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Trials Of Civilians Before Military Courts: Subversion Of Justice

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Abstract. The use of military courts to try civilians contravenes international law. This paper examines the major concerns about military court's jurisdiction over civilians. It is the argument of the paper that military courts sometimes are used to prosecute or determine the rights of civilians thereby allowing for procedures that deviate from standards applied by regular civilian courts. Furthermore, the paper argues that civilians tried before military courts have their rights routinely violated. the paper concludes that there is international consensus that trials of civilians by military courts contravenes the non-derogable right to a fair trial by a competent, independent and impartial court to the extent that they violate rights guaranteed by universal declaration of human rights and the united nations international covenant on civil and political rights.

Keywords: civilians, court-martial, fair trial, military courts, military tribunals, justice, military justice, rights

1. Introduction

Many states have established military courts to deal with offences committed by members of the armed forces. the allocation of jurisdiction between such courts and ordinary civilian courts can be precarious constitutional law exercise as the reason for creating military courts has often been the desire to place a premium on military expediency at the expense of fair trial rights, particularly problematic has been the choice made by some states to subject civilians under some circumstances to the jurisdiction of military courts. as a result of the trial before the military courts, there have been catalogue of abuses, including abduction and unlawful detention even before being referred to the military prosecution, held incommunicado for up to period of time in circumstances akin to enforced disappearance, being beaten, threatened and water boarded, at times, some civilians are forced to sign "confessions" to crimes they did not commit. Ordinarily, judges should always be independent and impartial. However, certain characteristics of military courts are likely to raise doubts as to their independence and impartiality. For example, military judges are subject to military discipline. Once appointed, they are incorporated into the army and given ranks. in view of this, military courts cannot be regarded as equivalent to the ordinary court. The end result has been that the civilians have been convicted by courts that did not meet international standards of competence, independence, and impartiality. Military courts have also routinely violated fundamental human rights such as the right to present a defence, the right against self-incrimination and the prohibition of the use of evidence procured by torture.

This paper therefore examines the major concerns about military courts' jurisdiction over civilians, drawing on treaties and other instruments, comments and jurisprudence of international courts and treaty bodies. For the intention of this study, civilians mean all those who are not fighters and are not members of the armed forces. to achieve this aim, this paper is divided into six parts: the first part is the introduction. The second part deals with conceptual clarification which provides a short conceptual clarification of military court system and military justice system. Part three briefly discusses the violation of fair trial guarantees in prosecuting civilians before the military courts. Part four provides for the regional human rights and military courts. Part five explores the international law on civilians before military courts. Part six demonstrates that the use of military courts in prosecuting civilians is subject to judicial review to ensure that the civilians' human rights are not violated. Part seven is the conclusion

while recommendations form the last part of the paper.

2. Conceptual Clarification

2.1 Military Court System

In the military court system, a court martial is the equivalent of being charged with and being made to answer for an accusation of a criminal offence in civilian court. There are several types of courts-martial, each with a different level of severity. Military court-martial is a mechanism by the military for the control, discipline and punishment of its personnel. It is primarily concerned with the discipline and control of troops. Although it is not yet an independent instrument of justice, court-martial remains to a significant degree, a specialized part of the overall mechanism by which military discipline is preserved. It is a military court that is assembled by a commander to try personnel within his command who are alleged to have committed offences. In *Maclaughry v. Denning*, the court maintained that it is a creature of statute and as a tribunal, it must be convened and constituted in entire conformity with the provisions of statutes or else, it is without jurisdiction. Thus, according to Abubakar, a court-martial is a judicial body and thus all its affairs, from the convening of the court, the jurisdiction of the court, arraignment and calling of witnesses must conform to law otherwise the entire court proceedings could be quashed on appeal. Courts-martial are generally found in all nations with military judges to try military personnel who commit offences. In addition, courts-martial might be used to try enemy prisoners of war who are on trial for war crimes.

