AN ANALYSIS OF THE APPLICATION OF THE DOCTRINE OF COMPACT UNDER THE NIGERIAN MILITARY LAW

BY

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LLM/LAW/66253/2013-2014

A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILLMENT OF REQUIREMENT FOR THE AWARD OF MASTER OF LAWS-LL.M

DEPARTMENT OF PUBLIC LAW,
FACULTY OF LAW,
AHMADU BELLO UNIVERSITY,
ZARIA

APRIL, 2017

DECLARATION

I declare that the work in this thesis entitled ***"An Analysis of the Application of the Doctrine of Compact under the Nigerian Military Law"*** has been carried out by me in the Department of Public Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another degree or diploma at this or any other institution.

Abba Ali GONI **Signature** **Date**

CERTIFICATION

This thesis ***"An Analysis of the Application of the Doctrine of Compact under the Nigerian Military Law"*** by Abba Ali GONI meets the regulations governing the award of the degree of Master of Laws – LLM of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to my late parents Alhaji Goni W. and Malama Hafsatu Goni and my beloved wife Mrs. Suhainat Y. Ja'e.

ACKNOWLEDGEMENTS

This research is made possible by the grace of Almighty Allah, and the contributions of many people in various capacity. I therefore thank Allah (SWT) for giving me divine enablement to complete this research despite so many challenges. I owe my erudite supervisors inexplicable appreciation for guiding encouraging me, and painstakingly going through the work with patience to ensure that it meets appreciable standard. I must thank Dr. I.F. Akande the chairman of my supervisory committee for her inspiration in shaping and refocusing this work to be apt. to Dr. I. Shehu who is a member of my supervisory committee for his guidance and hardwork despite all his challenges.

I must not forget to be grateful to my wife, Mrs. Suhainat Yukubu Ja'e in particular and my family members for their moral support by their continuous prayers for me to complete this research, I also thank my in-laws who selflessly supported me to ensure the successful completion of this thesis.

My sincere appreciation also goes to the Director of Legal Services (Army) Brigadier General Y.I. Shalengwa and his Chief of Staff, Colonel R.J. Alexander for their support in ensuring I complete this work. I also appreciate Colonel S.I. Musa who always put me on my toes whenever he challenges me with jurisprudential issues on military justice system. The concern and efforts of my course-mates Captain U.N Ukachukwu and Captain P. Nwachi in rendering assistance when necessary cannot be forgotten.

I am also grateful to Mr. Nura Badamasi, Ishaq Abubakar, Paul Ojo and all other staff of Area Business Centre at Ahmadu Bello University, Zaria (Kongo-Campus). Your efforts are highly appreciated in typing and restructuring the work on computer when amendments were made. Finally, but not the least I thank m

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ABBREVIATIONS

AFA	-	Armed Forces Act
AFD	-	Armed Forces Decree
All NLR	-	All Nigerian Law Report
APC	-	All Progressive Congress
ASA	-	Appropriate Superior Authority
AU	-	African Union
AWOL	-	Absent Without Leave
BOI	-	Board of Inquiry
BRT	-	Bus Rapid Transport
Cap	-	Chapter
CBN	-	Central Bank of Nigeria
CFRN	-	Constitution of the Federal Republic of Nigeria
C-in-C	-	Commander in Chief
COAS	-	Chief of Army Staff
CONAFSS	-	Consolidated Armed Forces Salary Structure
ECLR	-	East Central Law Report
ECOMOG	-	Economic Community of West African States Monitoring Group
ECOSOC	-	Economic Social and Cultural Rights
ECOWAS	-	Economic Community of West African States
FWLR	-	Federal Weekly Law Report
GC	-	Geneva Convention
GCM	-	General Court Martial
GOC	-	General Officer Commanding
HIV	-	Homo-Immune Syndrome
HIV/AIDS	-	Acquired Immune Deficiency Syndrome
HTACOS	-	Harmonized Terms and Conditions of Service
I.H.L	-	Imprisonment with Hard Labour
ICC	-	International Criminal Court

ICJ	-	International Court of Justice
ICL	-	International Criminal Law
ICRC	-	International Committee of Red Cross and Red Crescent
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for Former Yugoslavia
IHL	-	International Humanitarian Law
IS	-	Internal Security
ISO	-	Internal Security Operations
JA	-	Judge Advocate
LFN	-	Laws of the Federation of Nigeria
LLR	-	Lagos Law Report
LO	-	Liaison Officer
MML	-	Manual of Military Law
MNF	-	Multi-National Force
MNJTF	-	Multi-National Joint Task Force
MPB	-	Military Pension Board
NA	-	Nigerian Army
NAVTRAC	-	Naval Training Command
NCLR	-	Nigerian Constitutional Law Report
NMF	-	Nigerian Military Force
NMLR	-	Nigerian Monthly Law Report
NNLR	-	Northern Nigerian Law Report
NNPC	-	Nigerian National Petroleum Corporation
NNS	-	Nigeria Navy Ship
NWLR	-	Nigerian Weekly Law Report
M.J.S.C	-	Monthly Judgment of the Supreme Court
PDP	-	Peoples Democratic Party
PHCN	-	Power Holding Company of Nigeria
POW	-	Prisoners of War

QONR	-	Queen's Own Nigeria Regiment
RI	-	Regimental Inquiry
RNA	-	Royal Nigerian Army
ROE	-	Rules of Engagement
RPA	-	Rules of Procedure Army
RSM	-	Regimental Segment Major
SAN	-	Senior Advocate of Nigeria
SC	-	Supreme Court
SCM	-	Special Court Martial
SCSL	-	Sierra-Leone Special Court for Sierra-Leone
SOFA	-	Statutes of Forces Agreement
TCC	-	Troops Contributing Countries
UN	-	United Nations
UNAMSIL	-	United Nations African Mission in Sierra-Leone
US	-	United States of America
WAFF	-	West Africa Frontier Force

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ABSTRACT

This research titled: Analysis of the Doctrine of Compact under the Nigerian Military Law is concerned about the legal status of a soldier upon joining the military profession on the one hand, and his contract of service to the state on the other hand. The soldiers compact spelt-out his right privileges, liabilities and limitations. He is expected to perform his constitutional roles to the state in accordance to rule of law and International acceptable standard. The importance of the military profession in the development of a state cannot be over emphasized because no nation in the world today can develop without peace and stability. The primary role of the military is to ensure peace and stability through performance of their constitutional roles. It is in line with the important constitutional roles of the military that the Constitution of Federal Republic of Nigeria established the Armed Forces of Nigeria namely; Nigerian Army, Nigerian Navy and Nigerian Air force with their specific roles to the country. These constitutional roles of the soldier to the state is subjugated to military, civil and international law. However, it has been observed that there are problems in the application of military law to the soldier which range from the abused of human rights to inconsistencies of the military law with the constitution. The aim of the research work is to analyzed the legal status of the soldier under military law, civil law, and international law. In achieving this the objective is evaluating the extend of the application of military law, civil law and international law of the soldier in terms of his rights, duties, privileges and limitations. This research work adopts the doctrinal research methodology. The sources of information relied upon include relevant Textbooks, Statutes, Articles in Journals, Case Law, Internet Materials, Newspapers and Conference Papers. The research work finds that the Military Law and Military Justice System are not inconformity with democratic rules and the spirit of the constitution which has largely been the challenges of the Military Justice System in the Administration of Military Justice. The research concludes by recommending that the Military Justice System should be reformed to be inconformity with democratic rules and the constitution so as to correct the inconsistencies that infringes on human rights of service personnel. It also recommended for the reformed of the Armed Forced (Disciplinary Proceedings) (Special Provisions) Act which is discriminatory to service personnel and as well legalized double jeopardy in its provisions. Finally, it is recommended the need for soldiers to be educated at the point of joining the military service on their legal status, so as to help in upholding the law and preserving human rights by service personnel.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

This study deals with how the soldier is subjected to tripartite laws namely: military law, civil law and international law. The soldier upon acquisition of military status, did not only subject himself to a tripartite legal status, but also added onto himself additional legal responsibilities distinct from the civilian. The English Court in confirmation of the above fact, said a soldier does agree and consent that he shall be subject to the military discipline and cannot appeal to the civil courts to rescue him from his own compact.[1] The English court decision is no different with the legal status of a soldier in Nigeria except that during the military rule, application of civil laws in the case of the soldier was restricted. The advent of the military into political arena in Nigeria, application of civil laws on the soldier was restricted. Various military decrees promulgated during the first and second phases of military rules in Nigeria prevented the soldier from appealing the decisions of courts martial to the court of Appeal.[2] The decrees provided that all cases of appeal from courts martial pending before the court of Appeal should abate.[3] The respective service councils of the armed forces shall hear and determine appeal from courts martial as the final body.[4] This was the position of the soldier's legal status under the military administration in Nigeria.

The transition of Nigeria from military rule to a democratically elected government on 29th May, 1999, has not only generated far reaching implications on the political, social and economical sectors but has equally implemented the hitherto tripartite legal status of the soldier.

[1] Grant vs. Gould (1972) Henry Blackstone 69
[2] Section (1) and (2) of the Constitution (Suspension and Modification) Decree No. 1 of 1966 and Section 5 (1) of the Military Court (Special Powers) Decree No. 23 of 1984.
[3] Section 5 of the Constitution (Suspension and Modification) Decree No. 1 of 1966.
[4] Ibid

One major implication of the restoration of the soldier's tripartite legal status is that, things have to be done in a more generally acceptable way that conforms to the rule of law and international standards.[5] Another implication is that both civil and military thoughts, processes and practices have to conform to the democratic dispensation as against arbitrariness characteristics of military rules.[6] As a result, soldiers have constantly challenged the decision of Courts-Martial at the Court of Appeal and even up to the Supreme Court to enforce their rights. In addition, where a soldier feels himself being wronged by the military authority or a fellow service personnel, he has the right to seek redress at any civil court with jurisdiction to hear and determine the matter.[7] However, before embarking on such rights he must first exhaust internal administrative remedies. The effect of enforcing this right of redress in civil court, has immensely turn around military justice system to conform with democratic rule.

The soldier is a citizen of Nigeria hence the constitution is binding on him.[8] Being a soldier, he does not cease to be a citizen of Nigeria. He has all the rights and duties as the ordinary civilian enshrined in the CFRN 1999 in addition to his military status. He has the right to enjoy all civil laws either in his personal capacity or as a body corporate. He can engage in a contract, commercial trade, purchase of immoveable properties and so forth like the civilian. If he commits an offence, he can be tried by the civil courts and punished under our Criminal Code[9], Penal Code[10], Money Laundering Act[11] and all other penal laws. Also if he commits a civil wrong (tort), he can be sued in the civil court for his tortuous act. It is for this reason we

[5] Toun, P.A, (2005) *Defense Economics, Military Budgeting and Accounting in a Democratic Nigeria,* Ibadan Gold Press Ltd. p.XVI
[6] Ibid
[7] Sections 178 and 179 Armed Forces Act, Cap A20 LFN 2004
[8] Section 1(1) of the CFRN 1999 Cap C23 Vol.3, LFN Op.cit
[9] Cap. P1, Vol.12 LFN 2004
[10] Cap. P3 LFN 2004
[11] Section 114 of AFA Cao A20 LFN 2004

said that a citizen who joins the military service, is neither immune from the jurisdiction of civil laws nor civil courts.[12]

In addition, the soldier owes the state civic duties like the civilian. These duties such as respect for the constitution and its ideals, respect for dignity of other citizens and the right and legitimate interest of others, rendering assistance and declaration of asset and so forth.[13] Where he fails to uphold this civil duties, he will be held liable for his conduct[14].

The soldier also enjoys fundamental human rights like the civilians as enshrined in the CFRN 1999.[15] The only difference is that his rights can highly be restricted or derogated due to exigencies of service distinct from the civilian. These exigencies may arise as a result of defence, public order, morality or health.[16] However, it should be noted that the restriction of the soldier's fundamental human rights as a result of exigencies of service is not in anyway and alienation of these rights.

Military law and military justice system are mainly the product of the constitution, Act of National Assembly and other subsidiary legislations. Military law is therefore the branch of public law governing military discipline and other rules regulating service in the armed forces.[17] It is exercised both in peace time and in war. It prescribes rights and imposes duties and obligations upon the several classes of persons comprising the military establishment; it creates military courts martial, endows them with appropriate jurisdiction and regulates their procedure. It also defines military offences, imposes adequate penalties and endeavors to prevent their

[12] Sections 178 and 179 AFA, Cap. A20 LFN Op.cit
[13] Section 24 CFRN 1999 Cap C23 Vol.3 LFN op.cit
[14] Section 24 Harmonized Terms and Condition of Service (officer) 2012
[15] Cap C23 Vol.3 LFN Op.cit
[16] Section 45(1) CFRN 1999 Ibid
[17] George Y.A., Examining the Past, looking into the future the place of military justice in the Nigerian Legal System, in the military lawyer, A Professional Publication of the Directorate of Army Legal Services, 2007, Vol.3, pp.26-39

occurrences.[18] The United State Supreme Court in holding that military had the right to establish courts in insurgent territory over civil and criminal cases. Said; *"the power to establish by military authority courts for the administration of civil as well as criminal justice in portions of the insurgent states occupied by the national forces is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors".*[19]

To this end military law is an embodiment of, military justice system which is a structure of punitive measures designed to foster order, moral and discipline within the military.[20] The common features of military justice system and its administration amongst others include criminalization of act or omissions which ordinarily in the civil life would not be punishable under any law. This peculiarity of the military set up, mandates to ensure the enforcement of unique discipline within its rank and file which is not common to the civilian. For instance, offence like Absence Without Leave (AWOL), Malingering, Disobedience to Particular Orders or Standing Orders are offences in the military which have no equivalent in civil life. That is why the soldier is always placed at a higher pedestrian than the ordinary civilian. The reason is not to discriminate between him and the civilian but to place him on a high standard of discipline so as to carry out his constitutional role smoothly and efficiently.[21]

International law is made applicable to the soldier by virtue of the CFRN 1999[22]. The constitution provides that no treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the

[18] George, B. A Treaties on Military Law of the United States. (3rd Edition), 1915 cited in George Y.A., Op.cit,p.26
[19] 89 US (22 wall) 276 (1875)
[20] Black's Law Dictionary 8th Edition
[21] George Y.A. , Op.cit, p.27
[22] Cap A LFN 2004

National Assembly.[23] The Geneva Convention Act,[24] The Universal Declaration of Human Rights (1948), African Charter on Human and People's Rights Acts[25] and International Customs are applicable to the soldier.

International law through these treaties prescribes the rights, duties and obligations of combatants, noncombatants, belligerents, and Prisoners of War (POW), during conflict situation be it international armed conflict or non international armed conflict.

Nigeria, as a member of the United Nations, (UN) is bound by the UN charter, which requires that its members shall refrain from the threat or use of force in any member not consistent with UN policies.[26] In addition, Nigeria is a signatory to most major treaties relating to warfare, such as The Hague Convention of 1907, the Geneva Convention of 1929 and 1949, with its additional protocols of 1977, the Genocide Convention of 1948 and the Rome Statute of 1998 which established the International Criminal Court (ICC). All of these treaties set forth basic principles that govern the conduct of war; force should be directed only at targets directly related to the enemy's ability to wage war (military necessity); the degree of force used should be directly related to the importance of the target and the force used should cause no unnecessary suffering, destruction of civilian property, loss of civilian life, or loss of natural resources (humanitarian principles). In addition, the Hague Conference provided that captured towns cannot be pillaged, the property, rights and lives of civilians in armed conflict areas must be respected.[27]

[23] Section 12 CFRN 1999 Ibid
[24] Cap G3 LFN 2004
[25] Cap A4 LFN 2004
[26] Articles 2(4) and 51 of the UN Charter 1945
[27] Mukhtar A.S., The Doctrine of Exhausting Military Remedies and the Appellate Chain for the Military Justice System under the Democratic Dispensation, in the Military Lawyer, A Publication of the Directorate of Legal Services (Army) Vol.4 (2009), pp.20-40

In addendum to written treaties relating to war, international armed conflict is governed by customary international law or the common law of armed conflict. Under this, constantly evolving body of law, certain conducts are proscribed because world opinion forbids them. The customary law of war is based on the same principles embodied in the Hague Conference and subsequent treaties which reflects international agreement that actions inconsistent with those principles should not go unpunished even in the absence of express prohibitions. Many, nations, including Nigeria, have codified significant portions of the common law of armed conflict. For example the Geneva Convention Act[28] and more recently, the draft domestication bill for the domestication of the Rome Statute (1998) which have been submitted to the Federal Executive Council by the Attorney General of the Federation in 2012 to form part of laws of the federation of Nigeria. To this end, it suffices to say that the legal status of the soldier is derived from the tripartite laws namely: Military Law, Civil Law and International Law. These laws individual have spelt out the rights duties, obligations and limitation of the soldier according to their application either in peace time or in conflict situation.

1.2 Statement of Research Problem

This research is conceived out of the fact that this area of law, just like every other, is not without some problems. In Nigeria, military law is a special kind of law that is applicable to service personnel and some certain categories of civilians.[29] Under the military law, the administration of military justice system is largely characterized by abuse of human rights and command influence. The reason is because most of the laws relating to administration of justice

[28] Cap G3 LFN 2004

[29] Sections 272 & 273 of the AFA Cap A20 LFN op cit. the sections made Civilians serving in a Military Unit that is on active service subject to service law or any civilian on board military ship or aircraft.

under military law mostly emanated from military decrees and military rule which forms part of our extant Armed Forces Act.[30]

The Armed Forces (Disciplinary Proceedings) (Special Provisions) Act.[31] is another problem in the administration of military justice system. This is because apart from the fact, that it is discriminatory on the soldier, as it legalizes double jeopardy, its provisions are inconsistent with the constitution.

Again, another problem associated with administration of justice under military law is undue interference of courts martial proceedings by members of courts.[32] This is because the members of courts martial are lay-men and they are without the legal knowledge of the duty of judge not to dwindle into the arena of prosecution. This problem has largely made the Nigeria Army loss cases not on there merit but on procedural flaws.

Based on the above problems, the following research questions are formulated:

i. How does the Military Justice System operate under the Nigerian Military Law?
ii. Are there challenges under the current Military Justice System?
iii. Is there need for the reform of the Military Justice System?

1.3 Aim and Objectives of the Research

In view of the above research questions the aim of this research is to analyze the legal status of a soldier under the military law, civil law and international law. To achieve this, the objective shall cover the followings:

i. To examine the nature, scope, and purpose of the doctrine of compact in Nigeria military law.

[30] Cap A20 LFN Op Cit
[31] Cap A22 LFN 2004
[32] Mohammed vs. The Nigeria Army (1998) 7 NWLR (pt.557).

ii. To evaluate the extent of the application of these military law, civil law and international law on the soldier.

iii. To address his legal status in terms of his rights, duties, privileges and limitations under these laws.

1.4 Scope of the Research

The scope of this research work is restricted to the study of the application of the doctrine of compact vis-à-vis the legal status of a soldier under Nigeria Military Law. In so doing, the scope shall cover the following areas:

a. An examination of military law as it applies to the soldier.
b. An examination of civil law as it applies to the soldier.
c. An examination of International law as it applies to the soldier.

1.5 Research Methodology

The research methodology adopted in this research work is doctrinal. The doctrinal approach simply means a conceptual research. In other words, a researcher pays attention to written laws, judicial cases, textbooks, journals, conference papers and so forth. Under this method of research, materials are divided into primary and secondary sources. The primary sources are the written laws and judicial cases which includes the CFRN[33], AFA[34], Criminal Code, Penal Code, the Nigerian Police Act,[35] Rules of Procedure Army (1972). Others are Conventions, Charters, Protocols and Covenants. The secondary sources are: textbooks, journals, articles, unpublished papers, newspapers, articles from internet and so forth.

[33] Cap C23, Vol. 3, LFN, Op.cit
[34] Cap A20, LFN, Op.cit
[35] Cap, C19, L.F.N, 2004

1.6 Literature Review

There are many writers that wrote on the doctrine of compact in Nigeria. These work can be found either in texts books or articles published in hard or soft copy of journals. One basic fact noticeable in all the literature read is that most of the work on application of doctrine of compact to the Nigerian soldier under the Nigeria military law, are either not comprehensive or defective with some lope holes here and there.

In addition, Military Law like other Laws is not static but rather dynamic, because there have been changes, amendments, and additions in its application after these writers have written their literatures. The following analysis of the various literatures will vindicate this as thus:

Chiefe T.E.C[36] wrote extensively on the military law and military justice system in his book *"Military law in Nigeria under Democratic Rule"*. The book discuss military justice as regard pre-trial stage, trial and post trial stage of Court Martial with elaborate examples and relevant situations to explain the law. However, he raised the lapses in the military law i.e. AFA but did not proffer solution for reform of the Act which is one of the gap this thesis intends to cover.

Akinyemi O.[37] equally wrote on the legal status of a soldier in his book Jemibewon's *"Introduction to Military Law"*. He briefly discussed the legal status of a soldier in terms of his rights, duties, privileges and limitations, citing outdated laws. In view of this, we shall focus on the dynamic nature of military law and judicial pronouncement as its affects the soldier's legal status to comprehensively discuss his rights, duties, privileges and limitations to cover the lope holes left by this writer.

[36]Chief T.E.C, (2008) *Military Law in Nigeria Under Democratic Rule,* Arthill Publishers Ltd, Lagos, p.52
[37]Akinyemi O. (2010) *Introduction to Military Law,* Obafemi Awolowo University Pres Ltd Ile Ife, p. 22

Similarly, Nwankwo O.O.[38] wrote an article in the Military Lawyer Journal December 2007. The article was titled *"Operating in Accordance with Human Right Norms: The Responsibility of Service Personnel in Internal Security Operations"*. In this article, he was able the capture the rights duties, powers and limitations of service personnel during internal security operations. But he failed to discuss about the immunity granted to a soldier by law, while performing internal security operations.[39] This research intends to discuss immunity as privilege enjoyed by soldiers while on internal military operations.

Also, Adaka F.C.[40] In Military Lawyer Journal December, 2007, wrote an article on *"The Application of International Law to the Protection of Peacekeepers: A Case Study of the Peace Keeping Mission in Darfur, Sudan"*. In his article, he captured the 1994 UN Convention on the Safety of UN and Associated Personnel. He further proceeded to categorize the personnel covered by 1994 UN Convention. However, he did not take into cognizance the rules relating to privileges and immunities of the personnel on the UN mission. These privileges and immunities forms an integral part of the 1994 UN Convention that protected personnel enjoyed while on UN mission which is one of the concern of this thesis.

Bawa I.[41] wrote a very good article in the Military Lawyer Journal Volume 5, July, 2014. The article is titled *"Legal Issues in Internal Military Operations in Nigeria*". In his work, he captured a lot of issues like Internal Engagement of the Nigerian Armed Forces, Deployment of

[38]Nwakwo O.O. (2007) Operating in Accordance with Human Rights Norms. The Responsibility of Service personnel in Internal Security Operations, *The Military Lawyer Journal, A Professional publication of the Directorate of Army Legal Services,* Vol. 3 Pp 41-51

[39] Section 239 of the AFA Op cit. It stated that no action, prosecution or other proceeding shall lie against a person subject to service law under this Act for an Act done in pursuance or execution or intended execution of this Act or any regulation, service duty or authority or in respect of an alleged neglect or default in the execution of this Act, regulation duty or authority, if it is done in aid to civil authority or in execution of military rules.

[40]Adaka F.C. (2007) Application of International Law in the Protection of Peacekeepers. A Case Study of the Peacekeeping Mission in Darfur Sudan, *The Military Law Journal, A Professional Publication of the Directorate of Army Legal Services*, vol. 3 Pp. 52-65

[41] Bawa I., (2014) Legal Issues of Internal Military Operations in Nigeria. *The Military Lawyer Journal, A Publication of the Directorate of Legal Services (Army)*, Vol. 5 Pp 97-90

Soldiers for vengeful Operations and killings, Involvement of soldiers in Quelling Communal crises and so forth with examples of communal clashes of Tiv and Jukums in Benue and Taraba states. Also, vengeful operations and killings in Zaki Ibiam still in Benue state. He further discussed fundamental rights under Internal Military Operations. But one notable gap the article left, was that it appears not to be elaborate enough in the discussion of the need for soldiers to protect and preserve fundamental rights of citizens while on this Internal Military Operations. This is one of the focus of this thesis.

Adekangun L,[42] wrote an article in the Military Lawyer Journal Volume 5 July, 2014. On the topic *"Enhancing Discipline and Professionalism in the Nigerian Army through the Instruments of Court Martial in a Democracy"*. The article covered a lot of issues that bothered on courts martial procedure. He further discussed the attitude of Court of Appeal towards a court martial decision as one of the challenges of Military Justice System. However, he did not discuss the procedure provided by law for an aggrieved soldier to appeal the decision of court martial in the court of Appeal and Supreme Court. Thus we intend to cover this defect not focused on.

Ladan M.T.[43] in his article *"Applicable Legal and Human Rights Standard in Internal Security Operations in Nigeria and Perspectives of African Union and ECOWAS (2016)"* presented at the National Defence College, Abuja. In this paper he distinguishes types of internal military operations and how international legal instruments are applicable to all. He further discussed the rights, privileges, duties and limitations of soldiers of Multi-National Joint Tax

[42] Adekangun L, Enhancing Discipline and Professionalism in the Nigerian Army through the Instruments of Court Martial in a Democracy. Ibid, Pp 119-132

[43] Ladan M.T, Applicable Legal and human Rights Standard in Internal security Operations in Nigeria and Perspectives of African Union and ECOWAS, Being a Presentation made at the Civil Military Cooperation and Human Rights Observance Training of the Trainers Course for Members of the Nigerian Armed Forces and other Security Agencies, Organized by the Office of the National Security Adviser in Collaboration with the European Union Technical Assistance to Nigeria's Evolving Security Challenges, at National Defence College, on 4th – 15th April, (2016), Pp.1-20

Force (MNJTF) while on cross border operations. However, he was not comprehensive in his discussion of the privileges granted to MNJTF. We intend to cover up this gap left.[44].

Falana F., in his article *"Military Justice System and Human Rights"*[45] discussed abuse of human rights in the military justice system. He said this is done through command influence of Commanding Officers, undue interference and display of bias by Courts Martial's and detention of accused soldiers for a longer period during trial. But he did not consider the restriction of fundamental human rights constitutionally placed on the soldier in the interest of defence, public peace, security, morality and health which he ought to have considered.

Egwu in his article *"It is Time for Reforms in the Nigerian Military Justice System"*[46] discussed the nature of military justice system in Nigeria and how it is not inconformity with democracy and the constitution. He further discussed the inherent tension between human rights and military discipline and how they conflict one another. Finally, he pointed out possible areas that need reform under the military justice system. He did so, without recourse to the need for Courts Martial to give a binding decision devoid of any form of confirmation by any confirming authority which is very vital in justice dispensation. Furthermore, he did not consider the need to reform the Armed Forces (Disciplinary Proceedings) (Special Provisions) Act[47] which in all ramification is not inconformity with democracy and tenets of rule of law. Hence this works intends to focus on these loopholes.

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[44] Ladan M.T., Applicable Laws Engaging Non-State Actors in Counter-Insurgency Operations: with Particular Reference to Nigeria, Being a Paper Presented at A 3-Day International Workshop on Civil Military Cooperation and Observance of Human Rights in Internal Security Operations. Organised by the Office of the National Security Adviser and European Union Delegation to Nigeria at National Defence College, Abuja, 23-25 October, 2014, Pp.1-41

[45] Falana, F. (2015) Military Justice System and Human Rights. http://www.premiumtimesng.com accessed 10/4/17

[46] Egwu, N. (2015) It is Time for Reforms in the Nigerian Military Justice System. http://www.Thisdaynewspaperng.com accessed 10/4/17

[47] Cap A22 LFN 2004

Obilade, A.O., in his book *"Nigerian Legal System"*[48] discussed the Nigerian laws both the criminal and civil aspects applicable to Nigerian citizens. He however, fails to discuss military law which is a special law applicable to both the soldier and civilians in special circumstances. Hence we intent to cover this gap in our work left by the learned author.

Badewole in his article *"Imperatives for the Amendment of the Armed Forces Act: Nigerian Army Projection for Military Law Reform",*[49] discussed on the need for the amendment of the Armed Forces Act and the Armed Forces (Disciplinary Proceedings) (Special Provisions) Act to be inconformity with the constitution. He focused on the possible areas requiring amendment and reasons for that. However, he did not avert his mind to the fact that the Firearms Act[50] is not applicable to the soldier in the cause of his official duty and as such it is erroneous for Court-Martial assume jurisdiction to try any erring soldier under the Act.

Another important writer in the area of military law and military justice system is Kejawa A. in his book *"Military Law in Nigeria"*[51]. He dwelled on discussing the military justice system in terms of its nature and its applicability to the soldier. However, in his book, he did not discuss the challenges of military justice system in Nigeria and the way forward to remedy these challenges. Hence, this piece of work intends to focus on this lacuna.

Omachi, A.I., wrote on *"Court Martial Law and Practice in the Armed Forces of Nigeria".*[52] His work was very elaborate in discussing about Court Martial practice and procedure. One would have undoubtedly thought that as the title of his book Court Martial Law and Practice in the Armed Forces of Nigeria, he would look at all the Court Martial practice and

[48] Obilade, A.O. (2010) Nigerian Legal System. Spectrum Publishing Co. Ibadan, pp.21-32
[49] Badewole, B.M. (2009) Imperatives for the Amendment of the Armed Forces Act: Nigerian Army Projection for Military Law Reform, In the Military Lawyer, A Publication of Directorate of Legal Services (Army) Vol.4, pp.43-54
[50] Cap F28 LFN 2004
[51] Kejawa, A. (2005) Military Law in Nigeria, Captop Publication Nigeria Ltd., Ibadan, pp.1-237
[52] Omachi, A.I. (2012) Court Martial Law and Practice in the Armed Forces of Nigeria. Advance Concepts Printers, Kaduna. Pp.1-581

procedure in the Nigerian Army, Nigerian Navy and Nigerian Airforce. He however only concentrated on Court Martial practice in Airforce Courts Martial. He also did not consider the challenges Courts Martial face within the scope of law applicable in the practice and procedure. Thus we intend to cover this gap in our piece of work.

Osamor, B. is a writer on Criminal Procedure in Nigeria. He wrote on *"Fundamentals of Criminal Procedure Law in Nigeria".*[53] In his book, he elaborately discussed in details types of courts write criminal jurisdiction in Nigeria with their practice and procedure. He further discussed Courts Martial with their practice and procedure. He however did not discussed in details about Courts Martial including the practice and procedure. Hence this is one of our priority to look into in our piece of work.

Oyagha-Ukpong, G.I.O. in her book, *"Appellate Cases on the Nigerian Armed Forces Courts Martial: (A Compendium)",*[54] compiled Court Martial cases that were appealed at both the Court of Appeal and Supreme Court. She compiled and discussed the legal issues in these cases and their respective judgments. However, apart from the fact that the book is not updated with recently Court of Appeal and Supreme Court cases on Court Martial, she equally was not elaborate in discussing some of the cases she compiled. We intend to cite some of these recent cases with a view to analyze their legal principle on the development of military law in Nigeria.

1.7 Justification of the Research

The justification of this work cannot be under estimated. This is because it will address statement of the problem investigated by this researcher regarding the legal status of the soldier under his tripartite compact. Also, it will give a better understanding of the soldier in terms of his subjugation to military law, civil law and international law. The application of these laws will

[53] Osamor, B. (2004) Fundamentals of Criminal Procedure Law in Nigeria, Dee-Saga Nigeria Ltd Abuja, pp.1-442
[54] Oyagha-Ukong, G.I.O. (2012) Appellate Cases on the Nigerian Armed Forces Courts Martial: (A Compendium). Divine Connection Printing & Packaging Abuja, Pp.1-412

spelt out his rights, duties, privileges and limitation. In addition, it will discuss the constitutional roles of the soldier and how he is to perform such roles in line with rule of law. In view of this, this thesis will not only be of immense benefit and guidance to Lawyers, Soldiers, Police, Members of the Public and all relevant stakeholders, but will equally inform the public about who the soldier is and his legal status as a citizen of Nigeria.

1.8 Organizational Layout

The organizational layout deals with what this thesis intends to discuss under each chapter. In doing so, we shall give a brief summary of each chapter to this thesis in a narrative form.

Chapter one to this thesis is primarily concerned with the general introduction of the entire work. In the chapter, we are going to discuss; the background to the study, the statement of problems investigated, the aim and objectives of the research, the scope within which the research will cover, research methodology to be adopted by the researcher and the literature review of books and other relevant materials that will be used in the analysis of the work. The justification for the thesis cannot be underestimated because it will be of immense benefit to people mentioned and relevant stakeholders. Finally, the organizational layout.

Chapter two constitutes the conceptual clarification of key terms. In this chapter, the conceptual clarification is of paramount importance to clear the air on certain issues so as to give a better understanding of the thesis by any readers. These conceptual clarifications comprise; concept of a soldier (including his rights and duties); nature, scope and sources of military law in Nigeria; nature, purpose and scope of the doctrine of compact; meaning, nature and scope of Nigerian law applicable to the soldier and the nature, purpose and scope of international law applicable to the soldier in peace and conflict situations.

Chapter three deals with the legal framework for the application of the doctrine of compact under the Nigerian Military Law. In this chapter, we will discuss how the soldier's tripartite compact applies both in peacetime or conflict situations. In view of this fact, the chapter cover the followings; the development of military law in Nigeria, the development of the doctrine of compact in Nigerian Military Law, the application of Doctrine of Compact in relation to fundamental rights of a soldier, the application of the Doctrine of Compact in relation to civic rights and duties of a soldier, the application of Doctrine of Compact in internal military operations, the application of Doctrine of Compact in international military operations, and the application of Doctrine of Compact in relation to fundamental objectives and directive principles of state policies of a soldier.

Chapter four is talking about the various components for the enforcement of the Doctrine of Compact in Nigerian military law. These are summary trials, courts martial and civil courts. Under these components of enforcements, we will discuss pretrial stage, trial and post-trial stages of Military Justice System. They are: Complains by a soldier, power of the police to arrest and detain a soldier in military custody, power of the military police to arrest and detain a soldier in custody, investigation of cases, charges and basic rules of drafting charges, summary trials, court martial trials, review of summary trials, power of command, confirmation of sentence of a court martial, Appeals from Court Martial to civil courts and constitutional safeguard for fair hearing in a court martial in Nigeria. In addition, the challenges and possible areas of reforms of the AFA, and military justice system will be discussed.

Chapter five is the final chapter of this thesis. It is the chapter that will give a summary of the entire work and the findings that were made in the cause of the work. Also, in line with the

findings, recommendations shall be made as a panacea to the problems investigated before concluding the thesis.

CHAPTER TWO

CONCEPTUAL CLARIFICATIONS OF KEY TERMS

2.0 Introduction

In this chapter the relevant key concepts that will feature throughout this research work shall be cleared because they constitute the core variables of the work. The essence is for a better understanding and appreciation of this work.

2.1 Concept of a Soldier (His Rights, Duties and Privileges)

The term soldier is defined by the Oxford Advanced Learner's Dictionary, to mean *"a member of an army, especially one who is not an officer*".[1] This means that any person who is a member of the army at the lower level not commissioned as an officer, is a soldier. The A.F.A[2] on its part, defines a soldier to mean; *"A soldier, rating or aircraftman a member of the Armed Forces of or below the rank of Chief Petty officer or equivalent rank"*, from this definition, it appears that the definition of a soldier by the AFA is similar with the dictionary.

The Soldier along with the Ratings in the Nigerian Navy and Aircraftmen in the Nigerian Air force comprises the enlisted men of the Nigerian Armed Forces. These enlisted men are distinguishable from the officers' who are men that hold a presidential commission.[3] The Nigerian Armed Forces comprises of three services namely; Nigerian Army, Nigerian Navy, and Nigerian Air Force. Personnel of these services are broadly categorized into soldiers, ratings and Airmen. All these personnel whether commissioned officers or enlisted men are legally symmetrical except with some very minor variations arising from the peculiarities of each

[1] Hanby A. S. (2010), *Advanced Learner's Dictionary, International Student Edition* (New 8th Edition), Oxford University Press, p. 1417

[2] Section 291 Armed Forces Act, Cap A20 LFN Op.cit

[3] Chapter One, Definitions and General Provisions of the Harmonized Terms and Conditions of Service for Soldiers/Ratings/Airmen (2012) p. 5

services of the Nigerian Armed Forces.[4] Moreover, linguistically, the term 'soldier' in its generic sense refers to all persons who are engaged in the military business be they commissioned officers or enlisted men. Thus, the law to a large extent applies equally to all members of the Nigerian Armed Forces.[5] On this note, the word 'soldier' when used in the context of this thesis, it refers to the generic sense which constitutes both commissioned officers and enlisted men.

2.1.1 Rights of the Soldier

The CFRN 1999[6] guarantees and enshrined the enjoyment of Fundamental Human Rights by Nigerian citizens which includes the soldier. It is however, also a truism that regarding the soldier, fundamental human rights are not absolute. Most of the rights which civilians enjoy absolutely are often times circumscribed, restricted or derogated by the constitution in the case of the soldier.[7] The reason behind this state of affairs is simple and straight forward. It does not originate from the belief that a soldier is less human, but from the need to continue to protect and safeguard society and the sovereignty of the nation. A soldier is a man under arms and the last bastion of national defence[8], so he must at all time be available to continue to discharge his duty to the state. This is part of the additional responsibility he had added to his legal status by becoming a soldier distinct from the civilian. A soldier belongs to a special and very restricted class of citizens and he is not on the same regimental and disciplinary pedestal as civilians. On this note, in the interest of defence, public safety, public order, public morality or public health, the soldier's right can be constitutionally restricted and derogated in a democratic society[9] and it

[4] Cap A20. LFN, Op.cit
[5] Musa, S. I., (2015) *The Soldier and the Law,* (Unpublished) Being a Paper Presented to Members of Course 26/2015 Warrant Officers' Academy, Held at Armed Forces Command and Staff College Jaji Military Cantonment from Wednesday 6th to Friday 8th May, p. 4
[6] Cap. C23, Vol.3, LFN, Op.cit
[7] Ibid
[8] Musa, S. I. Op. cit p.21
[9] Cap. C23, Vol.3, LFN, Op.cit

is regarded justifiable. This position is not only peculiar to the Nigerian soldier. It is a worldwide phenomenon so as to make him available always to perform his primary function of defence of the sovereignty of his nation. For instance the European Court of Human Right in the case of ***Engel vs Netherlands***[10] while deciding on a case of human right and military discipline held that: "*Of course, freedom of expression applied to service men just as it does other persons…however, the proper functioning of an army is unimaginable without legal rules designed to prevent service men from undermining military discipline".*

The above decision, buttresses the position that it is universally accepted that the fundamental rights of soldiers could be lawfully abridged in the furtherance of military discipline. This position is justified in a non-conscript army like the Nigerian Army where personnel enlist or get commissioned voluntarily with the full knowledge of restrictions of their rights. This view point was again validated by the European Court of Human Rights in ***Kalac vs Turkey***[11] while commenting on this issue stated that: "*In choosing a military career, mister Kalac was accepting on his own accord a system of military discipline that by its very nature implied the possibility of placing restriction on certain of the rights and freedoms of members of the Armed forces limitations incapable of being imposed on civilians"*[12]. The EHRC decision has gained constitutional recognition in Nigeria. In the wordings of section 45(1) CFRN 1999[13] it states that nothing in sections 37, 38, 39, 40 and 41 of this constitution shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health, for the purpose of protecting the rights and freedom of other persons. In view of the above constitutional provision, it is crystal clear that the

[10] Engel vs. Netherlands cited in Musa S. I. Op. cit p.22
[11](1999) 27 EHRR 552
[12] Ibid
[13] Cap C23 Vol.3 LFN Op.cit

right of the soldier can be derogated or restricted to enable him perform his duties to the state and it is justifiable.

2.1.2 Duties of the Soldier

The roles of the soldier to the state are derived in section 217(2)[14] CFRN 1999 which provides as follows:

a. Defending Nigeria from external aggression
b. Maintaining her territorial integrity and securing its borders from violation on land, sea and air.
c. Suppressing insurrection and acting in aid of civil authorities to restore order when called upon to do so by the president subject to such conditions as maybe described by an Act of the National Assembly
d. Performing such other functions as may be prescribed by an Act of the National Assembly.

The constitution makes it very clear that the above listed roles of the Armed forces must be performed *"subject to an Act of the National Assembly"*[15]. Pursuant to this provision, parliament has enacted the Armed Forces Act[16] as the law governing the operations and administration of the three services of the Nigerian Armed forces. It should be remembered that the military being is a creation of the constitution, is expected to conduct all its affairs within the ambit of the law. This position is emphasized by the constitution in section 1(1) were it said: *"This constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria".*[17] The implication of this law is that the

[14] Cap C23 Vol.3 LFN Op.cit
[15] Sections 217(1) & (2) CFRN 1999 Ibid
[16] Cap A20 LFN Op cit
[17] Ibid

military is not exempted from this powerful regulatory effect of the constitution and every other law enacted in accordance with its provisions. The Nigerian military in recognition of this reality, has with varying degree of success, strived to conduct all its affairs in accordance with the constitution and other extant laws. These laws include both municipal laws and precepts of international law.[18] Contrary to public perception, obedience to law and observance of due process is engraved in the soul of the military. Laws are more prone to be obeyed in the military than outside it. The few instances of apparent or perceived disobedience are more of exceptions than the rule. For example, during the campaign period of the 2015 general elections, the general public had a strong belief and perceptions that the military had compromised its constitutional roles by surreptitiously involving itself into partisan politics. This perception did not only smear the reputation of the military but equally brought about loss of confidence on them by the public in the performance of their constitutional roles. Furthermore, this believed compromise led to a serious acrimony and heated argument as to whether or not it was constitutional to deploy the military for the 2015 general elections by the general public and the political parties. The judiciary equal gave a supporting decision to this belief where it stated that it is unconstitutional to deploy the military for the 2015 general elections.[19] The arguments and judicial decisions came up at a time when the country security situation was seriously threaten by activities of insurgency. A Sokoto High Court in an earlier decision on January 29, 2015 by Justice R.M. Alkawa said "*He has barred the use of soldiers in the conduct of elections".*[20] *In the same vein, Justice Aboki of the Court of Appeal in the Ekiti State Governorship Election Petition, said "the*

[18] Abubakar A.Q. (2009), Military Justice System in a Democracy, *The Military Lawyer*, A Publication of Directorate of Legal Services (Army) October, Vol.4 pp.222-239
[19] Taiwo A, PDP Insist on soldiers for Elections, why APC kicked, by Fani-Kayode, p.5 Daily sun Newspapers, Friday, February 20, 2015
[20] Ibid

use of Armed forces in the conduct of elections was a breach of both the constitution and the electoral laws".[21]

Taking a close study of these two judicial decisions above, we are of the opinion that the reason for these decisions was because the military did not conduct its roles in accordance with tenets of rule of law and laid down procedures. Because where they conduct their duties outside the law, it is expected that the civilians will lose confidence in them. If for instance, they remained apolitical in conductions of their constitutional roles, the civilians will not only build confidence in them but will also clamour for their deployment for the elections where the state refuses to deploy them. It should be noted that it does not make so much news when the military obey laws as opposed to when they are perceived to have disobeyed. This is because obedience is the norm and disobedience is a deviation from character. As the saying goes, "*if a dog bites a man, it is not news but if a man bites a dog, it is news*".[22] Hence, it is a duty on the military to abide fully by the tenets of rule of law in performance of their constitutional roles. The Traditions Custom and Ethics of the Nigerian Army states that; *"Military personnel will show and demonstrate absolute loyalty to the country and uphold the constitution, laws and regulations of the Federal Republic of Nigeria"*[23] Proceeding from a cultural background of this nature, it would amount to heresy within the military to operate outside the dictates of the law. Personnel who engage in such renegade conduct are regarded and treated as outlaws in accordance with military justice under democracy.[24]

[21] Ibid
[22] Abubakar A.Q. op.cit pp.222-239
[23] Ibid
[24] Ibid

2.1.3 Privileges of the Soldier

Just as the law has made a soldier subject to additional legal burdens, so has it granted some reprieve in the form of privileges and exemptions to enable him better perform his duty as a soldier. The privileges and exemptions are contained in the A.F.A[25] from section 235 to section 239 as follows:

a. Section 235[26] – Exemption from tolls etc
b. Section 236[27] – Exemption from levying of execution on property etc.
c. Section 237[28] – Exemption as to arms and explosives
d. Section 238[29] - Immunity from proceedings or judgment where appearance is not entered.
e. Section 239 – Indemnity for action in aid of civil authority and military duty.[30]

These privileges are not granted to the soldier in his personal capacity but to enhance or at least to remove some impediments so as to enable him efficiently discharge his military duties. The exemptions and privileges are discussed below:

i. ***Exemption From Toll:*** Section 235 of the AFA exempt soldiers on duty, their official or government owned vehicles, horses or other animals, aircraft and naval ship or vessel from paying tolls or duties. The exemption is still operative even if such materials are not owned by a member of the armed forces on duty. The exemption also covers goods belonging to the federal government carried on such vehicles and vessels. The exempt tolls include harbor, dues, anchoring or mooring charges, port duties, airport taxes etc. for embarking or disembarking on any pier, wharf, quay, ferry, bridge, roads or any other

[25] Cap A20 LFN, Op.cit
[26] Ibid
[27] Ibid
[28] Ibid
[29] Ibid
[30] Ibid

landing place in Nigeria. It should however, be noted that a soldier who is off duty and driving his personal vehicle or riding his horse, donkey or camel on which he is carrying his personal goods is obliged to pay tolls and other duties. The exemption will still avail where a soldier is using his personal vehicles while on duty. For example while commuting to his place of duty, he is still exempted from payment of toll. The reason is that the law is not concerned about the vehicle used but whether the soldier is on an official duty. He may be in his private vehicle and mofty and as well as on official duty. Therefore, for the soldier to enjoy this immunity, he must show that at the time of payment of tolls he was on an official duty and not personal affairs.

ii. ***Exemption from Levying of Execution:*** Section 236 of the AFA protects service or public property in the possession of a soldier from court seizure or execution as a result of a court order, judgement or decree entered against those personnel. This exemption only protects service or public property. Execution could still be levied on the personal property of soldiers pursuant to a court order, judgement or decree. For instance where a soldier is driving a Nigerian Army vehicle, and he is indebted to someone who has obtain a court judgment against him, this judgment cannot be executed on the Nigerian Army vehicle because the soldier is not the owner of the vehicle, the service only entrusted the vehicle to him to use it for his work. However, if it is his personal vehicle, the judgment can be executed on it.

iii. ***Immunity from Proceedings or Judgment where Appearance is not Entered:*** This exemption at section 238 of the AFA takes cognizance of the itinerant nature of military service which entails constant movement from one military post to the other. It seeks to protect a soldier against the antics of any litigant who may attempt to take undue

advantage of the absence occasioned by military service to obtain default judgment against a soldier.

