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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy

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Summary

This report, to be read in conjunction with the other three reports submitted to the Commission on Human Rights at its sixty-first session (E/CN.4/2005/60/Add. 1 to 3), sets out the activities in 2004 of the Special Rapporteur on the independence of judges and lawyers.

The report focuses on two topical issues: the impact of the fight against terrorism on human rights, and the administration of justice in a period of transition.

On this first theme, the Special Rapporteur examines certain recent worrying developments and shows how often the right to a fair trial by an independent and impartial court of law may be affected. He recalls the rules and principles of international law that should guide States when facing crisis situations and terrorist violence. He proposes that a study be carried out on the compatibility with the rules of international law of the laws and other measures taken by States in order to combat terrorism or preserve national security.

The Special Rapporteur gives a brief overview of justice in a period of transition. He proposes that the Commission look further into the question so as rapidly to make available to States in transition the tools and references being developed to help them to respond to the challenges they face concerning justice, the fight against impunity and the right of victims to the truth, reparation and compensation.

Certain other issues are briefly raised (the International Criminal Court, education for judges and lawyers, and capital punishment). In later reports, the Special Rapporteur will tackle the separation of powers, equal access to justice, the role of justice in combating corruption and corruption in the judicial system, the financial independence and external auditing of the judicial system, and other similar issues.

CONTENTS

Introduction

1. This is the eleventh report submitted to the Commission on Human Rights since it established the mandate of the Special Rapporteur on the independence of judges and lawyers, and the second by the current Special Rapporteur. In his previous report (E/CN.4/2004/60), the Special Rapporteur described the work carried out and planned. In the present report, he invites debate on the effects of the responses of some States to the phenomenon of terrorism or to resolve an exceptional situation, and on justice after a conflict or institutional crisis. The stress placed on these themes does not reflect a lack of interest in any other aspect of the mandate or an artificial ranking of the subjects. Editorial constraints obliged the Special Rapporteur to postpone the examination of the other matters pending a future report. However, a broad range of subjects was tackled during the year by means of urgent appeals, letters of allegation and press releases, in the context of missions and at international meetings. Therefore, the other reports he submits to the Commission (E/CN.4/2005/60/Add. 1-3) will provide food for thought on several other subjects.

I. TERMS OF REFERENCE AND METHODS OF WORK

2. The Special Rapporteur's terms of reference fall within the Commission's work on the protection of all persons subjected to any form of detention or imprisonment. Having noted many attacks suffered by magistrates, lawyers and legal staff and assistants, the Commission had become aware of the link between the weakening of the safeguards afforded to magistrates and lawyers and the frequency and the gravity of human rights violations in certain States.

3. The terms of reference include the structural and functional aspects of the judiciary and the dysfunctions which, in extremely varied contexts, may affect human rights. They concern justice in both ordinary and exceptional circumstances, in periods of conflict and of transition. They cover both civil and military justice, ordinary and special or exceptional jurisdictions, and developments linked to the International Criminal Court.

4. Since justice is at the heart of the democratic system and the rule of law, the impartiality of judges and lawyers should not be examined without taking account of the broader institutional context and the various factors that can have an impact on the functioning of the judiciary. It is therefore natural that the Commission should have asked for account to be taken of the relevant work and experience of the other procedures and mechanisms of the Commission and of the Sub-Commission for the Promotion and Protection of Human Rights and the whole United Nations system, and the following specific aspects: (i) raising awareness among judges and lawyers of the principles of human rights; impunity; integrity of the judicial system, (ii) cross-cutting issues, such as those concerning children, women and gender questions, disabled persons, members of national, ethnic, religious and/or linguistic minorities, or persons in extreme poverty, and (iii) problems posed by terrorism in relation to the administration of justice.

5. The broad scope of the terms of reference requires choices to be made and priorities to be set. Nevertheless, the Special Rapporteur is endeavouring to move ahead on the following tasks: (i) identify, inquire into and record any infringements of the independence of the judiciary, lawyers and court officials; (ii) identify and record any progress made in protecting and strengthening such independence; (iii) analyse underlying matters of principle with a view

to making recommendations aimed at securing and strengthening, as appropriate, the independence of the judiciary and of the legal profession, and at consolidating the international principles and tools in this area, without losing sight of the fact that there can be no universal model; (iv) promote consultative services or technical assistance aimed at strengthening the judiciary and the legal profession, and provide advice to interested member States; and (v) foster, in general, activities aimed at furthering the independence of the judiciary and the legal profession. The previous report sets out the working methods used to carry out these tasks.

II. ACTIVITIES IN 2004

Consultations

6. From 31 March to 7 April, 21 to 25 June, 22 and 23 July and 29 November to 3 December, the Special Rapporteur held consultations in Geneva with government representatives (notably those of Brazil, Cuba, Guatemala, Hungary, the Islamic Republic of Iran, Kazakhstan, Kenya, Kyrgyzstan, Paraguay and the Russian Federation) and non-governmental organizations. On 23 July, he met the High Commissioner for Human Rights, whose experience and views were particularly valuable in the context of this mandate. He also took part in the second Social Forum (22 and 23 July); its final document sets out the difficulties faced by the poorest people in gaining access to justice.

Cooperation with the Commission's special procedures and the treaty bodies

7. From 21 to 25 June, the Special Rapporteur took part in Geneva in the eleventh at annual meeting of the Commission's special procedures. He developed fruitful cooperation with several of them, taking account of the considerations concerning justice contained in certain reports and joining one or more colleagues in asking several governments for comments and information regarding allegations. He closely monitored the work of the treaty bodies, especially those having tackled issues relating to justice: the Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women.

Cooperation with intergovernmental and non-governmental organizations, including judges' and lawyers' associations

8. This was continued and stepped up and, from 28 October to 3 November 2004 in Mexico, the Special Rapporteur took part in the annual conference of the International Union of Magistrates.