Black's law dictionary defines a court-martial as an *ad hoc* military court convened under military authority to try someone, particularly a member of the armed forces, accused of violating the UCMJ. According to the New Zealand Armed Forces Discipline Act, (AFDA) courts-martial are defined as military courts established by senior military officers to determine the most serious allegations of misconduct by members of the armed forces and, in limited circumstances, non-military persons. Courts-martial are special courts which are established under the Armed Forces Act (AFA) (Nigeria). Hambali (2005) maintained that it is convened when the need arises and stands dissolved once the trial for which it has been conveyed is concluded. It gives binding and enforceable decisions, exclusively of criminal or quasi-criminal nature. Punishment or sentence includes committal to prison for a term of years. Appeals against its decisions lie to the court of appeal.

In Nigeria, courts-martial are akin to civilian criminal justice system. Section 143 of AFA states that court-martial have the similarity of a judge, a prosecutor, and are bound by the rules of evidence applicable at civilian criminal trials. However, courts-martial and civilian courts differ greatly in the method adopted in the selection and appointments of the latter are members. Contrary to what obtains under civilian legal system, neither the prosecutor nor the defence counsel contributes to the selection of members of the court-martial as the selection is done by the convening authority alone. In addition, AFA provides that determinations are made in private conference with the judge advocate, to the exclusion of the accused and prosecutor and without giving reasons.

Despite classifying court-martial as a judicial body, in Nigeria it is not part of the judiciary. The court-martial is empanelling of appropriate military officers of appropriate rank by an appropriate officer to perform an administrative job of a quasi-judicial nature. Any attempt therefore to bequeath on it the status of an arm of the judiciary would not only negate the concept of judicialism but would indeed vitiate the concept of separation of powers entrenched in our constitution. Despite this assertion, it should be pointed out that separation of powers appears not to operate any legal restriction on power but it provides the basis for important principles which the law protects such as the independence of the judiciary. Hence, regarding the court-martial as an arm of the judiciary could not negate the principle of separation of powers.

2.2 The Concept of Military Justice

According to Ladan, "the term 'military justice' can be defined as the impartial, fair and non-discriminatory application of the law to which military officers/armed forces personnel are subject to".
Military and justice seem to be an oxymoron as it cannot be fashioned or imagined that military as a concept that deals with force or authority can also be associated with justice. this has been vividly summed up by Yemi Akinseye-George (2009) thus:
The concept of 'military justice' appears to be contradictory in terms. if the idea being conveyed is the application of law to military personnel, then we should rather talk of 'justice in the military' rather than 'military justice'. the word military connotes the use of weapons or arms. When used in conjunction with the word, 'justice' it neutralizes the notion of

fairness and equality which is what justice is all about.

Despite the above observation, military justice can be said to be body of laws and procedures governing armed forces personnel. It is the fundamental legal enforcement tool of the armed services. It is similar to but different from the civilian criminal justice system. In Nigeria, the Armed Forces Act, 2004 is the major body of laws promulgated by the national assembly in governing the conduct of service personnel. Many countries have distinct and prominent systems of law that guide the behavior conduct of their armed forces personnel.
in the united states, military justice is enforced through the court-martial process, which ensures a fair trial for all enlistees while enforcing the laws contained in the statutes, while in Nigeria, the AFA provides for two types of trials, summary trial and court-martial. military justice system encompasses all matters relating to the investigation of crimes, summary trial, court-martial trials including appointment of members and the judge advocate, calling of witness etc., post-trial action and extra regimental appeals to superior courts of records i.e. from the court of appeal to the supreme court.
According to garner (2004), military justice is a structure of punitive measures designed to foster order, morale and discipline within the military. Garner maintained that military law and justice does not derogate from or prejudice the subjection of military personnel to the ordinary laws of the land. To this end, the Armed Forces Act, incorporates civil offences into the act. These include assault, manslaughter, murder, robbery, extortion, burglary, house-breaking, arson, forgery, cheating and other civil offences as provided for under section 114.

The section provides that:
A person subject to service law under this act who commits any other civil offence, whether or not listed under the act or committed in Nigeria or elsewhere is guilty of an offence under this section

Military justice is only one part of military law. Mukhtar (2009) has vividly put military justice in the following perspective thus:
Military justice administration is carried out on a platform modeled to suit its hierarchical command structure which has been adjudged necessary for the effective performance and delivery of its constitutional mandate. An adequate and fair system of military justice has always been essential to the maintenance of discipline and morale in any military command. Military justice system provides safeguards within the framework of established order or command. Those safeguards are unique but at the same time appropriate for the effective discharge of justice. The evolution of military justice has necessarily involved balancing of two basic interests: war fighting and the desire for an efficient, but fair system for maintaining good order and discipline.

