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A few Comments on a Comment: The UN Human Rights Committee's General Comment No. 32 on Article 14 of the ICCPR and the Question of Civilians Tried by Military Courts

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In its recent General Comment No. 32, the UN Human Rights Committee ('the Committee') has addressed the question when civilians may be tried by military tribunals. This article analyses the Committee's statements on this contentious issue and traces the negotiation history of the relevant paragraph in General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights. The Committee insisted that whenever a State tries a civilian before a military or another special tribunal, the State party not only needs to offer the due process standards contained in Article 14 of the Covenant, but that States are moreover required to provide objective reasons to try a civilian in a military court. The second condition was one of the most controversial issues during the drafting of the General Comment. This article concludes that claims of a novel and unjustified departure from previous jurisprudence are exaggerated. While the Committee's statements on the use of military tribunals to try civilians are legally well-founded, the article recommends how the Committee could explain and defend its stance in a more robust way if faced with subsequent individual communications.

Keywords: equality before courts and tribunals; fair trial; International Covenant on Civil and Political Rights; United Nations Human Rights Committee; military tribunals

Introduction

This article analyzes the second most recent General Comment (GC) adopted by the Human Rights Committee (HRC or 'the Committee'). The long comment deals with the right to equality before courts and tribunals and to a fair trial under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[1] It replaces the Committee's earlier GC 13 of 1984.[2] The article analyses how the HRC has addressed the question of the trial of civilians in military tribunals; one of the most contentious issues confronted in the negotiation of the GC.

GC 32 is an important document, especially since the Committee's jurisprudence on Article 14 of the Covenant is particularly developed and expansive.

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The negotiation of the GC started at the Committee's 88th session in 2006 in Geneva and was finalized at the 90th session in July 2007. The drafting process was chaired by Committee member Posada (Colombia). Kälin (Switzerland) was the Special Rapporteur of the Comment. The fact that numerous governments and organizations commented on the drafts confirms the interest in the issues dealt with by the GC.[3]

While the main part of this article is dedicated to the question of the trial of civilians in military tribunals, other aspects of the rich content of the GC however merit to be mentioned in section II. After briefly discussing the *raison d'être* of the new GC and situating it in its contemporary context, section II outlines the structure of the Comment and mentions some of its most notable aspects. Since one of the most controversial paragraphs of the GC is paragraph 22 relating to trials of civilians in military and special tribunals, the entirety of section III analyzes this paragraph. The article concludes that claims of a novel and unjustified departure from previous jurisprudence are exaggerated. While the Committee's statements on this controversial issue are legally well-founded, the article recommends how the HRC could explain and defend its stance in a more robust way in subsequent cases.

Why a new General Comment on Article 14?

Article 14 of the Covenant is not only one of the longest provisions of the ICCPR, but has also been at the heart of many individual communications submitted to the HRC. The fair trial provision is an undisputable classic of civil and political rights. It is also a central provision for the safeguard of other rights, including many of the explicitly non-derogable provisions of the ICCPR.[4] General Comments are adopted by the HRC to provide guidance to member States for submitting their periodic reports, to restate or clarify issues from previous Concluding Observations or from individual communications. The need for a new GC on the main fair trial provision of the Covenant[5] is clearly related to recent developments in the international legal sphere. Increasingly, debates on fair trial take place outside the traditional realm of formal, ordinary domestic courts as we traditionally understand them. First, numerous measures taken by States in the context of countering 'terrorism' are related to attempts to establish bodies such as the US military commissions. Not only are there doubts whether they fall under the notion of 'tribunal' as envisioned by Article 14,[6] but they in any event raise concerns about their consistency with Article 14 of the Covenant and their use in relation to non-derogable rights such as the prohibition of torture and ill-treatment. It should be stated upfront that this is not an essay on the American military commissions to try individuals detained in Guantánamo Bay. But it is clear that the need to update the previous GC on Article 14 has become urgent against the background of the United States – one of the most influential driving forces in the negotiation of the Covenant –challenging not only the specific guarantees of Article 14, but the applicability of the Covenant itself.[7] At the same time, and not only since the terrorist attacks of September 11, other States have extended their use of military or special tribunals to try individuals suspected of (often broadly defined) offences against the security of the State.

A second reason for updating GC 13 was that key terms on the scope of the Article have not been clarified in the previous comment. Some of the difficulties with Article 14 are related to the definition of a 'criminal charge' or 'a suit in law' as the conditions which trigger the application of most parts of Article 14. The new General

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Comment offers some useful explanations on these terms. Importantly, the HRC has considered under what circumstances customary tribunals and other judicial bodies entrusted by the State fall under the regime of Article 14.[8]

A third factor advocating for an update of GC 13 may be related to issues encountered in international tribunals. Even if the ICCPR is clearly directed at States parties, Article 14 had been pleaded before international tribunals.[9] It is obviously not stated that the Committee had such situations in mind and the issues are important in any tribunal, but observers of the proceedings before international tribunals will share the suspicion that the Committee included the clarifications on the issue of self-representation or on the confidentiality of evidence in light of recent developments in international tribunals.

