

**THE TRIALS AND TRIBULATIONS OF
RTD. COL. DR. KIZZA BESIGYE AND 22 OTHERS**

A Critical Evaluation of the Role of the General Court Martial
in the Administration of Justice in Uganda

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Table of Contents

Acknowledgments	ii
Summary of the Report and Policy Recommendations.....	iii
List of Acronyms.....	vi
I. INTRODUCTION.....	1
II. BACKGROUND TO THE TRIALS OF BESIGYE & 22 OTHERS.....	3
III. THE LAW GOVERNING THE GENERAL COURT MARTIAL.....	12
A. Establishment, Composition and Tenure	13
B. Quorum and Decision Making.....	14
C. Jurisdiction	14
D. Guarantees for the Right to a Fair Hearing and a Just Trial	17
IV. THE RELATIONSHIP WITH CIVILIAN COURTS.....	19
V. EVALUATION OF THE ROLE OF THE GENERAL COURT MARTIAL IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN UGANDA.....	22
A. Trial by a Competent Court	22
B. Trial by an Independent and Impartial Court.....	25
C. Concurrent Proceedings in Different Courts for Same Facts Offences.....	32
VI. RECOMMENDATIONS.....	33
A. The Question of Jurisdiction.....	34
B. The General Court Martial's Relationship with Civilian Courts	34
C. Appointment, Qualifications and Tenure.....	35
VII. CONCLUSION	36
VIII. SELECT BIBLIOGRAPHY.....	38

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Summary of the Report and Policy Recommendations

When the Chairperson of the Sessional Committee on Defence and Internal Affairs at the time, Hon. Simon Mayende introduced the Uganda Peoples Defence Forces (UPDF) Bill for the Second Reading, he informed Members of Parliament that the Bill was expected to harmonize military law with the Constitution and to improve the administration of justice in the UPDF. The Bill was developed within the overall context of professionalizing the UPDF. It was passed into law (i.e. The UPDF Act, Act No.7, 2005) in March 2005.

The indictment and various trials of Rtd. Col. Dr. Kizza Besigye and 22 others, present one of the first major tests of whether the new law has achieved its intended objectives. In particular, the trials provide the opportunity to examine the compliance of the UPDF Act with the Constitution with particular regard to issues of administering justice, especially as dispensed by the General Court Martial (GCM).

This Working Paper is an analysis of the role of the GCM in the administration of justice in Uganda. The paper makes the following key observations, conclusions and recommendations:

- Any State organ that purports to exercise judicial power in Uganda must adhere to certain minimum international and constitutional standards of administering justice. In particular, such organs are obligated to protect and uphold the fundamental right to a fair hearing. The right to a fair hearing is multifaceted and very broad in nature. It includes the right to a public hearing by a competent, independent and impartial court. It also includes the right to be presumed innocent until proved guilty, the right to legal counsel, and the right not to be subjected to double jeopardy, among others. In their totality, these rights constitute the minimum standards for administering justice in a democratic society.
- The indictment and trial before the GCM of Rtd. Col. Dr. Kiiza Besigye and 22 others sparked off a wave of public concern over the competence of the military court to conduct a fair and just trial in keeping with the above mentioned rights. It also presented an opportunity for a re-examination of the role of this court in the administration of justice in the country.
- While observing that the law governing the GCM has several laudable provisions on the right to a fair hearing, the paper makes the following conclusions:

- (i) The military court is established outside the Constitutional framework for the exercise of judicial power and the administration of justice in Uganda;
 - (ii) The court is not an independent tribunal. It lacks the minimum guarantees for an independent and impartial tribunal, which include; security of tenure of the members of the court, financial security and institutional independence with respect to matters of administration that relate directly to the exercise of the tribunal's judicial function;
 - (iv) The court lacks the necessary legal personnel for the effective administration of justice; and
 - (v) The concurrent jurisdiction of the military court and the High Court to try offences of a generic nature defeats the main objective and rationale of the law against double jeopardy.
- The paper also questions the rationale of trying civilians accused of non-military offences, moreover in courts that are not designed to try non-military personnel. The GCM is incompetent to interpret and uphold the fundamental human rights of accused civilians. The court also lacks the necessary legal capacity to deal with the legal intricacies and evidential technicalities that most civilian offences present.
 - The paper concludes with the following recommendations:
 - (i) The GCM should be stripped of the jurisdiction to try civilians of non-military offences;
 - (ii) The GCM should be made explicitly subordinate to the High Court;
 - (iii) Appeals from the military court should go to the High Court in line with the Constitutional framework for the exercise of judicial power and the administration of justice in Uganda;
 - (iv) The appointment of members of the GCM should be made by an independent body, preferably the Judicial Service Commission (JSC) on recommendation of the High Command;

(v) The GCM Chairperson should be a retired, non-serving army officer appointed for a non-renewable six year period;

(vi) The rest of the members of the GCM should be appointed for a period of three years, renewable only once, subject to satisfactory performance. This arrangement provides the necessary security of tenure of members of the court and guarantees sufficient continuity and institutional memory, and;

(vii) In order to enhance the GCM's capacity to handle complex legal issues and to help build public confidence in the court, the Chairperson of the court should be a person qualified to be appointed a Grade I Magistrate, while the rest of the court members should have legal training or a background of at least the equivalent of an ordinary diploma in law.

List of Acronyms

ACHPR	African Charter on Human and Peoples' Rights
BC	Broadcasting Council
CJ	Chief Justice
DP	Democratic Party
ECHR	European Court of Human Rights
EU	European Union
FDC	Forum for Democratic Change
GCM	General Court Martial
HURIPEC	Human Rights & Peace Centre
JA	Justice of Appeal
JSC	Judicial Service Commission
ICCPR	International Covenant on Civil and Political Rights
NORAD	Norwegian Agency for Development
NRA	National Resistance Army
NRMO	National Resistance Movement Organisation
PRA	Peoples' Redemption Army
UDHR	Universal Declaration of Human Rights
ULS	Uganda Law Society
UN	United Nations
UPDF	Uganda Peoples Defence Forces
USA	United States of America

I. INTRODUCTION

Trials of military personnel accused of committing offences and acts of indiscipline by military establishments are almost as old as the institution of the army itself. For instance in the United Kingdom, the English court military system appears in military legal history as early as 1296.¹ In the history of independent Uganda, trials by legally established military tribunals became more pronounced during the regime of President Idi Amin Dada and especially after the passing of the Trial by Military Tribunals Decree, 1973.²

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

It is not possible to over-emphasize the importance of the right to a fair trial in the administration of justice. The right to a fair trial is the bedrock and fountain of justice in any justice system. The Constitution of the Republic of Uganda recognizes this and classifies the right to a fair hearing among non-derogable rights.³ In other words, there are no circumstances in which the right can be overlooked or dis-regarded. As such, any State organ or establishment that purports to exercise judicial power in Uganda is obliged to respect and uphold this fundamental human right.

The arrest, indictment and subsequent trial of Rtd. Col. Dr. Kizza Besigye and 22 others before the GCM sparked off heated debates over the legality

¹ See, Rowlinson, 2002.

² Decree No.12, 1973. The Decree was enacted and passed by General Idi Amin Dada as the President and Legislature of the Republic of Uganda on the 25th June, 1973. For purposes of conducting trials under the Decree, it gave powers to the Defence Council to appoint military tribunals. Section 4 gave powers to the President to order trials of civilians by military tribunals where he was satisfied that their acts were calculated to intimidate or alarm members of the public or to bring the military Government under contempt or disrepute. Section 2 provided that any person charged with treason and related offences could be tried by a military tribunal.

