AN APPRAISAL OF THE LEGAL DUTIES OF MILITARY COURTS IN THE UGANDA CRIMINAL JUSTICE SYSTEM

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DECLARATIOIN

I **ORISHABA GODFREY KASIIKU** , declare that this is my original work and has never been presented to any other university or institution for award of any academic qualification.

Signed.....

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APPROVAL

This is to certify that this Research report entitled **"An Appraisal of the Legal Duties of Military Courts in the Uganda Criminal Justice System.**

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Date 13/6/2015.....

DEDICATION

This Research report is dedicated to my beloved parents Mr. NYAMUSINGURA JAMES KASIIKU and Mrs. TUMWEBAZE ALICE for their continuous financial and moral support. Also to my beloved wife MS. ORISHABA MBABAZI ANNET and my Sister, Nevious.

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LIST OF ACRONYMS

ACODE Advocates Coalition for Development and Environment ACHPR
African Commission on Human and Peoples' Rights ACHR
American Convention on Human Rights
CAS Centre for African Studies
ECHR European Convention on Human Rights ECrtHR
European Court of Human Rights
FDC Forum for Democratic Change
IRC Human Rights Committee
ICCPR International Covenant on Civil and Political Rights ICJ
International Commission of Jurists
IHL International Humanitarian Law
JLOS Justice, Law and Order Sector
JSC Judicial Service Commission
KAR King's African Rifles
MJSC Military Judicial Service Committee
NDPP National Director of Public Prosecutions NRA
National Resistance Army
NRC National Resistance Council
NRM National Resistance Movement
OAU Organisation of African Unity
OSCE Organisation for Security and Cooperation in Europe PMJ
Principal Military Judge
ANDSOAS School of Oriental and African Studies UDHR
Universal Declaration on Human Rights UHRC
Uganda Human Rights Commission
ULS Uganda Law Society
UK United Kingdom
UDC Unit Displinary Committee
UDCM Division Court Martial
UGCM Genal Court Martial
UN United Nations
UPDF Uganda Peoples' Defence Forces
USANDF South Africa National Defence Force

Summary of the Report and Policy Recommendations

The United Nations Human Rights Committee has emphasized that the right to a fair trial (which includes the right to an independent and impartial tribunal) applies in full to military courts as it does to the ordinary civilian courts. Based mainly on Uganda's military justice legal framework, this article critically examines the compliance of the country's military courts with the right to an independent and impartial tribunal. It is established that Uganda's military courts fall far short of meeting the essential objective conditions for guaranteeing the right to an independent and impartial tribunal. First, they do not have adequate safeguards to guarantee their institutional independence, especially from the military chain of command. Second, the judge advocates appointed to Uganda's military courts do not have adequate security of tenure. Third, the judge advocates and members of Uganda's military courts do not have financial security. To address these deficiencies, a number of recommendations shall be made, including establishing the office of an independent principal military judge to be in charge of appointing judge advocates to the different military courts; established office of director of military prosecutions in charge of prosecutions within the military should be left independent in execution of its duties.

CHAPTER ONE

BACKGROUND

The importance that Uganda's military justice system plays in the overall administration of justice in Uganda cannot be over-emphasized. Specifically, military courts 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.[1] Although originally designed to try serving members of the armed forces for the commission of military offences,[2]

INTRODUCTION

As the analysis in Chapter three will show, Uganda's military justice system now has jurisdiction over both military personnel and civilians.

Although in the latter case the jurisdiction is limited, it is worryingly likely to increase. For instance, in June 2010, while delivering his annual State of the Nation Address, President Museveni is reported to have asked Parliament to consider giving jurisdiction to military courts to hear matters involving corruption (whether by military personnel or civilians)[3]. Government has also previously indicated the possibility of changing the law to extend the jurisdiction of military courts to hear cases involving persons suspected of involvement in the abominable practice of child sacrifice.[4] The major reason always advanced for the need to expand the jurisdiction of military courts over civilians and over matters that ordinarily fall within the jurisdiction of ordinary courts is that the civil courts take long to dispose of cases. For instance, when he asked the Parliament to extend the jurisdiction of military courts to hear corruption cases, President Museveni is quoted to have remarked that there are loopholes in the trial of corrupt officials in the civilian courts as they waste a lot of time seeking evidence.[5]

This research in Section 1.1 however establishes that, in many cases, Uganda's military courts also take long to dispose of cases. The reason of civilian courts taking long to dispose of cases is therefore not a sound justification for expanding the jurisdiction of military courts.

Uganda's military justice system now also embraces a number of crimes; many of which have no bearing on military discipline and, in ordinary cases, would fall under the jurisdiction of civilian

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1 Military law is a code which regulates the conduct of members of the armed forces, and which ordinarily is not supposed at in some jurisdictions like Uganda applies to civilians in certain circumstances. The major objective of military law is to nsure discipline and good order in the armed forces. See Dambazau AB (1991), Military Law Terminologies, Spectrum ooks Limited, Ibadan, p.75. It is always

2 Military offences are generally those crimes which are unique to the military in the interest of maintaining discipline and ood order, which are subject to military court trials when committed by persons subject to military law

3 See Osike J and Among B, Corrupt Officials May Face Military Court, The New Vision, 2 June 2010

4 See Maseruka J, Police Issues Measures to Fight Child Sacrifice, The New Vision, 5 January 2009.

5 Supra note 5

courts. Examples of such crimes include assault, rape, defilement, larceny, and burglary and traffic offences. According to the Uganda Peoples' Defence Forces (UPDF) Act 2005 which is the major legal framework governing the administration of military justice in Uganda, a person subject to military law, who does or omits to do an act which constitutes an offence under the Penal Code Act or any other enactment, commits a service offence and is therefore liable to trial by a military court.[6] Unfortunately, despite the role that military justice plays in the overall administration of justice in Uganda, the issue of how the country's military tribunals (as the major mechanism for administering military justice) administer justice remains an area that hardly receives any scholarly attention and inquiry. In particular, there is hardly any study that has comprehensively assessed the conformity of Uganda's Military justice system with the right to a fair trial.

For the important role that the right to a fair trial plays in ensuring justice, securing the protection of other human rights and fundamental freedoms, and safeguarding the rule of law, it is recognized and protected by several regional and international human rights instruments to which Uganda is party. Key among these instruments is the International Covenant on Civil and Political Rights (ICCPR)[7] and the African Charter on Human and Peoples' Rights (herein after referred to as the African Charter).[8] Regarding the former, the United Nations (UN) Human Rights Committee (HRC) – the UN body charged with the interpretation and enforcement of the ICCPR, has emphasized that the right to a fair trial as provided for in Article 14 applies to military tribunals in full just as it does to the civilian and other specialized tribunals.[9] In no uncertain terms, the African Commission on Human and Peoples'Rights (ACHPR) has also forcefully stressed that —...military tribunals must be subject to the same requirements of fairness, openness, and justice, independence and due process as any other process. It is thus clear that in the administration of military justice, military courts are not an exception when it comes to the requirement to protect and respect the right to a fair trial.

This dissertation majorly concerned with the legal duties 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 court in comparison with the ci vil courts and casts strong doubt on their current set up to administer fair justice according to the minimum international human rights standards embedded in the right to a fair trial. By way of setting the stage for the analysis that follows, the important preliminary questions that must be addressed at this point are: What is military justice? Is military justice, justice at all? What are the justifications for having military justice as a separate system of administration of justice? To what extent are these justifications valid in Uganda's context? Do

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See Section 179.

The ICCPR was adopted 16 December 1966 at New York, entered into force on 23 March 1976,

0The African Charter was adopted 27 June 1981 at Nairobi, entered into force on 21 October 1986. Uganda ratified the frican Charter on 10 May 1986.

See HRC General Comment No.32 (Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial), dopted at the Ninetieth Session of the Human Rights Committee, 23 August, 2007.

nilitary personnel waive their human rights including the right to a fair trial by the mere fact of ɔecoming soldiers? Section 1.1 below analytically tries to provide answers to these questions among ɔther issues.

1.1. The Concept of Military Justice

The essence of military justice has been highlighted in a number of scholarly writings[10] and in the ase law of numerous jurisdictions. The concept of military justice largely revolves around the ɔstifications for military justice as a separate system of administration of justice[11] through Military Tribunals: [12]

ɔccording to the UN Commission on Human Rights, military justice is not and should not be onsidered as a separate system of administration of justice but an integral part of the general justice ystem. See the UN Draft Principles Governing the Administration of Justice through Military Tribunals (herein after referred to as — the extent to which members of the armed forces are entitled ɔ the respect and protection of their human rights and fundamental freedoms. As opposed to civilian ɔstice, military justice is a system of administration of justice which applies to members of the armed ɔrces and other persons subject to military law. It has the monopoly in dealing with military offences. ɔs earlier pointed out, military offences are generally those crimes which are unique to the military ɔhose major objective is to enforce discipline and good order in the army.[13] They include such ffences as disobedience, desertion, absence without leave, cowardice, mutiny, insubordination and onduct prejudicial to good order and discipline. It is said that some of these offences like ɔsubordination are as fatal to armies as gangrene is to human beings.[14] A notable feature about many f these military offences is that they are cast in very broad and vague language which gives the ɔilitary courts wide discretion when it comes to adjudicating cases involving suspected infraction of ɔilitary law. Take for example the offence of conduct prejudicial to good order and discipline[15] In ddition to encompassing all the other specific military offences; it can include many other undefined ɔings which in the opinion of the military court are prejudicial to good order and discipline. Although ection 178 (5) of the UPDF Act provides some of the instances that amount to conduct prejudicial to ood order and discipline of the Defence Forces. Section 178 (6) states in no unclear terms that, lothing in subsection (5) shall affect the general effect of subsections (1) and (2). It is submitted that ɔe very broad and vague language in which many military offences are cast makes the administration

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Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria, African ommission on Human and Peoples' Rights, Comm. No. 218/98 (1998), para.44.

