THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: OWINY-DOLLO, CJ; MWONDHA; TUHAISE; CHIBITA; MUSOKE; BAMUGEMEREIRWE; MUGENYI; JJ.S.C

CONSTITUTIONAL APPEAL NO. 02 OF 2021

(Arising from Constitutional Petition No. 45 of 2016)

ATTORNEY GENERAL ..... APPELLANT/ CROSS RESPONDENT

VERSUS

HON. MICHEAL A. KABAZIGURUKA ..... RESPONDENT/ CROSS APPELLANT

[Appeal from the decision of the Constitutional Court (Kakuru, Obura, Kasule JJ.A; and Madrama, Musota JJ.A. dissenting) at Kampala dated 1st July 2021 in Constitutional Petition No. 45 of 2016.]

JUDGEMENT OF OWINY – DOLLO, CJ.

Introduction

This appeal arises out of a petition instituted under Article 137 (1) & (3) in the Constitutional Court. In essence, the appeal and cross appeal are against the majority decision of the learned Justices of the Constitutional Court regarding the competence of the military Courts, their ability to render a fair hearing, offences triable in military Courts, and persons subject to the jurisdiction of the military Courts in Uganda.

Background

When he filed Constitution Petition No. 45 of 2016 in the Constitutional Court, the Respondent was a civilian and Member of Parliament representing the people of Nakawa Municipality, Kampala Capital City Authority (KCCA) in the 10th Parliament, and shadow Minister for KCCA. He filed the petition

against the backdrop of events following his arrest, whereupon he was arraigned before the General Court Martial (GCM), and charged, along with others, with offences under the Uganda People's Defence Force (UPDF) Act; to wit, offences relating to security contrary to section 130 (1) (f) with the particulars thereof being that he contrived a plot with others to overthrow the government of Uganda, and Treachery contrary to section 129 (a) with the particulars thereof being that he infiltrated the UPDF or was an agent of a foreign power or any force engaging in war or war-like activities against the government of Uganda. He objected to his trial in the GCM, contending that he was not subject to military law as he had no military connection and that the GCM was not a competent Court under the Constitution to try any of the offences with which he was charged; but, the GCM overruled his objection. He filed the petition in the Constitutional Court challenging the provisions of the UPDF Act No. 7 of 2005, which he singled out in the petition, and acts of the UPDF of arresting, detaining and remanding him to prison in relation to the charges against him, as being inconsistent with the Constitution. The proceedings in the GCM against the Respondent were stayed by an order of the Constitutional Court. In essence he alleged in the petition that:

(i) Section 197 of the UPDF Act 2005 is inconsistent with Articles 28 (1), 126 (1), 129 (1) and 257 (1) (d) of the Constitution to the extent that it purports to create a Court of law without constitutional authority.

(ii) The General Court Martial and other military Courts established under Part VIII of the UPDF Act are not Courts of law within the meaning of Art 126 (1), 129(1), 210 and 257 of the Constitution of the Republic of Uganda.

(iii) Sections 2, 179 and 119 (1) (g) & (h) of the UPDF Act are inconsistent with and in contravention of the Constitution of the Republic of Uganda to the extent they define a service offence to mean any offence under the laws of Uganda, and conferring jurisdiction unto the Court Martial to try any offence including both capital and non-disciplinary offences, and jurisdiction over every person.

(iv) The act of arraigning and/or charging the Respondent before the GCM holden at Makindye is inconsistent with and in contravention of his rights of a fair hearing under Arts 28 (1) of the Constitution of the Republic of Uganda.

He prayed for a permanent injunction to restrain the Appellant from continuing those proceedings. The Constitutional Court, partly allowed the appeal in its majority decision where it inter alia held that as a civilian, the Respondent was not subject to military law; and could only be lawfully tried by a military Court if he were charged under s. 119 (1) (g) of the UPDF Act as an accomplice to a principal who was subject to military law, and the principal was so named in the charge sheet. There being no principal named in the charge sheet, the Court held that the charges brought against him were null and void; and of no effect. The Court also declared section 119 (1) (h) of the Act, which allowed military Courts to try persons for offences provided for under other laws outside the scope of the UPDF Act, unconstitutional.

According to the Court, Parliament never intended that the UPDF Act should be an Act of general application since it is a statute of special and limited application. Hence, the unlimited and original jurisdiction of the GCM, referred to in the UPDF Act, only apply to offences under that Act. Last, the

Court examined the nature of the military Courts and held that, first, Military Courts lack all the tenets of an ordinary Court established under Chapter 8 of the Constitution; particularly under Art. 28 (1). Second, they are tribunals; and third, they are not part of the Judiciary. The Court accordingly ordered that the Petitioner be released forthwith. The Appellant was dissatisfied with the decision of the Constitutional Court; hence it appealed to this Court. The Respondent for his part, cross appealed against the decision allowing civilians, in certain cases, to be tried in the Military Courts.