³ See, Articles 28 (1) and 44 (c).

of not only the trial process, but also about the Court itself. These concerns directly highlighted the role of the GCM in particular and of military courts in general in the administration of justice in Uganda.

It is important to recall that this is not the first time that the role of military courts in the administration of justice is being brought under scrutiny. There have been a number of incidents where the public has questioned the military justice system in the country. Perhaps the most horrendous incident in recent times was the summary trial and public execution of Corporal James Omedio and Private Abdbullah Muhammad. The two soldiers were publicly executed on March 25th, 2002 after a trial of less than three hours before a Field Court Martial, which found them guilty of triple murder.⁴

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

Using the GCM as a case study, and specifically focusing on the trial of Kizza Besigye and 22 others, this paper explores a number of issues raised in the debate about military justice as dispensed by the GCM. The paper is not concerned with the guilt or innocence of Besigye or the 22 others. Rather, it is focused on the rights and freedoms of accused persons as guaranteed by the Constitution and by major international agreements to which Uganda is party, in a bid to trigger intellectual debate and inform policy decision making in the area of military justice.

⁴ See, J. Okello, *Probe O'Toole's murder, says Bishop*, The New Vision, Tuesday April 9, 2002.

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

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

II. BACKGROUND TO THE TRIALS OF BESIGYE & 22 OTHERS

The role of the military in maintaining national peace and security and defending Uganda's sovereign integrity cannot be over emphasized. In execution of their duties however, the army has often gone overboard and fallen short of society's expectations. Antecedents of Uganda's armed forces indicate that they have often engaged in human rights violations and committed heinous crimes ranging from theft and destruction of public and private property to defilement, rape, kidnap, murder and treason among others.⁵ It is for such reasons *inter alia* that military tribunals are set up to

⁵ See, Republic of Uganda, *The Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations*, Kampala, 1994.

bring the perpetrators to what is often referred to as “military justice” and to ensure discipline within the army.

It is important to emphasize however, that in the course of administering military justice, these courts in the same way as their civilian counterparts, are obliged to adhere to the rule of law and in particular to uphold the fundamental rights and freedoms of accused persons. They are obliged to respect and abide by the minimum constitutional and international standards of administering justice, in particular to respect and uphold the right to a fair hearing. The extent to which the GCM adheres to these standards is the major focus of this paper, with a particular emphasis on the Besigye trial. In order to set the context of the discussion and analysis which follows, the background and facts of the trials of Besigye and 22 others is set out here below.

Dr. Kizza Besigye—a trained medical doctor and at one time President Yoweri Kaguta Museveni’s personal physician—is the leader of the Forum for Democratic Change (FDC), the opposition political party with the largest number of parliamentary seats in the country.⁶ He retired from the army in 2000 in order to engage in active politics. In the 2001 Presidential elections, he contested and lost the race to President Yoweri Kaguta Museveni. Besigye contested the results in Uganda’s Supreme Court and lost the suit on the grounds that the rigging and other election malpractices did not substantially affect the results.⁷

After losing the presidential election petition, there was considerable anxiety and suspicion not only in Government, but also among the general public as to what the retired colonel’s next move would be. Indeed, Besigye was trailed by military and intelligence personnel wherever he went.

⁶ During the 2006 Presidential Elections, FDC won 37% of the total votes against its next rival, the Democratic Party (DP) which garnered 1%. The ruling party, National Resistance Movement Organisation (NRMO) won 59% .

⁷ See, *Col (Rtd) Dr. Besigye Kizza v. Museveni Yoweri Kaguta and the Electoral Commission*, Supreme Court Presidential Election Petition No. 1, 2001.

As a consequence, he filed a matter with the Uganda Human Rights Commission (UHRC) alleging that his life was in danger because of persons who were trailing him whose intentions were not clear.⁸

Following allegations that he was collaborating with rebel movements operating in western Uganda at the time, Besigye was placed under house arrest. Fearing for his life, he beat the security intelligence and fled the country to South Africa where he was exiled until October 2005 when he returned to contest the 2006 presidential elections.

Between the year 2003 and the beginning of 2005, a number of alleged rebels including 22 others who were subsequently charged along with Besigye, were caught in various places in the Democratic Republic of Congo (DRC) and Uganda. The Government alleged that they had linkages with the Peoples' Redemption Army (PRA), a rebel movement that had also been associated with Besigye. The 22 were detained in various military establishments around the country and were never charged or tried in any court of law until Besigye's return in late 2005.

Shortly after his return, Besigye was arrested and jointly charged with the 22 others with treason and misprision of treason under the Penal Code Act.⁹ The indictment was read to them at Buganda Road Chief Magistrates' Court. The first accused (Rtd. Col. Dr. Besigye) was separately charged with the offence of rape allegedly committed in 1997.¹⁰ All the accused were subsequently committed to the High Court for trial.¹¹

⁸ See, UHRC 177/2001, *Rtd. Col. Dr. Kizza Besigye v. Attorney General (Chieftaincy of Military Intelligence)*.

⁹ Cap 120, Vol.VI, Laws of Uganda, 2000.

¹⁰ By the time of writing this paper, the High Court had acquitted Besigye of the rape charges. In his judgment, while quoting Lord Brougham's speech in support of Queen Caroline, Justice Bosco Katutsi held that *the evidence before court was inadequate even to prove a debt; impotent to deprive of a civil right; ridiculous for convicting of the pettiest offence; scandalous if brought forward to support a charge of any grave character; and monstrous if to ruin the honour of a man who offered himself as a candidate for the highest office of this country*. For details of Justice Bosco Katutsi's judgement, see, *Col (Rtd) Dr. Kiiza Besigye v. Uganda*, High Court Criminal Session No. 149/2005.

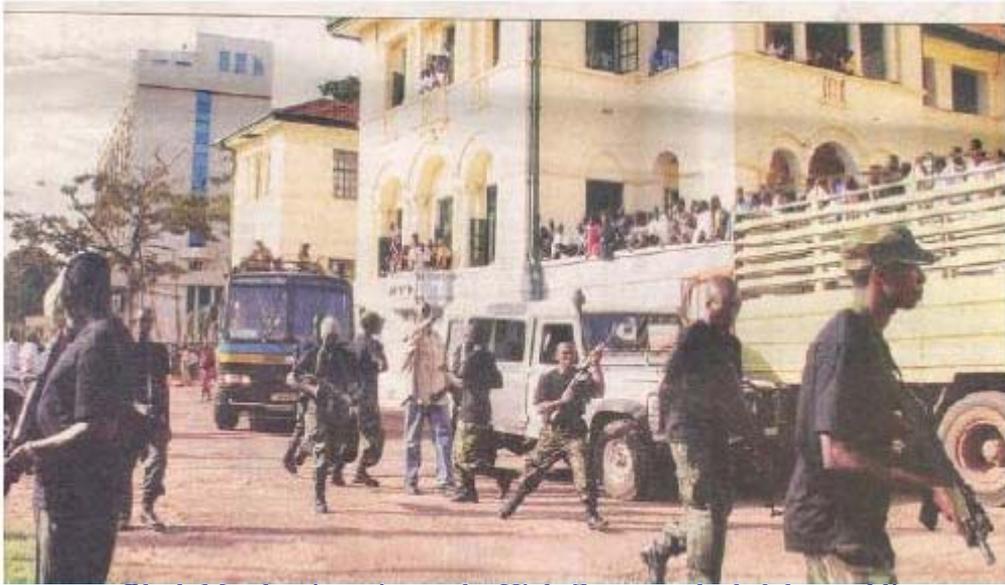
¹¹ High Court Criminal Case No. 955 of 2005.