The structure of General Comment 32 and some of its notable aspects

The structure of the GC follows the architecture of Article 14. Before the HRC elaborates on the details of the Article, a few general remarks are made. The Committee stresses the importance of the fair trial provision and explains the difference between the first sentence of paragraph 1 and its second sentence.[10] This distinction is crucial, since the first sentence of paragraph 1 'sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies',[11] while the second sentence of the same paragraph is only available if the individual faces a criminal charge or if his or her rights and obligations are determined in a suit of law.[12] The procedural guarantees contained in paragraphs 2-5 of the article only apply to persons charged with a criminal offence. Paragraph 6 entitles individuals to a right to compensation in cases of miscarriage of justice in criminal cases and paragraph 7 prohibits that a person is tried or punished twice for the same offence. The general remarks of GC 32 also contain a restriction of reservations,[13] and a confirmation of the Committee's earlier considerations that some fundamental aspects of fair trial are effectively non-derogable.[14]

Part II of the GC elaborates on the first sentence of article 14(1), which applies to all judicial bodies with any judicial tasks and which guarantees the right to equality before courts and tribunals.[15] The most interesting aspect in this regard is the Committee's insistence on the positive obligation to ensure access to justice without distinction.[16] In light of the discussion of the trial of civilians in military courts, it is important to note that paragraph 14 of the GC specifically mentions that 'equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings'.[17]

Part III of the GC deals with the second sentence of the Article, which provides for a fair and public hearing by a competent, independent and impartial tribunal established by law. The Committee offers some useful clarifications of the key terms of 'criminal charge' and 'suit at law'.[18] The GC also insists on the absolute requirements of competence, independence and impartiality of tribunals.[19]

The paragraph dealing with the presumption of innocence (Section IV) contains a number of important elements. Suffice it to say that the paragraph directly addresses the media by stating that '[t]he media should avoid news coverage undermining the presumption of innocence'[20]. The Committee does however not specify the consequences of a failure of the media to follow this call and the respective role of States with regard to news coverage by private media.[21] Section V.

of GC 32 is the longest section of the Comment and deals with the procedural safeguards of persons charged with a criminal offence. Many paragraphs would merit detailed analysis. For instance, the HRC has made a very important confirmation that the term 'adequate facilities for the preparation of his or her defence' in Article 14(3)b must include access to documents and evidence that the prosecution plans to offer in court against the accused or all exculpatory evidence.[22] This is not only highly relevant in trials related to national security, but has also become a difficult issue in the International Criminal Court.[23] Other very notable aspects of the fifth part of the GC include the statement that the right to self-representation is not absolute, but may be restricted in the interests of justice[24] or that the burden is on the State to prove that statements made by the accused have been given of their own free will.[25] At the same time, it would be presumptuous to expect that one Comment could resolve all uncertainties with regard to the complex fair trial provision; in particular with regard to issues around which there is no consensus. Therefore, some questions remain unresolved. One of these issues is the question of whether or under what circumstances the anonymity of witnesses may be compatible with Article 14(3)e and how the vulnerability of those who testify might be taken into account. The paragraph of the GC dealing with witnesses is silent on the issue of anonymity, but emphasizes that the defence must 'be given a proper opportunity to question and challenge witnesses against them'.[26] Juvenile persons and the 'desirability of promoting their rehabilitation' are dealt with in the sixth section of the GC.[27] Section VII clarifies that the review by a higher tribunal should be interpreted to mean that if domestic law provides for further instances of appeal, the convicted individual must have effective access to them.[28] Section VIII insists on the substantive right to compensation in cases of miscarriage of justice,[29] and section IX confirms international jurisprudence that the provision of *ne bis in idem* does not prohibit retrial in the jurisdiction of another State or by an international tribunal.[30] In this regard, a new element deserving appraisal is the inclusion of a paragraph stating that the repeated punishment of conscientious objectors may amount to punishment for the same crime.[31] The last section of the GC may be the most disappointing one from the view of providing guidance and clarification. Section X addresses the relationship of Article 14 with other provisions of the Covenant. The HRC emphasizes the relationship with the right to an effective remedy, the right to life and the prohibition of torture and ill-treatment, detention and expulsions of deportations. While this is clearly not an exhaustive list of provisions related to Article 14, one could have hoped for the inclusion of the derogation clause in the analysis of the other provisions related to Article 14.

The remainder of this paper is exclusively dedicated to the paragraph of the GC dealing with the use of military tribunals to try civilians, an important aspect of the GC. As noted by Kälin during the drafting process, the issue under consideration by paragraph 22 in the third section of the GC is not military courts *per se*, but the trial of civilians in such courts.[32] While it was the military justice systems in the Latin American dictatorships which have triggered the discussion on military tribunals and the administration of justice, the discussion is relevant for all regions of the world[33] and concerns about the issue have reawakened in the context of the 'war on terror'.

Military Tribunals to Try Civilians: Paragraph 22 of GC 32

The HRC has faced a formidable task in drafting paragraph 22 of the GC. It has made a justified statement on the very controversial topic of trying civilians in military tribunals.

