IN THE INTER AMERICAN COURT OF HUMAN RIGHTS

IN THE CASE OF

RADILLA-PACHECHO

AND

THE UNITED STATES OF MEXICO

AMICUS BRIEF ON BEHALF OF THE HUMAN RIGHTS COMMITTEE OF THE BAR OF ENGLAND AND WALES AND THE SOLICITORS' INTERNATIONAL HUMAN RIGHTS GROUP

1. The first named *amicus*, the Bar Human Rights Committee ("BHRC") is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world. It is also concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial.

2. The second named *amicus*, the Solicitors International Human Rights Group ("SIHRG") promotes awareness of international human rights within the legal profession and mobilises solicitors into effective action in support of those rights. The Group encourages human rights lawyers overseas and conducts related missions, research, campaigns and training. The SIHRG's organisation is designed to promote the application of solicitors' skills in realising the observance of international human rights standards.

3. This brief is directed to the Court in the case of *Radilla-Pacheco v Mexico*,[1] in which the case gave judgment on 23rd November 2009.

4. In the *Radilla* case, the Inter-American Court of Human Rights ordered, following its finding that the Mexican state was responsible for the forced disappearance of *Rosendo Radilla Pacheco,* that the State must, inter alia:

    - Carry out a thorough investigation, and to identify those responsible for his disappearance;

[1] *Radilla Pacheco v. Mexico,* Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 23, 2009, Case 777/01, Report No. 65/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005) available online at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_209_ing.pdf (last accessed 14 December 2010) (hereinafter "*Radilla Pacheco v. Mexico*").

- Pay reparations to the Radilla family;
- Bring Article 57 of the Code of Military Justice in line with recognised international standards, including the American Convention on Human Rights to which Mexico is a state party;
- Withdraw the reservation to Article IX of the Inter-American Convention on Forced Disappearances made by Mexico, which states that the military may prosecute and investigate crimes committed by the military whilst on duty.[2]

5. In this brief, the authors limit their comment to developing norms, as exemplified by jurisprudence of the European Court of Human Rights (ECtHR) and the Draft Principles on the Administration of Justice through Military Tribunals,[3] to the requirements of investigation and the framework for judicial resolution of human rights violations by members of a state's armed forces.

6. It is understood, in the light of the order made by the Court that reforms to the legislation governing military jurisdiction in Mexico are currently under consideration. The authors of this brief understand that President Felipe Calderón presented proposed amendments to the relevant law governing the operation of the Military Tribunals, before the Mexican Senate on 18 October 2010.

7. In giving guidance on the framework for changes in the legislative framework, the Court in the *Radilla* case indicated to the Government of Mexico that:

a) The application of "military criminal jurisdiction shall have a restrictive and exceptional scope";[4]

b) That "only active soldiers shall be prosecuted within the military jurisdiction for the commission of crimes or offenses that based on their own nature threaten the juridical rights of the military order itself."[5]

c) …."[t]aking into account the nature of the crime and the juridical right damaged, military criminal jurisdiction is not the competent jurisdiction to investigate and, in its case, prosecute and punish the authors of violations of human rights but that instead, the processing of those responsible always corresponds to the ordinary justice system;"[6]

[2] *Ibid,* operative paras. 7-18.
[3] Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006), available online at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/106/77/PDF/G0610677.pdf?OpenElement> (last accessed 14 December 2010).
[4] *Radilla Pacheco v. Mexico, supra* n. 1, para. 272.
[5] *Ibid*, para. 272
[6] *Ibid*, para. 273.

d) "...[r]egarding situations that violate human rights of civilians, the military jurisdiction cannot operate under any circumstance."[7]

8. The authors of this brief understand that the proposed amendments to the law would make provision for cases to be transferred to the civil courts only when a member of the military is accused of one or more of three crimes: enforced disappearance, torture and rape. All other cases that might involve, inter alia, alleged violations amounting for example to extrajudicial killing, ill-treatment and/or arbitrary detention will continue to remain within the jurisdiction of the military court system.

9. It is further understood that the draft bill provides that allegations of human rights abuses will be investigated by the military investigative police.