On November 16th, 2005, the accused were taken to the High Court for a bail application before Justice Lugayizi. Fourteen of the accused were granted bail. As the hearing was proceeding, armed security personnel dressed in black raided the court premises, and surrounded the holding cells in which the successful bail applicants were waiting to be released. As a result of this action, the bail papers could not be processed. The armed personnel (who subsequently came to be dubbed “Black Mambas” by the media) entered into some of the offices and interrupted the court’s normal duty of processing bail. The accused were thus returned to prison.¹²

While addressing journalists during a weekly cabinet press briefing, army spokesman, Major Felix Kulaigye, informed the public that the Black Mambas had been deployed to re-arrest the suspects in case they had been granted bail by the High Court, in order to ensure that they faced new charges that had been brought against them in the GCM.¹³

¹² Because of the acts of the Black Mambas on that day, Justice Edmond Lugaizi who was hearing the case resigned from proceeding with the trial. The file was subsequently allocated to another judge - Justice Bosco Katutsi who also after hearing the rape charges declined from hearing the treason and misprision charges. The attack of the High Court premises by the Black Mambas was widely condemned not only in Uganda but world over. In the words of Justice James Ogoola, the Principal Judge of High Court, he condemned it as a *a naked rape, defilement and desecration of our temple of justice.....Not since the abduction of Chief Justice Ben Kiwanuka from the premises of Court during the diabolical days of Idi Amin has the High Court been subjected to such horrendous onslaught as witnessed last Wednesday.*

¹³ See, G. Sseruyange, *Black Mambas intended to re-arrest PRA suspects*, The Daily Monitor, Thursday November 17, 2005.



Black Mambas in action at the High Court, as the helpless public watches in utter confusion

Indeed, the following day on November 17th, 2005, all the accused persons including Besigye were taken to Makindye and jointly charged in the GCM with the offence of Terrorism,¹⁴ and in the alternative with being in Unlawful Possession of Firearms.¹⁵ All the offences arose from the same facts as the treason and misprision of treason charges previously preferred against them in the High Court.

Because of the great anxiety the Besigye trials were causing among the general public, the Minister of Internal Affairs announced a ban on demonstrations, processions, public rallies and assemblies related to the matter.¹⁶ In similar vein, Dr. James Nsaba Buturo (the Minister of State for Information at the time), banned talk shows and media debates on the matter and was quoted as stating that the Broadcasting Council (BC) would

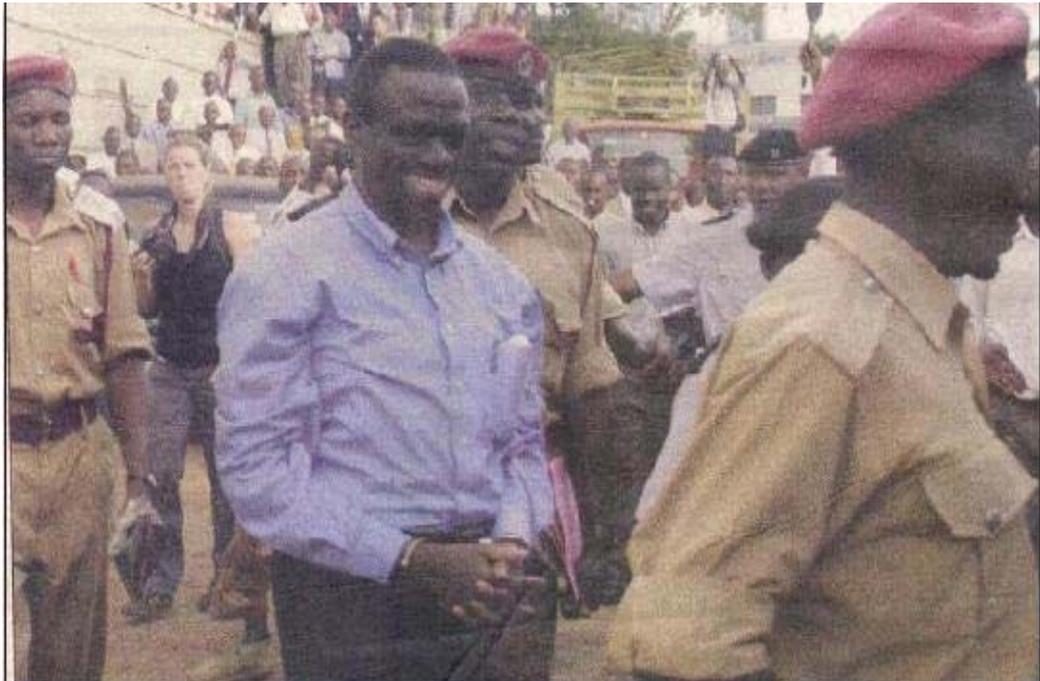
¹⁴ Terrorism is an offence created under the Anti-Terrorism Act. Act No. 14 of 2002.

¹⁵ Unlawful possession of fire arms is an offence under the Fire Arms Act Cap 299, Vol. XII, Laws of Uganda, 2000.

¹⁶ See, H. Bogere, *Govt Bans Talk On Colonel's Court Case*, The Daily Monitor, Thursday November 24, 2005.

cancel the licenses of any media house that did not take heed of this ban.¹⁷ Not many people took Dr. Nsaba Buturo's statement seriously.¹⁸

In Miscellaneous Criminal Applications Nos. 228 & 229 of 2005, Besigye applied for, and was granted bail by the High Court. However, on the basis of a warrant of commitment on remand issued by the GCM, he was not released.¹⁹



Bailed but not free: Dr. Kizza Besigye in handcuffs leaving High Court under tight security after he was granted bail

Concurrent trials of the accused in the High Court and the GCM went on until an application was made to the High Court for an order to stay the proceedings in the military court until the Constitutional Court's decision on the legality of the trial of the accused before the

¹⁷ *Supra.*

¹⁸ In fact, HURIPEC immediately convened a multi-stakeholder dialogue to discuss the legality of those bans and their implications on the freedom of press and the right of access to information.

¹⁹ See H. Bogere, et al... *Besigye gets bail, remains in jail*, The Daily Monitor, Saturday November 26, 2005.

General Court Martial.²⁰ Justice Remigio Kasule issued the injunction and accordingly stayed the proceedings in the GCM.²¹

In the subsequent application for a writ of *habeas corpus* filed by Besigye, Justice John Bosco Katutsi ruled that the “continued detention of Besigye on a purported warrant of commitment from the GCM was illegal, unlawful and in contempt of the High Court order to release the applicant on bail.”²² Justice Katutsi accordingly ordered Besigye’s immediate release.

The Chairperson of the GCM—General Elly Tumwine—did not officially challenge the High Court rulings that had stayed the proceedings in his court and released Besigye. He nevertheless asserted the military court’s independence from, and concurrent jurisdiction with the High Court.²³ In defiance of the High Court order, General Tumwine continued the trial of the accused. Even when the Constitutional Court subsequently pronounced itself on the matter, declaring that the military court did not have the jurisdiction to try the accused, he did not take heed, but insisted on proceeding with the trial up to its conclusion.²⁴ In the public interest petition filed by the ULS (cited above), the Constitutional Court held by a majority of 4-1 that the GCM did not have the jurisdiction to try the accused and that the trial before the military court contravened Articles 22(1), 28 (1), 120(1, 3b&c), 126 (1) and 210 of the Constitution.