Paragraph 22 reads:

> The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials. (..).[34]

This section explains that the paragraph in the GC is consistent with the Committee's previous jurisprudence as well as the wording, object and purpose of Article 14. The difficulties in the negotiation process of paragraph 22 were essentially linked to the following two connected questions: First, whether the HRC should limit itself to the question if a specific tribunal afforded all judicial safeguards – the standards test – or whether the Committee should also ask a State to provide objective reasons to try a civilian in a military court – the justification test. Once the first question was answered in favour of including the justification test, the second controversy was whether it was incumbent upon the State to justify the resort to military or special courts or whether the GC should simply refer to the exceptionality of military tribunals, without stating who bears the burden of justification.

In a recent case in 2007, the HRC was of the view that if a State tries a civilian in a military court, it must provide justification.[35] Since the government failed to submit such justification, the HRC did not enter the debate on whether the specific nature of the military tribunal complied with the guarantees of Article 14. In other words, it treated the justification test as an independent requirement of Article 14(1). This approach is, with some ambiguities, retained in GC 32. According to paragraph 22 of the GC, the relevant tests of when it is acceptable under the ICCPR to try civilians in military or other special courts are two-fold: First, the military tribunal (or any other tribunal) must comply with the standards set out in Article 14. Second, it is incumbent upon the State to demonstrate why a civilian court is unsuitable to try the civilian. A brief outline of the Committee's earlier views on civilians before military courts may explain the perception that the justification test was a new criterion introduced by the HRC. A closer look however reveals that this claim has to be qualified in important regards.

The Committee's Jurisprudence on Civilians before Military Tribunals

The Committee was faced with the question of civilians tried in military courts with the notorious series of cases brought to its attention during the military dictatorships in Latin America. In 1982, the HRC did not find a violation of Article 14 when a Colombian civilian was subject to military penal procedures. While the HRC found violations of Article 9 of the Covenant, it did not find that Article 14 was violated since the author did 'not cite any specific incidents or facts in support of his allegations of disregard for the judicial guarantees provided for by article 14.'[36] This approach suggests that the Committee resolved the question by looking at the judicial

standards only. The HRC made no mention that the Colombian government also had to justify why a military tribunal was necessary. One may only speculate if the Committee would have come to the same conclusion if it had not already found a violation of another provision of the Covenant.[37]

In any event, more than two decades later, the case of Mr. Madani was brought to the Committee's attention. Mr. Madani was the leader of the *Front Islamiqe du Salut* (FIS) in Algeria. He was arrested in 1991 and accused of 'jeopardizing State security and the smooth operation of the national economy'.[38] He was sentenced *in absentia* to twelve years of 'rigorous imprisonment' by a military court established after the president of Algeria declared a state of emergency following the turbulent elections in 1991.[39] After seven years, Mr. Madani was released but put under house arrest forty-five days later. The UN Working-Group on Arbitrary Detention dealt with his and the Vice-President of the FIS's cases in 2003 and found that both the imprisonment and the house arrest were arbitrary deprivations of liberty.[40] While the government of Algeria submitted that the trial of civilians in military courts was in conformity with the possibility of derogation under Article 4 of the Covenant, the HRC observed that Algeria failed to notify any derogation.[41] The majority of the Committee held that the trial of *Madani* by a military court was a violation of Article 14 since the government did not offer any reasons for resorting to a military trial. The Committee found it unnecessary to examine the specific nature of the military tribunal.[42] GC 32 had not yet been adopted and the Committee based its reasoning on the earlier comment. GC 13 explained that special courts are not *per se* prohibited, but must be very exceptional.[43] The Committee extrapolated from this account that civilians are not to be tried in military courts unless the State can convincingly show that exceptional circumstances so dictate.

The views of the Committee were criticized by two of its members who felt that the justification requirement was a new addition since it had not been raised before.[44] Mr. Amor (Tunesia) dissented and Mr. Khalil (Egypt) wrote an individual opinion. Both were of the view that Article 14 was only concerned with the guarantees of a fair trial, and not the nature of the tribunal. Indeed, it was stressed in the drafting history of the paragraph of the GC that it is not the role of the Committee to determine which courts should be used, but rather to assess the extent to which a particular tribunal would give a fair and impartial hearing. Sir Rodley (UK) rightly pointed out that the concerns of the Committee are valid for all courts and that too often, the civilian court system was also not in good shape.[45] When Mr. Kälin suggested modifying the language during the second reading of the draft, there was an agreement to add that trials by military or special courts must be exceptional and conform to all guarantees. The final difficulty of the Committee concerned the question whether it was incumbent upon the State to demonstrate that regular civilian courts would be unable to do the job.[46] The final version explicitly states that the burden of justification is incumbent upon the State party. The divergent views of Mr. Amor and Mr. Khalil are contained in the summary records.[47]