To this end, no court is permitted to enter a judgment against a soldier who could not attend court, due to exigency of military service. A certificate of absence duly executed by the Commanding Officer or Appropriate Superior Authority[31] (A.S.A) presented before the court shall be sufficient evidence of such absence. Once again, it should be noted that only lawful absence on military duty approved by the military authority will entitle the soldier to the benefit of this exemption. A soldier who absent himself without leave (AWOL) or otherwise on a frolic of his own is not covered by this exemption, default judgment can be served on him.

iv. ***Exemption as to Arms and Explosives:*** Section 237 of the AFA *"for the purpose of the Armed Forces"*, exempts members of the Armed forces from the provision of any enactment relating to the storage, possession or transmission of fire arms. This exemption is created to enable soldiers deal confidently with their *"tools of trade"* being weapons, ammunition and explosives without the risk and anxiety of falling prey to any penal enactment criminalizing such activities. The section 237 AFA only covers such activities carried out *"for the purpose of the Armed Forces"*. The provision only offers protection in respect of official military weapons, ammunition and explosives which should be stored in official holdings like arm stores and magazines. The exemption does not entitle a soldier to possess or store personal weapons, ammunition and explosives for his personal use. This is what the law envisages. However, the Court of Appeal gave a

[31] Section 128 of AFA Op. cit provided that Officers who are to act of Appropriate Superior Authority (A.S.A) are: The Commanding Officer of the accused and any officer of the rank of Brigadier or above or Officer of corresponding rank or those directed to so Act under whose command the person is for the time being.

decision in the case of ***Major Iyella vs. Nigerian Army***[32] to the effect that storage of firearms, ammunitions and explosives in the house of a soldier other than the arms store or magazine was equally covered by section 237 AFA. It is in our view that the Court of Appeal in delivering its judgment, did not take into consideration the importance of what was meant by *"for the purpose of the Armed Forces"* in the Act. If this was considered, obviously a soldier will not for security reasons be permitted to store such a delicate munitions like firearms, ammunitions and explosive in his house. It should also be remembered that munitions cannot be kept anywhere because it requires a very strict handling with care to evade possible explosion. However, this is the law interpreted by a competent court no matter how the Nigerian Army feels, it is a law that can only be overruled either by the Supreme Court or the Court of Appeal.

v. ***Indemnity for actions in Aid of Civil Authority and Military Duties:*** Section 239 of the AFA aims to protect a soldier from any legal backlash that may arise from the judicious and lawful performance of his military duties, especially when acting in aid of civil authority in Internal Security Operations. Soldiers are by this provision immunized against prosecution, civil action or proceedings for anything done in the course of their military duty. Only authorized actions are protected. The indemnity granted to soldiers acting in aid of civil authority at section 239 of the AFA would not avail or protect a soldier from prosecution or civil action for his misdeed arising from an unauthorized duty or; when on an authorized duty, he goes outside his mandate on a personal frolic he will be criminally responsible for his actions or inactions. Going by this constitutional provision, it is aimed at not only guaranteeing the right of life of the citizen but instances whereby death is caused by a person but yet it is justifiable in law and as well exculpate

[32] (2008) 7-12 SC. 35

the person from any civil or criminal prosecution. The soldier needs this immunity to perform his job smoothly because his tools of business are fire arms, ammunitions, and explosives to carry out his constitutional roles. Hence the significance of this immunity section. As a matter of fact, it is obvious that section 239 of the AFA[33] derives its source from section 33 (2) CFRN[34] which stated: *A person shall not be regarded as having been deprived his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary:*

a. *For the defence of any person from unlawful violence or for the defence of property;*[35]
b. *In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or*
c. *For the purpose of suppressing a riot, insurrection or mutiny*

2.2 Nature, Scope and Sources of Military Law in Nigeria

The nature of military law in Nigeria is prescribed by statute governing the armed forces and their civilian employees.[36] Military law is branch of the law that regulates a government's military establishment. It is entirely penal or administrative in nature and includes, in it military and civil offences. It in no way relieves military personnel of their obligations to their country's civil code or to the codes of international law. It creates unique offences like mutiny, insubordination, desertion, misconduct and other offences called military offences which are not codified in civil criminal law. It subject service personnel to its jurisdiction including civilian employees. Offenders of these military offences may be subject to Court Martial or Summary

[33] Cap A20 LFN, Op.cit
[34] Cap C23 Vol. 3 LFN, Op.cit
[35] Liya vs State (1998) 2 NWLR pt. 72, p. 529 and also Nwazoke vs. State (1998) 1 NWLR pt. 72, p. 529. In these two cases, the court held that reasonable, necessary or commensurate force may be used in self-defence, defence of another person, or in defence of property.
[36] Section 272 of the AFA Cap. A20 LFN 2004

Trial by the Commanding Officer.[37] The nation's armed forces are governed by military law. Military law includes statutes enacted by the National Assembly and regulation promulgated by the President as Commander in Chief (C-in-C), by the minister of defence, polices formulated by any of the arm of the armed forces (Nigerian Army, Nigerian Navy and Nigerian Airforce) the inherent authorities of Military Commanders. Military law is one type of military jurisdiction and is distinct from martial law, which is the temporary governance of the civilian population in enemy territory by a belligerent military force. The sources of military law are the constitution, other municipal laws, and international law.

Enforcement of military law is in the hands of Commanders. Minor offences may be handled by non-punitive disciplinary measures. The AFA[38] which gives life to the Rule of Procedure Army (1972)[39] contains provisions which include due process rights such as the rights to remain silent[40], to call witnesses[41] and cross-examine adverse witnesses[42], to consult with counsel[43] and have an interpreter[44] and to appeal.[45] Non-judicial procedure or trial by a commander was a response to a perceived need for a process to dispose of minor offences without permanently stigmatizing the person convicted.[46]

The military justice system is the primary legal enforcement tool in military law. It is similar to but separate from the civilian criminal justice system. The AFA[47] is the principal body

[37] Sections 115 & 116 AFA, Ibid
[38] Cap A20 LFN 2004
[39] Section 181, Ibid
[40] Section 36(11) of CFRN 1999 Cap C23 Vol.3 LFN Op.cit
[41] Rules 49 and 56 of Rules of Procedure (Army) 1972
[42] Rules 53 and 54 Ibid
[43] Rule 78 Ibid
[44] Section 36(e) of CFRN 1999 Cap C23 Vol.3 LFN Op.cit
[45] Section 184 of AFA Cap A20 LFN Op.cit
[46] Muktar, A.S. The Doctrine of Exhausting Military Remedies and the Appellate Chain for the Military Justice System under the Democratic Dispensation, in the Military Lawyer, A. Publication of Directorate of Legal Services (Army), (2009) pp.20-42
[47] Cap A20 LFN Op.cit

of laws that apply to service personnel. Court Martial interprets and enforce it. Many countries have separate and distinct bodies of law that govern the conduct of members of their armed forces. Some other countries use special judicial system and other arrangements to enforce those laws, while others use civilian judicial systems. In Nigeria, the nature of our military law and military justice system is the type that makes special judicial arrangement like Courts Martial and Summary Trial to try offences they are both military and civil in nature. Legal issues unique to military justice includes the preservation of good order and discipline, the legality of orders and appropriate conduct for service personnel. It should be noted that military justice system is the main instrument of enforcing discipline in the military which shall be discussed it in full later in this work with its peculiar challenges.

2.2.1 Scope of Military Law

The scope of military law can be determined from the applicable laws to the soldier, like Armed Forces Act[48] (AFA) civil laws and international law. The AFA is the principal enactment applicable to the soldier as his special laws distinct from the civilian. However, civilians in certain circumstances are subject to its provisions.[49] The circumstances are: if the civilian is serving in a unit that is on active service or if he is on board military ship or Aircraft as a passenger. The act, was enacted in 1993 to bring uniformity in the administration, control, maintenance and discipline of members of the armed forces. It repealed the Acts of the various services, namely the Nigerian Army Act 1960, the Navy Act 1964 and the Airforce Act 1964. The relevant areas of the AFA for the administration of military justice are sections 42-202 and the first schedule to the Act, parts I and II deals with administration. Part III-XI deals with command, control and maintenances of the Armed Forces. Part XVIII-XXII deals with

[48] Ibid
[49] Section 272 and 273 AFA

enforcement, privileges, application of the Act and miscellaneous provisions. The Armed Forces Act is categories into four schedules. The First Schedule deals with offences of which an accused may be convicted by Court Martial. The Second Schedule deals with supplementary provisions as to payment for requisitioned vehicles. Third schedule deals with Armed Forces services' Corresponding Rank Structure (Officers). Finally the fourth schedule deals with Armed Forces Service Corresponding Rank Structure (Soldiers, Rating and Airmen).

As regard civil law, the constitution and all other statutes enacted by the National Assembly are applicable to the soldier. Section 1(1) CFRN 1999[50] provides that *"this constitution shall have a binding force on any person or authority throughout the federation".* Obviously, the provision of this constitution did not in any way exempt the soldier from the binding authority of its provision. Similarly, section 114 of the AFA[51] explicitly subjected the soldier to the jurisdiction of civil offences codified in the civil criminal justice system. In the same vein, section 15 of the Criminal Code Act[52] has subjected the soldier to all its provisions. All other civil laws applicable to the civilian be it criminal or civil, is equally applicable to the soldier. Except that the Firearms Act[53] is not applicable to him by virtue of the nature of his job.

Under the international law, the constitution provides that *"no treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly"*[54]. This means that all treaties that Nigeria is a signatory to and has been domesticated is applicable to the soldier. For example, the Geneva Convention has been domesticated by Nigeria as Geneva Convention Act[55] and its

[50] Cap C23 Vol.3 LFN Op.cit
[51] Cap A20 LFN Op.cit
[52] Cap. G3 LFN 2004
[53] Section 38 of the Firearms Act Cap F28 LFN 2004
[54] Section 12 CFRN 1999 Cap C23 Vol.3 LFN Op.cit
[55] Cap G3 LFN 2004

provisions are fully applicable to the soldier. However, there is no report of any Nigerian soldier that have been tried and convicted for an offence by the International Criminal Court (I.C.C). The International Customs of global standard are applicable to him. Nigeria is a signatory to the Rome Statute, but it is yet to domesticated. However, steps are been made for the domestication of the Rome Statute. To this end, we shall safely conclude that the scope of military law encompasses the military law itself, civil and international laws.

2.2.2 Sources of Military Law

The sources of military law in Nigeria may be subsumed into four main divisions. These divisions are namely; Nigerian Legislation, Received English Law, Judicial Precedent and International Law.[56] These sources are enumerated and discussed as follows:

a. Nigerian legislation
b. English law both received and extended to Nigeria
c. Judicial precedents
d. International law

a. Nigerian Legislation

The primary Nigerian legislation is the C.F.R.N 1999[57] which is the source of all laws including military law in Nigeria. It is the grundnorm, which gives life to all other laws and any inconsistency with its provisions by any law including the military law, shall be null and void to the extent of its inconsistency.[58] Section 4 Schedule 2 C.F.R.N 1999 specifically placed defence of the nation in the exclusive legislative list and the National Assembly is empowered to make laws on it. There had been previous constitutions since Nigeria's independence namely, the Nigerian Constitution 1960, the Republican Constitution of 1963 and the Constitution of Federal

[56] Chiefe T.E.C. Op.cit, pp.31-48
[57] Cap. C23, Vol3, L.F.N, Op.cit
[58] Section 1(3) C.F.R.N 1999, Ibid

Republic of Nigeria 1979 all have similar feature and provisions. Other Nigerian legislations are laws enacted by the National Assembly plays a vital role in the military law and justice system laws such as the Evidence Act[59] which is applicable to the court martial proceeding of the armed forces by virtue of section 143(1) of the A.F.A,[60] The Criminal Code Act[61] and The Penal Code[62] and all other civil laws are made applicable respectively by virtue of section 114 of the A.F.A.[63]

The A.F.A[64] is today, apart from the constitution, is the main source of military law in Nigeria; it is an enactment of the National Assembly. It repealed the hitherto Nigerian Army Act 1960, Navy Act 1964 and the Airforce Act 1964[65]. Section 181(1) of the A.F.A[66] made the British Rules of Procedure (Army) 1972, the Court Martial Procedure for Royal Navy BR11 and the Rule of Procedure (Airforce) 1972 applicable to the Nigerian Armed Forces in Courts Martial and Summary Trial Procedures.

It is important to note that the other enacted decree not repealed, specifically for the discipline of members of the armed forces are equally part of Nigerian legislation. The included the Military Courts (Special Powers) Decree No.23 of 1968, Military Courts (Special Powers) Decree, Armed Force (Disciplinary Proceedings) (Special Provisions) Act. Other Nigerian legislations include subsidiary legislations which consist of Rules, Regulations, Orders and Instruments that were made in exercise of the enabling powers contained in the C.F.R.N 1999[67] and the A.F.A,[68] it empower the president or the National Assembly to make laws on them as they relate to the armed forces, for the effective command, control, administration and discipline

[59] Evidence Act, Cap.E14 LFN, 2011 (as amended)
[60] Cap. A20, L.F.N. Op.cit
[61] Cap. C38, Vol.4, L.F.N 2004
[62] Cap. P1, Vol. 12 L.F.N, 2004
[63] Cap A20, L.F.N, Op.cit
[64] Ibid
[65] Section 290 AFA Cap. A20 LFN 2004
[66] Ibid
[67] Cap. C23, Vol 3, L.F.N, Op.cit
[68] Cap. A20 L.F.N, Op.cit

of the armed forces. This are provided in Sections 5(5), 217(2) and 218 C.F.R.N 1999[69] and sections 8(4), 22, 26, 180, 197(1), 198(3) and 199 of the A.F.A.[70] It needs to be stressed that it is under these subsidiary regulations that the Harmonized Term and Conditions of Service Officers (2012) and the Harmonized Terms and Conditions of Service Nigerian Armed Forces Soldiers, Ratings and Airmen (2012) were enacted. In the same vein, the Board of Inquiry and Related Subjects as well as Traditions, Customs and Ethics of the Nigerian Army (2005) were also enacted under this subsidiary legislation.

b. English Law

The English laws applicable to the Nigerian Military are in two groups.[71] The first group consists of the Received English Law namely, the Common Law, the Doctrines of Equity and Statutes of General Application enforce in English on 1 October 1960 and extending to Nigeria.

In the first group, it may be mentioned that the British Army Act 1881 was made applicable to Nigeria by section 101 of the West African Frontier Force Ordinance 1916. *"The Army Act 1881, all Acts amending same and any article of war or rules made pursuant of such Acts and for the time being in force, shall, as to the provision therein contained respecting discipline, apply."* It is in our view that the main thrust of the provision is that the British Army Act 1881 and the rules made under it for the discipline of members of the army in England were applicable to the colonial army in Nigeria. Also, common law principles, for instance, which were still in force in England on 1 January, 1900 still apply in Nigeria unless any of the principles have been expressly abrogated by Nigerian legislation.[72] The application of such

[69]Cap. C23, Vol 3, L.F.N, Op.cit
[70] Cap A20 LFN, Op.cit
[71] Chiefe T.E.C Op.cit, p.31
[72] Achike, O. Op cit p.38 cited in Chiefe, T.E.C Op.cit p.36

common law principles in Nigeria was reaffirmed by McCardic J. in ***Heddon vs Evans,***[73] where he held that a person by enlisting as a soldier does not cease to be a citizen. The doctrines of equity, which are usually intended to reduce the vigours of common law also applies to Nigeria.

On the second group which is the English law extended to Nigeria, these are statutes and subsidiary legislations made on or before 1 October 1960 and introduced into Nigeria by Nigerian legislation. Some of these laws dealing with the military were the Royal Nigerian Military Forces Act 1953; special reference should be made to the British Army Act 1955 which was introduced into the Nigerian Military by the Royal Nigerian Military forces Act No. 26 of 1960.[74] Hence it is humbly submitted that with the introduction of the British Army Act 1955 into the Nigerian military, the rules made under the Act became useful guides in the application of the Royal Nigerian Military Forces Act 1955. Furthermore, with the attainment of statutes of independence by Nigeria, most of these laws were abrogated. However laws like the Queens Regulations, Rules of Procedure Army (1972) the Court Martial Procedure for Royal Navy BRII and the Rules of Procedure Airforce (1972) are retained as the extant laws applicable in various Courts Martial and Summary Trials of the armed forces.[75]

c. Judicial Precedence

It appears that there was dearth of military case law in Nigeria before Nigeria's independence, as none could be found in the former West African Court of Appeal Reports. The trend continued after independence, consequently, in ***Pius Nwaogu vs The State***[76] the Supreme Court made reference to leading English cases of ***Keighly vs Bell***[77] and ***R vs Smith***[78] because

[73] (1919) 35 T.L.R 642
[74] Chiefe, T.E.C Op.cit p.36
[75] Section 181 AFA
[76] (1972) 3, S.C.6
[77] (1886) English Rep. 781
[78] (1900) 17 S.C.R. 561

there were no local decision to rely on. Indeed, a pioneer work on military law observed that as a result of a conspicuous lack of military law cases decided by the Nigerian Courts, as well as in the British West African countries, the courts in Nigeria have always felt obliged to decide cases before them by reference to military law case of other countries, especially British and the United States of America.[79] However, from 1st October, 1979 to 31st December, 1983, when Nigeria was under civilian administration, a number of cases on military law were decided by the civil courts. These cases have no doubt provided the much needed case law on military law. One of such cases is ***Captain S.A. Asemota vs Colonel S.L. Yusufu***[80]**,** where the court granted the application of the applicant for the issue of a writ of habeas corpus for his release from prison detention. His detention was declared unlawful and unjustifiable. Another case is that of ***Major Ledejobi vs The Attorney General of the Federation***[81] which like the Asemota's case, dealt with the fundamental human rights issues of the officer.

Happily, from 29 May, 1999 when the military handed over the governance to a democratically elected government, some military personnel have challenged judgments of the courts martial and summary trials, in the civil courts. Judgment has been given in many of the cases at the federal High Court, the Court of Appeal and the Supreme Court. Consequently, a substantial size of case law on military law has been built which can be relied upon as judicial precedents. One of the cases is ***Colonel Mohammed vs The Nigerian Army***[82] where the decision of the Court of Appeal on the right to fair hearing was upheld by the Supreme Court.[83] Another case is the ***Nigerian Airforce vs Wing Commander Shelcete,***[84] in which the Supreme Court

[79] Achike, O. Op.cit p.40
[80] (1982)3 N.C.L.R. 419
[81] (1982) 3 N.C.L.R 563
[82] (1998) 7 .N.W.L.R (Pt. 557) 231
[83] Supreme Court Judgment No. S.C/144 delivered on 11 July, 2002.
[84] (2003) Vol. 2 M.J.S.C. 63

allowed the appeal of the Nigerian Airforce and held that the power to convene a court martial is delegable. The court of Appeal had earlier quashed the conviction of the officer by a court martial, on the ground that the court martial which tried him was convened by a subordinate of the convening officer who according to the A.F.A could not delegate such powers. The Supreme Court also allowed appeal of the ***Nigerian Airforce vs Ex-Wing Commander L.D James,***[85] holding that the power to convene a court martial can be delegated. Also in the case of ***Nigerian Airforce vs Obiosa***[86] the Supreme Court reiterated that the prosecution in a criminal trial has the burden of proving its case beyond reasonable doubt. One tremendous effect of military cases adjudicated by the civil court is that military law is gradually developing to meet up with the standard and practice in a democratic rule. Another is the subjugation of the military authorities to the jurisdiction of civil courts and constituted civil authorities as opposed to what the norm was during the days of military rule in Nigeria.

d. International Law

The soldier when deployed on either internal or external operations is bound by the laws of war and international standard in the conduct of the operations. The laws regulate and limit the conduct of operations by acting as checks against arbitrary use of force. They are intended to minimize unnecessary suffering by combatants and non-combatants during war.[87] The laws of war and international law are therefore sources of military law in Nigeria. These laws include the followings:

i. The four Geneva Conventions of 1949

ii. The two Additional Protocols of 1977 to the Geneva Convention of 1949.

[85] (2003) L.R.C.N. 131 para Z-ee
[86] (2003) Vol.3 M.J.S.C. 18
[87] Final Report to Congress of The U.S.A on Conduct of the Persian Gulf War, April 1992, Appendices A-S p.02 cited in Chiefe, T.E.C op.cit p.44

iii. The decisions of:

1. The International Court of Justice (ICJ)

2. The International Criminal Court (ICC)

iv. Multilateral and Bilateral agreements of which Nigeria is a signatory and have bearing on military service or operations.

The four Geneva Conventions of 12 August 1949 for the protection of war victims are as follows:

i. Geneva Convention for the Amelioration of the condition of the wounded and sick in Armed forces in the field.

ii. Geneva Convention for the Amelioration of the wounded, sick and shipwrecked members of Armed Forces at Sea.

iii. Geneva Convention Relative to the treatment of Prisoners of War.

iv. Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

The two Additional Protocols of 1977 to the Geneva Convention of 1949 are to supplement the 1949 Geneva Conventions and modernize the laws of war. Protocol 1 deals with the laws of war in international armed conflicts, while protocol 2 addresses the laws of war applicable in internal armed conflicts.

It is worthy of note to mention that the four Geneva conventions and the two additional protocols of 1977 have been formally given effect in Nigeria by the enactment of the Geneva Conventions Act.[88] In sum, the conventions and protocols which are now Acts of the National Assembly, elaborately spell out the laws of armed conflicts on the use of force and the legal

[88] Cap. G3 LFN Op.cit

implication of disregarding rules regulating the means and methods of warfare, among other things.[89]

Countries sometimes can enter into agreements either on bilateral or multilateral basis. When such agreements relate to military cooperation, service, assistance or operation with Nigeria the agreements form part of Nigeria military law and consequently a source of our military law.[90] An example is the Multi National Joint Task Force formed in June 2015 by Nigeria, Cameroon, Niger, Chad and Republic of Benin to counter Boko Haram insurgency in the Lake Chad Basin of West African sub-region.

The decision of the I.C.J regarding dispute presented to it by states for adjudication, no doubt have over the years contributed to the development of military law, since some of those issue relate to the laws of war. Finally, the decision of the I.C.C. which was set up by the Rome Statute 1998, to try violators of international humanitarian law, is also a source of military law. It is submitted that since Nigeria has rectified the Rome Statute 1998, she is bound by its jurisdiction. In effect, erring soldiers of crimes of international concern who are neither investigated nor prosecuted in Nigeria can be brought for prosecution before the ICC.

2.3 The Legal Status of the Nigerian Soldier

Any member of the military service is first and foremost a citizen of Nigeria.[91] His Nigerian citizenship entitles him to all the attendant rights and privileges; and also makes him subject to the liabilities of the fundamental laws of the country as contained in the constitution, civil laws, international law and military laws. Upon enlistment and the Oath of Allegiance, the soldier have in addition to his inherent rights, duties and obligations as a citizen; made himself

[89] Takai, D.B. (2002), *"The Legal Perspective of Counter-Revolutionary Warfare* (Unpublished) Being a lecture delivered to the Officers of Long Course XI of N.N.S Quarra on 8 Nov., p.26

[90] Ibid, p.26

[91] Akaagerger, J. Gravity of Offences and the Doctrine of Necessity to Enforce Discipline under the Military Law, in the Military Lawyer, A Publication of Directorate of Legal Services (Army) (2009) pp.185-197

liable to the Armed Forces Act and other relevant military laws and regulations. He remains entitled to the enjoyment of the provisions of the constitution, however with some restrictions in the enjoinments of his rights. This legal status he acquires is called compact. Achike O. described the legal status of the soldier as *"as an enigma and it is generally referred to as the Doctrine of Compact"*[92]. The subjugation of the soldier to civil law is also amplified by section 15 of the Criminal Code Act[93] which states that: *"members of the Armed Forces and Police are subject to the special laws relating to the force to which they belong, but are not exempt from the provisions of this code".*[94] The implication of this statute is that the soldier upon joining the military, he is not exculpated from the jurisdiction of civil criminal laws and Civil Courts. This has been the position since colonial rule in Nigeria cursory examination of old English case will reveal this.

Historically, the term "compact" is traceable to the old English case of ***Grant v. Gould***[95] where it was held that *"a soldier…does agree and consent that he shall be subject to the military discipline and he cannot appeal to civil court to rescue him from his own compact".*[96] The effect of this dictum is that once a person joins the military service, he has added on to himself additional responsibilities to his hitherto civil ones and as such, subject himself to jurisdiction of both civil courts and military courts. The dictum was further amplified by Wiles J. in the case of ***Dawkins vs. Lord Rokeby***[97], where he said that:

> But with respect to persons who enter into the military state, who takes his majesty pay and who are consent to act under commission although they do not cease to be citizens in respect of responsibility, yet they do by a compact which is intelligible and

[92] Ibid
[93] Cap C38 LFN 2004
[94] Ibid
[95] (1972) Henry Blackstone 69
[96] Ibid
[97] (1866) 4 F and F 806 at p.832

> which requires only the statement of it to the consideration of anyone of common sense, becomes subject of military rule and discipline.[98]

Going by these two old English cases cited above, it is evidenced that the legal status of the soldier has hitherto been subjected to civil laws and military laws. This English law position has been adopted in Nigeria by the Court of Appeal in the case of ***Idakwo v. Nigerian Army***[99] where the court held that:

> It is beyond doubt that by the provision of section 114(1) of the Armed Forces Decree No.105 of 1993, a person subject to service law can be charged and convicted for any civil offence created under any enactment. Therefore, a person subject to service law is liable to be charged with an offence under any other enactment and be punishable by virtue of section 114(1) of the Armed Forces Decree No.105 of 1993.[100]

Therefore, the effect is that upon acquisition of military status by a soldier, both civil and military law governs the soldier. If he commits any civil offence, he may be tried by the civil courts or military Courts Martial as the case maybe.

Regarding international law, the soldier is subject to all international laws Nigeria is a signatory to or international customs. This position as earlier stated has been enshrined in our constitution. Section 12 of CFRN 1999[101], the section states that for any treaty entered into by the Nigerian federation to have the force of law, such a treaty must first be enacted into law by the National Assembly. What this law means is that once a treaty has been domesticated by the National Assembly, becomes an integral part of Nigerian law and as such it's binding on the soldier. For example, the Geneva Convention (1949) is domesticated in Nigeria and today called

[98] Ibid
[99] (2004) NWLR pt.857 p.249 at 270
[100] Ibid
[101] Cap C23 Vol. 3 LFN 2004

the Geneva Convention Act[102]. The Act deals with the International Humanitarian Law in the prosecution of warfare. It equally ensures the protection and preservation of International Human Rights. A violation of this Act, will be tantamount to crimes of international concern and as such warrant prosecution of the soldier either domestically[103] or internationally[104].

In the same vein, military law has brought the soldier within the ambit of law of war and punishes any person who violates it. The AFA by virtue of section 130(2)[105] have vested jurisdiction on a General Court Martial (GCM) to try the infraction of a soldier who commits any offence under the law of war and award any punishment under the law of war. This provision undoubtedly has not only recognized the implementation of International Humanitarian Law (IHL) on the soldier but has equally ensured that no hiding place for any soldier accused of crimes of international concern to escape punishment.

To this end, it will not be out of point to state that the legal status of a soldier is tripartite and not dual as stated by some writers in their books because it is evidenced that he is subject to military law, civil laws and international law. It has been observed that most writers in this field are of the opinion that the soldier has dual legal status namely: military law and civil law. They erroneously equate international law as civil law and discuss it together. It is in our humble submission that the soldier has tripartite legal status not dual. Equating international law as one and the same with civil law which is our local enactment is a gross error. This is because international law is far beyond our local laws that have no effect once you live the shores of Nigeria. Also, apart from the fact that international law deals with states and individuals, it is effective in both internal affairs and external affairs of a state and carried universal jurisdiction.

[102] Cap G3 LFN Op.cit
[103] Section 130(2) AFA, Cap.A20 LFN Op.cit
[104] Article 7 of the Rome Statute (1998)
[105] Cap A20 LFN, 2004

Hence to equate international law as part of civil law as regards the legal status of a soldier, it's not only an error but it is misleading and should be corrected.

2.4 Meaning, Nature and Scope of Nigerian Law (Applicable to the Soldier)

As we have earlier said, the soldier being a citizen of Nigeria is subject to all civil laws and jurisdiction of Civil Courts in Nigeria.[106] In the context of this work, what is termed as civil law refers to Nigerian law. The civil law by way of definition consists of a body of rules of human conduct. Every society, primitive or civilized is governed by a body of rules which the members of the society regard as the standard of behaviour. It is only when rules involve the idea of obligation that they become law. When they merely represent the notions of good and bad behaviour they are rules of morality.[107] The Cambridge English Dictionary defines law as: *"a rule, usually made by a government, that is used to order the way in which a society behaves"*[108] from this definition, we are meant to understand that law is usually made by government that is used to order the way in which a society behaves.

In Nigerian, the natures of our civil laws are characterized by external and internal influences. The external influences are: The Received English Law, Doctrines of Equity and Statutes of General Application enforceable in England 1st January, 1900. While the internal influences are: Islamic Law and Customary Law alongside Nigerian Legislation. The Nigerian legislation are categorized into Federal and State Laws. The soldier is not exempted from jurisdiction of both the federal and state laws be it civil or criminal. However, the criminal aspect of the Nigerian law is the most commonly applicable law to the soldier. This does not mean the

[106] Grant vs Gould (Supra)
[107] Obilade A.O., (2009) The Nigerian Legal System , Sweet and Maxwell, London, p.3
[108] Dictionary. Cambridge.org/dictionary/cambridgeuniversitypress (2017)

civil aspect is not applicable to him. For instance, section 114 of the AFA[109] provides that *"A person subject to service law under this Act who commits any other civil offence, whether or not listed under this Act or committed in Nigeria or elsewhere, is guilty of an offence under this section".*[110] In the same vein, section 15 of the Criminal Code Act[111] equally subject members of the armed forces and the police to their special law and are not exempt from the provision of this Act.

In view of the above provisions, it is crystal clear that the criminal aspect of Nigerian law is more commonly applicable to the soldier than the civil aspect. It is worthy to note to state that the reason behind this application is because almost are laws applicable to the soldier as punitive; for instance almost all the provisions of the AFA[112] in part xii are criminal matter. The nature of the military profession and exigency of service has made it difficult for the soldier to be involved in civil transaction like contract, commercial transactions etc. However, where he is involved in any civil transaction, he is bound by the law governing that transaction. Civil case in the military are usually treated administratively because Courts Martial don't have the power to adjudicate on civil matter. Cases' involving the soldier on civil matters goes to Civil Courts. However, if the civil matter is between service personnel and the military authorities, the aggrieved soldier must first exhaust all internal administrative remedies before going to Civil Court.[113] It is for this reason the soldiers find it difficult to enforce their rights in court, and believe they are not subject to civil law. The CFRN 1999[114] by virtue of section 1, has made its provisions binding on any

[109] Cap A20 LFN, Op.cit
[110] Ibid
[111] Cap C38 LFN 2004
[112] Cap A20 LFN 2004
[113] Sections 178 and 179 of AFA Cap A20 LFN Op.cit
[114] Cap C23 Vol.3 LFN, Op.cit

person or authority throughout the federation.[115] This means that no person or authority is exempted from its provisions. The laws legislated by the National Assembly or the State House Assembly on either the Exclusive or Concurrent Legislative List are binding on every citizen including the soldier.[116] In addition, the decisions of our courts are laws binding on every person including the soldier. All military cases that have gone on appeal to the Court of Appeal and Supreme Court for judicial pronouncement are binding on the soldier and forms part of military law. Nigerian law applicable to the soldier is no different with the civilians. However, there are some reprieve he enjoys from the civil law distinct from the civilian. For instance, he is identified from prosecution under the Firearms Act.[117] It is pertinent to state that the soldier is more prone to obedience to law even more than the civilian because of the nature of his service to the state requires from him high standard of discipline and regimentation. His legal status on joining the military profession, has added on to him additional legal burden which he voluntarily signed. Hence, he can't complain when subjected to restriction of his right due to military exigency.

2.4.1 Scope of Nigerian Law (Applicable to the Nigerian Soldier)

Nigerian law is divided into various branches namely: civil and criminal law, public and private laws, substantive and procedural laws. Criminal law is that branch of Nigerian law that deals with crimes. The end result of it attracts either imprisonment, payment of fine, capital punishment or outright discharge and acquittal. Civil law on the other hand deals with civil wrong (tort), contract, land dispute etc in which the end result may either attract claims of damages and compensation for injury suffered or other remedies like specific performance,

[115] Section 1(1) CFRN 1999, Ibid
[116] Section 4(2) and (4) CFRN 1999, Ibid
[117] Cap F28 LFN 2004

injunctions or restitution etc. Public law deals with law that generally affects the public. Such as criminal law, constitutional law, administration law, taxation and so forth. While private law deals with the private affairs of individual. These laws like contract, tort, land law, company law, will etc. Substantive laws are those laws that spell out the rights, duties, privileges and limitations of citizens while the procedural laws are invoked in the event of breach of these substantive laws to commence proceeding in the court.

In Nigeria, the scope of Nigerian law applicable to the soldier is similar to the civilian be it civil or criminal laws, public or private laws, substantive or procedural laws. The soldier is subjected to the jurisdiction of these laws and they are enforced on him either in Courts Martial or Civil Court. The AFA[118] made provision for the creation of both military and civil offences and vested jurisdiction on Court Martial to try these offences and award punishments accordingly.[119]

It has been observed that unlike the civil courts that have both civil and criminal jurisdiction to entertain matters, Courts Martial, appears to have only criminal jurisdictions. All cases of civil matters affecting the soldier are either treated administratively by military authorities or judicially by the civil courts. However, in the application of procedural laws on the soldier, there are limitations. For instance, the Administration of Criminal Justice Act (2015) does not apply to the Court Martial.[120] The reason for this limitation is not well understood. This is inspite of the fact that the Rules of Procedure (Army) (RPA) (1972) have given the Courts Martial a wider room to do what is just in the event if the rule is silent on a particular issue.[121] What this rule presupposes is that the Court Martial can use other criminal procedure laws to

[118] Cap A20 LFN, Op.cit
[119] Section 130(1) of the AFA, Ibid
[120] Section 2 of the Administration of Criminal Justice Act 2015
[121] Rule 106 of the Rules of Procedure (Army) 1972

arrive at what is fair and just on a matter before it. It is in our view that the Administration of Criminal Justice Act should be allowed to apply in Court Martial because all case of appeals from decision of Courts Martial lies in the Court of Appeal and Supreme Court were the Administration of Criminal Justice Act holds sway in deciding Court Martial cases. Prohibiting its application from Courts Martial appears to be discriminatory to the soldier.

Another limitation of application of procedural law is the power of the Attorney General of either the Federation or State to undertake, institute or discontinue criminal proceedings in any court of law in Nigeria other than a Court Martial.[122] It appears that the limitation is to the fact that the Court Martial setting is not the same with our conventional courts which is presided over by a judge or justices learned in law. The Court Martial is viewed as a jury court presided by military officers who are lay men to try erring soldier in accordance with a specialized kind of law called military law and assisted by a judge advocate on legal issues who is a military lawyer. Also the nature of the Court Martial is a court of speedy trial that does not accommodate the legal technicalities of conventional courts like interlocutory matters moved by motions. Courts Martial sentence is not always a sentence until it has been confirmed.[123] Hence the reasons for the constitution not giving power to the Attorney General to institute, undertake or discontinue criminal matters before Courts Martial.

2.5 Nature, Purpose and Scope of International Law (Applicable to the Soldier in Peace and Conflict Situations)

Before we discuss the nature of international law applicable to the Nigerian soldier in peace and conflict situations, it will be apt to define international law and its subjects. The classic definition of international law is that body of rules that govern the relations between states. It is

[122] Sections 174(1) and 211(1) CFRN 1999 Cap C23 Vol.3 LFN, Op.cit
[123] Section 148 of AFA Cap A20 LFN Op.cit.

true, that at that time, international law was primarily concerned with states, when states were the only bodies, which had rights and duties under it. Today, however, this definition cannot be taken as an adequate and complete description of the intents, purpose and scope of international law, nor its suggestion that international law is a matter of concern solely to states be upheld.[124] International law today also comprises rules that relates to the functioning of international institutions or organizations, their relations with each other and their relations with states and individuals. Furthermore, certain rules of international law extend to individuals and non-state actors (transnational corporations) in so far as their rights or duties are the concern of the international community of states. International law inter alia lays down rules concerning the territorial rights of states (relating to land, sea and space), the international protection of the environment, international trade and commercial relations, the use of force by states, human rights and humanitarian law.[125]

The incorporation of international law into the national legal order of a state speaks for the significance of the law in the states relations with others. For example, the new constitution of Nigeria states that one of the aims of foreign policy is the *"respect for international law and conventional obligations"*[126] as well as for *"the resolution of conflicts through peaceful means"*[127]. According to the political bureau in charge of drafting the new constitution, that section of the Nigerian constitution is intended to express the philosophy of the government in the field of foreign policy.[128] Nigerian has shown commitment on respect and adherence for international law and conventional obligations by the provisions of the constitution which

[124] Ladan M.T., (2007) Materials and Cases on Public International Law, Ahmadu Bello University Press Limited, Zaria Kaduna State, p.1
[125] Ibid
[126] Section 19(d) CFRN 1999 Cap. C23 Vol.3 LFN, Op.cit
[127] Ladan M.T., Op.cit, p.6
[128] Ibid

stipulates that the National Assembly may makes laws for the federation or any part thereof with respect to matters not included in the exclusive legislative list for the purpose of implementing a treaty.[129] It is on the footing of this law that Nigeria have domesticated some international treaties as an Act and as well signed and ratified some of the treaties and conventions and make them bound the country. These can be seen from our foreign relationship with other states in African continent and the world in general.

To this end, the nature of international law applicable to the Nigerian soldier is all international laws that Nigeria is a signatory to and international customs. However, there are some prominent ones peculiar to his nature of service and constitutional roles. These laws like the Geneva Convention, Rome Statute, the International Human Rights Law and customary international law. These laws are prominent because of the nature of his service and the type of military operations he finds himself. Thus the nature of international law application to the soldier is most those regulating warfare.

2.5.1 Purpose of International Law Applicable to the Nigerian Soldier

The purpose of international law applicable to the Nigerian soldier in peace and conflict situations is to uphold that standard of international criminal and civil laws. The soldier is expected to adhere to these laws while performing his constitutional roles. The International Criminal Law (ICL) shall be the most focused on because it is the one that prominently applies to the soldier. ICL is a breach of public international law that aims at helping victim of crimes against humanity, genocide and war crimes to achieve justice and truth by ensuring the perpetrators of such crimes with impunity do not go unpunished in accordance with the due

[129] Ibid

criminal process.[130] The ICL therefore has it source from treaties, customary rules of international law, general principles of law, judicial decisions, writings of qualified international law scholars, resolutions of the UN, and soft law.[131] In view of this, the purpose of ICL is to provide penal sanctions, determination of criminal responsibility, promotion and protection of the due process rights of accused persons, and the attainment of criminal justice towards ending the culture of impunity.

The rationale for subjugating of the Nigerian soldier to the jurisdiction of ICL, is that in the past century, millions of victims of genocide, crimes against humanity and war crimes were denied justice for atrocities suffered and continue to suffer in several scenarios of conflict or gross human rights violations throughout the world from the conduct of soldiers. It is evident that the impunity of the perpetrators of international atrocities has provided a fertile ground for the commission of new horrendous crimes, which should not be left unpunished. Further, that impunity for the most serious crimes under international law has been the rule and justice the exception, notably when the international community decided to establish special (ad hoc). International Criminal Tribunals to face selected situations: the one in the former Yugoslavia in 1991, the others in Rwanda of 1994 and Serria Leone in 2002.

Undoubtedly, the establishment of these International Tribunals, and the adoption of the Rome Statute of 1998 that established a permanent International Criminal Court at the Hague (I.C.C), are important steps in the development of ICL and as well ensuring justice prevails in the event of commission of these heinous crimes. However, the I.C.C alone will never be able to

[130] Ladan M.T., Op.cit, p.219
[131] Ibid

try all cases of international crimes under ICL, Domestic courts have to step in and they must keep their roles as the main enforcers of ICL and agents for rendering criminal justice.[132]

In support of the above view, for instance, the AFA outrightly made provision for the General Court Martial (GCM) to have jurisdiction to try persons subject to service law under the law of war and impose punishment according to the law of war.[133] This statutory provision has not only subjected soldiers to the jurisdiction of ICL but to ensure protection and respect for the tenets of rules of law and human rights of individuals while conducting international military operations. The Rome Statute in Article 26 went further to hold commanders criminally responsible for the conduct of their troops under command if they fail to take disciplinary measures to deal with the matter. On this note, the purpose of international law as earlier stated, is to uphold the standard of international law be it civil or criminal and to ensure that international crimes are not committed with impunity.

2.5.2 Scope of International Law

The scope of the international law applicable to the soldier takes its source and obligation from section 12 CFRN 1999[134] which requires that for any treaty entered into by the Nigerian federation to have the force of law, such a treaty must first be enacted into law by the National Assembly. This means that once the treaty has validly undergone the process of legislative domestications, such a treaty on the footings of its enabling law, would become an integral part of Nigerian law.[135] It therefore follows those soldiers as a corollary to their duty to obey municipal laws, are bound to comply with all international laws and treaties acceded to by Nigeria. Some relevant laws in this regard are the UN Charter, the Geneva Convention and its

[132] Ibid
[133] Section 130(2) AFA Cap A20 LFN, Op.cit
[134] Ibid
[135] Aondoakaa, M. Op. cit Page 179

Additional Protocols, the Universal Declaration of Human Rights, African Charter on Human and Peoples Right, International Customs etc.

Nigeria as a member of the United Nations, is bound by the UN Charter, which requires that its members refrain from the threat or use of force in any manner not consistent with UN policies.[136] In addition, Nigeria being a signatory to most major treaties relating to warfare, such as the Hague Convention of 1907, the Geneva Convention of 1929 and 1949, the Genocide Convention of 1948 and the Rome Statute of 1998 which establishes the International Criminal Court is bound by these laws. All these treaties set forth basic principles that govern the conduct of war, force should be directed only at targets directly related to the enemy's ability to wage war (military necessity); the degree of force should be directly related to the importance of the target and should be no more than is necessary to achieve the military objective (proportionality); and the force used should cause no unnecessary suffering, destruction of civilian property, loss of civilian life, or loss of natural resources (humanitarian principles). In addendum, the Hague Conference provides that the captured prisoners cannot be killed, captured towns cannot be pillaged, and the property right and lives of civilians in armed conflict areas must be respected.

In addition to written treaties, international armed conflict is governed by customary international law or the common law of armed conflict.[137] Under this, constantly evolving body of laws, certain conduct is proscribed because world opinion forbids it. The customary law of war is based on the same principles embodied in The Hague Conference and subsequent treaties which reflects international agreement that actions inconsistent with those principles should not go unpunished even in the absence of express prohibitions.[138] Many nations, including Nigeria, have codified significant portions of the common law of armed conflict. See for example, The

[136] Article 2(4) of the UN Charter 1945
[137] Mukhtar, A, S, Op. cit p.27
[138] Ibid

Geneva Conventions Act[139], which is aimed at regulating crimes of international concern and punish anyone found culpable of these offences. In another development, Nigerian soldiers while on peacekeeping operation are bound to obey the local laws of the host community. This is pursuant to the Status of Forces Agreement (SOFA) between the UN, the host state and Nigeria. However, in the event of breach of this local law by the soldier, he shall be tried by his own military authorities. This is the position of the UN Model Status of Forces Agreement which shall be discussed in chapter 3 of this work.

[139]Cap, G 3, LFN, 2004

CHAPTER THREE

LEGAL FRAMEWORK FOR THE APPLICATION OF THE DOCTRINE OF COMPACT UNDER THE NIGERIAN MILITARY LAW

3.0 Introduction

It is now generally understood that a soldier is structurally part of the larger society and he cannot therefore live outside the sphere of civil laws which are applicable to the larger society and create the necessary rights and obligations that govern inter-social relationships in the wider society[1]. The European Convention on Human Rights 1950, for instance, treats the soldier as a citizen in uniform' which implies that a soldier retain his civil and political rights which are however modified in an appropriate way according to the military context.[2]

The Nigerian state currently operates the governmental model known as popular participatory democracy. The fulcrum of this model of governance is rule of law which emphasizes the supremacy and overriding force of law in all government affairs. Thus, government along with all its adjuncts must at all time be regulated by law. The soldier being a crucial and key component of government is not in any way exempt from this encompassing subordination to law.[3]

It is against this background that, this chapter will concentrate on the legal framework for the application of the doctrine of compact under the Nigerian Military Law. In so doing, we shall define the term "Application" and explain how it is used in the context of this work. The Longman Dictionary of Contemporary English (New Edition) defines "Application" in the context of practice use to mean *"the practice purpose for which a machine, idea etc can be used,*

[1] Section 1(1) CFRN 1999 Cap C23 Vol.3 2004
[2] Aondoakaa, M. K. Op. cit, p. 163
[3] Musa, S. I, Op. cit, p. 1

or a situation when this is used".[4] From this dictionary definition, application is not capable of one particular definition. It all depends on how you use the term in your work and its relevancy. For instance, application could function as written request, service provider, or when you put something such as liquid to a surface, effort etc. However, in the context of this research work, the term "application" means compliance and obedience with the legal framework that regulates the soldier, in terms of exercising his rights, obligations, privileges, limitations and enforcement measures when carrying out his constitutional roles.

On this note, this chapter shall cover the followings: Development of military law in Nigeria; Development of Doctrine of compact in Nigerian Military Law, Application of the Doctrine of Compact; Application of the Doctrine of Compact in relation to Fundamental Right; Application of Doctrine of Compact in relation to Civic Rights and Duties. Others are, Application of Doctrine of Compact in Internal Military Operation, Application of Doctrine of Compact in International Military Operation; and Application of Doctrine of Compact in relation to Fundamental Objectives and Directive Principles of State Policies.

3.1 The Development of Military Law in Nigeria

The development of military law in Nigeria would necessarily commence from the development of the Nigerian Army. This is because the Nigerian army was the first of the three arms of the armed forces to be established. The development of the Nigerian Army dates back to 1863 when Lieutenant Glover of the Royal Navy selected 18 indigenes from the Northern part of the country and organized them into a local force known as the "Glover Hausa" and these Glover Hausas became a regular force with the name Hausa Constabulary and was later called Lagos Constabulary in 1901. At Jebba in Northern Nigeria, Lord Fredrick Lugard had formed in 1890 the West African Frontier Force (W.A.F.F) and by 1901, he had incorporated all paramilitary

[4] The Longman Dictionary of Contemporary English (New Edition) for Advanced Learners (2009) p.69

units in all British dependencies.[5] The establishment of W.A.F.F led to the merger of units into a regiment in each of the dependencies and the merger produced the Northern Nigerian Regiment and the Southern Nigerian Regiment. With the amalgamation of Northern and Southern Nigeria in 1914 by Lord Lugard, the Northern and Southern Nigerian Regiments were unified and called the Nigerian Regiment. Thus, the Northern Nigerian Regiment became the 1st and 2nd battalions of Nigerian Regiment while the Southern Nigerian Regiment became the 3rd and 4th battalions of the Nigerian Regiments. The visit of Queen Elizabeth II of Great Britain to Nigeria in February 1956 changed the name of the Nigerian Regiment to Queens Own Nigerian Regiment (Q.O.N.R). Also the same year, with the rationalization of the W.A.F.F, it became the Nigerian Military Force (N.M.F). In 1960 when Nigeria became independent, the N.M.F became Royal Nigerian Army (R.N.A) and subsequently the Nigerian Army, when Nigeria became a republic.[6]

It appears that the earliest legislation relating to military law was the West African frontier force (Nigerian Regiment)[7] which constituted W.A.F.F. The ordinance made comprehensive provisions for the discipline, control and use of the armed forces. Other legislations are the West African frontier force ordinance[8], and the West African Northern (Nigerian Regiment) proclamation[9]. These were followed by the Royal Nigerian Military Forces Act of 1953, which was repealed by the Nigerian Army Act 1960[10]. The Nigerian Army Act 1960 which commenced on 1st October, 1960 provided for the establishment, governance and discipline of the Nigerian Army. Details of the Act will be discussed later under the development of the doctrine of compact under the Nigerian military law.