See for instance, Gibson MR (2008), —International Human Rights Law and the Administration of Justice.

Charterhouse, New York and Sherman EF (1973), —Military Justice Without Military Control.‖ The Yale Law Journal, ol.82, No.7, pp.1398-1425

Supra note 2.

See Lindley (1990), supra note 1.

Section 178 (1) of the UPDF Act, 2005

f military justice susceptible to abuse and manipulation. The noncompliance of a military justice ystem with the right to a fair trial makes the problem even worse.

listorically, as Sherman correctly observes, military justice developed as a separate legal system nder command control because military units were often isolated from civilians

IN Principles on Military Justice), U.N. Doc. E/CN.4/2006/58 (2006), paras.3, 10 and 11. See also IN Commission on Human Rights Resolutions 2004/32 and 2005/30. Provides that any act, conduct, isorder or neglect to the prejudice of good order and discipline of the Defence Forces shall be an ffence and each other.[16] Commanders therefore needed the power to convene military courts staffed ith their own officers so that a quick determination of guilt or innocence could be made.[17] However, espite the fact that modern transport and communication have ended the isolation of military units nd that the trial of service men in civilian courts is feasible in most situations, military justice still emains as a separate system of administration of justice in many countries.[18] Advocates for military stice as a separate system of administration of justice advance a number of theoretical arguments in pport of their viewpoint.[19]

irst, it is often argued that the military is a unique society apart from civilian life which requires ifferent legal standards that the civilian courts cannot appreciate or adequately enforce. *In Parker v.* evy[20]delivering the judgment of the Supreme Court of the United States of America, Justice *ehnquist* emphasized the specialized nature of the military society as thus:

he Court has long recognized that the military is by necessity, a specialized society separate from ivilian society. We have also recognized that the military has, again by necessity, developed additions of its own during its long history. The military constitutes a specialized community overned by a separate discipline from that of civilians .

or most part, military tribunals were not regarded as courts at all, but rather as instrumentalities of e executive power provided to aid Presidents as Commanders-in-Chief, through their authorized ilitary representatives, in properly commanding the armed forces and enforcing military discipline.

1.2. Statement of the Problem

The right to a fair trial is the foundation of any criminal justice system in a democratic society; vithout which, justice remains a mockery. The problem of this dissertation is the rope holes in military criminal justice system in comparison with the civil system. It is the critical element in the protection and realization of all the other internationally protected and guaranteed human rights and

Sherman (1973), supra note 13,
Ibid.
Sherman (1973), supra note 13
Vol.125, No.2, p.314.
[0] Parker v. Levy, 417 U.S. 733(1974).

freedoms.[21] 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.[22] It is indispensable in the protection of the individual against abuse of the criminal justice process by the state and its agents.[23]

The right to a fair trial is protected and affirmed by key international and regional human rights instruments to which Uganda is party. Key among these is the ICCPR and the African Charter.[24] As a state party to these instruments, Uganda is obliged in accordance with the doctrine of *pacta sunt servanda*[25] to fulfil its obligations in good faith. Importantly, the HRC has emphatically made it clear that the right to a fair trial as provided for in Article 14 of the ICCPR, applies to military tribunals, just as it does to the civilian and other specialized tribunals.[26] Similarly, the ACHPR has stressed that military tribunals must be subject to the same requirements of fairness, justice and due process[27] Principle 2 of the U.N. Principles on Military Justice[28] also emphasizes that .military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial Military tribunals are therefore not an exception as regards the obligation to protect and uphold the right to a fair trial. The right to a fair trial imposes on states, the duty to organize their courts (including military tribunals) in such a way that they comply with each of its requirements.[29] This includes complying with the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. The extent to which Uganda's military justice system complies with this right is the major focus of this thesis.

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.[30] As such, the administration of military justice is often left

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Lederer F and Zellif B (2003

HRC General Comment No.32 (2007), supra note 11, para.2.

Ibid.

Supra notes 9 and 10

[25] The doctrine of pacta sunt servanda provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. This doctrine which is a principle of customary international law is codified in Article 26 of the Vienna Convention on the Law of Treaties, 1969. The Vienna Convention on the Law of Treaties was adopted on 23 May 1969 at Vienna, entered into force on 27 January 1980. For a detailed analysis of the doctrine of pacta sunt servanda, see, Dixon M and McCorquodale R (2003), Cases and Materials on International Law, Fourth Edition, Oxford University Press, Oxford, pp.67-68.

[26] HRC General Comment No.32 (2007), supra note 11, para.22.

Supra note 12.

Supra note 14.

See Gunes v. Turkey, Application No. 31893/96, ECHR para.31. See also Pelissier and Sassi v. France, (2000) 30 EHRR 15, para.74

That this is the case is evident in the case of Uganda Law Society v. Attorney General, Constitutional Petition No. 18 of 005 [2006] UGCC 10 (31 January 2006). In this case, Justice Kikonyogo while delivering the judgement of the

ut of many initiatives aimed at improving the administration of justice in the country. For instance, nder the Justice, Law and Order Sector (JLOS) which is a sector wide reform process ongoing across he entire sector, several studies have been commissioned and done on the question of administration f justice in Uganda, but there is none that focuses on the issue of military justice. In fact, a review of he key documents of JLOS suggests that the administration of military justice is not part of its genda.[31]

he net effect of all this, in particular the failure to have any comprehensive analytical study on the uestion of military justice and the right to a fair trial has been the introduction of reforms that do not ddress the fundamental issues as far as helping Uganda's military justice system to comply with the ountry's international human rights obligations is concerned. For instance, although the UPDF Act 005 was intended to streamline Uganda's military law with the Constitution and the country's nternational obligations, inter alia, an analysis of the reforms introduced therein hardly shows any nprovement in the area of military justice, especially in as far as the right to a fair trial is concerned. mong other reasons, this could plausibly be attributed to the fact that the military law reform process as never informed by any incisive research on the question of military justice and human rights. In ct, with due respect, a review of the relevant Hansards shows that the Parliamentary debate leading the enactment of the UPDF Act 2005 was shallow, uninformed and sometimes misinformed on the uestion of military justice and the right to a fair trial.[32] It is in this regard that a research of this nature ecomes imperative for prompting and informing future reform of the country's military justice ystem to ensure that it complies with the minimum international human rights standards for dministering justice.

he researcher therefore would like to assess the legal duties of military courts and make appropriate ecommendations

1.3. Objective and Significance of this dissertation

he major objective of this dissertation is to assess the role played by the military courts in the rocess of administration of justice

a. To examine the history of military courts
b. Analyze legal statutes in military courts.
c. Examine the military courts in the dispensation of justice

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onstitutional Court held that General Court Martial was not subordinate to the High Court because in the first place, it was t a court of judicature under Article 129 (1) of the Constitution. The correct position was finally stated two years later by stice Mulenga while delivering the judgement of the Supreme Court in the case of Attorney General v. Joseph mushabe, Constitutional Appeal No. 3 of 2005 [2008] UGSC 9 (9 July 2008). Justice Mulenga emphasised that although ilitary courts are a specialised system to administer justice in accordance with military law, they are part of the system of urts that are, or deemed to be established under the Constitution to administer justice in the name of the people. He ld that the General Court Martial is both a subordinate court within the meaning of Article 129(1) of the Constitution and wer than the High Court in the appellate hierarchy of courts.

Art28 Uganda constitution 1995 as amended

d. To make an appropriate recommendations.

