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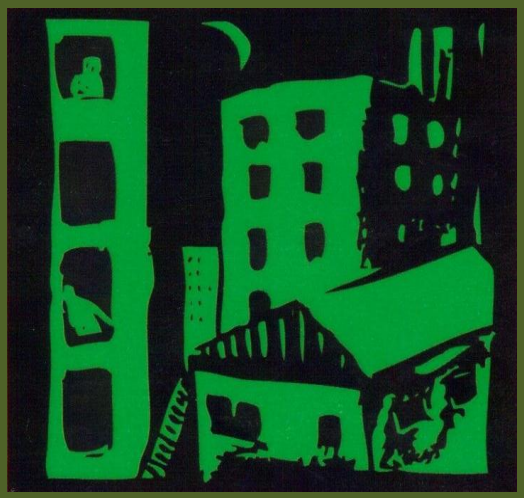

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Uganda's civil courts and the administration of military justice: An appraisal of their jurisprudence on selected issues

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1 INTRODUCTION

The last two decades stand out as the most important period in Uganda's history as far as civil courts' engagement with issues of military justice is concerned. In this period, Uganda's civil courts have handled many cases concerning the administration of military justice more than in any other epoch. Key among these cases include: *Attorney General v Major General David Tinyefuza*,[1]

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[1] *Attorney General v Major General David Tinyefuza* Const. Petition No. 1 of 1996 (CC).

Brigadier Henry Tumukunde v The Attorney General & Electoral Commission,[2] *Joseph Tumushabe v Attorney General*,[3] *Attorney General v. Joseph Tumushabe*,[4] *Uganda Law Society and Jackson Karugaba v Attorney General*,[5] *Uganda Law Society v The Attorney General*,[6] *Attorney General v Uganda Law Society*,[7] *Dr Kizza Besigye & Others v Attorney General*,[8] *Uganda Law Society v Attorney General*,[9] and *Major General James Kazini v Attorney General*.[10] A key observation about many of these cases is that they involve senior army officers/former senior army officers challenging their prosecution by the military justice system as essentially persecution by Government for their critical views. This is for instance true of the Tinyefuza case,[11] the Tumukunde case,[12] the Kazini case[13] and the cases involving Rtd Col Dr. Kiiza Besigye.

In the Tinyefuza case for instance, Major General David Tinyefuza petitioned the Constitutional Court for declarations, *inter alia*, that proceedings of the Parliamentary Sessional Committee on Defence and Internal Affairs are privileged under Article 97 of the Constitution and as such cannot form a basis for any disciplinary action and or criminal/civil action against him in any court of law and/or administrative body of any kind. Tinyefuza had been summoned to appear before the High Command for disciplinary action to be taken against him for the stinging attack he made on the Uganda Peoples Defence Forces (UPDF) when he testified before the Parliamentary Sessional Committee on Defence and Internal Affairs about the civil strife that was ongoing in Northern Uganda. It also emerged in the course of giving evidence that, President Museveni had listed several offences under the Army Code of Conduct for which Tinyefuza would have had to answer and had directed the High Command (which he chairs) to consider them and recommend action. The Constitutional Court rightly held that any threatened disciplinary, administrative, criminal or civil action or actions against Tinyefuza in any tribunal, forum or court of law, arising out of his testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs would be unconstitutional as it would violate Article 97 of the Constitution.

That Tinyefuza would be summoned to appear before the High Command for disciplinary action over his testimony to the Parliamentary Sessional Committee, which testimony is privileged under the Constitution, is so telling about the administration of military (in)justice in Uganda. In his resignation letter from the UPDF,[14] Tinyefuza essentially pointed to the fact that the military justice system was being abused to

[2] *Brigadier Henry Tumukunde v The Attorney General & Electoral Commission* Const. Appeal No. 2 of 2006 (SC).
[3] *Joseph Tumushabe v Attorney General* Const. Petition No. 6 of 2004 (CC).
[4] *Attorney General v Joseph Tumushabe* Const. Appeal No. 3/2005 (SC).
[5] *Uganda Law Society and Jackson Karugaba v Attorney General* Const. Petition Nos. 2 and 8/2002 (CC).
[6] *Uganda Law Society v The Attorney General* Const. Petition No. 18 of 2005 (CC).
[7] *Attorney General v Uganda Law Society* Const. Appeal No. 1/2006 (SC).
[8] *Dr Kizza Besigye & Others v Attorney General* Const. Petition No. 7/2007 (CC).
[9] *Uganda Law Society v Attorney General* Const. Petition No. 1/ 2006 (CC).
[10] *Major General James Kazini v Attorney General* Const. Petition No. 08 of 2008 (CC).
[11] *Attorney General v Major General David Tinyefuza*.
[12] *Brigadier Henry Tumukunde v The Attorney General & Electoral Commission*.
[13] *Major General James Kazini v Attorney General*.
[14] This letter is reproduced in full in the Court judgement.

persecute him. In relevant parts, Tinyefuza wrote to the President of Uganda, Commander-in-Chief of the UPDF and Chairman of the High Command as follows:

> Your Excellency,
>
> With great difficulty, I have decided to resign as a Member of the Uganda People's Defence Forces and also resign from the UPDF. There are several reasons *but most important among those is that I feel I am unjustly being harrassed over my testimony before that Parliamentary Committee on Defence and Internal Affairs*. *To require me to appear before the High Command so that [a]ction is taken against me is rather too high handed*… Article 42 of our Constitution requires that any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a Court of law in respect of any Administrative decision taken against him or her. *I am of the strong view that I will not have that Constitutional right before the UPDF High Command for obvious reasons.* It is therefore, because of the above that I must resign from the Army and subsequently its High Command. *I find it unjustified to continue serving in an institution whose bodies I have no faith in or whose views I do not subscribe to.*[15]

It is instructive that these words were coming from one of Uganda's top-most army officer. In essence, Tinyefuza was saying that he was being persecuted for his views and that even if he was ready to appear and defend himself before the High Command or indeed a military court, he would not get a fair trial.

The upsurge of cases concerning military justice in Uganda's civil courts in the last two decades, many of which involve litigants essentially challenging their prosecution by the military justice system as persecution raises many questions about the broader political economy of President Museveni's regime. Exploring these questions is outside the scope of this article. The major objective of this article is to appraise the jurisprudence of Uganda's civil courts on selected issues concerning the administration of military justice in Uganda.

The article is divided into ten sections. After section two which is a brief over-view of Uganda's military court structure, the rest of the article is organised along the major thematic issues concerning the administration of military justice that the civil courts have addressed in the various cases. These are: the purpose of military law and military courts; the status of military courts; military courts, the Constitution and human rights; military prosecutions conducted in violation of human rights; the jurisdiction of military courts; the right of appeal up-to the Supreme Court in cases handled by Field Courts Martial involving the death penalty; and the independence and impartiality of military courts.