[5] Achike O. Op.cit, p.8
[6] Ibid, p.10
[7] Ordinance of 1916
[8] Cap 33 laws of Southern Nigeria (1916)
[9] Cap 18 laws of Northern Nigeria (1916)
[10] Part C to Supplementary to Official Gazette Extra Ordinary No.39, Vol.47 8th July, 1960

It is pertinent to note that Nigeria experience military intervention into political arena between 15 January, 1966 - 1st October, 1979 and from 31 December, 1983 to 29 May, 1999. During these periods, some decrees were promulgated for the discipline control and administration of members of the Armed Forces. These Decrees did not specifically repeal the Nigerian Army Act 1960, but they listed some offences which were to be specially tried under the decrees by Courts Martial and prescribed punishments severer than those provided under the Act. These decrees are:

a. Military courts (Special Powers) Decree No. 4 of 1988

b. Military courts (Special Powers) Decree No 4 of 1977

c. Armed forces (Disciplinary Proceedings) (Special Provisions) Decree No. 97 of 1979.

d. Military courts (Special Powers) Decree No. 23 of 1984.

It equally worthy of note to point out that with decision of the then Federal Military Government to set in motion and process to return Nigeria to civil rule, the leadership of the armed forces in charge of the administration of military justice, also took steps to abrogate the military courts (special powers) Decree of 1984 as soon as a new federal constitution took effect. Also the concept of joint training of members of the armed forces in major military institutions and joint operations by the services propelled the idea that one Act of parliament for the administration and discipline of members of the armed forces, should be enacted to replace the Nigerian Army Act 1960, Nigerian Navy Act 1964 and the Nigerian Airforce Act 1964.

The idea was accepted, by the defunct Armed Forces Ruling Council which enacted the Armed Forces Decree No. 105 of 1993 (as amended).[11] The decree being the main source of military law and military justice system provides for the maintenance and administration of the

[11] Chiefe T.E.C. op.cit p. 25

armed forces of the federation. Under section 290(1),[12] it repealed the Nigerian Army Act, 1960, Nigerian Navy Act 1964 and the Nigerian Airforce Act 1964. It further repealed the Military Court (Special Powers) Decree No. 23 of 1984 and all other enactments relating thereto. Sequel to the collation of the Laws of the Federation of Nigeria in 2004 Decree 105 of (1993) (as amended) was amongst the laws collated together with Armed Forces (Special Proceeding) Decree to form Laws of the Federation of Nigeria in 2004. Consequently, they are called the Armed Forces Act, Cap. A20 L.F.N 2004 and the Armed Forces (Disciplinary Proceedings) (Special Provisions) Act Cap A22 LFN, 2004. Currently, they form the extant laws for the administration of military justice system of members of the armed forces. As earlier stated, the AFA is divided into part and schedules for the effective command, control and discipline of members of the Armed Forces which shall be discussed below.

3.2 The Development of the Doctrine of Compact in Nigeria Military Law

The development of the doctrine of compact in the Nigerian military law, can be traced to the development of the Nigerian Army on the one hand which have been discussed above and on the other hand, the development of laws and judicial authorities that have contributed to its development. Laws applicable to the soldier, are as old as the establishment of the Nigerian Army itself. An examination of these laws reveals how they apply to the soldier in terms of command, control, discipline and administration.

The earliest legislation relating to the Nigerian soldier was the West African frontier force (Nigerian Regiment) Ordinance of 1916. The ordinance made comprehensive provisions for the discipline, control and use of the soldier i.e. (Hausa Constabulary). It should be noted that Her Majesty the Queen of England had the final command and control of this Hausa

[12] Armed Forced Decree 105 of 1993 (as amended) now repealed and replaced with the Armed Forces Act Cap A20 LFN (2004)

Constabulary. The civil laws applicable to the Royal Army in England were equally applicable to the Hausa Constabulary in colony and protectorate of Nigerian. These laws were:

> The received English law comprising:
> a. The common law;
> b. The doctrines of equity;
> c. Statutes of general application in force in England on 1st January, 1900.[13]

Following the amalgamation of Northern and Southern Nigeria in 1914 by Lord Lugard, the name Hausa Constabulary was changed to Northern and Southern Nigerian Regiment and unified into one law. The Northern Nigerian Regiment constituted the 1st and 2nd battalions while the Southern Nigerian Regiment made up the 3rd and 4th battalions. There were two separate laws applicable to the soldiers of these two separate regiments. In the Northern Nigerian Regiment, the laws regulating the administration, maintenance, discipline, command and control of the soldiers was the West African Northern (Northern Regiment) proclamation[14]. While the Southern Nigerian Regiment was regulated by the West African frontier forces Ordinance.[15] It should be noted that these laws made provisions for rights, duties, obligations and limitations of the soldiers.

Sequel to the visit of Her Majesty Queen Elizabeth II to Nigeria, the nomenclature of the Northern Nigerian Regiment and the Southern Nigerian Regiment was changed to Queens Own Nigerian Regiment and thereafter to Royal Nigerian Military force. The law that was applicable for the maintenance, command, control and discipline of the military changed to the Royal Nigerian Military Forces Act 1953. The Act dissolved the Northern and Southern Nigerian regiment and provided for a central control of Royal Nigerian Military Forces. This was the position uptill 1960.

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[13] Obilade, A. O., (2000), *The Nigerian Legal System*, Spectrum Law Publishing Co. Ibadan, p. 55
[14] Cap 18 laws of Northern Nigeria (1916)
[15] Cap 33 Laws of Southern Nigeria (1916)

In 1960, when Nigeria became a sovereign independent nation, the Nigerian Army Act[16] was enacted and it repealed the Royal Nigerian Military forces Act 1953 by virtue of section 208(1) of the Nigerian Army Act 1960. The Act[17] commenced on 1st October, 1960 and provided for the establishment, governance and discipline of the Nigerian Army. A cursory look into the Act provides how the soldier's rights, duties, obligations and limitation are. For instance, part IV of the Act deals with Enlistment, Terms and Conditions of Service, Re-engagement and Extension of Service of Soldiers. Part V provided for Discipline, Trial and Punishments of Military Offences. These offences are covered from sections 30-71 of the Act. Section 72 of the Act provided for other civil offences. This implies that the legal status of the soldier under the Act subjected him to not only military laws but also the civil laws of the country. Furthermore, section 118 of the Act provided for the Relationship between military and civil courts and finality of Trial. The effect of this relationship between the two courts is that the soldier is subject to the jurisdiction of Courts Martial convened under the Act to try both military and civil offences on the one hand, and the jurisdiction of our Civil Courts to try civil offences on the other hand. Appeals from Courts Martial lies with the Court of Appeal and the Supreme Court see section 129 of the Act. It is worthy of note to mention that section 128(1) empowers the president of Nigeria to make rules of practice and procedure for Courts Martial and Summary trials. The Act equally made provision for Requisition and Billeting of vehicles during the period of military operation. It is also important to state that the Act provided on how a deceased soldier's estate is to be disbursed if he dies intested. The Act was fully implemented before the military coup of 15 January, 1966 that restricted the application of some parts and modified

[16] Supplementary to Official Gazette Extraordinary No. 31 Vol. 80 Dated 31st December, 1993
[17] Ibid

them. Like for example the right of appealing Courts Martial decision to Court of Appeal was hated and vested on the various service councils.[18]

These military administrations were in two phases. The first phase started from 15th January, 1966 to 30th September, 1979 and the second phase, started from 31st December, 1983 to 29th May, 1999. During these periods, the legal status of the soldier was not similar with that of the Act. For instance, the Military Courts (special powers) Decree No. 4 of 1968 was promulgated to enforce discipline of soldiers during the Nigerian civil war and anytime during the continuance of the state of emergency in Nigeria. Section (1) of the Decree gives the Military Court Special Powers, which was restrictive to fair hearing and rule of law in Courts Martial proceedings. Section 1 (2) of the Decree further limits the jurisdiction of Courts Martial to the trial of members of the armed forces not above the rank of substantive Lieutenant colonel. However, a Court Martial convened under the Decree cannot try a case whose punishment is death sentence or term of imprisonment above five years.

The Military Court (Special Powers) decree No. 4 of 1977 and the Military Court (Special Powers) (Amendment) Decree No. 2 of 1979, abridged the procedure to be followed in trials by Military Courts as against the detailed procedure in Court Martial. They categorically stated that there are no appeals to the court of Appeal against the judgment of the Military Courts set up pursuant to those Decrees. Appeals from courts created under these Decrees shall be determined by the respective service councils Armed Forces (Disciplinary Proceedings) (Special provisions) Decree No. 97 of 1979, further enables the Army council, Navy Board and Airforce Council as applicable, to take disciplinary proceedings against a soldier irrespective of the fact that he is facing prosecution in a Court Martial on the same disciplinary ground. Section 1 of the Decree provides that:

[18] Decree No.4 of 1977

> Notwithstanding anything to the contrary in any law, the council of each force of the Armed forces of the federation may institute, and where instituted, may continue disciplinary proceedings against any person subject to military law whether or not;
> a. Criminal proceedings have been instituted with respect to such a person in any court of law in Nigeria or elsewhere or are about to be instituted or are contemplated; or
> b. The ground upon which any criminal charge is based or is to be based in substantially the same as that upon which the disciplinary proceedings were or are to be instituted.[19]

Section 2 provides that a person acquitted on a criminal charge for an offence or given a discharge, whether amounting to an acquittal or not in any court of law, he may be dismissed or otherwise punished in accordance with any disciplinary provision on any other charge arising out of his conduct in the matter has been in any respect blameworthy or that it is in the interest of the force where he is deployed or in the interest of armed forces as a whole he be punished.

Taking a close study of this Decree, it appears that the Decree did not only given room for double jeopardy upon the acquittal of a soldier but has outrightly infringed on his fundamental right to liberty, fair hearing and presumption of innocence. Surprisingly, this Decree still forms part of our extent Laws of the Federation of Nigeria today called Armed Forces (Disciplinary Proceedings) (Special Provisions) Act Cap A22 LFN 2004. It is in our opinion that this Act, apart from the fact that it discriminatory on the soldier's, it is in the interest of justice that the Act should either be reformed or repealed by the National Assembly.

In 1984, The Military Court (Special Powers) Decree No. 23 of 1984 was promulgated. The Decree which commenced on 20 July 1984 reintroduced the Armed Force Disciplinary Court dissolved on 30 September 1979. Section 1(2) gives the military court all powers of a General Court Martial other than the power to impose a death penalty or a sentence of imprisonment exceeding five years. Section 3(1) under schedule 1 to the Decree, listed seven

[19] Chiefe, T.E.C. op.cit p.27

offences triable under the Decree they are; Failure to Suppress Mutiny, Insubordinate Behavior, Offences Relating to Public and Service Property, Offences Relating to Property of Members of the Armed Forces, Miscellaneous Offences Relating to Property and Making of False Documents. Section 5(1) lays down the procedure for trial by the military court while section 5 (5) provides that appeals against the judgment of the military court in case of soldier or equivalents ends with the respective service chiefs and in the case of officers, with the respective service council. Section 6 of the Decree provides that there are no appeals to the Court of Appeal and even appeals pending in civil courts shall abate. This was the position of the soldiers legal statute upto 1989.

Sequel to the plan of the then Federal Military Government to transform the country from military rule to a civilian government, the leadership of the armed forces in charge of the military justice system took steps to abrogate the military courts (special powers) Decree of 1984 as soon as the new Constitution of Federal Republic of Nigeria (1989) took effect. In 1993, the erstwhile Provisional Ruling Council under the leadership of General Sani Abacha promulgated Armed forces Decree No. 105 of 1993 (as amended). The Decree consolidated various services Acts as one and provided for the maintenance, administration and discipline of the Armed Forces of Nigeria. Section 290(1) of the Decree No. 105 of 1993 repealed the Nigerian Army Act 1960, the Navy Act 1964, the Air force Act 1964 and the Military Court (special powers) Decree No. 23 of 1984. Part IX of the Decree No. 105 of 1993 deals with Enlistment and terms and conditions of services. Part XII deals with military and civil offences while part XIV deals with Trial procedure and Courts Martial of the soldier. Part XVI deals with Appeals from Courts Martial to the Court of Appeal upto the Supreme Court. Part XVI deals with privileges and exemptions for

members of the Armed Forces[20]. Part XVII deals with forfeitures and deductions of pay of the soldier in the event of any statutory deduction or any civil or criminal liability made pursuant to a Court Order. Part XVIII on its part enforces Maintenance and Affiliation Order by Deduction from pay of service personnel made pursuant to a valid order or court. Part XIX deals with Billeting and Requisitioning of vehicles. This is in the event of Military Operations or State of Emergency period. Furthermore, it provided for procedure to be adopted for executing this billeting and requisitioning of vehicles and as well the modalities for compensation of affected civilians. Finally, part XXII is the Supplementary and Miscellaneous Provisions of the Act. This part is concerned with Application of the Act to: women, civilians, passengers in Military Ship or Aircraft, Cadets, Recruits and Boys of Nigerian Military School (NMS) and Airforce Military School (A.F.M.S) and finally the wills and Distribution of Property of Estate of a Deceased Soldier whether he died tested or intested.

On the 29th May, 1999 when Nigeria transited into democracy, thereby political power was handed over to a democratically elected government. The 1999 constitution[21] was promulgated by virtue of Decree No.24 of 1999. Under the aforementioned constitution, Section 315[22] provides that:

> Subject to the provision of this constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this constitution and shall be deemed to be.
>
> a. An Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this constitution to make laws;…

It is by virtue of this provision that the Armed Forces Decree No. 105 of 1993 (as amended) and Armed Forces (Disciplinary Proceedings) (Special Provisions) Decree No.97 of

[20] Armed Forces Decree 105 of 1993 (as amended) now cited as Armed Forces Act Cap A20 LFN 2004
[21] Cap. C23, Vol.3 L.F.N, Op.cit
[22] Section 315(1)(a) Ibid

1975 were retained by an Act of the National Assembly. In 2004, the government ordered for the collation of all federal laws. This exercise affected both the Armed Forces Decree No.105 of 1993 & Armed Forces (Disciplinary Proceeding (Special Provision) Decree No.97 of 1975. They are today called the Armed Forces Act and Armed Forces (Disciplinary Proceeding (Special Provisions) Act.[23] The A.F.A made adequate provision for the administration, command, control and discipline of members of the armed forces. Section 27-31 provides for enlistment, terms and conditions of service. Section 45- 114 specify the offences triable under the Act. Section 115-117 deals with summary trials, section 118 – 120 punishments by the court martial, sections 121 and 122 deals with arrest and custody of soldiers. Sections 123-128 deals with investigation and disciplinary process, sections 168 and 169 deals with trials of persons ceasing to be subject to service law and time limitation for trials, sections 170-171 deals with relations between the armed forces, civil courts and finality of trials while section 183-202 deals with Appeals from Courts Martial to Court of Appeal and Supreme Court. Also, sections 215-233 deals with Billeting and Requisition of vehicles. Sections 235-240, deal with privileges and exemptions for members of the armed forces. Section 241-245 deals with provisions relating to Deserters and Absentees without leave. Section 246-253 deals with offences relating to service matters punishable by civil courts. Section 257-256 deals with provision as to Evidence in Court. Section 257-258 is concerned about Reduction in Rank of a Soldier made pursuant to a Court Order. Section 259-261 talks of Miscellaneous Provisions of the Act. Section 262-269 deals with Reservist and pensioners, while section 270-274 is concerned with the Supplementary and Miscellaneous Provisions, Application of this Act. Finally, section 275-282 deals with Wills and Distribution of Property of a deceased soldier while 283-291 deals with Miscellaneous Matters which includes the interpretation section and the short title.

[23] Cap.A20, L.F.N, 2004 and Cap A22 LFN 2004

Having discussed how military law affects the development of doctrine of compact in Nigerian Military law, we shall concentrate on the contribution of civil law to the development of the compact under the Nigeria military law. The genesis of civil law in Nigeria started with the advent of the British into Nigeria for colonialism. However, they came, the met the Northern part of Nigeria administering Shariah Law while the Southern part, was administering Customary Law. Sequel to the amalgamation of Northern and Southern Protectorate by Lord Lugard to form Nigeria, the British introduced their own laws into Nigeria to exist side by side with our own indigenous laws. Today, the Nigeria Legal System is made up of the Received English Law, Islamic law and customary law.[24] English law has a tremendous influence on the Nigeria legal system, and it forms a substantial part of Nigerian law.[25] Section 45(1) of the Interpretation Act provides that, the common law of England and the doctrines of equity and the statutes of general application which were in force in England on 1st January, 1900 are applicable in Nigeria, only in so far as local jurisdiction and circumstances shall permit.

With this brief history of Nigerian law which makes up the civil law applicable to the soldier, the civil law serves as the source of soldering profession. Because even the military law today draws its genesis and legitimacy from the civil law. The constitution is the most supreme law under the civil law. The supremacy of the constitution is not only binding on every person or authority in Nigeria but also any law is made in consistent with its provision, that law shall be null and void up to the extent of its inconsistency.[26] For the purpose of the development of the soldier's compact under civil law, we shall concentrate on the 1999 constitution being the grundnorm in terms of the soldier's rights, duties and limitations.

[24] Lokulo-Sodipe, J. Akintola O. and Adebamowa, C., Legal Basis for Research Ethics Governance in Nigeria, elearning.trree.org/mod/page/view.php, 5th March 2014, p.1 visited 22nd April, 2017
[25] Ibid
[26] Sections 1(1) and (3) CFRN 1999 Cap C23 Vol.3 (2004)

Section 1(1)[27] provides that: *"This constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria"* The implication of the above provisions is that the constitution applies in equal measures to all persons and institutions in Nigeria and therefore there cannot be any group that may claim exclusion from any of its provisions for whatever reason. It on this footing that the soldier is subject to the constitution and any of its provisions. Also, any law made inconsistent with its provision, shall be null and void. Section 4 of the constitution gave the National Assembly to make laws on any matter affecting public peace, public order and good governance. It is against this background that, the National Assembly legislated on the Criminal Code Act, which by virtue of section 15 of the Act made the soldier subject to its provisions. Chapter IV of the CF.R.N provides for fundamental human rights in (Sections 33 to 46). These Fundamental Human Rights applies to the all citizens including the soldier. The chapter deals with the right to life,[28] dignity,[29] personal liberty,[30] fair hearing,[31] private and family life,[32] freedom of thought,[33] conscience and religion,[34] freedom of expression and the press,[35] peaceful assembly and association,[36] freedom of movement,[37] and the right to freedom from discrimination[38] respectively. Other includes the right to acquire and own property anywhere in Nigeria.[39] It should however be noted that these rights are not absolute to the soldier because of the nature of

[27] C.F.R.N, 1999, Cap. C23, Vol. 3 L.F.N, Ibid
[28] Ibid
[29] Section 33 Ibid
[30] Section 34 Ibid
[31] Section 35 Ibid
[32] Section 36 Ibid
[33] Section 36 Ibid
[34] Section 37 Ibid
[35] Section 38 Ibid
[36] Section 39 Ibid
[37] Section 40 Ibid
[38] Section 41 Ibid
[39] Section 42 Ibid

his work. Section 45(1)[40] provides for restriction on and derogation from fundamental rights in the interest of defence, public safety, public order, public morality and public health. The effect of this section clearly shows that these rights can be derogated in the interest of the aforementioned reasons in the case of the soldier. Furthermore, the constitution in sections 217-218[41] provides for establishment, command and operational use of the armed forces in Nigeria. The duties of the soldier are spelt out in the constitution by virtue of section 217(2)[42]. These duties are:

a. Defending Nigeria from external aggression
b. Maintaining its territorial integrity and securing its borders from violations on land, sea and air.
c. Suppressing insurrection and acting in aid of civil authorities to restore order when called upon to do so.
d. Performing such other functions as may be prescribed by an Act of the National Assembly.

As a matter of fact, all military operations take their genesis from those constitutional provisions. In conducting these operations, it must have to be limited to tenets of rule of law and preservation of fundamental human rights. Any military operations conducted outside these limitations, shall attract penal sanction. We shall discuss in details the duties and limitations in the conduct of military operations later in this chapter.

Considering judicial development of doctrine of compact in Nigeria, we earlier said, prior to this democratic dispensation in Nigeria, there was a serious dreath of reported military law cases in our courts. Nigeria courts often rely on English cases to decide military law cases. For

[40] Ibid
[41] Ibid
[42] Cap C23 Vol.3 LFN Op.cit

instance, in the case of ***Pius Nwaogu vs The State*** the Supreme Court had to make references to the English cases of ***Knightly vs Bell*** and ***R vs Smith*** to decide the case. Most military cases that were decided in Nigeria between 15 Jan, 1966-30 September, 1979 were relied on the English Courts. However, by 1st October 1979-31 Dec. 1983, there was a transition of power from the military to a democratic government. During this period, for the first time, soldiers could seek redress in our civil courts and their cases were decided based on our domestic law. For instance, the cases of ***Captain S.A. Asemota vs Colonel S.L. Yusufu***[43] and the case of ***Major Ledejobi vs the Attorney General of the Federation***[44] were one of the early military case that were decided in a civil court. The court granted the application of the applicant for the issue of write of habeas corpus for their release from prison detention. The court declared their detention as unlawful and unjustifiable. From the above court decisions, it was crystal clear that soldier under the democratic government did not only enjoy their right to go to civil court but to also enforce their fundamental rights in the event of any affront or violation.

By the period of 1st January, 1984 to 28th May, 1999, the country returned to military rule which hampered the development of military law cases following the promulgations of various military decrees that ousted the jurisdictions of Court of Appeal to hear appeal concerning members of the armed forces. This military rule lasted for 16 years. Within this period, apart from the fact that military cases don't go to civil court on appeal, the soldier have no right whatsoever to approach the civil court to seek redress. Any soldier who drags the military authority to the court at that time, was believed to be traitor and disloyal to the government. This was the position of his legal status till the transition to democratic rule in May 1999. From 29th May, 1999 to date there became a new era for the soldier to enforce his right in civil courts. As a

[43] (2000)3 N.W.L.R (Pt. 647) 77
[44] (2000) 15 N.W.L.R (pt. 692)868

result, a lot of cases have been brought by service personnel to the Federal High Court, National Industrial Court, Court of Appeal or the Supreme Court for redress regarding decisions of summary trial or Courts Martial. For example in the summary trial case of ***79NA/13394 CPL Bala Gotau and 25 others vs The Nigerian Army***[45] where the soldiers appealed against their dismissal from service by their Commanding Officer, at a Summary Trial on a charge of being married to foreign women, the Federal High Court quashed the dismissal of the soldier. It held that the girls were mere girl friends as there was no proof of marriage. The effect of this decision on the military justice system is that the Commanding Officer of a unit cannot just dismiss a soldier from service because he is married to a foreigner without proof of the marriage.

Also the Court of Appeal in case of ***Okoro vs Nigerian Army Council.***[46] The court held that the effect of not constituting a court martial in accordance with the provision of section 133 of the A.F.A is that the court lacked the required jurisdiction to try the appellant. This Court of Appeal decision in Okoro's case has help to transform the military justice system, whereby a Court Martial shall have no power to try a case if it is not duly constituted in accordance with section 133 of the AFA. The Supreme Court also in the cases of ***Nigerian Airforce vs Wing Commander Shekete***[47] and the case ***Nigerian Airforce vs Ex-Wing Commander L.D. James,***[48] held that the power to convene a court martial can be delegated. The Supreme Court per S.U Onu JSC (as he then was) set aside the judgment of the Court of Appeal and held that the power to convene a Court Martial cannot be delegated. In his judgment, he said *"I hold the view that the sub-section of section 133 empowers an appropriate superior authority to authorize a senior office to order a Court Martial in special circumstances".* On this note, this Supreme Court

[45] Suit No. F.H.C./K.D/C.S./68/98 (Unreported)
[46] (2000) 3 NWLR (pt. 647) p.77
[47] (2000) 15 NWLR (pt. 692) p.868
[48] (2003) 13 NWLR (pt.684) p.406

decision serves as a landmark decision for the development of military justice system whereby; the power to convene a Court Martial can be lawfully delegated.

In ***Nigerian Army vs Brig. Gen. Maude Aminu Kano***[49] the Supreme Court held in emphatic terms that the fundamental rights provisions of the constitution apply to all Nigerian including members of the Armed Forces who are also entitled to the protection of the guaranteed rights. This decision is to the effect that members of the armed forces are to enjoy all the fundamental rights enshrined in the constitution.

Having discussed some military law cases decided by civil courts, it is imperative to mention that these cases have not only provided a landmark decision to development of military law and military justice system in Nigeria but have equally assisted in guaranteeing the soldier's right to redress in a civil court. It is also worthy to mention that from 29th May, 1999 to date more than 50 military law cases have been decided in the civil courts[50] and more are still on the way.

3.3 Application of the Doctrine of Compact

A soldier on enlistment or commission attains a legal status. He becomes subject to military law, civil laws and international law. This status he attains is referred to as the doctrine of compact which imposes law and military discipline on him upon completion of the attestation form and taking the Oath of Allegiance. The soldier is expected to obey all lawful orders, rules and regulations which will uphold discipline in the force. Section 15 of the Criminal Code Act[51] provides that *"members of the military forces of Nigeria are subject to special laws relating to the forces which they respectively belong but not exempt from the provisions of the civil law".*

[49] (2010) Vol.35 WRN 1
[50] Oyagha-Ukpong, G.I.O, (2012) *Appellate Cases on the Nigerian Armed Forces Courts Martial*, Divine Connection Printing and Packaging Area 3 Garki, Abuja, Vol.1, Pp. 1-3
[51] Cap C. 38, LFN. Op. cit

The implication of this statute is that the soldier as a member of the armed forces and a citizen of Nigeria is subject to the provision of the Criminal Code. If he contravenes any of its provision he can be tried by either a Court Martial or a Civil Court. The doctrine of compact had been upheld by the English court in the ***Old Case of Grant vs Gould***[52] (Supra) where it was held that*; "A soldier…does agree to consent that he shall be subjected to military discipline and he cannot appeal to the civil courts to rescue him from his own compact."*[53] This doctrine was succinctly reaffirmed by Wills J. in a later case of ***Dawkins vs Lord Rokeby***[54] (Supra). Where his lordship said:

> But with respect to persons who enter into military service, who takes his Majesty's pay and consent to act under his commission, although they do not cease to be citizens in respect of responsibility, yet they do by a compact which is intelligible and which requires only the statement of it to the consideration of anyone of common sense, become subject to military rule and discipline.

Taking a close study of these 2 English Courts decisions, it can be deduced that a soldier upon acquiring military status, he is treated by the state as a service personnel on the one hand and as a citizen of the state on the other hand with all the rights and privileges citizens enjoy. However, in certain circumstances, due to the nature of his service to the state, some of his rights are restricted and are recognized justifiable. This English Court position on the compact of the soldier have not only been adopted in Nigeria but have found constitutional basis in section 45(1) of CFRN 1999[55] where it succinctly state that nothing in sections 37, 38, 39, 40 and 41 of this constitution shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order and public morality or public health. It also covers

[52] (1872) 2 Henry Blackstone Rep. 69
[53] Ibid
[54] (1866) 4 F and F 806 at P. 832
[55] Cap C23, Vol.3 LFN Op.cit

reasons for the purpose of protecting the rights and freedom of other persons. Looking at the constitutional provision and the judicial authorities, the question to ask is. Did the soldier alienate his rights upon joining the military? The answer is in the negative because McCandie J. in ***Heddon vs Evans***[56] which was adopted in Nigerian Courts said:

> I conceive that the compact or burden of a man who enters the army whether voluntarily or not, is that he will submit to military law and not military illegality. He must accept the Army Act and Rules and Regulations and Orders, and all that they involve. These (which I may call army legislation) define his status, indicate his duties, express his obligation, and announce his military rights/ to the extent permitted by them his person and liberty may be effected and his property touched. This defines the extent to which a soldier's life, rights and liability, burden and responsibilities are taken away or added. If he has lost all rights it would have meant also that he cannot be responsible or be blamed for shortcomings. Just as he has civil rights of others. He has to measure his path in between his military and civil rights and duties that are protected or waived by his change of status.[57]

Going by the above dictum of the learned judge, it is clear that a soldier's right can only be restricted upon joining the service. Nobody or authority can alienate his rights completely from him. The position of our constitutional and judicial equally only made provision for restrictions and not alienation. Section 45(1) provided for derogation and restriction of fundamental human rights. While, the Supreme Court in ***Nigerian Army vs. Brig. Gen. Maude Aminu Kano***[58] stated that the fundamental rights provisions of the constitution apply to all Nigerians including members of the armed forces who are also entitled to the protection of the guaranteed rights.[59] From this Supreme Court decision, it is a duty on the state to ensure the guarantee of the fundamental rights of the soldier. In turn, he owes the state obligation of

[56] (1919) 35 T.L.R Op. cit P. 54
[57] Ibid
[58] (2010) Vol.35 WRN 1
[59] Ibid

obedience or else he will be punished for a civil offence. In ***Idakwo vs Nigerian Army***[60] the Court of Appeal said:

> It is beyond doubt that by the provision of section 114 (1) of the Armed Forces Decree No. 105 of 1993, a person subject to Service Law can be charged and convicted for any civil offence created under any enactment. Therefore, a person subject to service law is liable to be charged with an offence to attempt to commit an offence under any enactment and be punishable by virtue of section 114 (1) of the Armed Forces Decree No. 105 of 1993.

In view of the above decision, it will be apt to state that the soldier is under an obligation to obey all civil laws be it civil or criminal in nature. These civil laws the soldier is bound to obey could be tort, contract, commercial transactions and so forth. While the criminal law could be Criminal[61] and Penal Codes[62], or any other laws made by the legislatures. It should be noted that the soldier is not subject to the Firearms Act.[63]

Under the international law, the soldier is expected to measure up to international standard in his conduct. Before now, nations often protect their citizens alleged to have violated international standards by hiding under the auspices of non-interference policy in internal affairs of a state. Recently, however, international pressure and concern are becoming successful in making individuals, including soldiers to justify their actions that are below international standards.[64] The arrest and trial of General Noriega by the United States of America, the extradition of the two Libyans alleged to have bombarded PANAM Jetliner in 1989, the voting out of president Slobadan Milosevic and his subsequent arraignment before the International Criminal Tribunal for former Yugoslavia for alleged war crimes, the arrest and trial of General

[60] (2004) 2 NWLR (pt. 857) 249 at 270
[61] Cap. C.38, LFN, Op.cit
[62] Penal Code (Northern State) Federal Provision Act Cap P3 Vol.13 LFN, Op.cit
[63] See Section 38 of the Firearms Act Cap. F.28 LFN 2004
[64] Chiefe, T.E.C (2003) "*The Military and the Law in A Democracy: A Focus on Disclaimer and Military Justice*:, (unpublished), Being a Lecture Delivered at N.N.S. Quorra in Lagos on 23th June, p.14

Augustine Penoechet for genocide and crimes against humanity. The arrest, trial and conviction of Sadam Hussein of Iraq for crimes against humanity, war crimes and genocide also the arrest and trial of the president of Ivory Coast Laurent Gbagbo by the International Criminal Court are pointers to the fact that a soldier is now in between a tripartite compact rather than a dual compact as opined by some books with regard to his legal status.[65]

Perhaps the establishment of the International Criminal Court (I.C.C) at The Hague on 1 July, 2002, and the adoption of the Rome Statute of the I.C.C on 17th July, 1998 has settled the controversy regarding the tripartite compact of the servicemen. The Rome Statute was ratified by Nigeria on 27th September, 2001.[66] The effect is that members of the Nigerian armed forces are now within the jurisdiction of the I.C.C[67]. Article 1 of the statute gives the I.C.C jurisdiction over persons charged with committing the most serious crimes of concern to the international community. In further support of the fact that a soldier is subject to a tripartite compact and not dual, section 12 (1) C.F.R.N[68] provides that: *"No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."*[69] This constitutional provision implies that once a treaty signed by the Nigerian Government and that treaty has been domesticated in Nigeria by our National Assembly, it automatically binds every person including the soldier. Examples of treaties that have been domesticated in Nigeria are: The Geneva Convention Act[70], African

[65] Daily Sun Newspaper, Wednesday 8th November, 2011, P. 11 Saddam Hussein was found guilty of crimes against humanity and sentenced to death by the Iraq High Tribunal, for the revenge

[66] Ladan , M. T. (2005), "An Overview of the Rome Statute of the International Criminal Court", *The Military Lawyer*, Vol. 2, September, P. 61

[67] Braimah, Y. J., "The International Criminal Court: A New Frontier in the Punishment of War Crimes" In the Military Lawyer, Vol. 2, September, 2005, P. 1

[68] Cap, C23, Vol. 3, L.F.N Op cit

[69] Ibid

[70] Cap G23 LFN 2004

Charter on Human and Peoples Right Act,[71] International Covenant on Political and Civil Rights etc. In 2012, a draft domestication bill for domestication of the Rome Statute has been submitted to the Federal Executive Council by the Attorney General of the Federation 2012[72] for onward transmission to the National Assembly to legislate on it. However, it is yet to be domesticated.

It should be noted that the soldier is not only subjected to international treaties or conventions; he is also subjected to observe and obey international customs in conducting military operations or duties. International customs are not codified; they are longtime usage and practice of states in international affairs which have attained the status of customs well known to states. This customs have binding force in the event of breaching them. Most treaties guiding military operations are derived from Hague Convention of 1907. Hence they form part of the international standard a soldier must uphold and obey.

3.4 The Application of Doctrine of Compact in Relation to Fundamental Rights of a Soldier

The C.F.R.N 1999[73] as the national grundnorm is the source of all the primary rights and obligations of every citizen. Generally speaking, it is equally designed to regulate societal relations within a civil context, as opposed to a military or martial environment. The Fundamental Human Rights Provisions in the constitution are significant in their application to all citizens because these species of rights are deemed to be inalienable and therefore non-negotiable in their application to every member of the society. It has been held that these rights cannot be legislated away by any statute or waived by a beneficiary.[74]

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[71] Cap LFN 2004

[72] Ladan, M.T. Applicable Laws in Engaging Non-State Actors in Counter-Insurgency Operations with particular Reference to Nigeria, Being a Paper Presented at a 3 Day International Workshop on Civil-Military Cooperation and Observance of Human Rights in Internal Security Operations, Organized by Office of the National Security Adviser and European Union Delegation to Nigeria, at National Defence College, Abuja, 23-25 October (2014) p.15

[73] Ibid

[74] Aondoakaa, M. K, Op. cit, p.178

It is generally recognized that outside the contract of actual armed conflict, when military laws and procedure hold sway, armed forces personnel enjoy much the same rights as civilians,. It must be admitted however that due to the very nature of military training and service, the protection of rights such as the right to life and freedom from torture and inhuman or degrading treatment and other rights present peculiar challenges where a soldier is concerned. In view of these facts, we shall discuss how the soldier enjoys fundamental human rights and restrictions placed on him by virtue of his legal status.

3.4.1 Right to Life

A solider, whether in or out of uniform, enjoys a right to life, which can only be abridged, in accordance with Section 33 of the C.F.R.N 1999[75] if it is in the execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria, or if it is lost in the course of the other circumstances outlined in Section 33 (1) (a) & (2) (a) (b) (c) C.F.R.N 1999[76] which states:

> a. *For the defence of any person from unlawful violence or for the defence of property;*
> b. *In order to effect a lawful arrest or to prevent the escape of a person lawfully detained or;*
> c. *For the purpose of suppressing a riot, insurrection or mutiny.*[77]

It is important to note that this right is so fundamental that section 45 of the constitution (which deals with restriction on and derogation from fundamental rights) expressly prescribed that: *"Nothing in this section shall authorize any derogation from the provision of section 33 of this constitution (on the right to life) except in respect of death resulting from acts of war…"*[78] As can be seen from the above provision, the fundamental right to life by every person, whether

[75] Cap C. 23 Vol. 3 LFN Op.cit
[76] Ibid
[77] Ibid
[78] Ibid

civilian or a soldier enjoys special consideration under the constitution, for the obvious reason that the presence of life is a pre-requisite to enjoyment of all other rights. However, where the life is lost as a result of act of war, such an action is justifiable.

It behooves on the military authorities to ensure the protection of the right to life of the soldier. No authority has the right whatsoever to deprive any person his right to life except in accordance with the provision of section 33 (2) C.F.R.N 1999. Any act of extra-judicial killing of a person by the soldier, or military authorities shall attract penal sanction. A clear example of extra-judicial killing by a soldier was the case of the soldier that was alleged to have shut to death one Abdul Saminu a Tanker driver along Zaria – Kaduna highway for allegedly refusing to part with ₦500 as bribe.[79] The act of the soldier is unconstitutional and unacceptable in our society. This is because he has no right whatsoever to constitute himself into a court of law and shoot at any person without lawful justification. The action of this soldier calls for a prosecution because he has acted outside the mandate of his duty and against the constitution.

3.4.2 Right to Dignity of Human Persons

The soldier enjoys these rights just as any other citizen. However, in his own case, there are limitations. The constitution expressly stated that every individual is entitled to respect for the dignity of his person and accordingly, no person shall be subjected to torture or to inhuman or degrading treatment. This right is not absolute on him, following the provision in the section 34(2). The C.F.R.N 1999[80] which provides a person is entitled to right to dignity of human person, no person shall be subjected to: any form of torture, inhumanity, degrading treatment,

[79] Madugba A. "Soldiers Shoot Tanker Driver over N500 on Zaria-Kaduna Highway" http://ww.vanguardngr.com/2015/06/soldiers-shoot-driverover-₦500-Colleagues-Shut-Zaria-Kaduna-highway//sthash.dpuf. Accessed 26th Nov. 2015

[80] Cap, C23, Vol. 3, L. F. N, Op cit

slavery, servitude and force or compulsory labour. However, force or compulsory labour does not include:

a. Any labour required in consequence of the sentence or order of a court, for instance, a sentence to a term of imprisonment with hard labour or community service and so forth as court may impose. This constitutional provision is also extended to where the soldier is summarily tried for an offence and sentence to 28 days imprisonment with hard labour in the unit guardroom by his commanding officer; it does not amount to infrunsment of his fundamental right to dignity of human person.

b. Any labour, required of the armed forces: - This part includes any labour forming part of his normal military routine duties and training. It also includes any labour he is required to perform by the state or military authorities.

c. Any labour required of the people who is reasonably necessary in the event of any emergency or calamity threatening the life or the well-being of a community.

It is pertinent to note that the soldier is under an obligation legally to protect his comrade or the civilian from any form of degration or inhumanity. Any soldier who treats any civilian in an inhuman manner shall be punished severely both in civil and criminal laws. For instance on Saturday, August 8, 2015, soldiers allegedly punish a civilian in the most cruel way at Mararaba, Nasarawa state. The Daily Trust Newspaper carried a photo that shows how the civilian was stripped naked and beaten in a gutter by a soldier.[81] However the NA through its spokesperson Sani Kukasheka stated:

> The civilian being maltreated is a suspected robber. He also pointed out that the perpetrators of the act have been identified and are facing disciplinary action. The news has done damages to the

[81] Ibeh, N. Nigerian Army to Punish Soldiers for Maltreating Suspected Armed Robber. http://www.premiumtimesng.com accessed 9/10/2015

> force. This shocking photo is coming up just when the military is being accused of gross violation of human rights.[82]

From the statement of the spokesperson, it can be deduced that apart from the fact that the NA is not in any way willing to conceal those personnel, it is equally committed to the preserve and protect fundamental rights of civilians. It is on the footing that the chief of Army Staff (COAS) has always referiated to soldiers to be professional in carry out their constitutional duties.

3.4.3 Right to Personal Liberty

The C.F.R.N 1999[83] provides that every person shall be entitled to his personal liberty and no personal shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law. This constitutional right is not only enjoyed by civilians alone it equally extent to the soldier. However, the soldier's liberty in most times is restricted due to exigency of service. For instance, his right to movement can be restricted so that he shall be available to carry out his constitutional roles. There are other justifiable restrictions of his liberty recognized by the constitution. These are:

a. In execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty.[84] In the military justice system, Sections 115, 116 and 118 of A.F.A[85] provided for punishment of a soldier found guilty of an offence either by summary trial or court martial by imprisonment for a specified term.

[82] Ibid
[83] Section 35 (1) of C.F.R.N 1999 Cap C. 23 Vol. 3, L.F.N, Op cit
[84] Section 35 (1) (a) Ibid
[85] Cap A20, L.F.N, Op.cit

b. By reason of his failure to comply with the order of a court or in order to secure the fulfillment of any obligation imposed upon him by law.[86]

c. For the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence.

d. In the case of persons suffering from infectious or contagious disease, person of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community.[87]

e. For the purpose of preventing the unlawful entry of any person into Nigeria or of affecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto.[88]

3.4.4 Right to Fair Hearing

The right to fair hearing is a crucial right which avails every soldier. It is the right to approach a court of law for the determination of his civil rights and obligations, including any question or determination by or against any government or authority as provided under section 36 (1) C.F.R.N 1999.[89] Under this provision, a soldier may institute or defend actions in any court in Nigeria in respect of personal civil matters concerning him such as marriage, custody of children, inheritance, defamation of character, and property disputes, among others. The determinations of these rights are treated by the courts as purely civil matters and the military background of any of the parties is hardly a fundamental matter for consideration.

[86] Section 35 (1) (b) of C.F.R.N 1999, C23, Vol. 3, L.F.N, Op cit
[87] Section 35 (1) Ibid
[88] Section 35 (1) Ibid
[89] Cap C23, Vol. 3 L.F.N, Op cit

In addition, a soldier may equally resort to the civil courts for the determination of his rights that may have been allegedly infringed upon by military court or other disciplinary mechanisms. Section 240, C.F.R.N 1999,[90] for instance, provides for the appellate jurisdiction of the Court of Appeal over decisions of a court martial other tribunals as may be prescribed by an Act of the National Assembly. This provision is further amplified by section 183 of the A.F.A[91] which provides that appeals from Court Martial shall lie without the leave of the Court of Appeal where it involves a sentence of death.

The case of ***Nigerian Airforce vs Ex Squadron Leader A. Obiosa***[92] presented a classic demonstration of the use of the civil courts to test legitimacy of the decisions of a General Court Martial. The case, which involved allegations of stealing and scandalous conduct, among others against the Respondent, went on appeal to the Court of Appeal at the instance of the officer who was found guilty and sentenced by the General Court Martial (GCM). The Court of Appeal upheld his appeal primarily on the ground that the GCM lacked the jurisdiction to try the Respondent. However, on further appeal by the Nigerian Airforce, the Supreme Court overturned the Court of Appeal, decision and restored the original decision by the GCM which had sentence the officer to various terms of imprisonment and ordered him to make restitution to the Nigerian Airforce in the sum of ₦137,750,00.

It is however important to note that there are certain restrictions on the soldier before he can either commence an action in the civil court for infringement of his right or before he appeals the decision of a court martial. These restrictions are found in the A.F.A.[93] For instance, section 178 (1) and 179 (1) which gives officers and soldiers the opportunity to redress

[90] Ibid
[91] Cap, A 20, L.F.N, Op cit
[92] (2003) 4 NWLR (pt. 810) 233
[93] Cap, A20, L.F.N, Op cit

complaints, provides that an officer or soldier who feels himself wronged by a superior officer or the authority should complain to his Commanding Officer within three months of the occurrence of the wrong complained about and where he does not obtain the redress he think he is entitled to, he may make a further complainant to the prescribed authority not later than three months of receiving the unfavourable redress. Sections 178 (3) and 179 (4) of the A.F.A[94] further mandated the officer or soldier to exhaust all internal administrative remedies before embarking on an action in civil court. The second restriction is regarding the right of the soldier to appeal a court martial decision to the Court of Appeal is that firstly, he has to wait for the confirming authority to confirm the court martial sentence and secondly that the confirmation of the finding and sentence of the Court Martial must have been promulgated. These are specifically provided for in sections 148 (3) and 151 (6) of the A.F.A.[95] Section 148 (3) states that *"A finding of guilty of a court martial shall not be treated as a finding or sentence of a court martial until it is confirmed…"* while section 151 (6) states that: *"The confirmation of a finding or sentence shall not be deemed to be complete until the finding or sentence has been promulgated…"* There is a further support of this statute from the decision of the Supreme Court in the case of ***Israel Aribisala vs Talaba Ogunyemi and others***[96] where the Supreme Court recalled its earlier decision in ***Eguamwenze vs Amaghizenmen.***[97] In that case, the Supreme Court per Balgore JSC (as he then was) stated as follows: *"Where a statute prescribes a legal line of action for determination of an issue,…the aggrieved party must exhaust all the remedies in that law before going to court".*[98] The Supreme Court in the Aribisala's cases held that: *"The position of the law therefore , is that in a dispute as this, an aggrieved person who brings a suit must show that he*

[94] Ibid
[95] Ibid
[96] (2005) Vol. 6 M. JSC 188 at P. 205
[97] (1993) 9 NWLR (pt. 315) 1 at P. 25
[98] Ibid

brought his suit only after he had exhausted the remedies provided or followed the procedure prescribed under the applicable law".[99] Hence, going by the statutory provisions and judicial decisions, we are of the view that the right to fair hearing of the soldier as regards bringing an action before a civil court is not automatic, as he must exhaust all administrative remedies provided by statues or else the matter will be thrown out of the court for not complying with statutory rules.

3.4.5 Right to Private and Family Life

Under section 37 of C.F.R.N 1999[100], every person this includes a soldier have the right to private and family life. Therefore the privacy of a person's home, correspondence, telegraphic and other forms of communication must not be invaded without lawful justification and according to law.[101] Where one person or public authority trespasses or invades the privacy or the home of an individual, such individual may be entitled to sue for trespass and so forth. [102] An invasion of private life may amount to defamation, or other tort or crime. A person so deferred may sue under the defamation law, or other relevant tort and recover damages except the defendant has a defence. Action may also be brought in criminal law. It is worthy of note to state that as regard the soldier, in the interest of defence, public safety, public order public morality or public health. His right to private and family life can be invade and it is reasonable justifiable. For instance, the military authorities have made it an offence for service personnel to print any

[99] Ibid
[100] Cap C23 Vol 3 L.F.N Op cit
[101] Complete Comm.. Ltd. vs. Onoh (1998) 5 N.W.L.R Pt 549, p. 197 CA
[102] Ese. M. (2012), *The Nigerian Constitutional Law*, Princeton Publishing Company 9, Ezekiel Street, Off Toyin Street Ikeja Lagos 3rd Edition p. 298.

related military matter or photos on the social media. The reasons behind this law are to checkmates and censor any form of security breach.[103]

[103] See Policy on the Use of Social Media for the Armed Forces of Nigeria (2017) Prepared under the Direction of A.G., Olonisakin, Chief of Defence Staff, pp.3-10

3.4.6 Right to Freedom of Thought, Conscience and Religion

Generally, under section 38 of the C.F.R.N 1999[104] it guarantees the right to freedom of thought, conscience and religion. A person is therefore free to believe, or change his religion, either alone or in community with others and in private or public manifest and propagate his religion, or worship, teach and practice his religion. This right is also extended to the soldier to enjoy just as the ordinary civilian. A person has the right to enjoy such right in a multi religious country like Nigeria; the need for this freedom cannot be overstressed. Nigeria is a multi religious nation and the government machinery, organisation or institutions are secular. The C.F.R.N 1999 prohibits government from adopting a state religion [105].