1.5. Scope

he right to a fair trial as provided for in the constitution[33] and international human rights law is very road and multifaceted. It includes the right to a fair and public hearing by a competent, independent nd impartial tribunal established by law;[34] the right to be presumed innocent until proved guilty ccording to law[35] and the minimum guarantees stipulated in Article 14 (3) of the ICCPR. These nclude: the right of accused persons to be informed promptly about the charges against them;[36] the ight to adequate time and facilities for the preparation of their defense;[37] the right to be tried without ndue delay;[38] the right to legal counsel;[39] the right to examine, or have examined the witnesses gainst them;[40] the right to an interpreter[41] and the right against self-incrimination.[42] The right to a fair ial also includes the right of convicted persons to have their conviction and sentence reviewed by a igher tribunal[43] and the right not to be subjected to double jeopardy.

n their totality, the above highlighted guarantees for ensuring a fair trial constitute the minimum nternational human rights standards for the administration of justice in any democratic society. ailure to meet the requirements of one element is enough to constitute noncompliance with the right o a fair trial. It is for this reason that it is always important to analyse the right to a fair trial as a hole. However, from its breadth as summarized above, it is clear that a thorough appraisal of all nese elements of the right to a fair trial in Uganda's military justice system cannot be covered in this nesis owing to the required word limits. For purposes of manageability therefore, this research mainly ocuses on appraising the right to a fair and public hearing by a competent, independent and impartial ibunal in Uganda's military justice system. In spite of this limitation in scope, it is gratifying that ne focus covers the core of the right to a fair trial.

n appraising the right to a fair and public hearing by a competent, independent and impartial tribunal, e mainly focus on analyzing Uganda's military justice legal framework. As Decary J rightly mphasized, in examining the compliance of certain aspects of military justice with human rights andards, legislative and regulatory provisions speak for themselves and if they are prima facie an fringement of the rights guaranteed... no further evidence is necessary.[44]

Ibid Article 28
Ibid, Article 14 (2)
Ibid, Article 14 (3) a.
Ibid, Article 14 (3) b
Ibid, Article 14 (3) c.
Ibid, Article 14 (3) d.
Ibid, Article 14 (3) e.
Ibid, Article 14 (3) f.
Ibid, Article 14 (3) g.
Ibid, Article 14 (5).
Ibid, Article 14 (7).
R v. Genereux (1990) 5 C.M.A.R. 38, p.59

1.6 Literature Review

'here is very little scholarly work on the question of military justice and human rights both at the nternational and national level. In particular, there is no comprehensive analytical study that has xamined the compliance of Uganda's military justice system with the minimum international tandards for the administration of justice embedded in the right to a fair trial. The literature on the opic under study in this dissertation is therefore very limited. Having considered the literature on the oncept of military justice in the analysis in Section 1.1 above, in this Section, we mainly analyse iterature on the right to a fair trial especially as it relates to the administration of military justice. This iterature can generally be reviewed under the following themes.

1.6.1. The Right to a Fair Trial as an Internationally Guaranteed Human Right

'he right to a fair trial as a human right is perhaps the only thematic area of this study with relatively ufficient literature. The major literature that has considered the right to a fair trial as a human right nclude: Harris' classic article which analyses the right to a fair trial as a human right with reference to ne provisions of the ICCPR, the ECHR and the draft Inter- America Convention on Human Rights;[45] Veissbrodt's text which gives an account of the drafting history of the right to a fair trial provisions in ne UDHR and the ICCPR and tries to explore how they have been interpreted especially by the HRC;[46] and Trechsel's book which discusses human rights issues in criminal proceedings.[47] Although nis literature has been very important in providing some insights to this research, it is mainly written n general terms. Most of it also precedes important human rights instruments and pronouncements of ne HRC in which different aspects of the right to a fair trial have been interpreted and expounded pon. This is for instance true of *Harris 'work* which precedes the adoption of the UN Basic Principles n the Independence of the Judiciary[48] and the two HRC authoritative General Comments on the right o a fair trial.[49] Although *Weissbrodt's* work was published much later i.e. in 2001, it is based on HRC ieneral Comment No.13 (1984)[50] which has since been replaced by HRC General Comment No.32 2007).112 Since 2001, the HRC has also passed many decisions of great importance to the right to a air trial which need evaluation; a task that is undertaken in this thesis. Further, in none of the above nentioned works have the authors attempted to analyse the right to a fair trial from the African egional human rights perspective. They mainly discuss the right to a fair trial as provided for either

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[45] Harris D (1967), —The Right to a Fair Trial in Criminal Proceedings as a Human Right,‖ The International and 'omparative Law Quarterly, Vol. 16, No.2, pp. 352-378

[46] Weissbrodt D (2001), The Right to a Fair Trial under the Universal Declaration of Human Rights and the International 'ovenant on Civil and Political Rights, Martinus Nijhoff Publishers, the Hague

[47] Trechsel S (2005), Human Rights in Criminal Proceedings, Oxford University Press, Oxford

[48] Adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders in Milan, 26 ugust - 6 September 1985, U.N.Doc. A/conf./121/22/Rev.1, I.B]. G.A. Res. 40/146, 13 December 1985, 40 U.N. GAOR upp (No.53) 254, U.N. Doc A/40/1007.

[49] I.e. HRC General Comment No.13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Twenty- first session 1984) and HRC General Comment No.32 (2007), supra note 11.

[50] Ibid.

nder the ICCPR, the ECHR, or the ACHR. This thesis not only analyses the right to a fair trial from he ICCPR perspective, but also as provided for in the African Charter.

1.6.2. Military Justice and the Internationally Guaranteed Right to a Fair Trial

t the international level, there are mainly four important works which have dealt with the issue of ilitary justice and the right to a fair trial, i.e. the Organisation for Security and Cooperation in urope (OSCE) handbook on human rights of armed forces personnel,[51] the International Commission f Jurists (ICJ) work concerning military jurisdiction and human rights violation,[52] Steiner, Alston and oodman's text on international human rights in context[53] and Rowe's work on the impact of human ghts in the armed forces.[54] Although these works have been very important in informing the analysis ade in this thesis, they have certain limitations. For instance, the OSCE Handbook presents models nd best practices from European countries that demonstrate how military tribunals can be organized o as to comply with the right to an independent and impartial tribunal among other human rights. his is very useful for this thesis which, inter alia, seeks to provide recommendations that can help ganda's military tribunals to comply with the right to an independent and impartial tribunal. But the alue of the models provided in the OSCE Handbook in the context of this thesis is limited given the ct that the circumstances obtaining in Uganda with regard to military justice are not the same as ose in the European countries. For any model to successfully work in another country in addressing particular challenge, the context of that particular country has to be taken into consideration. esides, not all the models presented in the OSCE Handbook are compliant with the right to the fair ial as the OSCE might believe. For instance, as a measure to ensure independence of the military dges in Ireland, the handbook states that the military judges are appointed by the Judge Advocate eneral.[55]

lthough important, such a measure in itself is not enough to guarantee the independence and partiality of the military judges. As was emphasized in *R v. Genereux*, in such circumstances, the dependence of the Judge Advocate General from the military command and the Executive has to be uaranteed in the first place.

he ICJ work while important, only focuses on the issue of the competence of military tribunals to try ilitary personnel accused of committing human rights violations. This issue is just a subcomponent f the broader question of the right to a competent tribunal in the administration of military justice hich is analysed in this thesis. Beyond the right to a competent tribunal, this thesis also analyses the

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[51] Office for Democratic Institutions and Human Rights (2008), Hand book on Human Rights and Fundamental Freedoms Armed Forces Personnel, Organization for Security and Cooperation in Europe, Warsaw.

[52] Andreu-Guzman F (2004), Military Jurisdiction and International Law: Military Courts and Gross Human Rights iolations [Vol.1], International Commission of Jurists, Geneva

[53] Steiner H, Alston P and Goodman R (2008), International Human Rights in Context: Law, Politics and Morals, Third dition, Oxford University Press, Oxford

[54] Rowe (2006), supra note 13.

[55] Supra note 113, p.228

ature and scope of the right to a fair and public hearing by an independent and impartial tribunal and he extent to which it is guaranteed in Uganda's military justice system. Steiner, Alston and Goodman aise the fundamental question whether in the national security context, military tribunals can provide fair trial and, if so, the circumstances under which this can be achieved[56]They do not however iscuss nor provide answers to the issues they raise. Instead, they just provide a few readings on the ubject.

. is only Rowe's work which tried to address the issue of independence and impartiality of military ibunals in some appreciable detail. Rowe rightly points out that the issue of independence and npartiality of military tribunals should be looked at from the perspective of a reasonable person equainted with all the relevant facts.[57] He notes that there are many ways to show actual and ereeived independence and impartiality of the members of armed forces who serve as members of ilitary tribunals. For instance, he argues that they should not be drawn from the same chain of ommand of the accused person or mingle socially during their call up for military court service with ich members[58] and that they should not be assessed by their military superiors in respect of their erformance as members of a military court or receive any performance-related pay which is derived whole or in part from court duties.[59]

hese are important criteria which this thesis adopts in its overall analytical framework in assessing ompliance of Uganda's military justice system with the right to an independent and impartial ibunal. But beyond these criteria, as Chapter Two will establish, there are many other aspects critical r determining the independence and impartiality of military tribunals. Besides, beyond analysing the ght to an independent and impartial tribunal in the administration of military justice, this thesis also xamines other aspects of the right to a fair trial viz., the right to a fair hearing, the right to a public earing and the right to a competent tribunal and analyses the extent to which these rights are uaranteed in Uganda's military justice system.

1.6.3. Uganda's Military Justice System and the Right to a Fair Trial

At the national level, there is indeed very little scholarly work on the issue of military justice and the ight to a fair trial. Most of the scholarly work on Uganda's military is generally centered on the role f the army in the country's politics.[60] Among the very few scholarly works that have attempted to

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Supra note 115, p.433.

Rowe (2006), supra note 13, p.83.

[8] Ibid.