The subsequent paragraphs explain why it appears that the HRC was right to insist on the burden for the State to provide justification for removing jurisdiction from the ordinary courts. Since GC 13 already emphasized the exceptionality of trying civilians in military courts, it should come as no real surprise that it is the State who bears the burden of justification if the term of exceptionality should be given any practical meaning. In a way, already GC 13 contained a rebuttable presumption that

military trials of civilians may violate the ICCPR. The only addition in GC 32 is the explicit statement that the burden was upon the Sate Party to justify why the trial of the civilian by a military court was unavoidable. Moreover, in earlier cases preceding the *Madani* case and GC 32, the Committee had already insisted on the need that States have objective reasons to employ military tribunals to try civilians. In 2002, the imposition of the death penalty on a civilian by a military court and the failure of the government to reply were held to be sufficient to find a violation of Article 14.[48] As Stavros has pointed out already in 1992, during the examination of States parties' periodic reports and in Concluding Observations, Committee members often enquire into the reasons for resorting to military or special courts.[49] Other developments at the level of the UN General Assembly also express the undesirability of trying civilians in military courts, even though this has not entered into hard law.[50] In 2007, the *Madani* test was applied in another case against Algeria. This time, the author was the vice-president of the FIS. The Committee again used the justification test as independent from the standards test and found a violation of Article 14 in the absence of justification from the government.[51]

Paragraph 22 suggests that the two tests – justification and standards – are to be considered as separate, cumulative requirements. At the same time, it is true that the undesirability of military courts is largely based on the concern of the lack of impartiality and independence in trying civilians. Some therefore argue that what counts is the analysis of the safeguards to guarantee impartiality and independence.[52] Rowe has asked why independence and impartiality would alter depending upon whether the accused is a soldier or a civilian.[53] However, these accounts omit one other central element of Article 14(1): the principle of equality. The next sub-section thus explains why the justification requirement is appropriate as a separate, independent test. It argues that the principle of equality is the real rationale for the justification requirement. Unfortunately, this rationale has maybe been insufficiently explained by the HRC, both in the two Algerian cases and in the drafting of GC 32.

The Rationale for the Justification Requirement: Giving Equality Real Meaning

The most important factor why the justification requirement should indeed be treated as an independent test is the following: Trying a civilian before a special court or military tribunal constitutes differential treatment as compared to individuals charged with similar offences. The first sentence of Article 14(1) precisely demands that all persons shall be equal before the courts and tribunals.[54] In other words, all those accused of a crime must be afforded the same treatment by the criminal justice system. As common to all human rights law, any deviation is only justified if the state demonstrates the existence of reasonable and objective grounds for discriminating, i.e. for trying particular categories of persons before extraordinary tribunals.[55] After all, the equality principle is at the core of Article 14(1). Committee Member Mr. Lallah (Mauritius) rightly pointed out that Article 14 dealt not only with the guarantees that should be provided but also with the notion of equality before courts.[56] The claim that the Committee invented a new criterion when it drafted GC 32 or when it considered the two Algerian cases thus has to be qualified. While the Committee has not explained this rationale in *Madani v. Algeria*, it considered that trial by a special court was incompatible with the equality principle in a case in 2002 since the author of the communication was disadvantaged compared to other persons accused of similar or equal offenses.[57]

In the same vein, the concern of equality and the resulting requirement for justification is also part of the jurisprudence of the European Court of Human Rights (ECtHR). In *Martin v. UK*, a civilian teenage son of a British serviceman was guilty in 1998 of the murder of a German civilian woman by a British court martial sitting in Germany. The ECtHR's main conclusion is based on the reasoning that the court martial violated the right to trial by an independent and impartial tribunal mainly because there were deficiencies in the British court martial system.[58] However, the court also said in a *dictum* that '[t]he power of military criminal justice should not extend to civilians unless there are compelling reason justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case'.[59] The insistence on legal certainty and 'foreseeable grounds' in the decision of the ECtHR also finds reflection in Principle 1 of the Decaux' Draft Principles Governing the Administration of Justice through Military Tribunals, updated in 2006.[60] Since Article 14(1) is *inter alia* concerned with the separation of powers to assert the independence and impartiality of a tribunal, military tribunals should be established only by the constitution or the law as 'an integral part of the general judicial system'. This is to avoid separate bodies created by the executive on an *ad hoc* basis. As McGoldrick points out, the idea of the integrity of the justice system is quite old and goes back to when the Committee examined the situation in Suriname in the early 1980s after the government established special courts to try members of the previous administration.[61] Prof. Lillich noted that in Article 14(1) the term competent 'was tended to ensure that all persons should be tried in courts whose jurisdiction had been previously established by law, and arbitrary action so avoided'.[62] The requirement that a State has to justify the use of a military tribunal to try a civilian thus merely relates to the effective guarantee of equality and the avoidance of arbitrariness. The justification requirement used by the HRC in GC 32 is therefore well-founded and not a new invention. Even if the HRC does not explicitly mention the underlying rationale for the justification requirement applied in the *Madani* communication or in paragraph 22 of the Comment, it is not a departure from previous jurisprudence.