2 OVER-VIEW OF UGANDA'S MILITARY COURT STRUCTURE

According to Article 126 (1) of the Constitution of the Republic of Uganda, "…judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people." In Article 129 (1), the Constitution further provides that the judicial power shall be exercised by the courts of judicature which shall consist of: the Supreme Court of Uganda; the Court of Appeal of Uganda; the High Court of Uganda; and such subordinate courts as Parliament may by law establish. It is

[15] *Attorney General v Major General David Tinyefuza* at 6. Emphasis added.

further provided that "…the Supreme Court, the Court of Appeal and the High Court of Uganda shall be superior courts of record and shall each have all the powers of such a court."[16]

Article 210 of the Constitution mandates Parliament to make laws regulating the UPDF.[17] Pursuant to this provision; Parliament enacted the UPDF Act as the major legal framework governing the UPDF.[18] Part VIII of the UPDF Act deals with the establishment and operation of military courts in Uganda. From the structural point of view, military courts in Uganda comprise of the Summary Trial Authority, Unit Disciplinary Committees and Courts Martial.[19] Under "Courts Martial", the UPDF Act provides for a four tier military court system i.e., Field Courts Martial; Division Courts Martial; the General Court Martial; and the Court Martial Appeal Court.[20]

Under the "Summary Trial Authority", an accused person can be tried by summary trial[21] either by his or her commanding officer or officer commanding or by a superior authority.[22] The offences triable by the Summary Trial Authority are provided for in the Eighth Schedule to the UPDF Act. They include disobeying lawful orders, insubordinate behaviour, violence to a superior officer, drunkenness, quarrels and disturbances, scandalous conduct by officers and absence without leave. Appeals from decisions of Summary Trial Authority lie only to the commanding officer or the immediate superior in command of the Summary Trial Authority.[23] Appeals from decisions of superior authority in exercise of original jurisdiction lie to the Commander-in-Chief.[24]

Unit Disciplinary Committees are established under section 195 (1) of the UPDF Act. This section establishes a Unit Disciplinary Committee for each Unit of the defence forces.[25] The jurisdiction of a Unit Disciplinary Committee is limited to trying persons accused of committing non-capital offences under the UPDF Act.[26] A Unit Disciplinary Committee has power to impose any sentence authorised by law.[27] This includes death. A party to the proceedings of a Unit Disciplinary Committee who is not satisfied with its decision has the right to appeal to the General Court Martial.[28] The UPDF Act also establishes a Division Court Martial for each Division or equivalent formation of the defence forces.[29] A Division Court Martial has unlimited original jurisdiction under the

[16] Art 129 (2) of the Constitution.
[17] The UPDF as the national army is established under art 208 of the Constitution.
[18] UPDF Act 7 of 2005.
[19] See the definition of "military court" in s 2 of the UPDF Act.
[20] See the definition of "court martial" in s 2 of the UPDF Act.
[21] According to s 2 of the UPDF Act, "summary trial" means an informal trial of a minor offence conducted by a Summary Trial Authority by which the accused has duly opted to be tried.
[22] See Ss 191 (1) and 192 (1) of the UPDF Act. "Superior authority" is defined in s 2 of the UPDF Act to mean the Chief of Defence Forces, Service Commanders, the Chief of Staff, or Service Chiefs of Staff.
[23] S 207 (1).
[24] S 207 (1).
[25] According to s 2, "Unit" means a unit of battalion strength or any other unit as declared by the Defence Forces Council.
[26] S 195 (3).
[27] S 195 (4).
[28] See Ss 227 (1) and 197 (2).
[29] S 194.

UPDF Act.[30] The power to convene a Division Court Martial vests in the High Command or any other authority authorised in that behalf by the High Command.[31]

Field Courts Martial are established under section 200 (1) of the UPDF Act. The jurisdiction of Field Courts Martial is limited to only circumstances where it is impractical for the offender to be tried by a Unit Disciplinary Committee or a Division Court Martial.[32] Section 197 (1) of the UPDF Act establishes the General Court Martial. The General Court Martial is the second highest military court in the country. The General Court Martial has both original and appellate jurisdiction. Like the Division Courts Martial, the original jurisdiction of the General Court Martial under the UPDF Act is unlimited.[33] Its appellate jurisdiction is limited to hearing and determining appeals referred to it from decisions of Division Courts Martial and Unit Disciplinary Committees.[34] The General Court Martial also has revisionary powers in respect of findings, sentences or orders made or imposed by any Summary Trial Authority or Unit Disciplinary Committee.[35]

The highest military court in Uganda is the Court Martial Appeal Court. The Court Martial Appeal Court hears and determines all appeals referred to it from decisions of the General Court Martial.[36] The Court Martial Appeal Court is the last appellate military tribunal in Uganda. No appeal lies from the Court Martial Appeal Court to any other court, except cases of appeal against convictions involving death sentence or life imprisonment which have been upheld by it.[37] In such cases, the appellant has a right of further appeal to the Court of Appeal.[38]

3 THE PURPOSE OF MILITARY LAW AND MILITARY COURTS

Military law can be described as that specialised area of law that governs military personnel and other persons subject to military law.[39] The major objective of military law is to ensure discipline in the armed forces which acceptably is considered to be key in ensuring military effectiveness.[40] In Tinyefuza's case, Justice Mulenga stressed that military law is "[a] special package of laws designed to ensure proper command and administration of, and *discipline in the army…*"[41] In the Uganda Law Society Constitutional petition of 2005,[42] Justice Mukasa-Kikonyogo expressed the view that one of the major purposes of military law is to ensure peace and security. This is the

[30] S 194.
[31] S 196 (1).
[32] S 200 (2).
[33] S 197 (2).
[34] S 197 (2).
[35] S 197 (3).
[36] S 199 (1).
[37] See the UPDF (Court-Martial Appeal Court) Regulations, Statutory Instrument 307 – 7, Regulation 20 (1).
[38] UPDF (Court-Martial Appeal Court) Regulations, Regulation 20 (2).
[39] See Dambazau A *Military law terminologies* (1991) at 75.
[40] Dambazau (1991) at 75.
[41] *Attorney General v Major General David Tinyefuza* Const. Appeal No. 1 of 1997 (SC) at 39. Emphasis added.
[42] *Uganda Law Society v Attorney General*.

end result of the military effectiveness which is largely achieved by ensuring discipline in the army. In addressing the issue whether sections 119 (1) (g) and (h) of the UPDF Act which subject certain categories of civilians to military law were inconsistent with particular provisions of the Constitution, she stressed that "…it is a tenable argument that the inclusion of the provisions above [in the UPDF Act] *were intended to safeguard national security* where such civilians find themselves in conflict with the military law."[43] "This is well intentioned for purposes of the wider realm of the State's constitutional mandate to control the nation's defence and national security", she further argued.