²⁰ In *Uganda Law Society v. The Attorney General of the Republic of Uganda*, Constitutional Petition No. 1, 2006, Uganda Law Society petitioned the Constitutional Court for a declaration to the effect inter-alia that the GCM did not have jurisdiction to try Besigye and the 22.

²¹ For details, see Justice Kasule’s ruling in High Court Miscellaneous Cause No. 151 and 155.

²² For details of Justice Bosco Katutsi’s ruling, see, *Rtd. Col. Dr. Kizza Besigye v. Attorney General*, Miscellaneous Cause No. 161 of 2005.

²³ See, S. Muyita and S. Lubwama, *Court Martial now defies High Court*, The Daily Monitor, Wednesday January 18, 2006.

²⁴ Monitor Team, *Defiant Tumwine sets new date for trial*, The Daily Monitor, Wednesday February 1, 2006. Also see, S. Lubwama and E. Kasozi, *Defiant Tumwine conducts illegal trial*, The Daily Monitor, Wednesday February 15, 2006.



Chairperson of the GCM, General Elly Tumwine addressing a Press Conference at his Art Gallery

Following this ruling, the Constitutional Court in particular and the judiciary in general came under heavy attack by the military establishment and the presidency. For instance, while appearing on KFM radio station, General David Tinyefuza, Coordinator of Security Services was quoted as saying that “the army cannot be ordered by courts of law ... the army would not accept this business of being ordered by judges”.²⁵ He further accused the judges of siding with “wrong doers instead of helping the State.”²⁶

²⁵ See, S. Muyita and P. Nyanzi, *Besigye ruling angers Tinyefuza*, The Daily Monitor, Friday February 3, 2006.

²⁶ General Tinyefuza was supported by Dr. Nsaba Buturo, Minister of State for Information at the time who was quoted as saying that, *We are happy with General Tinyefuza’s remarks on radio. He stuck to the position of the dilemma that the UPDF and Government find themselves* See, P. Nyanzi and J. Lawson, *Buturo now backs Tinye*, The Daily Monitor, Friday February 10, 2006.

While officiating at the Silver Jubilee celebrations of the army magazine, *Tarehe Sita* to mark the day of the launch of the National Resistance Army (NRA)'s armed struggle, President Museveni also vowed to fight the Constitutional Court ruling *legally and politically*.²⁷

In a rather strange turn of events, General Tumwine announced that he would not proceed with the trial of the accused until the Supreme Court had pronounced itself on the matter.²⁸ This announcement came as no big surprise to many because at around the same period, President Yoweri Kaguta Museveni was quoted in the newspapers assuring ambassadors of the European Union (EU) and the representative of the ambassador of the United States of America (USA) to Uganda that Besigye would not be tried by the military court.²⁹ The President was further quoted to have said that the 22 suspects co-accused with Besigye would remain in custody.³⁰

The President's assurances raised a number of questions regarding the independence of the GCM, particularly with regard to where the President got the authority to make these pronouncements since he was not a court of law. The general impression left by his actions was that the President could dictate the direction the GCM should take on the matter, which (as a matter of fact and law) is not supposed to be the case.

²⁷ See, H. Mukasa, *Museveni raps ruling on Court Martial*, The New Vision, Tuesday February 7, 2006

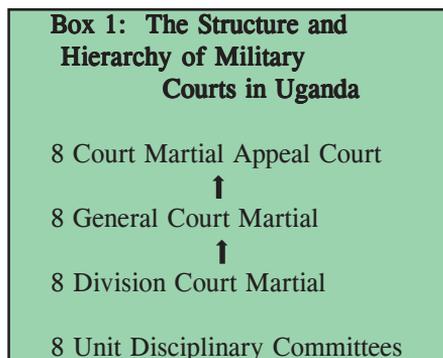
²⁸ The Attorney General appealed against the decision of the Constitutional Court in the ULS petition to the Supreme Court. ULS cross appealed.

²⁹ See, M. Okore, *Army Court Won't try Besigye – M7*, The New Vision, Wednesday March 8, 2006.

³⁰ *Supra*.

III. THE LAW GOVERNING THE GENERAL COURT MARTIAL

Military Courts in Uganda—including the GCM—are governed by the Constitution, the UPDF Act, the Army Code of Conduct and the Army Regulations.



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

The functions of the UPDF are to preserve and defend the sovereignty and territorial integrity of Uganda; to cooperate with the civilian authority in emergency situations and in cases of natural disasters; to foster harmony and understanding between the defence forces and civilians; and to engage in productive activities for the development of Uganda.³¹

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

In exercise of its mandate under Article 210 of the Constitution, Parliament enacted and passed the UPDF Act, 2005. The Act provides for the regulation of the UPDF and repeals and replaces the Armed Forces Pensions Act and the

³¹ See, Article 209.

Uganda Peoples Defence Forces Act.³² Part VIII of the Act deals with the establishment and operation of military courts.

A. Establishment, Composition and Tenure

The structure, composition, appointment and tenure of officers of the GCM raises a lot of questions when it comes to the right to a fair hearing. Suffice it to say that the procedures and institutions in place do not guarantee the independence and impartiality of the court as is supposed to be the norm in any justice system.

Box 2: Composition of the High Command

- 8 The President who is the Chairperson
- 8 The Minister Responsible for defence
- 8 Members of the High Command as at 26th, January, 1986
- 8 The Chief of Defence Forces and his deputy
- 8 All Service Commanders
- 8 The Chief of Staff
- 8 All Service Chiefs of Staff
- 8 All Chiefs of the Services of Defence Forces
- 8 All commanders of any formation higher than a Division
- 8 All Division Commanders; and
- 8 Such other commanders and experts as are from time to time co-opted by the President.

Source: Section 15 (1) of the UPDF Act

The GCM is established by Section 197 of the UPDF Act. It consists of a chairperson, two senior officers, two junior officers, a Political Commissar, and one non-commissioned officer.³³ The Chairperson must not be below the rank of Lieutenant Colonel.³⁴

All the above officers are appointed by the High Command for a period of one year.³⁵ They are however eligible for re-appointment.³⁶ It is important to observe here that the current Chairperson of the GCM in charge of trying Besigye and the 22, General Elly Tumwine is a member of the High Command

³² See, the long title of the Act.

³³ See, Section 197 (1).

³⁴ *Supra*.

³⁵ *Supra*. The period of one year is too short a time to guarantee continuity and institutional memory of the court. It also stifles administration of justice in certain respects especially so that in most cases the Presidency and the High Command does not appoint new members of court in time, on expiry of the sitting members' term. During this period, court's business comes to stand still and many accused persons continue to languish on remand before new members of court are appointed. See also, the concerns raised by M. Okore, *General Court Martial term expires*, The New Vision, Tuesday September 5, 2006.

by virtue of Section 15 (1) of the UPDF Act, which provides among other things that all members of the High Command as at 26th January 1986, shall be members of the High Command of the Defence Forces.

The Act also obliges the High Command to appoint such number of reserve members as it may decide to sit on the court, any of whom may be called upon to sit as a member of the court for the purpose of constituting a full court or of realizing quorum.³⁷ Inclusion of this provision was important because in the past, the business of court would stall for unreasonable periods because of the deployment of members of court on other assignments.

B. Quorum and Decision Making

When trying an accused person for a capital offence, all members of the court are required to be present, but in any other case, the quorum is five.³⁸ Decisions of court are by majority opinion, and when a decision is reached, it is binding on all members of the court concerned.³⁹ Section 201 (2) makes it an offence for any member who takes part in the proceedings of a Court Martial to later disassociate him or herself from the decision of that court.

