ADMINISTRATION OF JUSTICE IN MILITARY COURT MARTIAL: AN EXAMINATION OF THE LAW AND PRACTICE.

BY

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A RESEARCH DISSERTATION SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL FULFILLMENT FOR THE AWARD OF BACHELOR OF LAWS OF KAMPALA INTERNATIONAL UNIVERSITY

JUNE, 2015
DECLARATION

I, ATUHEIRE MOSES KANYONYI, the undersigned, declare that this dissertation is my original work and has never been presented to any organization or institution of higher learning for a degree or any other award.

Signature...........................................

Date ..................................................

13th JUNE 2015
This is to certify that this research has been done under my close supervision as University supervisor and is now ready for submission.

Name

MR. OGWAL SAMUEL

Signature

Date

13/6/2015
DEDICATION

This book is dedicated to my beloved children and mother. They have been an inspiration to me.
ACKNOWLEDGEMENT

First and foremost my humble thanks go directly to the almighty God for enabling me reach this honorary level of education.

I wish to extend my heartfelt thanks to my Academic supervisor Mr. Ogwal Samuel who has been helpful to me during my proposal writing and when the research was carried out. I thank him for having been there for me for consultation during the research work.

I also want to thank Nkwanzi Aidah and Kobuyonjo Zainab for all the support they have rendered to me.

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I wish to extend my sincere thanks to people who have been generous with good will and intention of assisting me in completing this project.
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ABSTRACT

Any system or tribunal that exercises judicial power in a democratic society must comply with certain minimum standards for the administration of justice. These standards are embedded in the right to a fair trial which undoubtly is the most important prerequisite for ensuring justice in the adjudication of cases. This dissertation examines the extent to which Uganda’s military justice system complies with the right to a fair trial.

It is argued that despite attempts at reform, Uganda’s military justice is somehow stuck in its historical origins and falls short of complying with some of the basic principles of human rights.

This dissertation appraises and points out other areas that require reform and provides recommendations which can help to make Uganda’s military justice system compliant with the rule of law particularly concerning the right to a fair trial.
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<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACHPR</td>
<td>African Commission on Human and People’s Rights</td>
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<td>DMP</td>
<td>Director of Military Prosecutions</td>
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<td>DPP</td>
<td>Director of Public Prosecutions</td>
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<td>ECrthR</td>
<td>European Convention of Human Rights</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>JLOS</td>
<td>Justice, Law and Order Sector</td>
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<td>KAR</td>
<td>King’s African Rifles</td>
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<td>MJSC</td>
<td>Military Judicial Service Committee</td>
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<td>NDPP</td>
<td>National Director of Public Prosecutions</td>
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<td>NRA</td>
<td>National Resistance Army</td>
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<td>NRC</td>
<td>National Resistance Council</td>
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<td>NRM</td>
<td>National Resistance Movement</td>
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<td>OSCE</td>
<td>Organisation for Security and Cooperation in Europe</td>
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<td>PMJ</td>
<td>Principal Military Judge</td>
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<td>SANDF</td>
<td>South African National Defence Forces</td>
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<td>SOAS</td>
<td>School of Oriental and African Studies</td>
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<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
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<td>Uganda Law Society</td>
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CHAPTER ONE

1.0. Introduction
This chapter covers the background of the study, objectives of the study, problem statement, scope of the study and the justification of the study.

1.0.1 Background of the study
"Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle order there, and tere it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience."
Louis De Gaya (1678), The Art of War.1

The importance that Uganda’s military justice system plays in the overall administration of justice in Uganda cannot be over-emphasized. Specifically, military tribunals/military courts (terms that will hereafter be used interchangeably) as the major mechanism for the administration of military justice, play a very vital, unique but highly controversial role in the administration of criminal justice with regard to persons subject to the country’s military law. Although originally designed to try serving members of the armed forces for the commission of military offences, the jurisdiction of Uganda’s military justice system (as is the case with many other countries), has expanded significantly over the years. As the analysis in Chapter three will show, Uganda’s military justice system now has jurisdiction over both military personnel and civilians.

This research shall look at the administration of justice in military courts martial under the UPDF.

It therefore will look at the law relating to the procedure in as far as administration of justice is concerned and the practice thereof within these courts Martial.

The research will then show whether at the end of it all justice is delivered to all. The research will also analyse whether these military courts follow the due procedure as laid down in the laws that govern them.

The essence of military justice has been highlighted in a number of scholarly writings and in the case law of numerous jurisdictions. The concept of military justice largely revolves around the justifications for military justice as a separate system of administration of justice and the extent to which members of the armed forces are entitled to the respect and protection of their human rights and fundamental freedoms. As opposed to civilian justice, military justice is a system of administration of justice which applies to members of the armed forces and other persons subject to military law. It has the monopoly in dealing with military offences.

As earlier pointed out, military offences are generally those crimes which are unique to the military whose major objective is to enforce discipline and good order in the army. They include such offences as disobedience, desertion, absence without leave, cowardice, mutiny, insubordination and conduct prejudicial to good order and discipline. It is said that some of these offences like insubordination are "...as fatal to armies as gangrene is to human beings." A notable feature about many of these military offences is that they are cast in very broad and vague language which gives the military courts wide discretion when it comes to adjudicating cases involving suspected infraction of military law. Take for example the offence of "conduct prejudicial to good order and

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3 According to the UN Commission on Human Rights, military justice is not and should not be considered as a separate system of administration of justice but an integral part of the general justice system. See the UN Draft Principles Governing the Administration of Justice through Military Tribunals (herein after referred to as "the UN Principles on Military Justice"), U.N. Doe. E/CN.4/2006158 (2006), paras.3, 10 and 11. See also UN Commission on Human Rights Resolutions 2004/32 and 2005/30.

4 Supra

5 See Lindley (1990), supra
discipline."\(^6\) In addition to encompassing all the other specific military offences, it can include many other undefined things which in the opinion of the military tribunal are prejudicial to good order and discipline. Although Section 178 (5) of the UPDF Act provides some of the instances that amount to conduct prejudicial to good order and discipline of the Defence Forces, Section 178 (6) states in no unclear terms that “Nothing in subsection (5) shall affect the general effect of subsections (1) and (2).” It is submitted that the very broad and vague language in which many military offences are cast makes the administration of military justice susceptible to abuse and manipulation. The noncompliance of a military justice system with the right to a fair trial makes the problem even worse.

Historically, as Sherman correctly observes, military justice developed as a separate legal system under command control because military units were often isolated from both civilians and each other.\(^7\) Commanders therefore needed the power to convene military courts staffed with their own officers so that a quick determination of guilt or innocence could be made.\(^8\) However, despite the fact that modern transport and communication have ended the isolation of military units and that the trial of service men in civilian courts is feasible in most situations, military justice still remains as a separate system of administration of justice in many countries.\(^9\) Advocates for military justice as a separate system of administration of justice advance a number of theoretical arguments in support of their viewpoint.\(^10\)

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\(^6\) Section 178 (1) of the UPDF Act, 2005 provides that “Any act, conduct, disorder or neglect to the prejudice of good order and discipline of the Defence Forces shall be an offence.”

\(^7\) Sherman (1973), supra note 13, p.1400.

\(^8\) Ibid. For most part, military tribunals were not regarded as courts at all, but rather as instrumentalities of the executive power provided to aid Presidents as Commanders-in-Chief, through their authorized military representatives, in properly commanding the armed forces and enforcing military discipline. See Kent SB (1976), “Structures of American Military Justice,” University of Pennsylvania Law Review, Vol.125, No.2, p.314.