Military courts/courts martial are the main mechanism for enforcement of military law. In the Joseph Tumushabe case,[44] while interpreting Article 126 (1) of the Constitution in the context of the relationship between military courts and civil courts, Justice Mulenga who delivered the unanimous decision of the Supreme Court emphasised that "…court[s] martial are a specialised system to administer justice in accordance with military law..." An important question to pose here is: Why should the military have a specialised kind of law and enforcement mechanism. In Joseph Tumushabe[45] the Constitutional Court adeptly summarised the justification for existence of military courts alongside civil courts. In the words of Justice Twinomujuni, "The only justification for the creation of special tribunals is that our ordinary Courts of Law tend to be very slow and are not suitable for certain category of professions and occupations."[46] He stressed that "Courts Martial are justified by the fact that they are more suited to try military service offences than ordinary courts but more importantly they are expected to dispose of cases expeditiously."[47] In this particular case, the General Court Martial had remanded 28 suspects in custody for about 18 months without trial and had refused to entertain their bail applications. Holding that under the Constitution, the accused persons were entitled to be released on bail after 120 days from the date they were remanded in custody, Justice Twinomujuni stressed that he "…expect[s] persons arrested for military offences to spend much less time on remand than their counterparts who appear in civil courts."[48] In Kazini's case[49] Justice Mpagi-Bahigeine also argued that proceedings of military courts should not be protracted as is often the case in civil courts. She stressed that the purpose of court martial proceedings is for disciplining military officers and that this has to be promptly determined.[50]

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[43] *Uganda Law Society v Attorney General* at 19. Emphasis added.
[44] *Attorney General v Joseph Tumushabe*.
[45] *Joseph Tumushabe v The Attorney General*.
[46] *Joseph Tumushabe v The Attorney General* at 13
[47] *Joseph Tumushabe v The Attorney General* at 13-14.
[48] *Joseph Tumushabe v The Attorney General* at 14.
[49] *Major General James Kazini v Attorney General* at 20.
[50] For a comprehensive discussion of the justifications for the existence of military courts, see Michael G "International human rights law and the administration of justice through military tribunals: Preserving utility while precluding impunity" (2008) 4 *Journal of International Law and International Relations* 16. For an analysis of the extent to which the reasons advanced to justify existence of military courts are valid in Uganda's circumstances, see Naluwairo R "A reassessment of military justice as a separate system in the administration of justice: The case of Uganda" (2012) 18 *East African Journal of Peace & Human Rights* 136.

In summary, the major purpose of military law and military courts as discerned from the jurisprudence of Uganda's civil courts is to ensure proper command and discipline in the army to guarantee its efficiency in maintaining national peace and security. Ensuring proper command and discipline in the army requires military courts to expeditiously handle and dispose of cases involving infraction of military law.

4 THE STATUS OF MILITARY COURTS

The status of military courts in Uganda's justice system is a critical question that civil courts have addressed in a number of cases. The major issue has often been whether military courts are courts of judicature within the meaning of the Constitution. Needless to mention, this issue indirectly addresses the question of the relationship between military courts and civil courts. Joseph Tumushabe's Constitutional Petition[51] was one of first cases that addressed this issue. Relying on Article 129 (1) of the Constitution which establishes courts of judicature in Uganda and Article 257 which defines the word "Court" to mean "[a] Court of Judicature established by or under the authority of this Constitution", the Constitutional Court held that military courts are courts of judicature within the meaning of the Constitution. This view is consistent with the position of the United Nations Human Rights Council (formerly called the United Nations Commission on Human Rights). The Human Rights Council has consistently stressed that military justice is not and should not be considered as a separate system of administration of justice but an integral part of the general justice system.[52] Regarding the relationship between the High Court and the General Court Martial, the Constitutional Court rightly held by a majority of four to one that the General Court Martial is subordinate to the High Court. Justice Twinomujuni who delivered the judgement of the Court, emphasised that under Article 129 of the Constitution, Parliament's power is restricted to establishment of only subordinate courts.

The question of the status of military courts came up again in the Uganda Law Society Constitutional Petition of 2005.[53] In this case, Rt. Col. Dr. Kiiza Besigye and twenty two others were charged in the High Court with treason and misprision of treason under the Penal Code Act.[54] They were also jointly charged in the General Court Martial with the offence of terrorism and in the alternative with being in unlawful possession of firearms. All the above-mentioned offences arose from the same facts. One of the issues that the Constitutional Court had to address was whether the concurrent proceedings in the High Court Case No. 955/2005 and Court Case No. UPDF/Gen/075/2005 in the General Court Martial against the accused contravened

[51] *Joseph Tumushabe v The Attorney General*.
[52] See paras 3, 10 & 11 of the Draft Principles Governing the Administration of Justice through Military Tribunals, U.N. Doc. E/CN.4/2006/58 (2006). See also UN Commission on Human Rights Resolutions 2004/32 and 2005/30.
[53] *Uganda Law Society v Attorney General*.
[54] Cap. 120.

Articles 28 (1) and 44 (c) of the Constitution[55] and were inconsistent with Articles 28 (9) and 139 (1) of the Constitution.[56] In deciding this issue, the Court had to determine the status of the General Court Martial.

The Constitutional Court departed from its earlier decision in Joseph Tumushabe's Constitutional Petition[57] arguing that the case had been wrongly decided. The majority of their Lordships (three to two) held the view that military courts are not courts of judicature within the meaning of the Constitution. They also held that the General Court Martial is not subordinate to the High Court but equivalent to it. The reasons advanced to support this position were tersely stated by Justice Mukasa-Kikonyogo who delivered the judgement of the Court. She argued that:

> First and foremost the 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, Non-Performing Assets Recovery 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 Courts [sic]. Thirdly and most important of all is the construction I put on Article 139(2)[58]...If the General Court Martial was subordinate to the High Court its decisions would have been appealable to the High Court.[59]

Justice Kikonyogo argued further that "…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."[60] She further reiterated the Court's position on this view noting 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."[61] She concluded by holding that "…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 [the] UPDF…The General Court Martial is the equivalent of the High Court in the civil court system."[62]

Although on the face of it the arguments advanced by Justice Kikonyogo appear to be convincing, they are not tenable. Parliament's power to establish courts for the purposes exercising judicial power and administration of justice in Uganda is derived from Articles 126 (1) and 129 (1) of the Constitution. As earlier pointed out, Article

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[55] Art 28 (1) provides for the right to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Under art 44 (c), this right is stated as one of the non-derogable rights.

