces against civilians. The IACHR welcomed this reform "as an important step in the protection of fundamental rights in Mexico and in the fulfillment of the State of Mexico's international human rights obligations."⁵² However, the IACHR urged Mexico to "ensure that its legislation clearly indicates that the nature of the right that has been affected should be the determining factor in establishing jurisdiction."⁵³

African Union: The African Human Rights System

The *African Charter on Human and Peoples' Rights* (the Banjul Charter) provides for the right to a fair trial in Article 7:

1. Every individual shall have the right to have his cause heard. This comprises:
 1. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 2. The right to be presumed innocent until proved guilty by a competent court or tribunal;
 3. The right to defence, including the right to be defended by counsel of his choice;
 4. The right to be tried within a reasonable time by an impartial court or tribunal.

The African Commission on Human and Peoples' Rights (ACHPR) has interpreted the Banjul Charter as prohibiting the use of military tribunals to determine the rights of civilians.

In the 2000 case of *Media Rights Agenda v. Nigeria*, the ACHPR found that special tribunals set up by the military regime with an ouster of the jurisdiction of the ordinary courts "violates the right to have one's cause heard, under Article 7.1."⁵⁴

⁵⁰ OHCHR, *Preliminary Observations on the official visit to Mexico by the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 22 April – 2 May 2013, recs. 11 and 13.

⁵¹ *Cabrera Garcia and Montiel Flores v. Mexico* I/A Court H.R., Preliminary Objection, Merits, Reparations and Costs. Judgement of November 26, 2010. Series C No. 220; *Rosendo Cantu et al. v. Mexico*. I/A Court H.R., Preliminary Objection, Merits, Reparations and Costs. Judgement of August 31, 2010. Series C No. 216; *Fernandez Ortega et al. v. Mexico*. I/A Court H.R., Preliminary Objection, Merits, Reparations and Costs. Judgement of August 30, 2010. Series C No. 215.

⁵² IACHR Welcomes Military Justice Reforms in Mexico. May 9, 2014.

http://www.oas.org/en/iachr/media_center/PReleases/2014/053.asp

⁵³ *Ibid.*

⁵⁴ *Media Rights Agenda v. Nigeria*, Comm. No. 224/98, paras. 60-66 (African Commission on Human and Peoples' Rights 2000); http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152-96.html

In the 2003 case of *Law Office of Ghazi Suleiman v. Sudan*,⁵⁵ the defendant civilian was tried by a military court established by Presidential Decree and composed primarily of military officers, including three in active service. The ACHPR stated: “Civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial.” In addition, the ACHPR found that “selection of active military officers to play the role of judges violates the provisions of paragraph 10 of the fundamental principles on the independence of the judiciary.” The Commission stated that “military courts should respect the norms of a fair trial. They should in no case try civilians. Likewise, military courts should not deal with offences which are under the purview of ordinary courts.” The Commission referred in its reasons the 2001 *Resolution on the Right to a Fair Trial and Legal Aid in Africa*,⁵⁶ which states in Principle L:

L. RIGHT OF CIVILIANS NOT TO BE TRIED BY MILITARY COURTS:

- a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.
- b) While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines.
- c) Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.

The ACHPR, in its 2006 and 2009 Concluding Observations on Uganda, expressed concern about trials of civilians by military courts and called on Uganda to comply with Article 7 of the Banjul Charter on fair trials by introducing legal measures to prohibit the trial of civilians by military courts.⁵⁷ The Commission found that the fundamental right to procedural fairness is undermined by the infrequency of military court sessions and the composition and lack of legal training of the panel members who act as judges in the military courts. Human Rights Watch had reported that up to one half of the more than 30 military tribunal sessions observed between June 2010 and July 2011 involved at least one civilian defendant.⁵⁸

In 2012, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedom while countering terrorism, Ben Emmerson, reporting on Egypt,

⁵⁵ *Law Office of Ghazi Suleiman v. Sudan*, Comm. Nos. 222/98 and 229/99, para. 64 (African Commission on Human and Peoples’ Rights 2003), available at: <http://www1.umn.edu/humanrts/africa/comcases/222-98.html>.

⁵⁶ African Commission on Human and Peoples’ Rights *Resolution on the Right to a Fair Trial and Legal Aid in Africa, 2003*, available at: <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>

⁵⁷ See Concluding Observations and Recommendations on the 2nd Periodic Report of the Republic of Uganda, Adopted at the 40th Ordinary Session of the African Commission on Human and Peoples’ Rights, November 2006, available at: <http://www.achpr.org/states/uganda/reports/2nd-2000-2006/>; Concluding Observations and Recommendations on the 3rd Periodic Report of the Republic of Uganda, Adopted at the 45th Ordinary Session of the African Commission on Human and Peoples’ Rights, 13 - 27 May 2009, available at: <http://www.achpr.org/states/uganda/reports/3rd-2006-2008/>.