10. This brief is directed to the Court in the context of the ruling and the directions given to the State of Mexico in the Judgment handed down by the Court on 23rd November 2009. As indicated in the judgment, compliance by the State of Mexico with the terms of the judgment would be monitored, with a requirement that the Mexican state provide the Court with a report on measures implemented within one year of the notification of the judgment. In this context, the authors of this brief respectfully draw attention to some of the relevant principles in the jurisprudence of the ECtHR as examples of standards emerging in the regional European context.

11. The authors of this brief respectfully acknowledge that many of the requirements of adequate investigation and prosecution of violations involving agents of the state and members of its armed forces, as defined in the case law of the European Court, are replicated in the case law of the Inter-American Court, and also note that the European Court has been assisted by jurisprudence from the Inter-American system.

12. Attention is also drawn to the *Draft Principles governing the Administration of Justice*.

13. In this context and in relation to the specific characteristics of proper investigation and the appropriate ambit of military jurisdiction, as required in the implementation of an appropriate legal framework, the authors of this brief would simply seek to comment as follows:

The nature of the obligation to investigate

(a) The case law of the European Court emphasises, in accordance with a state's obligations under Article 13 European Convention on Human Rights (ECHR),[8] that the fundamental importance of the right to protection of the right to life, and the requirement, in addition to the payment of compensation, of a thorough and

[7] *Ibid*, para. 274.

[8] 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity', Article 13 *European Convention for the Protection of Human Rights and Fundamental Freedoms,* Nov. 4, 1950, 213 UNTS 22.

effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and infliction of treatment contrary to Article 3 ECHR (i.e. the prohibition on torture and inhuman and degrading treatment and punishment) (inter alia, see *Anguelova v Bulgaria* no. 38361/97; *Aydin v Turkey* no. 25660/94);

(b) The nature of the obligation to investigate will depend on the circumstances but must be 'public and independent scrutiny' (*McCann v UK* (1996) 21 EHRR 97). In cases involving the right to life, and without proper investigation, there will be a violation of Article 2,[9] in addition to any violation caused by the death itself. The requirements are (a) the investigation is carried out by an independent body in public; (b) it must be thorough and rigorous and reasonably prompt; (c) capable of imputing responsibility and identifying perpetrators; (d) if agents of the state are involved, capable of determining whether Art 2 conditions was breached; (e) if part of criminal complaint, the complainant must participate; (f) the next of kin must have the opportunity for effective involvement: *Jordan v UK* (2003) 37 EHRR 2;

(c) Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Article 13 requires the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. 'Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State' (*Aksoy v. Turkey*; *Aydın v. Turkey*);

(d) Ineffective criminal investigation, with a consequence that other remedies including civil remedies are undermined, is likely to constitute a breach of Article 13; i.e. the right to an effective remedy (inter alia, *Utsayeva & ors v Russia* no. 29133/03);

(e) In an investigation designed to elicit and establish the role of the security forces in an alleged violation, the requirements that an investigation be independent was not established where civilian investigators were institutionally linked to the security forces under investigation (*Gulec v Turkey*; *Ogur v Turkey*);

(f) The investigation is likely to require the identification of those who gave orders and, where relevant, the justification for the orders given by the superior officer (*Khatsiyeva & ors v Russia* (no. 5108/02);

Independence and impartiality of the Court considering the violation

[9] Article 2 (1) states 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.

(g) In *Duzgoren v Turkey* (no. 56827/00), a case involving a civilian facing prosecution before a state security court, and the consideration of the possible infringement of freedom of expression rights under Article 10 ECHR, the Court considered that the presence of a military officer among the judges on the bench could lead to a legitimate fear that the Court would allow itself to be influenced by considerations that were unrelated to the merits of the case and that it could be considered to lack independence or impartiality.

The Draft Principles Governing the Administration of Justice Through Military Tribunals

(h) So far as the standards that might be expected of military tribunals, the Court has drawn (c.f. *Ergin v Turkey* (No. 6) No. 47533/99) on the '*Draft Principles Governing the Administration of Justice Through Military Tribunals'*, submitted to the Commission on Human Rights at its 62nd Session in 2006[10] which stated, inter alia, that (all emphasis in the following extracts from the *Draft Principles* has been added):

> "... the 'constitutionalization' of military tribunals that exists in a number of countries should not place them outside the scope of ordinary law or above the law but, on the contrary, should include them in the principles of the rule of law, beginning with those concerning the separation of powers and the hierarchy of norms."
>
> "Military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law."