[56] Art 28 (9) provides for the right against double jeopardy and art 139 (1) provides that the High Court has unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or other law.

[57] *Joseph Tumushabe v Attorney General*.

[58] Art 139 (2) of the Constitution states that "[s]ubject 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."

[59] *Uganda Law Society v Attorney General* at 15.

[60] *Uganda Law Society v Attorney General* at 15.

[61] *Uganda Law Society v Attorney General* at 16.

[62] *Uganda Law Society v Attorney General* at 16.

126(1) of the Constitution provides that "…judicial power is derived from the people and shall be exercised by the courts established under this Constitution…" Article 129 (1) states that "[t]he judicial power of Uganda shall be exercised by the courts of judicature which shall consist of— (a) the Supreme Court…(b) the Court of Appeal… (c) the High Court… and (d) such subordinate courts as Parliament may by law establish..." The "shall" language used in these provisions means that no organ/establishment can exercise judicial power outside the framework of these Articles.[63] Besides the High Court, the Court of Appeal and the Supreme Court, Article 129 restricts Parliament's power to the establishment of only subordinate courts. Constitutionally therefore, the General Court Martial or any other military court currently established cannot be equivalent or superior to the High Court. This is the position that unsurprisingly was finally established in the Joseph Tumushabe's Supreme Court Case[64] and in *Attorney General v Uganda Law Society*.[65]

In Joseph Tumushabe, the Supreme Court held that military courts are courts of judicature within the meaning of the Constitution. It held further that the General Court Martial is a subordinate court within the meaning of Article 129 (1) (d) of the Constitution, and a lower court in the appellate hierarchy of courts. In the words of Justice Mulenga who delivered the unanimous decision of the Court, "…although courts martial are a specialised system to administer justice in accordance with military law, they are part of the system of courts that are, or are deemed to be, established under the Constitution to administer justice in the name of the people."[66] Justice Mulenga emphasised further that military courts are not parallel but are complementary to the civilian courts, hence the convergence at the Court of Appeal level.

Perhaps more important to the understanding of the exact status of military courts in Uganda, in Joseph Tumushabe's case, the Supreme Court spent some time clarifying the meaning of "subordinate courts" and "superior courts" as used in the Constitution. The importance of this issue dictates quoting the words of the Court in some detail. Referring to Article 129 of the Constitution, Justice Mulenga argued:

> To my understanding, the classification between superior and subordinate courts in Article 129 only relates to the modes of establishment of the courts, namely 'courts established by the Constitution' being the superior courts, and 'courts established by Parliament under the authority of the Constitution' being the subordinate courts. The classification does not relate to the appellate hierarchy of courts. Thus, for example, notwithstanding the definition of subordinate court in Article 257 as a court subordinate to the High Court, in Article 139(2), which is concerned with the appellate hierarchy, it is provided that appeals which lie to the High Court are from ***'decisions of any court lower than the High Court'*** not decisions of subordinate courts. It appears to me that in this context, the word 'subordinate' was not used as synonymous with the word 'lower'; so that not all subordinate courts are necessarily lower than the High Court in the appellate hierarchy.[67]

Responding to the argument that if the General Court Martial was subordinate to the High Court, its decisions would have been appealable to the High Court and that the two

[63] See Naluwairo R *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* (2006) at 21.
[64] *Attorney General v Joseph Tumushabe*.
[65] *Attorney General v Uganda Law Society.*
[66] *Attorney General v Joseph Tumushabe* at 10.
[67] *Attorney General v Joseph Tumushabe* at 18. Emphasis in original.

courts would not have concurrent jurisdiction to try capital offences, Justice Mulenga clarified that under Article 129 (3) of the Constitution, Parliament has discretion to make provision for the jurisdiction and procedure of courts and that there is no provision in the Constitution which restricts Parliament from vesting in a subordinate court jurisdiction over some matter, which is also within the jurisdiction of the High Court. Citing Article 23 (6) (b) of the Constitution, he argued that Parliament may in its discretion place a subordinate court in the appellate hierarchy at the same level as the High Court. He gave a number of examples including section 15 of the Nonperforming Assets Recovery Trust Act,[68] where appeals from decisions of the Tribunal established under that Act lie to the Court of Appeal. He stressed that that does not render the Tribunal a superior court. He also pointed to the decisions of the Court Martial Appeal Court, which like those from decisions of the High Court, lie to the Court of Appeal. He argued that this places the Court Martial Appeal Court at the same level, in the appellate hierarchy of courts, as the High Court.

In sum, the Supreme Court concluded that "…the General Court Martial (from which, appeals lie to the Court Martial Appeal Court), is both a subordinate court within the meaning of Article 129(1) (d), and lower than the High Court in the appellate hierarchy of courts".[69] In the Uganda Law Society and Jackson Karugaba case,[70] where the issue of the status of military courts came up again, referring to the Joseph Tumushabe Supreme Court case, the Constitutional Court affirmed that military courts are courts of judicature established under Article 129 of the Constitution.

5 MILITARY COURTS, THE CONSTITUTION AND HUMAN RIGHTS

The Constitution expressly states that it is "…the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda."[71] The Constitution further provides that if any other law or any custom is inconsistent with any of its provisions, it prevails, and that other law or custom shall, to the extent of the inconsistency be void.[72] Despite these clear constitutional provisions, there are a number of cases where the Government through the Attorney General has consistently argued that the Constitution or particular provisions thereof do not apply to military courts. Two cases are worth highlighting.

In the Joseph Tumushabe Supreme Court case,[73] one of the main issues was whether the failure to release the detainees on bail after the constitutional time limit for remand in custody was unconstitutional. The Attorney General had appealed against the judgement of the Constitutional Court which had held by a majority that the detention after expiry of the maximum remand period in custody was inconsistent with and contravened Article 23 (6) (b) of the Constitution.[74] The Attorney General argued that

[68] Cap. 95.
[69] *Attorney General v Joseph Tumushabe* at 19.
[70] *Uganda Law Society and Jackson Karugaba v Attorney General*.
[71] Art 2(1).
[72] Art 2 (2).
[73] *Attorney General v Joseph Tumushabe*.
[74] *Joseph Tumushabe v Attorney General*.