Grounds of Appeal.

The grounds of appeal are;

1. *The learned majority Justices of the Constitutional Court erred in law in finding that ss. 2 and 179 of the UPDF Act are in contravention of Articles 28 (1) and 44 (c) of the 1995 Constitution and that the GCM is only competent to try military disciplinary offences under Part VI of the UPDF Act.*
2. *The learned majority Justices of the Constitutional Court erred in law and fact in determining that the GCM cannot be impartial or independent; is inconsistent with Art 28 (1) of the 1995 Constitution of Uganda, and does not apply the principles therein to persons subject to military law.*
3. *The learned majority Justices of the Constitutional Court erred in law and fact in determining that charging and arraigning the Petitioner before the GCM was inconsistent with Art 28 (1) and 44(c) of the Constitution.*
4. *The learned majority Justices of the Constitutional Court erred in law in finding that section 119 (1) (h) of the UPDF Act is inconsistent with Art. 28 (1) and 44 (c) of the Constitution.*

The Appellant prayed that the appeal be allowed, the decisions of the learned Majority Justices of the Constitutional Court cited be set aside, and the Appellant be awarded costs of the appeal.

The Cross appeal

The Respondent cross appealed on the following ground:

1. *That the learned majority Justices of the Constitutional Court erred in law in holding that a civilian can be charged before Military Courts as an accomplice together with a person subject to military law.*

He thus prayed that the cross appeal be allowed, and part of the decision of the majority Justices that he has impugned be set aside or reversed.

Representation

At the hearing of the Appeal on 30th September 2021, the Appellant was represented by Kirwoowa Kiwanuka the Attorney General appearing with Mr. Martin Mwambusya, Director Litigation; Mr Phillip Mwaka, Ag. Commissioner, Directorate of Civil Litigation; Mr Richard Adrole, Principal Sate Attorney; Mr. Brian Musota, State Attorney; and Mr. Franklin Uwizera, State Attorney.

The Respondent was represented by Counsel Caleb Alaka, Hon. Medard Ssegona and Mr. Jonathan Elotu. Counsel on each side had earlier on filed written submissions. Both sides made oral clarifications in Court on their submissions.

The matter came up for rehearing upon reconstitution of the panel, on 13th May 2024. Counsel Medard Lubega Segona represented the Respondent; while George Kalemera, Geoffrey Madette and Brian Musota appeared for the Appellant. Neither side had any new submissions. However, Counsel for the Respondent urged the Court to also consider a recent Constitutional Court decision in ***Rtd. Cpt. Amon Byarugaba & 169 Ors v A.G - Const. Pet. No. 44 of 2015*** as relevant.

Submissions of the parties.

Ground 1. *The learned majority Justices of the Constitutional Court erred in law in finding that ss. 2 and 179 of the UPDF Act are in contravention of Art. 28 (1) and 44 (c) of the 1995 Constitution, and the GCM is only competent to try military disciplinary offences under Part VI of the UPDF Act.*

The impugned sections incorporate all offences under other enactments within the jurisdiction of the GCM. Under this ground, Counsel for the Appellant challenged the Constitutional Court's finding that the GCM and military Courts in general are not Courts under the Constitution; but are tribunals with a limited jurisdiction, and only competent to try military offences rather than ordinary civil offences provided for in other enactments. Counsel submitted that, in enacting s. 2 and s. 179 of the UPDF Act 2005, Parliament acted within its Constitutional mandate in Art. 210 to legislate on matters of regulation of the UPDF including discipline and removal from the UPDF. He argued that this mandate extended to legislation on related matters such as creating the Courts Martial as Courts of law to imbue discipline in the army; delineate the scope and operation of the Courts Martial; and to enforce the law.

Regarding the wide jurisdiction of the GCM over civil offences and capital offences in particular, Counsel argued that the GCM was already deemed competent to handle offences under the Part VI of the UPDF Act, which attract the death sentence. He also additionally submitted that Parliament was alive to the reality that soldiers in the battle field are fallible to other offences not expressly listed in the UPDF Act, but are covered under other enactments,

such as rape or murder under the Penal Code Act; and cited the need to quickly and firmly deal with the soldiers to maintain discipline. Counsel submitted that the Constitutional Court created an absurdity whereby UPDF soldiers who commit such offences during military expeditions outside Uganda cannot be tried by the GCM or civilian Courts which would have no territorial jurisdiction to hear these matters. He argued that it was not necessary for Parliament to re-enact all offences into the UPDF Act s.2 and s.179 were sufficient.