\(^9\) Sherman (1973), supra note 13, p.1400.

\(^10\) It is worth pointing out from the onset that most of these theoretical arguments look at military justice in the context of members of the armed forces only. However, in today’s world, a number of military justice systems including Uganda’s military justice system have jurisdiction over civilians as well. The HRC has correctly observed that trial of civilians by military tribunals raises serious problems as regards the equitable, impartial and independent administration of justice. See HRC General Comment No.32 (2007), supra note 11. For a recent appraisal of the HRC’s jurisprudence on the issue of trial of civilians by military courts, see Shah S (2008), “The
First, it is often argued that the military is a unique society apart from civilian life which requires different legal standards that the civilian courts cannot appreciate or adequately enforce. In Parker v. Levy, delivering the judgment of the Supreme Court of the United States of America, Justice Rehnquist emphasized the specialized nature of the military society as thus:

The Court has long recognized that the military is by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed traditions of its own during its long history. In re Grimley the Court observed: “An Army is not a deliberative body. It is the executive arm. Its law is that of obedience.” More recently, we noted that “the military constitutes a specialized community governed by a separate discipline from that of civilians.” Just as military society has been a society apart from civilian society, so “military law... is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.”

Senator Nunn summarised the reasons why the military is considered as a unique specialised community which requires different rules and standards in the following words:

The primary mission of the armed forces is to defend our interest by preparing for and, when necessary, waging war, using coercive and lethal force. Responsibility for the awesome machinery of war requires a degree of training, discipline and unit cohesion that has no parallel in civilian society. The armed forces must develop traits of character, patterns of behaviour, and standards of performance during peace time in order to ensure effective application and control of force in combat. Members of the armed forces are subject to disciplinary rules and military orders twenty-four hours a day, regardless of whether they are actually performing a military duty. Military service is a unique calling. It is more than a job. Our nation asks the men and women of the armed forces to make extra ordinary sacrifices to provide for the common defence. While civilians remain secure in their homes, with broad freedom to live where and with whom they choose, members of the armed force may be assigned, involuntarily, to any place in the world, often on short notice, often to places of


grave danger, often in the most spartan and primitive conditions... Once military status is acquired, military service loses its voluntary character. Once an individual has changed his or her status from civilian to military, that person’s duties, assignments, living conditions, privacy and grooming standards are all governed by military necessity, not personal choice.

While it is accepted that, indeed as elaborated by Senator Nunn, the military is a unique society, it is submitted that there is nothing in that uniqueness which warrants the denial or violation of the military personnel’s internationally guaranteed right to a fair trial. Indeed because of the extra ordinary sacrifice that they make for the common good, members of the armed forces deserve to be treated in a just and fair manner in the process of administration of military justice. This can only be by guaranteeing their internationally protected right to a fair trial.

In support of the view that the military is a unique society which requires different rules and standards, it is also frequently argued that military offences such as absence without leave, desertion, insubordination, cowardice, mutiny and the like have no civilian analogues: the adjudication of guilt or innocence and the assessment of appropriate punishment may require experience and knowledge not commonly possessed by civilian judges and jurors. Delivering the judgement of the Supreme Court of the United States of America in United States ex rel. Toth v. Quarles, Mr. Justice Black agreed thus: “It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offence charged against a soldier is purely military; such as disobedience of an order, leaving post, etc.”

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16 Ibid
To the extent that this argument extends only to trying members of the armed forces for offences of a military character, it may be valid. But in countries like Uganda where military tribunals also have jurisdiction over non-military (civilian) offences, the above justification becomes highly contentious. As the analysis in Chapter three will establish, Uganda's military tribunals lack the necessary capacity and competence to deal with the legal intricacies and evidential technicalities that most civilian offences present. But even with military offences, it is still doubtable in Uganda's context that applying the same principles and standards of criminal justice, as should be the case, military personnel would be more competent than civilian judges in trying such cases. As Chapter three will establish, Uganda's military justice legal framework does not guarantee the legal competence of Uganda's military tribunals and the short tenure of the members of these courts and the judge advocates does not allow gaining relevant experience. This is unlike the situation with civilian courts, where judges are legally qualified and, over time, develop the skills and experience to deal with peculiar cases in such highly specialised areas as surgery, human medicine, architecture and engineering. Applying the same principles and standards of administration of criminal justice, and with the help of experts where need be, it is submitted that in Uganda's context, civilian courts would be more competent and better placed to deal with infractions of military law than the military tribunals.

1.1. Statement of the problem

The right to fair trial is the cornerstone of any criminal justice system in a democratic society; without which, justice remains a mockery. It is the critical element in the protection and realization of all the guaranteed human rights and freedoms. Without its protection, human rights remain a mere statement of legal rhetoric. It is a basic civil right critical for safeguarding the rule of law in any democratic state.


18 HRC General Comment No. 32 (2007)
To date, the extent to which Uganda’s military justice system complies with the right to a fair trial remains a matter of speculation. In Uganda, like in many African states, the question of military justice and the right to a fair trial hardly receives any scholarly attention or inquiry. This is despite the important role that the right to a fair trial plays in ensuring justice and the rule of law. This could be partly attributed to the fact that for most part, military justice is not considered as an integral part of the general system of justice in Uganda. As such, the administration of military justice is often left out of many initiatives aimed at improving the administration of justice in the country. For instance, under the Justice, Law and Order Sector (JLOS) which is a sector wide reform process ongoing across the entire sector, several studies have been commissioned and done on the question of administration of justice in Uganda, but there is none that focuses on the issue of military justice. In fact, a review of the key documents of JLOS suggests that the administration of military justice is not part of its agenda.

The net effect of all this, in particular the failure to have any comprehensive analytical study on the question of military justice and the right to a fair trial has been the introduction of reforms that do not address the fundamental issues as far as helping Uganda’s military justice system to comply with the country’s international human rights obligations is concerned. For instance, although the UPDF Act 2005 was intended to streamline Uganda’s military law with the Constitution and the country’s international obligations, inter alia, an analysis of the reforms introduced therein hardly shows any improvement in the area of military justice, especially in as far as the right to a fair trial is concerned. Among other reasons, this could plausibly be attributed to the fact that the military law reform process was never informed by any incisive research on the question of military justice and human rights. In fact, with due respect, a review of the relevant Hansards shows that the Parliamentary debate leading to the enactment of the UPDF Act 2005 was shallow, uninformed and sometimes misinformed on the question of military justice and the right to a fair trial.92 It is in this regard that a dissertation of this nature becomes imperative for triggering and informing future reform of the
country's military justice system to ensure that it complies with the minimum international human rights standards for administering justice.

1.2. Scope of the study
For the most part of this research, the study will focus and examine the administration of justice in courts martial with a special interest in the concept of fair hearing.

The choice of these areas of study is not by default but rather, it's intended to bring out what actually happens in military courts from when a case is brought for hearing up to when a sentence is passed or the accused acquitted.

It also should be noted that the concept of a fair hearing is cardinal in criminal proceedings. And it's worth mentioning that criminal cases is the only preserve of military courts as they can't handle civil cases.

1.3. Objective of the study
The objective of the study is to analyse the general compliance of military courts in Uganda in line with the right to a fair hearing.

This dissertation is also expected to contribute to improving the rule of law and advancement of democracy in Uganda, especially if the recommendations proposed herein are adopted and effectively implemented. In light of the fact that the question of administration of military justice in Uganda is an area that has hardly been researched and written about, this thesis will also provide very useful information on the subject for academics, law and policy makers, legal practitioners, students and military personnel.