[9] Ibid

[0] Among such works include: Omara Otunnu A (1987), Politics and the Military in Uganda, 1890-1985, MacMillan, ondon, and Ddungu E (1994), —Some Constitutional Dimensions of Military Politics in Uganda,‖ Working Paper lo.41, Centre for Basic Research Publications, Kampala. See also, Brett EA (1994), —The Military and Democratic ransition in Uganda: Neutralizing the Use of Force,‖ in Nsibambi A (Ed), Managing the Transition to Democracy in Iganda under the National Resistance Movement, Report of the Uganda Democratisation Study for the Global oalition for Africa and the African Leadership Forum, Makerere Institute of Social Research, Kampala, and Khiddu-Makubuya E (1994), the Military Factor in Uganda,‖ in Khiddu-Makubuya E, Mwaka WM, and Okoth PG (Eds),

canvas the issue of military justice and the right to a fair trial in Uganda is Onoria's journal article about the Kotido Executions[61] and the working paper I authored on the trials and tribulations of Rtd. Col. Dr. Kiiza Besigye and the 22 others.[62]

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.

The following points must be made regarding the above works in the context of this thesis. First, the works highlighted above focus on the specific trials and the particular circumstances surrounding those trials. While they attempt to address the issue of independence and impartiality of courts martial in Uganda, they mainly focus on the particular military courts. In the case of Onoria's work, he focused on the Field Court Martial which tried the two convicts. Regarding the paper on the trials and tribulations of Dr. Kiiza Besigye, the focus was on the General Court Martial. Over and above the General Court Martial and the Field Court Martial, this research analyses the extent to which the other military courts i.e. the Court Martial Appeal Court, the Division Courts Martial, the Unit Disciplinary Committees and the Summary Trial Authority comply with not only the right to an independent and impartial tribunal, but also the right to a fair and public hearing by a competent tribunal. Further, beyond analysing the compliance of Uganda's military justice system with the right to a fair and public hearing by a competent, independent and impartial tribunal, this thesis also explores the implications of a fair trial noncompliant military justice system on democracy and the rule of law. Also, unlike the works highlighted above, this thesis not only examines the concept of military justice, but also analyses its validity in the context of Uganda's situation. Finally, this thesis explores the historical foundation and evolution of Uganda's military justice system especially as it relates to the protection and respect of the right to a fair trial which none of the above mentioned scholarly works did. It therefore follows that while the above highlighted scholarly works have been instrumental in informing this research, they have many gaps which this thesis addresses.

Uganda: Thirty Years of Independence, 1962-1992, Makerere University, Kampala.

[1] Onoria (2003), supra note 37.

[2] Naluwairo R. (2006), —The Trials and Tribulations of Rtd. Col. Dr. Kiiza Besigye and 22 Others: A Critical Evaluation of the Role of the General Court Martial in the Administration of Justice in Uganda,‖ Working Paper No.1, HURIPEC Publications, Kampala.

1.7. Methodology

This research adopts a combination of mainly qualitative legal research methods in gathering and nalysing relevant data. These include literature review, comparative, descriptive and prescriptive ıethodologies. It draws upon the analysis of both primary and secondary sources. Although this is ırgely a legal research, it is recognized that there are certain historical, sociological and philosophical nderpinnings of the concept of military justice. In order to put this research in context therefore, as art of the introduction and background, the dissertation begins in Section 1.1 with the analysis of the oncept of military justice. This analysis not only explores and examines the justifications of military ıstice as a separate system of administration of justice, but also analyses the extent to which those ıstifications are valid in Uganda's context.

1.7.1. Analysis of International and Regional Human Rights Instruments

A critical analysis of the relevant international and regional human rights instruments to which Uganda is party is undertaken in Chapter Two to establish the nature and scope of Uganda's human ights obligations as regards the right to a fair trial, in particular the right to a fair and public hearing y a competent, independent and impartial tribunal. In particular, relevant provisions of the ICCPR nd the African Charter are examined. Other regional and international human rights instruments and ıaterials in which the right to a fair and public hearing by a competent, independent and impartial ribunal has been elaborated and affirmed are also analyzed. These include: the HRC's General Comment 32 (2007),[63] the UN Principles on Military Justice,[64] the UN Basic Principles on the ndependence of the Judiciary[65] and the Principles and Guidelines on the Right to a Fair Trial and egal Assistance in Africa (herein after referred to as —the African Commission Principles).[66] Although these materials are considered to be soft law and therefore not legally binding, they serve as mportant interpretative aids for the relevant binding treaty provisions on which this thesis is based.

1.7.2. Appraisal of Relevant Case Law and Concluding Observations of the HRC

There are many cases arising from the different regional and international human rights instruments which have repeatedly dealt with the issue of administration of military justice, that it can now be said hat an international body of military justice jurisprudence is emerging.[67] To complement the xamination of relevant international human rights instruments mentioned in Section 1.7.1 above, a ritical appraisal of this emerging military justice case law jurisprudence from the HRC and the ACHPR is undertaken in Chapter Two.

This is further complemented by the analysis of the Concluding observations of the HRC on the

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[63] Supra note 11.

[4] Supra note 14.

[5] Supra note 109

[66] Adopted by the ACHPR at its 33rd Ordinary Session in Niger, May 2003, DOC/OS(XXX)247, reprinted in 12 Int'l Hum. Rts. Rep. 1180 (2005). For a scholarly analysis of these Principles and Guidelines, see, Baderin M (2005).

[7] Fidell ER, Hillman EL and Sullivan DH (2007), Military Justice: Cases and Materials, LexisNexis, p.xi.

eriodic reports of states party to the ICCPR. With particular reference to these Concluding bservations, the HRC General Comments and case law jurisprudence, it is important to emphasise iat the HRC is the authoritative interpreter of the rights articulated in the ICCPR.[68] Therefore, lthough there is debate regarding the status of its decisions, what is clear is that, as Conte and Burchill put it, when it pronounces itself upon the content or meaning of a right contained in the CCPR, —it does so with undeniable authority.[69]

n substantiating many issues raised in this thesis, reference is also made to comparative case law rom the ECrtHR. This is not only because of easy access and availability of cases from the ECrtHR, ut most important, the ECrtHR has a well-developed body of jurisprudence on issues of military istice and human rights, in particular the right to a fair hearing by an independent and impartial ribunal as guaranteed by Article 6 (1) of the ECHR. This provision is in essence the same as Article 4 (1) of the ICCPR which is the major focus of this thesis. It is significant that decisions of the CrtHR are increasingly referred to and cited with approval by the HRC and other human rights upervisory bodies. Therefore, although the decisions of the ECrtHR are not legally binding on Iganda or African countries, they are highly persuasive and have actually been cited as persuasive uthority in many decisions of the ACHPR.[70] Where necessary, comparative jurisprudence from the uperior courts of the United Kingdom (in particular England), the United States of America and anada (three countries that have also had a lot of litigation on issues of military justice and human ghts) is also considered to strengthen the analysis in this thesis. Together, the review and analysis of ie human rights instruments highlighted above and the relevant case law will mainly answer the uestion regarding the nature and scope of Uganda's international human rights obligations as regards ie right to a fair trial and the issue whether or not and to what extent the right to a fair trial applies in ie administration of military justice.

1.7.3. Examination of Uganda's Military Justice Legal Framework

It is part of the hypothesis of this research that Uganda's military justice as it relates to the protection

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Romany C (1996), —Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection f Race and Gender,‖ Brooklyn Journal of International Law, Vol.21, No.3, p.

[69] Conte A and Burchill R (2009), Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee, Second Edition, Ashgate Publishing Limited, Surrey, p.9.

[70] For instance, in Sudan Human Rights Organisation, Centre on Housing Rights and Evictions v. The Sudan, Comm Nos. 279/03, 296/05 (2009), para.147, while holding that the duty of the state to protect the right to life is very broad, it quoted the ECrtHR's cases of McCann v. United Kingdom (1995) 21 EHRR 97 and Tanrikulu v. Turkey (1999) 30 EHRR 950 as authority that the state's duty in that regard includes taking preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. In Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, Comm No. 155/96 (2001), para.57, the ACHPR cited X and Y v. Netherlands, 91 ECHR (1985) (Ser.A) 32 as authority for the preposition that there is an obligation on government to take steps to ensure that the enjoyment of human rights is not interfered with by any other private person.

of the internationally guaranteed right to a fair trial (in particular the right to a fair and public hearing by a competent, independent and impartial tribunal) is still in many ways stuck in its historical origins. To test this part of the hypothesis, a critical examination of Uganda's military justice legal framework during the colonial period right from the establishment of the country's army as a national institution in 1895 is undertaken in Chapter Three. This comprises analysis of the Uganda Rifles Ordinance 1895, the Uganda Military Force Ordinance 1899, the King's African Rifles Ordinance 1902 and the Uganda Military Force Ordinance 1958. Examination of these legal instruments establishes the historical foundation, origins and evolution of Uganda's military justice system especially as it relates to the right to a fair and public hearing by a competent, independent and impartial tribunal. Perhaps the most important and deeply entrenched principle of international law is that existing treaty obligations must be fulfilled by the parties in good faith. This principle is what is commonly referred to as the doctrine pacta sunt servanda.[71] In majority of the international human rights instruments, as the first major necessary step, states are required to fulfill their obligations by way of putting in place relevant legislative and administrative measures[72]The starting point therefore in analyzing the extent to which Uganda's military justice system complies with its international human rights obligations as regards the right to a fair and public hearing by a competent, independent and impartial tribunal is to examine the country's legal framework governing military justice. A comprehensive review and analysis of Uganda's current military justice legal framework vis-à-vis the country's international human rights obligations regarding the right to a fair and public hearing by a competent, independent and impartial tribunal is therefore undertaken in this respect in Chapter Four.