C. Jurisdiction

The criminal Jurisdiction of the GCM is provided for under Sections 2, 119 and 197 of the UPDF Act. 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.⁴⁰ The law further gives the military court revisionary powers in respect of any finding, sentence or order made or imposed by any summary trial authority or Unit Disciplinary Committee.⁴¹

³⁷ Section 198 (b).

³⁸ See, Section 198 (c).

³⁹ See, Section 201 (1).

⁴⁰ See, Section 197 (2).

⁴¹ See, Section 197 (3).

These powers are to be exercised in accordance with the provisions of Part XIII of the Act.⁴² The Act defines a service offence as an offence under the UPDF Act or any other Act for the time being in force, committed by a person while subject to military law.⁴³ This therefore means that with some exceptions, where the law specifically limits the criminal jurisdiction regarding a particular offence to a particular court, the GCM has jurisdiction to try any person subject to military law for any criminal offence under any law in Uganda.

Section 119 provides for the persons who are subject to military law. These include not only officers and militants of the regular force, but also any person who voluntarily through the prescribed acts and omissions brings him or herself within the confines of military law.⁴⁴ This therefore means that in the prescribed circumstances, the GCM has the jurisdiction to try civilians. Indeed, in the ULS Constitutional Petition (cited above), the Constitutional Court ruled that the GCM could have jurisdiction over civilians where they have aided and abetted persons subject to military law to commit a crime.

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

The reason for this is that especially in criminal offences, which entail the abridgement or curtailment of the rights of the individual protected under the Constitution and International Covenants, the definition and application of the criminal laws under which this may legitimately be done must be consistent with the guarantees of human rights.

⁴² *Supra.*

⁴³ See, Section 2.

⁴⁴ A militant is defined in section 2 of the Act as any person other than an officer who is enrolled on or who is attached or seconded otherwise than as an officer of the Defence Forces.

In this regard, only the ordinary courts have the authority and power to interpret the guarantees of human rights under the Constitution.

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

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

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

The United Nations Human Rights Committee—the body authorized to interpret and monitor compliance with the International Covenant on Civil and Political Rights (ICCPR)—has also previously stated in a General Comment that military courts prosecuting civilians can present serious problems as far as the equitable, impartial and independent administration of justice is concerned.⁴⁵ The Committee concluded that the trial of civilians by military courts should be exceptional and occur only under conditions that genuinely afford full due process.⁴⁶

⁴⁵See, Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N.Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 4.

⁴⁶ *Supra*. See also, Human Rights Watch, “Intimidation and Violence by Government and the Ruling Party” <http://hrw.org/backgrounder/africa/uganda020/4.htm>

Related to the issue of trying civilians by military courts, is the concern among a cross-section of the general public about the rationale of giving such courts the jurisdiction to try non-military (civilian) offences. This concern is buttressed by the fact that many of the civilian offences involve a great deal of legal intricacies in terms of proof of the ingredients and standard of proof, which these courts have no competence to handle. The prevalent view is that military courts, including the GCM, should only deal with military offences such as mutiny, disobeying lawful orders and desertion. Those who hold this view argue that civilian courts are better placed and more competent to try non-military offences like assault, murder, rape and theft.

D. Guarantees for the Right to a Fair Hearing and a Just Trial

This section is a highlight of the major statutory guarantees of the right to a fair hearing before the GCM.

The right to a fair hearing lies at the heart of the concept of a fair trial. In its breadth, the right to a fair hearing is the most important element in any criminal justice system. It is also inextricably linked to democracy and the rule of law.

Box 3: Minimum Standards of Criminal Justice

- §The right to be tried by a competent court;
- §The right to an independent and impartial court;
- §The right to a public hearing;
- §The right to be charged and tried without undue delay;
- §The right to be presumed innocent until provided guilty;
- §The right not to be compelled to be a witness or to confess guilt;
- §The right to be present at the trial and to present a defence;
- §The right to legal counsel;
- §The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;
- §The right against double jeopardy; and
- §The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both.

The right to a fair hearing is multifaceted and extremely broad in nature. It includes the right to trial by an independent, impartial and competent court, the right to protection against retrospective criminal laws, the right to the presumption of innocence, the right to be tried without undue delay, the right to a public hearing, the right to defend oneself in person or through counsel and the right to equality before the law and courts (see box 3 above).

The Constitution of the Republic of Uganda clearly guarantees the above rights⁴⁷ and specifically provides that they are non derogable.⁴⁸ This means that any organ that purports to exercise judicial power in Uganda is obliged to protect, defend and uphold the above rights, and cannot apply any exceptions to their exercise, whether in form of an emergency or public unrest.

The UPDF Act has several laudable provisions for the protection of the right to a fair hearing. These provisions were included to ensure that accused persons get a fair and just trial. They were intended to minimize bias, ensure that there is no interference in the decision-making process and to guarantee a conducive atmosphere for the accused persons to prepare their defence, among other things. The issue of whether or not these provisions are upheld in practice is another matter altogether. At least the law has made provision for them.

The Act provides with exceptions, for the right to public hearings before the court⁴⁹ and guarantees the appearance in court of witnesses and advocates of the accused.⁵⁰ Sections 183 and 209 of the Act expressly provide that the rules of evidence and procedure to be observed in the proceedings before the court martial shall as far as practical be the same as those which apply before civil courts. The Act also provides for the right to bail⁵¹ and the right of appeal.⁵² It further provides in *pari materia* with the Constitution for the right against double jeopardy⁵³

⁴⁷ See, Article 28.

⁴⁸ See, Article 44 (c).

⁴⁹ See, Section 212 (1). Sub section 2 provides that where the military court considers it expedient in the interest of public safety, defence or public morals that the public should be excluded during the whole or any part of a trial, it may make an order to that effect, and any such order shall be recorded in the record of the proceedings of court.

⁵⁰ See, Section 214.

⁵¹ See, Section 219.

⁵² Appeals from the GCM go to the Court Martial Appeal Court (See, Section 199).

⁵³ See, Section 216 and Article 28 (9) of the Constitution.

IV. THE RELATIONSHIP WITH CIVILIAN COURTS

Although it is difficult to precisely define the relationship between the GCM and Civilian Courts, in particular the High Court, a few observations can be made in this regard. First of all, it is important to note that the GCM is established under the authority of Article 210 of the Constitution by the UPDF Act as an organ of the UPDF.⁵⁴ The High Court on the other hand is established by the Constitution as a court of record.⁵⁵ Secondly, whereas the High Court has unlimited original jurisdiction in all matters, subject only to the provisions of the Constitution,⁵⁶ the GCM's unlimited original jurisdiction is limited to the provisions of the UPDF Act.⁵⁷

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.⁵⁸ Lady Justice Leticia Kikonyogo summarized the reasons, and I quote her *in extenso* as follows:

⁵⁴ See, Section 197 (1).

⁵⁵ See, Article 138 of the Constitution.

⁵⁶ See, Article 139 (1).

⁵⁷ See, Section 197 (2). In the ULS Constitutional petition, Justice Constance Byamugisha emphasizing this point held that although the jurisdiction of the GCM is unlimited and original, it's confined to only offences committed under provisions of the UPDF Act by persons subject to military law.

⁵⁸ The Constitutional Court had previously held in *Joseph Tumushabe v. Attorney General*, Constitutional Petition No. 6 of 2004, that the GCM was subordinate to High Court.

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. 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 repercussions 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.⁵⁹

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.