Article 23 (6) (b) of the Constitution does not apply to military courts and that the issue of bail in respect of persons awaiting trial in the General Court Martial was governed by the UPDF Act.[75] The Supreme Court held that the bail provisions of Article 23 (6) of the Constitution apply to every person awaiting trial for criminal offence without exception. Justice Mulenga correctly stressed that "the Constitution guarantees to every person the enjoyment of the rights set out in Chapter 4 except only in the circumstances that are expressly stipulated in the Constitution."[76] He pointed out that the Constitution commands the government, its agencies and all persons, without exception, to uphold those rights. He emphasised that "[t]he General Court Martial is not exempted from the constitutional command to comply with the provisions of Chapter 4 or of Article 23 (6) in particular."[77] He rightly stressed further that neither "… is a person on trial before a military court deprived of the right to reclaim his/her liberty through the order of *habeas corpus* or application for mandatory bail in appropriate circumstances."[78]

In the Uganda Law Society and Jackson Karugaba case,[79] one of the issues was whether the Constitution of Uganda applies to Field Courts Martial. Referring to Article 2 of the Constitution and the Supreme Court case of Joseph Tumushabe, the Constitutional Court also re-affirmed the Constitution as the supreme law of Uganda with binding force on all authorities including military courts. Justice Twinomujuni who delivered the unanimous decision of the Court expressed shock that Government was still insisting that the Constitution does not apply to military courts. He argued thus

> In the course of my eleven years' service as a justice of the Constitutional Court, I have heard very senior representatives of the Attorney General argue that the Constitution does not apply to the Uganda Peoples Defence Force as it applies to other authorities and persons in Uganda. They particularly like to argue that the Constitution does not apply to the military courts martial because the Courts are not Courts of judicature within the meaning of Article 129 of the Constitution. They argue that these are special institutions that were never intended to be bound by stringent rules and procedures laid down in the Constitution. I have always held that this argument is fallacious. The majority of Justices of this Court have always maintained that the Constitution applies to all authorities and persons throughout Uganda. I was, therefore, shocked to hear the same arguments being advanced in this petition by counsel for the respondent.[80]

From the jurisprudence of Uganda's highest court i.e., the Supreme Court and the court specifically charged with the responsibility of interpreting the Constitution i.e., the Constitutional Court, it is now clear that the Constitution applies to military courts. Uganda's civil courts have also unequivocally stressed that in the administration of military justice, military courts, like the civil courts, must respect and uphold the guaranteed human rights and freedoms of the accused persons. This position is consistent with the decisions of the Human Rights Committee (HRC) and the African

[75] At the time, art 23 (b) of the Constitution provided that "[w]here a person is arrested in respect of a criminal offence - in the case of an offence which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offence before trial for one hundred and twenty days." This article was amended and the Constitutional time limit for remanding someone in custody is now sixty days before trial.

[76] *Attorney General v Joseph Tumushabe* at 15.

[77] *Attorney General v Joseph Tumushabe* at 15.

[78] *Attorney General v Joseph Tumushabe at* 15.

[79] *Uganda Law Society and Jackson Karugaba v Attorney General*.

[80] *Uganda Law Society & Jackson Karugaba v. Attorney General* at 9.

Commission on Human and Peoples' Rights (ACHPR).[81] As Justice Kanyeihamba pointed out in *Attorney General v. Senkali George and 45006 Others*,[82] persons who join the armed forces do not waive their human rights. They should therefore be treated fairly with maximum respect of their rights and freedoms.[83]

6 MILITARY PROSECUTIONS THAT VIOLATE THE RIGHTS OF SUSPECTS/ACCUSED PERSONS

For a very long time, the military in Uganda has been notoriously known to torture suspects and violate their guaranteed rights and freedoms.[84] This has happened at various stages for example, when arresting suspects, interrogating suspects, and in the general handling of accused persons. In Dr. Kizza Besigye's Constitutional Petition of 2007,[85] the Constitutional Court expressed concern that even where the violations of the accused persons' rights are brought to the attention of courts, prosecutions are allowed to go on as if nothing wrong happened. Relying on judicial decisions from Kenya and the United Kingdom, the Constitutional Court established the principle to the effect that proceedings tainted with flagrant, egregious and malafide violations of the law and the rights of accused persons should never be allowed to proceed.[86]

In this particular case, the Court found that given the violations of the law and the rights of the accused that had happened, the accused persons would never receive a fair trial if the prosecutions in question were allowed to continue. Among the violations of the law and the rights of accused that had occurred included charging the accused before the General Court Martial for offences over which it did not have jurisdiction; detaining them in total disregard of numerous orders from the High Court and the Constitutional Court, and high ranking state officials issuing statements that presupposed that they were guilty of grave offences. The Justices of the Supreme Court pointed out that they would not sanction any continued prosecution of the petitioners where during the proceedings, their rights had been violated to the extent described. They argued that no matter how strong the evidence against the accused persons was, they could never receive a fair trial and any subsequent trials would be a waste of time and an abuse of court process.

In *Republic of Kenya v Amos Karuga Karatu*,[87] one of the cases that the Constitutional Court found persuasive, Makhandia J emphasised that "…a prosecution

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[81] See para 22, HRC General Comment No.32 (Art 14: Right to Equality before Courts and Tribunals and to a Fair Trial), adopted at the Ninetieth Session of the Human Rights Committee, 23 August, 2007, and *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria,* ACHPR Comm. No. 218/98 (1998) at para 44 respectively.

[82] *Attorney General v Senkali George and 45006 Others* Civil Appeal No. 2 of 2006 (SC) at 13.

[83] *Attorney General v Senkali George and 45006 Others* at 13.

[84] See for instance, Human Rights Watch *Righting military injustice: Addressing Uganda's unlawful prosecution of civilians in military courts* (2011) at 17. See also various reports of the Uganda Human Rights Commission e.g., Uganda Human Rights Commission *Fourteenth Annual report to the Parliament of the Republic of Uganda* (2011) at 7; and Uganda Human Rights Commission *Sixth Annual report to the Parliament of the Republic of Uganda* (2003) at 87.

[85] *Dr. Kizza Besigye & Others v Attorney General*.

[86] *Dr. Kizza Besigye & Others v Attorney General* at 40.

[87] *Republic of Kenya v Amos Karuga Karatu* High Court Cr. Case No.12 of 2006.

mounted in breach of the law is a violation of the rights of the accused and is therefore a nullity."[88] In *R v Horseferry Road Magistrates Ex parte Bennet*,[89] another Commonwealth decision that the Constitutional Court relied on, the House of Lords stressed that prosecutions mounted in contravention of the rule of law are an abuse of court process and should never be allowed to continue. It therefore follows that in handling suspects and conducting prosecutions, the military and other authorities should be careful not to engage in acts or omissions that would violate the law and the rights of the accused persons.