This review covers Uganda's 1995 Constitution as amended, the UPDF Act 2005 and the rules and regulations made thereunder. It also includes analysis of the parliamentary debates leading to the enactment of the UPDF Act 2005 and its predecessor – the UPDF Act 1992.

1.7.4. Case Study

It is one of the arguments of this dissertation that a military justice system that does not conform to the minimum international human rights standards for administration of justice embedded in the right to a fair trial can be hostile to democracy and the rule of law. To demonstrate this, in Chapter 3, using the case of Rtd. Col. Dr. Kizza Besigye and the 22 others,[73] we examine the major implications of a fair trial noncompliant military justice system on democracy and the rule of law. The case of Rtd. Col. Dr. Kizza Besigye has been chosen not only because of its political implications but also because it represents one of the very few cases involving questions of military justice and human

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For further details about this principle, see supra note 85.

See for instance Article 2 (2) of the ICCPR, supra note 9.

Criminal Case No. UPDF/GCM/075/2005

rights under Uganda's current military justice legal framework in which the country's superior courts of record including the High Court, the Constitutional Court and the Supreme Court were heavily involved.

1.8. Research out line

This dissertation is divided into five chapters. Chapter 1: gives the introduction and provides the ontext in which this research is undertaken and should be understood. Chapter 2: analyses the nature nd scope of the law governing military courts in Uganda Chapter 3: evaluates the role of military ourt Martials in the administration of criminal justice in Uganda. Chapter 4: The relationship and ifferences of military courts with civilian courts. Chapter5 Recommendations.

he role and performance of these tribunals/courts in the administration of justice has over the times een a subject of considerable controversy. It has raised a number of issues and concerns not only mong scholars but among the general public as well. The issues mainly revolve around respect for the ıle of law and fundamental human rights, in particular the right to a fair and just trial.

. is not possible to over-emphasize the importance of the right to a fair trial in the administration of ıstice. The right to a fair trial is the bedrock and fountain of justice in any justice system. The onstitution of the Republic of Uganda recognizes this and classifies the right to a fair hearing among on-derogable rights.[74] In other words, there are no circumstances in which the right can be overlooked r dis-regarded. As such, any State organ or establishment that purports to exercise judicial power in ganda is obliged to respect and uphold this fundamental human right.

bdbullah Muhammad. The two soldiers were publicly executed on March 25th, 2002 after a trial of ss than three hours before a Field Court Martial, which found them guilty of triple murder.[75]

spite of the many concerns raised about the role of these courts in the administration of justice, ere has never been a comprehensive study of the subject. This partly explains why the arliamentary debate on the subject of military justice during consideration of the UPDF Bill was rgely superficial. For instance, nowhere in the Parliamentary Hansards, do you find any debate on the dependence of military courts, a factor that is vital for the administration of justice in any justice ystem.

sing the GCM as a case study, and specifically focusing on the trial of Kizza Besigye and 22 others. is paper explores a number of issues raised in the debate about military justice as dispensed by the CM. The paper is not concerned with the guilt or innocence of Besigye or the 22 others. Rather, it

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For purposes of conducting trials under the Decree, it gave powers to the Defence Council to appoint military ibunals. Section 4 gave powers to the President to order trials of civilians by military tribunals where he was satisfied at their acts were calculated to intimidate or alarm members of the public or to bring the military Government under ontempt or disrepute. Section 2 provided that any person charged with treason and related offences could be tried by a ilitary tribunal. See, Articles 28 (1) and 44 (c).

See, J. Okello. Probe O'Toole's murder, says Bishop, The New Vision, Tuesday April 9, 2002

s focused on the rights and freedoms of accused persons as guaranteed by the Constitution and by najor international agreements to which Uganda is party, in a bid to trigger intellectual debate and nform policy decision making in the area of military justice.

The major aim of the paper is to identify the strengths and weaknesses of the GCM with a view to roviding policy recommendations for enhancing its role in the administration of justice in Uganda. The aper is also intended to provide information and raise awareness about military justice as currently ispensed by the military court.

The paper discusses the law establishing and governing the GCM and explores the relationship etween the military court and civilian courts. With specific reference to the Besigye trial, the aper evaluates the performance of the court in the administration of Justice in Uganda. The valuation is done within the context of the minimum constitutional and international standards of dministering criminal justice. The evaluation focuses on the right to a fair hearing and specifically xamines the right to trial by a competent, independent and impartial court. Finally, the paper gives a umber of policy recommendations for improving the performance of the military court and bringing it nto line with the Constitutional provisions for the exercise of judicial power and the administration of ustice in Uganda.

CHAPTER TWO

The Law Governing The Military Court Martials In Uganda

Introduction

The military courts like other criminal justice systems are governed by the constitution[77] which under ıe UPDF act comes from which in particular provides the formation of Military Courts. Uganda also ng a party some international treaties like the UN charter, the African charter on people's rights and thers, such laws also do guide.

rticle 208 of the Constitution establishes the UPDF and provides that it shall be non-partisan, ational in character, patriotic, professional, disciplined, productive and subordinate to the vilian authority as established by the Constitution.

he functions of the UPDF are to preserve and defend the sovereignty and territorial integrity of ganda; to cooperate with the civilian authority in emergency situations and in cases of natural sasters; to foster harmony and understanding between the defence forces and civilians; and to engage in oductive activities for the development of Uganda[1]

rticle 210 mandates Parliament to make laws regulating the UPDF, in particular providing for e organs and structures of the UPDF; the recruitment, appointment, promotion, discipline and moval of members of the UPDF and ensuring that members of the UPDF are recruited from every strict of Uganda. The mandate also covers the terms and conditions of service of members of the UPDF d the deployment of troops outside Uganda.

exercise of its mandate under Article 210 of the Constitution, Parliament enacted and passed the PDF Act, 2005. The Act provides for the regulation of the UPDF and repeals and replaces the Armed rces Pensions Act and the Uganda Peoples Defence Forces Act. Part VIII of the Act deals with the tablishment and operation of military courts.

tablishment, Composition and Tenure

ıe structure of military courts in Uganda

Court Martial Appeal Court
General Court Martial
ivision Court Martial
nit Disciplinary Committees

RTICLE 126 1995 Uganda constitution as amended

)uorum and Decision Making.

)ecisions of court are by majority opinion, and when a decision is reached, it is binding on all members of ıe court concerned.[78] Section 201 (2) makes it an offence for any member who takes part in the roceedings of a Court Martial to later disassociate him or herself from the decision of that court.

urisdiction

'he criminal Jurisdiction of the military courts are provided for as follows

ıe unit displinary committee (UDC)

.195 provides for the unit displinary committee which is composed of:

. chairperson who shall not be below the rank of captain
he administration officer of the unit.
he political commissar of the unit
he regiment sergeant major or company sergeant major of the unit
wo junior officers
'ne private

he quorum of the U D C Shall be five members including the chair person and shall have power to y any person for any noncapital offences under this act. It shall also have powers to impose any ıntence authorized by law, s.196 (2) of the U P D F Act gives powers to the division commander or)mmander of an equivalent formation to convene a unit displinary committee.

2.4 Davison court martial

At each division or its equivalent formation of the defence forces a Division court martial with unlimited original jurisdiction under this which shall consist of

A chairperson who shall not be below the rank of a major
Two senior officers
Two junior officers
Apolitical commissar
One noncommissioned officer

All of who shall be appointed by the high command for aperiod of one year.

2.5 The General court martial

The court has both original and appellate jurisdiction for service offences under the Act. It has unlimited original jurisdiction under the Act and hears and determines all appeals referred to it from decisions of Division Courts Martials and Unit Disciplinary Committees.[79] The law further gives the general court martial revisionary powers in respect of any finding, sentence or order made or imposed by any summary trial authority or Unit Disciplinary Committee.[80]

It is composed of

A chairperson who shall not be below the rank of lieutenant colonel
Two senior officers
Two junior officers
A political commissar
One noncommissioned officer

All of whom shall be appointed by the high command for a period of one year

2.6 Court martial appeal court

This court have jurisdiction to hear and determine all appeals referred to it under this act from the decision of the general court martial.

A chairperson who shall be an advocate qualified for appointment as a judge of the high court of Uganda.
Two senior officers of the defence force.
Two advocates who are members of the defence forces.

The court also does have a registrar legally qualified person appointed by the high command. When the court is considering an appeal against a judgment involving death sentence it shall be with a quorum of five members and in any other case a quorum of 03 members including the chairperson.