The prevalent law on military justice in Nigeria is the AFA. Section 218(4) (b) of the constitution of the Federal Republic of Nigeria, 1999 brought into existence AFA. It regulates the conduct of military justice in Nigeria. The act is made up of 282 sections and 4 schedules. Section 217 of AFA provides for the establishment and composition of the armed forces, its administration, offences, punishment, trial procedures, court-martial proceedings and other sundry issues.
The notion of justice under military law in Nigeria is not different from the one developed by the supreme court in *Josiah v. the State* where it stated that justice is three way traffic- to the accused person, to the victim and to the society at large. in the same manner, justice as conceived by the supreme court in the case of *Salawu Ajide v. Kadiri Kelani* where it stated that justice is much more than a game of hide and seek, it is attempt to discover the truth, human imperfection notwithstanding aligns with military justice. Contrary to the notion of military justice by Hugo I. Black in *Reid v. Covert* that military justice must of necessity be a rough form of justice, emphasizing summary procedure, speedy convictions and stern penalties. Justice cannot be roughed nor can justice be rushed and should not occasion a miscarriage of justice with resultant consequence of denial of fundamental human rights as was stated in the supreme court matter of *Osassona v. Ajayi*.

3. Violating Fair Trial Guarantees in Prosecuting Civilians before Military Courts

The continuing prosecution of civilians before military courts requires urgent resolution, partly due to the numerous human rights violations that occur, as well as their gravity, which may endanger the right to life or result in unlawful detention for some period of time. The procedures of military trials violate international law and standards. among the fair trial guarantees that are being routingly violated when civilians are prosecuted before military courts are:

3.1 The Right to be tried before a competent, impartial, and an independent court

The military is part of the executive branch of government. Matters before the military courts are

investigated by military prosecutors and trials are heard by a single military judge. Under military law, commanders decide, in many instances, whether an allegation of wrongdoing is to be investigated at all, and whether to send that allegation to military law enforcement for investigation. The president of the court-martial is appointed by the convening authority. Military courts are a division of armed services and are thus part of the executive branch of government and are not part of the independent judicial branch of government. In addition, the composition of military courts with the high command appointing active military officers as judges and acting as convening authority deprive military courts of the necessary independence and impartiality that human rights law requires. Moreover, the lack of legal qualifications of some of the military court panel members seriously compromises their competence to try serious offences.

The prescribed right to a public trial under article 14 of the ICCPR, provisions under principle 5 of the UN basic principles on independence of the judiciary and also relevant provisions under the African Charter on Human and Peoples' Rights have been violated.

3.2 The right to adequate time and facilities for the preparation of a defence and to be tried without undue delay

Contrary to the provisions of article 14 of the iccpr, military courts have frequently failed to ensure that defendants have access to the relevant case processes before the commencement of trial. in some cases, the authorities do not provide defence lawyers with the details of the charges until the trial commences.

Article 14 of the ICCPR that states as follows:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality...(b) to have adequate time and facilities for the own choosing. Preparation of his defence and to communicate with counsel of his choosing

3.3 The right not to have any statement made as a result of torture used as evidence

The use of torture and other forms of ill-treatment on defendants that appear before military courts to obtain confessional statements is very common. Despite this pattern, it has been observed that courts often fail to investigate defendants' allegations of torture and other ill-treatment fully and to ensure that "confessions" or other incriminating statements were freely given". Accordingly, courts have repeatedly sentenced defendants to death or lengthy prison terms on the basis of confessions and other statements that defendants alleged were extracted from them using torture or other ill-treatment, while they were held incommunicado in pre-trial detention. This is certainly against the un convention against torture as it places an obligation on the state to ensure that a prompt and impartial investigation is initiated wherever there are reasonable grounds to believe that torture or other ill-treatment has been committed.