More specifically the objectives include;

1. To critically examine the performance of military courts in regard to a fair hearing.
2. To assess the compliance of the current military justice system in regard to the right to a fair hearing.
3. To evaluate the implications to the right to a fair hearing.
4. To recommend the appropriate reforms to the military legal justice system.
1.4. Justification of the Study
A great deal of cosmetic attention has been paid to military courts and as such little or no research at all has been done in this field. The public and even UPDF soldiers often don’t talk about the administration of justice in these courts. Despite some debates here and there concerning cases in courts martial is genuine concern in as far as the administration of justice and procedure for that matter is done in military courts. It’s therefore, necessary to examine the extent to which the notion of administration of justice is practical and the law to this effect. For all these reasons, it is necessary to spend time in a preliminary attempt at analyzing this concept.

1.5. Hypothesis
The hypothesis below illustrates something of the range, area and of the phenomena sought to be analysed or explained and above all of the scope offered for disagreement of debate. The following hypothesis will be guidance;

1) That the position of the administration of justice in military courts martial is inefficient to justify whatever their outcome.
2) That whatever outcome from these courts has a negative impact on both the convicts and those yet to appear before these courts.
3) That there can be other ways in which the army can bring to book rogue soldiers without taking them to military courts martial.
4) That military courts martial have therefore never been necessary in the administration of justice in the UPDF.
1.6. Methodology
This research employed a wide range of methods. The first phase relied on library research to acquaint one's self with the law relating to criminal procedure under military courts martial. Documentary sources were used at this stage, legal statutes relevant to the study and learned writings plus case law.

The second phase was field work. During this phase, information was mainly got from attending court sessions in military courts martial and also interviews with both people charged with administering these courts, the soldiers and those about to appear before these courts using questionnaires.

1.7. Literature Review
There is very little scholarly work on the question of military justice and human rights both at the international and national level. In particular, there is no comprehensive analytical study that has examined the compliance of Uganda’s military justice system with the minimum international standards for the administration of justice embedded in the right to a fair trial. The literature on the topic under study in this dissertation is therefore very limited. In this Section, we mainly analyse literature on the right to a fair trial especially as it relates to the administration of military justice. This literature can generally be reviewed under the following theme.

1.7.1. Uganda’s Military Justice System and the Right to a Fair Trial
There is indeed very little scholarly work on the issue of military justice and the right to a fair trial. Most of the scholarly work on Uganda’s military is generally centered on the role of the army in the country’s politics.\(^\text{19}\) Among the very few scholarly works that have attempted to canvas the issue of military justice and the right to a fair trial in

Uganda is Onoria’s journal article about the Kotido Executions\textsuperscript{20} and the working paper I authored on the trials and tribulations of Rtd. Col. Dr. Kiiza Besigye and the 22 others.\textsuperscript{21} As shall shortly hereafter be highlighted, these works equally have many gaps in the context of this thesis. Onoria’s article analyses the constitutionality of the Field Court Martial which tried and sentenced Corporal Omedio and Private Abdullah Mohammad. The two soldiers were indicted, tried and executed on the same day for the alleged murder of three civilians in Kotido district in North Eastern Uganda. The trial itself did not last more than three hours. He concludes that this Field Court Martial violated several fair trial and other human rights of these soldiers as guaranteed by Uganda’s Constitution. The working paper on the trials and tribulations of Rtd. Col. Dr. Kizza Besigye and the 22 others mainly focused on the extent to which the General Court Martial which attempted to try Besigye and the 22 others complied with the right to an independent and impartial tribunal.

\footnotesize{\textsuperscript{20} Onoria (2003), supra

CHAPTER TWO
UGANDA'S MILITARY JUSTICE THROUGH THE TIMES (1895-1992)

2.0. Introduction
This chapter analyses the historical foundation, development and evolution of Uganda’s military justice system especially as it relates to the right to a fair hearing; in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. This analysis is important because as it shall become apparent, Uganda’s current military justice has been and remains in many ways shaped by its historical origins.

The analysis in this chapter starts with the examination of Uganda’s military justice during the colonial era followed by an appraisal of the country’s military justice in the immediate post independent Uganda. Here, particular attention and emphasis will be on Idi Amin’s regime and president Museveni’s style of military justice under the code of conduct to the National Resistance Army and the NRA Operational Code of Contract.

Then the administration of justice in military courts as it is now under the Uganda People’s Defence Forces at 2005.

2.1. Uganda’s military justice during colonial days
Uganda’s army as a national institution was first established by the Uganda Rifles Ordinance of 1895\textsuperscript{22}. The Uganda Rifles Ordinance 1895 was the first legal framework to provide for the organisation and administration of military justice in Uganda. The fact that this law and the subsequent military justice legal framework came from the British Parliament, is enough to argue that in that sense, the origin of Uganda’s military justice system as reflected in those legal instruments were British.

The Uganda Rifles Ordinance 1895 did not put in place any clear and fair mechanism for administering military justice. Instead, it vested arbitrary and dictatorial powers in the commandant, chief officer and commanding officer. For instance, in the cases of

aggravated or repeated offences, the commandant had powers, to charge, investigate and convict any accused person and give sentence.

It is significant under the ordinance that the commandant, chief officers and commanding officers were all appointed by the commissioner and were answerable to him. They cannot therefore be taken to have been independent from the executive and the military command influence.

The issue here is not that the colonial government should have provided for adequate administration of justice to today’s standards but rather than much of the essence of the provisions of Uganda’s military justice legal framework continue to feature in the country’s military justice system.

What to note here is what has been discussed in the introduction with the various quotations therein that, “the military has its own code of service discipline... special service tribunals rather than ordinary courts have been given mandate to punish breaches of this code of service discipline...”

Therefore, the army has to be appreciated the way it is and there is hardly anything that changes or that will change in many years to come because that would in the long run change the whole concept of what armies are and the roles they play.

Over the years still under the colonial government, several ordinances were passed that repeated the 1895 ordinance but in as far as the administration of justice was concerned, nothing much changed.

It is important, though, to observe that military justice systems of the time including those in developed countries by then were generally arbitrary and tyrannical in nature. They were heavily disciplinarian and generally emphasized the iron hand of discipline over fairness and justice as a core of military justice.

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23 S.3 Ordinance 1895
24 Parcker Vs Levy supra
However, by the disk of colonialism Uganda had improved and had started providing some guarantees for ensuring fair trials. Three reasons could explain for this change, first, the colonial government’s mission had largely been accomplished, the second factor could have been the influence of the adoption of important human rights instruments like the Declaration of Human Rights and the United Nations Charter which emphasized among others equality of all human beings. And thirdly, Britain like other western countries after World War II reexamined its military justice and undertook many reforms to make it humane and some of these reforms were subsequently introduced in Uganda.

2.2. Uganda’s Post Independence Military Justice

The attainment of Uganda’s Independence marked an important era in the protection of human rights in the country at least in so far as their recognition within the country’s legal framework was concerned. For the first time, in Uganda’s legal and constitutional history, chapter III of Uganda’s independence constitution, contained extensive provisions for the protection of human rights and freedoms. Article 24 of the 1962 constitution guaranteed the right to a fair hearing. It can be argued that the independence constitution 1962 of Uganda guaranteed the rights to a fair trial. This is not surprising as Morris and Read point out that, the human rights provisions in this constitution were modeled along the lines of the European convention on Human Rights.