Missions and visits

9. By official invitation, the Special Rapporteur went to Kazakhstan in June and to Brazil in October (see E/CN.4/2005/60/Add.2 and E/CN.4/2005/60/Add.3). In late November in Uzbekistan, he contributed to the national Conference on National and International Mechanisms for the Protection of Human Rights organised by the World Organization against Torture (OMCT). He wishes to thank the Governments that received him and also those of Greece, the Islamic Republic of Iran, Kenya, Kyrgyzstan, Nigeria, Paraguay and Tajikistan for

their invitations. He regrets that United Nations budgetary constraints did not enable him to accept them immediately. He nevertheless hopes to be able to make three of those visits in 2005. The same constraints prevented him from making further progress with the measures taken by his predecessor concerning several other countries: Egypt, Tunisia, Turkmenistan, Turkey, Sri Lanka and Uzbekistan. Moreover, those responsible for the Commission's special procedures, in a declaration of 25 June 2004, invited the Special Rapporteur and three other special rapporteurs to visit persons arrested, detained or sentenced for terrorism or other alleged offences in Afghanistan, Iraq, the Guantánamo Bay military base and elsewhere.

Urgent appeals and letters of allegation addressed to Governments, and press releases

10. Document E/CN.4/2005/60/Add.1 contains a summary of the allegations sent to Governments and the answers received, along with statistics for 2003 and 2004. By way of indication, the following exchanges took place from 1 January 2003 to 31 December 2004:

Urgent appeals sent: 104;

Letters of allegation sent: 34;

Press releases: 15;

Answers received: 92 from 38 Governments (out of 53 which received communications).

Promotion of advisory services and technical assistance

11. This matter was discussed with the High Commissioner and a plan of activities will be drawn up.

Promotional activities

12. In Buenos Aires, the Special Rapporteur presented his activities to the third Global Judges Forum held from 30 August to 1 September and organised by the Asociación Civil Justicia y Democracia and the Asociación de Mujeres Jueces de Argentina. On 15 October at the headquarters of the lawyers' association in São Paulo (Brazil), he gave a speech on his mandate in the context of the fourth International Human Rights Colloquium organised by Connectas Human Rights.

III. COUNTER-TERRORISM AND ITS IMPACT ON HUMAN RIGHTS, INCLUDING THE RIGHT TO A FAIR TRIAL

A. The rise of terrorism

13. Three and a half years after 11 September 2001, the continuation, not to say the growth of terrorist acts shows that terrorist networks are far from having been eliminated, even though they have suffered serious setbacks. This faces States with the challenge of effectively preventing and combating terrorism but not at the expense of the rule of law.

B. **Fighting terrorism with the weapons of the law**

14. It is in this context and with the weapons of the rule of law that we must fight terrorism. Circumventing the rule of law on the grounds of the specific nature of the danger that terrorism represents and the need to be effective amounts to an acceptance of the terrorist's logic. There can be no more effective response to terrorism than one based on respect of international law on the one hand and economic and social development on the other. Since 11 September 2001, this has been the consensus of the world community, which remains unanimous in its condemnation of terrorist methods and practices and also of any form of response to terrorism that contravenes international law. In this connection, we can refer to the Security Council's declaration of 20 January 2003 on the issue of the fight against terrorism annexed to its resolution 1456 (2003); to the declaration of 25 June 2004 of those responsible for the Commission's special procedures (see E/CN.4/2004/60/Add.1); to the Declaration adopted by 160 jurists from all over the world at the biennial conference of the International Commission of Jurists in Berlin on 28 August 2004; to the report of the High-Level Panel of Eminent Persons responsible for assessing the threats to international peace and security (A/59/565) transmitted by the Secretary-General to the General Assembly on 2 December 2004.

15. Against this background, the Commission asked the High Commissioner to update and periodically republish the 'Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism'. It asked her to analyse the question of the protection of fundamental rights in the context of the fight against terrorism, to make appropriate recommendations and provide assistance to States upon request. It also asked all treaty and non-treaty bodies to analyse the compatibility of national measures taken in the context of the fight against terrorism with international human rights law. The Commission decided to appoint, for one year, an independent expert with the task of helping the High Commissioner to carry out this mandate and asked for a report on the means of strengthening the promotion and protection of human rights and fundamental freedoms while countering terrorism to be transmitted to the General Assembly, at its fifty-ninth session, and to the Commission, at its sixty-first session.

16. As regards the administration of justice for terrorist suspects, the Secretary-General's report transmitted to the General Assembly by the High Commissioner stresses that "the judiciary should not surrender its sober, long-term, principled analysis of issues to a call by the executive for extraordinary measures grounded in information that cannot be shared, to achieve results that cannot be measured" (A/59/404, para. 9). In the report on the protection of human rights and fundamental freedoms while countering terrorism, the High Commissioner concludes that "overall, there are significant gaps in the consideration of national counter-terrorism measures by the United Nations human rights system" (A/59/428, para. 47). On the matter of fair trial rights, she observes that: "Counter-terrorism measures have included the introduction of new procedures for use in the detention of suspected terrorists and the prosecution of terrorism-related cases. Some measures, such as the expanded use of military commissions, have been addressed by special procedures including the Special Rapporteur on the independence of judges and lawyers and the Working Group on Arbitrary Detention […]. However, other measures have not yet been treated in depth by the special procedures. These include, for example, measures permitting detention to be based on information, including non-evidentiary information, withheld from the accused (so-called "secret evidence"). Another example is judicial or quasi-judicial investigative procedures that may affect the right not to be

compelled to testify against oneself. A number of detention regimes allow limits on *habeas corpus* and similar remedies, limits on access to counsel, and indefinite detention without trial. The presumption of innocence sometimes appears to be disregarded". (ibid., para. 43).

C. **The status of "enemy combatant" and its effects in practice**

17. Despite the remarkable international consensus (see para. 14 above), in practice, counter-terrorism has led to international law and the rule of law being undermined in many ways that affect the exercise of human rights, notably personal integrity and the right to a fair trial by an independent and impartial court of law. In these respects, the Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, signed on 13 November 2001 by the President of the United States of America, is a cause for grave concern on the part of the international community.