On the other hand, Counsel for the Respondent/Cross Appellant submitted that the learned Majority Justices were right in finding that ss. 2 and 179 are unconstitutional. He argued that a service offence under s. 2 is wide and limitless to include all offences to which a person is chargeable under civil statutes that have nothing to do with the military; therefore, affording the UPDF to usurp the powers of the Judiciary and become a jack of all trades. He argued that the UPDF Act is not an Act of general application, but one of special and limited application; and the power of Parliament in regulating the UPDF was to regulate the UPDF only within the four corners of Art 210 of the Constitution. This excludes the general adjudicatory function and the corresponding wide jurisdiction over all offences, bestowed on the Judiciary under Art. 126.

According to him, Parliament also overstepped its legislative mandate granted by Article 79 of the Constitution for good governance because even the power to legislate on 'related matters', that appears in the long title to the UPDF Act, cannot be read to include the mandate of the Judiciary of adjudication and administration of justice provided for in Chapter 8 of the

Constitution; but falls outside the scope of Art 210. He opined that conferring that jurisdiction on the military Courts, had the effect of amending the Constitution without following the due procedure for so doing under Art 259. He also submitted that Chapter 12 and in particular, Art 210 (a) - (d) only relates to the functioning of the UPDF and what the UPDF does outside that generic string such as the exercise of the overly wide jurisdiction over subject matter outside is *ultra vires.* In this line of argument, he further argued that the impugned sections 2 and 179 of the UPDF Act illegally confer criminal jurisdiction upon Courts Martial instead of limiting jurisdiction only to jurisdiction over disciplinary offences; yet military law concerns military discipline and other rules governing the armed forces.

In rejoinder, Counsel for the Appellant submitted that the rule of harmony and exhaustiveness should be kept in mind while interpreting the provisions of the Constitution, and that the Constitution must be read as a whole with no particular provision destroying the other. He argued that Art 209 only broadly sets out the functions of the UPDF; and that all laws made under Art 210 must be made with the sole purpose of ensuring each of these functions in Art 209 are fully realized. In that light, the provisions of Art 210 only serve to particularize what the laws should expressly include but are not exhaustive. Thus, Parliament used this power to legislate on what amounts to service offences and the jurisdiction of military Courts in the UPDF in order to ensure that all related matters required for the proper functioning of the UPDF are covered.

Ground 2: ***The learned majority Justices of the Constitutional Court erred in law and fact in determining that the GCM cannot be impartial or independent; is inconsistent with Art 28(1) of the 1995 Constitution***

of Uganda, and does not apply the principles therein to persons subject to military law.

Counsel submitted that the majority Justices erred in finding that the GCM is neither independent nor impartial and therefore its existence is in contravention of Art 28(1) of the Constitution. He submitted that jurisdiction is a creature of statute and the GCM, as established under Art 210 (b) of the Constitution and s. 197 of the UPDF Act, is an independent and impartial Court. He defined "impartial and independent" as meaning "*even headed and not subject to the control of the appointer*". For this, he referred to ***Petition No. 13 of 2014 consolidated with Petition No. 36 of 2014 Robinson Malombo T/A O.M Robinson & Co Advocates vs The Disciplinary Tribunal of the Law Society of Kenya & A.G.*** He also cited ***RDS vs Her Majesty the Queen [1997] 3 S.C.R 484 to 548 at p 486*** for the assertion that impartiality is a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by evidence and submissions.

By analogy, Counsel submitted that since, the UPDF is enjoined under Art 221 to observe and respect human rights and freedoms in the performance of their functions, it can be concluded that, even though it is composed of military officers, the GCM is also mandated to do the same as regards the principles that pertain to a Court of law including the right to a fair hearing. He referred to ***Commander Lesotho Defence & 4 others vs Second Lieutenant Setho Maluke C of A (CIV) No. 30/2014 CIV/APN/83/2014.*** He submitted that the finding of the majority of the Justices of the Constitutional Court that the GCM is not independent or impartial is an absurdity because it presupposes those military personnel do not enjoy fundamental rights and freedoms enshrined in the Constitution. Further, even though the Petitioner's affidavit showed

that he objected to the GCM's competence to try him when he was arraigned before it, it did not suggest that the GCM did not act as an impartial and independent Court. This makes the Constitutional Court's finding in this regard, speculative, and as such, it arrived at the wrong decision.

Counsel also submitted that independence of the Court cannot be premised on the structure and constitution or appointment of the members of the Court because regardless of that, under Art 221, they are required to observe fundamental rights and freedoms. He emphasized that what should be considered is not who the appointing authority is, but whether the members of the GCM and the Chairman are under the influence of the Appointing Authority during their deliberations, before they reach a verdict. He asserted that there was no evidence on record that the appointing authority has power to get involved in the judicial function of the Court Martial (see ***2nd Lt. Rantso Josias Sekoati & 48 others vs the President of the Court Martial (Lt. Col. G.P Lekhanyaye) & 2 others CIV/APN/82/99.***

Counsel also argued that members of the Courts Martial take the oaths and affirmations for Members and Chairman of the Court under the 6th Schedule to the UPDF Act (Rules of Procedure). Lastly, Counsel pointed out the fact that in the past, in the exercise of their appellate jurisdiction, Courts of Judicature have appraised and considered the evidence and the process of the trial before the GCM and upheld decisions of the GCM leading to the conclusion that it is an impartial Court under Art 28(1). He referred to ***RA/LFK016PTE Eruaga Moses v Uganda Criminal Appeal No. 0530 of 2014***.