In light of the above constitutional development and the development of military justice during the colonial period, two key questions must be asked as we proceed to analyse the post independence military justice. First to what extent did the military justice guarantee the right to a fair hearing in as far as the administration of justice in military courts given the new constitutional provisions and secondly how far did the military

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25 This constitution was attached as a schedule to the Uganda (Independence) order in council 1962.
justice go in as far as strengthening the guarantees provided for under the 1962 constitution in as far as the administration of justice in military courts was concerned.

After independence, the parliament of Uganda seemed not to be in a hurry to interfere with the military justice legal framework left by the British. In fact, in October 1963, parliament confirmed that despite the new constitution, the military law passed by the colonial masters in 1958 (i.e. Uganda Military Forces Ordinance 1958) would continue in operation and full force until such a time as it would be amended. Omara-Otunu observes in this respect that this was a mockery of the very achievement of independence for it concerned one of the most sensitive organs of the state.27 Nevertheless, in 1964 parliament of Uganda passed the Armed Forces Act28 which repealed and replaced the Uganda Military Forces Ordinance 1958, as the legal framework for the establishment, maintenance and discipline of the forces.

The 1964 Armed Forces Act maintained summary trials by commanding officers but made provisions for the accused persons to elect to be tried by court martial29. It established a three tier court martial system, i.e. the general court martial30, the disciplinary court martial31 and the court martial Appeals Court32. As a departure from the Uganda Forces Military Ordinance 1958, the convening authority for general court martial and disciplinary court martial was the Defence Council which also had the power to appoint the president and members of court.

Officers responsible for convening courts martial, prosecutions, the commanding officer of the accused person, provost officers and any other person who prior to the court-martial participated in any investigation in respect of the matters upon which a charge against the accused person was founded were ineligible to serve on the courts—

27 Omara Otunu (1987) supra
28 Cap 295 Vol. VIII laws of Uganda 1964
29 Section 63
30 Section 66
31 Section 67
32 Section 89
This was a critical provision for ensuring independence and impartiality of courts martial.

An important development introduced by the 1964 Armed Forces Act was that any person to officiate as a judge advocate at the General Court martial was to be appointed by the Chief Justice in consultation with the Attorney General. The above position contrasts sharply with the position under the Uganda Military Forces Ordinance 1958, where the responsibility for the appointment of the judge advocate was vested in the governor and the convening officers of the courts martial.

However important to note here is that one should put into consideration the fact that as at independence, it was very hard to find an advocate in the forces if there was ever any. Today under the UPDF, the judge Advocates are appointed by the high command of the UPDF. This is so because, the forces now have their own advocates who are serving officers of the forces unlike under the 1964 Act where there were none in the Army and thus giving the Chief justice powers to appoint one amongst his own.

Another important reform introduced by the 1964 Act was that it established the court martial appeals court to hear and determine all appeals from decisions of the General Courts martial. The court martial appeal court replaced the high court as the last appellate court on issues of military justice. The court martial appeals court was to be composed of the chief justice and all Puine judges of the High court with the Registrar of the High Court serving as its registrar. Therefore, it’s arguable, at least in theory that the fact of the chief justice becoming a member of this court strengthened, the right of appeal and enhanced the quality of military justice. However, as earlier stated, it was necessary at the time because the army had no personnel trained in the law profession unlike now when the UPDF boosts of a full chieftaincy of legal services with a capacity of over 500 officers both advocates, lawyers and para legals.

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33 Section 69 & 74
34 Section 68
35 Section 89(2)
2.3. President Iddi Amin's Military Justice

Perhaps the most abominable courts martial in Uganda's post independence history were those established during Idi Amin's Regime. In total disregard of the constitution and provisions of the Armed Forces Act, Military Justice as dispensed by President Amin's Military tribunals violated all the tenets of the right of a fair hearing. First, the tribunals were composed of illiterate individuals who did not have any basic understanding of the law. This violated the right to a competent court. Also, Amin's military tribunals were staffed with only those officers who were loyal to the president and the fact that they could be relied upon to convict whoever the regime wanted to be convicted.

The right to a fair hearing within a reasonable time as guaranteed was understood to mean instant (in) justice and on conviction, the tribunals normally had a standard sentence i.e. death by firing squad. In doing this so many rights were denied the accused person and as such, the administration of justice had a lot of loopholes. As the Amnesty International observed in its 1978 report on human rights in Uganda,

...the military tribunals were a complete travesty of any accepted norms of justice.

Their members had no legal training

The defendants were usually denied legal representation, a legally qualified "court advisor" has no power to intervene where legal procedures are contravened, such as rules of evidence and other internationally accepted judicial norms; trials are often in closed court and proceedings are not published. Cases are known of trials which have been conducted in secret or even without the defendant's knowledge. There is no appeal from these tribunals to a non-military legal authority only to the Defence Council (i.e. to President Amin).

The above situation was compounded by the fact that in 1973 Amin had substantially increased the jurisdiction of military tribunals to include the trial of civilians accused of...
committing capital offences. This became the genesis of conferring military tribunals in Uganda with the jurisdiction to try civilians.\textsuperscript{38}

Sadly, there was no remedy against the government including members of the military tribunals for any violations of human rights and freedoms. In May 1972, the president signed a decree which gave government immunity from all forms of legal actions. In its very wide scope, the decree provided that:

\textit{Notwithstanding any written law or other law, no court would make any decision, order or grant any remedy or relief in any proceedings against the government or any person acting under the authority of government in respect of anything done or omitted to be done for the purpose of maintaining public order or public security in any part of Uganda or for the defence of Uganda or for the enforcement of discipline or law and order on in respect of anything relating to, consequent upon or incidental to any of those purposes during the period between the 24\textsuperscript{th} day of January 1971, and such date as the president shall appoint.}\textsuperscript{39}

In sum, it’s a fallacy to talk about compliance of military justice with the right to a fair hearing by a competent independent and impartial tribunal in particular during Amin’s regime. While the constitution guaranteed this right in full measure, it was never respected in the country’s military justice administration. Indeed as has been analysed above, it was abused and violated in all its facets. Although there is hardly any information on the administration of military justice in the first year after the overthrow of Amin in 1979, it is unlikely that the situation as regards upholding to the right to a fair trial changed much. This probably confirms Oloka – Onyango’s observation that the protection and enjoyment of fundamental rights in Uganda’s criminal justice system generally is very much dependent on the prevailing system of governance in the country at the material time.\textsuperscript{40} There is no doubt therefore that Olaka Onyango was

\textsuperscript{38} Decree No. 12/973 – 5.4 gave powers to the president to order trials of civilians by military tribunals where he was satisfied that their acts were calculated to intimidate or a lam members of the public or to bring the military government under contempt or disrepute.

\textsuperscript{39} Decree no. 8 of 1972

\textsuperscript{40} Olaka-Onyangos (2006) Criminal justice, the court and human rights in contemporary Uganda.
spot on in his observation given the fact that under the National Resistance movement system of governance, the criminal justice system has been growing steadily save for a few incidents which are debatable given one’s line of thinking. Unlike Amin’s making of decrees, the president, H.E Yoweri Museveni and the inspector General of Police have called on parliament several times to extend the 48 hour detention by police and scrap bail for capital offences.

Between 1979 when Amin was removed up to 1986 when President Museveni came to power, there is hardly any information on how military justice was administered in the short successive governments (five governments in between) for one to attempt to discuss them would be highly speculative. What is clear though is that the 1964 Armed Forces Act remained the country’s major legal framework for the administration of military justice. Whether or not its provisions were complied with is another issue.