18. This key instrument of counter-terrorism doctrine creates the *sui generis* status of "enemy combatant", which allows suspects either to be detained indefinitely without charge or trial, or to be tried before a military commission. Apart from the fact that they are not answerable to the judiciary, military commissions deprive the accused of any independent judicial control, allow military trials for crimes committed outside any armed conflict and fail to satisfy any of the essential requirements of a fair trial. For example, they impose severe restrictions on the right to a defence, accept as evidence information obtained by "dubious methods" (see para. 21 below), deny those sentenced the right of appeal to an independent and impartial court of law, and violate the principles of equality before the law and of non-discrimination, since only non-US nationals may be tried before them. In its November 2004 judgment in the case of *Hamdan v. Rumsfeld*, the District Court for the District of Columbia stated that military commissions violate the Geneva Conventions and demanded that they be dissolved. The Government appealed against the decision.

19. Serious distortions are occurring through the application of the above-mentioned military order in the case of detainees at the United States Camp Delta naval base at Guantánamo Bay. As for those detained for their alleged links with Al Qaeda, in the prisons administered by coalition forces in Iraq and Afghanistan, all indications are that they are subject to a similar regime.

(a) Detainees at Guantánamo Bay

20. According to various sources, in November 2004 some 550 persons - known as "enemy combatants" - were still being detained at the naval base; they may still include some minors and persons aged over 70. These persons still have had no access (some since March 2002) to a lawyer or a trial and no right to family visits, and are being held in conditions which many human rights organizations and United States jurists all describe as cruel, inhuman and degrading treatment. In November 2004, the Committee against Torture accused the United Kingdom Government of taking no action to put an end to the torture suffered by a British citizen at Guantánamo Bay. Moreover, on 30 November, the International Committee of the Red Cross (ICRC) apparently sent the United States Government a report denouncing the application to Guantánamo Bay detainees of methods "equivalent to torture".

21. On 3 December 2004, the Principal Deputy Associate Attorney General declared, before a Washington court, that torture is contrary to the policy of the United States and is not used at Guantánamo Bay, and at the same time that the detainees at Guantánamo Bay "do not enjoy any of the constitutional rights protected by this court" and that the Constitution nowhere outlaws the use of information of "dubious origin". Section 6.D.1 of Military Commission Order No 1 states that it is for the presiding officer of the military commission or a majority of its members to establish that such information "would have probative value to a reasonable person".

22. As regards the legal status of the detainees, on 29 June, in a decision adopted by six votes to three, the Supreme Court ruled that foreign nationals detained without charge at Guantánamo Bay are entitled to challenge their detention before United States federal courts. The ruling was in response to the question as to whether "United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay", and not whether the detainees should be released. The Court overturned the decisions of the US District Court for the District of Columbia and the D.C. Circuit Court of Appeal which maintained that the 1950 Supreme Court ruling in the case of *Johnson v. Eisentrage* prevented the detainees at Guantánamo Bay from challenging their incarceration at the base because they were foreign nationals on foreign territory. The Court ruled that the law of the United States of America "confers on the District Court jurisdiction to hear petitioners' *habeas corpus* challenges to the legality of their detention at the Guantánamo Bay Naval Base".

23. Since that decision, some 90 detainees have gradually been released, some without their identity being revealed. Combatant Status Review Panels have also been set up. Composed of three military officers, these panels have the task of deciding, for each detainee, whether he should be held in detention or released. They are non-jurisdictional bodies and so do not release the detainees from the legal vacuum they are in. Detainees may not attend all the hearings nor consult lawyers during them, and have no access to the confidential information nor the right to know the source of the allegations made against them. By 10 December, only one of the 194 cases submitted to a panel had resulted in release.

24. In late August 2004 four detainees – one Australian, two Yemenis and one Sudanese – were tried before a military commission. After the hearing on 2 November, the Amnesty International and Human Rights Watch observers noted a series of circumstances indicative of the absence of guarantees of a fair trial.

(b) Detainees of coalition forces in Iraq

25. A few months ago, the world was horrified to discover a first series of photos taken at Abu Ghraib prison, under the control of coalition forces, showing inhuman treatment inflicted on Iraqis suspected of having ties with Al Qaeda, who were moreover deprived of a fair trial. An ICRC report of February 2004 quoting representatives of the coalition forces estimated that 70-90% of persons arrested by those forces were arrested "by mistake" and revealed that many of these detentions bore a resemblance to de facto forced disappearances. On 30 April, United States Army General A. Taguba, responsible since January for investigating the situation of those detained since 1 November 2003 under the responsibility of the 800th Brigade of the military police, presented a report describing practices tantamount to torture of the detainees by

American soldiers. Furthermore, in December 2004, a British court concluded that British troops had "effective control" of the prison in south-eastern Iraq where an Iraqi detainee died under torture.

26. In Iraq, a large number of other detainees have a different legal status and the fact that they are not being brought to trial is also of serious concern to the Special Rapporteur, and merits the Commission's attention.

(c) Detainees of coalition forces in Afghanistan

27. In his report on the human rights situation in Afghanistan (A/59/370), transmitted under the mandate specified by the Commission in its resolution 2003/77, the independent expert described the situation of those detained or imprisoned in Afghanistan, a situation that should also be of concern to the Commission.

28. Regarding the persons suspected of belonging to Al Qaeda who are detained by coalition forces, since he was unable to visit them, the independent expert based his report on reliable information, stating that they are victims of serious violations of international human rights law and international humanitarian law, including the right to a fair trial. The ICRC claims that people are detained for up to two months by coalition forces in several secret locations to which the ICRC has no access, which is a serious violation of the Geneva Conventions. United States Army General Jacoby was ordered to investigate and he reported in July 2004, but in December 2004 the Department of Defense did not authorise publication.