Conclusion and Recommendations

In light of the above, it appears that the two tests of standards and justification should indeed be considered as separate and cumulative criteria to assess compliance with Article 14. Considering the importance of the equality principle enshrined in Article 14(1), the author of this article respectfully disagrees with Committee Members Amor and Khalil who stated that the justification requirement was an unjustified departure from the earlier jurisprudence. Even if no category of tribunal is inherently ruled out by the Covenant, there are, in my view, sound legal reasons contained in the article itself to insist that that the two tests are cumulative and that it suffices if the State does not advance any objective reasons to resort to a military trial to find a violation. The Committee's approach to the trial of civilians in military courts in the Algerian cases and in the GC is entirely justifiable from a legal point of view. At the same time, it may not have been very fortunate that the Committee only mentions equality in an earlier paragraph of the GC but does not include it in paragraph 22 as the underlying rationale for demanding justification from the State party.[63] In addition, from the point of view of forging legitimacy and consensus around the issue at hand, it may have been useful if the Committee in the Algerian cases had also substantiated the test concerning the specific safeguards that the tribunal failed to afford. Interestingly,

paragraph 22 of the GC mentions the standard test first and second, the justification requirement. Therefore, if the Committee decides to start with the justification requirement, a 'belts and suspenders' approach may have been more legitimate and the Committee could quite easily have backed up its views in the two Algerian cases if it had discussed the judicial guarantees in addition to the failure of justification. It is unlikely, although not to rule out entirely, that a case would fail one test but pass the other. In other words, even if the HRC has already found a violation of the justification requirement, it could still have substantiated its concerns with regard to the judicial standards afforded by the military tribunal. From the point of view of pure logic, this suggestion is of course slightly inconsistent. After all, saying that the two conditions are cumulative means that the Committee is done if it finds that one of the two requirements is not fulfilled. At the same time, it is true that the Committee in an early case only looked at the standards and has not asked for justification. At the very least, it may be recommendable if the Committee in future cases more clearly grounds its demand for justification in the principle of equality and clearly explains its rationale.

A further concluding remark is the observation that the HRC's statement in para. 22 differs from the Principles Governing the Administration of Justice through Military Tribunals drafted by Emmanuel Decaux. It is true that the approach chosen by the HRC in its GC goes less far than some proposals contained in the Decaux principles,[64] around which so far no consensus has been reached. One may hope that paragraph 22 of the GC will be useful to advance the efforts to codify the use of military tribunals for civilians in more details. One of the advantages of para. 22 of the GC is that its content seems well-suited for all legal traditions. Gibson, a common lawyer, is right to point out that the Decaux principles were predominantly written by scholars schooled in civil law traditions. Unfortunately however, some of his suggestions also seem to suffer from a lack of comparative appraisal and are equally unconceivable for representatives of the other main legal tradition.[65] Paragraph 22 of GC 32 may offer a reasonable starting point for the future discussions on Decaux' draft principles and it may be useful in this respect if such future efforts could involve scholars trained in comparative legal studies to avoid further misunderstandings.

In short, GC 32 is a welcome and timely document. The Committee has clarified and re-confirmed a number of important elements of Article 14. Hopefully, the GC contributes to a reaffirmation of the centrality of this provision and to increased awareness about its importance for the safeguard of the most fundamental norms contained in the ICCPR. The statements made by the Committee on the issue of civilians before military or special tribunals are legally sound. However, it is somewhat regrettable that the Committee has not effectively affirmed the rationale for the requirement that a State party must provide objective reasons why the ordinary courts are unsuitable and why the resort to military jurisdiction is unavoidable. The right to equality before the law as contained in the first sentence of Article 14(1) remains a principle central to the very philosophy of human rights and it deserves due attention, not only in respect to the panoply of measures taken in the name of counter-terrorism.

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Notes

[1] 'International Covenant on Civil and Political Rights, G.A. Res. 2200a (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171'.

[2] Human Rights Committee, 'General Comment 13, Article 14 (Twenty-First Session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. Hri/Gen/1/Rev.1 at 14 (1994)', (1984).

[3] International Service for Human Rights, 'Human Rights Committee 90th Session: Revised General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights', Human Rights Monitor Series, http://www.ishr.ch/hrm/tmb/treaty/hrc/reports/hrc_90/hrc_90_gc_32.pdf.

[4] The idea that Article 14 is crucial for the effective safeguard of explicitly non-derogable rights is contained in: Human Rights Committee, 'General Comment 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), Reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. Hri/Gen/1/Rev.6 at 186 (2003)'. (Stating that "it is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.")

[5] It should be noted that Article 14 is not the only provision relating to the right to a fair trial. See also Article 9 relating to the judicial review of detention, Article 13 relating to expulsion cases and Article 15 prohibiting retroactive criminal laws.

[6] It should be noted that the question on the defining criteria of military tribunals has to be further explored since it is not entirely clear whether the definition of a military tribunal depends on whether military representatives sit on it, according to its jurisdiction, or whether at all a body is a tribunal in the sense of Article 14 if it has a certain degree of independence. An international expert seminar organized by the International Commission of Jurists has concluded in 2004 that the US military commissions could not be considered "tribunals" within the meaning of Article 14 because they were entirely incorporated in the framework of the executive branch. International Commission of Jurists and Cordula Droege, 'Conclusions ICJ Report' (paper presented at Human Rights and the Administration of Justice Through Military Tribunals, 26-28 January, 2004). For the same view, see also: Michael R. Gibson, 'International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility While Precluding Impunity', Journal of International Law & International Relations 4, no. 1 (2008): 1-50.