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ec 197(2) of updf Act

supra

hese powers are to be exercised in accordance with the provisions of Part XIII of the Act.[81] The ct defines a service offence as an offence under the UPDF Act or any other Act for the time being in rce, committed by a person while subject to military law.[82] This therefore means that with some xceptions, where the law specifically limits the criminal jurisdiction regarding a particular ffence to a particular court, the GCM has jurisdiction to try any person subject to military law for any riminal offence under any law in Uganda.

ection 119 provides for the persons who are subject to military law. These include not only officers nd militants of the regular force, but also any person who voluntarily through the prescribed acts nd omissions brings him or herself within the confines of military law.[83] This therefore means that n the prescribed circumstances, the GCM has the jurisdiction to try civilians. Indeed, in the ULS onstitutional Petition (cited above), the Constitutional Court ruled that the GCM could have risdiction over civilians where they have aided and abetted persons subject to military law to commit a rime.

rial of civilians by military establishments raises a number of fair trial and human rights issues both nder municipal and international law. In the ULS petition (cited above), while holding that the diciary as established under Chapter Eight of the Constitution takes precedence over the GCM, stice S. G. Engwau, had this to say:

he reason for this is that especially in criminal offences, which entail the abridgement or rtailment of the rights of the individual protected under the Constitution and International ovenants, the definition and application of the criminal laws under which this may gitimately be done must be consistent with the guarantees of human right In this regard, ly the ordinary courts have the authority and power to interpret the guarantees of human ghts under the Constitution.

imilarly, Lady Justice Constance Byamugisha in the same case emphasized that,

he Constitution has ordained civil courts with jurisdiction for the protection of human and vil rights for both civilians and members of defence forces who are charged with criminal fences. The jurisdiction of military courts should not be invoked, except for the purpose maintaining or enforcing discipline in the forces

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Supra.

Section 2.of u p d f A

A militant is defined in section 2 of the Act as any person other than an officer who is rolled on or who is attached or seconded otherwise than as an officer of the Defence rces.

he point that their lordships were trying to stress is that in matters that involve issues of the rotection of fundamental human rights, and more especially where civilians are involved, it is the ivilian courts that have the mandate and competence to try those cases. The jurisdiction of military ourts should only be invoked for the purpose of maintaining or enforcing discipline in the forces.

he United Nations Human Rights Committee—the body authorized to interpret and monitor ompliance with the International Covenant on Civil and Political Rights (ICCPR)—has also reviously stated in a General Comment that military courts prosecuting civilians can present erious problems as far as the equitable, impartial and independent administration of justice is oncerned.[84] The Committee concluded that the trial of civilians by military courts should be xceptional and occur only under conditions that genuinely afford full due process.[85] Related to the sue of trying civilians by military courts, is the concern among a cross-section of the general ublic about the rationale of giving such courts the jurisdiction to try non-military (civilian) ffences. This concern is buttressed by the fact that many of the civilian offences involve a great deal f legal intricacies in terms of proof of the ingredients and standard of proof, which these courts ave no competence to handle. The prevalent view is that military courts, including the GCM, should nly deal with military offences such as mutiny, disobeying lawful orders and desertion. Those ho hold this view argue that civilian courts are better placed and more competent to try non-military ffences like assault, murder, rape and theft.

See, Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 84), Compilation of General Comments and General Recommendations Adopted by man Rights Treaty Bodies, U.N.Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 4.
Supra. See also, Human Rights Watch, "Intimidation and Violence by Government and the Ruling Party" tp://hrw.org/backgrounder/africa/uganda020/4.htm

CHAPTER THREE

Evaluation of the role of the military court martial in the administration of Criminal justice in Uganda

3.0 Introduction

his section of the paper is an analysis of the performance of the military courts in the administration riminal justice as major elements of the right to a fair hearing, in particular the right to a competent, ndependent and impartial court as guaranteed by Articles 28 and 44 of the Constitution. The section is ntended to identify the strengths and weaknesses of the court with the ultimate objective of improving s performance in the future dispensation of justice in Uganda.

3.1 Trial by a Competent Court

ne of the foundations of any justice system is that in the determination of any criminal charge, the trial ould be conducted by a competent court or by a tribunal established by law. The court or tribunal ust have jurisdiction. Jurisdiction is conferred by law. No court should therefore confer upon itself risdiction that Parliament as the law making organ of the State did not give it. The issue of competence in iminal justice not only requires that the tribunal/court should have the jurisdiction over the subject atter and over the person, but also requires that the trial should be conducted within the prescribed time nit.[86]

the trial of Besigye and the 22, the accused were charged with the offence of terrorism and the lawful possession of firearms. The offence of terrorism is created under the Anti-Terrorism Act, 002. The Act specifically provides that such offence is only triable by the High Court the question of mpetence of the GCM to try Besigye and the 22 for the offence of terrorism was one of the major issues at the Constitutional Court addressed in the ULS Constitutional petition against the Attorney General. ie Court rightly held by a majority of four to one that the GCM did not have the jurisdiction to try the fence of terrorism because under the Anti-Terrorism Act where the offence is created, such jurisdiction is nferred only on the High As Justice Constance Byamugisha emphasized, a court that has no risdiction cannot be said to accord an accused person a fair trial. Addressing himself on the same ue, Justice G.M. Okello, had this to say:

right to a fair hearing embodies the right to be tried by a competent court. A court that has no sdiction to try a case with which a person has been charged is not a competent court for the purpose of case. It is in fact, not a court for the purpose of such a trial. Any decision made by it in that regard is and void. To be tried by an incompetent court is a violation of one's right to a fair hearing protected by

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mnesty International Fair Trials Manual.

rticle 28 (1) and entrenched by Article 44 (c) of the Constitution. The other element of the right to trial by a mpetent court relates to the competence of the judicial officers and to the court's procedural rules. The frican Commission on Human and Peoples Rights has previously held regarding Article 26 of the African harter on Human and Peoples' Rights [87] that the element of competence of court requires the existence of a dicial system with adequately trained officers and satisfactory procedural rules.[88]

n examination of the law governing the GCM reveals that the military court is far from meeting the ove requirements. There is no provision requiring officers of the court including the Chairperson to have gal training or background. Although there is provision for a judge advocate to advise court on matters of w and procedure,[89] the advocate is not a member of court and does not take part in decision making. His or r advice is also not binding on court. It is therefore important in this regard that at the very least, the hairperson of court should be sufficiently trained in law and legal practice.[90] The failure to ensure that rsons who preside over military courts have legal training demonstrates that Government has neglected its ty to provide courts that are sufficiently competent to satisfy Article 26 of the ACHPR[91]

3.2 Trial by an Independent and Impartial Court

e right to be tried by an independent and impartial tribunal established by law is perhaps the most portant canon in the criminal justice system. It is a major pre-requisite for access to justice and an egral part of a democratic government.[92] It is guaranteed by major international and regional struments to which Uganda is signatory and party including the UDHR, the ICCPR and the African Charter Human and Peoples' Rights among others. It is also embedded in Uganda's Constitution as one of the

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Article 26 provides that, State Parties to the present Charter shall have the duty to
uarantee the independence of the Courts and shall allow the establishment and improvement
'appropriate national institutions entrusted with the promotion and protection of the rights
id freedoms guaranteed by the present Charter.

See, Civil Liberties Organisation v. Nigeria, ACHPR Commn. No. 129/94.

See, Section 202 of the UPDF Act.

During the Parliamentary debate on this issue when considering the UPDF Bill, Hon. Amama babazi, the Minister of Defence at the time, erroneously argued and surprisingly convinced embers of Parliament that it was not necessary to have lawyers man the GCM because at that vel, issues of law rarely arise. He also argued that having lawyers man the GCM could stifle lministration of justice because there could arise occasions when there would be no lawyers in e army to administer justice. Hon. Twarabireho on the other hand strongly argued that ofessionalizing the UPDF entails having a professional military court system manned by ofessionals. He dismissed Hon. Mbabazi's argument that there might arise a situation when e army would not have lawyers to man the GCM and informed members that there were many wyers in the Force and many more were still studying at university and Law Development ntre. For more details regarding the Parliamentary debate on the UPDF Bill, see, Parliament Uganda, Parliamentary Debates (Hansard) Official Report, 4th Session – 1st Meeting Issues), 26, 27 and 28 of 2004, and 29, 30 and 31 of 2005.