(d) Initiative of the Commission's special procedures, and the outcome

29. Very concerned by the above allegations, at their annual session in June 2004, those responsible for the Commission's special procedures asked for four special rapporteurs, including the author of this report, to be authorised to visit, together and as quickly as possible, the persons arrested, detained or sentenced for terrorist or other alleged offences in Iraq, Afghanistan, at the Guantánamo Bay military base or elsewhere, so as to ensure, each in relation to their respective mandates, that international human rights standards were being properly respected in relation to those persons. This request was the subject of an exchange with the United States Government (see E/CN.4/2005/60/Add.1).

(e) Considerations regarding the legal status of "enemy combatant"

30. The interest of special procedures in the above-mentioned visit and the insistence that it should take place is founded not only on the positive impact that the visit could have on the detainees themselves – some having been held for a long time – but also because it would enable their legal situation to be determined and clarified. At the same time, it would help to clarify the debate that has begun at international level in which not only specialists, but also the general public are expressing concern.

31. The most crucial questions relate to the retrograde step represented by the possibility that certain persons – many of them civilians, and possibly including minors and senior citizens – may remain detained indefinitely on the basis of a military order, especially considering that a large and relatively imprecise number of people is involved. This situation amounts, at least, to

the violation of the set of principles and rules governing the right to a fair trial and to the safeguards offered by a competent, independent and impartial court of law.

32. Aside from the de facto situation described above and elaborated upon day after day by the media, and the normative framework that the experts are applying to it as a violation of international human rights law and international humanitarian law, the Special Rapporteur would draw attention to the most worrying aspects that have characterised this debate, and which are linked to the attempt to set limits on the international law applicable to these detainees by creating the status of "enemy combatant". As indicated in paragraph 18, according to this thesis, the characteristic features of this particular type of enemy would imply that the protective rules of international human rights law and humanitarian law apply in a limited way or not at all.

33. This is not the first time that in debating whether or not one or other branch of international law is applicable people have tried to exclude or limit the application of both. As proof of this, the author would refer to his successive reports as the Sub-Commission's Special Rapporteur on the question of human rights and states of emergency and, in particular, to document E/CN.4/Sub.2/1997/19, in which he recounts the events in Latin America during the 1970s, when some de facto governments argued that "the country was experiencing internally a state of dirty, unconventional war compelling the authorities to suspend the exercise of human rights and to claim, before international forums, that international humanitarian law conventions were not applicable since the situation did not involve an international armed conflict and even less a declared war. This gave rise to a kind of legal no-man's land where everything was permitted, including the cruellest and most aberrant forms of behaviour and the most serious human rights violations" (para. 7.3).

34. Faced with a situation such as the present one, it is imperative to reaffirm some basic principles governing this subject and which offer appropriate normative protection of human rights in those situations of conflict or violence where respect for all of them is seriously threatened:

(a) While international human rights law accepts that in exceptional circumstances the exercise of some rights may be suspended, at the same time it lays down a series of requirements operating as legal safeguards to preserve the most fundamental ones and to return to normality. These safeguards are linked to the legality of a state of emergency, the circumstances surrounding its declaration and communication, the proportionate nature and timing of the measures adopted, and the absolute inalienability of some rights.

(b) With regard to inalienable rights, the international supervisory bodies have established solid jurisprudence regarding those safeguards which must be respected at all times and in all circumstances in order to comply with the rules governing the right not to be subjected to torture or to cruel, inhuman or degrading punishment or treatment contained in article 7 of the International Covenant on Civil and Political Rights, and the rules governing the right to a fair trial detained for the most part in articles 9 and 14 of the Covenant;

(c) The inalienability and non-derogability of a right also apply to the legal safeguards recognised as essential for exercising that right. This is what emerges from the text of the

American Convention on Human Rights and the Human Rights Committee's assertion[1] that "procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights". Furthermore, "the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2, are inherent to the Covenant as a whole", which entitles us to conclude that a State party "may not depart from the requirement of effective judicial review of detention" (CCPR/C/79/ADD.3 [Israel] para. 21). This reasoning is valid with respect to the use of *habeas corpus*, which was duly defended in the above-mentioned United States Supreme Court ruling, ratifying a long historical tradition of independence of the country's judiciary;

(d) International humanitarian law, designed to apply in conflict situations, also provides for minimum judicial safeguards;

(e) The principle guiding the relationship between international human rights law and international humanitarian law is not exclusion or incompatibility but rather harmonisation and complementarity. This enabled the Human Rights Committee to make the following interpretation: "as certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations", whether those situations derive from serious internal unrest, internal or international armed conflict or some other threat to law and order;

(f) For the Committee, "only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State party's decision to derogate from the Covenant". The absence of these fundamental guarantees would amount to a simple denial of justice;

(g) Reaffirming the principle of compatibility of the two branches of international law, the Committee also reiterated that "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by <u>deviating from fundamental principles of fair trial</u>, including the presumption of innocence";

(h) The Committee further felt that, whether or not the rights referred to in article 4 of the Covenant were non-derogable, "all persons deprived of their liberty [must] be treated with humanity and with respect for the inherent dignity of the human person" and "the prohibitions against taking of hostages, abductions or <u>unacknowledged detention</u> are not subject to derogation";

(i) The Committee's interpretations of article 5, paragraphs 1 and 2, of the Covenant confirm that principle.

[1] Save where otherwise indicated, the quotations in subparagraphs (c) to (h) come from the Human Rights Committee's general comment No. 29. Underlining by the Special Rapporteur.

35. In summary it can be said that the inalienable nature of some rights linked to the proper administration of justice and the protective complementarity of the two branches of international law emerge quite clearly, both from the current rules and from their congruent interpretation by the treaty bodies. Therefore, the current international legal order does not provide for any possibility of excluding a person from the application of those rules. This is the case regardless of the legal term used: "enemy combatant", subversive, terrorist, etc. Even United States courts have recognised that no exceptions can be made to *habeas corpus*.