7 THE JURISDICTION OF MILITARY COURTS

It is trite law that any competent tribunal must have jurisdiction over both the subject matter (jurisdiction *ratione materiae*) and the person(s) it tries (jurisdiction *ratione personae*). Jurisdiction of a tribunal is a matter determined by law. In this connection, Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR) provides that a competent, independent and impartial tribunal must be established by law.[90] The African Commission of Human and Peoples' Rights has held that the purpose of requiring that courts be "established by law" is to ensure that the organisation of justice is not dependent on the discretion of the executive.[91]

In principle, the jurisdiction of military courts should be limited to serving military personnel accused of committing military offences.[92] The jurisdiction of military courts over civilians is supposed to be exceptional. According to the HRC, the "...trial of civilians by military or special tribunals should be… limited to cases where the state party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials."[93]

Uganda's military law gives the military courts jurisdiction over many categories of civilians. According to section 119 of the UPDF Act, persons subject to military law/ jurisdiction of military courts include: civilians who serve in the position of an officer or militant in any force raised and maintained outside Uganda and commanded by an officer of the defence forces;[94] civilians who voluntarily accompany any unit or other element of the defence forces which is on service in any place;[95] and civilians who serve in the defence forces under engagements by which they agree to be subject to military law.[96] Civilians who aid or abet a person subject to military law in commission of a

[88] *Republic of Kenya v Amos Karuga Karatu* at 5.
[89] *R v Horseferry Road Magistrates Ex parte Bennet* [1994] 1 AC 42.
[90] The ICCPR was adopted 16 December 1966 at New York, entered into force on 23 March 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) 52, U.N.Doc. A/6316 (1967). Uganda acceded to the ICCPR on 21 June 1995.
[91] See *Civil Liberties Organisation et al v Nigeria* para 27.
[92] See Principle 5 of the Draft Principles Governing the Administration of Justice through Military Tribunals. See also *Media Rights Agenda (on behalf of Niran Malaolu) v Nigeria*, ACHPR Comm. No. 224/98 (2000) para 62.
[93] HRC General Comment 32 (2007), para 22.
[94] S 119 (1) (d).
[95] S 119 (1) (e).
[96] S 119 (1) (f).

service offence and civilians found in unlawful possession of arms, ammunitions or equipment ordinarily being the monopoly of the defence forces or other classified stores as prescribed, are also subjected to the jurisdiction of military courts.[97]

There are a number of cases where Uganda's civil courts have dealt with the question of trial of civilians in military courts. In the Uganda Law Society Constitutional Petition of 2005,[98] one of the major issues was whether sections 119 (1) (g) and (h) of the UPDF Act which subject civilians not employed by or voluntarily or in other way connected with the UPDF to military law and discipline are inconsistent with Articles 28 (1), 126 (1) and 210 of the Constitution. By a majority of three to two, the Constitutional Court held that those provisions were not inconsistent with the said constitutional provisions. The major reasoning of the Court was that subjecting those categories of civilians to military law was necessary to safeguard national security. Justice Mukasa-Kikonyogo who delivered the judgment of Court stated that:

> [*D*]*ue to the importance of national security* it appears it is generally accepted that those members of civil society who assist in anyway the commission of military offence or aid and abet military offenders or those holding arms and ammunition unlawfully should be answerable in military courts.[99]

With respect, it is apparent that the Constitutional Court missed the point. The issue was not whether the trial of civilians in military courts was justifiable, but rather, whether according to the interpretation of Articles 28 (1), 126 and 210 of the Constitution, subjecting civilians to the jurisdiction of military courts was permissible. In the Uganda Law Society Constitutional Petition of 2005,[100] the Constitutional Court also clarified that to validly charge someone under section 119 (1) (g) of the UPDF Act, there must be a principal offender to aid or abet who must be subject to military law. On the facts of the case, the charge sheet was found to be defective as it did not disclose who the principal offender was. Regarding section 119 (1) (h) of the UPDF Act, the Court held that it has to be shown that the arms or equipment found in possession of the accused are the monopoly of the UPDF or classified stores as prescribed.[101] On the facts of the case, it was not shown that the arms allegedly found in possession of the accused were a monopoly of the UPDF. On the specific question whether the joint trial of civilians and members of the UPDF in the military court for offences under the UPDF Act is inconsistent with the Constitution, still largely basing its decision on grounds of national security, the Constitutional Court held that such trials were justified in the circumstances envisaged under section 119 (1) (g) of the UPDF Act.

In *Re Muhindo Herbert & 6 Others*,[102] the applicants were charged in the General Court Martial with illegal possession of fire arms contrary to the Fire-arms Act.[103]

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[97] S 119 (1) (g) & (h) respectively.
[98] *Uganda Law Society v Attorney General*.
[99] Emphasis added.
[100] *Uganda Law Society v Attorney General* at 83.
[101] The arms, ammunition and equipment ordinarily the monopoly of the defence forces are spelt out in the Uganda Peoples' Defence Forces (Arms, Ammunition and Equipment Ordinarily the Monopoly of the Defence Forces) Regulations, Statutory Instrument 13 of 2006.
[102] *Re Muhindo Herbert & 6 Others* HCT-05-CV-MA-0042-2012.
[103] Cap. 299.

Relying on the Uganda Law Society Constitutional Petition of 2005,[104] Justice Bashaija of the High Court reiterated that "civilians who are not jointly charged with members of the armed forces or who are not charged with possession of equipment which is the exclusive monopoly of the military are excluded from trial by Court Martial."[105] Noting that the evidence on record pointed to the fact that the applicants were civilians charged with illegal possession of fire arms and ammunition under the Fire arms Act, he argued that he did "…not see how they could then be brought within the ambit of Court Martial for trial given the Constitutional Court's decision [in *Uganda Law Society v Attorney General*]."[106] Consequently, he held that the General Court Martial was not a competent court to conduct the trial in question.

In *Attorney General v Uganda Law Society*, the Supreme Court also addressed the issue of the competency of military courts to try civilians charged with offences under legislation other than the UPDF Act. The Attorney General had appealed the decision of the Constitutional Court arguing *inter alia* that the justices of the Constitutional Court erred in law and in fact in holding that the General Court Martial does not have jurisdiction to try charges of terrorism as provided for in the Anti-Terrorism Act[107] and unlawful possession of firearms contrary to the Firearms Act. He emphatically argued that by virtue of section 2 of the UPDF Act,[108] the General Court Martial had jurisdiction over the offences in question. The Supreme Court did not find his argument convincing. It held that "[f]or an offence under an Act other than the UPDF Act to fall within the jurisdiction of military courts, it must have been committed by a person subject to military law."[109] In this particular case, because it was not alleged nor shown that the accused persons had committed the offences with which they were charged while they were subject to military law, the Court held that the General Court Martial did not have jurisdiction over the offences. "Without that link, neither of the two offences can be called a service offence within the meaning of the said definition",[110] emphasised justice Mulenga who delivered the Judgement of the Supreme Court.