⁵⁹ See also, P. Mulira, *The Court Attributed Powers to Parliament Which It Didn't Have: Adopt Constitutionalism*, The New Vision, Tuesday March 7, 2006.

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.⁶⁰

V. EVALUATION OF THE ROLE OF THE GENERAL COURT MARTIAL IN THE ADMINISTRATION OF JUSTICE IN UGANDA

This section of the paper is an analysis of the performance of the GCM in the Besigye trial with regard to the major elements of the right to a fair hearing, in particular the right to a competent, independent and impartial court as guaranteed by Articles 28 and 44 of the Constitution. The section is intended to identify the strengths and weaknesses of the court with the ultimate objective of improving its performance in the future dispensation of justice in Uganda.

A. Trial by a Competent Court

One of the cornerstones of any justice system is that in the determination of any criminal charge, the trial should be conducted by a competent court or by a tribunal established by law. The court or tribunal must have jurisdiction. Jurisdiction is conferred by law. No court should therefore confer upon itself jurisdiction that Parliament as the law making organ of the State did not give it.

The issue of competence in criminal justice not only requires that the tribunal/court should have the jurisdiction over the subject matter and over the person, but also requires that the trial should be conducted within the prescribed time limit.⁶¹

⁶⁰ Constitutional Appeal No.1 of 2002.

⁶¹ Amnesty International Fair Trials Manual.

In the trial of Besigye and the 22, the accused were charged with the offence of terrorism and the unlawful possession of firearms. The offence of terrorism is created under the Anti-Terrorism Act, 2002. The Act specifically provides that such offence is only triable by the High Court.⁶²

The question of competence of the GCM to try Besigye and the 22 for the offence of terrorism was one of the major issues that the Constitutional Court addressed in the ULS Constitutional petition against the Attorney General (cited above). The Court rightly held by a majority of four to one that the GCM did not have the jurisdiction to try the offence of terrorism because under the Anti-Terrorism Act where the offence is created, such jurisdiction is conferred only on the High Court.

As Justice Constance Byamugisha emphasized, a court that has no jurisdiction cannot be said to accord an accused person a fair trial. Addressing himself on the same issue, Justice G.M. Okello, had this to say:

The right to a fair hearing embodies the right to be tried by a competent court. A court that has no jurisdiction to try a case with which a person has been charged is not a competent court for the purpose of that case. It is in fact, not a court for the purpose of such a trial. Any decision made by it in that regard is null and void. To be tried by an incompetent court is a violation of one's right to a fair hearing protected by Article 28 (1) and entrenched by Article 44 (c) of the Constitution.

The trial of Besigye and the 22 before the GCM is therefore in contravention of the right to a fair hearing and contrary to the rule of law and the Constitution of the Republic of Uganda.

The other element of the right to trial by a competent court relates to the competence of the judicial officers and to the court's procedural rules. The African Commission on Human and Peoples Rights has previously held regarding Article 26 of the African Charter on Human and Peoples'

⁶² Section 6.

Rights,⁶³ that the element of competence of court requires the existence of a judicial system with adequately trained officers and satisfactory procedural rules.⁶⁴

An examination of the law governing the GCM reveals that the military court is far from meeting the above requirements. There is no provision requiring officers of the court including the Chairperson to have legal training or background. Although there is provision for a judge advocate to advise court on matters of law and procedure,⁶⁵ the advocate is not a member of court and does not take part in decision making. His or her advice is also not binding on court. It is therefore important in this regard that at the very least, the Chairperson of court should be sufficiently trained in law and legal practice.⁶⁶ As Henry Onoria has argued, the failure to ensure that persons who preside over military courts have legal training demonstrates that Government has neglected its duty to provide courts that are sufficiently competent to satisfy Article 26 of the ACHPR.⁶⁷

⁶³ Article 26 provides that, State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

⁶⁴ See, *Civil Liberties Organisation v. Nigeria*, ACHPR Commn. No. 129/94.

⁶⁵ See, Section 202 of the UPDF Act.

⁶⁶ During the Parliamentary debate on this issue when considering the UPDF Bill, Hon. Amama Mbabazi, the Minister of Defence at the time, erroneously argued and surprisingly convinced Members of Parliament that it was not necessary to have lawyers man the GCM because at that level, issues of law rarely arise. He also argued that having lawyers man the GCM could stifle administration of justice because there could arise occasions when there would be no lawyers in the army to administer justice. Hon. Twarabireho on the other hand strongly argued that professionalizing the UPDF entails having a professional military court system manned by professionals. He dismissed Hon. Mbabazi's argument that there might arise a situation when the army would not have lawyers to man the GCM and informed members that there were many lawyers in the Force and many more were still studying at university and Law Development Centre. For more details regarding the Parliamentary debate on the UPDF Bill, see, Parliament of Uganda, *Parliamentary Debates (Hansard) Official Report*, 4th Session – 1st Meeting Issues No. 26, 27 and 28 of 2004, and 29, 30 and 31 of 2005.

⁶⁷ H. M. Onoria, *Soldiering and Constitutional Rights in Uganda: The Kotido Military Executions*, *East African Journal of Peace and Human Rights* Vol. 9, No. 1, 2003 at page 87.

B. Trial by an Independent and Impartial Court

The right to be tried by an independent and impartial tribunal established by law is perhaps the most important canon in the criminal justice system. It is a major pre-requisite for access to justice and an integral part of a democratic government.⁶⁸ It is guaranteed by major international and regional instruments to which Uganda is signatory and party including the UDHR, the ICCPR and the African Charter on Human and Peoples' Rights among others. It is also embedded in Uganda's Constitution as one of the major tenets of the right to a fair hearing.⁶⁹ It is a non derogable right, which means that it cannot be suspended at any time, regardless of the circumstances.⁷⁰

The right to trial before an independent and impartial tribunal established by law requires that justice must not only be done but justice must also be seen to be done.⁷¹ The right therefore calls for the impartiality of the judges and the need for trials to be held in open court.⁷² The right to trial by an independent and impartial court has two related principles i.e. the principle of impartiality and the principle of independence. Although the two are closely related, they nevertheless differ in certain material respects. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case.⁷³

⁶⁸ F.W. Jjuuko, *The Independence of the Judiciary and the Rule of Law : Strengthening Constitutional Activism in East Africa*, Kituo Cha Katiba, Kampala, 2005.

⁶⁹ See, Article 28.

⁷⁰ Article 44 (c) of the Constitution.

⁷¹ Dictum by Lord Hewart, C.J in *R v. Sussex Justices ex parte McCarthy* (1924) 1 KB 256 at 259.

⁷² *Supra*, note 68.

⁷³ Impartiality comes from the word "impartial" which means not giving special favor or support to any one or group. It means absence of bias, actual or perceived. See, Longman Dictionary of Contemporary English, Third Edition, Longman Group Ltd, England, 1995.

The requirement for independence on the other hand embodies the traditional constitutional value of judicial independence and connotes not only a state of mind or attitude in the actual exercise of judicial functions, but also a status or relationship to others, particularly to the executive branch of government.⁷⁴

The principles of independence and impartiality seek to achieve three major objectives: first, to ensure that a person is tried by a tribunal that is not biased in any way and is in a position to render a decision which is based solely on the merits of the case before it, according to law.⁷⁵ The decision-maker should not be influenced by the parties to a case or by outside forces except to the extent that he or she is persuaded by submissions and arguments pertaining to the legal issues in dispute. The second objective is to maintain the integrity of the judicial system by preventing any reasonable apprehensions of bias.⁷⁶ Finally, the principles of independence and impartiality are intended to allow and enable the courts to fulfill their historical and constitutional role as protectors and guarantors of human rights and values.