D. **Spread of improper administrative detention without legal safeguards**

36. Based on the doctrine of counter-terrorism and sometimes even taking inspiration from the status of "enemy combatant", the governments of many States have adopted or strengthened legal instruments giving them powers of detention beyond all judicial control which, depending on the context, they use to detain terrorist suspects, political opponents, refugees or asylum seekers. With the same aim, certain other States make extensive use of ministerial powers of detention granted by the law (generally on public order or national security), and they do so despite the UN's insistent demands over the past 20 years that they renounce such legal tools because they contravene international law by conferring exceptional powers without the need to declare a state of emergency.

37. In Malaysia, for example, the highly controversial law of 1960 on national security remains in force, allowing the police to arrest, without a warrant or investigation, any person suspected of threatening the security or economic life of the State; detention may be extended for 60 days, after which the Interior Minister may, without intervention from the judiciary, extend it for a further two years, and so renew it indefinitely. In Nepal, in late October 2004, the King authorised the arrest and detention of suspects, without charge, trial or judicial review, for up to 12 months. The Human Rights Committee has criticised the definition of terrorism enshrined in Egyptian law and the trial of terrorist suspects before military tribunals or special emergency tribunals, doubting that they respected the principles of a fair trial. It has also criticised the United Kingdom's Anti-terrorism, Crime and Security Act of December 2001, which allows the detention without charge or trial, for an indefinite period and without judicial remedy, of non-British terrorist suspects who cannot be expelled from the country; the relevant evidence is secret and is not even communicated to the suspect, who may only use an appointed lawyer. On 16 December 2004 the House of Lords ruled that preventive detention for an unlimited period and without trial of foreign terrorist suspects was incompatible with European human rights law. In India, the May 2002 Prevention of Terrorism Act includes a vague definition of terrorism, extends the State's powers of investigation and authorises the detention of suspects without charge or trial for up to six months.

E. **Improper use of military courts for trying civilians**

38. In its resolutions 2003/39 and 2004/32, the Commission stressed that the integrity of the judicial system should be observed at all times, reaffirmed that every convicted person should have the right to have his/her conviction and sentence reviewed by a tribunal of competent jurisdiction according to law, and denounced the creation of courts employing unlawful procedures to render due-process courts incompetent. It called upon States that have military courts or special criminal tribunals for trying criminal offenders to ensure that such courts, where required by applicable law, are an integral part of the general judicial system and that

such courts apply due-process procedures that are internationally recognized as guarantees of a fair trial, including the right to appeal a conviction and a sentence.

39. It is particularly urgent that such requests be heeded since detainees in Guantánamo Bay, Iraq and Afghanistan are in the situation described above. It is equally urgent in the case of civilians detained in several other countries. By way of illustration, the Human Rights Committee, the Committee against Torture and the Working Group on Arbitrary Detention are concerned about Belarus, where military courts can try civilians and pass sentences tantamount to arbitrary detention, and about Pakistan's counter-terrorism law of 13 August 1997, which gives the police sweeping powers of arrest and sets up special counter-terrorism courts and has been supplemented by the order of 31 January 2002 setting up, for trying suspected terrorists, new courts composed of a senior military officer appointed by the Government and two civilian judges.

40. The Special Rapporteur is therefore especially pleased to see (i) the laws passed in Greece, Guatemala, Haiti, Honduras, Italy, Nicaragua, Paraguay, Portugal and Venezuela limiting the powers of military tribunals, (ii) the measures taken in Bolivia, Colombia, Guatemala, Haiti, Peru, Nicaragua, Norway and Venezuela following the opinions of the treaty bodies and several Commission special procedures which asked for serious human rights violations to be excluded from the competence of military tribunals, and (iii) the abolition of the military criminal court in Belgium early in 2004.

41. To assist States in exercising military justice in compliance with international human rights rules, draft principles are being studied by the Sub-Commission for the Promotion and Protection of Human Rights (see E/CN.4/Sub.2/2004/7) with a view to submitting to the Commission shortly a proposal that could meet with broad agreement. Several experts on intergovernmental and non-governmental organizations and members of various military justice systems have contributed to this important normative process.

F. **Consequences for other human rights of counter-terrorism activities and of measures taken on grounds of national security**

42. Not only has the judicial system been stripped of control over arrests and detentions on grounds of counter-terrorism or security considerations, but also a whole series of fundamental rights and freedoms have been restricted in many States. For instance:

(a) Freedom of opinion and expression, the right to privacy, including confidentiality of private communications

In Colombia, for example, the counter-terrorist law of late 2003 authorises the armed forces, without a warrant, to carry out personal searches, telephone tapping and monitoring of private correspondence (see E/CN.4/2004/64/Add.3); on 30 August 2004, the Constitutional Court declared this reform unconstitutional;

(b) Freedom of association, assembly and demonstration

In Egypt, for example, Emergency Law No 162 (1958) prohibiting strikes, demonstrations and meetings in public places, appears to have been extended for three years.

(c) Rights of refugees and asylum-seekers

The Human Rights Committee has discovered, for example, that in Sweden and New Zealand the new laws and practices applicable to asylum-seekers suspected of terrorism eliminate any mechanism for controlling their expulsion.

V. JUSTICE IN A PERIOD OF TRANSITION

A. A complex challenge

43. The judiciary also faces major challenges when the conflict endured by a country – whether armed, political, economic, institutional or all of these together – is being resolved and the transition to democracy and the reconstruction of institutions is being prepared. The problems to be solved are then many, the risks of a setback great, and the difficulties of building a future immense. Each country gives its transition its own stamp, endeavouring – despite the complexity of the crisis – to appeal its wounds in its own way and with what institutions it has. Depending on the context, the Government attempts immediate transformations or, conversely, aims to introduce them gradually because the factors and protagonists of the past troubles remain very much present. It is never a simple matter to move the process forward while strengthening institutions, and to do so the speed which is neither too fast nor too slow

44. In the field of justice, the most urgent challenges are the fight against impunity, the establishment of the truth, the trial and punishment of perpetrators, and reparation and compensation for victims. But the new authorities may face dilemmas. For instance, how to try criminals by judges appointed by those very criminals and when the previous regime has passed a law granting itself amnesty for human rights violations? One priority of the State in transition may therefore be to clean up the judiciary in order to restore its legitimacy, independence and impartiality, and hence its public credibility. Depending on the extent of the violations and the context, the State may also opt to establish a para-judicial truth and reconciliation mechanism alongside judicial procedures, or agree with the United Nations to set up a joint tribunal, like the one created in Sierra Leone.