[7] The US advanced various arguments why the ICCPR would not apply and therefore, article 14 was irrelevant. The arguments were/are mainly based on the reasoning that an armed conflict precluded its applicability and/or because the detainees in Guantánamo and elsewhere were held outside the United State's territory and jurisdiction. Leila Zerrougui et al., 'Situation of Detainees at Guantánamo Bay E/CN.4/2006/120', (Economic and Social Council, 2006).

[8] Human Rights Committee, 'General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32', (2007).

[9] 'Prosecutor V. Landžo, Delić, Delalić and Mucić, Decision on Delalić's Motion for Provisional Release, Case No. It-96-21', (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, 1996), 10. 'Prosecutor V. Tadić, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, Case No. It-94-1-T', (International Criminal Tribunal for the Former Yugoslavia, 1995). During the drafting of the General Comment, Mr. Posada said that the ICCPR was for State parties only, and therefore anything referring to tribunals at international level eclipsed the mandate of the HRC.

[10] Human Rights Committee, 'General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32', (2007)..

[11] Ibid.

[12] Ibid.. Para. 17 explains that the requirement does not apply in expulsion cases since domestic law does not grants an entitlement to residency.

[13] Ibid.

[14] Ibid. The wordings is taken from GC 29: Human Rights Committee, 'General Comment 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), Reprinted in

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. Hri/Gen/1/Rev.6 at 186 (2003)'.

[15] Human Rights Committee, 'General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32', (2007).

[16] Ibid. This paragraph also insists that the right to access to justice is obviously not limited to national citizens. The following paragraph (para. 10) emphasizes the need to ensure "meaningful" participation in proceedings and the provision of legal aid. Paragraph 13 uses the term of assuring "equality of arms", a concept elaborated in the jurisprudence of the ECtHR.

[17] Ibid.

[18] The Committee suggests that whenever domestic law grants an entitlement, the right to access a tribunal as provided for by the second sentence of Article 14(1) should be applicable. It is important to note that even if the second sentence of Article 14(1) is inapplicable to extradition, expulsion or deportation cases, other procedural guarantees may still apply. See Ibid.

[19] Ibid.

[20] Ibid. Paragraph 25 mentions that "[a] hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects." Human Rights Committee, 'General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32', (2007). (footnote omitted). While the Committee's statement in para. 30 is directly addressed at the media, paragraph 25 seems to make clear that the relevant question is whether the court *tolerates* such hostile attitude.

[21] For the relevant paragraphs in the summary record, see 'Summary Record (Partial) of the 2475th Meeting, Held at the Palais Wilson, Geneva, on Tuesday, 24 July 2007, Human Rights Committee, 90th Session, CCPR/C/SR.2475'.

[22] Human Rights Committee, 'General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32', (2007). The issue of evidence raised substantive concerns and was subject to detailed discussion, see 12. 'Summary Record of the 2463rd Meeting, Held at the Palais Wilson, Geneva, on Monday, 16 July 2007: Human Rights Committee, 90th Session, CCPR/C/SR.2463', (2007). and 'Summary Record (Partial) of the 2475th Meeting, Held at the Palais Wilson, Geneva, on Tuesday, 24 July 2007, Human Rights Committee, 90th Session, CCPR/C/SR.2475'.

[23] See: 'Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(E) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, Icc-01/04-01-06/1401', (International Criminal Court,2008). On 13 June 2008, Trial Chamber of the ICC imposed a stay on the proceedings of the case because the Prosecutor was unable to disclose a large number of documents containing potentially exculpatory information and information relevant to the preparation of the defence. The documents were mainly from United Nations sources that refused to consent to their disclosure to the defence and, in most instances, to the Trial Chamber. The Trial Chamber I decided to lift the stay on proceedings on 18 November, 2008 and the trial began on 26 January 2009. The Chamber ruled that the reasons that led to the stay on proceedings on 13 June 2008 have "fallen away": The decision is not yet available. For the press release, see: 'The Prosecutor V. Thomas Lubanga Dyilo ICC-CPI-20081118-Pr372_Eng (Press Release)', (International Criminal Court, 2008). Even if the stay on proceedings is lifted in that case, the issue of confidentiality may come up again.

[24] Human Rights Committee, 'General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32', (2007).. The right to self-representation can be limited "particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused".

[25] Ibid. This idea of a rebuttable presumption is part of the Committee's jurisprudence and of the case-law of regional courts. See for instance: 'Nallaratnam Singarasa V. Sri Lanka, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001', (Human Rights Committee,2004). and 'Velásquez Rodriguez', vol. Ser. C, No. 4, (Inter-American Court of Human Rights,1988). (Where the Court asked the Honduran government to sustain the burden to rebut the presumption of its responsibility for the forced disappearances of the individual.)

[26] Human Rights Committee, 'General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32', (2007).