However, in the military there are only two religions namely Islam and Christianity that are recognized. All activities, ceremonies and functions organized by the military, observe only these two religious. In the administrative settings for religions affairs, there are Directorate of Islamic Affairs, Directorate of Roman Catholic and Directorate of Protestine. In all these Directorates, they are presided over by spiritual leaders such as Imams, Chaplain Roman Catholics and Chaplain Protestine. There function is to provide religious rights and rituals according to the belief and faith of soldiers. In addition, all military barracks, have three houses of religious worship i.e. the mosque headed by an Imam for the Muslim faithful, while for the Christian faithful, there is a church for Roman Catholic head by a Chaplin Roman Catholic and a church for Protestine headed by Chaplin Protestine.

[104] Cap C23 Vol. 3 L.F.N Op cit
[105] Section 10 CFRN 1999, Ibid

It is pertinent to note that the soldier right to freedom of thought, conscience and religion is not absolute because it can be restricted on ground of defence, public safety, public order, morality or public health.[106]

3.4.7 Right to Freedom of Expression and the Press

The C.F.R.N 1999[107], has guarantees freedom of expression and press to every individual. A person therefore has freedom to hold opinions as he will, to receive, and impact ideas and information without interference. A person shall within the provisions of any Act enacted by the National Assembly be free to own, established and operate any medium for the dissemination of information, ideas and opinions. However, the soldier right in section 39 (3) (b) of the C.F.R.N 1999[108] have been restricted. The section categorically provides as follows: *"Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society imposing restrictions upon persons holding office under the Government of the federation or of state, members of the armed forces of the federation or members of the Nigerian Police Force or other government security services or agencies established law…"*[109] It is in the light of this constitutional provision that the soldier is not allowed to hear his opinion publicly without authorization. Where a soldier communicated with the press in exercise of his freedom of expression or embark on a protest against the constituted authority with the aim of expressing his opinion, he will be criminally responsible for either Disobedience to Standing Order or Insubordinate Behaviour which are crime provided by our A.F.A.[110]. The Criminal Code[111] also provided restriction to the enjoyment of freedom of expression of public servants and any public

[106] Section 45 (1) Ibid
[107] Section, 39 (1) Ibid
[108] Cap, C. 23 Vol. 3 L.F.N Op cit
[109] Ibid
[110] Cap A20, L.F.N, Op cit
[111] Cap C. 38 L.F.N, Op cit

servant indicted for such act, is guilty of a misdemeanor upon conviction. Public servant in Nigeria includes a soldier. The Act stated that:

> Any person who being employed in the public service, published or communicated any fact which comes to his knowledge by virtue of his office, and which it is his duty to keep secret, or any document which comes to his possession by virtue of his office and which it is his duty to keep secret, except to some person to whom he is bound to publish or communicates it, is guilty of misdemeanor, and is liable to imprisonment for two years.[112]

To cap everything up, section 45(1) C.F.R.N 1999[113] restricted the enjoyment of the right to freedom of expression and the press of a soldier in Nigeria in the interest of defence, public safety, public order, public morality or public health.[114] This restriction is not only peculiar to the Nigerian soldier; it is equally applicable in other jurisdictions. For instance, Article 10 of the European Convention on Human Rights 1950 is similar to our section 39 of C.F.R.N 1999[115]. Also the European Court of Human Rights in ***Engel vs Netherlands[116],*** held that:

> Of course, the freedom of expression guaranteed by Article 10 applies to servicemen just as it does to other person within the jurisdiction of the contracting state. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings.[117]

Similarly, in ***Le Cour Grandmaision and Fritz vs France,[118]*** the court held that "*there had been no violation of Article 10 when two conscripts were imprisoned for a year after distribution of materials calling for French army units to withdraw from Germany"*. With these developments, it is crystal clear that in order to uphold discipline and effective performance of

[112] Section 97 (1) Ibid
[113] Cap, C. 23 Vol. 3 L.F.N, Op cit
[114] Section 45 (1) Ibid
[115] Cap C. 23 Vol. 3 L.F.N Op cit
[116] Appl No. 11567/85153 DR 150 (1987)
[117] Ibid
[118] Appl No 94 84 DR58 (1975)

military duties, certain rights of the soldier are restricted to pave way for military discipline. One may ask, does it mean that the soldier cannot air his views or opinion absolutely? The answer is in the negative. Because the proper channel of expression is done either through authorization, complaint[119] or through its mouthpiece being the Nigerian Army Public Relations Directorate.

3.4.8 Right to Peaceful Assembly and Association

Section 40, C.F.R.N 1999[120] provides every person shall be entitled to assemble freely and associate with other persons, and in particular he may form and belong to any political party, trade union or any other association for the protection of his interest. This is the general rule as far as the constitution is concerned.

However, this right is minimally enjoyable by the Nigerian soldier. The soldier in Nigeria is not allowed to belong to any association or a political party, whether the association is a pro-government association or not except a recognized professional body like Nigerian Bar Association (NBA). The soldier in Nigeria took the Oath of Allegiance to be loyal and pay the true allegiance to the Constitution of Federal Republic of Nigeria 1999[121] and the government of the day. Hence, he remains apolitical. He shall not put himself in a position where his personal interest conflicts with his duties and responsibilities.[122] Where he allows his personal interest to conflict with his official duties, it will lead to loss of confidence in him by the public. For instance, during the campaign period of 2015 general elections, there was acrimony and heated arguments between the two prominent political parties in Nigeria, All Progressive Congress (APC) and People Democratic Party (PDP) as to whether to deploy soldiers for the elections or

[119] Section 178 and 179 A.F.A Cap A20 L8N Opcit
[120] Cap C23, Vol.3, L.F.N Op cit
[121] Schedule Seven of C.F.R.N 1999 Ibid
[122] The Code of Conduct for Public Servant in Fifth Schedule, Part 1 of CFRN 1999 Cap C23 Vol.3 LFN Op.cit

not.[123] The reason for this acrimony and heated argument was because the military have compromise their duties and involved in partisan politics. As a result, Nigerian Army's name was not only smeared but equally her integrity was highly doubted by the public. It was a challenge the government took to restructure its military so as to live upto the expectation of their constitutional duties.

Another restriction of the soldier's right to peaceful assembly and association can be drawn from marriages. Marriage is generally believed to be an association between a husband and a wife. A man can marry any woman of his choice and from any part of this world. But in the case of the soldier, it is not so. He is restricted only to marry a Nigerian woman. This restriction has been provided by the HTACOS for both officers and soldiers[124] who prohibit the members of the Armed Forces from marrying non Nigerians. Section 45 (1) C.F.R.N[125] clearly derogates from that right in as much as the act of the derogation is done in pursuant to a law made in the interest of the defence of the country.[126] In support of this position, the Kaduna Federal High Court had to quash a dismissal order meted on some soldiers by the Nigerian Army authority in the case of ***Corporal Shehu Maigari & 28 Ors v. Nigerian Army.***[127] Where the soldiers appealed against their dismissal from service by their Commanding Officer, at a summary trial on a charge of being married to foreign women, the Federal High Court quashed the dismissal of the soldiers; in that case, the court held that the girls were mere girl friends as there was no proof of marriage. In our view, restricting a soldier from marrying a foreigner as well a good law because it may end up jeopardizing national security.

[123] Taiwo A., PDP Insist on Soldiers for Elections, why APC kicked, By Kayode F., p.5 Daily Sun Newspapers, Friday February 20, 2005.
[124] Section 17.03 of the Harmonized Terms and Conditions of Service of (Officers) (2012)
[125] Cap C23, Vol. 3, LFN, Op cit
[126] Ibid
[127] Suit No FHC/KD/CS/68/98/(unreported)

Another development is the issue of soldiers forming an association to protest for their right from the authority. In such cases, it is always treated as indiscipline and Mutiny which is punishable either with death or life imprisonment. The case of ***CPL Oladele & ORS vs Nigerian Army***[128] and the case of ***Corporal Oliver & 26 ORS vs Nigerian Army*** are locus classical cases of soldiers that have been convicted for mutiny because they protested to the military authorities to enforce their legitimate entitlement.

Contrary to the general belief in military circle, a peaceful or violent demonstration or protest by soldiers does not constitute mutiny but rather insubordination which is punishable under section 54 of the AFA.[129]

Notwithstanding that soldiers are citizen of Nigeria, who are entitled to exercise their fundamental right to freedom of expression and association, whenever soldiers have staged a protest they have been charged with mutiny punishable with death. In ***Inspector General of Police vs All Nigerian Peoples Party***[130], the Court of Appeal held a protest, rally demonstration is a trend recognized and deeply entrenched in the constitution of every democratic country as a compound of the freedom of expression. Hence, in view of this Court of Appeal decision, where the soldiers protest either peacefully or violently, he has not committed munity however, it may be the offence of insubordination to the constituted authorities.

3.4.9 Right of Freedom of Movement

The C.F.R.N 1999 provides that every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof and no citizen of Nigeria shall be expelled

[128] Falana, F. (2015) Military Justice System and Human Rights. http://www.premiumtimesng.com accessed 10/4/17
[129] Cap A20 LFN Op.cit
[130] (2008) 12 WRN 65 at 106

from Nigeria or refused entry thereto or exists there from.[131] This right is not only to civilians but it is equally extended to the soldier to enjoy as a citizen of Nigeria. But in the case of the soldier, apart from the general restriction provided by Subsection 2 of section 41 of C.F.R.N 1999,[132] the soldier right is equally restricted by the constitution under 45 (1) in the interest of defence, public safety, public order, public morality or public health.

In subsection 2, to section 41, it provided that nothing in subsection (1) of this section shall invalidate any law that is reasonably justifiable in a democratic society:

a. Imposing restrictions on the residence or movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria[133] or
b. Providing for the removal of any person from Nigeria to any other country to:

i. Be tried outside Nigeria for any criminal offence, or
ii. Undergo imprisonment outside Nigeria in execution of the sentence of a court of law in respect of a criminal offence of which he has been found guilty.

In the military, the AFA provides for detention of a soldier who has committed an offence[134]. Where an officer commits an offence, he is confined to the Officers' Mess pending investigation and trial of the case. Where a senior non commissioned officer commits an offence, he is equally confined to the Mess. But where non commissioned officer commits an offence, he is confined in the guard room pending the outcome of the disciplinary case. The power to detain service personnel in custody is provided in section 122 of the NA.

[131] Section 41 (1) of C.F.R.N 1999 Cap C.23, Vol. 3, L.F.N, Op.cit
[132] Cap C23 Vol.3 LFN Op.cit
[133] R. V. Home Secretary, Exp Soblem (1963) 1 QB 829
[134] Section 122 of the AFA Cap A20 LFN Op.cit

As regards restriction of right to movement of the soldier in the interest of defence, public safety, public order, public morality or public health, his movement is restricted for the simple fact that he can at anytime be available to be deployed for any military duty that may inadvertently arise. It is against this background that military tattoo are been conducted to check the unwarranted movement of soldiers outside military confinements.

3.4.10 Right to Freedom from Discrimination

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subjects.[135]

In view of this constitutional provision, the military authorities have always upholds this constitutional provision whenever they are recruiting soldiers or Commissioned Officers; The exercise reflects the federal character system as enshrined in the constitution to give equal representation of each state of the federation including the Federal Capital Territory Abuja. Section 219 of CFRN[136] stated that the National Assembly shall in giving effect to the functions specified in section 217 of this constitution with respect to the powers exercisable by the president under section 218 of this constitution by an Act, establish a body which shall comprise such members as the National Assembly may determine, and which shall have power to ensure that the composition of the armed forces of the federation shall reflect the federal character of Nigeria in the manner prescribed in the said section 217 of this constitution. It is however,

[135] Section 42(1) of C.F.R.N 1999 Cap C23 Vol.3 L.F.N 2004 and also the case of Nzekwu vs. Nzekwu (1989) 2 NWLR, pt 104
[136] CFRN 1999 Ibid

doubtful if this body has been established by the National Assembly. But notwithstanding, the military authorities always ensure federal character is reflected in its recruitment exercise.

However, this right is not devoid of restriction to members of the Armed forces. In the wordings of section 42(3) it stated that nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the state or as a member of the armed forces of the federation,[137] in our view, this restriction can be exercised in the interest of National Security. For example, with the current insurgency conundrum in the North Eastern part of Nigeria, if recruitment of intending soldiers from the North East will prejudice National Security, because of surreptitious infiltration of the insurgents into the recruitment process, candidates from that part of the country may be restricted from joining the military and it becomes justifiable. Contrary to the justifiable laws the military justice system by virtue of the Armed Forces (Disciplinary Proceedings) (Special Powers)[138] is discriminatory to the soldier who after been acquitted by a competent court, the Army Council is empowered by the Act in the interest of the Armed Forces to punish the acquitted soldier. Obviously this Act is not only infringing the fundamental human right of the soldier but it is discriminatory on his path. Hence it needs to be reformed.

3.4.11 Right to Acquire and Own Immovable Property anywhere in Nigeria

This right is enshrined in our constitution to be enjoyed by citizens. Section 43 of the C.F.R.N 1999[139] provided that subject to the provisions of this constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria. The implication of this constitutional provision is that every person in Nigeria has the right to own

[137] Cap C23 Vol.3 LFN Op cit
[138] Cap A20 LFN Op cit
[139] Cap C23 Vol.3 LFN 2004 and see the cases of Lalcami v. A.G. Western State (1971) 1 U.L.R. 201. Also the case of Uwaifo v. A.G. Bendel State (1983) 4 N.C.L.R 1 SC

immovable property in Nigeria irrespective of where he comes from or what state he belongs to. Undoubtedly, this right is enjoyable by the Nigerian soldier. He has the right to purchase land in any part of the country and as well build and live in that part of the country. It should however be noted that due to exigency of service, he can be posted to work from one part of the country to another without notice. Hence this may deprive him the right to safe guard and protect his immovable property trespasses. Many a times, trespassers have taken advantage of exigency of the military service to claim ownership of immovable properties of soldiers. This is inspite of the law that said default judgement shall not be passed against a soldier who could not attend the court due to exigency of service. Hence it is suggested that the state should adequately protect the soldier's right in this regard.

3.4.12 Restriction on and Derogation from Fundamental Rights

The fundamental rights enshrined in Chapter IV of the CFRN 1999[140] discussed above is available to the Nigerian solider. However, considering the specialized nature of the military profession and the risky and hazardous task a solider is required to execute, some of these rights which are taken for granted in the case of an ordinary citizen, maybe curtailed with respect to a soldier. This is because he is under a compact and the demands of a stricter discipline and the requirement of obedience to lawful superior order. It will therefore not be open to a soldier to claim violation or threat of violation to his right to life or other fundamental rights on account of his being deployed for military operations with the risks and dangers of taking up such order. Recently, a British Newspaper reported the trial by Court Martial of one Lance Corporal Joe Glenton of the British Royal Logistics Corps for refusing to return to Afghanistan where the British Army is engaged in military operations against the Taliban's his action amounted to a desertion publicly. The 27 year old soldier handed over a letter to the Prime Minister's Office

[140] Cap C23 Vol.3 LFN Op cit

calling for British troops to be withdrawn from Afghanistan, insisting that Britain's mission would fail. He is said to be the first soldiers to have publicly deserted the military rather than take up arms again in Afghanistan.[141]

The story of Lance Corporal Joe Glenton is relevant to the extent that it depicts that even in a Western country like Britain where the rights of citizens are highly respected, the laws and rules as they relate to military personnel are a bit different.

Similarly in Nigeria, it would be recalled that on 15 October, 2014, 97 soldiers and 15 officers were arraigned over allegation of mutiny before a General Court Martial (GCM). The GCM headed by Brigadier-General Musa Yusuf which sat at the Army Headquarter Garrison, Abuja presented a charge sheet which claimed that the soldiers' standing trial rejected lawful orders from their Commanding Officer to advance on an operation to recapture Delwa, Bulabulin and Damboa in Borno state from insurgents. The soldiers were charged and convicted for mutiny, assault, desertion, house-breaking and disorderly behaviour.[142]

Even though, the soldiers mutinised because they have consistently alleged failure of the Federal Government to properly arm them to confront the insurgents, whom they claimed have more sophisticated weaponry.[143] The Borno State Governor, Alhaji Kashim Shettima had earlier lamented about how ill-equipped Nigerian soldiers in the state were.[144] Falana F. Counsel to the accused soldiers equally said it is not mutinous for the soldiers to demand for equipment to fight insurgents.[145] The battle for the freedom of the convicted soldiers also took a new dimension as the United Nation is weighing in on the Nigerian Government to halt the execution of the

[141] Ayua P.M. (2009), Military Justice System in a Democracy, *The Military Lawyer*, A Publication of the Directorate of Legal Services (Army) OctoberVol.4, pp.173-184
[142] Ahmed T.A., Terna D; and Ronald M., Nigerian Army's Season of Court Martial weekly Trust Newspaper, pp.4&5 Saturday, January 10, 2015.
[143] Ibid
[144] Ibid
[145] Ibid

soldiers.[146] Taking a holistic study of this mutiny case, we are of the opinion that the soldier upon joining the military owes the state allegiance of obedience and in turn, the state owes him the duty of maintaining and equipping him to perform his constitutional roles.[147] Where the state fails in her constitutional duties to provide equipments to fight the insurgents and the soldiers protested in disobedience to confront the insurgents, it should not be made a subject matter of criminal action against them. Section 45(1) which restricted the soldier's rights in the interest of defence, public safety, health and morality did not give room for alienation of the human rights of the soldier. Hence the reasons for the criticisms and condemnation of the Court Martial sentences on the soldiers by both the society and international community. Where the rights of the soldier are restricted pursuant to section 45(1) of the CFRN 1999, it must be seen to be transparent and justifiable in the eyes of the law.

In another development, the right of the soldier can be abridged pursuant to section 45(1) and it is justifiable. For instance section 176 (2) AFA[148] entitles a person tried by a court martial to obtain from the convening officer copy of the record of proceedings of the court on payment of a fee. Section 176(4) however qualifies this right by empowering the Minister of Defence to decline to furnish the accused person with such record if he is of the opinion that such proceedings or any part thereof should not be disclosed or made public for reasons of security. This subsection also impugns on the right granted to an accused person under section 36(7) of the CFRN 1999[149] to have unqualified and unimpeded access to the judgment of the court that tried him within seven days of the judgment being given.

[146] Ibid
[147] Section 217(1) of the CFRN 1999 Cap C23 Vol.3 LFN, Op.cit
[148] Cap A20 LFN Op cit
[149] Cap C23 Vol.3 LFN Op cit

The soldier as earlier stated is required to first exhaust all subsisting internal military and administrative remedies for redress before resorting to external instruments like litigation. Every soldier is protected and shall not be penalized for making a complaint in accordance with the laid down procedure under the law. It is pertinent to note that in laying a complaint, the soldier shall ensure he does not contravene any provisions of the law.[150]

In view of this, we are of the opinion that where the possibility of restriction of the soldiers rights exist, military laws should be applied more liberally in the spirit of the rule of law and democracy rather than adhere to strictly to legalese the traditional norms rooted in history which may be archaic. Perhaps, this is the message that is hitherto being sent across to the general public that attracts condemnation and the appellate courts which have from time to time upturned the decisions of Court Martial. Because most military case are not lost on their merit but due to the fact that the military justice system is not in conformity with tenets of rule of law and democracy. Hence there is a need for the reformation of the Armed Forces Act and other relevant laws so as the Military justice system will be inconformity with our constitution and democracy.

3.5 The Application of Doctrine of Compact in Relation to Civic Rights of the Soldier

Generally speaking, a citizen of a country is a person who is a legal member of a country.[151] Citizenship of a country may be acquired by one of several means. For instance, by birth, naturalization, descent from a grand-parents and registration. There is also honorary citizenship, which is citizenship conferred on an achiever, distinguished, or eminent foreigner as a mark of honour.[152] In Nigerian citizenship is acquired constitutionally in three ways. That is by

[150] Section 178 & 179 of AFA Cap A20 LFN 2004
[151] Ese M. op.cit p.274
[152] Ibid

birth[153], registration[154] and naturalization.[155] It should however be noted that only a Nigerian citizen by birth as defined in the constitution of Federal Republic of Nigeria can be enlisted or commissioned into the Nigerian armed forces.[156]

A citizen enjoys many rights in his country. He enjoys full social, economic, political, constitutional, and legal rights and the protection of the law. He is entitled to take part in the political process, vote and be voted for according to law. He has right to live in his country, make his country his permanent place of residence, seek employment, trade and otherwise legally earn his living. A citizen enjoys all the fundamental rights in the constitution. The rights of a citizen can only be restricted or denied according to law and the constitution. A democratic government, a bill of rights, an independent and impartial judiciary, a free and fearless press, peace and order and a good economy and so forth, are necessary factors for the full enjoyment and protection of the right of a citizen. All these are rights guaranteed to citizens the state which includes the soldier. A citizen in enjoyment of these rights owes the country civic rights and obligations. These civic rights and obligations apply to all citizens including the soldier. We will discuss how these civic rights and obligations are applicable to the Nigerian soldier just like the ordinary citizens with examples.

3.5.1 Respect for Constitution and its Ideals

The CFRN 1999 made adequate provision for the civic rights and obligations of the Nigerian citizen. For instance, it shall be the duty of every citizen to abide by this constitution,

[153] Section 25 CFRN (1999) Cap. C23 Vol.3 Op.cit
[154] Section 26 Ibid
[155] Section 27 Ibid
[156] Section 02.01(a) of Harmonized Terms and Conditions of Service Soldiers/Ratings/Airmen op.cit

respect its ideals and institutions, the National Flag, the National Anthem, the National Pledge and legitimate authorities.[157]

In view of this constitutional provision, it is a civic duty for the soldier to respect the constitution, ideals and institutions. The constitution stated that this constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.[158] The effect of this provision is that every person in Nigeria which includes the soldier shall observe and respect the provisions of the constitution. Including all institutions created by it. As regards the National flag, Anthem and Pledge, it is a duty rooted on the soldier as part of military regimentation to respect them.

3.5.2 Enhancing the Power, Prestige and Good name of Nigeria

The constitution provided that every citizen shall help to enhance the power, prestige and good name of Nigeria, defend Nigeria and render such national service as may be required.[159] As regard the help to enhance power, prestige and good name of Nigeria, the Nigerian soldiers in the conduct of all international and domestic military operations, conduct it with professionalism and high sense of respect for rule of law. Today, The Nigeria Military have the two of Battalions in Darfur Sudan and Liberia for the peacekeeping operations. This is as a result of high level of professionalism and respect for tenets of rule of law exhibited by them in the operations. Hence, it is evidenced that the conduct of the soldiers both at home and outside the shores of Nigeria has helped in enhancing the prestige and good name of Nigeria as a country. On the issue of defending Nigeria, it is one of the primary role of the soldier, which have been extensively discussed in chapter two to this work. Rendering national service that may be required, it is also one of the ancillary duties of the soldier to the state in the event of disaster or calamity. For

[157] Section 24(a) of CFRN 1999 op.cit
[158] Section 1(1) Ibid
[159] Section 24(b) Ibid

example, it would be recalled that sometimes in 2013 there was a bridge that collapse in Sokoto state North West Nigeria which led to the serious hardship to the citizenry and economic development of the state. The Sokoto State Government called on the Federal Government for an immediate intervention to arrest the situation to make life easy for the victims. In respond to the call, the Federal Government tasked the Nigerian Army to go and construct a bridge that can remedy the difficult situation. The Nigerian Army Engineer Corps in turn, was tasked to build an interim bridge that can be used by the citizens to easy the hardship pending the repair of the collapsed one. Undoubtedly, this act of the military is an example of rendering of national service to the nation.

3.5.3 Respect for Dignity of other Citizens and the Rights and Legitimate Interests of Others

The respect for dignity of other citizens and the rights and legitimate interests of others and live in unity and harmony and in the spirit of common brotherhood,[160] is a civic obligation is not only to the civilian it is equally an obligation of the soldier. But including the soldier to ensure he respect the rights of civilians and his fellow soldier and also live in peace and harmony with every citizen. The constitution have made this clear. However, so many times, the soldiers in our society have been accused of maltreating civilians and other security agencies. Cases abound of report either against the military authorities or individual soldiers for infringement of human rights of civilians. This conspicuous affront and bizarre violation of rights were recorded both during military rule and in our day's democracy. Today with the democratic government, its institutions, and social media, human rights violations don't go unpunished. However, there are still reports of infringement of human right. An example is the case of maltreatment of a civilian in Mararaba Nasarawa State. On Saturday, August 8, 2015, soldiers allegedly punished a civilian

[160] Section 24(e) of CFRN 1999 op.cit

in the most cruel way at Mararaba Nassarawa state. The Daily Trust Newspaper carried a photo that showed how the civilian was stripped naked and beaten in a gutter by the soldiers.[161] This bizarre violation of his right to dignity attracted public condemnation and intervention of the National Human Rights Commission against to enforce the right of the victim. The Nigeria Army, in a bid to bring the culprits to book stated that:

> The civilian being maltreated is a suspected robber. He also pointed out that the perpetrators of the act have been identified and the news has done damage to the force. This shocking photo is coming up just when the military is being accused of gross violation of human rights. In effect, the NA is not just disclaiming and condemning the actions of the soldiers but for the fact that it is a discipline force, the soldier were subjected to disciplinary action to serve as a deterrent for others. Therefore, the respect for the right of citizen is sacrosanct and shall at all time be respected.[162]

The other civic right is respect for the right and legitimate interest of others and live in unity and harmony and in the spirit of brotherhood, the soldier is expected to exhibit this civic obligation even when a wrong by the civilian or any security agent is done to him. However, in some instances, reverse is the case for example, on the 4th July, 2014, soldiers went on rampage as a result of the death of Lance Corporal Mathew Ishaya who was knocked down by a BRT along Ikorodu express way. The deceased died as a result of no emergency medical attention and the driver of the bus ran away. Some military men from the intelligence unit of the NA at Yaba stormed the Onipanu area of the highway demanding to know the circumstances surrounding the death of the soldier. The soldiers were said to have incensed that their colleague was allowed to die after he was knocked down, when he could have been rushed to a nearby hospital. However, hell broke loose shortly after the soldiers sighted the lifeless body of Lance Corporal Ishaya in the bus that knocked him down. They allegedly blocked one side of the ever-busy road stopping

[161] Ibeh, N. Nigerian Army to Punish Soldiers for Maltreating Suspected Armed Robber. http://www.premiumtimesng.com Accessed 9/10/15
[162] Ibid

any BRT buses plying the route, four of which were allegedly set ablaze. The shed at the bust stop was also not spared. Pedestrians passing through the area alleged that they were manhandled by the irate soldiers.[163] From this situation, it is a clear exhibition of conduct contrary to the expectation of civic obligation as provided by the constitution. If they are irate and aggrieved with the act of the BRT driver, it is a duty upon them to follow the proper channel of redress stipulated by the law and not to take the laws into their hands by resorting to violence and vandalization. Thus, their act was uncivilized and cruel which requires penal sanction.

3.5.4 Making of Useful Contribution

The constitution also tasks citizens to make positive and useful contribution to the advancement, progress and well-being of the community where they reside.[164] Going by this civic obligation, the soldier is expected to make positive and useful contributions within the community where he resides. This will help to foster a good relationship between him and other citizens and between him and the state.

3.5.5 Rendering of Assistance and Declaration of Income

Citizens are constitutionally enjoined to render assistance to appropriate and lawful agencies in the maintenance of law and order.[165] This civic obligation equally binds the soldier to render assistance to lawful agencies to maintain law and order. For instance, due to the security situation of the country, soldiers have been deployed to provide security in government owned agencies, installations and properties e.g. Nigerian National Petroleum Corporation (NNPC), Central Bank of Nigeria (CBN), Power Holding Company of Nigeria (PHCN) and their installations.

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[163] Usman E; Adelaye B; and Olowoopeyi M., "Soldiers go on Rampage Burn, Vandalize BRT Buses over Colleagues Death in Lagos" http://www.punchng.cpm/news/soldiers-on-th-rampage-on-Ikorodu-road-burnt-brt-busses on 4 July, 2014 visited 12/2/15

[164] Section 24(d) CFRN 1999 op.cit

[165] Section 24(e) Ibid

It is also a civic duty on the soldier, to declare his income honestly to appropriately and pay his tax promptly.[166] He is expected to declare his income honestly just like any other citizen when the need arises to the appropriate agencies. It is also incumbent upon him to pay his tax promptly and accordingly failure to pay tax is a breach of the law. To further amplify this obligation, the HTACOS under the Code of Conduct stipulated that *"a Soldier, Rating or Airman shall pay all just financial obligations in a proper and timely manner especially those imposed by law and mutual contract".*[167] In view of this code of conduct, it will be apt to state that in the case of the soldier, apart from the fact that the law considers it an offence not to pay tax, it is equally a breach of the code of conduct not to pay tax. Hence his military status does not in any way exempt him from the binding force of civil law instead; it places him on a higher pedestal then the ordinary civilian.

3.6 The Application of Doctrine of Compact in Internal Military Operations

It will be recalled that in the cause of our discussion of the constitutional roles of the military, we stated that one of the duty of the soldier, is suppressing of insurrection and acting in aid to civil authorities to restore law and order when called upon to do so.[168] It is on this footing that the soldier apart from performing of his primary role of defence of the nation from any external aggression; he is also bound to perform the police duty in the event where the police are unable to perform their function of maintenance of law and order. This Police duty that he performs in aid to civil authorities is called Internal Military Operations. This operation can be International Security (IS), Internal Security Operations (ISO), Non-International Armed Conflict (NIAC) (civil war), Multi-National Force (MNF) or Cross-Border Operations. For better

[166] Section 24(f) Ibid
[167] Section 18.06 HTACOS op.cit
[168] Section 217(2)(c) CFRN 1999 op.cit

understanding of these various types of Internal Military Operations, we shall discuss these types of Internal Military operations and their conduct in line with tenets of rule of law.

3.6.1 Categories of Internal Military Operations the Soldier is involved:

a. **Internal Security (IS):** Simply put means the act of keeping peace within the borders of sovereign state, generally by upholding the national law and defending against threats to internal security.[169] Threats to internal security may range from low-level civil war, civil disorder, large scale violence or even an armed insurgency. Such threats may be directed at either the state's citizens, or the organs and infrastructure of the state itself, and may range from incessant political and industrial unrest, crimes of kidnapping, armed robbery, organized crime, to even domestic terrorism. Foreign powers may also act as threats to internal security, by either community or sponsoring acts of terrorism or relation or insurgency, without actual declaring a war.[170]

b. **Internal Security Operation (ISO):** It refers to an operational environment in which situations of internal disturbances and tension are characterized by riots, isolated and sporadic acts of violence, social, economic, political and religious tensions and other acts of a similar nature that disrupt public order without amounting to armed conflict because of the level of violence is low or not sufficiently high and because the persons retorting to violence are not organized as an armed group.[171] In such situations, the military comes in and to the civil authorities for a supporting role and will be deployed only when existing law

[169] Ladan M.T, Applicable Legal and human Rights Standard in Internal security Operations in Nigeria and Perspectives of African Union and ECOWAS, Being a Presentation made at the Civil Military Cooperation and Human Rights Observance Training of the Trainers Course for Members of the Nigerian Armed Forces and other Security Agencies, Organized by the Office of the National Security Adviser in Collaboration with the European Union Technical Assistance to Nigeria's Evolving Security Challenges, at National Defence College, on 4th – 15th April, (2016) Pp. 3-4

[170] Ibid

[171] Ibid

enforcement authorities resources are over stretched to do the job properly. In cases where law and order has broken-down completely and the civil authorities, including the police are unable to cope with the situation, the military on the instruction of the government, may have to take over, but only until law and order can be restored at which time responsibility will be handed back to the civil authorities and law enforcement agencies.[172]

In these circumstances, the primary role of the military is not to conduct hostilities against an organized armed opponent but to fulfill some of the functions normally carried out by police in restoring and maintaining law and order. They must apply the legal constraint that guides police forces, particularly in relation to the use of force and firearms. It should be noted that the military do not become police overnight, but they have to adjust to their new role, by adjusting their operational procedures rather than to adopt new ones.

c. Non-International Armed Conflict (NIAC) (Civil War): Situation of internal disturbances and tension can escalate to the point that a government decides to involve the armed forces in operations to restore public order within its territory. Where this happens, armed confrontations between members of the armed forces and dissident armed forces or other organized non-state armed groups can be said to constitute a situation of "civil war" (NIAC).

A NIAC is an armed conflict in which hostilities are taking place between the armed forces of state and organized non-state actors NIAC, they must reach a high level of intensity and the armed groups must be sufficiently organized.[173] Two distinct case of NIAC must be

[172] Section 217 (2) CFRN 1999 Cap C23 Vo. 3 LFN Op.cit
[173] Ladan M.T, Op.cit Pp. 4-5

considered under common Article 3 to the Geneva Conventions and falling within the meaning provided in Article 1[174] of Additional Protocol 2 of 1977 to Geneva Convention.

i. NIACs may occur between states armed forces and organized non-state armed groups or only between such groups.[175]

ii. Any situation where, within state's territory, hostilities break out between states armed forces and dissidents' armed forces or other organized armed groups which are under the leadership of a responsible command and exercise such control over a part of the territory as to enable them conduct sustained and concerted military operations.[176]

iii. The definition of NIAC under Protocol II is narrower than the nation of NIAC under Common Article 3 in two respects:

It introduces a requirement of territorial control by providing that organized non-state armed group must exercise such control to enable them carryout sustained and concerted military operations.

Unlike common Article 3, Additional Protocol II does not apply to armed conflict between organized non state armed groups. This means that the restrictive definition of NIAC is relevant only for the application of Additional Protocol II, it does not extend to the general law of NIAC and therefore it is supplementary to common Article 3 of the Geneva Convention.[177]

d. Multi-National Force (MNF) Cross-Border Operations: MNF refers to any grouping of countries or a coalition of the countries willing that come together to undertake a joint

[174] Additional Protocol 2 (1977) to the Geneva Convention of (1949)
[175] Common Article 3
[176] Article 1 Additional Protocol 2 1977 Op.cit
[177] Ladan, M.T, Op.cit P.6

operation.[178] A MNF is normally associated with peace enforcement operations authorized by the UN Security Council.

Peace Enforcement Operation (PEOs), which come under Chapter VII of the UN charter, are carried out by UN Forces or by state, group of states or regional organisation, either at the motivation of the state concerned or with the authorization of the UN Security Council. These forces are given a combat mission and are authorized to use coercive measures of carrying out their mandate, the consent of the parties in conflict is not necessary. IHL is applicable to MNF, once they become parties to an armed conflict (NIAC or IAC). When MNF are fighting against or opposed by one or more organized non-state armed groups, the legal framework of reference will be IHL applicable NIAC. But when MNF are fighting against state armed forces then IHL applicable to IAC is triggered.[179]

e. Cross-Border (Trans-border) Military Operations: It is a multifunctional military campaign (involving intense and consistent offensive and MOP up operations) being carried out on a multilateral (MNF), bilateral or unilateral basis against the transnational threats to peace and security as well as safe haven of organized non-state armed groups on the territory of a consented sovereign state, with a view to containing the spread of trans-border sporadic acts of violence, protecting defenseless civilians defending the territorial integrity of a state and ultimately defeating the enemy (insurgents terrorist, dissident forces etc).[180]

In January 2015, the African Union Peace and Security Council (AUPSC) authorized the deployment of the MNJTF troops from Nigeria, Niger, Chad, Cameroon

[178] Ibid Pp. 7-8
[179] Ibid Pp 8-9
[180] Ibid

and Benin Republic with the mandate inter alia, to protect civilians against the Boko Haram violent attacks and arbitrary displacement. This mandate was renewed for 12 months in January 2016 by the AUPSC. A Joint Military Campaign Multi National Joint Task Force (MNJTF) against Boko Haram (organized non-state armed group) was initiated on 11th June, 2015 in Abuja by the Head of State of Lake Chad Basin Commission (Lake Chad region) Nigeria, Cameroon, Chad, and Niger Republic, while Benin republic was co-opted as a strategic partner in the campaign to enforce these mandate of protecting civilians and their arbitrary displacement in the Lake Chad region. Having defined various types of Internal Military Operations, we shall discuss how the soldier conducts these operations in line with professionalism and tenets of rule of law.

3.6.2 Legal Call out of the Soldier for Internal Military Operations

As we have said, the primary duty for maintaining public order within the state lies with the police. This duty is derived under section 4 of the Police Act.[181] Similarly, other types of internal operations such as disaster management are not the primary function of the soldier but that of civil authorities. However, where a given situation be it an internal unrest or a natural disaster is beyond the capacity of the police or the civil authorities as applicable, the president is empowered under section 217(2)(c) and (d) of the C.F.R.N 1999[182] to call out the armed forces to assist the civil authorities in restoring the situation to normalcy. These constitutional provisions states as follows:

Section 217(2)(c):

> The federation shall, subject to an act of the National Assembly, made in that behalf, equip and maintain the armed forces as may be considered adequate and effective for the purpose of

[181] Cap P19 LFN 2004
[182] Cap C23 Vol.3 LFN Op cit

> suppressing insurrection and acting an aid of civil authorities when called upon to do so by the president, but subject to such conditions as may be prescribed by an Act of the National Assembly.[183]

Section 217(2)(d) states: *"Performing such other functions as may be prescribed by an Act of the National Assembly".*[184] Section 217(2)(c) refers specifically to internal military operations, while section 217 (2)(d) can be interpreted as being wide enough to cover other forms of internal humanitarian operations which the armed forces may from time to time be tasked to perform such as natural disaster management. The soldier in a bit to perform these constitutional roles cannot just deploy for such duty except with the authority and approval of the presidents. Section 217(2)(c) and the whole of section 217(2)(d), gives the president power to call out soldiers for internal military operations. However, this power is prescribed by an *"Act of National Assembly"*[185]. It is interesting to note that the term *"Act of the National Assembly"* has been defined as a law or statute made by a sovereign with the consent of the parliament, or written laws of a country.[186] The implication of this definition is that in consonance with the concept of the rule of law, the power of the president to call out soldiers for internal military operations is neither arbitrary nor unilateral. It is rather, subject to clearly defined conditions, which the National Assembly may deem fit to make as the occasion warrants.

It should however not be assumed that in calling out soldiers, the president ought not to exercise any initiative but should always wait upon the National Assembly for directives. The concept of the rule of law makes allowances for the president to exercise his prerogative to a certain extent. For instance, it is within the prerogative of the president to determine the threshold of disorder, natural disaster or other mishap whereby it is necessary to call out the

[183] Ibid
[184] Ibid
[185] Section 217(2)(c) Ibid
[186] Black's Law Dictionary (1979), 6th Edition, St. Paul Minn: West Publishing Co., p.33

soldier.[187] In addition under section 8(1) and 8(3) of the AFA[188] the president may delegate his powers for the day to day operational use of the armed forces to the following specifically named authorities to deploy the armed forces on his behalf for internal military operations. These authorities are:

i. *The Chief of Defence Staff for the use of the armed forces*
ii. *The Chief of Army Staff for the specific Use of the Army*
iii. *The Chief of Naval Staff for the specific use of the Navy*
iv. *The Chief of Air Staff for the specific use of the Air Force.*[189]

It should be noted that where any of the aforementioned authority is delegated with the powers of the president under the Act to deploy the armed forces for internal military operations, such deployed must be inconformity with the rule of law. It is worth of note to also state that, the interface between the concept of the rule of law and the decision to call out soldiers for internal military operations requires that in taking such a decision, the president has some prerogatives on the operational use of the armed forces. However, in deference to the concept of the rule of law, this prerogative is by no means unlimited, neither is it arbitrary or unilateral. It can be subject to certain conditions, which the National Assembly may from time to time decide to impose. One of the major advantages of the concept of rule of law is that by placing this sort of check and balance on the use of the armed forces, it helps to prevent the tyrannical use of such a crucial agent of government and it also helps to promote accountability in the operational use of the armed forces.[190]

[187] Chief T.E.C. Op.cit, p.244
[188] Cap A20 LFN Op cit
[189] Ibid
[190] Chiefe T. E. C. Op. cit 224

3.6.3 Legal Limitations for the Conduct of Internal Military Operations

Even after the military have been called out for internal military operations, the application of the rule of law is followed to regulate the action of the soldier in the conduct of the operations. In consonance with the rule of law, these limitations operate as necessary checks against the arbitrary use of force, in the day-to-day conduct of operations. Some of these limitations are found in: International Humanitarian law, International Human Rights law, The Additional Protocol 2 to the Geneva Convention (1949) which relates to the protection of victims of Non-International Armed Conflicts,[191] Common Article 3 of the Geneva Convention (1949) the CFRN of 1999,[192] Acts of the National Assembly and the Rules of Engage (REO) for the internal military operations. The (REO) commonly used by the soldier as he carries it about during this type of operations because apart from the fact that it constitutes virtually all the relevant limitations embedded therein, it also spelt out the way and manner the internal military operation is to be carried out in line with rule of law. If the soldier act contrary to the provisions of the (ROE), he will be held responsible for his action.[193] It is as a matter of fact sacrosanct for the soldier to adhere strictly to the provisions of the (ROE). The basic tenets of the rule of law are unequivocal as to the fact that calling out the military on an internal military operations, does not confer on them more powers than those prescribed under the law of the country and international standard. Consequently, compliance with the tenets of rule of law demands that the rules should be adhere to by the soldiers on all issues during these operations. Some of these issues and the rules applicable to them are addressed as follows:

[191] Articles 7 and 13 of the Additional Protocol 2 to the Geneva Convention (1949) on 8th June, 1977
[192] Cap C23 Vol.3 LFN Op cit
[193] Article 33 Rome Statute (1998) and Article 87(3) of the Additional Protocol 1 (1977) to the Geneva Convention (1949).

i. ***The use of Minimum Force***: The first thing a soldier has to bear in mind when engaged in internal military operation is that force should be used when absolutely necessary. Even then, the rule is that soldiers on internal military operations may only use such force as is reasonable in the circumstances. There is no hard and fast rule to determine whether a particular degree of force is reasonable in any circumstances. The relevant and widely accepted objective test in determining the use of force is the popular saying that *"you do not kill a fly with a sledge hammer"* or conversely, *"you do not attack a lion with a pen knife".*[194] This tenet of the rule of law to be observed by the soldiers while on internal military operation have its support from section 33(2)(c) of CFRN 1999 which states; A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary for the purpose of suppressing a riot, insurrection or munity. It therefore follows that in suppressing a riot, insurrection or mutiny, the force to be used by the soldier must be proportion ate to the situation prevailing at that material time. There will be no justification for indiscriminate killing of unarmed civilians.

ii. ***Arrests during an Internal Military Operation***, it is usual for a soldier involved in that operation to carryout arrest. The suspect may include rioters or even more serious offenders like murderers, armed bandits insurgents or looters who are merely taking advantage of an upheaval or mishap. Whatever the circumstances, arrests are either conducted with a warrant of arrest, or without such a warrant. In practice, a warrant usually contains the followings:

a. The date of issue

[194] Chiefe T.E.C, op.cit, pp.262-263

b. A concise statement of the offence or matter for which it was issued
c. The name of the person to be arrested
d. An order to a law enforcement officer to apprehend the named person and bring him before the law
e. The signature of the magistrate or judge

In situations of public emergency, it is usual that most arrests are carried out without warrant because of the exigencies of the moment. The circumstances under which soldiers involved in internal military operations may conduct arrests without warrant includes the followings:

a. Where the person is reasonably suspected of having committed an indictable offence against a Federal or State law except where the written law creating the offence states expressly that a suspect cannot be arrested without warrant.
b. Where the suspect commits an offence in the presence of the soldiers.
c. Where the suspect obstructs law enforcement agents in the execution of their lawful duties, or when the suspect escapes or attempts to escape from lawful custody.
d. Where the suspect is found in possession of a property which is suspected to have been stolen.
e. Where a person is suspected upon reasonable ground of being a deserter from any service of the armed forces.[195]

It is important that irrespective of the circumstances of arrest, the requisite rules pertaining to arrest are followed. For instance, in circumstances where it is mandatory that an arrest must not be carried out without a warrant, warrant should be procured prior to that arrest.

[195] Section 10 of the Criminal Procedure Act

It should also be ensured that warrants are issued from the appropriate judicial authority and the contents conform to the requirements of the law. It is command responsibility to ensure that the relevant rules are followed and where in doubt, the commander should always seek legal advice from appropriate quarters.

iii. ***Detention of suspects***: Arrested suspects are sometimes detained pending investigations into the crimes allegedly committed by them. Irrespective of whether such suspects are kept in military or civil custody, the CFRN 1999[196] prescribes certain limitations on the detention of suspects. Section 35(1)[197] entitles law enforcement agents to detain persons suspected of committing offences while section 35(3)[198] limits these powers of detention by stipulating that any detainee must be informed within twenty-four hours in writing and in a language which he understands, the facts and grounds for his arrest or detention. Section 35(4)[199] further circumscribes the powers of the detaining authority by stipulating that any detainee who is not brought before a court of law within a period of two months and has had no further charges filed against him, shall be released unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial on a particular date. It is advised that military authorities hand over detainees to the police within twenty-four hours. This is because the police are trained in the legal technicalities involved in the handling of detained suspects. If it is necessary to interrogate the suspect while in detention, it must be ensured that domestic and international human rights standards are maintained. For instance, torture and all forms of ill treatment and degrading punishments should be avoided because such conduct is prohibited internationally and also forbidden by section 34(1)(a) CFRN

[196] Cap C23 Vol. 3 LFN Op cit
[197] Ibid
[198] Ibid
[199] Ibid

1999.[200] It is command responsibility to ensure that the constitutional provisions and international standard on the detention of suspects are followed and that suspects are not torture or ill treated.[201]

iv. ***Search and seizures***: Search like arrests, are generally conducted with warrants. There is however situations where searches maybe conducted without warrant. The laws relevant to the different types of searches are variously analyzed in relation to the conduct of internal military operations:

a. Search of Persons: Section 10(d) of the Police Act[202] empowers the police to arrest persons who are reasonably suspected to having in their possession or conveying in any manner anything which they reasonably suspect to have been stolen or unlawfully obtained. It would appear that during internal military operations, where the military are deployed along side policemen or where they perform *"police-like duties"*, the powers in the Police Act are conducted on persons arrested during internal security operations. Such searches are usually aimed at preventing looting as well as the illegal possession of arms, ammunitions, and other such dangerous weapons. In conducting such bodily searches the law enforcement officer may remove from the arrested person anything found on him other than necessary clothing. In order to maintain decency, only females can search females, while males should search males. However, situation where a female cannot be found or vice-versa, a male can search a female and a female can search a male but it must be conducted with decency.

b. Search of Premises: In situation of general break down of law and order, it would appear that the requirements for a search warrant could be dispensed with provided that such search can be objectively and reasonably justified. Except in such situation of public emergency and where

[200] Ibid
[201] Chief T.E.C op.cit, p.266
[202] Cap P19 LFN, Op cit

there are objective and reasonable justification soldiers on internal military operation are not ordinarily empowered to enter into the dwelling homes of citizens. Any contravention of this requirement of law may infringe upon section 37 C.F.R.N 1999[203], which guarantees citizens right to private life. Where the soldier fails to comply with this rule, he will be held liable for trespass.

c. Search on Chattels: Property such as vehicles, ship and aircraft may equally be searched if required by the situation on the ground during internal military operations. The general rule is that a warrant should be obtained before such searches are conducted. However, there are situations of breakdown in law and order, in such issue, warrant to search may be dispensed with. It is submitted that this power to search chattels covers the stop and search of vehicles at road-blocks which is mounted during internal military operations. Similarly, the powers to detain any vehicle reasonably suspected of conveying anything unlawful is derived from these powers to search chattels. But in exercising such power, it should not be done arbitrarily.