B. "Cleaning up" and reconstructing the judiciary

45. Although it may be seriously tainted for having served the previous regime, the judiciary is the institution to which victims turn and from which they are entitled to expect truth and justice. In order to clean up the judiciary, the State usually has to review the method of appointing and dismissing judges, particularly those of the Supreme Court, since that is the body with ultimate responsibility for the respect of human rights and fundamental freedoms and the preservation of the rule of law. When doing this, the State must be attentive to at least two facts: (i) the crisis of the legitimacy of the judiciary is generally not limited merely to the composition of the supreme court, that being only its most obvious symptom; (ii) the most discredited members of the judiciary must be dismissed without coming into conflict with the law. Depending on the country, dismissal may take the form of expulsion pure and simple, or the judges and assessors concerned may have to undergo reselection based on new criteria; in both cases there exists the possibility of abuse and settlement of scores, and the State must do

everything possible to avoid them, if only to avoid reproducing the previous situation and to ensure that the judicial system gains in authority and credibility. Cleaning up without observing international standards for a fair trial or the basic principles for the independence of the judiciary may, far from strengthening the judicial system, undermine it. The jurisprudence of the human rights treaty bodies, at both universal level (Human Rights Committee) and regional level (Inter-American Court of Human Rights), is also especially important in this area.

C. **Fighting against impunity**

46. In post-conflict situations, when the need for truth and justice dominates public life, it is not rare for the new authorities to find that they have inherited laws or decrees whereby those responsible for human rights violations have granted themselves amnesty, and that they therefore face the challenge of repealing that legislation without exposing the population to violence from those who stood to benefit from it. The new authorities may themselves be tempted to seek immediate civil peace to the detriment of the truth regarding human rights violations, and moral reparation and material compensation for the victims, with a consequent serious risk of institutionalising impunity.

47. In its General Comment No 20 on article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee states “the Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible” (para. 15). Moreover, pursuant to a broad interpretation of article 6, paragraph 5, of Protocol II to the Geneva Conventions, it is now no longer acceptable to grant an amnesty for serious international crimes committed in the context of internal conflicts.

48. The granting of immunity by means of amnesty laws is being rejected by national and regional courts, as shown by the study on impunity presented to the Commission by Mrs Orentlicher (E/CN.4/2004/88) and recent events. Thus Argentina, Chile and Poland have repealed the amnesty laws adopted by the authoritarian regimes or at the time of transition which infringed their international obligations. Argentina and Uruguay have amended their Civil Codes to enable the Government to issue certificates of “forced disappearance” with which victims’ families can settle the affairs of disappeared persons without having to apply for a certificate of “presumed death”, a procedure that many considered morally unacceptable. Several recent decisions have confirmed the incompatibility of amnesty measures with States’ obligation to punish serious crimes covered by international law. The above-mentioned study refers to the consistent rulings of the Inter-American Commission on Human Rights concerning amnesty measures; to a 1988 decision of the International Criminal Tribunal for the Former Yugoslavia regarding crimes such as torture; to the 2002 decision of the French Court of Cassation confirming the competence of French courts despite an amnesty proclaimed in Mauritania in 1993; and to the decision of the Spanish National High Court (*Audiencia Nacional*) affirming Spain’s competence in the criminal investigation concerning former Chilean President Augusto Pinochet, despite the 1978 self-amnesty law. In Chile, the judiciary three times lifted General Pinochet’s immunity, allowing proceedings against him for serious human rights violations, and it examined the possibility of lifting immunity for massive

embezzlement of public funds. The appeals chamber of the Special Court for Sierra Leone recently declared it to be a well-established rule of international law that a Government may not grant amnesty for serious crimes under international law. The Human Rights Committee has stated that measures contributing towards impunity for perpetrators of serious human rights violations or preventing such violations being investigated, the perpetrators being tried and sentenced and/or the victims and their families obtaining an effective remedy and reparation are incompatible with the obligations under the International Covenant of Civil and Political Rights. The Committee expressed this view when examining legislation granting amnesty or pardons for serious human rights violations in Argentina, Chile, El Salvador, France, Haiti, Lebanon, Niger, Peru, the Republic of the Congo, the Republic of Croatia, Senegal, Uruguay and Yemen. The Committee against Torture has held that amnesty laws and similar measures enabling the perpetrators of acts of torture to evade prosecution are against the spirit and the letter of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and reiterated this view in its concluding observations concerning Argentina, Azerbaijan, Kyrgyzstan, Peru and Senegal.

D. **Re-establishing truth and ensuring justice, reparation and compensation for victims**

49. As recent history shows, States' ways of meeting the requirement for truth, justice and reconciliation that they face in a period of transition may vary. The State may entrust responsibility for trying the main perpetrators of serious and massive human rights violations to the ordinary courts: Argentina did this in 1984, for example. It may set up a para-judicial instance such as a truth and reconciliation commission, as South Africa and some thirty other countries did. These two measures may be taken simultaneously or consecutively, as happened, for example, in Argentina, Peru, Sierra Leone and Timor-Leste. The time taken to implement the chosen measure may vary considerably. For instance, President Lagos set up the national commission on political prisons and torture in Chile between 1973 and 1990 30 years after the events, and the commission submitted its report, based on evidence from 35,000 people, on 28 November 2004.