3.4 The imposition of death penalty/the use of the death penalty

The un safeguards guaranteeing protection of the rights of those facing the death penalty state that capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the international covenant on civil and political rights. The Amnesty International considers the death penalty to be a violation of the right to life and the ultimate cruel, inhuman and degrading punishment. For instance, in Uganda, military courts have convicted and sentenced civilians to death, despite the 2006 Constitutional Ruling. For example, on September 8, 2010, the third Division Court Martial (DCM) sentenced one Judith Koryang, a 20 year old civilian, to death for murdering her husband. She was charged with murder under section 188 of the penal code act.

In view of the above, the human rights watch states that" military court proceedings are not in line with international law requirements, that individual be tried by a competent, independent and impartial tribunal". Accordingly, human rights watch strongly opposes "any trial trials of civilians before military courts, where the proceedings do not protect basic due process rights and do not satisfy the requirements of independence and impartiality of courts of law".

4. Regional Human Rights Systems and Military Courts

4.1 African Union: The African Human Rights System

The African Commission of Human and Peoples' Rights (ACHR) examined the issue of trial of civilians by courts-martial, in accordance with articles 7 and 26 of the African Commission of Human and Peoples' Rights that pertain the right to a fair trial and the obligation to ensure that courts are independent. ACHPR has taken the view that a military tribunal per se is not offensive to the rights in the charter nor does it imply an unfair or unjust

process. however, the point must be made that military tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process. What causes offence is failure to observe basic and fundamental standards that would ensure fairness but under the principles and guidelines on the right to a fair trial and legal assistance in Africa, it has expressed its opposition to the trial of civilians by military courts. The guidelines state the fundamental principles governing the extent of personal and material jurisdiction of the military courts, as well as the procedures to be followed by these courts. They are:

- The only purpose of military courts shall be to determine offences of a purely military nature committed by military personnel;
- while exercising this function, military courts are required to respect fair trial standards enunciated in the African charter and in these regulations; and
- Military courts should not in any circumstances have jurisdictions over civilians. Similarly, special tribunals shall not try offences that fall within the jurisdiction of regular courts.
- The African Charter guarantees the right to a fair trial under article 7 and the associated right to judicial independence in article 26.

The prohibition against the trial of civilians is also reflected in the commission's principles and guidelines, which state that "the only purpose of military courts shall be to determine offences of a purely military nature committed by military personnel." To underscore the exclusivity of military court jurisdiction over military personnel, the principles and guidelines further affirm that military courts should not have jurisdiction over civilians "in any circumstances."

In view of the above, the African Commission previously established that the African charter prohibits the trial of civilians by military courts. Thus, in *Suleiman v. Sudan*, the commission held that "civilians appearing before and being tried by a military presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial." The commission referred to the resolution on the right to a fair trial and legal aid in Africa, which adopted the Dakar declaration and recommendations. The commission had further noted that "the purpose of military courts is to determine offences of a pure military nature committed by pure military personnel." The commission in addition stated that military courts should "in no case try civilians."

Also, in *Media Rights Agenda v. Nigeria*, the commission determined that the arraignment, trial and conviction of a civilian by a special military tribunal presided over by serving military officers, violated the basic principles of fair hearing guaranteed by article 7 of the charter, as well as the duty to guarantee the independence of the courts under article 26. Citing its resolution on the right to a fair trial and legal aid in Africa, the commission stated that military courts "should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, special tribunals should not try offences that fall within the jurisdiction of regular courts."

The prohibition against the trial of civilians by military courts is also reflected in the commission's principles and guidelines, which state that "the only purpose of military courts shall be to determine offences of purely military nature committed by military personnel."

The commission's judgments above aligned itself with the growing international consensus on the prohibition of the use of military tribunals to try civilians for offences not related to the functions of the military. Both the inter-american court on human rights, in the case of Durand and Ugarte v. Peru and the European Court on Human Rights, in *Ergin v. Turkey*, have argued against the extension of military criminal jurisdiction to try civilians where there is no nexus to the military.

4.2 European Union: The European Human Rights System

The European Court of Human Right (ECTHR) emphasises article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which states as follows:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save In the following cases and in accordance with a procedure prescribed by law;...right to a fair trial: in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The ECTHR has confirmed in several cases including *Ocalan v. Turkey* in 2003 thus:

The ECTHR points out that in several previous judgments...it noted that certain aspects of the status

of military judges sitting in the state security courts that had convicted the applicants in those cases raised doubts as to the independence and impartiality of the courts concerned. The applicants in those cases had had legitimate cause to fear that the presence of a military judge on the bench might have resulted in the courts allowing themselves to be unduly influenced by considerations that were not relevant to the nature of the case.