2.4. Military Justice under the NRA Codes of Conduct

One of the challenges that president Museveni’s National Resistance Movement (NRM) faced soon after it came to power was how to enforce military discipline in an army that had expanded to include soldiers of former military regimes whose character and record as regards respect for fundamental human rights was very questionable. This was indeed critical as he had to prove in many ways that his government “... was not a mere change of guards but a fundamental change”.41

In order to achieve this, the government maintained two strict codes viz., the NRA code of conduct and the NRA Operational code of conduct, these two served as the blue print of the NRA military justice system. They were originally designed to regulate the behaviour and conduct of the NRA soldiers during its bush war. They were subsequently appended as schedules to legal notice no. 1 of 1986 which ushered in the NRM government.

41During his maiden speech on 29th Jan 1986
Important to note here is that at this time, the NRA was still pursuing elements of the former Army and other rebel groups that had been formed to fight the NRM government mostly in Northern Uganda and the west Nile Regions. Therefore the NRM had in mind that the war was not over and as such loosening the grip on the NRA soldiers would have been letting loose hungry dogs in a crowded market place.

However, unlike the Armed Forces Act 1964 the code of conduct for NRA abolished the court martial appeal court and established the General Court Martial as the Supreme trial organ of the military justice system.\(^{42}\) The code also provided for the field court martial\(^{43}\) and unit disciplinary committees.\(^{44}\) All the members of the General Court martial were appointed by the High Command for a period of 3 months and eligible for reappointment. The High Command was also responsible for appointing the prosecution.

The judge advocates and the secretary to the court were personally appointed by the chairman of the High Command who was president and commander in chief of NRA. It was also a requirement for all minutes of the proceedings of the General Court Martial and unit tribunals to be sent to the high command for perusal\(^{45}\) and the high command had powers to revise, quash or suspend any sentence of courts martial. It can therefore be argued that the high command had appellate powers (Last appellate court).

The fundamental question to pose at this point therefore, is whether such a structure and composition of Uganda's military justice system complied with the right to a fair trial in as far as administration of justice is concerned.

As has been pointed out earlier, the regime would not as young as it was and given the history of the soldiers of past regimes let loose. They had to keep a firm grip least they risked losing it all. This is evidenced with the fact that later as we shall see under the UPDF Act some changes were made to the effect of independence of these courts.

\(^{42}\) S. 10(i) of the code  
\(^{43}\) S.4 of the code  
\(^{44}\) S. 11 of the Code  
\(^{45}\) S.7 (1) NRA Operational Code of Conduct
That said, in the essence of a fair trial and impartiality lacked because even court members did not enjoy security of tenure and were not insulated from the command influence to guarantee their independence. The most disturbing provision being under S.26(iv) and (vi) of the code of conduct, where the court martial, field court martial or unit tribunal was found guilty of gross contravention of the provisions of the code either in substance or of procedure, the High Command would suspect such court, set up a provisional one and all members or any one of them would be charged. As punishment, they could be dismissed, demoted from the substantive rank and could suffer any other punishment laid down in the code up to the maximum sentence of death. Where they were found to favour the accused person or failed to execute their duty, they would be charged of conspiracy and would be dismissed by the high command and could suffer any additional punishment as the high command would determine. Together, the above provisions constituted the most serious affront to the independence and impartiality of military tribunals under the NRA military justice system.

In 1992, the NRA statute 1992 was enacted by the National Resistance Council to replace the two NRA codes of conduct and the 1964 Army Act as Uganda’s major legal framework governing the country’s Armed forces and the Administration of justice as well.

Important to note under this statute is that there was heated debate when the bill was being discussed. Hon. Karuga observed thus “I opened the bill at page 14 and 15 and found that at the conclusion of every section, suffering death is the punishment. Now on just two pages, there are four times you can die in this bill. To me it seems that the bill was brought so that we finish our soldiers”46.

Arguing that the bill was terribly harsh, Hon. Kisamba Mugerwa observed that in total there were 54 incidences in the Bill where a soldier could die. He argued that at that rate, Uganda could soon find itself without anybody in the army.

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46 The Republic of Uganda Parliamentary Debate (Honsard) official report fifth session 1991
However as has been pointed out before, that the young government needed to keep a tight grip on the discipline of the army and the fact that it had worked in the bush war, they were not about to let go and as such given the overwhelming numbers they had in the NRC, the bill was passed into law.

In concluding this, we see that starting early 2000, many cases came up against the way the military justice system was being administered. One such case of substance was the **Uganda Law Society Vs Attorney General**\(^ {47}\), where the applicants sought to challenge the constitutionality of the 1992 NRA statute in so far as it provided for the passing of the death penalty without the right of appeal to the Supreme Court. The application sought an injunction to restrain the state from carrying out the death sentences passed by the field court martial until the case was heard. Constitutional court held that the primary objective of a field court martial was to administer instant justice and instill discipline among the men and women in the armed forces at the front line and that to that extent, it could not be bogged down by appeal procedures. The court held further that the constitution regarded field courts martial as special courts which were established to maintain law and order and military discipline in the field of operation, where to employ the normal court structures would create problems for the field commander. It went on to argue that, although death was an end to everything, it had to be balanced with the higher objectives the punishment was intended to achieve. That the necessity for death sentence in a field operation cannot be underestimated for in a field operation tough decisions and actions are a sine quo non. The court held therefore, that on a balance of convenience, it was not proper to suspend the operations of the provisions which permitted the field courts-martial to pass death sentences without the right to appeal to the Supreme Court.

\(^{47}\) Constitutional Application No. 7/2003
2.5. Conclusion

In this chapter, we set out to analyse the historical foundation /origin and evolution of Uganda’s military justice system i.e its administration with an emphasis to the right to a fair hearing by a competent, independent and impartial tribunal. From the foregoing analysis, its clear that the origins of Uganda’s military justice were British. As a colony, all Uganda’s early military law like was the case in many other colonies and the masters alike were less concerned with issues of proper administration of justice.

We have also seen that even after the colonial days, the administration of military justice went on to erode the subsequent governments either because that’s the way they wanted it or that they didn’t know how to rectify it.

Thus, despite the attempts at reform by 1992, Uganda’s military justice system was in essence still largely stuck in its origins and was still far from complying with acceptable standards for the administration of military justice. It is from this background that we proceed to examine the current law relating to military justice and how it is applied while administering it.
CHAPTER THREE
UGANDA'S CURRENT MILITARY JUSTICE SYSTEM

3.0. Introduction
This chapter looks at the law relating to the administration of justice in military courts as it is today in Uganda with an emphasis on the right to a fair hearing. The analysis provides a critical examination of Uganda's current military justice legal framework. As Decary J rightly emphasized in examining the compliance of certain aspects of military justice "...legislative and regulatory provisions speak for themselves and if they are prima facie and infringement of the rights guaranteed...no further evidence is necessary".

3.1. The Ugandan constitutional framework in regards to the administration of justice in military courts
The most important starting point in analyzing the constitutional framework for the right to a fair trial in the administration of military justice in Article 2 of the constitution. This provision emphatically states that the constitution is the Supreme Law of the land and that it binds on all other authorities and persons in the country (Uganda). And that if any law or custom is inconsistent with it or any of its provisions, the constitution prevails to the extent of the inconsistency.