50. In a post-conflict or transition period, the independence of judges cannot be assessed solely on the basis of the sentences passed, or that of prosecutors on the basis of the way in which they have prepared the charges. The other relevant factors include the judiciary's structure and degree of financial independence, the nature of the criminal code and the code of criminal procedure which are applied, the type of training of the judges and prosecutors, the logistics at their disposal, etc. Consequently, the independence of the judiciary will be considerably reinforced if the action carried out with the declared intention of establishing the truth and trying the perpetrators is coupled with a sustained and coherent effort to set up a legal and judicial system based on the principles of independence and impartiality. A State going through or emerging from a crisis must not only ensure that particular violations are punished under the law, but also examine the whole of the judicial system and its operation to ensure that it is compatible with international human rights law. To that end, the Government must sometimes dismantle the whole repressive legal and institutional arsenal put in place by the previous regime.

51. In a transition context, proper administration of justice may also be hampered by factors such as economic, social and cultural constraints or even the absence of clear criteria

concerning gender, young offenders or minorities which limit access to justice for certain segments of the population. It may be undermined by other shortcomings, such as (i) the absence of mechanisms for protecting witnesses, (ii) the absence of a legal framework for protecting lawyers defending persons accused of violations, (iii) an imprecise definition of the functions, competences and immunities of the persons called upon to sit on a truth commission, tribunal or body for monitoring and cleaning up the judiciary, (iv) the absence of a legal basis for prosecuting certain human rights violations, such as enforced disappearances, (v) short statute-of-limitations periods for offences, (vi) the absence of a mechanism for auditing the body monitoring and advising the judiciary in the context of a peace-keeping mission.

52. Regarding truth and reconciliation commissions, the source, scope and duration of their mandate, the persons appointed to sit on them, the procedures applied and the material resources made available to them are decisive. The work of such commissions is no substitute for legal proceedings and should never prevent them: to that end, it is important to provide all possible guarantees to ensure that the commission operates with objectivity and that its procedures and final report are designed to facilitate - rather than hinder - future judicial action.

53. With their specific characteristics, many national situations show how topical these issues are. Thus, for Afghanistan, report A/59/370 (see para. 27 above) expresses the need for a provisional strategy for the administration of justice during the transition and, at the same time, the need to set up a properly institutionalised lay judicial system while taking account of tradition. As regards Iraq, the continuing violence far from facilitates the reconstruction of the judicial system so that it can operate in accordance with international rules. As for the arrangements made to try Saddam Hussein and the chief officials of the previous regime, there is a serious risk of their resulting in a verdict based on a trial that contravenes those rules.

E. **Good practices and tools to assist new authorities**

54. The difficulties referred to above explain the efforts made to identify the best practices emerging from the experience and knowledge acquired by a large number of States and by the United Nations in the context of its peace-keeping operations and international courts. The aim is to offer possible responses to a wide variety of situations, each with its specific characteristics.

55. Based on the Secretary-General’s report on the rule of law and transitional justice in conflict and post-conflict societies, the Security Council undertook on 23 August 2004 (S/2004/616) to define rules that could serve as a reference in future. A meeting of experts has discussed ways of strengthening the capacity of OHCHR regarding transitional justice and debated the drafting of an operational manual for practical use by field missions and transitional administrations in post-conflict States.

56. Experiences such as those in Angola or those ongoing in Timor-Leste and the Democratic Republic of the Congo could serve as a guide for the processes of re-establishing the rule of law and reconstructing judicial systems. The Special Rapporteur proposes to look at this theme in greater depth as he prepares his next report.

F **The International Criminal Court**

57. No discussion of post-conflict justice would be complete without noting the extraordinary impact of the creation of the International Criminal Court (ICC), with many new developments in 2004. From the structural viewpoint, we note (i) the ratification of the Rome Statute by five new States despite persistent opposition from some others; (ii) the entry into force, in July, of the Agreement on the Privileges and Immunities of the ICC's members and officials; (iii) the setting-up in The Hague, in September, of the Secretariat of the Assembly of States Parties to the Rome Statute; the signature on 4 October of the agreement defining the legal bases of the cooperation between ICC and the UN. Furthermore, the ICC is already handling two cases. After receiving a letter of referral from President Museveni, on 29 January 2004 the ICC Prosecutor opened an investigation into allegations of crimes falling within the Court's competence committed in Uganda since 1 July 2002 (date of the entry into force of the Rome Statute) and attributed to the Lord's Resistance Army. On 19 April, following a referral request from President Kabila, the Prosecutor opened an investigation into alleged crimes falling within the Court's competence committed in the Democratic Republic of the Congo, especially in Ituri, since 1 July 2002. To quote the Prosecutor, the opening of these investigations "represents a great step forward for international justice, the fight against impunity and the protection of victims".

V. **CONCLUSIONS AND RECOMMENDATIONS**

Counter-terrorism and respect of international law

58. **The international community is unanimous in condemning terrorism. However, three and a half years after the attacks of 11 September 2001, faced with the rise of the phenomenon and the effects of the rules and practices put in place by certain States, it is fair to ask how we can combat terrorism while preserving the achievements of international law over the past 60 years. Historically and in the present, all indications are that whenever States, however laudable and justified their objective, make selective use of the rules of international law based on subjective criteria of effectiveness and opportunity, they open the way to serious abuses which erode the foundations of the rule of law.**

59. **As shown above, laws and measures to combat terrorism or preserve security can have very serious repercussions on the respect for the integrity of detainees and their right to be tried by an independent and impartial court of law. Deviations from the rule of law can occur not only when a state of armed conflict or emergency has been declared, but also in other situations. This results in profound transformations of (i) basic criminal law, affecting the qualification of persons, offences and the scale of punishments; (ii) procedure, affecting the remedy of habeas corpus and guarantees of a fair trial, and (iii) standards of jurisdictional competence, with recourse to military tribunals or emergency courts, or even non-judicial proceedings.**

60. **The consequence is a weakening of the principle of legality that can lead to a real mutation of the rule of law since, as the work of the treaty bodies and several Commission special procedures shows, there is a knock-on effect on the enjoyment of other rights (such as freedom of opinion and expression, the right of assembly and association, the**

right to strike or the right to privacy) and broad categories of people (such as immigrants, refugees and asylum-seekers, and sometimes political opponents and minorities) are affected.

