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Jeanine Bucherer, Die Vereinbarkeit von Militärgerichten mit dem Recht auf ein faires Verfahren gemäß Art. 6 Abs. 1 EMRK, Art. 8 Abs. 1 AMRK und Art. 14 Abs. 1 des UN-Paktes über bürgerliche und politische Rechte

Summary

A. Introduction

Military tribunals have existed ever since standing armies became customary. While their primary objective has generally been to maintain order and discipline within the forces, their structure, their jurisdiction and trial procedures have varied in the course of time as well as according to legal traditions and circumstances in general. As will be seen below, jurisdictional matters in particular are at the heart of the analysis.

The study focuses on three Conventions: the European Convention on Human Rights (ECHR), the Inter-American Convention on Human Rights (IACHR) and the International Covenant on Civil and Political Rights (ICCPR). It undertakes to analyse the conformity of military courts with the right to a fair trial based on the jurisprudence of treaty-based supervisory organs, i.e.: the European Commission and the European Court of Human Rights, the Inter-American Commission and Court of Human Rights as well as the U.N. Human Rights Committee.

A look at the jurisprudence reveals that over the years international supervisory bodies have dealt with a variety of questions of a structural as well as of a procedural nature. Two categories of cases stand out, the first one being of major importance for all three treaties: trials against civilians before military tribunals and trials against members of the armed forces accused of human rights violations. Supervisory bodies tend to deal with those issues in the context of the elements "independence" and "impartiality". However, as will be seen below, there have been interesting developments within the last couple of years.

B. Independence and Impartiality

The principles of independence and impartiality guarantee that courts act as neutral thirds. To establish whether a tribunal complies with the requirements, all of the supervisory bodies recur to a – more or less similar – set of criteria such as the manner of appointment of its members, their term of office and security of tenure to establish whether a tribunal can be considered as independent. The following will give a brief outline of the existing case-law.

I. ICCPR

In the 70ies and 80ies, the U.N. Human Rights Committee rendered "views" in a number of individual complaints against Uruguay, and to a lesser extent against Colombia, in which civilians invoked the violation of the right to a fair trial because of having been tried before military tribunals. Without further elaboration, the U.N. Human Rights Committee found the trials to infringe the right to a fair trial. In its General Comment of April 12, 1984, the Human Rights Committee acknowledged that the trials by military tribunals could present serious problems under Article 14 (1) of the International Covenant on Civil and Political Rights, but concluded only that such trials "should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14". More recent country reports may be interpreted to indicate that the Committee draws back from that cautious approach. On this note, the Committee states in the concluding remarks to its fourth country report on Chile that "the continuing jurisdiction of Chilean military courts to try civilians does not comply with Art. 14 of the Covenant" and that as a consequence the respective laws ought to be amended so as to restrict their jurisdiction. The same demand can be found in the fourth report on Columbia with regard to human rights violations presumed to have been committed by members of the military forces.

II. ECHR

Up until the 90ies, the so-called Strasbourg organs dealt with military tribunals only sporadically and primarily in the context of the maintenance of discipline and order within the armed forces. The situation changed when Commission and Court were confronted with complaints against the United Kingdom and Turkey.

1. "British Cases"

At the focus of attention of the "British cases" was the outstanding role of the convening officer prior to the coming into force of the 1996 Armed Forces Act. The convening officer played an important role at all stages of the trial. In the pre-trial phase, he decided which charges should be brought and which type of court-martial was most appropriate, he convened the court-martial and appointed its members – all sub-

ordinate in rank to him – as well as the prosecuting and defending officers. During the trial he procured the attendance at trial of the witnesses for the prosecution and those "reasonably requested" by the defence. Lastly, the convening officer acted as confirming officer, meaning that the decision of the court became effective only upon being ratified by him, and he had the power to vary the sentence imposed as he saw fit. In view of those and other features, the Court concluded that the defendant's right to a hearing before an independent and impartial tribunal had been violated.

Some aspects of the "British cases", for instance the ratification requirement, are of interest for the assessment of the US military commissions.

2. "Turkish Cases"

The "Turkish cases" are of a different nature. They concern trials against civilians before Turkish State Security Courts. Up until 1999, those courts were composed of two civilian and one military judge (the latter was then replaced by a further civilian judge). The State Security Courts' jurisdiction comprises "political offences" such as offences against the Republic, against the indivisible unity of the nation and offences which directly affect Turkey's internal or external security.

At the centre of attention of the Court's assessment in those cases was the military judge. The Court observed positively that the military judges followed the same professional training as their civilian counterparts. On the other hand, it criticised that military judges remained subject to military discipline and assessment reports and that the army's administrative authorities played an important role in the judges' appointment. However, having weighed up those and other facts, the Court was unable to reach a decision. As a consequence, it turned to a further criterion, namely the question as to whether the State Security Court presented an appearance of independence. In this context, it attached great importance to the fact that a member of the armed forces participated in a trial against a civilian and concluded "that the applicant could legitimately fear that because one of the judges (...) was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case."

As the *Gerger* case illustrates, the Court's line of argument is not wholly satisfying. In *Gerger*, it was established that the military judge voted against the majority of the two civilian judges for a lighter pen-

alty. In view of those circumstances, it is difficult to perceive how the above "appearances" could come into play. How could the applicant have had legitimate cause to doubt that the military judge was unduly influenced? Lamentably, however, the Court followed the line of arguments set out above without giving in-depth consideration to the particular circumstances of the case.