In Uganda Law Society Vs A.G, Justice Twinomujuni while delivering the unanimous decision of the constitutional court in regards to the Supreme authority said;

"In the course of my eleven years service as a justice of the constitutional court, I have heard senior representatives of the Attorney General Argue that the constitution does not apply to the Uganda People's Defence Forces as it applies to other authorities and persons in Uganda. They particularly like to argue that the constitution doesn't apply to the military courts martial because they are not courts of judicature within the meaning of Art 129 of the constitution. They argue that these are special institutions that were never intended to be bound by stringent rules and procedures laid down in the constitution. I have always maintained that the constitution applies to all authorities and persons in Uganda...".

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48 Constitution of the Republic of Uganda 1995
49 ULS Vs A.G. Petition No. 02 of 2002 and no. 8 of 2002 para 4(A), pp. 8 - 9
It is therefore clear that two of the highest courts in Uganda i.e the court of Appeal in the above case and the **Supreme Court in A.G. Vs Joseph Tumushabe**\(^{50}\) have pronounced themselves on the supremacy of the Uganda constitution.

The constitution of Uganda also proclaims that judicial powers are from the people of Uganda and are to be exercised by courts established under the constitution.

Justice Mulenga in **A.G Vs Joseph Tushabe**\(^{51}\) emphasized that the principle stated in Article 126(1) of the constitution embraces all judicial powers exercised by both the civilian and military courts;

"that while parliament established the courts martial, as organs of UPDF, the authority to vest them with judicial powers must be construed as derived from this constitutional principle for only courts established under this constitution have mandate to exercise judicial powers...although courts martial are a specialized system to administer justice in accordance with military law they are part of the system of courts that are deemed to be established under the constitution to administer justice in the name of the people...\(^{52}\)

Under Article 210, parliament is mandated to make laws regulating the UPDF and to be precise to provide for recruitment, appointment, promotion, discipline and removal of members from UPDF.

Pursuant to this provision parliament in 2005 enacted the Uganda People's Defence Forces Act.\(^{53}\) And thus, it is this law that provides and regulates the administration of justice by providing for the courts and their mandate to try cases of a criminal nature.

From the structural point of view the military courts provided for include, summary Trial Authority, field courts martial, unit disciplinary committees, division courts martial, general courts martial, general court martial and court martial, appeal court.

However, we shall deal with the rest excluding the summary trial authority and field courts martial because they are no longer much in force. It has taken time since them being used.

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\(^{50}\) A.G. Vs Joseph Tumushabe Constitutional Appeal No. 3 of 2005  
\(^{51}\) Supra  
\(^{52}\) Ibid  
\(^{53}\) Uganda People's Defence Forces Act no. 7 2005
3.2. Unit Disciplinary Committees

These are provided for under S. 195(1) of the Act\textsuperscript{54}. It consists of a chairman not below the rank of captain, the administrative officer of the unit the political commissar of the unit, the regimental sergeant major or company sergeant major of the unit, two junior officers and one private. The quorum of the Unit Disciplinary Committee is five members including the chairman.

The jurisdiction of a unit disciplinary committee is limited to trying non capital offences and it can impose any sentence authorized by law\textsuperscript{55}. The convening authority of the Unit Disciplinary committee is the high command or any other authority as may be authorized in that behalf by the high command as is provided for under section 196 of the UPDF Act\textsuperscript{56}.

Decisions of a committee (UDC) are by majority and once passed are binding on all court members. And all decisions of the unit Disciplinary Committee are appellable by any party dissatisfied to the appellate court (Division court martial)\textsuperscript{57}.

In its operations, the Unit Disciplinary Committee is guided by legal personnel who is conversant with the law (on matters of the law).

The question that is always asked is whether these UDCs are capable of administering justice in as far as the right to a fair hearing is concerned and the impartiality of the court given its composition and the one who appoints the members. There have been arguments that members are chosen by the commander in chief through his cronies and as such his interests are served.

However, its important to note that even in civil courts, the constitution mandates the president to appoint judges and justices. The input of the justice commission is low. Also, we should address our mind to the fact that the American justice uses the jury system where members of the jury are ordinary persons who don’t know the law but are guided by a judge on points of the law. In fact, one would be justified to state that whatever flows and challenges faced by the military justice system is more less the

\textsuperscript{54} UPDF Act no. 7 2005
\textsuperscript{55} S. 195 UPDF Act no. 7 2005
\textsuperscript{56} Ibid
\textsuperscript{57} S. 227(1)
same faced in civilian courts, the only difference being that one justice system is carried out within the confines of a military set up whereas the other is not but they all use the same procedure save for the composition of court. Therefore, much as the UDCs are faced with their challenges, such should not be construed to poor administration of justice as is fronted by some sections of the public.

3.3. Division Courts Martial
The UPDF Act establishes a division court martial for each division or equivalent foundation of the defence forces.\(^{58}\) The division court martial has unlimited original jurisdiction under the Act\(^{59}\). It consists of a chairman who is not below the rank of a major, two senior officers, two junior officers, a political commissar and a non commissioned officer\(^{60}\) and are appointed by the high command. All of them are eligible for re-appointment\(^{61}\). The quorum of a division court martial is 5 members but when trying a person for a capital offence; all members of court shall be present\(^{62}\). The powers to convene the division court martial vests in the High command on any other authority authorized in that behalf by the high command.\(^{63}\)

3.4. The General Court Martial
Under Uganda’s military justice system is established the General Court Martial which is the second highest court in Uganda’s military justice system\(^{64}\). It comprises of the chairman (not below the rank of Lt. Colonel), two senior officers, two junior officers, a political commissar and one non commissioned officer\(^{65}\) and are appointed by the high command for a period of one year and eligible for reappointment.\(^{66}\)

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\(^{58}\) S. 194
\(^{59}\) Ibid
\(^{60}\) Ibid
\(^{61}\) S. 198
\(^{62}\) Ibid
\(^{63}\) S. 196
\(^{64}\) s. 197(1)
\(^{65}\) Ibid
\(^{66}\) S. 198(9)
The General court martial has revisionary powers in respect of sentences, findings or orders imposed by summary trial authority or unit disciplinary committees. The quorum of the General court martial is five members but when trying an accused person for a capital offence, all members of the court must be present. The General court martial has unlimited jurisdiction.

3.5. The Court Martial Appeal Court

The court martial appeal court is the highest in Uganda’s military and as such, it hears and determines all appeals referred to it from the General Court Martial. It comprises of a chairperson who must be an advocate qualified for appointment as a judge of the High court of Uganda, two senior officers of the Defence forces and two advocates who must be members of the defence forces. All members of this court are appointed by the commander-in-chief of the UPDF on the advice of the High Command. The registrar of the court martial appeal court, who must be a legally qualified person is appointed by the High Command. The quorum of the court martial Appeal court is three members but when considering an appeal against a judgement involving a sentence of death, the quorum must be 5 members. The court martial appeal court is the last appellate military tribunal in Uganda. No appeal lies from the court martial appeal court to any other court except cases of appeal against convictions involving death sentences or life imprisonment. In such cases, the appellate has a right to appeal to the court of appeal.

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57 S.197(3)
58 S. 198(c)
59 S. 199(1)
60 S.1999(2)
61 Regulation no. 3(1) of the UPDF (court martial appeal court) Regulations statutory inst. No. 307
62 S. 19993)
63 Regulation 4(2) of the UPDF (court martial appeal court) Regulations
64 Regulation 20(2)
CHAPTER FOUR
COMPLIANCE OF UGANDA’S MILITARY JUSTICE WITH THE RIGHTS OF AN ACCUSED PERSON IN THE ADMINISTRATION OF JUSTICE

4.0. Introduction
Having seen the composition of military courts in the preceding chapter, we now critically analyse how they operate (practically) and see whether they comply with the rights of an accused person considering the right to a fair hearing, right to a competent tribunal, right to an independent and impartial tribunal and the right to a public hearing. Of course, there have been arguments that there is no rights observed in military courts by sections of the public and that's what we are going to expand on in this chapter.

