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**Statement by Gabriela Knaul
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JUDGES AND LAWYERS**

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Honourable Chair,
Excellencies,
Distinguished Delegates,
Ladies and Gentlemen,

I welcome this opportunity to address again the Third Committee of the General Assembly in my capacity as Special Rapporteur on the independence of judges and lawyers. Before focusing on the key insights and concerns highlighted in the report that I submitted for your consideration, which this year focuses on the administration of justice through military tribunals, please allow me to give you a brief overview of the activities I carried out since I last appeared before this Committee.

Between November 2012 and October 2013, I had the opportunity to undertake three official visits to El Salvador, the Republic of Maldives and the Russian Federation to assess the progress made at the national level in strengthening the independence of the judges, prosecutors and lawyers. The reports on my missions to El Salvador and the Republic of Maldives have already been presented to the Human Rights Council last June as addenda to my annual thematic report, which was devoted to the issue of legal aid. The report on my visit to the Russian Federation will be presented to the Human Rights Council in June 2014. I wish to thank once again the Governments of the three countries for their invitation and their cooperation with my mandate.

I would also like to thank the Government of Qatar for its invitation to conduct a country visit in 2014. This is the first time my mandate has the opportunity to assess the status of the judiciary in a Middle East country. I believe this visit will offer an invaluable opportunity to assess, in collaboration with State authorities and civil society organizations, the progress made by Qatar in strengthening the independence of the judiciary and the challenges that still lie ahead. I would like to encourage other Governments to respond positively to my request for a country visit and extend an invitation to my mandate in the near future.

Excellencies,

Issues relating to the establishment and functioning of military tribunals lie at the core of my mandate. Both my predecessor, Mr. Leandro Despouy, and I have paid considerable attention to the question of the establishment and operation of military and special tribunals, in particular for the trial of terrorism-related cases.

The report before you focuses on the compliance of military tribunals with human rights law and internationally recognized standards. The establishment and functioning of military tribunals have for long been a matter of concern for human rights mechanisms in terms of access to justice, impunity for past human rights abuses, the independence and impartiality of military tribunals and respect for the fair trial rights of the accused.

In the report, I addressed these concerns, and proposed a number of solutions aimed at ensuring that, where they exist, military tribunals must form an integral part of the general judicial system and function with competence, independence and impartiality, guaranteeing the exercise and enjoyment of human rights, in particular the right to a fair trial and the right to an effective remedy.

My analysis and recommendations are grounded on existing international and regional human rights instruments, the jurisprudence of human rights treaty bodies, special procedures mandate holders and regional human rights mechanisms, as well as on the responses to a questionnaire on military justice that the mandate transmitted to all Member and Observer States. I would like to seize this opportunity to thank again all States that provided written responses to the questionnaire. State responses are available on the OHCHR webpage.

Distinguished Delegates,

Military tribunals take various forms in different States. State practice is also heterogeneous with regard to the composition and to the personal, territorial, temporal and subject-matter jurisdiction of military tribunals. The position of military tribunals within the structures of the State further varies from one country to another. Moreover, there is no consistency between different military legal systems with regard to what is meant by the term "military offence". All these differences and complexities make any attempt to classify the types of military jurisdiction very difficult.

The fundamental aim of military tribunals is to allow the armed forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. However, the need for separate tribunals to enforce special disciplinary standards in the military is not universally recognized. In many States, the primary purpose of military tribunals continues to be that of serving the interests of the military, rather than those of society, and military tribunals end up constituting a weapon for combating the so-called "enemy within" rather than being a tool for disciplining the troops.

In my report, I highlight that irrespective of the peculiarities of each national justice system, military tribunals should have jurisdiction only over military personnel who commits military offences or breaches of military discipline, and only when those offences or breaches do not amount to serious human rights violations. Exceptions are to be made exclusively in exceptional circumstances and be limited to civilians abroad and assimilated to military personnel.

Ladies and Gentlemen,

Using military or emergency courts to try civilians is a regrettably common practice that runs counter to all international and regional standards and established case law.

Although international human rights treaties do not explicitly address this issue, a number of soft law instruments and the jurisprudence of international and regional mechanisms show the existence of a strong trend against extending the criminal jurisdiction of military tribunals over civilians. State practice also shows a tendency towards limiting the personal jurisdiction of military tribunals to criminal offences and breaches of discipline allegedly committed by active members of the armed forces. Exceptions with regard to civilians who are assimilated to military personnel tend to be crafted and interpreted narrowly.

In my report, I underline that the trial of civilians by military tribunals should be prohibited, except in exceptional circumstances where civilians can be assimilated to military personnel, for instance in cases of civilian dependants of military personnel posted abroad and civilian persons accompanying the armed forces, such as contractors, cooks and translators. Such exceptional cases should be expressly provided for by the law, and the burden of proving the existence of such exceptional circumstances should rest with the State. In no case should a military tribunal established within the territory of the State exercise jurisdiction over civilians accused of having committed a criminal offence in that same territory.