3.6.4 Unauthorized Acts and Immunities in Internal Military Operations

Although Section 239 of the AFA[204] appears to provide immunity for the soldier, for acts done in pursuance or execution of any duty during internal military operations. The immunities of a soldier have earlier been discussed extensively in chapter two to this thesis. However, for clearer understanding, we shall reproduce the text of the section 239:

> No action, prosecution or other proceedings shall lie against a person subject to service law under this Act for an act done in pursuance or execution or intended execution of this Act or any regulation, service duty or authority or in respect of an alleged neglect or default in the execution of this Act, Regulations, duty or authority, if it is done in the aid to civil authority or in execution of military rules.[205]

[203] Cap C23 Vol.23 LFN Op cit
[204] Cap A20 LFN Op cit
[205] Ibid

To this end, it is settled that the rule of law which prescribes equality of all citizens before the law, would operate to qualify that immunity granted to the soldier under the statutory provision above. Thus, this provision only operates when the soldier does lawful acts, pursuant to legitimate duties. For instance, no immunity would cover a soldier who engages in unlawful acts such as genocides, crimes against humanity, stealing, raping, extortion, murder, etc. Like the earlier example we gave about soldiers who shut a driver over ₦500, colleagues shut Zaria – Kaduna highway in protest of the shooting which caused a heavy traffic gridlocks for hours.[206] In this situation, the soldier's action is not covered by the immunity under section 239 AFA[207] because he was on a frolic of his own. Also other examples of unlawful acts as extortion, looting, rape, arson and so forth. Immunity can equally not cover a soldier who commits military offences such as cowardly behaviour, insubordination and Absent without leave.[208]

3.6.5 Enforcement Measures of Law in Internal Military Operations

As we have seen so far the laws applicable to internal military operations is meant to ensure that well known rules and regulations takes precedence over and above the arbitrary acts of the soldier while deployed for internal military operations. In relation to conduct of internal military operations by the military, the doctrine of compact and the rule of law ensures that from the onset when soldiers are called out for military operations the spirit and terms of law must be followed. The next issue therefore is to discuss how the various regulations are enforced since without any enforcement measures, the law despite its framed supremacy, would be ineffective

[206] Madugba A. "Soldiers Shoot Tanker Driver over N500 on Zaria-Kaduna Highway" http://ww.vanguardngr.com/2015/06/soldiers-shoot-driverover-₦500-Colleagues-Shut-Zaria-Kaduna-highway//sthash.dpuf. Accessed 26th Nov. 2015

[207]

[208] Like the cases of the trial and Dismissal of about 5000 soldiers from service for various degree of military offence during Operation Zamman Lafiya in the North East Nigeria between 2014 and 2015

or at best merely cosmetic and academic.[209] Thus, we shall discuss the enforcement measures of applicable laws in internal military operations.

The following measures are designed to ensure that infringements of the rules relating to the conduct of internal military operations do not go unpunished. When the occasion warrants, some of these measures are designed to enforce criminal liability for individual violators, while other measures are designed to enable civil claims and compensation for victims of alleged infringements of the law. They include the followings:

i. ***Summary and Elaborate Trial of Criminal Cases***. Where, in the course of internal military operations, a soldier infringes upon the law in the manner prescribed under section 45 to 114 of the A.F.A[210] or violation of law of war, the various named authorities under section 115; 116, and 131 of the A.F.A[211] may enforce the law by either trying the offender summarily or committing him to trial by court martial depending on the nature of the offence committed. As regard the court martial, it can equally try and punish offenders under the law of war and award punishment accordingly under the law of war.[212] Furthermore, in line with the legal statute of the soldier, the law may also be enforced by the referral of the offender to the civil courts for criminal trial.

ii. ***Litigation in Civil Courts***. In consonance with the rule of law which prescribes equality before the law, the Nigerian Army as a juristic person and its personnel may jointly or severally be sued before civil courts in Nigeria, for acts done during internal military operations, which deemed to be some infringement on the rights of other citizens or organizations. Indeed, the internal military operations at Odi, Bayelsa State in 1999 led to

[209] Chiefe T.E.C Op. cit, P. 289
[210] Cap A20, LFN, Op.cit
[211] Ibid
[212] Section 130(2) Ibid

a civil suit before the High Court in Port Harcourt, Rivers State.[213] The possibility of civil litigation arising from botched operations is one good reason why due attention must be paid to the application of doctrine of compact in internal military operations, to ensure that soldiers are properly acquainted with their legal status and all the rules relevant to the operations and to follow them to the later. Because any internal military operation not conducted in consonance with rule of law, will attracts legal redress in court by affected citizens.

iii. ***Judicial Panels of Inquiry***. It is usual that at the end of internal military operations, a tribunal or panel of inquiry is set up to investigate the entire incident or upheaval which led to the call out of soldiers in the first place. The powers to convene these panels are derived under the Tribunal of Inquiry Act.[214] These panels are either judicial or quasi-judicial in nature. Although they neither pass judgments, nor convict or pass sentence, they still assist in the enforcement of the law by writing reports of their findings, expressing opinions and making recommendations. An example is the judicial commission of inquiry on the operations in Tiv/Jukun areas of Benue and Taraba States in 2001 headed by Mr. Justice Opene. It was set up by the Federal Government of Nigeria following allegations of mass destruction of houses, property and wanton killing of defenseless villagers of Zaki Ibiam in Benue state, leveled against soldiers of the Nigerian Army carrying out internal military operations in the area. More recently, the judicial tribunal of inquiry set up by the Kaduna State government to investigate the circumstances that led to the Army-Shiite Clash in Zaria-Kaduna State on 12 of December 2015 is another good example of judicial inquiry.

[213] Chiefe T.E.C. Op. cit, P. 291
[214] Cap T 21, LFN, 2004

3.7 The Application of Doctrine of Compact in International Military Operations

We have often mentioned that, the soldier's compact subjects him to international law particularly while he is deployed for any international military operations. He is expected to observe to the later all tenets of rule of law regarding international law and to maintain all international standards. He is to reframe from any act of infractions that are against the law and the citizens. Where he is found committing any crime of international concern, he is been tried and punished by the enforcement mechanism put in place for that purpose. To this end, we shall discuss the legal status of the soldier while on:

3.7.1 Commitment of Soldiers on International Military Operations

These type of operations being referred to here ranges from outright armed conflict against foreign forces to the conventional peacekeeping and humanitarian missions. In relation to these types of operations, the interface between rule of law and power to commit soldiers outside the country occurs at two difference levels. Respect for the rule of law requires in the first instance, that the domestic legal requirements on the commitment of soldiers outside Nigeria are met. These domestic legal requirements are essentially in the C.F.R.N 1999.[215] On another level, Nigeria's international legal commitments in terms of treaties and customary international law must also be observed in any decision to commit soldiers outside the country.

Section 217 (2) (a) and (b) C.F.R.N 1999,[216] may be referred to as the legal bedrock for the commitment of soldiers outside the borders of the country. The provisions state that the nation's armed forces shall be equipped and maintained for the purpose of defending the country from external aggression and maintaining it territorial integrity and securing its borders from violation by land, sea or air. It is submitted that these provision can be interpreted to mean that

[215] Cap C23 Vol. 3, LFN, Op cit
[216] Ibid

the armed forces are well equipped and maintained to defend Nigeria against external aggression and that in the performance of this function; soldiers may be committed outside the country if the nature of the task in question requires such a deployment.[217]

Under section 5 of the C.F.R.N 1999, the above powers to commit the armed forces outside the borders of the country is classified as an executive function and in consonance with the objective of the concept of the rule of law to check the arbitrary use of the executive powers of governance, these powers to commit the soldier can only be exercised according to the conditions set out under section 5 (4) (a), (b) and 5 (5) of the C.F.R.N 1999.[218] Section 5 (4) (a) states as follows: *"The President shall not declare a state of war between the federation and another country except with the sanction of a resolution of both houses of the National Assembly sitting in a joint session".*[219] Section 5 (4) (b) further states as follows: *"Except with the prior approval of the senate, no member of the Armed Forces of the Federation shall be deployed on combat duties outside Nigeria".*[220] Recognizing however, that the unique nature of military operations which requires some measures of flexibility, the C.F.R.N 1999,[221] goes on to provide as follows in section 5 (5):

> Notwithstanding the provisions of subsection (4) of this section, the president, in consultation with the National defence Council, may deploy members of the armed forces of the federation on limited combat duty outside Nigeria if he is satisfied that the national security is under imminent threat or danger. Provided that the president shall, within seven days of actual combat engagement, seek the consent of the senate and the senate shall thereafter give or refuse consent within fourteen days.[222]

[217] Chiefe T.E.C. Op. cit
[218] Cap C23 Vol. 3, LFN, Op cit
[219] Ibid
[220] Ibid
[221] Ibid
[222] Ibid

In summary, we are of the opinion that at the level of domestic law, the rule of law and the soldier's compact operates to ensure that soldiers are not committed outside the country for any military operation without the prior approval of the National Assembly. However, in appreciation of the unique nature of military operations, some flexibility has been brought to bear on the application of the law, such that when the threat or danger is imminent, the president acting in conjunction with National Defence Council may commit soldiers outside the country to deal immediately with the threat in a limited war pending a formal approval by the National Assembly.

Domestic legal approval of a decision to commit soldiers on an international operation is not the only check and balance put in place to guide against the arbitrary use of the armed forces. In so far as the commitment of soldiers on an international operation may involve engagement with foreign forces or dissidents, and can by necessary implication affect international relations and the sovereign rights of other countries, the rule of law equally operates at another level, through treaties and customary international law, to guide against the arbitrary use of military might in international relations. From the outset, it must be pointed out that the provisions of international law in this respect are not entirely devoid of controversy. There are many arguments and counter argument as to when one country can be deemed to have justifiably wage war against another. This raises the question as to what is the international legal basis for the deployment of soldiers abroad for the purposes of peacekeeping, peace enforcement or even outright combat in aid of another sovereign nation. At the scholarly and academic level, there is substantial debate on the most appropriate answer to such a question.[223] It is therefore necessary to appraise the basic rules.

[223] Chiefe T.E.C. Op. cit

A good starting point on this subject of justifiable international military intervention is in the expression "*Jus Ad Bellum*". This expression refer to the title given to that branch of international law that defines the legitimate reasons for a state to engage in war and focuses on certain criteria that render a war to be just.[224] The main modern source of *Jus Ad Bellum* is derived from Article 2 (4)[225] which state as follows: *"All members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the UN."*[226] The other ambit to the *Jus Ad bellum* expression is Article 51[227] which states as follows among others: *"Nothing in the present charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a member of the UN".*[228]

While Article 2 (4) of the UN Charter operates as legal restriction on the arbitrary commitment of soldiers in an international military intervention, Article 51 on the other hand appears to allow such intervention if done in the exercise of a right of self defence. The International Court of Justice (ICJ) dealt with this issue of foreign intervention in the 1986 case of **Nicaragua** and the **United States of America**.[229] The facts of the case were that the then Sandinista government in Nicaragua dragged the United States before the ICJ, accusing her of actively supporting the contra rebels in Nicaragua and there by violating the above stated international law forbidding arbitrary foreign military intervention in the affairs of another state. In that case, ICJ defined an "armed attack" as: *"the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another*

[224] Gutman R. and Rieff D. (1999), *Crimes of War, what the Public Know, Crimes of War Project*. WW Norton Company P. 223
[225] United Nations Charter, 1945
[226] Ibid
[227] Ibid
[228] Nicaragua and the Unites States (merits) ICJ Reports of 27th June, 1986, Para 14
[229] Ibid

state of such gravity as to amount to an actual attack conducted by regular forces or in its substantial involvement therein."[230] This act was categorically declared by the ICJ to be illegal under international law.

While an armed attack as defined in this case may amount to arbitrary and illegitimate use of force, the ICJ in the same **Nicaragua** case interpreted Article 51 of the UN Charter, which recognized the right of states to resort to armed conflict in exercise of the right of "**collective self defence**", as being a possible exception to the restrictions on the use of force enunciated under Article 2 (4) of the UN Charter. However, it was added that this right of collective self-defence under Article 51, presupposes that an *"armed attack"* has already occurred. In addition, the ICJ expounded certain conditions for the exercise of these rights they include a formal report of the offending armed attack to the UN Security Council, and an express request for assistance by victim state.[231] The ICJ further implied that a sovereign state may lawfully request intervention by another in order to enable it contain an insurgency by dissident forces.[232]

Commenting on this last aspect, renowned international legal scholars have opined that although a third party state may rightly intervene to assist a fellow state facing an insurgency, such an intervention is allowed only against the rebels or dissidents and within the limit imposed by territorial sovereignty.[233] In the case concerning ***Armed Activities on the Territory of the Congo (Democratic Republic of Congo) vs Uganda***[234], the ICJ had course to adjudicate on this issue of non-use of force in international relations. The court found that by sending armed forces across the border into Congo and by the actions of the members of the armed forces while in territory of Congo, Uganda violated its obligations under International Human Rights Law and

[230] Ibid
[231] Ibid, Paragraphs 232, 233 &235
[232] Ibid, Paragraph 246
[233] Harris D. J. (1998), *Cases and Materials on International Law*, Sweet and Maxwell P. 888
[234] (Democratic Republic of the Congo vs. Uganda) ICJ Decision 19th December, 2005

International Humanitarian Law; and that it violated other obligations owed to the Democratic Republic of Congo. In addition, the court also found that the Democratic Republic of Congo violated obligation owed Uganda under the Vienna Convention on Diplomatic Relations 1961.

The effect of the above provisions of international law and their elucidation in the Nicaragua and Congo cases on the conduct of military operations may be summarized thus. Even after domestic legal checks and balances under C.F.R.N 1999[235] on the commitment of soldiers abroad have been satisfied, the rule of law as discernible under the UN Charter, still operates to ensure that the commitments of soldiers to apply force against another sovereign country is done in accordance with Articles 2 (4) and 51.[236] In the case of commitments of soldiers to assist another country facing an armed insurgency, it should by implication be against the insurgents only and such operations must be conducted within the limits imposed by the national sovereignty of the victim state involved.

The above discussion on the commitment of soldiers for foreign operations has focused on armed conflict between states other than for the purposes of peacekeeping or peace enforcement pursuant to a UN or other regional organisation such as Economic Community of West African States (ECOWAS) mandate. For these latter types of operations, the rules are different. Although the legal basis for the commitment of soldier on peacekeeping and peace enforcement operations are equally derived under the UN Charter, the provisions relating to them are different. For a start, Article 24 (1)[237] confers primary responsibility for the maintenance of international peace and security on the UN Security council. Article 24 (2)[238] goes further to state that in the discharge of this responsibility, the Security Council shall act in accordance with the

[235] Cap C23 Vol. 3 LFN, Op cit
[236] UN Charter 1945
[237] Ibid
[238] Ibid

purpose and principle of the UN and in line with the specific powers granted under chapters VI, VII, VIII and XII of the UN Charter. Article 43 (1)[239] specifically task all members state to contribute to maintenance of international peace and security by contributing troops to the UN on request by the Security Council and in accordance with special agreements between the UN and troop contributing countries. (TCC)

In spite of these provisions, it should be pointed out that the legal powers of the UN to embark on peacekeeping missions have not always been entirely free of controversy. In the early days of UN peacekeeping missions, certain countries disputed the legal basis of the UN missions. In consonance with the concept of the rule of law, one of whose central pillars is equality of all persons and organizations before the law, the UN submitted itself to the ICJ for the international court to interpret its powers in respect of peacekeeping missions. In that case which was titled **Certain Expense of the UN Case**,[240] some member nations of the UN fell seriously behind in the payment of financial contributions to the UN because of their refusal to accept responsibility towards the financing to two UN mission, (UNEF and ONUC). These nations claimed that those missions were ultra-vires the powers of the UN under the UN Charter 1945. The ICJ decided that UN peacekeeping mission were justifiable either under a liberal approach to the implied powers of the UN or, perhaps more accurately as an inherent power of the UN. Having discussed commitment of Nigerian soldier for international military operations, using domestic and international law, it will be apt to explain how these laws apply to them while engaged in these type of operations.

[239] Ibid
[240] Certain Expenses of the UN case, reported in Advisory ICJ Report (1962) P. 151

3.7.2 Applicable International Laws on Nigerian Soldiers in Military Operations

Soldiers, when deployed for any international military operations are largely governed by International Human Right Laws and International Humanitarian Laws (IHL) be it international armed conflict, peacekeeping mission or peace enforcement missions. The International Human Rights Law strictly deals with the protections of human rights during the operation while IHL deals with the method and means of executing the warfare.

The International Committee of Red Cross and Red Crescent (ICRC) are internationally recognized as the custodians of IHL. They advocate that the laws of war should be applicable to UN forces when in self defence they resort to the use of force. Recognizing however that the UN as a body is not formally a signatory to the Geneva Convention and other IHL Conventions, the ICRC advocates further that IHL principles should apply "*Mutatis Mutandis*" to forces on UN operations.[241] The UN on the other hand, posits that the mere presence of UN forces in a theatre of war, while performing humanitarian or diplomatic mission, would not necessarily entail that the IHL should apply to them. It recognized however, that in some mission such as enforcement operations under chapter VII of the UN Charter, UN troops might be involved in combat.

Consequently, the UN Secretary General in 1999 released a bulleting setting out the fundamental principles and rules of IHL applicable to forces on UN operations.[242] Specifically, section 1 of that bulletin recommends that IHL should apply to UN forces when in situation of armed conflict they engage as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self defence. From the position of the ICRC and the UN, it appears incontestable that the above discussed IHL would apply to the Nigerian Soldiers on UN and

[241] UN Secretary General's Bulletin on the Observance by UN forces of IHL (ST/SGB/199/13 dated 6 August, 1999)
[242] UN Model SOFA for Peacekeeping Operations. UN Document: A/45/594/(09th Oct, 1990)

related operations, where the soldiers are engaged in combat either pursuant to an enforcement mandate of self defence or outright peacekeeping. It should however be noted that were the soldiers are engaged in international armed conflict, international human rights laws and IHL apply to them in full to the extent of duration of the conflict.

3.7.3 Legal Limitations in International Military Operations

The commencement of an international military operation of the character described under common Article 2 and 3 of the Geneva Conventions (GC) 1949 and Article 4 of the 1977 Protocol 1 to the GC automatically makes the rule of law applicable to the operations.[243] Consequently, irrespective of the motives or justifications given for the operation at the policy level, defined rules on the conduct of operations are to be followed by the soldiers involved in the operations. These rules or set of laws are described with the Latin expression "*Jus in Bello*" which means the method and mean of warfare is not unlimited. An example of the sort of operation in which *Jus in Bello* applied is (Operation Harmony) in the Bakassi Peninsula where there was dispute between Nigeria and Cameroon over the ownership of the oil rich peninsula[244] and presently, the fight between Nigerian soldiers and Boko Haram insurgents is also another example.

The purpose of *Jus in Bello* is to regulate how wars are fought, without prejudice to the reasons of how or why they began.[245] As distinct from "*Jus Ad Bellum"* which derives mainly from the UN Charter 1945, the set of laws comprising "*Jus in Bello"* are derived mainly from the 1907 Hague Convention IV, the four GC's of 1949 and their Additional Protocols of 1977, as well as customary international law. These set of laws have also been variously described by the appellation International Humanitarian Law (IHL), the laws of armed conflicts or the laws of

[243] Ibid
[244] Chiefe T.E.C. Op. cit
[245] Ibid

war. Nigeria has ratified and domesticated the GC's and its Additional Protocols. Today, they are under Nigerian law known as the Geneva Convention Act.[246]

The GC's and its protocols are derived from two fundamental principles of the law of war. The first is that the right of belligerents to adopt means of warfare is not unlimited while the second is that the use of weapons and projectiles or materials calculated to cause unnecessary suffering is prohibited.[247] The rules applicable under the IHL conventions are numerous and they operates as legal limitations on the actual conduct of military operations for the soldiers. Some key limitations shall be examined:

i. **Rule of Proportionality:** The concept of proportionality has been described as an attempt to balance the conflicting interest of military necessity and humanitarian interest and it is most evident in connection with the reduction of incidental damage caused by military operations.[248] Its origin dates far back into antiquity and today it is considered to be part of customary international law. According to Rogers A.P.V, the rule of proportionality was first set out in treaty form in Article 51 (5) (b) and 57 (2) (b) of the 1977 Protocol 1 to the GC's.[249]

The substance of the rule on proportionality can be approximated to the domestic rules of minimum force in the conduct of internal military operations. In the international sphere, proportionality prohibits military acts in the course of operations in which the negative effects such as collateral civilian casualties clearly outweigh the military gain. Rogers however, goes further to suggest that in applying the proportionality rule, the risk to the attacking forces is a factor that should be taken into consideration. Howbeit, the rule on proportionality created an

[246] Cap G3 LFN, 2004
[247] Rogers A.P.N. (1996), *Law on the Battle Field Manchester*: Manchester University Press, P. 14
[248] Ibid, P. 16
[249] Gutman R. and Rieff D., Op. cit, P. 294

obligation for commanders to consider the results of a planned attack compared to the advantage anticipated. This implies that the target list must be continuously updated as the operation develops with special attention given to the safety of civilians and civilian objects.[250]

ii. Doctrine of Military Necessity: Military necessity is a legal concept used in IHL as part of the legal justification for attacks on legitimate military targets that may even have adverse consequence for civilian objects. It implies a recognition by the law that in planning military operations, it is permitted to take into account the practical requirements of a military situation at any given moment and the imperatives of achieving the military objective or task given to the unit or formation.[251]

It would however be unreasonable to assume that the doctrine of military necessity gives the soldiers a free hand during operations, to take action that they would otherwise have been impermissible. In reality, the doctrine of military necessity must be balanced with humanitarian considerations required by IHL. There are three constraints upon the free exercise of military necessity. First, any attack must be intended towards the defeat of the enemy; attacks that are not geared towards the defeat of the enemy cannot be justified by military necessity because they would have no military purpose. Second, even an attack aimed at weakening the enemy must not cause harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage. Third, military necessity cannot be used to justify the deliberate violation of other rules of IHL.[252]

According to Chiefe T.E.C, he opined that it may be argued that there are some measures of flexibility in the determination of what is military necessity. For instance, the greater the military advantage anticipated, the larger the collateral damage that may be justified or

[250] Ibid, P. 251
[251] Ibid
[252] Chiefe T.E.C Op. cit, p.273

necessary. This flexibility also appears with regard to the prohibition of the use of weapons that may cause unnecessary suffering.[253] The greater the necessity, the more the suffering that appears to be justified.[254] This appears to be the position of the law as given by the ICJ in its advisory opinion in the **Legality of the Threat or Use of Nuclear Weapons Case**.[255] In that case, the majority of the judges of the ICJ left open the possibility that a state might be able to justify its use of nuclear weapons, where the very survival of that state was under threat. It would be safe therefore to submit here that as regards military necessity, great discretion has always been attached to the commander's judgment especially those made under battlefield conditions.

iii. Military Objectives (Legitimate and Prohibited Targets): Under the laws of war, the term military objective is used to refer to targets and objects which makes an effective contribution to military action and whose neutralization offers a definite military advantage.[256] The rules restrict deliberate attacks to only military objectives. In other words, only military objectives are legitimate targets that can be made objects of deliberate attack.

As a corollary to the above, certain targets, not being military objectives are prohibited from attack. For example, it is prohibited to conduct any direct attack upon civilian populations, or upon places, localities or objects used solely for humanitarian, cultural or religious purposes such as hospital, churches, mosques, schools or museums. This prohibition may however be compromised by the enemy, if he uses such objects for military purposes.

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[253] Ibid

[254] Extracts of ICJ's Advisory Opinion Op. cit., Robert A. and Geiff R., P. 639

[255] 1977 Additional Protocol 1 to the GC's Article 52 (2) cited in Chiefe, T.E.C, Op. cit, P. 273

[256] Shraga D. and Zacklin R. (1994), *The Application of IHL to UN Peacekeeping Operations* In Palwankar U., (ed) Symposium on Humanitarian Action and Peacekeeping Operations, ICRC Pp 39-49 cited in Chiefe T.E.C., Op. cit. P. 274

iv. **Protected Persons:** Under IHL, individuals are accorded a range of protection from the effect of hostilities. Individuals accorded such protection are called protected persons within the specific limits of protection given to them under IHL. Historically, the first groups of persons accorded protected status were certain class of combatants and not civilians. These early treaties offered protection to medical personnel and facilities and Prisoners of War (PoWs). In simple term, a combatant is a member of an armed force who takes active part in hostilities, who can kill and who in turn, is a lawful military target. Under IHL, a combatant can acquire the status of protected person under a number of circumstances e.g. if he is captured, wounded or no longer taking part in the hostility.

The 1949 GC's enunciated the first comprehensive set of rules protecting combatants and civilians in international armed conflicts. The first three of the GC's 1949, referred to the protection of combatants and related personnel. These are the wounded and sick combatants in the field, wounded, sick and ship wrecked personnel at sea and PoWs. The fourth, GC was devoted exclusively to the protection of civilians during an armed conflict. The fourth GC's requires that protected persons be humanely treated without any adverse distinction founded on race, religion, sex, wealth or any other similar criteria. Protected Persons shall not be willfully killed, injured, or used for medical experiments. Similarly, captured and detained persons must be given food, clothing, shelter, and the medical care required. No protected person should be deprived of a right to fair trial and must not be tortured or used as human shields.

It should be noted that as regard the protection of civilians in armed conflict, the difficulty of distinguishing between combatants and civilians in complex asymmetric conflicts poses political and legal problems, but also very practical ones. These problems limit the

applicability of the membership approach whereby individuals are legitimate targets of attack if they maintain membership of an organized armed group.[257]

However, tempting the clear-cut logic of this approach may be from a policy point of view, it does not match the reality of armed conflicts that more often than not involve ruthless factions on all sides, be they government or rebel forces. The actual dynamic interaction that takes place between civilians and combatants reflects the ad hoc character of most armed groups, especially in situations of civil war. Individual membership is often impermanent, and constantly changing coalitions shape the interactions between different groups.[258]

One way of trying to break the deadlock and surmount the danger of political bias when deciding on who is a civilian or a combatant' is to focus on individual conduct rather than on collective labeling. Article 3 common to the four Geneva Conventions of 1949 adopted after the Second World War, introduced the concept of *"taking no active part in the hostilities",* thereby opening the door to the contemporary notion of direct participation in hostilities.[259]

Among protected persons, women who are not engaged in combat are given special regard. For instance, they shall be treated with due regard to their sex and must be protected against rape, enforced prostitution, and other forms of indecency. Other categories of protected persons specifically mentioned are expectant mothers, aged persons, children, ministers of religion and medical personnel.

[257] Ladan M.T., Applicable Laws in Engaging Non-State Actors in Counter-Insurgency Operations: with particular Reference to Nigeria, Civil-Military Cooperation and observance of Human Rights in Internal Security Operations, organized by the office of the National Security Adviser and European Union Delegation to Nigeria, At National Defence College, Abuja on 23-25 October, 2014, pp.1-41
[258] Ibid
[259] Ibid

3.7.4 Rules relating to Privileges and Immunities to the Soldier in International Military Operations (Peacekeeping Operations under Chapter IV of the UN Charter 1945)

As we have already seen, one of the central pillars of the rule of law is equality of all persons and organizations before the law. This being the case, it is important to determine the extent to which the Nigerian soldier enjoys certain privileges while on international military operations. Where the operation is either international armed conflict or peace enforcement under chapter vii of the UN Charter 1945, the Geneva Convention of 1949 applies to protect belligerent forces. However, if the operation is the traditional peacekeeping operation which is the focus of this work, peacekeepers under the United Nations and Associated Personnel are protected by virtue of the 1994 UN Convention of the safety of UN and Associated Personnel. The 1994 Convention innovatively places an obligation on host states to ensure the safety and security of UN associated personnel. In addition, the convention also criminalizes attack against peacekeepers. By virtue of Articles of 14 and 15[260] of the Convention, the principle of *aut judicare aut dedere* is made applicable to attacks on peacekeepers. It is interesting to note that by these provisions, the convention establishes universal jurisdiction for the offence of attacks against peacekeepers and therefore places an obligation on all states to ensure that all crimes which are defined in the convention are, in fact punishable under their domestic law.

Another important fact to note is that all peacekeeping operations are conducted on the function of a law called Status of Forces Agreement (SOFA). This SOFA is an agreement between the peacekeepers and the host state on how the conduct of the operation will be carried out. Where there is no SOFA between them, the UN model SOFA and the 1994 UN Convention on the safety of UN and Associated personnel is used to form the agreement. We shall serially examine some provisions of this UN model SOFA for peacekeepers as follows:

[260] Ladan, M.T. Op.cit, pp.12-20

i. **Peacekeeping Forces and Respect for Local Laws:** Where Nigerian soldiers are on UN peacekeeping operations, the SOFA between them as peacekeepers and the host state will usually enjoin the peacekeepers to refrain from any action or activity which is incompatible with the impartial and international nature of their duties. In particular, peacekeepers are obliged to respect all local laws and regulations. It is command responsibility to ensure the observance of these obligations.[261]

ii. **Flags and Pennants:** The host state is obliged to recognize the right of the peacekeeping force to display the flag of the UN or other regional arrangement such as ECOWAS within its territory. Such flags may be displayed on premises, camps, vehicles etc. other flags such as the national flags of the sending state may only be displayed in exceptional circumstances and in doing so, sympathetic consideration ought to be given to any observations raised by the government of the host state.[262]

iii. **Communications:** The peacekeeping force is authorized to install and operate radio sending and receiving stations mobile telephony as well as satellite systems to connect locations within and outside the territory of the host state. The force is also authorized to make its own arrangement through its own facilities for the processing and transportation of private and official mail addressed to or emanating from the peacekeeping force and its members. The host government shall be informed of these arrangements and shall not interfere with or apply censorship to the said mails.[263]

iv. **Transportation and Travel:** The peacekeeping force and its members shall enjoy, together with vehicles, vessels, aircrafts and equipments, freedom of movement throughout the host country. This movement shall also cover the large movement of

[261] Ibid, Articles 10 and 11
[262] Ibid, Article 12
[263] Ibid, Article 37

personnel, stores or vehicles through airports or on railways or roads used for general traffic. The vehicles of the force employed in these movements shall not be subject to registration or licensing by the host government and shall be exempted from tolls and taxes.[264]

v. **Uniform and Arms:** Military members of the peacekeeping force are authorizes to wear their uniforms, while performing official duties, the national military uniforms of their respective states with standard accoutrements of the UN or concerned regional arrangements. They are also authorized to possess any carry arms openly in accordance with the respective orders.[265]

vi. **Arrest, Transfer and Custody of Offenders:** It is command responsibility to ensure the maintenance of discipline and good order among members of the peacekeeping force.[266] In order to enforce discipline, the forces' military police shall have power of arrest over service personnel of the peacekeeping force. Soldiers who are placed under arrest outside their own contingent areas shall be transferred to the appropriate authority in their own contingent for appropriate disciplinary action.[267] The forces' military police may also arrest any members of the civil populace of the host state who are found committing an offence within the premises of the peacekeeping force or in their presence, if there is no local security agent present. It is however mandatory that arrested persons be handed over immediately to the nearest official of the host government for further necessary action.[268]

Law enforcement agents of the host state are also empowered to arrest members of the peacekeeping forces in the following limited circumstances:

[264] Ibid, Article 40
[265] Ibid, Article 41
[266] Ibid
[267] Ibid, Article 45
[268] Ibid, Article 47

a. When so specifically requested by the Special Representative of the Secretary General in the case of UN force or the force commander.

b. When a member of the force commits or attempts to commits a criminal offence in the presence of law enforcement agents of the host state, provided that such an offender shall be handed over immediately with any weapon or item seized, to the nearest appropriate authority of the peacekeeping force.

vii. Prosecution of Offenders

The authorities in the host state shall undertake to ensure that civilians offenders of the host state who are arrested by the peacekeepers and handed over to them for criminal offences committed in relation to the force, are appropriately brought to justice according to the due process of law applicable in that host state.[269] On the other hand, all members of the peacekeeping force shall be immune from the jurisdiction of the local courts of the state for all allegations bordering on criminal offences. Where the authorities in the host country consider that any member of the peacekeeping force has committed a criminal offence, it shall promptly inform the Special Representative of the Secretary General of the UN or the Commander concerned as the case may be, and present to him all available evidence of the alleged crime. Thereafter, the appropriate department within the peacekeeping force shall conduct an independent inquiry or investigation and if the allegations are found to have substantiated, the offending member of the peacekeeping force shall be handed over to the authorities of his contingent who have exclusive jurisdiction to take disciplinary action against him.[270]

[269] Ibid, Articles 51 &53
[270] Ibid

The AFA[271], under section 166(2) have given powers to commanders to convene a Court Martial at the threatre of war for disciplinary action for any offending force. In addition, section 130(2) of AFA[272] has confirmed jurisdiction on a General Court Martial to try offenders of law of war and even impose punishment therein. Taking a close study of these statutes we are the view that the jurisprudence behind the statutes is not only to punish the erring soldier but to settle the conflict of jurisdictional problems, fair hearing and calling of evidence and witnesses upon prosecution. This is with the aim of preserving rule of law and the cause of justice. However, convening the court outside the country might not be in the best security and diplomatic interest of Nigeria. It is for these reasons; Erring Personnel are repatriating back home for prosecution.

viii. Civil Cases and Claims Brought against Members of the Forces

Where any proceedings or claims is instituted against any member of the peacekeeping force before a civil or similar judicial authority within the host state, the appropriate authority within the force shall be notified immediately and that authority shall determine if the proceedings are related to legitimate official duties performed by the concerned member of the force. If it is not related to official duties, the case may be continued provided that the property of the force in the possession of the members such as vehicles shall not be levied pursuant to any successful claim. On the other hand, if it is determined that the case relates to legitimate official duties, the authorities of the force shall request the matter to be discontinued immediately and the matter shall be subjected to out of court arbitration. In the case of a UN force, such official matters which result in civil cases and claims shall be referred to a standing claims commission,

[271] Cap A. 20 LFN Op cit
[272] Ibid

which shall be established for that purpose.[273] In the event that the terms of settlement set out by the commission are not agreeable to the claimant, then a last resort could be had to the ICJ.[274]

From the above, it may be safely asserted that the relevant regulations such as the SOFA and other ancillary regulations assist in smoothing the legal relationship between the peacekeeping force and the host state. Areas of potential dispute such as the use of flags and pennants, communication, equipment, uniforms and arms, the arrest and prosecution of offenders as well as civil claims and compensation, are properly sorted out to achieve a measure of predictability and consensus between the peacekeeping force and the host state. These measures undoubtedly enhance the administrative and operational efficiency of the peacekeeping force.

a. Prohibited Acts in International Military Operations

As a starting point, it is necessary to state that soldiers are prohibited from certain act while on international military operations be it under the auspices of the UN or under regional arrangements like ECOWAS, African Union (AU) or even in an outright armed conflict.

Like for instance, under the ECOWAS of which Nigeria is a signatory to its mandate, soldiers deploy for military operations under the ECOWAS mandate are to conform with the Supplementary Act on the Code of Conduct for Armed forces and Security Services of West Africa 2011. It was adopted by the Council of Ministers of ECOWAS in Abuja 17-18 August, 2011. The Code of Conduct set out common principles and standards applicable to all armed forces and security forces of member states in their security military operations.[275]

Article 4[276] which is concerned with affirmation of Human Rights and International Humanitarian Law provides in the conduct of defence and security affairs, personnel of the

[273] Ibid
[274] Ibid
[275] Ladan M.T., Op.cit, Pp.12-20
[276] ECOWAS Supplementary Act on the Code of Conduct of Armed Forces and Security of West Africa 2011

defence and security forces shall uphold international humanitarian law, human rights and relevant national laws and show due regard for the property as well as physical integrity and psychological well being of people. In situations of armed conflict, all armed groups and individuals shall be subjected to international humanitarian law, human rights laws and the relevant national laws.

Article 17[277] further said that the civilian political and administrative authority shall ensure that the military operations it orders, including operations to maintain internal law and order, shall be executed in conformity with the relevant provisions of international humanitarian law, human rights, laws national laws. The ECOWAS Protocol on Democracy and Good Governance and its Supplementary Act.

A violation of this Code of Conduct will attract criminal proceedings and punishment whether or not the acts were committed outside the shores of Nigeria. The first category of the prohibited acts are the service offences listed under section 45 to 114 of the A.F.A.[278] the act listed under those sections include offences amongst others like AWOL, Looting, Stealing, Rape, Extortion, Murder and so forth. The second categories of prohibited acts are those prohibited under international conventions on the law of war and are sometimes addressed under the general law of 'war crimes'. They are acts for which offenders are usually charged before various international tribunals such as the tribunal set up in Nuremberg in 1945, the international tribunals in Yugoslavia, Rwanda, Sierra-Leone and more recently, the first permanent criminal tribunal, the International Criminal Court (ICC) at the Hague. These prohibited acts are limitations in the conduct of operations because they must be avoided no matter the exigencies confronting troops during an operation. It must be pointed out that the prohibited acts are

[277] Ibid
[278] Cap A20 LFN, Op cit

numerous and their legal definitions are sometimes technical and controversial. Nevertheless, the following broad categorization can be discerned:

a. Grave Breaches of the Geneva Conventions: A person may be indicted for grave breaches of the GC's if he committed or ordered the commission of any of the following acts among others.[279]

i. Willful killings of non-combatants

ii. Torture or inhuman treatment, including biological experiment on human beings.

iii. Willfully causing great suffering or serious bodily injury to protected persons.

iv. Extensive destruction and appropriation of property not justified by military necessity and carried out willfully and wantonly.

v. Compelling prisoners of war or civilians to serve in the forces of a hostile power.

vi. Willfully denying prisoners of war or civilians the right to fair and regular trial

vii. Unlawful and forceful deportation or transfer of the civilian populace.

b. Violations of the Laws of Customs of War: Person who commits the following acts during an operation may be indicted for violations of the laws and customs of war

i. Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering.

ii. Wanton destruction of cities, towns or villages or devastation not justified by military necessity.

iii. Attack or bombardment by whatever means of undefended towns, villages, dwellings or buildings.

iv. Seizure of destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.

[279] Article 8 (2) (a) Rome Statute 1998

v. Internationally directing attacks against personnel and installations, materials, units or vehicles involved in humanitarian assistance or peacekeeping mission in accordance with the Charter of the UN.[280]

vi. Conscription or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.[281]

c. Crimes against Humanity: Persons may be indicted for crimes against humanity if they commit the following crimes as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.[282]

i. Murder

ii. Extermination

iii. Enslavement

iv. Deportation

v. Imprisonment

vi. Torture

vii. Rape

viii. Persecution on political, racial and religious grounds.[283]

d. Genocide: It means any of the following acts committed with intent to destroy in whole or in part, a national, ethic, racial or religious group:

i. Killing of members of the group

ii. Causing serious bodily harm or mental harm to members of the group

[280] Ibid
[281] Ibid
[282] Article 7 Rome Statute, 1998
[283] Article 6 Ibid

iii. Deliberate inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

iv. Imposing methods intended to prevent birth within group

v. Forcible transferring children of the group to another group.

e. **Violations of Common Article 3 to the Geneva Conventions**. Indictments may also follow violations of common Article 3 to the GC's. These violations which relates more to international wars (civil wars), including the followings:[284]

i. Violence to life; health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilations of any form of corporal punishment.

ii. Collective punishments

iii. Taking of hostages

iv. Acts of terrorism

v. Outrages upon personnel dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.

vi. Pillage

vii. The passing of sentences and carrying out executions without previous judgment pronounced by regular constituted courts, affording all the judicial guarantees which are recognized as indispensible by civilized people.

3.7.5 Enforcement Measures for the International Military Operations

The following mechanisms have been put in place to enforce the rules of international law during military operations:

[284] Article 8 (2) (c) Ibid

i. Duty of Commanders to Enforce the Provisions of the GC's: Article 87 (1)[285] states as follows:

> The High contracting Parties and Parties to the Conflict shall require military commanders with respect to members of their armed forces under their command and other persons under their control, to prevent and , where necessary, to suppress and to report to competent authorities breaches of the conventions and their protocols.

Article 87 (2)[286] states that:

> The High Contracting Parties and Parties to the Conflict shall require that, commensurate with their level of responsibility, commanders, in order to prevent and suppress breaches, are to ensure that members of the armed forces under their command are aware of their obligations under the conventions and these protocols

Article 87 (3) further states as follows:

> The High Contracting Parties and Parties to the Conflict shall require any commanders who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of its protocol, to initiate such steps as are necessary to prevent such violations of the convention or this protocol, and where appropriate, to initiate disciplinary or penal action against violators thereof.

From the above three provisions, it is clear that it is command responsibility to educate soldiers on the basic requirement for the enforcement of the law of war. Commanders are also to ensure that breaches of the law are prevented and that disciplinary action is taken against violators. It needs to be stated that in line with the above provisions, the British Army tried by

[285] Additional Protocol, 1977, to the Geneva Conventions of 1949
[286] Ibid

court martial some British soldiers accused of abusing Iraqi prisoners in 2003 to uphold discipline within the force.[287]

ii. **Trial of Violators of the Law of War under the A.F.A[288]:** Commanders who desire to initiate disciplinary action against their men specifically for violations of the laws of war have recourse to section 130 (2)[289] which states as follows: *"A general court martial shall also have power to try a person subject to service law under this Act who by law of war is subject to trial by a military tribunal and may adjudge a punishment authorized by the law of war or armed conflict".*[290] It follows from the above that a soldier who violates the law of war during international military operations may be tried by General Court Martial (GCM). Such trials may either be held at the theatre of the operations abroad, or the offender may be repatriated to Nigeria for trial. The courts martial trials of officers and soldiers for various offences committed during Operation Liberty in Liberia, though mostly unrelated to the laws of war, are approximate examples of court martial trials in the field for offences committed during international military operations. Most of the servicemen were tried for offences relating to murder of colleagues, stealing and disobedience to lawful orders.

iii. **Universal Jurisdiction:** In simple terms, "universal jurisdiction" is a phrase that is used to connote the mechanism under international law whereby persons indicted for committing very serious offences such as grave breaches of the GC's crimes against

[287] The incident involved three UK Solders who were to face war crimes charges for alleged killing of one Bala Musa, an Iraqi citizen who died in custody in September, 2003. News of the incident was reported in BBC News, bbc.co.uk (20th July, 2015). The Nigerian Vanguard case of the trial and conviction by a court martial of Daniel Kenyon, Darren Lakin and Mark Cooley of the Royal Regiment of Fusiliers for Violating the Laws of War. Daniel Kenyon was specifically convicted for failure to report that a soldier under his command had abuse and Iraqi prisoner, which was a violation of the Laws of War. Cited in Chiefe T.E.C. Op.cit, p.294

[288] Cap A20 LFN, Op cit

[289] Ibid

[290] Ibid

humanity, genocide, torture and violations of the laws and custom of war, may be subjected to trial in the competent court of any interested country, which arrests the offender, regardless of whether the alleged offences were committed in that country or not. The powers to exercise universal jurisdiction over the above mentioned offences is founded in international treaties such as the GC's where Article 146 of the fourth GC of 1949 states that parties to the convention, which include Nigeria, are obliged to search for persons alleged to have committed, or order the commission of grave breaches of the GC's and bring such offenders to trial before their own courts regardless of their nationality. The cases of ***The Prosecuto vs Dusko Tadic***[291] at the International Criminal Tribunal for the former Yugoslavia (ICTY) that of ***Regina vs. Bartle*** and ***The Commissioner of Police for the metropolis and others Exparte Pinoshet***.[292] ***The Prosecutor vs Anto Farundzia***[293] are examples of cases where the concept of universal jurisdiction for war crimes, crimes against humanity and torture were variously restated and acknowledged. Borrowing the words of the judge in the Anto Farundzia case above *"There exists today universal revulsion against torture such that the torture has become like the pirate and slave dealer before him, hostsi humani generis, and enemy of all mankind".* It is opined that for soldiers on international military operations, the implication of the concept of universal jurisdiction is that the offences, which are said to

[291] Case No. IT-94-1-A (ICTY) Tadic, a Bosnian Serb was arrested in 1994 in Germany on the allegation that he committed serious offences in Bosnia – Hertzegovina. The offences included torture, aiding and abetting the commission of genocide, which in terms of substance and jurisdiction could be tried in Germany. A formal request for Referral, however, brought the case to ICTY. The case was also cited and discussed in Kalshovan F. and Zegeried L. Constraints on the waging war – An Introduction to International Humanitarian Law (Geneva: International Committee of the Red Cross) (2001) p. 196

[292] (1999) 2 All ER 97

[293] Case No. IT-95-17/1/T(ICTY)

be subject to universal jurisdiction, would be avoided in all circumstances in order to avoid being labeled life time fugitive from the law.

iv. **The International Crime Court and Other Ad Hoc War Crime Tribunals:** The newly established International Criminal Court (ICC) currently sits at The Hague, Netherlands and it's a permanent forum for trials of perpetrators of a number of crimes including the aforementioned war crimes, crimes against humanity and genocide. It needs to be stated that following the adoption of the Rome Statute of the ICC on 17 July, 1988, the ICC came into effect on 1st July, 2002. Nigeria has signed and ratified that statute and the effect is that soldiers have come under the jurisdiction of the ICC in respect of indictment for committing the most crimes of concern to the international community.[294] Before the advent of this permanent court, Ad Hoc war crimes courts have been sitting in Yugoslavia (ICTY), Rwanda (ICTR) and Sierra-Leone special court for Sierra Leone (S.C.S.L). The S.C.S.L in particular was setup in response to the resolution of the UN Security Council of 14th August, 2000 to establish hybrid international domestic special courts on Sierra Leone, to prosecute those allegedly responsible for atrocities during the civil war in Sierra Leone.[295] The actual establishment of the S.C.S.L, was affected based on an agreement between the UN and the government of Sierra Leone.[296] It is interesting to note that in the case of the UN backed S.C.S.L; Article 2 and 3 of the statute of the court[297] empower the court to try peacekeepers who committed crimes within the competence of the court inside the territory of Sierra Leone. However, in that regard, the

[294] Braimah Y. J. (2005) "The International Criminal Court: A New Frontier in the Punishment of War Crimes" in *The Military Lawyer,* Vol. 2, Op. cit, p. 1
[295] Security Council Resolution SC Res/1315(200)
[296] Udombana N. J., "Charles Taylor, Imputing and International Law, in Human Right Forum" Being a Paper Presented on 25th august, 2004 at the Nigerian Bar Association Annual General Conference 2004, p. 14 cited in Chiefe T.E.C Op. cit, p. 298
[297] Statute of the Special Court for Sierra Leone

home state of the offending peacekeeper has been given that primary jurisdiction to first try the offender and the S.C.S.L will only exercise jurisdiction where the home state is unwilling or unable to carry out investigation and trial of the offender. It therefore seems incontestable that in the case of UNAMSIL, the UN backed S.C.S.L can be regarded as one of the enforcement mechanisms of the rule of law for that international military operations.

v. **The International Court of Justice:** The ICJ was established in 1945 as the principal judicial organ of the UN. In accordance with the rule of law, which prescribes equality before the law, the court is a forum where nations and organizations with international juristic personality, including the UN itself, can resort for the resolution of international disputes. The disputes include those arising from the conduct of international military operations such as international peacekeeping missions and armed conflict between two sovereign nations. However, unlike the ICC and Ad Hoc tribunals discussed above, the ICJ does not try individual and has no power to convict and pass sentence as such. It can however, issue advisory opinions, which states are obliged to follow or incur the wrath of the UN Security Council.

vi. **Sanctions:** Another Mechanism for the enforcement of the rule of law at the international level is the instrument of sanctions which is covered by Chapter VII, Article 41 and 42 of the UN Charter 1945. Sanctions may come in the form of complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication and the severance of diplomatic relations. It may also take the more stringent form of blockade or even operations by land, sea and air by authorized member states of the UN. For instance, in relation to ECOMOG operations in Liberia, on 19th

November, 1992, the UN Security Council unanimously adopted Resolution 788 (1992) which inter-alia "welcome the commitment of ECOWAS towards a peaceful resolution of the Liberian conflict" and "determined that the deteriorating situation in Liberia constituted a threat to international peace and security". It was then decided that under chapter VII of the UN Charter, all member state should immediately implement those destined for the sole use of the ECOMOG force. It is common knowledge that ECOMOG forces were authorized to use force to enforce the will of the international community in this regard.