H. M. Onoria, Soldiering and Constitutional Rights in Uganda: The Kotido Military xecutions, East African Journal of Peace and Human Rights Vol. 9, No. 1, 2003 at page

F.W. Jjuuko, The Independence of the Judiciary and the Rule of Law : Strengthening nstitutional Activism in East Africa, Kituo Cha Katiba, Kampala, 2005.

ajor tenets of the right to a fair hearing.[93] It is a non derogable right, which means that it cannot be ispended at any time, regardless of the circumstances.[94]

he right to trial before an independent and impartial tribunal established by law requires that justice must ot only be done but justice must also be seen to be done.[95] The right therefore calls for the impartiality of the dges and the need for trials to be held in open court.[96] The right to trial by an independent and impartial ourt has two related principles i.e. the principle of impartiality and the principle of independence. Although e two are closely related, they nevertheless differ in certain material respects. Impartiality refers to a ate of mind or attitude of the tribunal in relation to the issues and the parties in a particular case.[97] The quirement for independence on the other hand embodies the traditional constitutional value of dicial independence and connotes not only a state of mind or attitude in the actual exercise of judicial nctions, but also a status or relationship to others, particularly to the executive branch of government.[98]

ie principles of independence and impartiality seek to achieve three major objectives: first, to ensure that a rson is tried by a tribunal that is not biased in any way and is in a position to render a decision which is sed solely on the merits of the case before it, according to law.[99] The decision- maker should not be luenced by the parties to a case or by outside forces except to the extent that he or she is persuaded submissions and arguments pertaining to the legal issues in dispute. The second objective is to intain the integrity of the judicial system by preventing any reasonable apprehensions of bias.[100] nally, the principles of independence and impartiality are intended to allow and enable the courts to fill their historical and constitutional role as protectors and guarantors of human rights and values.

assess the impartiality of a tribunal, reference has to be made to the state of mind of the decision-makers the time of hearing and determining a particular matter/case.[101] The principle of impartiality demands that lges or jurors have no interest or stake in a particular case and do not have pre- informed opinions about it. such, the issue of impartiality is largely a question of fact determined on a case by case basis. In *Re edicaments*[102], the Court of Appeal of England following the European Court of Human Rights CHR)'s decision in *Hausschildt v. Denmark*[103], stated that *in considering whether in a given case there*

See, Article 28.
Article 44 (c) of the Constitution.
Dictum by Lord Hewart, C.J in R v. Sussex Justices ex parte McCarthy (1924) 1 KB 256 at 59.
Supra, note 94.
Impartiality comes from the word "impartial" which means not giving special favor or pport to any one or group. It means absence of bias, actual or perceived. See, Longman ictionary of Contemporary English, Third Edition, Longman Group Ltd, England, 1995.
See, Valente v. The Queen [1985] 2 S.C.R, 673
See, judgment of Lord Lamer C.J in R v. Genereux [1992] 1 S.C.R, 259.
Supra.
Supra.
[2001] 1 Weekly Law Reports 700.
[1989] 12 EHRR 266.

a legitimate fear that a particular judge lacks impartiality, the stand point of the accused is important but not ecisive.... What is decisive is whether this fear can be held objectively justified. The test to apply to each dividual case is therefore whether there is a reasonable apprehension that the decision-makers will : subjectively biased in the particular situation. The requirement for independence on the other hand :tends beyond the subjective attitude of the decision-makers. It involves both individual and institutional lationships: the individual independence of a judge reflected in such matters as security of tenure and stitutional independence of the court as reflected in its institutional and administrative relationships with e executive and legislative branches of Government.[104] It also requires that officials responsible for the lministration of justice are completely autonomous from those responsible for prosecutions.[105] The sence of judicial independence was well summarized by the Canadian Chief Justice,

ord Dickson as follows:

istorically, the generally accepted core of the principle of judicial

dependence has been the complete liberty of individual judges to hear and decide the cases that come fore them; no outsider- be it government, pressure group, individual or even another judge- should interfere fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his her decision. This core continues to be central to the principle of judicial independence.[106]

ie factors which influence the independence of court have been articulated over time in different struments and court decisions. The now undisputed major conditions for the independence of courts are sentially three.

rst, there is the need for a guarantee of security of tenure,[107] second, is the issue of financial security.[108] J finally there is the question of institutional independence with respect to matters of administration that ate directly to the exercise of the tribunal's judicial function

e test for a tribunal's independence and impartiality was succinctly stated by Lord Lamer C.J in the Canadian preme Court case of *R v. Genereux* (cited above) as follows:

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[4] Supra, note 100.
[5] Guideline 10 of the United Nations Guidelines on the Role of Prosecutors.
[6] Beauregard v. Canada [1986] 2 S.C.R 56 at 69.
[7] Security of tenure requires that a judge should only be removed for a just cause, and that e cause should be subject to independent review and determination by a process at which e judge affected is afforded a full opportunity to be heard. The essence of security of nure is tenure, whether until the age of retirement, for a fixed term, or for a specific ljudicative task, that is secure against interference by the Executive or other appointing ith The essence of financial security is that the right to salary and other financial benefits ould be established by law and not be subject to arbitrary interference by the Executive in aority in a discretionary or bitrary manner. See, Valente v. The Queen (cited above).
[8] The essence of financial security is that the right to salary and other financial benefits ould be established by law and not be subject to arbitrary interference by the Executive

emphasize that an individual who wishes to challenge the independence of a tribunal for the purposes `s. 11(d) need not prove an actual lack of independence. Instead, the test for this purpose is the same as the st for determining whether a decision- maker is biased. The question is whether an informed and easonable person would perceive the tribunal as independent....The perception must, owever, as I have suggested, be a perception of whether the tribunal enjoys the essential objective nditions or guarantees of judicial independence, and not a perception of how it will in fact act, gardless of whether it enjoys such conditions or guarantees Applying the above principles to the trial of esigye and the 22, the issue that begs an obvious answer is whether an informed and reasonable person would receive the GCM as an independent and impartial tribunal.

pplying the above principles to the trial of Besigye and the 22, the issue that begs an obvious answer is ether an informed and reasonable person would perceive the GCM as an independent and impartial bunal.

the ***Genereux*** case where a similar issue arose within a context akin to the trial of Besigye, *it was held that structure and constitution of court at the time of the accused's trial infringed his right as it did not comply h the essential conditions of independence described above.* The Judge Advocate General who had the al authority to appoint a Judge Advocate at a GCM was not independent, but was part of the Executive and s serving as an agent of the Executive. According to the holding of the court, the Judge Advocate and mbers of the GCM did not enjoy sufficient security of tenure and financial security and the Executive had ability to interfere with the salaries and promotional opportunities of officers serving as Judge Advocates l members at a Court Martial. It was further held that military officers, who are responsible to their superiors he Department of Defence, are intimately involved in the proceedings of the tribunal. In particular, it was ceptable to court that the authority that convenes the Court Martial, i.e. the Executive, which is ponsible for appointing the Prosecutor, should also have the authority to appoint members of the Court rtial, who serve as the assessors of fact. Similarly, in the trial of Besigye and the 22, although members of GCM as highlighted earlier are eligible for re-appointment, they are only appointed for a period of one year a time. This short period compromises their security of tenure and thus undermines the nciple of judicial independence. Moreover, the law is not clear on the circumstances and the manner er which they can be removed before the expiry of their term or upon which they can be re-ointed. It all depends on the discretion of the appointing authority. It could be that given their short re, the members would then work towards pleasing their superiors and the appointing authority in icular, so as to secure re-appointment. The law as it presently stands falls short of providing fficient rity of tenure to protect them from the discretionary and arbitrary interference of the Executive. It casts bt in the minds of reasonable and informed persons as to the independence of the court.[109]

In illustration of this point, as this paper was going to the publisher, Gen. Tumwine was

CHAPTER FOUR

The Relationship of Military Courts with Civilian Courts

Although it is difficult to precisely define the relationship between the military courts and Civilian Courts. a few observations can be made in this regard. First of all, it is important to note that the military courts are established under the authority of Article 210 of the Constitution by the UPDF Act as an organ of the UPDF.[110] The civil courts on the other hand are established by the Constitution as courts of record.[111] Others like magistrate court .Secondly, whereas the High Court has unlimited original jurisdiction in all matters, subject only to the provisions of the Constitution,[112] the GCM's unlimited original jurisdiction are limited to the provisions of the UPDF Act.[113]

The relationship of the GCM with the High court was one of the major issues in the ULS Constitutional petition against the Attorney General (cited above). The issue arose following Justice Kasule's order staying the proceedings of the GCM pending the decision of the Constitutional Court on the competence of the GCM to try Besigye and the 22. The Chairperson of the GCM argued that it could not take orders from the High Court as the High Court did not have powers over it and therefore could not issue orders binding it. By a majority of three to two, the Constitutional Court held that *the GCM was not subordinate to the High Court but equivalent to it.* A number of reasons were advanced for this change in position.[114] Lady Justice Leticia Kikonyogo summarized the reasons, and I quote her *in extenso* as follows: *First and foremost Court Martial Courts are not courts of Judicature but military courts. They are creatures of the UPDF Act enacted under Article 210. That shows that they are special courts.* Secondly *unlike all the other special courts like, the Industrial Court, Tax Appeal Tribunal, decisions- from the General Court Martial are not appealable to the High Court but as indicated before to Court Martial Appeal Court, then to the appellate courts of the Courts of Judicature, namely the Court of Appeal and the Supreme Court*

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placed by Lt.Gen. Ivan Koreta as GCM Chairperson

[3] See, Section 197 (1).

[1] See, Article 138 of the Constitution

[2] See, Article 139 (1)

[3] See, Section 197 (2). In the ULS Constitutional petition, Justice Constance Byamugisha nphasizing this point held that although the jurisdiction of the GCM is unlimited and iginal, it's confined to only offences committed under provisions of the UPDF Act by rsons subject to military law.