61. **It is indispensable, therefore, that the Commission reaffirm the principles that governs the protection of human rights in crisis situations and when terrorist violence affects civilian populations.**

62. **Authorising States to suspend certain rights is not the same as allowing arbitrary action. On the contrary, the rule of law provides for a legal institution – the state of emergency – which is governed by a series of international requirements and principles operating as safeguards and which enables States to face up to all types of emergency without derogating from their obligations and the rule of law. As discussed in paragraph 34, there is no de facto or legal excuse for denying anyone, whatever their particular characteristics, the application of the current rules of international law. Any other approach would amount to a repudiation of one of the most important advances in international law of the past 60 years.**

63. **As the international community has affirmed, there is no incompatibility between counter-terrorism or the preservation of national security and the application of the rules of international human rights law and international humanitarian law. On the contrary, the application of these rules, which are complementary, is the only possible way of standing up to terrorist threats and preserving security.**

64. **It is therefore imperative that the Commission closely monitor the question of the independence of judges and lawyers and reaffirm the right of all suspects– whatever the reason for their arrest, their citizenship or their place of detention – to the respect of their physical and moral integrity, to access to a defence lawyer of their choice and to a fair trial by an independent and impartial court of law. The Commission must demand that no suspect be kept in detention outside the protection of a judicial authority and, as regards the cases referred to in the June 2004 request of the special procedures, that the four Special Rapporteurs appointed be able to accomplish quickly and fully the mission entrusted to them.**

Complementary approach in United Nations work

65. **Some work is complementary. In particular, the Special Rapporteur would draw attention to the following:**

> **On the subject of terrorism, the inventory of the work of the human rights bodies and special procedures contained in the High Commissioner's study on the protection of human rights and fundamental freedoms while countering terrorism (A/59/428) and the report submitted by the independent expert Robert Goldman (E/CN.4/2005/103) under the mandate set out by the Commission in its resolution 2004/87. The Commission should envisage a special procedure for supervising the compatibility of ongoing or planned counter-terrorism or security measures with the current rules of international law;**

In view of the growing abusive recourse to military justice, the work in progress in the Sub-Commission to complete the development of principles governing the proper administration of military justice. This process should be concluded as a matter of urgency since, as requested by the Commission in its resolution 2004/32, it responds to the fundamental concept of "unity of justice" and hence aims to preserve the integrity of the judicial system;

In view of the types and conditions of detention referred to above, the considerations of the Working Group on Arbitrary Detention as expressed in its report E/CN.4/2005/6;

Concerning impunity, the recommendations made by the Independent Expert in study E/CN.4/2004/88, particularly the recommendations to update the draft principles submitted to the Commission in 1997 by Louis Joinet, to ensure that the documentary archives on human rights violations are safeguarded and to legislate on their declassification. The implementation of these recommendations would represent a major step forward in the fight against impunity;

Concerning victims, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights Law and [Serious] Violations of International Humanitarian Law (E/CN.4/2004/57, appendix I).

66. **The intention of the Human Rights Committee to revise its General Comment No 13 on article 14 of the International Covenant on Civil and Political Rights is very opportune. The Special Rapporteur is at the Committee's disposal and would encourage the Commission to examine the issues relating to (i) military justice (in the light of the principles being devised within the Sub-Commission) and (ii) the right to a fair trial for persons in extreme poverty, minorities, indigenous populations and particularly vulnerable groups such as disabled persons and inmates of psychiatric hospitals.**

Justice in post-conflict and transition periods

67. **The Commission should contribute actively to the work on transition justice, building on the experience acquired by States and the United Nations in recent decades to develop tools and references that will help States entering a transition period to respond to the challenges they face. The development of these instruments, taking account of the unique and complex nature of each national transition situation, is of great importance, and the Special Rapporteur will return to this issue. He will also return to the role of ICC which, as a judicial institution that complements, not excludes national courts, has the advantage of being able to undertake investigations and prosecute and try those chiefly responsible for war crimes, crimes against humanity and acts of genocide where the national authorities are incapable or unwilling to do so.**

Capital punishment

68. **The Special Rapporteur encourages all States to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the**

abolition of the death penalty. He welcomes the new provisions of the Turkish Criminal Code, which no longer includes the death penalty, and the encouraging steps taken with regard to that penalty in Kazakhstan and other States.

Training of judges and lawyers

69. **The content of this report shows how far proper administration of justice requires judges, lawyers and prosecutors having a solid legal training, including in-service training, that takes account of the most recent developments in law and national jurisprudence and covers inter alia (i) international human rights standards and principles, including those in preparation and those relating to justice, international humanitarian law and international law on refugees, (ii) international criminal law, and (ii) the principles of national and international professional ethics.**

70. **This training must include international jurisprudence covering the circumstances in which sex crimes, particularly rape, may be classed as international crimes and, in general, awareness-raising regarding gender issues so as, *inter alia*, to facilitate women's access to judicial functions on an equal footing with men. Such equality is far from the rule, and not only in countries where "crimes of honour" continue to be perpetrated.**

Mechanisms for cooperation with States

71. **Missions offer the opportunity for flexible and productive dialogue and can stimulate decisive progress. It would therefore be worth exploring the possibility of applying the current rules – which limit missions to two per year - with more flexibility.**

72. **Urgent appeals and the procedure for exchanges with States concerning allegations can also be tools for fruitful development, as shown by the President of the Italian Republic's response to the Special Rapporteur's appeal concerning that country's judicial reform project (see United Nations press release of 17 December 2004).**

73. **In the case of advisory and assistance services, it is time to engage in discussions with beneficiary States and associations of judges and lawyers to learn the lessons of decades of experience and devise strategies for the future.**

74. **Associations of judges and lawyers can play a role in ensuring the independence of the judiciary. That role should be encouraged at all times. In transition periods, these associations can be very productive forums for discussion and consultation, including for the United Nations and other international players.**