In sum, it may be restated that the interface between the soldiers compact and the conduct of military operations requires that in all aspects of the conduct of military operations, the relevant laws are followed. It is therefore submitted that the interface between his compact and the conduct of military operations is neither a resort to undue legalism an unnecessary constraint on the smooth conduct of operations. Rather, it constitutes measures that have been in place since antiquity, to ensure the most important instruments of executive governance by commanders and their troops who are involved in all types of military operations, would enable them avoid civil and criminal liabilities arising from actions taken or for failure to act appropriately during an operation.

3.8 The Application of Doctrine of Compact in Relation to Fundamental Objectives and Directive Principles of State Policies on the Soldier

Fundamental objectives and directive principles of state policy have been provided in Chapter II of the CFRN 1999[298]. It is a constitutional obligation that the government owes the citizens of Nigeria includes the soldier. These constitutional obligations of government as spelt

[298] Cap C23 Vol.3 LFN Op.cit

out in Chapter II of the Constitution are: the government and the people[299]; political objectives[300]; economic objectives[301]; social objectives[302]; educational objectives[303]; foreign policy objectives[304]; and environmental objectives.[305] Thus, the government and its agencies are not without guide and directives to better life of the people and as well develop Nigeria as a sovereign nation. According to Malemi E., he opined that *"as important as these objectives and principles are, they are not justiciable, and so they do not confer right of action, nor remedy in court, except the action is also founded on another provision of the constitution which confers right of action and remedy".*[306] It is in our view that the learned author erred as he said these rights are not only justiciable, but they are constitutional obligation of government to better the life of the people. Where the government fails in this obligation, the people have the right to seek remedy in a court of law. In support of this fact, the Supreme Court in the case of ***AG Ondo State vs. AGF***[307] ***and AG Lagos State vs. AGF***[308] said that by virtue of Section 4(2)[309] read together with item 60(a) 2nd Schedule of the Constitution[310] Exclusive Legislative List, once the National Assembly legislates on any or each of the provisions or fundamental objective principles of state policy, it becomes justiciable as with section 15(5) and ICPC Act. To this end, to outrightly say the constitutional obligations of government founded in Chapter II of the Constitution are non-justiciable is not correct because it is the primary responsibility of government. These obligations of government shall be discussed to the extent of how it affects the soldier.

[299] Section 14 Ibid
[300] Section 15 Ibid
[301] Section 16 Ibid
[302] Section 17 Ibid
[303] Section 18 Ibid
[304] Section 19 Ibid
[305] Section 20 Ibid
[306] Ese, M. The Nigerian Constitutional Law, (3rd ed) Princeton Publishing Company, Ikeja Lagos, (2012), p.261
[307] (2002) 9 NWLR pt 772 p.772 SC
[308] Ibid
[309] CFRN 1999 Cap C23 Vol.3 LFN, Op.cit
[310] Ibid

3.8.1 The Government and the People

Section 14 CFRN 1999[311] made provision for the constitutional obligation of the government to the people. This section provides that Nigeria shall be a nation or country base on the principles of democracy and social justice[312]. Sovereignty belongs to the people of Nigeria from whom government thought this constitution derives all its powers and authorities.[313] The security and welfare of the people shall be the primary purpose of government and the participation by the people in their government shall be ensured in accordance with the provisions of this constitution. It is also a duty on the government to ensure that the composition of the government of the federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria. Furthermore, it provided for the need to promote national unity, and national loyalty, to thereby ensuring that there shall be no predominance of persons from a few state or a few ethnic or other sectional groups in that government or in any of its agencies. Talking about this government obligation, it is a duty on the government to ensure that the soldier of the Nigerian Army is treated in accordance with Section 14 of the Constitution. In terms of establishment, administration, recruitment, provision of tools of work and security of troops. This right is justiciable and enforceable in the event of failure of government to uphold the constitution.

3.8.2 Political Objectives

The political objective of government, which is a constitutional obligation, is categorically stipulated under section 15 CFRN 1999[314]. The section provides that the motto of

[311] Cap C23 Vol.3 LFN Op.cit
[312] Badejo vs. Fed. Ministry of Education (1996) 8 NWLR pt. 464 p.15 SC
[313] CFRN 1999 Cap C23 Vol.3 LFN Op.cit, The Preamble and Section 1
[314] Ibid

the Federal Republic of Nigeria shall be unity and faith, peace and progress. These are the cardinal principles which the government and its agencies and people are to pursue. National integration shall be actively encouraged, whilst discrimination on grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited. In this section, the constitution suggests various examples of activities that will promote national integration of the ethnic groups in Nigeria, such as encouraging residence, association and inter-ethnic marriages among the different people. Furthermore, the state shall foster a feeling of belonging and of involvement among the various people of the federation, to the end that loyalty to the nation shall override sectional loyalties. The state shall abolish all corrupt practices and abuse of power.[315] This provision applies to the soldier to uphold in all his dealings in the state and the citizens.

3.8.3 Economic Objectives

This is one of the very important constitutional obligation of the government in the development and harnessing of the economic wealth of the nation for the purpose of equitable and just distribution throughout the federation. Section 16 CFRN 1999[316] provides that government shall harness the resources of Nigeria and promote national prosperity, and an efficient dynamic and self-reliant economy, and manage and control the national economy in such a manner as to secure the maximum welfare and happiness for every Nigerian citizen on the basis of social justice, and equality of opportunity.

[315] The Criminal Code Act Cap C38 Vol.3 LFN 2004, Penal Code Law Cap 89 Laws of Northern Nigeria 1963 Economic and Financial Crimes Commission Act, Independent Corrupt Practices Commission Act Cap C31 LFN 2004, Code of Conduct Bureau and Tribunal Act Cap C15 2004.
[316] Cap C23 Vol.3 LFN Op.cit

The section further provides that the state direct it policy towards ensuring: the promotion of a planned and balanced economic development; material resources of the nation are harnessed and distributed as best as possible to serve the common good; the economic system is not operated in such a manner as to permit the concentration of wealth, or the means of production and exchange in the hands of few individuals or group and that suitable and adequate shelter, food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.[317]

3.8.4 Social Objectives

The social objective of government to citizens is another constitutional obligation of the government on the ideals of freedom, equality and justice in furtherance of the social order. Section 17 CFRN 1999[318] is to the effect that every citizen shall have equality of rights, obligations and opportunities before the law. The section further provides that: the sanctity of the human person shall be recognized and human dignity be maintained. Exploitation of human and natural resources for reasons other than the good of the community shall be prevented. The independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.[319] It is also the duty of government to ensure that all citizens without discrimination have opportunity to secure adequate means of livelihood, secure suitable employment, condition of work are just and human, health, safety, and welfare of all citizens in employment are safeguarded, there are adequate medical facilities, equal pay for equal work,

[317] Section 16(2)(a)(b)(c) and (d) Cap C23 Vol.3 LFN 2004. See also the cases of Agbor vs. Metro Police Comm (1969) 1 WLR 703 CA and Momodu vs. NULGE (1994) 8 NWLR pt.362, p.336 CA
[318] Cap C23 Vol.3 LFN Op.cit
[319] Section 17(2)(a)-(d) Ibid

provision of assistances in deserving cases and evolution and promotion of family life is encouraged.[320]

3.8.5 Educational Objectives

Education is the key to success to every nation in the world. Without education, no nation can develop. Education is the future. The future belongs to the power of the brain to produce products and provide services. It is on this base, section 18 CFRN 1999[321] stipulates the constitutional obligation of government as regard education amongst other things that, the government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.[322] Government shall promote science and technology, strive to eradicate illiteracy, provide free, compulsory and universal primary education, free secondary education, free university education and free adult literacy program.[323] From this constitutional provision, it is a duty incumbent on the government and its agencies to ensure free education of citizens from primary level up to university. This obligation of government is certainly extended to the soldier being a citizen of Nigeria.

3.8.6 Foreign Policy Objectives

Talking about foreign policy objective, Nigeria is active in foreign affairs. At the West African sub-region, she is a member of ECOWAS. At the African level, she is a member of African Union and at the world level, she is a member of the United Nations. Nigeria has taken part in various peacekeeping operations, economic assistance and developments efforts in many parts of the world.

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[320] Section 17(3)(a)-(h) Ibid
[321] Cap C23 Vol.3 LFN Op.cit
[322] Section 18(1) Ibid
[323] Section 18(3) Ibid

In view of these foreign obligation, the constitution in section 19[324] provides that the foreign policy objective shall be; promotion and protection of the national interest, promotion of Africa integration and support for African unity, promotion of international cooperation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestations, respect for international law and treaty obligation as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication and promotion of a just world economic order.[325]

3.8.7 Environmental Objectives

The state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.[326] The well being of any nation depends on the proper exploitation and use, prudent management and protection of its natural resources and environment. Renewable and non-renewable resources must be properly managed for the welfare and development of the country. A healthy, save and beautiful environment is a place where the people can live healthy and happy lives. It is a place where tourism can thrive and be a major national revenue earner.[327] The environmental obligation of the government to provide a healthy and beautiful environment is also extended to the soldier. This can be evidenced in setting of all military barracks across the country where the government ensures that they are kept neat. Also resources are properly managed to ensure the welfare and development of the Nigerian Army and its troops. To this end, we can conclude by saying that although these are the obligation of government as provided by the constitution. However, the reality is that this government

[324] Cap. C23 Vol.23 LFN Op.cit
[325] Section 19(a)-(e) Ibid
[326] Section 20 CFRN 1999 Cap 23 Vol.3 LFN 2004. And for instance, the Federal Environmental Protection Agency Act Cap F10 LFN 2004, and also the case of Amos vs. Shell BP Nig. Ltd (1974) 4 ECSLR 486
[327] Malemi E. Op.cit, p.272

obligation has not been successfully implemented on the citizens. Hence the government needs to do a lot to uphold its constitutional obligation to its citizens.

CHAPTER FOUR

COMPONENTS OF LAW ENFORCEMENT OF THE DOCTRINE OF COMPACT IN NIGERIAN MILITARY JUSTICE SYSTEM

4.0 Introduction

As we have earlier stated, the doctrine of compact is concerned about the applicability of the tripartite laws on the Nigerian soldier. In our view, the application of these laws cannot be complete without a detailed discussion of how the components of law enforcement are used to enforce military justice system on the soldier. This is because, where a legislation has been enacted for compliance and obedience by the public or a section of the public, in other that the law to be effective, there must be methods stipulated for its enforcement.

In view of this fact, the law has spelt out various components on how to enforce the doctrine of compact in military justice system. These enforcement components start from initiation of disciplinary process up to the final stage of appeal. It should be noted that the soldier by virtue of his legal status, is subject to the jurisdiction of military courts, civil courts and international courts. It therefore implies that the aim of the enforcement of the doctrine of compact is to maintain discipline and uphold the tenets of rule of law. Discipline in the military is predicated on justice and rule of law. In line with this, we shall serially discuss these components.

4.1 Reporting Complaint to the Commanding Officer

Disciplinary measures in the military usually start with an allegation being reported to the Commanding Officer of the suspected accused in the form of a charge. The Commanding Officer in turn is required to carry out an investigation to determine the authenticity of the allegations in

a prescribed manner.[1] The Commanding Officer has several avenues open to him to investigate cases. The investigation should commence as soon as possible within 24 hours of receipt of the complaint. The avenues at his disposal to investigate the offence include Personal Investigation, Board of Inquiry or Regimental inquiry, Summary and Abstract of Evidence and Military Police Investigation.[2] We shall discuss the various avenues open to a Commanding Officer to investigate cases later in this chapter.

4.2 Complaints and Instituting of Action in Civil Court by a Soldier

Most soldiers erroneously think that they cannot sue to enforce their rights regarding tort, contract, land, and commercial transaction, among others or sue fellow services personnel or the military authorities while in service. This is obviously incorrect, except for the limitation in relation to suits against the military authorities, or service personnel as provided for in sections 178 and 179 of the A.F.A.[3] a soldier who feels wronged on any matter by any person subject to military law can seek redress for such a wrong in accordance with the procedure set out by the AFA. Section 178 that deals with complaints by officers' provides that if an officer thinks that he has been wronged by a superior officer or authority and on application to his Commanding Officer does not obtain redress to which he thinks he is entitled, he may make a complaint with respect to that matter to the Forces Council.[4] The section further states that before the officer takes any other steps to further his complaint, he shall exhaust the administrative remedies available to him under the section before embarking on any action.[5]

[1] Section 123 of AFA Cap A20 LFN, Op.cit
[2] Peters A. O. (2014) *Understanding the Character of Summary Trials and their Importance in Enforcing Military Discipline. The Military Lawyer*, A Publication of the Directorate of Legal Service (Army) July, Vol. 5 Pp.154-160
[3] Cap A20, LFN, Op.cit
[4] 178 (1) A.F.A. Ibid
[5] 178 (3) A. F. A. Ibid

In respect of a soldier, section 179 which is similar to section 178 provides that he may make a complaint with respect to the matter to his Commanding Officer.[6] And if he is not satisfied with the redress, he may make a complaint to the next officer whom he, the complainant, is for the time being serving, being an officer not below the rank of Brigadier General or corresponding rank. In other words, he is to complaint to the next higher authority to his Commanding Officer.[7] Section 179(4), also enjoins the soldier to exhaust all the administrative remedies before embarking on any other action.[8]

The import of section 178 and 179 therefore is that service personnel is bound to exhaust all administrative remedies before he can proceed to the civil courts to seek remedy against a fellow service personnel or the military authority. If he refuses to do so, his matter will be thrown out of the court for not satisfying statutory condition before coming to the court.[9] Even in the United States of America, the Federal Courts have recognized the need to allow the military justice system and its agencies to conclude matters before the courts can intervene. It was held that it promotes efficiency and discourages servicemen form neglecting the institution created by the law. Thus, in ***Orloff vs Wiloughby,***[10] the US Supreme Courts stated the positions as follows:

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favouritism or other objectionable handling of men. But judges are not given the task of turning the army. The responsibility of setting up channels through which such grievances can be considered and fairly settled rest upon congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from the judiciary be as scrupulous not interfere

[6] Section 179 (1) Ibid
[7] Section 179 (2) Ibid
[8] Section 179 (4) Ibid
[9] Chiefe T.E.C. (2008) Op.cit, p.60
[10] 345 U.S. 83 (1953) at p. 93

> it legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.[11]

From the above decision, it is submitted that this position of the US Court is similar to section 178 and 179 of the A.F.A[12]. The Supreme Court in Nigeria has further reaffirmed the provisions of sections 178 and 179 A.F.A.[13] in the case of ***Israel Aribisala vs Talaba Ogunyemi & Ors.***[14] Where it held that; *"where a statute prescribes a legal line of action for determination of an issue…the aggrieved party must exhaust all the remedies in that law before going to court".*[15]

One question that may be asked is, that is it mandatory for service personnel to exhaust all internal administrative remedies before he can sue a civilian in court to enforce his right? Certainly, the answer is in the negative. This is because the provisions of sections 178 and 179 of the A.F.A[16] are only limited to suit between service personnel or military authorities excluding civilian. Once the matter involves a civilian, the service personnel can directly approach the court to enforce his right. It should be noted that once a service personnel who after exhausting all internal administrative remedies commences an action in court against a fellow service personnel, he shall neither be retired from service nor be victimized for enforcing his rights. Because doing so will be tantamount to infringement of his fundamental right to fair hearing which is guaranteed by the constitution.

[11] Ibid
[12] Cap A20 LFN, op.cit
[13] Ibid
[14] (2005) Vol.6 M.J.S.C 188 at p.205
[15] Ibid
[16] Cap A20 LFN, op.cit

4.3 Power of the Police to Arrest and Detain a Soldier in Custody

The Nigerian Police Force was established by the Police Act[17] section 14 of the Act[18] vests the police with the powers of prevention and detection of crime, apprehension of offenders, preservation of law and order, protection of life and property and law enforcement. The section states:

> The Police shall be deployed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the enforcement of all laws and regulations with which they are directly charged and shall perform such military duties within or outside Nigeria as may be required of them by or under the authority of this of any other Act.[19]

On account of this, the police can enforce the law on every citizen of Nigeria including the soldier. Consequently, it has the authority to enter any military location to affect an arrest or search premises. In practice however, for security reasons, the police do so through the cooperation and liaison with military higher command. This reduces friction between the police and the military, yet, it achieves the desired result.

Perhaps, the occasional violent, clashes of the police and the soldier may be attributed chiefly to the low level of cooperation and liaison between the two security agencies in location where such clashes occur. This view is reinforced by the fact that where cooperation and liaison exist, soldiers and policemen at the lower level who often cause the clashes, would be mindful of the fact that their superiors would not take it kindly with them in the event of any clashes. It is also expected that in the case of disagreements in the cause of duty, soldiers and policemen

[17] Cap P19 LFN, Op cit
[18] Ibid
[19] Section 14 Police Act, Ibid

would report to their respective superiors who would in the spirit of cooperation and liaison iron out the differences without rancor.[20]

As for the soldier, it is already part of the curriculum of all military institutions and units training, that soldiers are taught the powers of the police over the military, in a democracy. This aspect of military education has reduced to the bearest minimum, the violent clashes between the police and the soldier. The police can also continue to educate its personnel, on the need to be as civil as possible to all persons including soldiers, when effecting their duties to avoid clash with soldiers.[21]

As regards the detention of a soldier by the police in custody, the police have the power to do so. However, such detention should not be more than twenty four hours without informing him the reasons for his detention. This position is supported by the CFRN 1999[22] which states: *"Any person who is arrested or detained shall be informed in writing within twenty four (and in language that he understands) of the fact and grounds of his arrest or detention".*[23] Having cited this constitutional authority, it is the duty of the police to bring any person who is arrested or detained before a court of law within a reasonable time.[24] This is the provision of the constitution too. But administratively, in the case of the soldier, the police are expected to inform his unit or any military authority within twenty four hours of the arrest and detention. So as to enable the military authority or the unit take over the matter through its law enforcement department i.e. Military Police or commence investigation of the matter. The reasons behind this administrative step are not in any way to contravene the law but because the soldier is under a command and subject to both the military authorities and civil authorities. And it is the duty of the unit at all

[20] Chiefe T. E. C. Op. cit, Pp. 66-67
[21] Ibid
[22] Section 35 (3) CFRN 1999, Cap C23 Vol. 3 LFN, Op.cit
[23] Abacha vs. Fawehinmi (2000) 6 NWLR pt. 660, p. 228 S. C and Section 35(3) CFRN 1999 Cap C23 Vol. 3 LFN, 2004
[24] Section 35 (4) of CFRN (1999) Cap C23 Vol. 3 LFN, Op.cit

time to account for their soldier. In the light of this fact, the soldier being a person subject to service law can be tried by either a court martial or a civil court. This is the position of his legal status.

4.4 Power of the Military police to Arrest and Detain a Soldier in Custody

Like in the civil setting, service personnel who commits or is reasonably suspected to have committed an offence can be arrested and detained by the military police. The provisions regulating arrest and detention in the military justice system are sections 121 and 122 of the A.F.A.[25] By these provisions, any person empowered to arrest an offender is permitted to use reasonable force necessary for that purpose.[26] An officer may only be arrested by another officer, but an officer is only permitted to arrest his superior if such a superior is found engaged in a quarrel or disorder behaviour[27].

A soldier i.e. order ranks, can be arrested by an officer or his superior.[28] The military police have unrestricted powers of arrest. A military police officer can arrest any service personnel of any rank. Provost Officers can arrest any service personnel on the order of an officer.[29] Section 122 of the AFA[30] which deals with detention makes provision for the avoidance of delay after arrest. This is to ensure that service personnel are not unduly detained for longer periods than necessary. The law requires that except where the Commanding Officer determines otherwise[31] the allegation against service personnel who is arrested shall be investigated within a reasonable time for criminal proceedings to be taken or he shall be released within 24 hours after the arrest. Where it is impossible to meet the 24 hours deadline, the

[25] Cap A20 LFN, Op.cit
[26] Section 121 (2) Ibid
[27] Section 121 (3) Ibid
[28] Section 121 (4) Ibid
[29] Section 121 (5) Ibid
[30] Section 122 (5) AFA Ibid
[31] Ibid

detaining authority is required to make a report to his superior every 8 days explaining the need for continuous detention. The total period for detention in these circumstances shall not exceed 90 days.[32] It is an offence punishable with a maximum of 2 years imprisonment for anyone to detain service personnel without complying with these provisions.[33] The circumstances that will justify long detention includes a reasonable belief that it is necessary in the interest of public order and the need to prevent deliberate undermining of service discipline to continue to detain the person in custody specifically, a person can be detained on the following grounds:[34]

i. The seriousness of the allegation or accusation e.g. Treason, Murder or Mutiny,
ii. The need to establish the identity of the person under arrest,
iii. The need to preserve or secure evidence,
iv. The need to prevent a repetition or continuation of the offence,
v. The need to ensure the safety of the personnel detained (protective custody),
vi. The need to prevent interference with investigation, and
vii. The need to prevent escape.[35]

4.5 Avenues Open to Commanding Officer to Investigate Cases

Section 123 of the AFA[36] provided that before an allegation that service personnel has committed an offence is proceeded with, the allegation must be reported to the Commanding Officer of the accused in the form of a charge and the Commanding Officer is to investigate the charge in the prescribed manner.[37] The Commanding Officer has several avenues open to him for

[32] Section 122 (3) of AFA Ibid
[33] Section 84 of A.F.A. Ibid
[34] Section 122 (6) Ibid
[35] Ibid
[36] Cap A20 LFN, Op.cit
[37] Section 123 of A.F.A Ibid

investigating case and the investigation should be commenced within twenty-four hours of receipt of the report of the allegation.[38] The avenues open to him are as follows:

a. **Personal Investigation:** In uncomplicated cases, the Commanding Officer may call witnesses directly to fine out the gravity of the offence before embarking on further investigation.

b. **Board of Inquiry or Regimental Inquiry:** The Board of Inquiry (BOI) or Regimental Inquiry (RI) specifies what facts have to be investigated. The BOI or RI are essentially to inform the Commanding Officer of the facts of the case or the allegation. Consequently, the terms of reference of any inquiry should not specify an accused person. Furthermore, evidence in the BOI or RI or the reports of the BOI or RI are not admissible in a summary trial or court martial except in a case of perjury.[39] Under the military justice system, it has become a procedure to investigate cases of AWOL or unnatural death of a service personnel by a BOI or RI.

c. **Summary and Abstract of Evidence:** The Summary or Abstract of Evidence are another form of investigation that requires the evidence to be reduced to writing in the prescribed form.[40] The purposes are:[41]

    i. To assist the Commanding Officer in a complicated case to decide whether the accused should be remanded for trial by court martial.

    ii. To enable the Commanding Officer to consider whether he should order the trial by court martial and if so, what type of court martial should be ordered.

    iii. To provide a brief for the prosecutor at the trial.

[38] Section 122 (1) of AFA Ibid
[39] Section 172 (4) of AFA Ibid
[40] Rule 7 (2) Rule of Procedure Army (1972)
[41] Chiefe T.E.C. Op.cit. 73

iv. To inform the defence of the evidence which will be given by the prosecutor at the trial?

v. To enable the president of a court martial in those cases in which a judge advocate has not been appointed or as the case may be the judge advocate, to appreciate the nature of the case before the trial commences.

vi. In the event of a plea of guilt, to enable the court and the confirming authority to know the facts of the case and to decide on the punishment.

Specifically, Summary of Evidence must be taken if:

i. The maximum punishment for the offence with which the accused is charged is death or

ii. The accused at any time before the charge against him is referred to higher authority in accordance with rule 13[42] requires in writing that a summary of evidence be taken, or

iii. The Commanding Officer is of the opinion that the interest of justice requires that summary of evidence be taken.

The procedure for taking a Summary[43] or Abstract of Evidence[44] is found in the Rules of Procedure (Army) 1972.[45] An officer is usually appointed to take the evidence and not a board of officers. He is not to make a recommendation as to the charge or render a report. The procedure and form of the evidence is provided in the Rule of Procedure. The Summary or Abstract of Evidence can be tendered in evidence in a court martial.[46] It is necessary to point out that the Summary or Abstract of Evidence must be taken even where an

[42] Rules of Procedure Army (1972)
[43] Rule 9 Ibid
[44] Rule 10 Ibid
[45] Schedule 1 to the Rules of Procedure, Ibid
[46] Rule 45(1) of the Rules of Procedure, Ibid

investigation report has been produced by the military police. This is because it is mandatory for the accused to be served the Summary or Abstract of evidence to enable him prepare his defence.[47]

d. **Military Police Investigation:** The Commanding Officer has the discretion as to the means he will use to investigate an allegation or case reported to him. However, in complicated cases, he is expected to make use of the military police. The investigation report, exhibits and statements of witnesses collated by the military police are useful for the prosecution of cases. The military police have highly skilled manpower to carry out investigation competently. It is mandatory that in investigating any alleged offence, the investigation must comply with the provisions of Evidence Act (2011).[48] This implies that any confessional statement obtained under duress or undue influence is inadmissible in a court of law. Non-compliance with it will jeopardize the prosecution of the offender and therefore undermine military justice.

These are the avenues open to a Commanding Officer to investigate an offence reported to him in form of a charge. It should however be noted that failure to investigate a charge forthwith, without any reason attracts a penal sanction.[49]

4.6 Charges and Basic Rules for Drafting Charges

A charge is a document containing the statement and particulars of an offence for which a person is accused.[50] In other words, a charge is a written document containing facts which

[47] Chiefe T.E.C. Op.cit, p.78
[48] Cap E14, LFN 2011 (as amended)
[49] Section 84(1) A.F.A. Op.cit
[50] Section 2 Criminal Procedure Act

disclose that a person named therein has done or omitted to do an act thereby committing an offence.[51]

In the military justice system, the law did not specify who may draft a charge. However, section 123 of the AFA[52] which deals with the investigation of charge provides that, *"before an allegation against a person subject to service law that he has committed an offence under the AFA may be proceeded with, the allegation shall be reported in the form of a charge to the Commanding Officer of the accused who shall investigate the charge in the prescribed manner".*[53] Although the section did not specify the person that may prefer a charge, but however it appears that it is the duty of every service personnel to know how to draft a charge because the only formal way of reporting an offence to a Commanding Officer is in a form of a charge. It is on this note, we shall discuss the basic rules for drafting a charge.

4.6.1 Basic Rules for Drafting Charges: A charge is a formal legal document which must conform to the rules prescribed by law for its validity. The rules governing the drafting of charges may be categorized into two. They are: Rules relating to the form or format of charge and Rules relating to the content of a charge

i. **Rule Relating to the Form or Format of a Charge:** Rule 14 (3)[54] requires the form or format of a charge to conform to the form set out in schedule 2 of the Rules of Procedure Army (RPA). Also, section 39 in chapter two of the Manual of Military Law contains provision on the form or format of a charge. According to the said provision:

[51] Omachi A.I. (2012), *Court martial Law and Practice in the Armed Forces of Nigeria,* Advance Concept Printers Kaduna, p.15
[52] Cap A20 LFN, Op.cit
[53] Ibid
[54] Rules of Procedure, Op.cit

"The charge-sheet contains the whole of the issues to be tried at one time and it consists of:

a) The commencement of offence, and
b) The charges, each being divided into
  a. The statement of offence, and
  b. The particulars of the act, neglect of omission constituting the offence;
c) The signature of the commanding officer;
d) The order for trial."[55]

Any charge short of this format is not in accordance with the RPA and Section 39 of MML.

4.6.2 Rules relating to the Content of a Charge: The rules relating to the content of a charge are subsumed in the rules governing the drafting of charges, which are:

Rules against ambiguity

Rules against duplicity

Rules against misjoinder of offenders

Rules against misjoinder offences

Rules against multiplicity of offences

i. **Rules against Ambiguity**: A Charge must be clear or unambiguous as regards the particulars of the offender, the statement of offence and the particulars of offence. Rule 14 (3)[56] clearly stated that the particulars of the offender should be clearly stated in the charge. That is to say, the charge shall state the service number, the rank, name, and unit of the accused person and show by the description of the accused person directly or by an express averment that he is subject to service law or otherwise liable to trial by court martial.

A charge is required to contain in an unambiguous manner, a statement of the offence allegedly committed by the accused person. It is advisable for the statement of offence to be in

[55] Rule 14(3) Rules of Procedure Army Op cit
[56] Ibid

the exact words or definition contained in the statute creating the offence. However, where in the statement of offence, words are used which are different from the exact words used in the law creating the offence, it is not unlawful provided the accused is not misled by the difference in the words in the charge and the law creating the offence.[57] Where the statute does not define the offence, the description of this is required to contain the essential particular ingredients constituting the offence.[58]

Also, the particular section of the law contravened must be clearly stated. The definition section should be proffered where this is provided. In ***Aoko vs Fagbemi***[59] the appellant was charged under a non-existing law and was convicted. The conviction was quashed on appeal. Similar consequence was meted on the judgement of the lower court by the appellate court in the case of ***Clement Isong vs State***[60] where the accused was charged and convicted based on an offence not contained in the statute. Also, in the case of ***Kalu vs Nigerian Army,***[61] the court held that the accused must be tried for a well defined and known offence contained in a written law wherein the ingredients of the offence are defined. The statement of offence in an unequivocal manner in a charge is a very fundamental prescription of law as it goes to the root of the validity of the charge. The particulars of the offence are, apt, the general information regarding that offence.[62]

ii. **Rule against Duplicity:** This rule relates to the count in a charge. It is to the effect that a count shall not contain more than one offence. In other words, where an accused has

[57] Asuquo vs. State (1967) 1 ALL NLR 124
[58] Omachi, A.I., Op.cit, p.20
[59] (1963) 1 All NLR 400
[60] (1986) 1 QLRN 86
[61] (2010) 4 NWLR (pt. 1185) 433 at 446 H – 447 A
[62] Rule 15 (5) Rules of Procedure, Op.cit

committed several offences in the same transaction each count shall contain one of such offences there are however, exceptions to this rule. The exceptions are as follows:

a. Offences of misappropriation or stealing of money over a period of time may be summed up and contained a single count. For instance, where 'A' (a store keeper in the store of 'B') stole ₦10,000.00 in June 2011, ₦50,000.00 in August 2011 and ₦30,000.00 in December, 2011, the total amount of monies stolen by 'A' from 'B' store over this period may be collated and contained in the same count.[63]

b. Offences defined alternatively by law can be contained alternatively in a single count. For instance, the offence created in section 98 of the A.F.A[64] stated:

> A person subject to service aw under this Act who aids, abets, counsel or procures the commission by another of an offence under any of the provisions of this Act is guilty of the like offence and liable to be charge, tried and punished as a principal offender.[65]

c. Identical offences by an accused person in a single transaction may be stated in a single count. For instance where 'A' robs 'B', 'C' and 'D' at the same time, the offence may be contained in the same count.[66]

iii. **Rules against Misjoinder of Offenders**: The Rules of Procedure (Army) 1972 provides that offenders have to be charged separately on separate charge sheets. For instance 'A' kept his rifle carelessly and 'B' stole it, 'A' will be charged for the offence of loss of service property and 'B' will be charged separately on another charge sheet for stealing of service property. However, there are exceptions of this rule. These exceptions are as follows:

[63] Domingo vs. R. (1963) 1 All NLR 81, R. vs. Aniemeka (1961) 1 All NLR 43
[64] Cap A20, LFN, Op.cit
[65] Ibid
[66] Police vs. Oyemisi (1957) WNLR 387

a. Any number of accused persons may be charged in the same charge sheet for offences alleged to have been committed by them separately if the acts on which the charges are founded are so connected that it is in the interest of justice that they be tried together. For instance following a dispute in a restaurant between two customers 'A' and 'B' and two employees, 'C' and 'D', 'C' assaulted 'A' in the restaurant and about the same time 'D' assaulted 'B' outside the restaurant, 'C' and 'D' can be tried together for the separate assaults. This was the fact in ***R vs. Assim*** cited in the Manual of Military Law.[67]

b. Any number of accused persons may be charged jointly in one charge for an offence alleged to have been committed by them jointly.[68]

iv. **Rules against Misjoinder of Offences**: Every distinct offence by an accused person is required to be charged separately in separate charge sheets, rule 15 (1)[69] provides that each charge shall state one offence only. In other words, where an accused person commits two separate offences with one being independent of the other, it would be wrong to contain the two offences on a single charge sheet. For instance, 'A' assault 'B' and escapes in his car, 'A' gets to another destination and robs 'C'. the two cases of assault and robbery by 'A' against 'B' and 'C' shall be contained in separate charge sheet because there is no nexus between the two offences in that the offence are different even though committed by the same person. The exceptions to the rule are:

a. A charge sheet may contains more than one charge if the separate charges are founded on the same facts or form part of or are part of a series of offences of the same or similar character.[70]

[67] Footnote 3 of Rule 16, Rules of Procedure Army (1972) p. 692
[68] Rule 16 (1) Ibid
[69] Rules of Procedure Army Op.cit
[70] Rule 14 (1) Ibid

b. The charge of Desertion[71] Absence without Leave[72] Loss of Service Property[73] or Escaping from Confinement[74] under the AFA[75] may be included in any charge sheet notwithstanding that other counts are not founded on the same facts and do not form or are not part of a series of offences of the same or similar character.[76]

c. Offences may be charged in the alternative in separate counts on the same charge sheet.[77] Where it is doubtful which of the offences committed by an accused person will be consistent with the facts to ground a conviction of the accused, he may be charged with one or more of the offences or in the alternative on the same charge sheet. For instance, 'A', a superior officer gets drunk and physically assault 'B' junior officer. This fact can sustain a charge of Ill-Treatment of an Officer under section 92 (a) and Disgraceful Conduct under section 93 of the AFA.[78] Where it is doubtful as to which of the two sections would most suitably ground a conviction of the accused person based on the fact, the offence may be charged alternatively on both sections 92 (a) and 93 as separate counts on the same charge sheet. On no account shall two or more offences be charged in the alternative on the same count.[79]

v. **Rules against Multiplicity of Offences**: This rule is to affect that where the facts disclose the commission of an offence, it would be wrong to bring that single offence under two separate charges with one of the charges being of an omnibus nature. For instance, 'A' a superior officer assaults 'B', a junior officer, it would be wrong to charge

[71] Section 60 of AFA Cap A20LFN Op.cit
[72] Section 59 Ibid
[73] Section 68 (1) (a) Ibid
[74] Section 87 Ibid
[75] Cap A20 L.F.N Ibid
[76] Rule 14 (1) Op. Cit
[77] Rule 15 (2) Ibid
[78] Cap A20 L.F.N. Op cit
[79] Rule 15 (1) Op. Cit

'A; for Ill-Treatment of 'B' under section 92 (a) and under the omnibus charge of Conduct to the Prejudice of Good Order and Military Discipline under section 103 (1) AFA[80] subsection 2 of the section 103 stated: *"It shall be a defence to charge under subsection 1 of this section that the conduct or neglect of the accused had already been charged under section 45 to 102 and section 104 to 114 of this Act".*[81]

The essence of this rule is to prevent an accused from being charged for an offence under a section of the AFA and also under the omnibus section 103 (1) AFA[82] based on the same facts. This rule should be distinguished from a situation where two offences are brought in one count for a single offence in the alternative in the circumstances stated earlier above.

4.6.3 Effects of the Breach of the Rule Governing the Drafting of Charges: Where a charge is bad for breach of any of the rules afore-stated, the accused may object to the charge on that ground.[83] Such an objection must be made before the accused pleads to the charge. However, when an accused objects to a charge, the prosecutor may address the court in reply to the objection, and if he does so, the defence may reply to the address of the prosecution.[84] If the court martial uphold the objection, the charge may be amended where the defect may be attributed to clerical error or omission.[85]

Alternatively, the court may adjourn and report to the convening officer.[86] But if there is another charge against the accused and to which no objection has been raised, the court martial

[80] Ibid
[81] Ibid
[82] Ibid
[83] Rule 37 (1) Rules of Procedure Op.cit
[84] Obakpolor vs. State (1991) 1 NWLR (pt. 125) 128
[85] Rue 37 (1) Rules of Procedure, Op.cit
[86] Rule 37 (2) and 83 (10) Ibid

may proceed against the accused person on such other charge while the decision of the convening officer is being awaited on the charge objected to.[87]

Upon receiving the report aforesaid, the convening officer may either approve or disapprove the decision of the court martial in allowing the objection. Where the convening officer approves of the decision of the court in allowing the objection, he may dissolve the court martial or direct that the accused be tried on another charge to which there is no objection or amend the charge if it would be in the overall interest of justice and fairness to the accused as prescribed in Rule 84.[88] If on the decision of the court martial to try the charge or where there is another charge or charge sheet to which the objection does not relate, he may direct the trial of the accused based on such other charge or convene a fresh court martial to try the accused.[89]

4.7 Summary Trials

On completion of the investigation, the Commanding Officer is required by section 124 of the A.F.A[90] to decide whether to dispose off the case either by summary trial or court martial trial. If the case is for summary trial, the following are to be done:[91]

a. The charges against the offender should be accurately drafted and in the proper form set out in schedule 2 of the Rules of Procedure Army (1972).
b. The accused should be notified of the trial not less than 24 hours before it is held.
c. The accused should be afforded the opportunity of examining witnesses against him and to present his own defence during the trial.
d. At the end of the evidence, the Commanding Officer is required to act within the law and take any of the following actions.[92]

[87] Rule 37 (3) Ibid
[88] Rules of Procedure Army Op cit
[89] Rule 37 (3) (a) Ibid
[90] Cap A20 LFN, Op.cit
[91] Rule 13 Op. Cit

i. Dismiss the charge (Section 125 (5) (a) AFA)[93]

ii. Refer the charge to the appropriate superior authority (Section 126 (1) AFA)[94]

iii. Take steps to try the case by court martial (Section 126 (1) of the AFA)[95]

iv. Find the accused guilty and imposed the appropriate punishment (Section 124 (5) (c) AFA)[96]

v. Condone the offence (Section 124 (5) (d) AFA)[97]

Summary trial involves the accused soldier appearing before his Commanding Officer. The charge is read out to him and he takes a plea. Witnesses are called during the trial and a decision reached by the Commanding Officer after evaluation of evidence. Judgement is finally pronounced. Averagely, a typical summary trial lasts about thirty minutes. Summary trial is authorized on the ground that discipline and morale will be adversely affected, if Commanding Officers are unable to impose punishment immediately for minor offences. Allowing such offences to proceed through the court martial process would lead to expenses time consuming and administrative delays. The concept therefore is that summary trial punishment is primarily corrective.[98]

When the Commanding Officer decides to try a case summarily, he should bear the fundamental principles of justice in mind and do the followings:

i. The charge sheet against the accused is drafted in the correct format.

ii. The accused should be notified of the trial not less than 24 hours before the trial.

iii. The charge should be read to the accused in the language he understands accurately.

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[92] Ibid
[93] Cap A20 LFN, Op.cit
[94] Ibid
[95] Ibid
[96] Ibid
[97] Ibid
[98] Peters A. O. Op.cit, pp 154-160

iv. The accused should be asked to take his plea of either guilty or not guilty.

v. The witnesses against the accused should be present to testify on oath except where the accused has agreed in writing to dispense with their presence and this should be in rare situations occasioned by military necessity.

vi. The accused should be allowed to cross examine the witnesses brought against him.

vii. The accused should be permitted to present his defense during trial. He may adduce evidence as to the facts of the case and as to his character and plea in mitigation of punishment.[99]

It is necessary to note that section 124 (6)(a) of the AFA[100] lists the offences that cannot be tried summarily as those sections 45, 46, 47, 48, 51, 52, 65, 6, 70, 71, 72, 73, 75, 76, 83, 91, and 93 as well as attempts to commit such offences[101] and aiding and abetting the offences.[102] The offences are aiding the enemy (Section 45), communication with the enemy (Section 46, offence against Morale (Section 48), looting (Section 51), Mutiny (Section 520, Wrongful use of or possession of drugs which are controlled items (Section 65), offences, dangerous flying (Section 70), low flying (Section 72), inaccurate certification of ships, aircraft or parachutes (Section 73), Prize offence by commanding officers of ships, vessels or aircraft (Section 75), other prize offences (Section 76), offence in relation to requisitioning of vehicle (Section 91) disgraceful conduct (Section 93) attempt to commit the above offences (Section 95) adding and abetting such offences (section 98).[103] An examination of the above offences gives the impression that they are excluded from summary trial because they are serious offences and

[99] Ibid
[100] Cap A20 LFN, Op.cit
[101] Section 95 Ibid
[102] Section 98 Ibid
[103] All these offences listed above are enshrined at part xii of the AFA which deals with various offences in the Armed Forces Act, Cap A20, L.F.N, Op.cit

deserve more severe punishment that cannot awarded at a summary trial. It is therefore not clear why very serious offences such as rape (Section 77), defilement (Section 78), sexual relation with spouse of service personnel (Section 79), fraternization (Section 80), Sodomy (Section 81), Murder (Section 106) and Manslaughter (Section 105)[104] are not included in this section. However, in any case, it is expected that Commanding Officers will always exercise their judgment in favour of trying such serious offences by court martial in the interest of military justice.

At the completion of the summary trial, a record of the proceedings shall be made and kept in accordance with the prescribed form.[105] This is to ensure that where the accused petitions against the trial to the appropriate superior authority or sues the military authorities in respect of the case, the records would be available to defend the case. Indeed, since the democratic dispensation in Nigeria 1999. Soldiers have been exercising their rights under the Act. They do so by petitioning against punishments awarded them and Commanders have relied on records of such trials to respond to the request by the military headquarters for comments on the trials. With the specific provisions of section 147, 178 and 179 of AFA,[106] it becomes inevitable that proper records should be kept of summary trials.[107] At the conclusion of the trial, if the accused is found guilty as charged, the Commanding Officers can proceed to award punishment in accordance with Sections 115 and 116 of AFA which deals with awards of punishment for officers and soldiers. The punishment to be awarded could be extra duties, dismissal from service, reduction in rank, loss of pay, imprisonment with hard labour, reprimand, admonition and so forth. This depends on the nature of offence committed and its gravity. It is pertinent to note that officers'

[104] All of Part XII of the AFA Cap A20 LFN, Op.cit
[105] Rule 20 Op. Cit
[106] Cap A20 LFN, Op.cit
[107] Chiefe T.E.C Op. Cit., p. 93

and warrant officers have the right to elect to be triable by court martial.[108] But this right cannot be exercised by the order ranks. Taking a close study of this law, it is in our opinion that section 117[109] seems to be discriminatory on the part of the order ranks and also deny them adequate fair hearing. This is because where they are not allowed to elect how they want to be tried, there will be every possibility of bans in the summary trial as there is no legal representation in the summary trial and the accused is always presumpted guilty until he proves his innocence. Hence it is suggested that Section 117[110] should be amended to give the order ranks the right to equally elect whether to be tried summarily or by a Court Martial.

4.7.1 Abridgment of Soldiers Rights at Summary Trials: Summary trials have been condemned as abridging the rights of the soldiers and giving him little or no room to plead his cause. To an extent, this may be true. The accused soldier is usually marched into the Commanding Officer's office by the Regimental Sergeant Major (RSM) under a very frightful atmosphere. He is bullied and shouted upon if he tries to plead his innocence. He is virtually condemned before the trial begins. Sometimes there are situations where the Commanding Officer is the accuser and the judge. Obviously, justice may not be dispensed in such situations. The need to protect the constitutional rights of the soldiers appearing for a summary trial is as important as it is in a court martial trial.[111]

Thus, in enforcing discipline through the summary trial system, the Commanding Officer must balance military necessity against individual rights of the soldier. While the Commanding Officer has a legitimate interest in the maintenance of discipline within his command, this should not be done at the expense of the individual soldier's rights. The interests of discipline does not

[108] Section 117 of AFA Op. Cit.
[109] Ibid
[110] Ibid
[111] Peters A. O., Op. Cit, p. 158

require that elements of justice be dispensed with. In balancing these interests, there is the need for the Commanding Officer to ensure that adequate procedural safeguards are followed to give the soldier fair hearing.[112] In order to meet the needs of fairness, there is the need for a record of the proceedings to be produced during the trial.[113] As earlier stated, the importance of keeping the record is to ensure where the accused petitions against the trial or sues the military authorities, records of the trial would be available to speak for itself.

4.8 Court Martial Trials

The court martial is described as a military court that determines punishments for erring members of the military who are subject to military law.[114] Court Martial is a system of court established by the CFRN 1999[115] but of which little is known. Doherty refers to it as; *"a specialized court, set up to cater for the peculiar disciplinary needs of the Armed Forces".*[116] Douglas J. however, describes it as; *"as a system of specialized military court proceedings which practices are different from those obtainable in the regular courts and generally less favourable to the defenders…"*[117] From the above definitions of Court Martial, it is understood that Courts Martial are special courts created to try erring military offenders. The courts have jurisdiction to try cases of military offences[118] and civil offences[119]. It needs to be noted that serious offences are handled by courts martial which also consider cases when accused holds ranks above that of

[112] Ibid
[113] Rule 20 Op. Cit
[114] Adekangun, L. (2014), Enhancing Discipline and Professionalism in the Nigerian Army through the Instruments of Courts Martial in a Democracy, *The Military Lawyer*, A Publication of the Directorate of Legal Services (Army) July, vol. 5, Pp. 119-132
[115] Section 6(5)(j) of CFRN 1999 op.cit
[116] Doherty O., (1999) *Criminal Procedure in Nigeria Law and Practice,* London: Blackstone Press Ltd, p. 48
[117] Callahan O. vs. Paker quoted in Peters A. O. "The Nigerian Military Justice System: A Critical Appraisal", in the Dragon, vol. 2, Nos. 2&3 July and December 1992, p. 14 cited in Adekangun, L.., op. cit, p. 123
[118] Section 45-103 AFA Cap A20 LFN, Op.cit
[119] Section 114, Ibid

a Commanding Officer or he (the accused) demands such a trial.[120] The AFA specifically provided that some categories of offences must be tried by courts martial ostensibly to promote discipline and enhance professionalism.[121]

The need to maintain the military in a state of readiness warrants putting the soldier in a position to enforce internal discipline effectively and efficiently.[122] This is done by supplementing ordinary criminal law and judicial system of the country with a specialized code for the military discipline and equally a specialized system of enforcing same.[123] There are basically two types of courts martial in the military namely the General Court Martial (GCM) and Special Court Martial (SCM).[124] The power to convene courts martial is tied to appointments being held and not to individual or ranks. This means that no matter how high ranking an officer is in the military, if he fall outside the specified command appointment holders provided by AFA, he cannot convene a court martial.[125]

A GCM may be convened by the president of the Federal Republic of Nigeria in his capacity as the Commander-in-Chief (C-in-C) of the Armed Forces. Other appointment holders who can convene GCM are the Chief of Defence Staff, Chief of Army Staff, General Officer Commanding and Brigade Commanders.[126] A GCM is composed of a president, not less than four members, a waiting member, a Liaison Officer (LO) and a Judge Advocate (JA).[127] A GCM

[120] Sherman E., (1971)*In Conscience and Command: Justice and Discipline in the Military,* New York; Vintage Books, p. 21
[121] Section 124 (6) AFA Op. Cit.
[122] R vs. Genereux (1992) 1 SCR
[123] Adekandun L., Op. cit
[124] Section 129 AFA, Op. Cit
[125] Section 131 of A.F.A, Ibid
[126] Section 131 (2) Ibid
[127] Section 129 (a) Ibid

can try all classes of offences except that it cannot impose a sentence of death if its membership consists of less than seven members.[128]

A SCM can be convened by any of the appointment holders already mentioned as empowered to convene GCM. Additionally, Commanding Officers of units and the Senior Officers of detached units can convene SCMs.[129] The conferment on Commanding Officers of the powers to convene SCMs is informed by their closeness to the troops where the bulk of disciplinary cases occur. A SCM is composed of a president and not less than two members with a waiting member, a LO and a JA.[130] Where the SCM consist of only three members, it cannot impose a sentence that exceed one year imprisonment term or of death.[131] It can thus be seen that the basic difference between these two types of courts martial lies in their membership and sphere of power to award punishments.