[27] Ibid. Juveniles are not defined in terms of age and there was resistance during the drafting process to incorporate language from the Convention on the Rights of the Child. See: International Service for Human Rights, 'Human Rights Committee 90th Session: Revised General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights', Human Rights Monitor Series, http://www.ishr.ch/hrm/tmb/treaty/hrc/reports/hrc_90/hrc_90_gc_32.pdf.

[28] Human Rights Committee, 'General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32', (2007).

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] 'Summary Record (Partial) of the 2475th Meeting, Held at the Palais Wilson, Geneva, on Tuesday, 24 July 2007, Human Rights Committee, 90th Session, CCPR/C/SR.2475'.

[33] Jeanine Bucherer, *Die Vereinbarkeit Von Militärgerichten Mit Dem Recht Auf Ein Faires Verfahren Gemäss Art. 6 Abs. 1 EMRK, Art. 8 Abs. Amrk Und Art. 14 Abs. 1 Des UN-Paktes Über Bürgerliche Und Politische Rechte,* vol. 180, *Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht*, (Berlin: Springer, 2005).

[34] Human Rights Committee, 'General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32', (2007).

[35] 'Abbassi Madani V. Algeria, CCPR/C/89/1172/2003', *28 March 2007*, (2007).

[36] 'Orlanda Fals Borda Et Al. V. Colombia, Communication No. 46/1979, U.N. Doc. CCPR/C/OP/1', chap. 139, (1985).

[37] It is often the practice of the Committee not to push the analysis of other provisions in cases in which it has already found a violation of the Covenant.

[38] 'Abbassi Madani V. Algeria, CCPR/C/89/1172/2003', *28 March 2007*, (2007).

[39] Ibid.para. 2.3.

[40] 'Abassi Madani and Ali Benhadj V. Algeria, U.N. Doc. E/CN.4/2003/8/Add.1 at 32', (UN Working Group on Arbitrary Detention,2001).

[41] The way the HRC dealt with the state of emergency in Algeria is less than clear. In para. 3.4, the Committee observes the absence of a notification of a derogation. Therefore, it seems as if the Committee applied the Covenant to the full extent, interpreting the failure to comply with the notification requirement in Article 4(3) as an absence of derogation. However, the Committee then still looks at the Act proclaimed by the Algerian government and considered by Algeria as a derogation from the ICCPR. In any event, the Committee did not have to decide the Act's conformity with the emergency regime of the Covenant since the HRC observed that even if it would accept the Act as a *de facto* derogation under Article 4, the Act was not correctly applied in the case of Mr. Madani. Mr. Amor criticized in his dissent that the "the Committee arrogate[d] to itself the role of adjudicating on the exceptional nature of circumstances or determining whether or not there is a public emergency." In his view, the state of emergency may have been a sufficient justification for the use of a military tribunal. 'Summary Record (Partial) of the 2475th Meeting, Held at the Palais Wilson, Geneva, on Tuesday, 24 July 2007, Human Rights Committee, 90th Session, CCPR/C/SR.2475'.

[42] 'Abbassi Madani V. Algeria, CCPR/C/89/1172/2003', *28 March 2007*, (2007).

[43] Human Rights Committee, 'General Comment 13, Article 14 (Twenty-First Session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. Hri/Gen/1/Rev.1 at 14 (1994)', (1984).

[44] 'Abbassi Madani V. Algeria, CCPR/C/89/1172/2003', *28 March 2007*, (2007).

[45] 'Summary Record (Partial) of the 2475th Meeting, Held at the Palais Wilson, Geneva, on Tuesday, 24 July 2007, Human Rights Committee, 90th Session, CCPR/C/SR.2475'.

[46] Ibid.10-11.

[47] This raised the issue whether Mr. Amor could add an individual or dissenting opinion to the GC to explain his divergent view. It has not been a practice for GCs or for general reports of the HRC. The fact that paragraph 22 of GC 32 for the first time raised the issue of individual opinions to a General Comment is proof of the controversy of the subject at hand. Mr Amor essentially applied something like a *Lotus* principle to his reasoning for including a dissenting opinion. In his view, since nothing in the rules of procedure explicitly prohibited the attachment of dissenting opinions to a GC, the Committee had decided in favour of an implicit

prohibition, which in his view, amounted to a deprivation of his right to express and publicize his views freely. Ibid.p. 10-11.

[48] 'Mr. Abduali Ismatovich Kurbanov V. Tajikistan, Communication No. 1096/2002, U.N. Doc. CCPR/C/79/D/1096/2002', (2003).

[49] Stephanos Stavros, 'The Right to a Fair Trial in Emergency Situations', The International and Comparative Law Quarterly 41, no. 2 (1992): 343-65. Stavros mentions the reports of Venezuela A/36/40, Jordan A/37/40, Morocco A/37/40 and Zaire A/42/40. He adds that when the Committee discussed the situation in Chile there seemed to exist a consensus among Committee members against the use of military courts for civilians in Chile (A/34/40, A/39/40 and A/40/40). More recent concluding observations include: 'Concluding Observations of the Human Rights Committee: Lebanon, 01/04/97. CCPR/C/79/Add.78', (1997). and 'Concluding Observations of the Human Rights Committee: Slovakia. 22/08/2003, CCPR/CO/78/SVK', (2003).. These reports are discussed in Sangeeta Shah, 'The Human Rights Committee and Military Trials of Civilians: Madani V Algeria', Human Rights Law Review 8, no. 1 (2008), http://hrlr.oxfordjournals.org (accessed January 1). The Committee recommended that Slovakia aments the criminal code to prohibit trial of civilians by military tribunals in any circumstances.