4.1. Right to a fair hearing
The right to a fair hearing goes to the heart of every trial as its guaranteed under the constitution. Minus, fair hearing, one can't say that there was even a trial under Article 28.

Of course, it has to be realized that over the years, military justice has been gaining status in as far as a fair trial is concerned. This is attributed to the administration of justice in civil courts in general. It has not come easily as there have been ups and downs but in the end, there is much to be desired than before.

Given the set up of military courts, there has been and still doubts about the concept of a fair trial. As has been seen in the chapters before about the composition of military courts, its more less a jury only that the accused person doesn’t get to participate in choosing them directly. However, when doing their work, they are governed by the same laws that govern civil courts in as far as a fair trial is concerned.

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75 Art. 28 constitution 1995
In the military courts that have been discussed before, there is hierarchy of appeals from the lower courts up to the last one. The jurisdiction of the General Court martial in relation to a fair hearing was also discussed in the case of **Uganda Law Society Vs A.G.**\(^76\) where the constitutional court held by a majority of 4-1 that the General Court Martial did not have the jurisdiction to try the accused person and the trial among others contravened Art 28(1) of the constitution. This case was brought in reference to the concurrent jurisdiction of the GCM with the High Court during the trial of Besigye and twenty two others. Its therefore observed here that overtime, matters to do with the fair hearing in the administration of justice in military courts has been streamlined overtime and now, one can say that, fair hearing is exhibited in these courts. This is seen from the administration of justice from the colonial times when the governor had all the powers to president Amin’s time where the courts martial could do anything they wanted. In fact during Amin’s time, no body (as they were in Limbo) could dare bring any petition (constitutional) against government for fear of being in the wrong books of the government. Its therefore, worthy to state that the military justice as it is today in relation to the concept of a fair hearing has to greater part been harmonized with the way its done in civil courts.

### 4.2. Right to an independent tribunal

Perhaps, the most important guarantee to a right to a fair trial is the right to an independent tribunal. It’s a right guaranteed under the international conventions and the constitution of Uganda\(^77\). Therefore, its only an independent tribunal that is able to render justice impartially on the basis of the law.

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\(^76\) Constitutional petition no. 1 of 2006  
\(^77\) Art. 28(1)
Under the UPDF Act\textsuperscript{78} a law that was enacted by parliament specifies the way these tribunals are set up and their composition\textsuperscript{79}, as has been seen in the preceding chapter. These tribunals are appointed by the High Command which is the top most body of the Defence Forces chaired by the commander in chief. However, in case of Unit Disciplinary Committees, the high command delegates its appointing authority to any other authority to appoint the members of the tribunal (Division commander)\textsuperscript{80}

These members then swear an oath of allegiance to uphold and preserve the law and to try the accused persons basing on the law without fear or favour. Of course, it has to be observed that like it is in civilian courts, members of these courts are faced with the challenge of those who want to corrupt them.

Given the history of military justice in Uganda and other national armies in general, it's still arguable that the composition of military courts given the fact that they are composed of a committee of more than 3 persons who are soldiers, that in itself is good because its more less a bench although not conversant with law but have a judge advocate to guide them on matters of the law.

It's also worth mentioning that because the committee is composed up of serving soldiers, its easier for them since the person being tried is a soldier himself. Therefore, the military tribunal set up are in turn mandated to try fellow soldiers of service offences, is okay save for those challenges that face the entire administration of justice in Uganda as a whole.

4.3. Right to a public hearing

This is also guaranteed under the constitution of Uganda, which states that in the determination of civil rights and obligations or any criminal change, a person shall be

\textsuperscript{78} Act of 2005
\textsuperscript{79} S. 197, S. 198 S.199, S. 195 UPDF Act 2005
\textsuperscript{80} 196(1)(2) UPDF Act 2005
entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. 81

As has already been seen, military courts are by law established. Military courts have designated public places where they conduct their hearings save for when it is necessary to hear the cases in camera for purposes and all intent of national security. 82 For example, the Kasese trials by the General Court martial are being held in open court in the very places where the accused persons committed the offences.

Over time, the UPDF has carried out public hearings for both the General court martial and division courts martial in villages or towns where the accused persons committed the offences.

The army spokesperson by then Col. Felix Kulaigye said that it has helped the UPDF and the general public to bond more. Of recent, UPDF is ranked among the best institutions people have trust in around the country. 83

All in all, the military justice in Uganda under the UPDF has enhanced the principle of public hearings unlike the way it was before.

4.4. The legality of the trial of civilians in military courts

Due to the much insecurity that was witnessed during the 1990s around the country because of the many rebel groups fighting government by then, Operation Wembley was formed. 84 As a result, those arrested by Operation Wembley were ultimately handed over to the military justice to be tried before courts martial.

81 Art. 28(1) Constitution 1995
82 Art 28(2) Constitution 1995
83 New Vision 13 Oct 2012 page 16
84 Operation Wembley was formed at a meeting of security chiefs on June 25, 2002 chaired by President Yoweri Museveni
Also under the Karamoja disarmament operations many civilians were arrested with guns who were also brought before military courts for trial. At the time, there was need to use military courts to try the suspects as was asserted by the president Museveni.

"The killers were being arrested, taken to civilian courts and released back to the streets to commit more crimes. The court martial ended that nonsense... The General court martial is good because it reduces our problems by hastening trials of criminals. It deals mainly with soldiers and other suspects who are found with illegal weapons or who abet or aid crime with weapons, terrorists, rebels, Karimojong cattle rustlers and other such criminals"\(^{85}\).

However, in January 2006, the constitutional court ruled in **Uganda Law Society Vs A.G.** that the military courts did not have jurisdiction over civilians.\(^{86}\) Court held that civilians who don’t fall under the categories stated in the UPDF Act are not liable to be tried by military courts because parliament did not intend them to be so tired. In its summary, the court specifically stated that the trial of civilians accused of terrorism and unlawful possession of firearms before military courts is unconstitutional. In January 2009, the Supreme Court dismissed an appeal by the Attorney General, and upheld the constitutional courts ruling on this issue.\(^{87}\)

However, even with a judgement of the highest court in the country, the military courts have gone on to try civilians. Between June 2010 and July 2011, the Human Rights Watch observed over 30 sessions of the General Court martial in Kampala, in which civilians were among those prosecuted.\(^{88}\)

According to an interview with the Human Rights Watch with the deputy chief of legal services in 2011, there were 341 cases involving civilians pending before military courts.

It’s on this background therefore, that in as far as trying civilians in military courts is concerned that the concept of a fair hearing is not accorded to them. Article 28 of the constitution is thus abused given the ruling of the Supreme Court on the matter.

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\(^{85}\) Alfred Wasike, "Museveni Defends court martial" New Vision Nov 30, 2005


\(^{87}\) Constitutional appeal No. 1 of 2006

\(^{88}\) Human Rights Watch (Addressing Uganda’s unlawful prosecution of civilians in military courts)
CHAPTER FIVE
RECOMMENDATIONS

5.0. Introduction
Having seen in the preceding chapter the compliance of military justice with the rights to fair hearing in the administration of justice, this chapter proposes major recommendations that can help to ensure compliance of Uganda’s military justice system with the right to a fair trial in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. The major issue on challenge is that regarding how to ensure that military justice system in Uganda complies with the rights of a fair trial in its administration of justice without compromising or undermining military discipline which acceptably is important for ensuring military efficiency.
That although enforcing military discipline, can remain as one of the major objectives of military justice, the administration of military justice should importantly be concerned with dispensing justice with respect to the person’s subject to military law. Its from this perspective that we now recommend the following.