Excellencies,

One of the most complex aspects of military tribunals relates to their subject-matter jurisdiction, that is, to the types of offences that fall under their jurisdiction.

The jurisprudence of human rights treaty bodies, special procedures mandate holders and regional human rights mechanisms on this issue tend to confine the jurisdiction of military tribunals to purely disciplinary types of military offences, rather than to offences of a criminal nature. However, many military justice systems do not make any distinction between a criminal offence and a breach of discipline. In these systems, which are based on the concept of "service offence", military tribunals simultaneously exercise judicial functions and disciplinary authority over military personnel.

In my report, I recommend that the *ratione materiae* jurisdiction of military tribunals be limited to criminal offences of a strictly military nature; in other words, to offences that by their own nature relate exclusively to legally protected interests of military order, such as desertion, insubordination or abandonment of post or command. States should not resort to the concept of service-related acts to displace the jurisdiction belonging to the ordinary courts in favour of military tribunals.

I am of the view that ordinary criminal offences committed by military personnel should be tried in ordinary courts, unless regular courts are unable to exercise jurisdiction owing to the particular circumstances in which the crime was committed (i.e. exclusively in cases of crimes committed outside the territory of the State). Such cases should be expressly provided for by the law.

An issue that is the subject of disagreement among human rights and military practitioners concerns the competence of military tribunals to try military personnel accused of offences involving serious human rights violations. A number of human rights instruments and the jurisprudence of human rights treaty bodies and special procedures mandate holders recognize that the jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts.

I consider that the jurisdiction of military tribunals 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.

Ladies and Gentlemen,

Human rights mechanisms have often expressed concern about the lack of sufficient fair trial guarantees in proceedings before military tribunals. These concerns refer, in particular, to the right of the accused to legal representation of his or her choice, violations of the principle of equality of arms between the prosecutor and the defence, and limitation to the right of appeal before a higher tribunal.

The right of the accused to legal representation of his or her choice assumes particular relevance with regard to proceedings before military tribunals. The free choice of defence counsel must be guaranteed in all circumstances and any kind of restriction of this right should be extremely exceptional, so as not to hamper the credibility of the military justice system.

Furthermore, it is important to note that even if a military lawyer is provided to the person facing charges before a military tribunal, the possibility for the defendant to opt for a civilian lawyer must be fully guaranteed. Moreover, when the person accepts a military lawyer as counsel, the same safeguards and guarantees provided to the civilian legal profession must be ensured so as to allow the military lawyer to act with objectivity, efficiency and independence, thus providing adequate and unbiased counsel.

In addition, I wish to reiterate that the right to communicate with one's counsel requires that Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than 48 hours from the time of arrest or detention.

With regard to the principle of equality of arms between the prosecutor and the defence, it is relevant to highlight that every party must be given the opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds. Where distinctions apply, they must be proportional and sufficiently counterbalanced to ensure that the accused receives a fair trial, and must not entail actual disadvantage or other unfairness to the defendant.

In this context, I would like to point out that the lack of disclosure may affect the overall fairness of the trial and, hence, the necessity of non-disclosure should be decided by a court rather than the prosecution, so as to ensure respect for the principle of equality of arms and the right to prepare one's defence. The authorities and the courts must also keep under review, throughout the proceedings, the appropriateness of non-disclosure in the light of the significance of the information, the adequacy of the safeguards and the impact on the fairness of the proceedings as a whole.

Finally, the right of appeal should be available to all persons convicted of a crime, including those who have been convicted by military tribunals.

The report addresses all these issues and concludes that military tribunals and the proceedings before them should, in all circumstances, respect and apply the principles of international law relating to a fair trial. Any restrictions to fair trial requirements and due

process guarantees must be provided for by the law, justified by objective reasons, be proportional and never undermine the overall right to a fair trial.

Distinguished Delegates,

Let me conclude my presentation by reaffirming that the integrity of the justice system, which is a precondition for democracy and the rule of law, must be structured on the pillars of independence, impartiality, competence and accountability in order for the principles of independence of the judiciary and the separation of powers to be duly respected. To guarantee that they function in accordance with the integrity and independence of the judiciary, military tribunals must be an integral part of the general justice system and be compatible with human rights standards, including the respect of the right to a fair trial and the due process guarantees.

The draft principles governing the administration of justice through military tribunals represent an important initiative to guide States in regulating the establishment and functioning of military tribunals, with the aim to guarantee their independence, objectivity and impartiality. I would like to reinforce my recommendation that these principles should, therefore, be promptly considered and adopted by the Human Rights Council and endorsed by the General Assembly.

I thank you for your attention.