[50] Leandro Despouy, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, a/61/384', (2006).. (Noting that the UN Assembly has criticized the trial of civilians by military tribunals in the context of Chile and with regard to the DRC.)

[51] 'Mr. Abdelhamid Benhadj V. Algeria, Communication No. 1173/2003, CCPR/C/90/D/1173/2003', (2007). *(*"In the present case the State party has not shown why recourse to a military court was required. (...) The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. The Committee concludes that the trial and sentence of Mr. Benhadj by a military court discloses a violation of article 14 of the Covenant.")

[52] Shah mentions that the real rationale for not subjecting civilians to military trials is (only) the concern of their independence and impartiality. According to her, the impartiality test is affected, but not conclusively altered, if a civilian has to appear before a court of members of the armed forces. In her view, if a civilian is tried in a military tribunal, this adds weight to the assessment of the independence and impartiality of the security court, but is not yet a decisive factor. See: Sangeeta Shah, 'The Human Rights Committee and Military Trials of Civilians: Madani V Algeria', Human Rights Law Review 8, no. 1 (2008), http://hrlr.oxfordjournals.org (accessed January 1 2009).

[53] Peter J. Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge; New York: Cambridge University Press, 2006).

[54] For the discrimination aspect, the work of reference is: Daniel Moeckli, *Human Rights and Non-Discrimination in the 'War on Terror'*, *Oxford Monographs in International Law*, (Oxford; New York: Oxford University Press, 2008).

[55] The right to equality before courts in the first sentence of Article 14(1) is a specific manifestation of the general right to equality of Article 26 (Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (Kehl [Germany]; Arlington, Va., U.S.A.: N.P. Engel, 1993).) It is therefore logic and legitimate to apply the logic used to deal with Article 26 cases when interpreting the right to equality before courts and tribunals.

[56] 'Summary Record (Partial) of the 2475th Meeting, Held at the Palais Wilson, Geneva, on Tuesday, 24 July 2007, Human Rights Committee, 90th Session, CCPR/C/SR.2475'.

[57] 'Mr. Joseph Kavanagh V. Ireland, Communication No. 819/1998, U.N. Doc. CCPR/C/71/D/819/1998', (2001).

[58] 'Martin v. United Kingdom, Application Number 40426/98', (ECHR, 2006). Similarly, in an earlier case: 33. 'Findlay V. The United Kingdom 110/1995/616/706', vol. Reports 1997-I, (European Court of Human Rights, 1997). In another case, the safeguards were sufficient: 34.
'Cooper V. United Kingdom, Application Number 48843/99', vol. Reports of Judgments and Decisions 2003-XII, (European Court of Human Rights (Grand Chamber), 2003).

[59] 'Martin V. United Kingdom, Application Number 40426/98', (ECHR,2006).

[60] Emmanuel Decaux, *Issue of the Administration of Justice through Military Tribunals: Report of the U. N. Special Rapporteur on the Issue of the Administration of Justice through Military Tribunals, E/CN.4/2006/58 at 4* (Geneva: UN, 2005).

[61] Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, *Oxford Monographs in International Law*, (Oxford; New York: Clarendon ; Oxford University Press, 1991).

[62] Richard B. Lillich, 'Civil Rights', in *Human Rights in International Law: Legal and Policy Issues*, ed. Theodor Meron (Oxford: Clarendon Press, 1983).

[63] Even if equality is mentioned in para. 14 of the GC, it has not been inserted in para. 22.

[64] For instance, Draft Principle 5 reads: "In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts." Emmanuel Decaux, *Issue of the Administration of Justice through Military Tribunals: Report of the U. N. Special Rapporteur on the Issue of the Administration of Justice through Military Tribunals, E/CN.4/2006/58 at 4* (Geneva: UN, 2005). Moreover, GC 32 is of course silent on most other issues dealt with in the much more detailed draft principles.

[65] For instance, Gibson is alarmed at Decaux' suggestions with regard to the role of victims in proceedings (Principle 16). In his view, some of the proposals "go too far in conflating civil with criminal proceedings". Since most systems in the civil law tradition combine the criminal with the civil proceeding as a sequence and not as a separate proceeding, Gibson's suggestions that "the appropriate method would be to initiate an action as plaintiff in a civil trial as a separate proceeding" and that "providing for victims to have access to judicial remedies to challenge decisions and rulings by military courts against their rights and interests' converts them into a litigant in a civil case rather than their proper role as victims in a criminal trial" would equally alarm a civil lawyer. (Michael R. Gibson, 'International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility While Precluding Impunity', Journal of International Law & International Relations 4, no. 1 (2008): 1-50.)