4.3 American Convention on Human Rights

Articles 8 and 9 of the American Convention on Human Rights, which came into force in 1969 expands the fair trial rights guaranteed by the ICCPR. Equally, the strongest support for draft principle 5 can be found in the inter-American system. Hence, the inter-American court and commission have taken an unambiguous position that the trial of civilians by military court is incompatible with the American convention on human rights. The inter-American Commission of Human Rights in its 1998 Annual Report, reminded all member states that:
Their citizens must be judged pursuant to ordinary law and justice and by their natural judges. Thus, civilians should not be subject to military tribunals. Military justice has merely a disciplinary nature and can only be used to try armed forces personnel in active service for misdemeanors or offences pertaining to their function.
Thus, in Castillo Petruzzi, the court explicitly picked up the commission's line of reasoning, holding that 'allowing military courts to try civilians accused of treason, means that the natural judge is precluded from hearing the cases. In addition, mention should be made of an *obiter dictum* in *Durand and Ugarte*, a case that dealt with military jurisdiction over common crimes committed by service members. The court stated that:
In a democratic government of laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offences that by its own nature attempt against legally protected interests of military order.

5. International Law on Civilians prosecuted by Military Courts

International legal standards deem the trial of civilians in military courts, in principle, to be incompatible with the right to fair trial, and in particular the right to be tried before an independent and impartial tribunal. Trials before military courts are often incompatible with international standards due to the lack of independence of judges, who tend to be serving members of the military who remain in the military chain command. while International Law does not prohibit limited use of military courts to try civilians in times of armed conflict, the united nations human rights committee, the expert body that monitors state compliance with the ICCPR, has held that "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."
In addition, a number of instruments and statements of international principles prohibit trials of civilians in tribunals other than ordinary courts. for example, the basic principles on the independence of the judiciary, endorsed by the un general assembly in 1985, affirm in principle 5 that:
Everyone has the right to be tried by ordinary courts or tribunals using established legal procedures. tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals

The Paris minimum standards of human rights norms in a state of emergency (Paris standards) article 16, paragraph 4, provides that even in a state of emergency provides that:
Civil courts shall have jurisdiction over all trials of civilians for security or related offences; initiation of any such proceedings before or their transfer to a military court or tribunal shall be prohibited. The creation of special courts or tribunals with punitive jurisdiction for trial of offences which are in substance of a political nature is a contravention of the rule of law in a state of emergency.

In July 2014, the United Nations Working Group on Arbitrary Detention (WGAD) asked the Human Rights Council to deliberate the adoption of a set of principles to be applied to military courts. in its report, the WGAD set out the following "minimum guarantees":

- Military tribunals should only be competent to try military personnel for military offences; if civilians have also been indicted in a case, military tribunals should not try military personnel;
- Military courts should not try military personnel if any of the victims are civilians;
- Military tribunals should not be competent to consider cases of rebellion, the sedition or

attacks against a democratic regime, since in those cases the victims are all citizens of the country concerned; and
- Military tribunals should never be competent to impose the death penalty.

According to Rowe (2007), "treaty bodies have been particularly critical about the prosecution of civilians before military courts that raises the awkward question whether and, if so, why the independence and impartiality assessment changes depending upon whether the accused is a service member or a civilian. However, the insufficiently articulated concern of human rights treaty bodies in this respect appears to be that trying certain civilians before military courts, even if those courts meet the due process requirements, discriminates against them compared to other civilians.

Indeed, over past decades, human rights organizations are concerned about the prosecution of civilians before military courts. As early as 1984, the human rights committee stated that the "existence in many countries, of military or special courts which try civilians" has presented grave problems concerning the equitable, impartial and independent administration of military justice. Frequently, the rationale for establishing such courts is to enable uncommon procedures be adopted that are contrary to normal standards of justice. While the covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14 of the ICCPR of 1966. The basic principles on the independence of the judiciary stipulates that "everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures and those tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".