3. Notes

The Strasbourg organs' jurisprudence highlights that "independence and impartiality" are key issues where – as in the British cases – it's a matter "solely" of structural deficiencies. Trials against civilians before military courts raise questions that go beyond the military courts' structure. Here the central problem lies in the conflict between the military's task in the fight i.e. against terrorism and the military's judicial duties. It is for this reason that the traditional approach of applying criteria such as security of tenure or the manner of appointment is not wholly convincing when it comes to arguing jurisdictional restrictions.

III. IACHR

The Inter-American Commission first dealt with military courts in country reports. Its line of argument at the beginning of the 90ies centred on military courts being purely functional courts designed to maintain discipline within the forces. Consequently, trials against civilians were considered to overstep the military courts' "natural role". In the *Tamayo* case, the Inter-American Commission went a step further. It found the trial against Loayza Tamayo, a civilian tried before a Peruvian military court, to be "contrary to the natural and competent judge". Interestingly, the notion "competent" appears in the wording of Article 8 para. 1, however, not as "competent judge" but as "competent tribunal". The Inter-American Court followed the Commission's line of argument. It found that the trial contravened the right to a competent judge (juez competente). Given the facts of the case, it remained uncertain as to whether that decision was founded on internal Peruvian law or whether it indicated a paradigm shift from "independence and impartiality" to a somewhat undefined element "competent judge". As will be seen below, the latter interpretation was correct.

C. The Right to a Competent Court

The International Covenant as well as the Inter-American Convention expressly provide for a right to a trial before a competent court. The following section outlines the further jurisprudence of the Inter-American organs and thoughts of an alternative approach.

I. Stock-taking

Following the above-mentioned *Tamayo* case, the Inter-American Court of Human Rights rendered a further judgement in *Castillo Petruzzi and others*. The application challenged convictions by Peruvian military courts of four Chilean nationals for the crime of "treason against the fatherland" (traición a la patria). The Court ruled that military proceedings were contrary to the "juez natural" (the natural judge), a right implied in the right to a fair trial. As regards its content, the Court explained that judicial competence may not be arbitrarily altered. In the eyes of the Court, the *nomen iuris* of treason was used to "cloak this arbitrary mutation in the guise of legality" and to remove jurisdiction from the ordinary to the military courts. The idea of a court's "natural competencies" is intriguing. The concept of "natural judge" is known in constitutional law, and it has indeed been used to restrict military courts' competencies. However, given that international human rights law doesn't provide for a framework equivalent to national constitutions and that armed forces have no predefined role, it seems difficult to transfer that concept.

In *Cesti Hurtado*, finally, the Court had the opportunity to confirm its *Castillo* jurisprudence. However, it didn't. Instead of falling back on the concepts of the "competent" or "natural" judge, this time the Court relied on the wording "competent tribunal" Again, it remains somewhat unclear whether this implies a deliberate turning away from the "inherent rights-approach" or whether it is due to the particular circumstances of the case.

II. Alternative Approach

In the next step, the study undertakes to develop an alternative approach. The idea is to derive a jurisdictional restriction *ratione materiae*

by way of autonomous interpretation of the notion "competent tribunal". The first task is to define a benchmark. Generally speaking, it would be possible to conceive "competent" as a renvoi to the respective national law. However, in that case it would be redundant. Neither does the majorities' perspective provide a reliable basis for interpretation. The content of the right to a "competent tribunal" has to be inspired by the Conventions' intrinsic values and standards. It must reflect and be coherent with their core principles. "Competent", "arbitrary" and "unlawful" appear at various points in the Conventions. The rule of law, the prohibition of arbitrary actions and effective legal protection are key concepts and have been filled with meaning in prior jurisprudence. Based on those considerations, the study proposes an alternative line of argument for the restriction of military courts' competencies.

D. Additional Considerations

Two other issues are being analysed: questions arising in the context of emergency situations and the compliance of US military commissions with Art. 14 ICCPR.

I. States of Emergency

States of emergency typically affect the judiciary. The executive obtains additional powers while at the same time – purportedly to enhance the judiciary's "efficiency" – judicial standards are lowered. As set out above, international bodies consider trials against civilians by military courts as incompatible with the right to a fair trial. In the context of states of emergency, the question arises as to whether the State parties' right to derogation alters that assessment. In neither of the three conventions is the right to a fair trial – as such – mentioned in the list of non-derogable rights. Therefore, their derogability depends on the two correctives incorporated in the conventions: the principle of proportionality and other international obligations. The study comes to the conclusion that core rights such as the right to an independent and impartial tribunal and the rule of law are not at the State parties' disposal.

II. The Compliance of US Military Commissions with Art. 14 Para. 1 of the U.N. Covenant on Civil and Political Rights

Lastly, the study investigates the compliance of the US military commission with Article 14 of the International Covenant on Civil and Political Rights. A closer look at the structure of the commissions reveals similarities with the court-martials in the British cases. Not only the dominant role of the appointing authority, but the overall influence of the executive, starting with the issuing of orders establishing the commissions and ending with the president of the United States taking the final decision is disturbing and incompatible with the exigencies of Art. 14 para. 1 ICCPR.