With particular reference to the offence of terrorism, Justice Mulenga approved the Constitutional Court's decision in the Uganda Law Society Constitutional Petition of 2005,[111] where it was held by a majority of four to one that the General Court Martial did not have jurisdiction over this offence because section 6 of the Anti-Terrorism Act conferred exclusive jurisdiction over it in the High Court.[112] He pointed out that there can be no trial at all where the court is not competent. He emphasised that "[a] trial by an incompetent court is by that fact alone a nullity *ab initio.*"[113] In the Constitutional

[104] *Uganda Law Society v Attorney General*.
[105] *Re Muhindo Herbert & 6 Others* at 9.
[106] *Re Muhindo Herbert & 6 Others* at 9.
[107] Act 14 of 2002.
[108] S 2 of the UPDF Act defines a service offence as "an offence under this Act [UPDF Act] or any other Act for the time being in force committed by a person while subject to military law."
[109] *Attorney General v Uganda Law Society* at 10.
[110] *Attorney General v Uganda Law Society* at 10.
[111] *Uganda Law Society v Attorney General*.
[112] S 6 of the Anti-Terrorism Act states that "…the offence of terrorism and any other offence punishable by more than ten years imprisonment under this Act are triable only by the High Court and bail in respect of those offences may be granted only by the High Court."
[113] *Attorney General v Uganda Law Society* at 9.

Court, Justice Mukasa-Kikonyongo who delivered the decision of the Court rightly emphasised that a court be it civil or military, can only try the accused for an offence where it is seized with jurisdiction. Referring to section 6 of the Anti-Terrorism Act, she argued that clearly the General Court Martial has no jurisdiction to try persons charged with the offence of terrorism. In response to the argument raised by the Solicitor General that terrorism and unlawful possession of firearms are service offences within the meaning of section 2 of the UPDF Act and are therefore triable by the General Court Martial, she pointed out that that provision had no effect in the instant case. "It is immaterial to me whether the charges preferred against the accused are service offences because where the law excludes jurisdiction from a particular court, it is not competent to try it. The offence with which the accused are charged carries a death sentence and is only triable by the High Court",[114] she rightly argued.

Uganda's civil courts have also dealt with the specific issue of the jurisdiction of Field Courts Martial. According to section 200 (2) of the UPDF Act (a replica of section 77 of the National Resistance Army Statute),[115] Field Courts Martial are only supposed to operate in circumstances where it is impractical for the offender to be tried by a Unit Disciplinary Committee or a Division Court Martial. In the Uganda Law Society and Jackson Karugaba case,[116] one of the issues that the Constitutional Court had to determine was whether at the time of the Kotido Field Court Martial in question, circumstances existed such that it was not practical for the alleged offenders to be tried by a Unit Disciplinary Committee or a Division Court Martial. In addressing this issue, Justice Twinomujuni posed a very important question regarding the jurisdiction of Field Courts Martial. He asked: "Who is competent to determine whether the requisite circumstances existed; is it subjectively the province of the appointing authority or can the matter be determined using an objective test by another person or authority like a court of law?"[117] Noting that on the particular day in question, there was no evidence of a warlike situation or military operation in progress, he nonetheless stated that it was not possible for a person or authority like court to determine the nature of the military operation that was required in Karamoja to disarm the heavily armed war lords of Karamoja region. He opined that such decision should be left to the military command and the appointing authority. He held that since this is what happened, the Field Court Martial which handled the Kotido trial was a competent court.

Justice Twinomujuni's decision in the above-mentioned case is highly contentious. Arguably, the correct test he should have applied is an objective one. Section 77 of the National Resistance Army Statute which was in issue clearly stated that "[a] Field Court Martial shall only operate *in circumstances* where it is impractical for the offender to be tried by a Unit Disciplinary Committee or Division Court Martial."[118] Going by this language, it could not have been the intention of the legislature that the issue of whether or not circumstances exist to warrant a Field Court Martial should be left to the entire discretion of the military commanders or the

[114] *Uganda Law Society v Attorney General* at 24.
[115] Statute No. 3 of 1992.
[116] *Uganda Law Society and Jackson Karugaba v Attorney General*.
[117] *Uganda Law Society and Jackson Karugaba v Attorney General* at 23.
[118] Emphasis added.

Commander-in-Chief. Were this to be the case, the law would have explicitly stated so. It would have stated that a Field Court Martial shall only operate in circumstances where the Field Commander or the deploying authority considers it impractical for the offender to be tried by a Unit Disciplinary Committee or Division Court Martial. In the instant case, both parties to the proceedings should have adduced evidence as to the circumstances that existed at the time in question. From that evidence, the Court should then have ruled whether from an objective point of view, it was impractical to have the offenders tried by a Unit Disciplinary Committee or a Division Court Martial.[119]

8 APPEALS UP-TO THE SUPREME COURT IN CASES DECIDED BY FIELD COURTS MARTIAL INVOLVING THE DEATH PENALTY

Another important issue concerning the administration of military justice that the civil courts have pronounced themselves on concerns the right of appeal up-to the Supreme Court in cases decided by Field Courts Martial involving the death penalty. This has always been an issue because, although the Constitution requires that a conviction and sentence of death by a court must be confirmed by the highest appellate court[120] Uganda's military law was ambiguous on the question whether persons found guilty and sentenced to death by Field Courts Martial had a right to appeal up-to the Supreme Court level.

In *Uganda Law Society v Attorney General*,[121] Uganda Law Society filed a petition challenging the constitutionality of the NRA Statute in so far as it provided for the passing of a death sentence without the right of the convicts to appeal up-to the Supreme Court. The application sought for an injunction to restrain the state from carrying out the death sentences in respect of certain convicts until the petition was heard. Basing mainly on Articles 135 (5) and 121 of the Constitution,[122] the Constitutional Court held that Parliament never intended Article 22 (1) of the Constitution to apply to Field Courts Martial. Stressing that a Field Court Martial is established for the trial of service men and women who commit service offences in a field operation, it held that "…a Field Court Martial, is a special court which should not be bogged down by appeal procedures."[123] In light of the Joseph Tumushabe Supreme Court case,[124] this decision cannot stand. As justice Mulenga emphasised in that case, except where the Constitution expressly states otherwise, it applies to all persons and authorities in Uganda. If Parliament wanted to exempt Field Courts Martial from the provisions of Article 22 (1) of the Constitution, it would have explicitly stated so.

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[119] For a thorough analysis of the constitutionality of the Kotido executions and the Field Court Martial that ordered them, see Onoria H "Soldiering and constitutional rights in Uganda: The Kotido military executions" (2003) 9 *East African Journal of Peace and Human Rights* 87.