Accordingly, principle 5 of the draft principles governing the administration of justice through military tribunals states that "military courts should, in principle, have no jurisdiction to try civilians and that, in all circumstances, the state shall ensure that civilians accused of a criminal offence of any nature are tried by civilians". Commentary to the principle, states that "the practice of trying civilians in military tribunals presents serious problems as far as the equitable, impartial and independent administration of justice is concerned, and is often justified by the need to enable exceptional procedures that do not comply with normal standards of justice". In addition, principle no. 8 that deals with functional authority of military courts states as follows: "the jurisprudence 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." Also, the set of principles for the protection of human rights through action to combat impunity, presented before the former United Nations Human Rights Commission in 2005, states 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 or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.

In addition, in the draft principles on military justice adopted by the former United Nations Human Rights Commission in 2006, Principle No. 9 states that:
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.

Furthermore, the International Commission of Jurists (ICJ) recently declared that "the trial of civilians by military courts is a glaring surrender of human rights and fundamental freedoms". In its briefing paper, the ICJ documented serious fair trial violations in the operation of military courts, including the denial of the right to counsel of choice, failure to disclose the charges against the accused, denial of public hearing; failure to give convicts copies of a judgment with evidence and reasons for the verdict, and a very high number of convictions; more than 97 per cent on confessions without adequate safeguards against torture and ill treatment.

It is important to note that in certain circumstances, international law might demand states to have military tribunals exercise jurisdiction over civilians. the various circumstances are as follows:

The first of these relates to the prisoner of war status determination tribunals required by article 5 of Geneva Convention III. Certain categories of civilians specified in paragraphs 4, 5 and 6 of article 4 of Geneva Convention III are persons who

accompany the armed forces without actually being members thereof, members of crews of the merchant marine or of civil aircraft, and inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms to resist invading forces. And they are, pursuant to article 5, entitled to have their status determined by a competent tribunal, which will almost inevitable be a form of military tribunal.

Second**,** in respect of the duties of an occupying power under Geneva Convention IV, pursuant to article 66 of that convention, in the case of a breach of the penal provisions applying to civilians in the occupied territory promulgated by it by virtue of article 64(2), the occupying power may hand over the accused to its properly constituted, non-political military courts, on condition that the said court sit in the occupied country.

Third**,** article 84 of Geneva Convention III provides that a prisoner of war shall be tried only by a court, unless the existing laws of the detaining power expressly permit the civil courts to try a member of the armed forces of the detaining power in respect of the particular offence alleged to have been committed by the prisoner of war.

Also, International Humanitarian Law explicitly allows for the trial of civilians by military courts in certain circumstances and given the need to ensure accountability, especially the Decaux Principles, the Yale Draft Principles for governing administration of justice through military tribunals provides: "military courts have no jurisdiction to try civilians except where there are very exceptional circumstances and compelling reasons based on a clear and foreseeable legal basis, made as a matter of record, justifying such a military trial". Those circumstances only exist, where:

- Such a trial is explicitly permitted or required by international humanitarian law;
- The civilian in serving with or accompanying a force deployed outside the territory of the sending state and there is no appropriate civilian court availabe; or
- The civilian who is no longer subject to military law is to be tried in respect of an offence allegedly committed while he or she was serving as a uniformed member of the armed forces or he or she was a civilian subject to military law under paragraph (b).
- The repercussion of these provisions of international humanitarian law is that "the adoption of principle no. 5 of the draft principles as it is currently proposed by the special rapporteur would be contrary to existing internal law".

6. Application of the Right to a Remedy

International human rights bodies have continuously held that the appropriate remedy for an individual being unlawfully deprived of their liberty is their "immediate release." Thus, in constitutional rights *Project v. Nigeria*, the African Commission instructed that the remedy for seven civilians detained following conviction before a military tribunal was their release. The commission found that the seven men, who had been tried under the Nigerian Robbery and Firearms (Special Provision) Act before a military tribunal, had their rights to be tried before an independent and impartial court or tribunal violated and should be freed. further, in *Assanidze v. Georgia*, the European Court of Human Rights (ECHR), having found a violation of a fair trial and that the applicant was being detained in violation of human rights norms, ordered Georgia to put an end to the violation and that the government must secure the applicant's release at the earliest possible date.