To assess the impartiality of a tribunal, reference has to be made to the state of mind of the decision-makers at the time of hearing and determining a particular matter/case.⁷⁷ The principle of impartiality demands that judges or jurors have no interest or stake in a particular case and do not have pre-informed opinions about it. As such, the issue of impartiality is largely a question of fact determined on a case by case basis. In *Re Medicaments*⁷⁸, the Court of Appeal of England following the European Court of Human Rights (ECHR)'s decision in *Hausschildt v. Denmark*⁷⁹, stated that *in considering whether in a given case there is a legitimate fear that a particular*

⁷⁴ See, *Valente v. The Queen* [1985] 2 S.C.R., 673.

⁷⁵ See, judgment of Lord Lamer C.J. in *R v. Genereux* [1992] 1 S.C.R., 259.

⁷⁶ *Supra.*

⁷⁷ *Supra.*

⁷⁸ [2001] 1 Weekly Law Reports 700.

⁷⁹ [1989] 12 EHRR 266.

judge lacks impartiality, the stand point of the accused is important but not decisive.... What is decisive is whether this fear can be held objectively justified. The test to apply to each individual case is therefore whether there is a reasonable apprehension that the decision-makers will be subjectively biased in the particular situation.⁸⁰

The requirement for independence on the other hand extends beyond the subjective attitude of the decision-makers. It involves both individual and institutional relationships: the individual independence of a judge reflected in such matters as security of tenure and institutional independence of the court as reflected in its institutional and administrative relationships with the executive and legislative branches of Government.⁸¹ It also requires that officials responsible for the administration of justice are completely autonomous from those responsible for prosecutions.⁸² The essence of judicial independence was well summarized by the Canadian Chief Justice, Lord Dickson as follows:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.⁸³

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

⁸⁰ *Supra*, note 75.

⁸¹ *Supra*, note 74.

⁸² Guideline 10 of the United Nations Guidelines on the Role of Prosecutors.

⁸³ *Beauregard v. Canada* [1986] 2 S.C.R. 56 at 69.

First, there is the need for a guarantee of security of tenure,⁸⁴ second, is the issue of financial security,⁸⁵ and finally there is the question of institutional independence with respect to matters of administration that relate directly to the exercise of the tribunal's judicial function.

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

I emphasize that an individual who wishes to challenge the independence of a tribunal for the purposes of s. 11(d) need not prove an actual lack of independence. Instead, the test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent....The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

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

In the *Genereux* case where a similar issue arose within a context akin to the trial of Besigye, it was held that the structure and constitution of court at the time of the accused's trial infringed his right as it did not comply with the essential conditions of independence described above. The Judge Advocate General who had the legal authority to appoint a Judge Advocate at a GCM was not independent, but was part of the Executive and was

⁸⁴ Security of tenure requires that a judge should only be removed for a just cause, and that the cause should be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure is tenure, whether until the age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner. See, *Valente v. The Queen* (cited above).

⁸⁵ The essence of financial security is that the right to salary and other financial benefits should be established by law and not be subject to arbitrary interference by the Executive in a

The Role of the General Court Martial in the Administration of Justice in Uganda serving as an agent of the Executive. According to the holding of the court, the Judge Advocate and members of the GCM did not enjoy sufficient security of tenure and financial security and the Executive had the ability to interfere with the salaries and promotional opportunities of officers serving as Judge Advocates and members at a Court Martial. It was further held that military officers who are responsible to their superiors in the Department of Defence, are intimately involved in the proceedings of the tribunal. In particular, it was unacceptable to court that the authority that convenes the Court Martial, i.e. the Executive, which is responsible for appointing the Prosecutor, should also have the authority to appoint members of the Court Martial, who serve as the assessors of fact.

Similarly, in the trial of Besigye and the 22, although members of the GCM as highlighted earlier are eligible for re-appointment, they are only appointed for a period of one year at a time. This short period compromises their security of tenure and thus undermines the principle of judicial independence. Moreover, the law is not clear on the circumstances and the manner under which they can be removed before the expiry of their term or upon which they can be re-appointed. It all depends on the discretion of the appointing authority. It could be that given their short tenure, the members would then work towards pleasing their superiors and the appointing authority in particular, so as to secure re-appointment. The law as it presently stands falls short of providing sufficient security of tenure to protect them from the discretionary and arbitrary interference of the Executive. It casts doubt in the minds of reasonable and informed persons as to the independence of the court.⁸⁶

In the *Genereux* case, it was further held that the requirement of financial security will not be satisfied if the Executive is in a position to reward or punish the conduct of the members of Court by granting or withholding benefits in the form of promotions and salary increases or bonuses. According to the UPDF Act, one of the considerations for promotion and therefore increase in salary and other benefits is performance.⁸⁷

⁸⁶ In illustration of this point, as this paper was going to the publisher, Gen. Tumwine was replaced by Lt.Gen. Ivan Koreta as GCM Chairperson.

⁸⁷ See, Section 55 (1).

Performance at the GCM could and definitely is one way of evaluating an officer for promotional purposes and therefore leading to an increment in salary and other benefits. Lord Chief Justice Lamer in the *Genereux* case rightly observed that an officer's performance evaluation could potentially reflect his superior's satisfaction or dissatisfaction with his conduct at a court martial. Consequently, by granting or denying a salary increase or promotional prospects on the basis of a performance evaluation, the Executive through the High Command (the appointing authority) might effectively reward or punish an officer for his or her performance as a member of the GCM. This greatly undermines the independence of the military court.



Dr. Kizza Besigye (in blue shirt) arriving at High Court in handcuffs to attend one of the court sessions

A closer examination of the law governing the operations of the GCM also reveals that there is no sufficient institutional independence of the court from the military hierarchy and from the Executive. In the first instance, the President who is the Chief Executive of the country is also the Commander in Chief of the UPDF and Chairperson of the High Command which is the appointing authority of the members of the GCM. Secondly, members of the court are serving military officers in the army and therefore operate under a chain of command.⁸⁸ On this note, Lady Justice Constance Byamugisha rightly observed in the ULS Constitutional Petition (cited above) that “the General Court Martial is established as the coercive arm of the Executive and as such operates under a chain of command. It is and cannot therefore in the current circumstances be independent and impartial.”

Finally, the High command of which the President is Chairperson, also appoints the Prosecutor.⁸⁹ Commenting on a similar scenario in the *Genevex* case, Lord Lamer CJ held that:

It is not acceptable, in my opinion, that the convening authority, i.e., the Executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as the triers of fact. At a minimum, I consider that where the same representative of the Executive, the “convening authority,” appoints both the prosecutor and the triers of fact, the requirements of s. 11(d) will not be met.

From the above analysis, it is clear that the GCM as currently established is not an independent and impartial court. It lacks the minimum guarantees for an independent and impartial court. Given the importance of the right to an independent and impartial tribunal in the administration of justice, it is critical that Parliament and the authorities in the UPDF revisit as a matter of urgency the structure, composition, manner of appointment and tenure of members of the GCM.

⁸⁸ Rule 3 of the Code of Conduct for the Defence Forces provides *inter -alia* that the lower ranks of the Defence Forces shall obey the higher ranks.

⁸⁹See, Section 202.

C. Concurrent Proceedings in Different Courts for Same Facts Offences

As pointed out in section II of this paper, Dr. Kizza Besigye and the 22 were first charged in the High Court for the offences of Treason and Misprision of Treason. They were then subsequently charged in the GCM with the offences of Terrorism and Unlawful Possession of Firearms. Even when the Constitutional Court ruled that the military court did not have jurisdiction to try the accused of the offences they were being tried for, the Chairperson insisted on continuing with the trial upto its conclusion.