(i) The authors of this brief also draw attention to other important elements of the Guiding Principles. At Principle No. 8:

> 'The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for **infractions strictly related to their military status**.'
>
> 'The jurisdiction of military tribunals to try military personnel or personnel treated as military personnel **should not constitute a derogation in principle from ordinary law, corresponding to a jurisdictional privilege or a form of justice by one's peers. Such jurisdiction should remain exceptional and apply only to the requirements of military service. This concept constitutes the "nexus" of military justice, particularly as regards field operations, when the territorial court cannot exercise its jurisdiction. Only such a functional necessity can justify the limited but irreducible existence of military justice. The national court is prevented from exercising its active or passive jurisdiction for practical reasons arising from the remoteness of the action, while the local court that would be territorially competent is confronted with jurisdictional immunities**.'

(j) Principle No. 9 states:

> 'In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into **serious human rights violations** such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.'
>
> Contrary to the functional concept of the jurisdiction of military tribunals, there is today a growing tendency to consider that persons accused of serious human rights violations cannot be tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons. Moreover, the military authorities might be tempted to cover up such cases by questioning the appropriateness of prosecutions, tending to file cases with no action taken or manipulating

[10] Doc. E/CN.4/Sub.2/2005/9 of 16 June 2005.

"guilty pleas" to victims' detriment. Civilian courts must therefore be able, from the outset, to conduct inquiries and prosecute and try those charged with such violations. The initiation by a civilian judge of a preliminary inquiry is a decisive step towards avoiding all forms of impunity. The authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings'

(k) So far as the inter-relationship between military and the civilian system of justice is concerned, Principle No. 17, provides, inter alia:

'In all cases where military tribunals exist, their authority **should be limited to ruling in first instance**. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts. In all situations, disputes concerning legality should be settled by the highest civil court. Conflicts of authority and jurisdiction between military tribunals and ordinary courts must be resolved by a higher judicial body, such as a supreme court or constitutional court, that forms part of the system of ordinary courts and is composed of independent, impartial and competent judges.'

'While the residual maintenance of first-degree military courts may be justified by their functional authority, there would seem to be **no justification for the existence of a parallel hierarchy of military tribunals separate from ordinary law**. Indeed, the requirements of proper administration of justice by military courts dictate that remedies, especially those involving challenges to legality, are heard in civil courts. In this way, at the appeal stage or, at the very least, the cassation stage, military tribunals would form "an integral part of the general judicial system". Such recourse procedures should be available to the accused and the victims; this presupposes that victims are allowed to participate in the proceedings, particularly during the trial stage.'

'Similarly, an **impartial judicial mechanism for resolving conflicts of jurisdiction or authority should be established**. This principle is vital, because it guarantees that military tribunals do not constitute a parallel system of justice outside the control of the judicial authorities. It is interesting to note that this was recommended by the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions'

14. In considering the adequacy of the proposals for legislative and procedural reforms proposed by the State of Mexico, following the Court's judgment in November 2009, the authors of this brief would therefore respectfully underscore:

(a) The importance of proper investigation, and the underlying requirement that the investigation must be impartial and independent;

(b) The importance of the independence of the Prosecuting authority and the Court considering violations;

(c) The limits that should be imposed on the availability of military jurisdiction:

(1) to cases that have a *true* nexus on the operation of the armed forces;

(2) That cases involving *serious human rights* violations should be excluded from the jurisdiction of military tribunals, so that the authors would respectfully contend that any focus on the crimes of

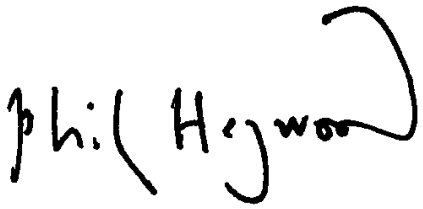
enforced disappearance, torture and rape would be too narrow and reserve too much jurisdiction to the system of military justice;

(3) That the Military Tribunals must in any event be constituted and act in accordance with principles of human rights and humanitarian law;

(4) Military Tribunals must not act as a parallel jurisdiction and should in any event be subject to the supervision of the national Courts, and there should be an appropriate and impartial judicial mechanism got resolving conflicts of jurisdiction.

Dated: 14 December 2010

Respectfully submitted,



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