[4] The Constitutional Court had previously held in Joseph Tumushabe v. Attorney General, onstitutional Petition No. 6 of 2004, that the GCM was subordinate to High Court

Thirdly and most important of all is the construction I put on Article 139(2) (supra). Clause 2 reads as follows: -"Subject to the provisions of this Constitution and any other law, the decisions of any court lower than the High Court shall be appealable to the High Court." If the General Court Martial was subordinate to the High Court its decisions would have been appealable to the High Court. **Further**, it would be strange for the appeals from the Court Martial Appeal Court to be appealable to the Court of Appeal of Uganda and yet remain subordinate to the High Court whose decisions go to the same Appeal Court. Another point to support our view is that both the High Court and General Court Martial have concurrent jurisdiction to try capital offences like murder and impose the same sentences and appeals from their decisions finally go to the same courts. For the aforesaid reasons the General Court Martial cannot be described as a subordinate court to the High Court. It is not a court of Judicature under Article 129(1) of the Constitution but a military court created by the UPDF Act enacted by Parliament in exercise of its mandate to regulate UPDF. Article 210 of the Constitution reads inter alia that: -"Parliament shall make laws regulating UPDF and in particular providing for (a) the organs and structures of UPDF." The General Court Martial is the equivalent of the High Court in the civil court system. Both have concurrent jurisdiction, same sentencing powers in capital offences with exceptions. Their decisions in capital offences are appealable to the Court of Appeal and eventually Supreme Court. Both courts have supervisory powers over their subordinate courts. The General Court Martial is, therefore, neither subordinate nor superior to the High Court but has to be equivalent to it.

It is important to emphasize however that Article 210 of the Constitution does not empower Parliament to establish courts for the purposes of exercising judicial power and administering justice.

Parliament's power to establish courts other than the Supreme Court, the Court of Appeal and the High Court for the purposes of exercising judicial power and the administration of justice in Uganda is derived from Article 129 (1).

This Article provides that, "Judicial power in Uganda shall be exercised by the courts of judicature which shall consist of- (a) the Supreme Court of Uganda; (b) the Court of Appeal of Uganda; (c) the High Court of Uganda; and (d) such subordinate courts as Parliament may by law establish..." It is important to note in this regard that Article 126 (1) of the Constitution provides that, "Judicial Power is derived from the people and shall be exercised by courts established under the Constitution..."

The language used in the above provisions is mandatory. It therefore means that no organ/establishment of State whatsoever can legally exercise judicial power outside the framework of Article 129. In any case, *Article 129 (1) (d) which is relevant in this regard restricts Parliament's*

mandate to the establishment of subordinate courts and not equivalents or superior courts to the High Court.

The Constitutional Court's ruling, unless reversed, has grave effects for the doctrine of the separation of powers, democratic governance and human rights in Uganda. By holding that the *GCM is a special court equivalent to and with concurrent jurisdiction as the High Court, it means that the Constitutional Court clothed the GCM—an organ of the UPDF and the Executive—with judicial power contrary to basic principles of good governance and in particular, the doctrine of separation of powers.*[115]

The more acceptable view is that the GCM as currently established falls outside the Constitutional framework for the exercise of judicial power and the administration of justice in Uganda. It is a mere organ of the UPDF and is therefore subordinate to the High Court. Article 210 cannot stand and be read alone when establishing the status of the GCM *vis-a vis* the High Court.

One of the fundamental principles of constitutional interpretation which was also alluded to by Justice Leticia Kikonyogo is that the Constitution should be construed as a whole. This means that each provision should be construed as an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so as Chief Justice Benjamin Odoki emphasized in the case of *Paul K. Ssemogerere, Zachary Olum and Juliet Kafire v. Attorney General*, could lead to an apparent conflict within the Constitution.[116]

However it's important to not the two justice systems do differ in some matters, pertaining composition, the military courts do have non-lawyers as decision makers[117]

There are cases which specifically can be committed by military persons like dis obeying lawful orders, mutiny and others which therefore fall within the jurisdictions of military courts

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See also, P. Mulira, The Court Attributed Powers to Parliament Which It Didn't Have: Hopt Constitutionalism, The New Vision, Tuesday March 7, 2006.

Constitutional Appeal No.1 of 2002.

Sec 201 UPDF ACT

CHAPTER FIVE

Recommendations and Conclusion.

Justice requires that any organ that purports to exercise judicial power should meet certain minimum international and constitutional standards necessary to ensure a fair and just trial. These standards are the essence of the right to a fair hearing which is guaranteed by the Constitution and major International Human Rights Instruments including the UDHR, ICCPR and the African Charter on Human and Peoples' Rights.

This paper has demonstrated that the current establishment, composition and operations of the GCM fall far short of guaranteeing the right to a fair hearing. In particular, the paper has demonstrated that the court is not independent and impartial and lacks the necessary legal expertise for ensuring adherence to procedural rules and comprehension of complex legal matters. Above all, the GCM falls outside the Constitutional framework for the exercise of judicial power and the administration of justice in the country.

The recommendations below are therefore intended to bring the GCM into line with the Constitution and in particular to ensure that it becomes a truly independent, impartial and competent court. The recommendations are also a contribution to ensuring that the UPDF becomes a truly professional army with an acceptable military justice system.

5.1 The Question of Jurisdiction.

The military criminal jurisdiction should be limited to only serving military officers and for only matters involving military offences. The High Court in its original jurisdiction is the most competent court to try civilians accused of committing military offences and military officers accused of committing civilian offences. In such circumstances, it is only the High Court and other superior courts of record that can guarantee and ensure the protection of the fundamental human rights of the accused persons. The GCM's criminal jurisdiction should therefore be restricted to service offences committed by military personnel. The definition of a service offence under s. 2 of the UPDF Act should therefore be revisited in the above respect.

To avoid the complications caused by the military chain of command system, the GCM should not exercise jurisdiction over cases involving military officers above the rank of Lt. Colonel. Such cases should go straight to the High Court at the first instance.

5.2 The military Court Martials Relationship with Civilian Courts

The military court Martials should explicitly be made subordinate to the High Court. This means that appeals from the (CMAC)COURT MARTIAL APPEAL COURT would go to the High Court and then onwards to other superior appellate courts of record. This arrangement will bring the GCM into line with the Constitutional framework for the exercise of judicial power and the administration of justice in Uganda. It will also remove the unnecessary competition and tensions between the two

courts as witnessed in the trial of Besigye and the 22. It would further benefit the Government financially as it would save money for running a parallel appellate military court.

5.3 Appointment, Qualifications and Tenure.

It is instructive to note that currently, all the members of the court including the prosecutor are appointed by the High Command chaired by the President of the Republic of Uganda who is also the Commander in Chief of the UPDF. This arrangement not only contravenes the fundamental principle of the Separation of Powers, but it also undermines the independence and impartiality of the military court. It is my considered opinion that members of the court should be verified by an independent body outside the military establishment (preferably the Judicial Service Commission) but on recommendation of the High Command.. This will contribute to ensuring the independence and impartiality of the military court.

The Chairperson of the military court martial should be a person qualified to be appointed a Grade I Magistrate for unit displinary committees (UDC)i.e. he or she should have at least a bachelor's degree n law and a post graduate diploma in legal practice. And other courts a person qualifying to be a udge. The other members of court should have legal training or the background of at least the equivalent of an ordinary diploma in law. This would enhance the court's capacity to handle complex egal issues such as the burden and standard of proof, and the proper interpretation and application of other rules of evidence and procedure. It will also help build public confidence in the military court.

The recommendation of the Chairperson of the GCM to be qualified for appointment as judge is ogical especially in light of the fact that the Chairperson of the Court Martial Appeal Court to which appeals from the GCM go is required to be a person qualified to be appointed a judge of the High Court.[118]

The Chairperson and at least two members of the court should be retired army officers. This will nsure that the Chairperson and at least the two members of court are not subject to the chain of ommand and do not owe allegiance to the military establishment as is currently the norm. This will elp strengthen the independence and efficiency of the court in the administration of justice.

The Chairperson should be appointed for a period of six years, not renewable. The other nembers of court should be appointed for a period of three years, renewable only once, subject to atisfactory performance. The circumstances and manner under which the members of the court nay be removed should be made clear. These should provide for an independent review of the easons for removal of the member, and should guarantee the right of the affected member to be eard. Such an arrangement provides sufficient security of tenure to guarantee minimum ndependence and impartiality of the military court.

[3] See, Section 199 (2) (a) of the UPDF Act

5.4 Conclusion

The current establishment of the military courts as one of the organs exercising judicial power in Uganda falls outside and contravenes the 1995 Constitutional framework. The Courts do not fit into the ordinary hierarchy of Ugandan courts. Example the GCM is not a court of record as established under Article 129 (1) (d) of the Constitution which governs the establishment of subordinate courts. The military does not fit within the parameters of the exercise of judicial power provided for under Chapter Eight of the Constitution which governs the administration of justice in Uganda.

This paper reveals that both the law and the practice of the military courts are at variance with the Constitutional order, and with several basic tenets of international law and practice. It has also demonstrated that the structure, composition, tenure and manner of appointment of the officers of the court do not meet the minimum standards necessary to ensure a fair and just trial. They do not guarantee the independence and impartiality of the military court. The paper has finally proposed key policy recommendations necessary to enhance the court's role in the administration of justice in Uganda.

It is hoped that the analysis, observations and conclusions made in this working paper will provide a firm basis for stimulating further debate and discussion in a bid to reform the structure and operation of military courts in Uganda.

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