The concurrent trial of the accused persons in the two courts of generic offences arising from the same facts raises a number of constitutional issues in respect to the right to a fair and just trial and in particular regarding the law against double jeopardy.⁹⁰ It defeats the objective and rationale of the law against double jeopardy.⁹¹ If the accused were to be acquitted of treason in the High Court and convicted by the GCM on charges of terrorism, it would amount to being prosecuted for a similar offence after acquittal. Alternatively, if both courts were to convict the accused, this would lead to multiple punishments for the same offence.⁹²

While holding that the charging of the accused persons in the GCM of offences arising from the same facts as those they were charged with in High Court was *malafide*, Lady Justice Constance Byamugisha concluded as follows. “In principle, there is nothing illegal or unconstitutional in charging a person in different courts with criminal offences concurrently if the said courts are seized with jurisdiction. But if the offences arise out of the same

⁹⁰ Article 28 (9) of the Constitution provides that, *a person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence, shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review of the proceedings relating to the conviction or acquittal.*

⁹¹ Justice demands that a person should not be punished twice for generic offences arising from the same facts.

⁹² See argument made by Mulira, P. Mulira, *The Besigye case puts justice itself on trial*, The New Vision, Tuesday December 6, 2005.

facts and transactions, the accused person ought to face those charges in one court....The Director of Public Prosecutions having preferred charges against the accused persons in exercise of his powers under the Constitution, the military ought to have respected that decision. Secondly, it is not healthy for efficient administration of Government to see government departments competing with each other. Thirdly, the accused persons themselves are incapacitated in the preparation of their defences as they have to appear before different courts. Fourthly, they may end up being punished twice”.⁹³

The above concerns call for a review of the law governing the GCM to ensure that the purpose and rationale of the law against double jeopardy is not defeated. It is especially important in this regard to ensure that the High Court and the GCM do not have concurrent jurisdiction to try offences of a generic nature.

VI. RECOMMENDATIONS

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

⁹³ *Supra*, note 20.

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.

A. The Question of Jurisdiction

The GCM's 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.

B. The General Court Martial's Relationship with Civilian Courts

The GCM should explicitly be made subordinate to the High Court. This means that Appeals from the GCM 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.

C. Appointment, Qualifications and Tenure of Members of the General Court Martial

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 appointed by an independent body outside the military establishment (preferably the Judicial Service Commission) but on recommendation of the High Command. For this purpose, the Judicial Service Commission (JSC) should be given special powers to appoint members of the GCM. This will contribute to ensuring the independence and impartiality of the military court.

The Chairperson of the GCM should be a person qualified to be appointed a Grade I Magistrate i.e. he or she should have at least a bachelor's degree in law and a post graduate diploma in legal practice. 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 legal 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 Magistrate Grade I is logical 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.⁹⁴

⁹⁴ See, Section 199 (2) (a) of the UPDF Act.

The Chairperson and at least two members of the court should be retired army officers. This will ensure that the Chairperson and at least the two members of court are not subject to the chain of command and do not owe allegiance to the military establishment as is currently the norm. This will help 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 members of court should be appointed for a period of three years, renewable only once, subject to satisfactory performance. The circumstances and manner under which the members of the court may be removed should be made clear. These should provide for an independent review of the reasons for removal of the member, and should guarantee the right of the affected member to be heard. Such an arrangement provides sufficient security of tenure to guarantee minimum independence and impartiality of the military court.

VII. CONCLUSION

The current establishment of the GCM as one of the organs exercising judicial power in Uganda falls outside and contravenes the 1995 Constitutional framework. The Court does not fit into the ordinary hierarchy of Ugandan courts. It is not a court of record and yet it is not established under Article 129 (1) (d) of the Constitution which governs the establishment of subordinate courts. The GCM 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. The GCM is therefore not a court properly so called for the purposes of administering justice in Uganda.

The issues and concerns raised by the trial of Rtd. Col. Dr. Kizza Besigye and the 22 regarding the right to a fair hearing before the GCM call for immediate review of the law establishing and governing the GCM.

This paper has revealed that both the law and the practice of the GCM 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. The argument that featured in the media debate that Uganda's military court system is structured and operates on similar principles as those in some developed countries is not tenable. The issue is not whether military courts in Uganda are structured and operate in similar fashion to those in the developed world. Rather, the issue is whether these military courts, as is the case elsewhere, meet the minimum acceptable international and constitutional standards of administering justice. Quite clearly, they do not.

VIII. SELECT BIBLIOGRAPHY

Books and Scholarly Articles

Botha, C., "Jungle Justice and Fundamental Human Rights: Military Courts in a Future Constitutional Dispensation," *African Defence Review*, Issue No.17, 1994.

Gloppen, S., Kasimbazi, E., and Kibandama, A., "The Evolving Role of Courts in the Political Transition Process," Chr Michelsen Institute and Makerere University, 2006 (Unpublished paper).

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

Kanyehamba, G.W., "Constitutional and Political History of Uganda: From 1894 to the Present," Centenary Publishing House Ltd., Kampala, 2002

Kanyehamba, G.W., "Kanyehamba's Commentaries on Law, Politics and Governance," Renaissance Media, Kampala, 2006.

Onoria, H.M., "Soldiering and Constitutional Rights in Uganda," *The East African Journal of Peace & Human Rights*, Vol. 9, No. 1, Kampala, 2003.

Republic of Uganda., "Report of the commission of inquiry into the violation of human rights: findings, conclusions and recommendations," Kampala, 1994.

Rowlinson, S.P., "The British System of Military Justice," *Air Force Law Review*, Vol.17, 2002.

Legislation

The Anti-Terrorism Act, Act No. 14 of 2002

The Constitution of the Republic of Uganda, Kampala, 1995

The Fire Arms Act, Cap 299, Vol. XII, Laws of Uganda, 2000

The Judicature Act, Chapter 13, Vol. II, Laws of Uganda, 2000

The Penal Code Act, Chapter 120, Vol. VI, Laws of Uganda, 2000

The Trial by Military Tribunals Decree, Decree No. 12, 1973

The Uganda Peoples Defence Forces Act, Act No.7, 2005

Regional and International Covenants and Guidelines

African Charter on Human and Peoples' Rights

Amnesty International Fair Trials Manual

International Covenant on Civil and Political Rights

Universal Declaration of Human Rights

United Nations Basic Principles of the Role of Lawyers

United Nations Guidelines on the Role of Prosecutors

Cases

Beauregard v. Canada [1986] 2 S.C.R 56 at 69.

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

Col (Rtd) Dr. Besigye Kizza v. Yoweri Kaguta Museveni and the Electoral Commission, Supreme Court Presidential Election Petition No. 1, 2001.

Valente v. The Queen [1985] 2 S.C.R, 673.

Hausschildt v. Denmark [1989] 12 EHRR 266.

Joseph Tumushabe v. The Attorney General, Constitutional Petition No.6 of 2004.

Paul K. Ssemogerere, Zachary Olum and Juliet Kafire v. Attorney General, Constitutional Appeal No.1 of 2002.

R v. Genereux [1992] 1 S.C.R 259.

R v. Sussex Justices ex parte McCarthy (1924) 1 KB 256.

Re Medicaments [2001] WLR 700.

Uganda Law Society v. The Attorney General of the Republic of Uganda, Constitutional Petition No.18 of 2005.