[120] See art 22 (1) of the Constitution.

[121] *Uganda Law Society v Attorney General* Const. Application No.7 of 2003.

[122] Art 137 (5) provides that where any question as to the interpretation of the Constitution arises in any proceedings in a court of law other than a Field Court Martial, the court may refer it to the Constitutional Court. This Article provides further that where one of the parties to the proceedings requests the matter to be referred to the Constitutional Court, the matter must be referred to the Constitutional Court.

[123] *Uganda Law Society v Attorney General* at 14.

[124] *Attorney General v Joseph Tumushabe*.

In the Uganda Law Society and Jackson Karugaba case,[125] Justice Twinomujuni also expressed serious doubts about the correctness of the decision of the Constitutional Court in *Uganda Law Society v Attorney General*. He reiterated that except where the Constitution expressly exempts application of a provision to any person or authority, the Constitution applies to all. He convincingly argued that Article 137 (5) of the Constitution was intended only "…to ensure that proceedings which start in Military Courts remain there until they are finalised in the Court Martial Appeal Court or in case of capital offences, until they are referred to the Court of Appeal". He stressed that this was logical because it minimizes delays which would otherwise occur if cases were to move from the military courts to the Constitutional Court and then backwards to the military courts. With respect to Article 121 of the Constitution which exempts Field Courts Martial from the provisions stated therein, he pointed out that those provisions were equally designed to expedite proceedings in cases emanating from the Field Courts Martial. In conclusion, he held that there was nothing in Articles 137 (5) and 121 that exempts Field Courts Martial from the mandatory application of Article 22(1) of the Constitution and that the accused persons in the Kotido trial were entitled, as of right, to appeal through the military court system up-to the Supreme Court. It follows therefore that all persons convicted and sentenced to death by whatever court including the Field Courts Martial have the right to appeal up-to the Supreme Court.

9 THE INDEPEDENCE AND IMPARTIALITY OF MILITARY COURTS

Article 28 (1) of the Constitution guarantees to everyone a fair hearing before "an independent and impartial court or tribunal established by law." At the same time, Article 128 (1) of the Constitution provides that "…in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any authority." The question to ask is whether Uganda's military courts can be said to be independent and impartial.

In the Uganda Law Society Constitutional Petition of 2005,[126] one of the main issues was whether the joint trial of civilians and members of the UPDF in military courts was inconsistent with Article 28 (1) of the Constitution. By a majority of three to two, the Court held that the trial was not inconsistent with the said constitutional provision. In giving the reasons for the Court's decision, Justice Mukasa-Kikonyogo stressed that the fear of possible violation of the right to a fair trial was not justified. She pointed out that "…where the offences charged, properly fall under the martial courts jurisdiction, the martial courts have the capacity to provide a fair trial in accordance with Article 28 of the Constitution."[127] This is because "[f]irstly…the military courts have their own Rules and Regulations intended to ensure fair trial. Secondly, under section 209 of UPDF Act, they are enjoined to observe the rules of evidence and civil procedure applicable in ordinary civil courts...",[128] she argued. With respect, as far as the independence and impartiality of military courts is concerned,

[125] *Uganda Law Society and Jackson Karugaba v Attorney General.*
[126] *Uganda Law Society v Attorney General*.
[127] *Uganda Law Society v Attorney General* at 19.
[128] *Uganda Law Society v Attorney General at* 19.

these reasons cannot support the conclusion reached by the Court. The test for determining the independence and impartiality of a tribunal is whether an informed and reasonable person would perceive a tribunal to be independent and impartial. This test is based on the objective conditions/requirements of security of tenure, financial security and institutional independence.[129] The Constitutional Court should therefore have examined whether the rules and regulations of the military courts, and the rules of evidence and civil procedure guarantee these conditions before concluding that military courts can provide a fair trial. Suffice to point out that the law governing Uganda's military courts does not guarantee security of tenure and financial security for the persons who play judicial roles in the country's military courts. Neither does it guarantee the institutional independence of the military courts.[130]

The better view is therefore that which was given in the Uganda Law Society and Jackson Karugaba case.[131] In this case, one of the main issues was whether the Kotido Field Court Martial accorded the accused persons a fair trial in accordance with Article 28 of the Constitution. Justice Twinomujuni who delivered the judgement of the Constitutional Court concluded that given the requirements of Articles 28 and 128 (1) of the Constitution "…it is not possible for Uganda Military Courts to be independent and impartial given the current laws under which they are constituted and the military structure within which they operate."[132] He rightly pointed out that in order to be independent and impartial, the military courts must have officers with privileges enjoyed by the other judicial officers in the Uganda judiciary including security of tenure and financial security.[133]

10 CONCLUSION

For a very long time, issues concerning the administration of military justice in Uganda had been a reserve for the military. The last two decades have, however, seen a shift with many cases concerning military justice being referred to the civil courts, particularly the Constitutional Court. On the whole, the civil courts have performed well in addressing the various issues that have been raised before them. They have interpreted and applied the law satisfactorily. They have clarified many issues and articulated several principles relevant for improving the administration of military justice in the country. From their jurisprudence appraised in this article, six important points are worth re-emphasising. First, military courts are courts of judicature within

[129] See the Basic principles on the independence of the judiciary (adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders) Milan 26 August - 6 September 1985, U.N.Doc. A/conf./121/22/Rev.1 (1985) at 59.

[130] For a thorough analysis of the independence and impartiality of Uganda's military courts, see Naluwairo R "Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal" (2012) 12 *African Human Rights Law Journal* 448.

[131] *Uganda Law Society and Jackson Karugaba v Attorney General*.

[132] *Uganda Law Society and Jackson Karugaba v Attorney General* at 16.

[133] For a good discussion of the reforms needed to make Uganda's military justice system compliant with the right to a fair trial including the right to an independent and impartial tribunal, see Naluwairo R "Guaranteeing the right to a fair trial in Uganda's military justice system: Proposals for reform" (2012) 18 *East African Journal of Peace & Human Rights* 316.

the meaning of the Constitution and are therefore subordinate courts. Second, except where the Constitution states otherwise, it is binding on military courts just like the civil courts. Third, in the administration of military justice, military courts like their civilian counterparts, must respect and uphold the accused persons' guaranteed rights and freedoms. Fourth, no military court should allow prosecutions conducted in flagrant violation of the law and the accused persons rights and freedoms to proceed. This is an abuse of court process which should not be tolerated. Fifth, given the major objectives of military justice, military courts must dispose of cases more expeditiously than civil courts. Finally, the law governing the administration of military justice in Uganda needs urgent reform if persons subject to military law are to fully enjoy their guaranteed right to a fair trial.

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