5.1. Recommendations

Ensuring more independence and impartiality of Uganda’s military tribunals
This research earlier showed that although this independence and impartiality are there, they to some extent fall short of the required in international standards as there is no security of tenure for judicial officers and the court members. Therefore we recommend that the law is amended to give security of tenure, financial security (allowances) for members.

Guaranteeing the independence and impartiality of the judge advocates
To avoid their arbitrary removal as judge advocates which could undermine their independence, the law should explicitly state the circumstances and manner under which they can be prematurely removed. Its therefore submitted that the grounds for their removal should be similar to those pertaining to the removal of judicial officers in the civilian justice system i.e they should be only removed prematurely from their
offices for inability to perform the functions of their offices arising from infirmity of the body or mind, misconduct unbecoming of a judicial officer or incompetence. Except in cases of military exigencies, the law should also require that the judge advocate should not be redeployed or transferred to non-judicial functions which would affect the carrying out of their judicial responsibilities.

It is also recommended that their professional allowances should be raised to a level befitting an advocate like it is with medical personnel; where a clinical officer earns a professional allowance of five hundred thousand shillings whereas a para-legal who are majority prosecutors in the UPDF earn two hundred thousand shillings as their professional allowance. This sets a wrong precedent in a way that one profession is held to be more important than the other.

**Guaranteeing the independence of the members of military tribunals**

It may be asked whether since members of military tribunals act as and play roles similar to those of a jury; they require any special measures to guarantee their independence and impartiality. It is submitted that the circumstances under which the military members of military courts operate, justify the need to safeguard them against the ever-present possibility of command influence and pressure from the military hierarchy which is not the case with members of an ordinary jury. Therefore, beyond the oath that the members of military tribunals take and the fact that they need to respect the advice and directives of the judge advocate, they require additional measures to secure their independence and impartiality.

One key measure recommended is that chairman of courts martial and Unit Disciplinary Committees should also have sufficient security of tenure of six years renewable and to be only removed prematurely on the same grounds as has been recommended for judge advocates.

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89 Art. 144(2) of the constitution
Also recommended is that members of these courts are given an allowance as an enticement which may deter them from taking bribes or (and) even make them love their work.

Guaranteeing the institutional independence of military tribunals

One major concern that Uganda’s military justice is concerned with, is the failure to guarantee the independence of military prosecutions and judge advocates from the military chain of command and the executive. There is no clear separation of the prosecution function and the military chain of command.

To address the above, we strongly recommend that a line be drawn between the chain of command and prosecution so that prosecutors are allowed to do their work. As of today, it’s very hard for the prosecutors because, they are prevented from applying their professionalism because they are told on which case files to prosecute and those not to prosecute whether evidence is sufficient or not.

The remuneration of prosecutions and judge advocates and the funding of the chieftaincy of legal services in general should be increased so that its harmonized to the level of other chieftaincies.

On this note, it’s worth mentioning that the legal fraternity under the UPDF have contributed tremendously to the discipline that is visible in the UPDF as a force to reckon with in Africa today.

It’s also recommended that Uganda’s military justice legal framework should establish the office of the Principal Military Judge. This office would be constituted of the principal military judge and his staff the judge advocates. As such, this office would take over power to appoint judge advocates to the different military tribunals from the High Command. This would be better because, the office of the Principal military judge would be knowing better which advocate to put in which court depending on their capacities.
Ending the jurisdiction of military courts over civilians

With respect to the question of jurisdiction, it is submitted that Uganda’s military tribunals should not have jurisdiction over civilians except in circumstances associated with war or in situations where Uganda’s ordinary courts are out of reach. Therefore as was decided in the case of Uganda law society Vs Attorney General, military courts should cease from trying civilians courts.

However, given the complexity of some issues touching national security, the military, through the minister of defence and through cabinet can table a bill in parliament to have the law changed to allow military courts to try civilians in cases where they deem that the national security of the country is at stake.

Until this is done, the military justice system in Uganda ought and must respect the decision of the Supreme Court of Uganda.

5.2. Conclusion

The major objective of this dissertation was to examine the law and practice in the administration of justice in military courts with emphasis on the right to a fair trial. The right to a fair trial constitutes the most important guarantee for ensuring justice in any democratic society. There cannot be justice from a system whose legal framework and tribunals do not protect and guarantee the right to a fair trial. Therefore, as long as Uganda’s military justice system exercises judicial power over criminal offences or matters that are criminal by nature, then it must comply with the right to a fair trial as enshrined in the constitution.

The only legally acceptable alternative would be to remove the jurisdiction of the military justice system over criminal matters so that it deals with only disciplinary offences that do have penal sanctions; like it is under the Uganda Police Force while a few countries like Sweden, Denmark and Germany have successfully done this, it may not be feasible in Uganda’s circumstances for some reasons. First, many of Uganda’s military units and bases are still isolated from civilian places where ordinary courts are
based. Also, executing such a reform requires much planning and a lot of reorganization not only on the part of the judiciary but the entire ILOs and military authorities. For now therefore, Uganda’s military justice system can remain with the jurisdiction over criminal matters but must comply with the right to a fair hearing.

It has also been established that Uganda’s military justice system has some shortcomings. Although the military authorities could argue that there is no evidence of the military hierarchy command on the executive exerting pressure on the Judge advocates and members of military tribunals, this does not mean that command influence, and pressure on members does not actually happen. As Baum and Barry rightly observed that command influence can take so many subtle forms. Yet even if there was no command influence or pressure exerted on members of military tribunals, it does not mean that Uganda should not put in place sufficient legal safeguards against occurrences to guarantee their independence and impartiality. After all, there is evidence of command influence over military judges in many countries including those whose democratic credentials are highly rates. For instance in his article titled “military judges and military justice. The path to judicial independence” Fidell discusses some of the major instances of command influence and retaliation over military judges that have happened in America’s military justice history.

On his part, citing some instances of retaliatory transfer of special court martial judges, Sherman observed that although military judges have generally become more judicial and wearing robes in some instances, they remain officers of the service and as such the changes have not removed them from the ultimate military hierarchical command or from the inherent career pressures towards accommodations in the officer society of a military installation. He pointed out that sometimes pressure is applied to military judges, especially the low ranking legal officers of court. It is therefore important that

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90 Baum & Barry (1989) United States Navy-Marine Corps Courts of military review Vs Carlucci
Uganda’s military justice undertakes reform of its military justice system to provide for effective measures to safeguard the members of military courts and other judicial officers in the military justice system from the command influence and pressure and generally ensure that persons subject to Uganda’s military law enjoy all the guarantees for a fair trial. The reforms that have been discussed in this dissertation if adopted and effectively implemented, will go a long way in ensuring the compliance of Uganda’s military justice with the right to a fair hearing.

The time is therefore now for Uganda to reform its military justice system to ensure that it meets the minimum human rights standards for administering justice embedded in the right to a fair trial. Compliance of Uganda’s military justice system with the right to a fair trial will not only ensure justice for persons subject to military law but will also promote sustainable discipline in the armed forces, advance the rule of law, respect for fundamental human rights and democracy in Uganda.
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