⁵⁸ *Righting Military Injustice Addressing Uganda’s Unlawful Prosecutions of Civilians in Military Courts*, Human Rights Watch, 2011 at p. 14., available at: http://www.hrw.org/sites/default/files/reports/ugandamilcts0711webwcover_0.pdf

stated:

The trial of civilians in military and Emergency Supreme State Security Courts raises concerns about the impartial and independent administration of justice and furthermore does not comply with the right to have a conviction and sentence fully reviewed by a higher court.⁵⁹

Prosecution of Children in Military Courts

The UN *Committee on the Rights of the Child* (CRC Committee), which monitors the *Convention on the Rights of the Child* (CRC), has highlighted concerns about the prosecution of children in military courts in breach of international standards, including Principle No. 19 of the *Decaux Principles* and Article 77, paragraph 1 of the *First Additional Protocol to the Geneva Conventions* which states:

Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of age or for any other reason.⁶⁰

Democratic Republic of Congo

The CRC Committee reviewed compliance with the CRC in the Democratic Republic of Congo (DRC), welcomed the pardon by Presidential Decree of all children condemned before 2002 for military offences and expressed concern that in some cases children had been sentenced to death or to life imprisonment.⁶¹ Among its recommendations, the CRC urged the State party to ensure that if criminal charges are brought against children, trials must be held before civilian courts and in compliance with international standards on juvenile justice, including the standards enshrined in the CRC and illustrated in the CRC's General Comment No. 10 (2007) on the rights of the child in juvenile justice.⁶²

Egypt

The CRC Committee welcomed the announcement by the Supreme Council of the Armed Forces that it intended to lift the state of emergency in 2011 before Parliamentary elections. However, it urged Egypt to review the Emergency Law No. 162 (1958) and Child Law (2008) with a view to prohibiting criminal proceedings against children before military courts. It called upon Egypt to never prosecute any person below the age of 18 solely for association with an armed group and to ensure that no child is held in military detention under Emergency Law No. 162 (1958).⁶³

⁵⁹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, *Addendum follow-up to country missions*, 15 June 2012, A/HRC/20/14/Add.2 at para. 7, available at:

⁶⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available at:

<http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=8F7D6B2DEE119FBAC12563CD0051E0A2>.

⁶¹ Concluding observations: Democratic Republic of Congo, 7 March 2012, CRC/C/OPAC/COD/CO/1 (2012), at para. 46.

⁶² *Ibid*, para. 47.

⁶³ CRC/C/OPAC/EGY/CO/1 (2011)

Israel and the Occupied Palestinian Territories

The UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, reporting in January 2011, found that the treatment by Israeli authorities of Palestinian children living under occupation did “not at all” comply with the provisions of the CRC.⁶⁴ Further, the 2nd-4th periodic reports of Israel reviewed by the CRC Committee at its 63rd session found that the Military Order 1676 adopted in September 2011 raising the age of majority in the military courts from 16 to 18 years in line with the CRC’s recommendations under the Optional Protocol on the involvement of children in armed conflict (OP-CRC-AC) was not fully applied in practice.⁶⁵ The CRC urged the State party to ensure that children living in the Occupied Palestinian Territories are considered as children up to the age of 18 years and that they benefit effectively from the full protection of the CRC.

The UN Committee on the Elimination of Racial Discrimination (CERD) expressed concern over the separate sets of laws for Palestinians and Israelis, particularly the worrying reports of an increase in the arrest and detention of children and the undermining of their judicial guarantees.⁶⁶ Most notably the military courts exercise competence over Palestinian children, which the CERD noted is inconsistent with international law.

United States of America

In 2008, the CRC, in its Concluding Observations on the United States of America (USA), expressed serious concern

that children who were recruited or used in armed conflict, rather than being considered primarily as victims, are classified as “unlawful enemy combatants” and have been charged with war crimes and subject to prosecution by military tribunals, without due account of their status as children.⁶⁷

The CRC recommended that the USA avoid conducting criminal proceedings against children within the military justice system, and ensure that investigation of accusations against detained children be conducted “in a prompt and impartial manner, in accordance with minimum fair trial standards.”

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⁶⁴ UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, 10 January 2011, A/HRC/16/72, para 26, available at: <http://www.refworld.org/docid/4d8b41ce2.html>

⁶⁵ CRC/C/ISR/CO/2-4 (2013).

⁶⁶ CERD/C/ISR/CO/14-16 (2012).

⁶⁷ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: Concluding Observations: United States of America*, 25 June 2008, CRC/C/OPAC/USA/CO/1, available at: <http://www.refworld.org/docid/4885cfb0a.html>