4.8.1 Appraisal of the Procedure for Courts Martial Trials: It is important to note that only commissioned officers can be members of courts martial and the membership's qualification is fixed to not less than five years of recorded service in the aggregate.[132] Likewise, a service lawyer officer who is less than three years post call to bar cannot be appointed as a JA of any court martial.[133] The essence of these requirements is to prevent injustice likely to be occasioned by inexperience. It is highly desirable that the president and members of a court martial are senior in rank or at least be of the same rank and seniority with the accused person being tried.[134]

It would be unethical and an absurdity against service practice for subordinates to sit in judgement over their superiors. The officer who convenes a court martial is expressly prohibited

[128] Section 130 (1) Ibid
[129] Section 131 (3) Ibid
[130] Section 129 (b) Ibid
[131] Section 130 (3) Ibid
[132] Section 133 (2) Ibid
[133] Section 133 (6) Ibid
[134] Section 133 (3) (a) Ibid

from presiding over or being a member of it in line with the doctrine of fair hearing guaranteed by the CFRN 1999.[135]

Courts Martial are statutorily created, with power to convene them restricted to specified command appointment holders. However, such powers could in special circumstances be delegated.[136] This assertion found judicial support in the Supreme Court decision in the case of ***Nigerian Air Force vs James.***[137] The convening order which initiate's courts martial must be personally signed by an officer statutorily vested with the power to convene it or the express delegatee. It is this convening order that specifies the type of court martial, its members and also direct on where the court martial should sit.[138]

The AFA[139] provides for courts martial to observe the Rules of Evidence that is applied by criminal courts in Nigeria.[140] The failure of courts martial to scrupulously observe these rules would render courts martial's decisions nugatory. The president and the C-in-C is vested with the authority to formulate the rules of procedure to be observed by Courts Martial.[141]

The British Rules of Procedure (Army) 1972 RP(A) has been the extant rules being applied in our Court Martial Proceedings.[142] This is because the president is yet to make an indigenous Rules of Procedure for our Courts Martial. The AFA[143] has been in operation since 6th July, 1994 and the failure to evolve an indigenous RP(A) for close to 22 years, is not the best.

[135] Section 36 CFRN 1999, Op. Cit
[136] Section 131 (8) AFA Op. Cit
[137] (2000) 18 NWLR 295 at 302
[138] Section 135 (1) AFA and Rules 22 and 23 Rules of Procedure, Op.cit
[139] Cap A20 LFN, Op.cit
[140] Section 143 (1) AFA Ibid
[141] Section 180 (1) AFA Ibid
[142] Section 181 (1) AFA Ibid
[143] Cap A20 LFN, Op cit

This is more so that, the British environment for which her RP(A) (1972) was made is intrinsically different from that of Nigeria.[144]

On assembly of a court martial, the procedures to follow are as enumerated in the AFA and RP (A).[145] The procedure of Court Martial is essentially similar to what is obtainable in the civil courts in terms of examination-in-chief, cross examination and re-examination of witnesses and making of plea in mitigation of sentence (*allocutus*). An accused person can object to the president or any member of the court martial.[146] The accused equally have the right to object to the appointment of the JA if he took part in an inquiry into the matter relating to the subject matter of the charge against the accused.[147] The RP(A) provides for the swearing in of the president members of the court martial and the JA all in a bid to ensure fairness.

Unlike civil courts, there is no necessity for courts martial to give reasons for their findings or write judgments as required to civil courts in Nigeria.[148] All that is required is a simplistic finding of guilty or not guilty. This practice is inadequate as those who were not at the court martial's sittings will not be able to fathom how the court arrived at its decision without going through the whole record of proceedings to discern it. There is therefore absolute need for courts martial decisions to be written, as doing so would assist the Appropriate Superior Authority (ASA), members of the public and the Court of Appeal to appreciate how the court martial decisions were arrived at. The JA could facilitate the writing of the court martial's judgement.[149]

[144] Adekangu, L. Op.cit, p.124
[145] Section 137 to 177 AFA Op.cit, and Rule 26 Op. Cit.
[146] Rule 26 of Rule of Procedure, Op.cit
[147] Section 134 (2) AFA Op.cit
[148] Rule 67 Rule of Procedure, Op.cit
[149] Adekangun, L., Op. Cit, p. 125

At the completion of the trial, the JA compiles the court martial record of proceedings signs it with the court martial's president and forwards same to the confirming authority within 60 days from the date of finding and sentence.[150] In a situations where six or seven officers took part in the trial but only two of them signed the document emanating therefrom is not very reasonable. There is need for all members of the court martial to be signing its record of proceedings for purpose of authenticity.

Courts Martial are required to sit from day to day and no adjournment be allowed for more than six days at any time.[151] The necessity for this is the achievement of speed and alacrity which are the hallmarks and real essence of military trial as justice delayed is justice denied.[152] In another vein, justice stampeded is justice assassinated. There is need therefore, to give a liberal application to these provisions so as to afford an accused person adequate opportunity to present his case. A middle course action of granting adjournments on the merits of the unfolding individual circumstances is consequently suggested.

The court martial cannot make valid finding and sentence without the confirmation of the ASA. This is a setback as an accused whose acquittal is not confirmed by ASA could still be tried again by another court martial on same facts.[153] The confirming authority can withheld confirmation of the finding and sentence of a Court Martial as having not been tried despite the psychological trauma he might have gone through. To compound matter, the Armed Forces (Disciplinary Procedures) (Special provisions) Act[154] empowers the Army council to punish service personnel acquitted at court martial trials thus legalizing double jeopardy. Clearly, this statute is discriminatory and infringing on the fair hearing of the accused. Hence it needs to be

[150] Section 148 (1) AFA Cap A20 LFN (2004) and Rule 76(3) RPA (1972)
[151] Section 135 (3) Ibid
[152] Adekangu, L. Op.cit, p.125
[153] Section 156(1) A.F.A
[154] Cap A22 LFN, 2004

reformed. There is also need for Court Martial decision to take automatic effect from its pronouncement free from any form of conformation to give it the inherent powers of a court of law and justice.

4.9 Review of Summary Trials

The review of the summary trial finding and award is provided in section 147(1) of the AFA[155]. It provides that where a charge has been dealt with summarily and the charge is not dismissed, the appropriate superior authority may review the finding or award either upon a petition submitted under subsection (2) of this section or at anytime if facts material to the case arise which were not available during the trial. Subsection 2 further provides that a person convicted and sentenced summarily may petition against the finding or award or both to the ASA not later than one month after the finding or award was made, and the authority may review the finding or award.[156] Where on a review under this section, it appears to the authority expedient so to do by reason of any mistake of law in the proceedings on the summary dealing with the charge or of anything occurring in those proceedings which, in the opinion of the authority involved substantial injustice to the accused, the authority may quash the finding, and if the finding is quashed, the authority shall also quash the award.

Also, where on a review, under this section, it appears that a punishment awarded was invalid or too severe or where the award included two or more punishments that those punishments or some of them could not validly have been awarded in combination or are, taken together, too severe, the authority may vary the award by substituting such punishments as the authority may think proper.

[155] Cap A 20 L.F.N 2004
[156] Section 147(2) Ibid

Section 178 of the AFA[157] which gives officers the opportunity to redress complaints also provides that an officer who is wronged by a superior officer or authority should complain to his Commanding Officer within three months of the occurrence of the wrong complained about and where he does not obtain the redress he thinks he is entitled to, he may make a further complained to the prescribed authority not later than three months of receiving the unfavourable redress.[158] In the case of soldiers, section 179 makes a provision similar to section 178 of AFA.

It is in our view that, it appears where a petition for the review of summary findings or award is written pursuant to Section 147(2) of the AFA, it has a time limitation of one month. But, if it is a complaints by both an officers or a soldier made pursuant to sections 178 and 179 of AFA, it has a time limitation of three months within which an aggrieve service personnel may write for redress. It should however be noted that where a petition for summary trial is written pursuant to section 147(1) of the AFA, it has no time limitation provided facts materials to the case arise which were not available during the trial.

To this end, it is submitted that unless there are proper records kept of summary trials; aggrieved service personnel cannot get justice which they may have been denied during the trial, if they choose to exercise their rights under the law. it is pertinent to mention that in the case of complaint pursuant to sections 178 and 179 AFA, it is only after exhausting all administrative remedied available that a service personnel may lawfully embark on any other action.[159]

Service personnel in exercise of these rights have challenged the decision of summary trials in civil courts. Thus in the case of ***Corporal Shehu Maigari & 28 Ors vs Nigerian Army***[160] where the soldiers appealed against their dismissal from service by their Commanding Officer, at

[157] Cap A.20 LFN, Op.cit
[158] Section 178(1) Ibid
[159] Sections 178(3) and Section 179(3) A.F.A
[160] Suit No. F.H.C/K.D/C.S/68/98 (unreported)

a summary trial on a charge of being married to foreign women, the Federal High Court quashed their dismissal and the court held that the girls were mere girl friends as there was no proof of marriage.

On the whole, in the absence of any other means of quasi judicial process under military justice system, summary trial remains an instrument in the administration of military justice available to commanders in disposing of cases in the military. This is because the procedure is simple and speedy. The system afforded the right to seek redress against the finding and sentence of the summary trial administratively within the chain of command and can also appeal to the civil courts if after exhausting the administrative remedies; he thinks his complaint has not been adequately addressed.

4.10 Power of Command

Before the trial commences, the trying authority must consider whether he has jurisdiction to try an offender and award punishment. This jurisdictional power is referred to as power of command. In the military power of command is that authority given to a commander or any person having command of a unit or formation to run it administratively and operationally.[161] Under the military justice system, the power of command enables the commander to take appropriate disciplinary measures to dispose off cases by way of summary trial and award punishment against accused prescribed by the law. In the AFA,[162] the power to summarily try and award punishment depends on the level of command of the commander on the one hand and the rank of the accused soldier on the other hand.[163] These powers shall be discussed as follows:

[161] Section 131(1)(d) of A.F.A
[162] Cap A20 L.F.N Op.cit
[163] Section 115 and 116 AFA, Ibid

4.10.1 Company Commander or Equivalent: The power to summarily try cases begins with a company commander or equivalent and he can only exercise his power of summary trial over personnel of the rank of captain and below. At the trial of an officer from the rank of captain to second lieutenant, the company commander may either dismiss the case or award any of these punishments; confinement not exceeding seven days, award extra duties not exceeding seven days and admonition.[164] While a soldier below a rank of sergeant, he may dismiss the case or award any of these punishments, Imprisonment with Hard Labour (IHL) not exceeding seven days, confinement not exceeding seven days, stoppages not exceeding ₦200:00, reprimand and admonition.[165]

4.10.2 Battalion Commander or Equivalent: The Commanding Officer can only exercise summary jurisdiction over personnel of the rank of Major and below. At the trial of an officer from the rank of Major to Second Lieutenant, he can either dismiss the case or award any of the following punishments; fine not exceeding ₦500:00 and where the offence has occasioned expenses loss or damage, award stoppages not exceeding ₦2,500:00.[166]

As for trial of the Warrant officer and below, the Commanding Officer may dismiss the case or award any of the following punishments that is dismissed regiment to the rank of corporal or below, IHL up to 28 working days to the rank of corporal and below, reduction in rank not below one step for sergeant and below, forfeiture of pay not exceeding seven day stoppages not exceeding ₦1,500:00; confinement to barracks not

[164] Section 115(a) Ibid
[165] Section 116(a) Ibid
[166] Section 115(b) Ibid

exceeding 28 days, extra duties not exceeding seven days, reprimand or severe reprimand and admonition.[167]

4.10.3 Brigade Commander or Equivalent: The Brigade Commander can exercise his powers over personnel of the rank of Lieutenant Colonel and below. He can summarily try officers from the rank of Lieutenant Colonel to Second Lieutenant. He may either dismiss the case or award any of the following punishments; fine not exceeding ₦1,000:00 forfeiture of pay not exceeding thirty days and stoppages not exceeding ₦3,000.00[168]. In the trial of warrant officer and below, he may dismiss the case or award any of the following punishments; dismissed regiment to the rank of staff sergeant and below IHL up to 28 days in the unit guard-room, reduction in rank of staff sergeant and not more than two steps, fine not exceeding ₦200.00, stoppages not exceeding ₦2,500:00 forfeiture of pay not exceeding 30 days, reprimand or severe reprimand and admonition[169] where a warrant officer and below is tried, the GOC may either dismiss the case or award any of the following punishments; dismissed regiment to the rank of warrant officer and below, IHL up to 28 days, reduction in rank of warrant officer and below not more than two steps, fine not exceeding ₦2,500.00, stoppages not exceeding ₦3,500.00, forfeiture of pay not exceeding 28 days, reprimand or severe reprimand and admonition.[170]

4.10.4 General Officer Commanding or Equivalent: The G.O.C can only exercise summary jurisdiction over officer's of the rank of colonel and above and soldiers who are of the rank of Warrant Office class one and above. At the trial of an officer of the rank of

[167] Section 116(b) Ibid
[168] Section 115(c) Ibid
[169] Section 116(c) Ibid
[170] Section 116(d) Ibid

colonel and above, the G.O.C may either dismiss the case of award any of the following punishments; fine not exceeding ₦2,000:00, forfeiture of pay not exceeding 60 days, stoppages not exceeding ₦5,000:00, reprimand or severe reprimand and admonition.[171] Regarding the soldiers, he may either dismiss the case or award any of the following punishments that is dismissed regiment to the rank of Warrant Officer class two. Imprisonment with hard labour upto 28 days in the unit guardroom. Reduction in rank of Warrant Officer class two and below, not more than two steps, fine not exceeding N250,00. Where the offence has occasioned any expenses, loss or damages, make good the loss by stoppages not exceeding N3,500:00, forfeiture of pay not exceeding 28 days. Reprimand or severe reprimand and admonition.

It should however be noted that there are some notable points while exercising these powers of command. These notable points are as follows:

i. The Commander should not award more than one punishment for one offence. But stoppages may be awarded in addition to any other punishment. Also he may award reprimand or severe reprimand together with fine.[172]

ii. A punishment specified in any sub-paragraph of the scale shall be treated as less than the punishment specified in the preceding sub-paragraph and greater than those specified in the succeeding sub-paragraph of the scale.[173]

iii. Where a soldier from the rank of warrant officer and below is sentenced to a term of imprisonment upto 35 days or more, he shall also be sentenced to dismissal from the service.[174]

[171] Section 115(d) Ibid
[172] Section 116(3) Ibid
[173] Sections 115(2) and 116(2) Ibid
[174] Section 116(4) Ibid

iv. The GOC does not have the power of command to try and punish summarily officers from the rank of lieutenant colonel down to second lieutenant.[175]

Having discussed these powers of command, it has been observed that the essence of discipline is to inculcate attitude of respect for authority developed through leadership percepts and training. It is a state of mind that conditions the solider to obey orders without considering how unpleasant the consequences. In line with this assertion, the importance of the power of command is apart from the fact that it enforces discipline; it also checkmates arbitrary abuse of power by military commanders in discharging their command responsibility.

4.11 Confirmation of Sentence of a Court Martial

The confirmation of the findings and sentences of the court martial is dealt with by section 148 of the A.F.A[176] subsection 1 states that where a court martial finds the accused guilty of a charge, the record of the proceedings of the court martial shall be transmitted within sixty days from the date of the finding to the confirming authority, for confirmation of the finding and sentence of the court martial on that charge.[177] Subsection 2 further states that where the record of proceedings of a court martial, other than proceedings resulting in sentence of death or life imprisonment are not transmitted within sixty days, the accused shall be released from custody unconditionally pending such confirmation or review.[178]

Subsection 3, on its part, states that the finding and sentence of a court martial shall not be treated as the finding and sentence of the court martial until confirmed.[179] The section further states that this provision shall not affect the keeping of the accused in military custody pending confirmation, where the sentence is a term of imprisonment or a higher sentence. In addition, the

[175] Section 115(d) Ibid
[176] Cap A20 LFN, Op.cit
[177] Section 148(1) A.F.A, Ibid
[178] Section 148(2) A.F.A. Ibid
[179] Section 148(3) A.F.A. Ibid

power of detention under section 148 or any part of the A.F.A[180], shall not prejudice the right of an accused to an order of stay of execution of sentence pending appeal or review.

Under subsection 4, where an accused has been refused an order of execution of sentence pending approval or confirmation of sentence and has been taken in custody, the sentence shall include the period of detention commencing with the date he was so detained.[181]

From subsection 1, it is mandatory for the court martial to forward the proceedings of the court martial to the confirming authority within sixty days from the date of delivery of its judgment while by subsection 2, any delay beyond this period entitles the accused who is sentenced to any punishment other than death or life imprisonment, to a release from custody. It appears that the rationale for subsection 1 and 2 is to hasten the compilation of the record of proceedings and the process of confirmation of the findings and sentence, since by subsection 3, the findings and sentences cannot be regarded as findings and sentences until confirmed. It also seems clear from subsection 4 that in a sentence of imprisonment by the court martial, the sentence starts from the date the accused was detained after pronouncement of the sentence by the court martial. It should however be noted that for better understanding of the post trial procedure in military justice system, it will be apt to discuss some relevant issues under it. These issues are:

a) Petition against findings or sentence
b) Direction for Revision of findings
c) Confirming authorities and powers

4.11.1 Petition against Findings or Sentence: Section 149(1) of the A.F.A[182] permits an accused person to petition against his conviction within three months after being sentenced. This

[180] Cap A20 L.F.N, Op.cit
[181] Section 148(4) of A.F.A. Ibid

written petition is to the confirming authority on any matter, which may reasonably tend to affect the confirming authorities decision whether to disapprove a finding of guilty or to approve the sentence. Section 149 (2)[183] specifies that the matter to be submitted under subsection 1 may include:

i. Allegations of errors affecting the legality of the trial
ii. Portions or summaries of the record or copies of documentary evidence offered or introduced at the trial and
iii. Matters in mitigation, which was not available for consideration at the trial.[184]

Furthermore, section 149(3)[185] makes it mandatory that before the confirming authority takes action on a record of trial by a court martial regarding the confirmation, it shall obtain from the Directorate of Legal Services (Army), a legal review of the case. In order to ensure fairness in the legal review, a person who has acted as a member of the court martial investigating officer in the case, judge advocate, trial counsel or defence counsel, shall not be involved in the review.[186]

Inspite of these provisions, however, findings and sentences of courts martial during the military dispensation in Nigeria were sometimes confirmed on the same day judgment was delivered. This was evident in the case of ***Lieutenant Colonel. A. Akinwale vs The Nigerian Army***[187] the Appellant upon conviction on 16th August, 1996 wrote a petition against his conviction on the 16th August, 1996 but the confirming authority confirmed and promulgated the findings and sentences of the court martial on the same 16th August, 1996. The Court of Appeal

[182] Cap A20 L.F.N. Op.cit
[183] Ibid
[184] Ibid
[185] A.F.A Ibid
[186] Ibid
[187] (2001) 16 N.W.L.R (pt.738) 122 para. G-H

expressed shock and stated that the procedure adopted by the confirming authority. *"Made mockery of the independence and the impartiality provided and guaranteed by the constitution of this country".*[188] Similarly, in the case of ***Colonel Clement Gami vs The Nigerian Army***[189] where findings and sentences were confirmed just four days after conviction and the sentence. Oguntade JCA (as he then was), in his lead judgment express his displeasure thus:

> I am however shocked or greatly disturbed by the fact that the confirmation of the decision of the GCM was done within four days after the decision was given. The appellant was in the process prevented from making representation to the confirming authority as to why the decision of the GCM should not be confirmed. The confirming authority by proceeding to confirm the decision of the GCM without waiting for the representation of the appellant would appear to have believed that nothing the appellant said could have persuaded it to change its mind. The confirming authority has thus exposed itself to a justifiable accusation of bias against the appellant and unfairness in its approach. I think the approach was wrong and ought not to be repeated. If I had to decide this appeal on the propriety or otherwise of the decision of the confirming authority, I would set aside the confirmation and proceed to allow the appeal.[190]

It therefore appears settled from the above cases that where the confirming authority does not wait for three months to elapse before confirming the findings and sentences of the courts martial, such confirmation will be set aside by the appellate courts for not giving the accused person fair hearing. According to Chief T.E.C, he is of the opinion that, notwithstanding these decisions of the Court of Appeal, it may be argued that since section 149 of the AFA does not expressly provide that the conforming authority shall wait for three months, before confirming the findings and sentences of the court martial, there is no obligation for the confirming authority to delay confirmation by waiting for the accused to send his petition. This argument appears to

[188] Ibid
[189] Appeal NOCA/276/98 (Unreported) delivered on 7th February, 2001
[190] Ibid

find support from the wording of section 149(1) which does not make it mandatory for the accused to forward his petition within three months[191] for clarity the subsection states as follows:

> Any accused may within three months after being sentenced by a court martial and before the sentence is confirmed, submit to the confirming authority any written matter which may reasonably tend to affect the confirming authority's decision whether to disapprove a finding of guilty or to approve the sentence.[192]

He further said, from the above, it seems persuasive to argue that if subsection 1 of section 149 of AFA intended that the confirming authority must allow the expiration of three months before confirming the findings and sentences, it would have expressly said so. Be that as it may, it is incontestable that the position of the law presently as decided by the Court of Appeal, is that the confirming authority shall wait for three months after the findings and sentences of the court martial are delivered before any confirmation. One cannot but agree more with the Court of Appeal for the following reasons.

i. The said three months gives the Judge Advocate time to compile the record of proceedings properly.
ii. The period will allow the Directorate of Legal Service time to carry out a careful and professional legal review of the case, which will enable the confirming authority justifiably exercise its powers of confirmation.[193]

It should be noted that where the Court of Appeal has delivered its judgment, which is arrived per-incurium, there is no amount of argument that can up-turn the judgment of the Court of Appeal except the decision of the Supreme Court if the matter went on appeal or where the Court of Appeal over-ruled itself on the same judgment. Hence no matter the opinion of the learned author, the judgment has come to stay, because as for now it is the law until over ruled.

[191] Chief T.E.C. Op.cit, Pp.180-182
[192] Section 149(1) of the AFA op.cit
[193] Chief T.E.C, Op.cit

4.11.2 Direction for Revision of Findings: The AFA[194] under section 150 empowers the confirming authority to direct the court martial to revise its findings of guilty under some specified circumstances. Subsection 1 gives the conditions as where it appears that:

i. The finding was against the weight of evidence

ii. Some question of law determined at the trial and relevant to the findings was wrongly made.[195]

Thus, in any case, where any of the conditions exists, the confirming authority can order the court martial to revise its findings of guilty against the accused. It is important to note that by the provision of subsection 1, the direction to revise findings is limited to findings of guilty. Consequently, the confirming authority cannot direct the court martial to revise its finding of not guilty against the accused, in any circumstances.[196]

In order to focus the court martial on the nature of the direction, subsection 2 states that the direction shall be accompanied by the necessary directions for the reassembly of the Court Martial and shall contain a statement for the reasons for the direction.[197] Subsection 3 on the other hand provides that on the revision of a finding of guilty, the court martial shall consider the finding and may substitute the finding of guilty with a finding of not guilty or any other finding to which the court martial could originally have reached at the trial. The court martial shall however, not receive any further evidence.[198]

Under subsection 4, the court martial on the revision of the original finding of guilty, may substitute a different sentence for the original sentence.[199] Subsection 5 however emphasizes that

[194] Cap A20 LFN, Op.cit
[195] Section 150 A.F.A, Ibid
[196] Section 150(1) A.F.A, Ibid
[197] Ibid
[198] Ibid
[199] Ibid

the court martial has no power to substitute a sentence of a punishment greater than the punishment originally awarded or a punishment severe than the original sentence.[200] Finally, subsection 8 provides that the decision of a court martial on a revision shall not be required to be announced in open court.[201] It appears not easily understandable why it is not mandatory that the announcement be made in open court. The announcement in open court will no doubt enhance the perception of the court martial as a court of justice and therefore underscore the fact that the military justice system indeed applies the rule of law. It is therefore preferable that a court martial announce its revision of the finding of guilty and sentence earlier pronounced in open court.

4.11.3 Confirming Authorities and Powers: Section 152 (1) of the AFA[202] specified persons that can confirm the findings and sentences of court martial. In the case of a Warrant Officer and below, it is the Chief of Army Staff (COAS) that is the confirming authority while in the case of a commissioned officer, it is the Army Council. It further provides that in the absence of the COAS an officer appointed by the Appropriate Superior Authority (ASA) to act is the confirming authority whether for a particular case or for a specified number of cases. Section 152 (2)[203] goes on to state that the following persons shall not confirm the finding or sentence of a court martial:

i. An officer who was a member of the court martial.
ii. A person who, as Commanding Officer of the accused, investigated the allegation against him or who is for the time being the commanding officer of the accused,

[200] Ibid
[201] Ibid
[202] Ibid
[203] Ibid

iii. A person who, as Appropriate Superior Authority, investigated the allegation against the accused.[204]

From the above provision, it is clear that where for instance, a G.O.C. of a division convened a court martial to try a sergeant and that G.O.C. was subsequently appointed C.O.A.S., he cannot confirm the finding and sentence of the court martial in respect of that soldier. Instead, another G.O.C who is neutral will be appointed as the confirming authority in the matter. Indeed, the provision is aimed at ensuring an unbiased consideration of the case by the confirming authority.

By the provision of section 151 of the AFA[205] the confirming authority can withhold confirmation or can confirm the finding or sentence or can refer both to a higher confirming authority. For clarity, section 151 (1) provides that a confirming authority shall deal with the finding or sentence of a court martial as follows:

i. By withholding confirmation, if of the opinion that the finding of the court martial is unreasonable or cannot be supported, having regard to the evidence or to the fact, that it involves a wrong decision on a question of law or that on any other ground there was a miscarriage of justice; or
ii. By confirming the finding or sentence; or
iii. By referring the finding or sentence or both for confirmation to a higher confirming authority.[206]

Section 151 (2) on its part provides that where a confirming authority is of the opinion that the facts of the case as considered by the court martial would have justified a finding of guilty by that court martial on other grounds, the confirming authority may, instead of

[204] Ibid
[205] Ibid
[206] Ibid

withholding conformation of the findings substitute a finding of guilty on those other grounds and direct whether the punishment should be remitted in whole or in part or be commuted under the provision of subsection (4) of this section.[207] Subsection 3 states that where it appears to a confirming authority that a sentence of a court martial is invalid, the confirming authority may, instead of withholding confirmation of the sentence, substitute that sentence with a proper sentence of any punishment which might have been awarded by the court martial, not exceeding the initial punishment awarded by the Court Martial or, in the opinion of the confirming authority confirms the sentence of a court martial, the confirming authority may do any of the following:

a. Remit in whole or in part a punishment awarded by the court martial.
b. Commute a punishment or an award for such other and lesser punishment under the AFA.[208]

Under subsection 5, a finding or sentence substituted by the confirming authority has remitted or commuted the punishment, shall be treated for all purposes as a finding or sentence of the court martial duly confirmed.[209] Subsection 6 on the other hand provides that the confirmation of a finding or sentence shall not be deemed to be completed until the finding or sentence has been promulgated as if it has effect after the substitution, remission or commutation.[210] In any case, subsection 7 provides that where the confirming authority withholds confirmation, notice of that shall be promulgated and it shall have effect as from the date of the promulgation.

[207] Ibid
[208] Ibid
[209] Ibid
[210] Ibid

It needs to be pointed out that by virtue of section 171 (a) of the AFA,[211] a person shall not be deemed to have been tried by a court martial if confirmation is withheld of a finding of guilty by the court martial. It also provides that he is not deemed to have been tried by a court martial if the court martial finds him not guilty by reason of insanity. In addition, under section 171 (3) of the AFA,[212] where confirmation is withheld, an accused cannot be tried for that offence again except the convening order for the new court martial is issued within 28 days of the promulgation of the decision to withhold confirmation. The implication of section 171 (2) (a) and (3) is that a person can be tried again by a court martial for the same offence, provided that the convening order for the latter court martial is issued within 28 days of withholding the confirmation.

The issue of retrial where confirmation is withheld was settled by the Federal High Court Kaduna in ***Major U.G.K. Duwo (N/6992) and Major J.O. Iyala (N/6794).***[213] Confirmation was withheld after their first trial by the court martial. In a bid by the Nigeria Army to try them again by another court martial, they rushed to the Federal High Court to stop the second trial. The Federal High Court however held that the second court martial could try them since it was convened within the time limit of 28 days.

It is also necessary to discuss at this point promulgation under AFA. Section 175 of the AFA[214] provides that a finding, sentence, determination or other things required by the AFA to be promulgated shall be promulgated either by being communicated to the accused or in such a manner as the confirming or reviewing authority, as the case may be, may direct. From this provision it seems that the confirming authority has been given wide discretion as to how to

[211] Ibid
[212] Ibid
[213] A. 1999 Federal High Court Case Kaduna (Unreported) Cited in Chiefe T.E.C., Op.cit, p.188
[214] Cap A20 L.F.N Op.cit

promulgate a finding and sentence confirmed by it. In spite of that, one would expect the confirming authority to take cognizance of general service knowledge whereby correspondences relating to service personnel are communicated to their units, who in turn inform them about the correspondence. Some of the acceptable ways of informing service personnel about events are through unit part one and part two orders. It is therefore submitted that the confirming or reviewing authority has a duty to direct that the promulgation be made in written form in accordance with the general service knowledge in the Nigerian Armed Forces.

4.12 Appeals from Court Martial to Civil Courts

Generally, appeals from the decision of a court martial lies to the Court of Appeal from there it moves to the Supreme Court. So many cases involving services personnel from court martial have been appealed to the Court of Appeal and Supreme Court. Appeals from decisions of courts martial are dealt with from sections 183-202 of the AFA.[215] Section 183 of the AFA[216] makes specific provision for convicted service personnel to appeal against the decision of the Court Martial to the Court of Appeal where it states as follows:

> Subject to the following provisions of this part, an appeal shall lie from decisions of a court martial to the Court of Appeal with leave of the Court of Appeal: Provided that an appeal as aforesaid shall lie as of right without leave of a court martial involving a sentence of death.[217]

It appears however, settled that before a soldier can appeal to the Court of Appeal against the decision of the court martial, that soldier must have exhausted the remedies prescribed by the AFA.[218] The main remedies are, firstly, that he has to wait for the confirmation of the finding and sentence by the confirming authority and secondly, for the confirmation of the finding and

[215] Ibid
[216] Ibid
[217] Ibid
[218] Ibid

sentence to be promulgated. These are specifically provided for in section 148 (3) and section 151 (6) of the AFA. Section 148 (3) states that: *"A finding of guilty of a court martial shall not be treated as a finding or sentence of a court martial until it is confirmed…"*[219] While section 151 (6)[220] states that: *"The confirmation of a finding or sentence shall not be deemed to be completed until the finding or sentence has been promulgated…"*[221]

The Supreme Court in its decision have given light to these statutory provisions in the case of ***Israel Aribisala vs Talaba Ogunyemi and Ors***[222] where the Supreme Court recalled its earlier decision in ***Eguamwenze vs Ama Ehizenmen.***[223] In that case the Supreme Court per Belgore J.S.C. (as he then was) stated as follows: *"Where a statute prescribes a legal line of action for determination of an issue,… the aggrieved party must exhaust all the remedies in that law before going to court"*[224] The Supreme Court in the Aribisala case held that:

> The position of the law therefore, is that in a dispute as this, an aggrieved person who brings a suit must show that he brought his suit only after he had exhausted the remedies provided or followed the procedure prescribed under the applicable law.[225]

It is therefore submitted that where a convicted soldier does not wait for the confirmation and promulgation of the findings and sentence of the court martial before going on appeal to the Court of Appeal, the Court of Appeal will not grant him leave to appeal or even allow him to exercise his right to appeal where the decision of the court martial involves a death sentence.

[219] Ibid
[220] Ibid
[221] Ibid
[222] (2005) Vol. 6 M.J.S.C. 188 at P.205
[223] (1993) 9NWLR (Pt.315) 1 1t P.25
[224] Ibid
[225] (2005) Vol. 6 M.J.S.C. 188 at P.205

The procedure for applying for leave to appeal or lodging an appeal is provided for in section 184 of the AFA.[226] Subsection 1 states that leave to appeal to the Court of Appeal shall not be given except the application is lodged with the Registrar of the Court of Appeal within forty days of the date of promulgation of the finding of the court martial, in the prescribed form specifying the grounds on which the leave to appeal is sought.[227] Subsection 2 however, provides that an appeal against a decision involving a sentence of death shall not be entertained by the Court of Appeal unless the appeal is lodged by or on behalf of the applicant, within ten days of the date of promulgation of the findings of the court martial, in respect of which the appeal is brought with the Registrar of the Court of Appeal in the prescribed manner.[228] On its part, subsection 3 states that rules of court may provide that, in such circumstances as may be specified in the rules, any such application or appeal which is lodged with such person other than the Registrar, as is specified in the said rules shall be treated for the purpose of subsection 1 as having been lodged with the Registrar.[229]

Subsection 4 goes on to state that the Court of Appeal may extend the period within which an application for leave to appeal is to be lodged, whether or not that period has expired, in respect of that case.[230] Subsection 5 on its part states that in considering whether or not to give leave to appeal, the Court of Appeal shall have regard to any expression of opinion by the Judge Advocate at the court martial that the case is a fit one for appeal. Furthermore, the Court of Appeal may grant leave to appeal where there is such an expression.[231] Subsection 6 specifies that where the Court of Appeal dismisses an application for leave to appeal, it may, if it

[226] Cap A20 L.F.N. Op.cit
[227] Section 184(1) Ibid
[228] Section 184(2) Ibid
[229] Section 184(3) Ibid
[230] Section 184(4) Ibid
[231] Section 184(5) Ibid

considers the application to have been frivolous or vexatious, order that any sentence passed upon the application in the proceedings from which it is sought to bring the appeal, shall begin to run from the day on which the Court of Appeal dismisses the application.[232]

It seems pertinent at this stage to compare the above provisions of the AFA[233] regarding appeals from Courts Martial to the Court of Appeal, with that from the Civil Court to the Court of Appeal. Section 24 of the Court of Appeal Act[234] deals with time for appeals in criminal cases. Subsection 2 provides that the period for giving of notice of appeal or notice of application for leave to appeal to the Court of Appeal in a criminal case or matter is ninety days from the date of the decision appealed against.[235] Subsection 4 provides that the Court of Appeal may extend the period prescribed in subsection 2.[236] From the above, it is clear that whereas under section 184 (1) and (2) of the AFA,[237] the appellant tried by a court martial has only forty days from the date of promulgation of the finding of the court martial, to file an application for leave to appeal or ten days where the finding is a death sentence to appeal as of right, under the Court of Appeal Act,[238] all appellants have ninety days to appeal from the date of the decision appealed against. It is in our view that the shorter time allowed to the soldier to appeal his sentence to the Court of Appeal appears to be discriminatory and infringes on his fundamental right to fair hearing. This is because considering the administrative inconveniencies of applying to the military authorities for a certify true copy of the record of proceedings, and the bureaucracy involved for approval of the record of proceedings may take upto to forty or ten days available for the aggrieved

[232] Section 184(6) Ibid
[233] Cap A20 L.F.N Op.cit
[234] Cap C36 L.F.N 2004
[235] Ibid
[236] Ibid
[237] Cap A20 LFN Op.cit
[238] Cap C36 LFN Op.cit

convicted soldier to exercise his right of appeal. Hence it is suggested in the interest of justice, the soldier should be given three months within which to file his appeal at the Court of Appeal.

It is worthy of note that in respect of death sentence by the court martial, section 192 of the AFA provides that where a conviction by the court martial involves sentence of death, the sentence shall not be executed until the expiration of the period within which an appeal to the Court of Appeal against the conviction shall be lodged and if such an appeal is duly lodged, the sentence shall not be executed until the appeal is determined or abandoned. This provision must however be read in conjunction with section 153 of the AFA[239] which makes it mandatory that a sentence of death passed by a court martial shall not be executed unless it is approved by the president C-in-C.

Regarding the determination by the Court of Appeal of any appeal from courts martial, section 187 of the AFA[240] expressly provides that the decision of the Court of Appeal is not final. Indeed, section 202 of the AFA [241]provides that appeals shall lie from the decision of the Court of Appeal to the Supreme Court of Nigeria.

It is submitted that both the service and the aggrieved servicemen can appeal from the Court of Appeal to the Supreme Court and in appeals by the service, by section 190 of the AFA[242] the Attorney General of the federal shall undertake the defence of the appeal against a decision of a court martial. The service has exercised its right of appeal from the Court of Appeal to the Supreme Court in a number of cases. In the ***Nigerian Air Force vs Wing Commander***

[239] Cap A20 LFN Op.cit
[240] Ibid
[241] Ibid
[242] Ibid

T.L.A. Shekete,[243] Uwaifo J.S.C. (as he then was) affirmed this right of the service where he stated as follows:

> A reading together of sections 183, 187 and 202 of the Armed Forces Decree 105 of 1993 (as amended) leaves me in no doubt that there is a right of appeal by either party to a court martial proceedings at every stage to the Supreme Court with leave except that it is as of right in any decision involving a death sentence. The Nigerian Air Force was obviously a party (being the respondent) to the proceedings in the Court of Appeal, having been so made by the present respondent who was then the appellant. The judgment of the Court of Appeal having been against it, it is entitled to appeal in person from the judgment to this court as it did.[244]

Also in ***Colonel Umar Mohammed vs. The Nigerian Army***[245] where the Court of Appeal allowed the appeal on the ground that his right to fair hearing had been breached, the supreme Court in SC/144/1998 delivered on 11th July, 2002 on an appeal by the Nigerian Army, affirmed the decision of the Court of Appeal. In another development, the Nigerian Air Force, being dissatisfied with the decision of the Court of Appeal that the power to convene a court martial cannot be delegated, appeal to the Supreme Court. In that landmark judgment in the case of ***Nigerian Air Force vs Wing Commander L.D. James***[246] the Supreme Court allowed the appeal.

It is important to state that section 199 of the AFA[247] makes it mandatory that the Court of Appeal shall consist of at least three justices for the hearing of any appeal from a court martial. This is in line with section 9 of the Court of Appeal Act[248] which provides that the Court of Appeal shall be duly constituted if it consists of not less than three justices of the Court of Appeal. Section 200 of the AFA, however, provides that any justice of the Court of Appeal may:

a. Grant leave to appeal.

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[243] (2002) Vol. 12 M.J.S.C. 92 at P.101
[244] Ibid
[245] (1998) 7NWLR (Pt. 557) 232. Also the Supreme Court in Appeal No S.C./144/1998
[246] (2003) 104 LRNC 131 Paraz – EE
[247] Cap A20 L.F.N Op.cit
[248] Cap C36 L.F.N Op.cit

b. Extend the period within which an application for leave to appeal is required by section 184 (1) of the AFA to be lodged.
c. Allow an appellant to be present at any proceedings.[249]

Undoubtedly, the service has the right to appeal decision of the Court of Appeal to the Supreme Court. This is just like the right aggrieved service personnel have to appeal a Court Martial decision in the Court of Appeal. So many Court Martial decisions have been challenged on appeal at the Court of Appeal with most of them been upturned. Careful studies for upturning of these cases are not mostly on their merits but due to either technicalities or tension between military discipline and human rights. These Court of Appeal decisions have within time adversely affected the efficiency of the military service and discipline of troops under command. Hence, to cure these problems, it is in our humble opinion that we are looking forward to the day when justices learned in military law will be appointed to sit on appeal from courts martial. This is necessary because military law is a specialized area of law whereby general service knowledge, in conjunction with the substantive law, holds sway. General Service knowledge can only be acquired through long and distinguished military service. In our view, retired military lawyers with at least 15 years post call experience, who have distinguished themselves in military service and military law practice, would be in the best position to contribute most meaningfully in the Court of Appeal, where appeals in cases arising from courts martial are being considered. In any case, it is suggested that in the meantime, the Court of Appeal should engage the services of military law experts as consultants, while deciding cases arising from Courts Martial.

Section 201 of the AFA[250] on its part, stipulates general provision as to the procedure to be followed by the Court of Appeal in respect of appeals from courts martial. It states that

[249] Section 200 A.F.A. Ibid

subject to the provisions of the Court of Appeal Act[251] relating to the hearing of appeals from subordinate courts shall apply to the hearing and determination of an appeal against the findings and sentence of Court Martial. From the foregoing, it seems that adequate opportunity has been provided by the AFA, for soldiers to seek justice at both the Court of Appeal and the Supreme Court to enforce their rights.

Having discussed about appeals from courts martial, it will be apt to discuss the status of the convicted soldier pending appeal and finality of trial of the soldier in relation to both military trials and civil trials. The reason for discussing these issues, will give a clearer understanding of legal status of the soldier regarding finality of trial.

As regard the status of the soldier pending appeal, the AFA under section 160[252] makes provision for the release of convicted soldier sentenced to a term of imprisonment, under certain conditions. Subsection 1 states that a serviceman sentenced to a period of detention or imprisonment by a court martial, has right to apply to the confirming authority or the appropriate superior authority within thirty days after being sentenced, for his release from custody or imprisonment until the expiration of the period prescribed for the appeal or if there is an appeal, until the determination of the appeal. Under subsection 2 the confirming authority or appropriate superior authority on entertaining an application for release from custody or imprisonment may direct the release of the person and the suspension of the sentence if the person establishes that:

a. He intends to appeal,
b. The appeal is not frivolous but founded on sound arguable points of law.
c. It would cause unnecessary hardship if he were placed or retained in custody or imprisonment.
d. He shall surrender himself into custody when directed to do so.

[250] Cap A20 L.F.N Ibid
[251] Cap C36 L.F.N Op.cit
[252] Cap A20 L.F.N Op.cit

e. His detention under custody or imprisonment is not necessary in the interest of the public or the Armed Forces.[253]

This provision appears justifiable in the light of the fact that a finding of guilty and sentence by the court martial shall not be treated as a finding or sentence of the court martial until is confirmed by the appropriate confirming authority under section 148 (3) of the AFA.[254] This is the position of the law. However, in so many cases, convicted soldiers are kept in detention for a very long period of time awaiting confirmation of their sentence. Some even stay in detention for as long as the prison term pronounced by the court on them without confirmation. This practice in all sense of sincerity and justice is bad and infringes on their fundamental right to liberty and movement. This practice gives a justifiable ground of appeal against the military authority. Thus the high time, the authority abides by the provision of section 160 the better for the system and the convict. Because detaining them this long may end up attracting claims of damages and compensation against the system on appeal.

Regarding about finality of trial of the soldier, sections 170 and 171 of the AFA[255] dealt with that. Section 170 provides as follows:

(1) Subject to the provisions of this Act prohibiting retrial where conviction is quashed, nothing in this Act shall restrict the offences for which a person may be tried by a civil court, or the jurisdiction of a civil court to try a person subject to service law under this Act for an offence.
(2) Where a person is tried by a civil court for an offence and he has in pursuance to this Act been punished for an act or omission constituting (whether wholly or in part) that offence by his commanding officer or appropriate superior authority, the civil court shall, in awarding punishment, have regard to his punishment in pursuance of this Act.[256]

[253] Ibid
[254] Ibid
[255] Ibid
[256] Ibid

Under section 171 (1) which is relevant provides as follows:

> (1) Where a person subject to service law under this Act-
> (a) has been tried for an offence by a competent civil court or court martial under service law; or
> (b) has been charged with an offence under service law and has the charge dismissed, or has been summarily tried under this Act; or
> (c) has an offence condoned by his commanding officer; he shall not be liable in respect of that offence to be tried by a court martial or to have the case dealt with summarily under this Act.[257]

It appears that the above provisions have the following implications:

i. Where a soldier was tried and convicted in a summary trial, he can be tried again by a civil court but the judge in that court must take cognizance of the punishment that was awarded during the summary trial.
ii. Where a soldier was first of all tried by a civil court and convicted, he cannot be tried again either summarily or by court martial.
iii. Where a soldier had been tried summarily before for an offence he cannot be tried for the same offence by court martial.
iv. Where an offence has been condoned by his Commanding Officer, the soldier cannot be tried either summarily or by court martial.

Thus, while a trial by a civil court will oust the jurisdiction of a court martial or summary trial, the civil court can still try an accused that has already been tried summarily. It is however arguable if an accused can still be tried for a civil offence, which has been condoned by the Commanding Officer of an accused. According to Chiefe T.E.C. (of blessed memories) he opined that one school of thought is that strictly speaking a Commanding Officer can only condone purely military offences, in which case the accused will not be tried again either summarily or by a court martial for that military offence. He is not expected to condone a civil offence, which is an offence against the state. The second school of thought is that the express

[257] Ibid

provision of section 171 (1) (c) does not distinguish between a military offence and a civil offence as it just mentions 'offence'. This presupposes that once the Commanding Officer has condoned the offence, whether it is a civil or military offence, he cannot be tried summarily or by court martial.[258] He further said that it appears to me that the better view is that once the Commanding Officer has exercised his power to condone an offence; the affected serviceman cannot be tried for the same offence by a Court Martial, or a civil court because the AFA is unequivocal as to the finality and complete closure of all issues relating to the offence, the moment the Commanding Officer condones the offence. In addition, it is expected that given the disciplinary implications of condoning an offence in his command, a Commanding Officer will be cautious and circumspect in exercising the power.[259]

With all due respect to the learned author, we beg to disagree with his view as regard barring of civil courts from trial of a serviceman for a civil offence condoned by his Commanding Officer. This is because section 171 (1) (c) of the AFA unequivocally mentioned courts martial or summary trial without mentioning civil courts. In addition, taking a holistic and jurisprudential study of civil offences and military offences, most military offences when committed don't have grievous and injurious effect to the larger society like when a civil offence is committed. For example, offences like Rape, Murder or Armed Robbery are not only injurious to the victim but to the larger society. It will amount to serious injustice to even think of a Commanding Officer having jurisdiction to condone civil offences like aforementioned one committed by a serviceman thereby barring civil courts from trying the serviceman. It should above all be remembered that under section 171 (4)[260] provides that a Commanding Officer

[258] Chiefe T.E.C. Op.cit Pp. 213-214
[259] Ibid
[260] AFA Cap A20 L.F.N Op.cit

cannot condone an offence in excess of jurisdiction. For clarity, we shall reproduce the text of the law as follows:

> *"Except as provided in the foregoing provisions of this section, proceedings for an offence under this Act (whether summarily or before a court martial) shall not be barred on the grounds of condonation if the condonation is done in excess of jurisdiction".*[261]

Going by the wordings of the above law, it will well amount to an exercise in futility if a Commanding Officer condone an offence in which he has no jurisdiction to do so.