The initial remedy to which all those detained pursuant to military courts martial are entitled is the dropping of pending charges or voiding of the conviction, and release from detention. This is done by:

- Guaranteeing that all wrongfully detained civilians have systematic access to habeas corpus proceedings to contest the lawfulness of their detention; or
- Initiating proceedings in their cases to have their convictions set aside or voided for lack of jurisdiction.

Any remedy should be effective, timely, and implemented in a manner that respects and complies with international law. To be effective, a remedy must be accessible. The African commission on human and peoples' rights has stated that a remedy "must be available, effective and sufficient" to satisfy the African Charter. A remedy is considered available if the victim "can pursue it without impediment." To be sufficient, the remedy must be capable of rectifying the violation of rights that has occurred. An available or accessible remedy in the context of the systematic prosecution and detention of civilians pursuant to an unlawful exercise of military jurisdiction should mean:

The remedy is not dependent solely on the initiative of a victim taking legal action to secure an end to their unlawful detention or to avoid their unlawful

conviction. Any barrier that effectively deprives a victim of a meaningful opportunity to avail themselves of the remedy, such as financial barriers or onerous bureaucratic or administrative requirements, would render the remedy ineffective.

It is in view of the above that on the 29 June 2018, the court of justice for the economic community of West African states decided in the case of *Gabriel Inyang & another v. Federal Republic of Nigeria* that has placed clear constraints on the use of military tribunals by states to prosecute civilians for non-military offences. The facts are briefly stated as follows: the appellants in the case were citizens of Nigeria who, at the time of instituting proceedings were on death row. They were originally charged with armed robbery and had been tried and convicted in 1995 by a special military tribunal (military tribunal) established pursuant to section 8 of Nigeria's robbery and firearms (special provisions) act, 1990. the applicants lodged claims before the ECOWAS Court, arguing that their trial by military tribunal constituted a violation of the right to fair trial under article 7 of the African Charter on human and peoples' rights (ACPHR). Specifically, the applicants argued that they were unable to appeal the military tribunal's decision in violation of article7 (1) (a) ACHPR, which guarantees the right of an appeal to competent national organs. the applicants also argued that, by virtue of its composition, the military tribunal could not be classified as impartial as is required by article 7(1) (d) of ACPHR. The court held inter alia that the composition of the tribunal violates article 7 (1) (d) of ACPHR and that the trial of the applicants by military tribunal violates article 7(1)(a) and (d) of ACHPR.

7. Conclusion

This article has examined trials of civilians before military courts. It has also shown that justice has been subverted during the process of prosecuting civilians before the military courts. Every attempt by the executive branch to extend the use of military courts beyond members of the armed forces has been resisted by the judicial branch as a potential encroachment on the jurisdiction of the civilian courts and a deprivation of the constitutional guarantees of trial by military courts.

As demonstrated throughout this article, the unchecked use of military courts to try and punish civilians apprehended in the name of committing civilian offences threatens their rights.

8. Recommendations

Based on the forgoing analyses, this study recommends as follows:

The trends should be towards more independence to judges. There should be standing courts, rather military courts that are established on *ad hoc* basis. In addition, increased right to elect trial instead of summary procedures be emphasised. Furthermore, increased right to legal representation be resorted to. In cases where the person has not been convicted, all pending charges should be dropped, and the review unit should determine whether the evidence warrants a recommendation to pursue a criminal prosecution in the civilian courts. If so, civilian prosecutors can bring fresh charges before civilian courts. Since military courts lack the comptence to try civilians, implementing the death penalty against a civilian in any case tried by court martial would be a grave violation of the right to life as protected under international law. Therefore any case in which military courts sentenced a civilian to death should be identified as a matter of urgency, and the case referred to the competent judicial authority to have the sentence immediately set aside.

There should be civilianization of military justice as an alternative to military courts. Hence, whether by rule, statute or judicial decision, more and more procedural protections be added to the military justice system, until it increasingly begins to resemble the civilian justice. Hence, the tendency is to shift from military to civilian jurisdiction. Consequently, there have been numerous changes in a large number of national military justice systems in recent years or decades. for instance, Denmark, France, Guinea, Norway, Sweden, Germany, Slovenia, Estonia, the Netherlands, and the Czech Republic have entailed placing restraints on the exercise of military jurisdiction over civilians.

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