4.13 Constitutional Safeguard for Fair Hearing in a Court Martial in Nigeria

Before and during the trial of any person accused of a crime, there are provisions in the CFRN 1999, which ensures that the accused person shall have a fair trial.[262] These provisions are enshrined in section 36 of the constitution. The provisions override any provisions in any other enactment, which is not consistent with it.

Fairness of a trial is fundamental to the administration of justice. It does not only give integrity to the legal system but it also ensures the confidence of the society in the administration of justice system. In line with this assertion, the question that may be asked is whether a soldier is entitled to fundamental human rights? Chiefe T.E.C. adopted the view of William Blackstone where he said: *"In (free states)… A man puts not off his citizenship when he enters the camp, but it is because he is a citizen and would wish to continue so that he makes himself for a while a soldier."*[263] The importance of the above statement is that a soldier does not cease to be a citizen simply because he is a soldier. He remains a citizen and since the constitution applies to all the citizens of Nigeria, the fundamental human rights enshrined in the constitution apply to him. One

[261] Ibid
[262] Osamor B. (2004) *Fundamentals of Criminal Procedure Law in Nigeria*, Dee-Sage Nigerian Limited, p.230
[263] Chiefe T.E.C. Op.cit, p.197

of the most relevant rights guaranteed by the constitution is the right to fair hearing. Section 36 of the C.F.R.N 1999[264] guarantees various rights under fair hearing which shall be discussed serially:

4.13.1 Fair Hearing: Section 36 (1) and (4) C.F.R.N 1999[265] provides that in the determination of his civil rights and obligation including any question or determination or against any government or authority, a person shall be entitled to a fair hearing.[266]

Section 36 (4) C.F.R.N 1999 specifically provides that: "*Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal*".[267]

The concept of fair hearing is at the very foundation of the legal system and is usually encapsulated in two Latin maxims: *Audi Alteram Partem (hear the other party) and Nemo Judex in Causa Sua* (No one should be a judge in his own case). However, the Supreme Court in ***Effiom vs The State***[268] prescribed the essential elements of fair hearing as follows:

i. Easy access to the court;
ii. The right to be heard;
iii. The impartiality of the adjudicating process;
iv. The principles of *Nemo Judex in Causa Sua*; and
v. Whether there is inordinate delay in delivering judgment;

Where any of these principles given by the Supreme Court is not followed, the trial will be a nullity. This is because fair hearing is the very foundation for justice and judicial

[264] Cap C23 Vol.3 LFN Op.cit
[265] Ibid
[266] Ibid
[267] Ibid
[268] (1995) 1 NWLR (pt. 373) p. 507 at 575

adjudication. Thus, it is a duty incumbent on Courts Martial to observe the principles of fair hearing in adjudicating any matter before it.

a. Audix Alteram Partem

In the resolution of a dispute or the determination of guilty, the court martial is duty bound to listen and consider the evidence of both side in a case. However, a court martial can convict an accused person who chooses to say nothing in his defence.[269] Consequently, the law only requires that the accused person fails refuses or neglects to state his case, he cannot claim that his right to fair hearing has been violated.[270]

b. Nemo Judex in Causa Sua

This is another prerequisite of a fair trial. Justice must not only be done but it must be seen by all to have been manifestly done. Consequently, an officer who, at anytime between the date on which the accused was charged with the offence and the date of the trial, has been the Commanding Officer of the accused and any other officer who has investigated the charge against the accused, or who under service law has held or had acted as one of the persons holding an inquiry into matters relating to the subject matter of the charge against the accused, shall not sit as a member of a court martial or act as judge advocate at the court martial.[271] Hence, if a court marital is presided over by any member of the court who was either the Commanding Officer of the accused at the time of the commission of the offence or partook in the investigation of the offence, he is not eligible to sit in the court martial either as a president, member or judge advocate of the court martial. If the court martial proceed to try the matter like

[269] Rule 59 of the Rules of Procedure Army Op.cit
[270] R. vs. The University of Cambridge (1723) S. 128
[271] Section 134 (2) of A.F.A Op. cit

that, the conviction will be nullified on appeal. The fact that the president members or judge advocate was not biased is immaterial.[272]

4.13.2 Publicity of Trials: Section 36 (4) 1999 Constitution. The fair hearing as envisaged by section 36 (4) of the C.F.R.N 1999[273] must be conducted in the public. In fact, the publicity of a trial is one of the hallmarks of fairness. Members of the public are therefore, not prohibited from attending court martial trials even when they are not parties to the proceedings.

The court marital must be open and accessible to the members of the public as far as it can conveniently accommodate them.[274] However, there are certain situations when criminal trials may not be conducted in the public. These instances are as follows:

i. In the interest of defence, public safety, public order or public morality.[275]
ii. When it is considered necessary to special circumstances to protect the private lives of the parties to the proceedings.[276]
iii. When it is deliberating on finding or sentence on any charge.[277]

4.13.3 Presumption of Innocence: section 36 (5) C.F.R.N 1999. Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.[278] It is the duty of the prosecution who alleges that the accused person committed the offence to prove it beyond reasonable doubt. In ***Okoro vs The State,***[279] the seven accused persons were charged with murder before the high court. At the end of the prosecution case none of the accused persons was identified as one of those who unlawfully caused the death of the deceased. The

[272] Garba and Others vs. University of Maiduguri, (1986) 2 S.C. p. 128
[273] Cap C23 Vol. 3 LFN, Op.cit
[274] Section 139 (1) AFA Op. cit
[275] Section 139 (2) and (3) Ibid
[276] Sections 136 (4) (a) C.F.R.N 1999, Op.cit
[277] 139(4) A.F.A Op.cit
[278] Section 36 (5) C.F.R.N 1999 Op. cit
[279] (1988) 12 S.C.N.J or (1988) N.W.L.R. (pt. 74) p. 255

court discharged the third accused person on the ground that he had no case to answer. The other accused persons were asked to defend themselves. At the end of the trial, the first accused person was found guilty while the other accused persons were acquitted. He appealed against his conviction. The Supreme Court held;

i. That since the prosecution had failed to establish that any of the accused person unlawfully caused the death of the deceased, there was no case against any of the accused person;

ii. That to ask the first accused person to defend himself was to ask him to prove his innocence, which is contrary to the presumption of innocence enshrined in the constitution.[280]

4.13.4 Accused person must be informed of his offence: Section 36 (6) (a) C.F.R.N 1999[281]. The constitution requires that any person who is charged with a criminal offence must be informed promptly and in details the nature of the offence he is alleged to have committed.[282] The accused person must be informed in a language that he understands. He must be informed of the nature of his offence promptly. Therefore, this information must be given to the accused person at the time of his arrest or not later than when the accused person is arraigned for trail.

The exception to this rule is where an accused person is informed of the nature of a grave offence for which he was previously tried but was subsequently convicted for a lesser offence. Where the facts proved by the prosecution cannot sustain the offence charged but establishes the commission of a lesser offence, the court can convict for the lesser offence without a fresh trial.[283] The constitution does not require that he should be informed of the nature of the lesser

[280] Ibid
[281] Cap C23 Vol.3 , LFN, Op.cit
[282] Ibid
[283] Section 142 of the AFA Op. cit

offence for which he was subsequently convicted. Having been informed of the nature of the grave offence, he is deemed to have knowledge of the lesser offence.

The essence of the provision is for the accused person to know the nature and details of the offence for which he is charged in order not to be prejudiced in his defence. Therefore, an accused person who was informed to a charge of rape for which he was tried but was subsequently convicted for indecent assault cannot claim to have been prejudiced in his defence.[284]

4.13.5 Adequate Time and Facilities to Prepare his Defence: Section 36 (6) (b) C.F.R.N 1999.[285] Every person who is charged with a criminal offence is entitled to be given adequate time and facilities to prepare for his defence. Therefore, an accused person is entitled to an adjournment in order to secure the services of a defence counsel or the attendance of witnesses in his defence. However, the grant of adjournment depends on the circumstances of each particular case. The accused person is not entitled to continuous adjournments without reasonable cause. Therefore, the refusal of an adjournment after repeated adjournments is not *ab initio* a violation of an accused person's right to adequate time to prepare for his defence. In ***Ortese Yawor vs The State,***[286] the accused person applied for adjournment, and the court grants several adjournments to enable the accused person secure the attendance of a witness material to his defence. At the resumed hearing, the accuse person applied for further adjournment but the court refused his application. The court thereafter proceeded to try and convicted the accused. The accused person appealed against his conviction, contending that the failure of the court to grant his application for adjournment was a denial of fair trial, as he

[284] Osamor B. Op. cit p. 237
[285] Cap C23 Vol. 3 LFN, Op.cit
[286] (1965) 1 All NLR p. 193 or (1965) NMLR p. 337

was consequently not given adequate time and facilities to prepare his defence. The Supreme Court noted that an accused person who applies for an adjournment must satisfy the court that the witness is material to his defence; he has been diligent in his effort to secure the attendance of the witness and that there is reasonable expectation that he can procure the attendance of the witness on a certain date.[287] The Supreme Court held: That the refusal of the court to grant a further adjournment was proper exercised of discretion and therefore not a violation of the accused person's right to a fair trial.

In the trial of capital offences, the court must grant an adjournment once the accused person's defence counsel is absent from court. In other cases, adjournments are at the discretion of the court.[288]

4.13.6 Right to a Defence Counsel: Section 36 (6) (c) C.F.R.N 1999[289], the section above guarantees that every person who is charged with a criminal offence is entitled to defend himself in person or by legal practitioner of his own choice. In effect to this constitutional provision, an accused person has two options in his defence; that is to defend himself personally or defend himself through a legal practitioner of his own choice. Thus, any law which prohibits the appearance of a legal practitioner before any court or tribunal is unconstitutional, and consequently, null and void. This was the Supreme Court decision in ***Uzodinma vs Commissioner of Police.***[290] But the right to a defence counsel is not unqualified. If the accused person chooses a counsel who is subject to other limitations and such limitations prevent the counsel from defending him, he cannot complain that his right to a counsel of his own choice has

[287] Ibid
[288] Osamor, B., Op.cit, p.254
[289] Cap C23 Vol. 3 LFN, Op.cit
[290] (182) (1) NCR p. 27

been denied. In ***Awolowo & Ors vs Minister of Internal Affairs and Ors,***[291] on a charge of treasonable felony, the plaintiff retained the services of a British Lawyer enrolled in Nigeria but who was resident in the United Kingdom. The defendant, as the Minister of Internal Affairs, denied the lawyer entry permit into Nigeria. The plaintiff, therefore, sought a declaration that they were entitled under the constitution to a counsel of their own choice in their defence. The court held:

i. That the plaintiffs have the right to be defended by a legal practitioner of their own choice but that the legal practitioner must not be under any form of legal disability;
ii. That there counsel of choice being a British citizen, resident outside Nigeria required an entry permit before he could enter the country;
iii. That the grant or refusal of any entry permit was at the discretion of the Minister of Internal Affairs; and
iv. That this requirement was not contrary to the constitutional right to a counsel of the accused person's choice.[292]

4.13.7 Examination of Witnesses: Section 36 (6) (d) C.F.R.N 1999[293]. Every person who is charged with a criminal offence is entitled to:

i. Call witnesses in his defence; and
ii. Cross-examine the witnesses called by the prosecution.

The accused person may do so personally or through his counsel. This right is exercisable by an accused person on the same conditions as those that apply to the witness called by the prosecution. In ***Tulu vs Bauchi Native Authority***[294]**,** during the trial, the prosecution called many

[291] (1962) LLR p. 117
[292] Ibid
[293] Cap C23 Vol. 3 LFN, Op.cit
[294] (1965) NMLR p. 343

witnesses. The court did not allow the accused person to cross examine any of them. Instead, the court put several questions to the witnesses. The Supreme Court held; that this was a contravention of the accuse person's right to cross examine prosecution witnesses.

The accused person is also entitled to call witnesses in defence. Therefore the court martial shall not refuse an application by an accused person to call a witness. This in ***Idirisu vs The State***[295]**,** on a charge of culpable homicide, the report of a medical doctor was received in evidence. The accused person, through his counsel, applied for an adjournment so that the medical doctor who made the report be called as a witness. The court refused the application on the ground that an adjournment would not serve the interest of justice. The Supreme Court held that; *"Whenever an accused person makes an application for the maker of a statement to be called as a witness, such as is now, in point, such application should not be lightly refused".*[296]

4.13.8 Right to an Interpreter: Section 36(6)(e) CFRN 1999[297]: Every person who is charged with a criminal offence is entitled to have, without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence. The language of the Court Martial in Nigeria is English Language. However, any person who cannot understand the English language is entitled to an interpreter to interpret the language of the court to him in the language he understands.

The interpreter is to be provided by the Court Martial free of charge. The interpreter must be competent enough to interpreting English language or any other language used at the proceedings into the language understood by the accused person. In ***Ajayi vs Zaria Native***

[295] (1967) 1 All N.L.R. p.32
[296] Ibid
[297] Cap C23 vol.3 LFN, Op.cit

Authority[298]**,** the court proceedings were conducted in Hausa language, which was not understood by the accused persons. Although five interpreters were engaged in the course of the proceedings, there was evidence that the interpreters were incompetent. The accused persons appealed against the conviction, the Supreme Court held that:

i. That the proceedings of the court were not adequately interpreted to the accused persons; and

ii. That the interpretation was defective to such an extent as to deny the appellant a fair trial.[299]

The interpreter must be accurate and comprehensive in his interpretations of the proceedings of the Court Martial to the accused person. In ***Zaria Native Authority vs Bakari***[300] it was observed that: *"An interpreter should interpret whatever is said immediately it is said, sentence by sentence, he should not wait till everything has been said and then state what he remembers of it or what he thinks it was, but should interpret the whole and every part of it".*[301]

The effect of failure to comply with the constitutional requirement is fatal to a criminal trial as it raises the question whether an accused person so affected ever had a fair hearing.

4.13.9 No Trial on Retroactive Legislation: Section 36(8) CFRN 1999[302]: The constitution guarantees that an accused person shall not be convicted of any crime for acts or omissions that did not constitute a crime at the time the accused person committed it. Similarly, a convicted person should not be sentenced to a penalty, which is higher than the penalty in force at the time

[298] (1964) N.N.L.R. p.61
[299] Ibid
[300] (1964) N.N.L.R. p.25 at 29
[301] Ibid
[302] Cap C23 Vol.3 LFN, Op.cit

when the offence was committed.[303] Therefore, any person who is charged with a criminal offence shall not be held to be guilty unless at the time he committed the acts or omissions, there was an existing law, which prescribed his act or omissions. The same applies to penalties. Any person held to be guilty of a crime shall not be penalized with a sentence which is more than the one prescribed by a law when the offence was committed.

4.13.10 Prohibition of Double Trial: Section 36(9) CFRN 1999[304]: The constitution guarantees that criminal proceedings shall not be conducted against any person in respect of a crime for which the accused person had previously been tried by a court of competent jurisdiction and for which he was either convicted or acquitted, except upon the order of a superior court. The constitution therefore prohibits double jeopardy, which is double prosecution for the same offence which has the same ingredient that the accused person was earlier tried[305]. Any accused person who claims that benefit of this provision should raise an objection to his trial before pleading to the charges against him.[306] However, an accused person is not precluded from raising an objection to his trial on ground of *autre fois acquit or convict*.

It should be noted that under the military justice system, where an accused is tried by a summary trial, he cannot raise the plea of *autre fois convict* if he is subsequently taken to a civil court for trial. The Civil Court can retry him for that offence but it must take cognizance of the previous punishment awarded.[307] Another issue that does not amount to double jeopardy is where the confirmation of sentence is withheld by the conforming authority, the convening officer can within 28 days of withholding confirmation convene another Court Martial to retry the accused

[303] Ibid
[304] Ibid
[305] Edu vs. Commissioner of Police (1952) 14 W.A.C.A. p.163
[306] Section 36(9) CFRN 1999 Op.cit and The State vs. Modu & Anor (1976) N.N.L.R. p.155
[307] Section 171(1) AFA Op.cit

and it does not amount to double jeopardy.[308] Hence for the plea to succeed, you must have to show that you have once been tried by a competent court and you have either been acquitted or convicted for the offence.

4.13.11 Pardone:-Section 36(10) CFRN 1999[309] *"No person who shows that he had been pardoned for a criminal offence can again be tried for that offence"*[310]. That is the clear and unequivocal provision of section 36(10) of the CFRN 1999. This provision forms the basis of the plea of pardon to a criminal charge. The plea differs from *autre foise acqit or convict.* In a plea of pardone, the accused person is saying that the appropriate authority has pardoned his conviction, while an accused person who pleads *autre foise acquit* or convict is saying that has been tried by a court of competent jurisdiction, he should not be tried again for the same offence. The appropriate authority that can grant pardone to a convict for a federal offence is the president of the Federal Republic of Nigeria while in the state; the Governor is the appropriate authority in respect of state offences.[311] The power of the President to grant pardon also extends to persons convicted or sentenced by a Court Martial.

4.13.12 Right to Silence: Section 36(11) CFRN 1999[312] *"No person who is tried for a criminal offence shall be compelled to give evidence at the trial".*[313] In addition to the provision of the 1999 Constitution, the Evidence Act also declares an accused person a competent but not a compellable witness.[314] It should be noted that section 143(1) of the A.F.A[315] has made applicable the Evidence Act in the proceedings of a Court Martial. Therefore, any person who is

[308] Section 171(3) Ibid
[309] Cap C23 Vol.3 L.F.N, Ibid
[310] Ibid
[311] Section 175 and 212 Ibid
[312] Cap C23 Vol. 3 LFN Op.cit
[313] Ibid
[314] Section 160(a) Evidence Act Cap. 112 LFN 2004
[315] Cap A20 LFN, Op.cit

accused of a criminal offence cannot be compelled to give evidence or testify as a witness. He may choose to remain silent during his trial.

When an accused person exercises his right to silence, the prosecutor cannot comment on the accused person's failure to give evidence in his defence. The prosecutor may not assert that the failure or refusal of the accused person to testify is an admission or evidence of guilt.[316] However, when an accused person exercises his right to silence, the court may draw such inferences as it thinks just from the accused person's silence. This is not contrary to the right to silence guaranteed by the constitution.[317] In ***Sugh vs The State***[318], the accused person was charged with culpable homicide punishable with death. In the course of the trial, the accused person did not make a statement as to the cause of the death of the deceased and the court commented on it in its judgment. On appeal, it was contended that the court's comments on the accused person's failure to make a statement as to the cause of the death of the deceased violated the accused person's right to silence. The Court of Appeal held:

i. That the right to silence means that no accused person can be compelled to give evidence at his trial;
ii. But it does not prevent a trial court from drawing any necessary inference from the evidence before it, the accused person's failure or refusal to give evidence notwithstanding.[319]

4.13.13 The offence must be known to Law: Section 36(12) CFRN 1999[320] A person shall not be convicted of an offence unless the offence is defined in a written law, which also prescribes

[316] Osamor, B. op.cit, p.258
[317] Section 160(b) Evidence Act op.cit
[318] (1988) 2 NWLR (pt.77) p.475
[319] Also the Supreme Court decision in Nasiru vs. The State (1999) 2 NWLR (pt. 589) 87 at p.102

the penalty for the offence.[321] A written law means an Act of the National Assembly or a law of a State House of Assembly and all subsidiary legislation made under either of them.[322]

Under the military justice system, offences have been categorized as military and civil offences. These civil offences are drawn from our Nigerian legal system.

It should however be noted that due to the duality of our criminal codes in Nigeria, an act or omission may be an offence in one part of the country while it is not an offence in the other. For instance, in ***Aoko vs Fagbemi and Anor[323],*** the accused person was charged, tried and convicted for adultery. On appeal, his conviction was quashed because the offence of adultery is not defined and penalized by the criminal code. However, in the North under sections 378 and 388 of the Penal Code, adultery is a criminal offence.[324]

Furthermore, an accused person who is charged upon a section of a law, which only defines an offence but does not prescribe the penalty for the offence, has not been charged with an offence known to law. In ***Attorney-General (Federation) vs Isong[325],*** the Supreme Court held that the accused person could not be convicted of unlawful possession of firearms contrary to section 3 and unlawful possession of ammunition contrary to section 9 of the Firearm Act 1966, because neither of the sections stated the penalty for the alleged offences.[326]

From the Supreme Court decision, it is crystal clear that where an accused person is charged in a definition section of an offence under any law including the AFA[327] and not the

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[320] Cap C23 vol.3, LFN, Op.cit
[321] Ibid
[322] Section 36(12) Ibid
[323] (1961) 1 All N.L.R. p.400
[324] Ibid
[325] (1988) 1 Q.L.R.N. p.75
[326] Ibid
[327] Cap A20 L.F.N, Op.cit

punishment section, such a charge will be knocked out for not defining an offence known to law and a punishment prescribed therein. Hence it is in our opinion that for a charge to be regarded in our military justice system, it must provide for an offence that is defined by law and a punishment prescribed.

4.14 The Need to Reform the Military Justice System in Nigeria

Military justice system, especially in a nation like Nigeria, which as it is often said is still suffering from the hangover of the military rule, has its peculiar challenges. When people talk of the hangover of military rule, they normally refer to the persons and authorities who still insist on carrying on in the arbitrary and authoritarian ways of the past with scant regard for reality of the present democratic order.[328]

However, this situation provides an opportunity to understand the need for reforms in the military justice system. The large number of cases which have come up before the superior civil courts shows that the military justice delivery system has been moving at a very slow pace. It is antiquated and out of step with the liberal spirit of the constitution. It has also not been able to either satisfy the aspirations of the soldier or the dictates of a country whose leadership professes to be committed to a culture of rule of law and respect for human rights.[329]

It will not be correct to say that since the number of persons affected by military law is limited, or the members of the Armed Forces have voluntarily submitted themselves to the existing system with all its defects, no reform of the law is necessary. Courts Martial are regarded by most in the legal and by men circle as the archetype of summary and arbitrary proceedings. There are safeguards accorded to the accused and in the attitude of those

[328] Abubakar, A.Q. (2009) Military Justice System in a Democracy, in the Military Lawyer vol.4, A Publication of Directorate of Legal Services (Army), pp.222-239

[329] Nathaniel, E. It is Time for Reform in the Nigerian Military Justice System. http://www.nigeriabar.com visited 10/4/2017

administrations in the military justice delivery system. The military justice delivery system is considered as part of the executive department and is in fact, simply an instrument of the executive power for enforcing discipline in the military.

The Nigerian military justice system has its origin in the military laws of England. It was made by the British to govern natives and has some major defects. These include:

i. There is no provision of bail for accused military personnel charged with an offence.

ii. The insufficiency of legal aid to the accused during a Court Martial.

iii. The Court Martial President and members are subject to considerable influence of the convening officer.

The military justice system ought to adopt a procedure that is not only open and objective, but also strives towards a liberal interpretation of the principles of natural justice. Though the primary objective of the military justice system must always be to maintain discipline within the military. It must be focused on organizational effectiveness rather than on punishing or protecting individual actors.

Other countries seem to agree with the need for reform. Over the last decade, external review by civilian court abroad has led to the European Court of Human Rights ruling that the United Kingdom's Court Martial System, on which the U.S. system is based, violated the European Convention for the protection of Human Rights.[330]

A decade ago, the Canadian Supreme Court held that Comparable Military Tribunals in Canada violated the Canadian Charter of Rights and Freedoms. In all the cases of the Military Tribunal, the High Courts held that the unchecked powers of the military commanders made

[330] Ibid

military trials neither independent nor impartial in response those rulings, both the UK and Canada greatly reduced the role of the commanding officers in the trial process.[331]

Similarly, reform is underway in the Military Courts of many other nations, including South Africa, India, Australia and Mexico. Nigeria lacks behind other countries in Court Martial reform largely because the military justice system has long been over looked by the National Assembly that have the primary responsibility of making laws for the maintenance and administration of members of the armed forces. Courts Martial was treated primarily as tools of discipline not forums of justice. No external task force has been appointed to review the fairness or wisdom of military justice system for more than a generation. No parliamentary hearings have been devoted to a full study of military justice system since at least 1999. The public and the civil courts have been drawn by concerns about the nature and workings of military culture, not matters of procedural justice.

The fundamental tension that shapes Court-Martial Procedure is that military justice is expected to enforce military discipline as well as to dispense justice. These two mandates can work cross-process. Military stalwarts argue that in order to enforce discipline, Courts Martial must directly involve higher-ups and permit commanders to make important decisions about how to punish their troops. But it is precisely the enormous discretion and influence of commanding officers that prejudices military trials.

To begin with, Commanding Officers are remarkably free to use their power to prosecute as they see fit. Unlike civilian criminal justice system, where the authority to prosecute ultimately rest in the hands of a single appointed Director of Prosecutions. The authority to prosecute at Court Martial is dispersed throughout military commands that entertain drastically

[331] Ibid

divergent ideas about when and how the law ought to be applied. Any transgression even as minor as it may be, can lead to a wide variety of results, ranging from no punishment under the watch of a lenient commander to a Court Martial conviction under a severe one.

In addition, protections for the accused are threatened by the lack of a sharp distinction between the interest of the Commanding Officers and the interests of the judges and defence attorneys. Accused soldiers are represented at no cost by an appointed military lawyer in the event where he can't afford to engage his own. But because the military defence lawyer is appointed by the convening authority, many of the accused soldiers have reason to doubt the independence of the lawyers detailed to them to diligently and freely prosecute their matter without hindrance.

The Court Martial members who preside at the trial are also part of the service, they are (at least potentially) targets of retribution if their rulings prove unpopular. The Court Martial member neither lack life tenure nor fixed term as members. Service personnel do have recourse to civilian over sight they can appeal convictions to the Court of Appeal up to the Supreme Court. There are also provisions for criminal prosecution for undue in filtration into the cause of justice. Although no commander from our findings has ever been prosecuted for that offence. Despite the protests of accused soldiers who have felt railroaded by biased commanders, the military have not changed the practice of involving Commanding Officers in every aspect of military justice system.

Therefore, it is time for change, for emphasis what is being proposed is not the dismantling of the current military justice system, but merely the implementation of a set of reasonable reforms that few outside observers can disagree with and that many military lawyers themselves believe to be prudent. Leaving the military justice system to its own devices does a

disservice to the Nigerian soldier. Ironically, the military may have the highest stake in this reform. Though the higher echelon have historically resisted changes to the Courts Martial Procedure and objected to civilian oversight, responding to external criticism will best serve their cherished autonomy.[332]

4.14.1 Possible Areas of Reforms of under the Military Justice System in Nigeria

a. Securing the Independence and Impartiality of Courts Martial: A court is said to be independent and impartial, when in all ramifications it is seen to be free from all manners of interference be it administrative or otherwise.[333] Again it entails its decision being respected, obeyed and not subjected to any kind of review or conformation. The practice of Court Martial decisions subjected to review and confirmation negates the principles of independent of our courts. This in our view was designed in those days when decisions of Court Martial are not subjected to appeals to Court of Appeal and Supreme Courts. But with the provision of section 183 of the AFA[334], and the current full fledge democratic regime, an appeal shall lie from decisions of Court Martial to the Court of Appeal either with the leave of the Court of Appeal or as of right. Based on this, the idea of review and confirmation under Sections 148 and 149 of the AFA[335] is a mere surplusage since any disagreed party can appeal.

b. **The Armed Forces (Disciplinary Proceeding) (Special Provisions) Act needs to be Reformed to Conform with the Constitution:** In order to attain the end state of justice which discipline seeks and limit command influence in our military law and justice

[332] Ibid
[333] Section 36(1) CFRN 1999 Cap C23 Vol.3 LFN Op.cit
[334] Cap A20 LFN Op.cit
[335] Ibid

system, the Armed Forces (Disciplinary Proceedings) (Special Provisions) Act[336] should be reformed to be in conformity with constitution. This is because all its pre-device offends all manner of rule of law, natural justice, equity and good conscience. Adekangu L. opined that *"this Act legalized double jeopardy and offends against all tenets of the rule of law with its provisions that vast the service council with power to punish an accused personnel following an acquittal. This is absurdity which offends against the principles of natural justice, equity and good conscience".*[337]

A cursory examination of this Act shows that it looks like decrees that were formulated during the military era targeted principally to punish certain category of persons, suspends some parts of this constitution and abolish fundamental human rights principles. The Act has only six sections. Section 1 empowers the council to hold disciplinary proceedings concurrently with criminal proceedings in court on same matter while section 2 provides for the council to punish following an acquittal and discharge from any court. As if it is not enough, section 3 gives immunity and ousts the power of any court to entertain any proceeding against an act done or purported to be done in pursuance of this Act. One wonders what this kind of law is still doing in our extant statute books. Hence it is humbly suggested that this statute should be imminently reformed.

c. Section 131 AFA which made Provision for Convening of Court Martial should be Amended: Section 131 of the AFA vested powers on categories of persons that can convene either a general or Special Court Martial. These categories of persons that convene either a GCM or SCM are endowed with the power to funding the court. As a

[336] Cap A22 LFN Op.cit
[337] Popoola O., Op.cit, p.110

result, they control the court and directly or indirectly dictate the direction they want the pendulum of justice to swing. Because it is popularly said *"He who pays the piper, dictates the turn".* Sequel to this attitude so many Courts Martial cases have been unturned on appeal not on their merit but on either procedural flows or infringement of fair hearing we have earlier discussed some cases that were lost based on this procedural flows or human rights infringement. Thus, it is suggested that the power to convene either a GCM or SCM should be removed from these persons and be replaced with a standard independent and impartial Court Martial akin to High Court of a state with a military lawyer judge or judges statutorily appointed and the period of their tenure of office be well defined. By so doing, it will not only liberated the Court Martial from the dictates of the convening authority, but will equally guarantee the independent and impartiality of the Court Martial which shall dispense justice swiftly.

d. All Possible Sections exposed to Command influence in Court Martial Proceedings should be amended: The convening authority of a Court Martial has the inherent and statutory powers to appoint all members of the court, the Judge Advocate (JA), Liaison Officer (LO), Awaiting Member, the Secretariat of the Court, Prosecutor and even the Defence Attorney for the accused where necessary. All these appointees are junior to the convening authority and by implications, they are answerable to him and his authority in all ramification. It is what he wants that prevails in Court Martial trials for fair of retribution and not the cause of justice. Only in few cases that the convening authority does not interfere in the Court Martial trials. So many cases of Courts Martial have been loss on appeal due to command influence. For instance, the case of ***Col. Umar Mohammed vs. The Nigerian Army (Supra)*** the Court of Appeal held that where a court

or tribunal of justice unwittingly proceeds to make statements in the course of proceedings which go to impugn the integrity of the trial then the trial has been fundamentally and irredeemably flawed. On this note, it is suggested that the inherent and statutory power of the convening authority to appoint the members of the court and the JA should be amended and replaced with the appointment of a military lawyer(s) as judge(s) via statute including their tenure of office, modalities of appointment and removal from office as a judge. This will drastically reduce command influence to bearest minimum. The creation of appointment of a JA should be completely abolished. This suggestion will help in not only upholding the spirit of justice in military courts but will checkmate command influence in Court Martial proceedings to bearest minimum.

e. **The Military Justice System should make provision for Bail to Accused Service Personnel while in Detention for an Offence:** Under the military justice system, what is known as "bail" in civil palace, it's called open arrest. The AFA in section 122(6) made provision for the grant of open arrest to accused soldiers who are charged with offences other than offences of murder or manslaughter. However, it has been very rare if not almost impossible to grant an accused soldier open arrest while under detention even for minor offences brought for Court Martial. Where the Court Martial grants an open arrest to the accused soldier, the condition will be made so stringent that it can't be met. Hence accused soldiers are detained from the time of arrest for commission of the offence to the day the Court Martial sentence is confirmed by the confirming authority. In so many cases, accused soldiers are kept in detention even longer than the prison term they are to spend if the sentence was confirmed on time. Therefore, these attitudes have always

caused the military authorities action in court for violation of fundamental rights of these accused soldiers.

Thus it is suggested that section 122(6) be redrafted to make open arrest mandatory to accused soldier who has not committed an offence that carries in it capital punishment or offence of AWOL. This will imminent aid the military justice system in upholding the spirit of democracy and rule of law, and as well reduce cases of violation of human right of the accused soldiers.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

This research considered the legal status of the Nigerian Soldier with particular attention to understanding the extent to which military law, civil laws and international law apply to him. In doing so, the research considered his rights, duties, privileges and limitations within the ambit of these laws on one hand, and the challenges faced him in obedience to these laws on the other hand.

The research identified some problems in the application of the military justice system on to the soldier. These problems range from inconsistencies of Military Law with the constitution, abuse of human rights of the soldier in military justice system to undue interference and conspicuous display of bias by Courts Martial. The soldier's rights, privileges, duties and limitations as provided by the aforementioned laws were also discussed. We further focused on the conduct of military operations and how it is conducted within the tenets of rule of law and preservation of human rights. The component of enforcement of the military justice system was also discussed with challenges faced and as well areas of possible reform. Finally, the research work was able to come up with its findings and recommendations as a solution to the problems observed.

5.2 Findings:

i. The Solider is Subject to all Laws of the State, its institutions and Constituted Authorities

It has been observed that the soldier as a citizen of Nigeria is subject to the Military Law, Civil Law and International Law and all institutions and constituted authorities created under them. Section 1(1) of CFRN 1999[1] states that *"this constitution shall have a binding force on any person or authority throughout the federation".*[2] No person or group of persons shall rule this country except in accordance with the provisions of this constitution[3]. Any law made inconsistent with the provisions of this constitution, shall be null and void.[4] Giving a wider interpretation of the above constitutional provision, citizens of Nigeria including the soldier are not only subject to the laws of the constitution but all institutions and constituted authorities created by it. Inspite of this law, the soldier in his own psyche and erroneous belief, he is above the civil laws and therefore not subject to it. Whatever act or omission he commits, can only be dealt with by Courts Martial and Military Authorities. From our investigation, this belief of the soldier emanates from the system, which placed him in a position not to be able to comfortably sueing a civilian, fellow service personnel or the military authorities in a civil court while in service to enforce his rights. It is on this note that we can simply say that this belief is what is responsible for his oppression of civilians in the society on the one hand and his violent protest against the military authorities to enforce his rights on the other hand. Thus, it is suggested that at the point of joining the military service, soldiers should be well educated on the legal status.

[1] Cap C23 Vol.3 LFN Op.cit
[2] Section 1(1) of CFRN 1999, Ibid
[3] Section 1(2) Ibid
[4] Section 1(3) Ibid

ii. The Military Justice System is not in Conformity with Democratic Rule and the Spirit of the Constitution

It was also observed that our military justice system is not only discriminatory to the soldier but also not in conformity with democracy and the constitution. As a result, so many military ceases have been loss on appeal either at the Court of Appeal or Supreme Court. The bulk of these cases were not lost on their merits but mostly due to either infringement of human rights or procedural flows emanating from the type of military justice system we operate. It should be noted that our military justice system was sourced from the AFA, and Rules of Procedure (1972). This AFA is purely a product of the military rule in Nigeria; and the Rules of Procedure was inherited from the United Kingdom since 1972 without any amendment. These laws till date are the main sources of our military justice system. Their provisions are either archaic or a times contrary to the rule of law and human rights. Hence there is the need for reformation of the military justice system to be inconformity with our democratic society.

iii. There is always an Inherent tension between Fundamental Rights and Military Discipline

It was observed that there is always an inherent tension between human rights and military discipline whenever they are issues of determination before a civil court. As a result, the action of military authorities has always been subjected to criticism and condemnation by both the public and the judiciary. Recalled was the military of ***Nigerian Army vs. Corporal Jasper Braidator and 11 others (Supra)*** in 2014 which attracted wide public outcry to halt the execution of these soldiers who were found guilty of mutiny by a General Court Martial convened at Abuja. Another was the case of ***Capt. Asake (Supra)*** who was convicted by a General Court Martial under section 103 of the AFA for borrowing money from his subordinate in service. On appeal the Court of Appeal up-turned the Court Martial decision and held that borrowing money from a subordinate is not an offence known to our laws. This was without

recourse to military discipline and regimentation. The dangers of this judicial decision by allowing a senior to borrow money from his junior, it will negatively affect effective command and control of troops. Hence it is suggested that all military cases on appeal with such issues, the court should endeavour to give special consideration to military discipline and regimentation in passing judgment. Also justices acquitted with military law and discipline should be given the opportunity to sit on appeal involving tension between military discipline and human rights to advice the court accordingly.

iv. The Armed Forces (Disciplinary Proceedings) (Special Provisions) Act[5] is not Inconformity with the Constitution

It has been observed that the above mentioned Act needs to be reformed because apart from the fact that it is not inconformity without extant laws, it has legalized double jeopardy and offends against all tenets of the rule of law with its provision that vests the service council with power to punish accused personnel following an acquittal. This is an absurdity which offends against the principles of natural justice, equity and good conscience. In view of these findings, the following recommendations are proffered.

5.3 Recommendations:

i. The need to Educate of Soldiers at the point of entering the Military Service cannot be overemphasized

It is imperative for the military authority through the Directorate of Legal Service to educate persons who intend to join the military of their compact and the legal implications of joining the military profession at the point of entry. This will help immensely in upholding and preserving the laws. And reduce unnecessary court litigations for both the service and its personnel.

[5] Cap A22 LFN Op.cit

ii. Justices Learned in Military Law and Military Regimentation should sit on Appeal in Military Cases at both the Court of Appeal and the Supreme Court.

Since there is always inherent tension between human rights and military discipline, it is suggested that military cases appealed at the Court of Appeal or the Supreme Court should be heard and determined by at least one of the three justices of the Court of Appeal or two of the five to seven justices of the Supreme Court well acquainted with Military law and Military regimentation. This will assist a lot in hearing and determining military cases on its merit, and by implication determine their judgment in consideration of military discipline and regimentation.

iii. The Military Justice System should be Reformed to be Inconformity with Democracy and the Constitution

Sequel to the challenges discussed bedeviling the military justice system, there is the need for it reform. This will enormously help in dispensing justice in the spirit of the constitution, and secure the Independent and Impartiality of Courts Martial.

iv. The Armed Forces (Disciplinary Proceedings) (Special Provisions) Act should be Reformed to be Inconformity with the Constitution

This Act as earlier stated is against the principles of natural justice, equity and good conscience. Hence in line with the observation made in respect of this law, it should be reformed to be inconformity with the constitution of Federal Republic of Nigeria 1999.

5.4 Conclusion

The very basis for the military is identified as service on behalf of properly constituted civil authority, the conduct of operations within established norms and law and the requirement for a high standard of discipline.[6] Under a democratic rule, the military are subject to the direction and control of the elected government. The military leaders on their part must enforce discipline through the elaborate disciplinary system, which is an integral part of the rule of law.

[6] Chief T.E.C Op.cit, p.419

The means of ensuring that the military perform their roles under a democratic rule is through military law.

In the light of the above position, military personnel have enormous responsibilities to their mother land and to fellow citizens. But as citizen of the country, they are equally entitled to basic rights albeit within the confines of military law and discipline.[7] They have a right to the necessities of life which will keep them in the proper physical, psychological, intellectual and emotional frame of mind to be able to carry out their obligations with utmost sense of responsibility and competence. Hence the military personnel's compact as earlier stated, they are subjected to military law, civil law vis-à-vis international standard. Following this fact, they are enjoined at all time to do their things in conformity with rule of law and respect of the rights of citizens.

It is settled that the military are subject to tripartite laws based on their compact. Hence, it is expected that they uphold the rule of law in the performance of their constitutional roles and as well respect for the rights and dignity of citizens. Where they are performing their constitutional roles, they enjoy some right, privileges and restrictions. It is therefore opined that the society and the judiciary should take cognizances of the soldiers' rights, privileges and restrictions before subjecting the actions of military authorities to outright condemnation and criticism. On the one hand, and the military authorities on the other hand should always discipline any personnel who infringes on the rights and dignities of civilians. This in essence will address the problems associated with the tension between fundamental rights and military discipline.

Finally, soldiers while deployed for international military operations are to adhere strictly to international standard and rule of law. It is the duty of the commander as a command

[7] Ibid

responsibility to at all time commence disciplinary action against any soldier who commits any offence or crimes of international concern. However, where he fails to commence disciplinary action, he will be held responsible of the action of the soldier. Where the soldier is tried for violation of any international standard, the trial shall be on the premise of rule of law recognized by the international standard.

BIBLIOGRAPHY

A. BOOKS

Aboki, Y. (2013) Introduction to Legal Research Methodology, Ayiba Printing Production SS17, Jama'a Road, Kaduna.

Akinyemi, O. (2010), Introduction to Military Law, Obafemi Awolowo University Press Ltd., Ile Ife.

Black's Law Dictionary, 6th Edition, St. Pinn West Publishing Co. (1979)

Chiefe, T. E. C, (2008), Military Law in Nigeria under Democratic Rule, Arthill Publishers Ltd. Lagos.

Doherty, O. (1999) Criminal Procedure in Nigeria Law and Practice. Blackstone Press Ltd., London.

Eze, M. (2012), The Nigerian Constitutional Law, Princeton Punishing Company, 9 Ezekiel Street Off Toyin Street, Ikeja Lagos.

Hanby, A. S. (2010), Advanced Learner's Dictionary International Student Edition (New 8th Edition) Oxford University Press, London.

Jemibenwo, D. M. (1989), An Introduction to the Theory and Practice of Military Law in Nigeria, Friends Foundation Publishers, Lagos.

Kejawa, A. (2005), Military Law in Nigeria. Captop Publication Nigeria Ltd., Ibadan.

Ladan M.T. (2007) Materials and Cases on Public International Law, Ahmadu Bello University Press Limited, Zaria, Kaduna State.

Obilade, A. O. (2010) Nigerian Legal System, Spectrum Law Publishing Co. Ibadan.

Omachi, A. I., (2012) Court Martial Law and Practice in the Armed Forces of Nigeria. Advance Concepts Printers, Kaduna.

Osamor, B. (2004) Fundamental of Criminal Procedure Law in Nigeria. Dee-Sage Nigeria Limited.

Oyagha-Ukpong, G.I.O. (2012) Appellate Cases on the Nigerian Armed Forces Courts Martial: (A Compendium), Divine Connection Printing & Packaging, Shop 2 Back of Rajab Plaza, Area 3 Junction, 2nd entrance of Old Federal Secretariat Area 1, Garki-Abuja.

Rogers, A. P. V. (1996 Law on the Battle Field Manchester, Manchester University Press.

Sherman, E. (1971) Conscience and Command: Justice and Discipline in the Military. Vintage Books, New York.

B. ARTICLES IN JOURNAL PUBLICATIONS

Abubakar, A. Q. (2009) Military Justice System in a Democracy. The Military Lawyer Journal, Vol. 4, No. 11.

Adekangun, L. (2014), Enhancing Discipline and Professionalism in the Nigerian Army through the Instrument of Court Martial in Democracy, Vol. 5, No. 5.

Akaagerger, J. (2009) Gravity of Offences and the Doctrine of Necessity to Enforce Discipline under Military Law. A Journal of the Military Lawyer, Vol. 4, No. 9.

Aondoaka, M. (2009), The Armed Forces Personnel: What Rights and Obligations avail him as an Ordinary Citizen? The Journal of the Military Lawyer Vol. 4. No. 8.

Ayua, P. M., (2009) Military Justice System in a Democracy. Commentary to Aondoaka, M. (2009), The Armed Forces Personnel: What Rights and Obligations avail him as an Ordinary Citizen? The Military Lawyer Journal Vol. 4. No. 8.

Badewole, B. M., (2009) Imperatives for the Amendment of the Armed Force Act: Nigerian Army Projection for Military Law Reform. The Journal of the Military Lawyer Vol. 4, No. 3.

Bawa, I. (2014) Legal Issues of Internal Military Operations in Nigeria. The Military Lawyer Journal Vol. 5, No. 3.

Ladan, M. T. (2005) An Overview of the Rome Statute of the International Criminal Court. The Military Lawyer Journal. Vol. 2. No. 4.

Mukhar, A. S. (2009) The Doctrine of Exhausting Military Remedies and Appellate Chain for the Military Justice. The Military Lawyer Journal, Vol. 5, No. 2.

Nwankwo, O. O. (2007) Operating in Accordance with Human Rights Norms. The Responsibility of Service Personnel in Internal Security Operations; the Military Lawyer Journal, vol. 3, No. 4.

Peters, A. O., (2014), Understanding the Character of Summary Trials and their Importance in Enforcing Military Discipline. The Military Lawyer Journal Vol. 5, No. 7.

Yemi, A. G., (2007) Examining the Past, Looking into the Future, the Place of Military Justice in the Nigerian Legal System. A Journal of the Military Lawyer, vol. 3, No. 3

C. INTERNET MATERIALS

Disu, M. Soldiers Treat a Civilian like an Animal in Nasarawa State. http://www.nairaland.com accessed 9/10/15

Egwu, N. It is time for Reforms in the Nigerian Military Justice System. http://www.thisdaynewspaperng.com Accessed 10/4/2017

Falana, F. The Military Justice System and Human Rights. http://www.premiumtimesng.com accessed 10/4/2017

Ibeh, N. Nigerian Army to Punish Soldiers for Maltreating Suspected Armed Robber. http://www.premiumtimesng.com accessed 1/9/15

Madugba, A., Soldiers Shoot Tanker Driver over ₦500 on Zaria-Kaduna Highway. http://www.vanguardngr.com/2015/06 accessed 26/11/15

Usman, E., Adelaye B., and Olowoopeyi, M., Soldiers go on Rampage Burn, Vandalize BRT Buses over colleague's Death in Lagos. http://www.punchng.com accessed 4/8/14

D. CONFERENCE PAPERS

Ladan M.T., Applicable Laws in Engaging Non-State Actors in Counter-Insurgency Operations: with Particular Reference to Nigeria, Being a Paper Presented at a 3-Day International Workshop on Civil-Military Cooperation and Observance of Human Rights in Internal Security Operations, Organized by the Office of the National Security Adviser and European Union Delegation to Nigeria, at National Defence College, Abuja, 23-25 October, 2014.

Ladan M.T., Applicable Legal and Human Rights Standards in Internal Security Operation (ISOs) in Nigeria and Perspectives of African Union and ECOWAS, Being a Presentation made at the Civil-Military Cooperation and Human Rights Observance Training of the Trainers Course for Members of the Nigerian Armed Forces and other Security Agencies, Organized by the Office of the National Security Adviser (ONSA) in Collaboration with the European Union Technical Assistance to Nigeria's Evolving Security Challenges (EUTANS) Team at National Defence College, Abuja on 4-15 April, 2016.

Musa, S. I., The Solder and the Law, Being a Paper Presented to Members of Course 26/2015 Warrant Officers' Academy, Armed Forces Command and Staff College, Jaji Military Cantonment, 2015.

E. NEWSPAPERS

Ahmad, T. A., Terna, D. and Roland, M. Nigerian Army's Season of Court Martial, Weekly Trust News Paper Saturday, January 10, 2015

Femi, F., Nigerian Army Season of Court Martial. Weekly Trust Saturday, January, 10, 2015.

Taiwo, A. PDP Insists on Soldier's for Elections, while APC kicked. DailySun Newspapers, Friday, February, 20, 2015.