In reply to the submissions of Counsel for the Appellant on the ground that the '*Court erred in holding that the GCM cannot be independent and impartial*

in line with Art 28 (1) and neither does it apply the principles therein to persons subject to military law,' Counsel for the Respondent disagreed that the Constitutional Court made such holding and as such the ground as phrased misrepresents the majority holding of the justices. He maintained that the gist of the holding was that the GCM as established under s. 197 of the Act is a 'competent Court' within the meaning of Art. 28 (1) and 210, but only for purposes of disciplinary offences under Part VI of the UPDF Act and not for criminal trials generally. This stems from their military and command structure as well as the oath taken by military officers.

However, it was his submission that courts martial are not even competent to try military officers with offences not of a military nature. He referred to ***Professional Training Series No. 9 Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers.*** Counsel agreed with the majority Justices of the Constitutional Court and explained that Article 28 has two limbs: first is competence as established by law, and second, impartiality and independence. Regarding the first, the Courts Martial are not envisaged under Art 126 and generally Chapter 8, and are thus tribunals for disciplinary purposes. He argued that there is no plausible reason to create a parallel Court outside the Court system in the Constitutional framework that clearly provides for the Courts of record and subordinate Courts. He argued that it is by design that the Executive powers are reserved for the Executive while hearing is for the Judiciary; and this helps to avoid anarchy.

He submitted that allowing the army to take over judicial work is a vote of no confidence in the judicial arm; yet there is no parallel legislature or parallel Executive within our Constitutional framework as it stands. He referred to

Ambrose Ogwang (supra), and ***ULS V A.G SC Const. Appeal No 1 of 2006*** (supra). As regards the second limb, Counsel elucidated on the importance of the requirement of independence and impartiality under Art 28 (1) for both Courts of law and tribunals as an integral part of a fair hearing. Counsel reasoned that Courts martial fall short of this because: (i) the command structure of the UPDF as an army and component of the Executive arm cannot guarantee the rights associated with the two tenets of independence and impartiality; (ii) the command structure is both military and political as, for instance, the panel even includes a political commissar provided for under s. 197 (1) (d) of the UPDF Act; and_whose job is political education and organization, and loyalty to the Government; (iii) it constitutes a violation of the principle of separation of powers; and (iv) the absence of competent specialized officers.

Arguing in essence that the military Courts are unfair even to persons subject to military law, counsel challenged the notion of '*voluntary assumption of risk'* by persons subject to military law on the basis that a person can only assume the discipline but not the illegality and unfairness as the same is not envisaged and can never be condoned. Counsel also further submitted that the powers of the Court Martial are an interference with the office of the Director of Public Prosecutions (DPP) operations. He reasoned that interference with the DPP's office destroys the root of our democracy and offends the right to fair hearing which does not begin with Court; but with the decision making process on whether, and how, to prosecute a person. He explained that the Constitution is by design intended to achieve a particular purpose to avoid abuse, and promote orderliness; and the DPP is an independent body specialized body, acting as a sieve for penal prosecutions,

intended to take professional and fair decisions before arraignment; unlike the military which is subject to direction.

In rejoinder, as for the first limb of competence under Art 28 (1), Counsel submitted that the argument that the Courts Martial are not envisaged under Art 126 of the Constitution is without merit because in ***A.G. v Uganda Law Society – S.C. Const. Pet. No. 1 of 2006,*** this Court held that the General Court Martial is a competent subordinate Court under Art 129 (d) of the Constitution; hence, it is comparable to the Industrial Court (see: ***Asaph Ruhinda Ntegye & Anor v A.G. Const. Pet. No. 33 of 2016).*** Second, Counsel submitted that Courts martial are capable of being fair and impartial because; (i) they are bound under Art 221 of the Constitution to respect human rights and freedoms of all persons including those of civilians who appear before them; (ii) as evidence that they are capable of respecting the rights to a fair hearing, their past decisions have been upheld by the Courts of Judicature on appeal; (iii) its members take an oath to serve in their different capacities and are bound by the Constitution; and (iv) in terms of qualifications, some of the members of the Courts martial, like the prosecutor and advocate are specialized legal officers.

Ground 3. *The learned majority Justices of the Constitutional Court erred in law and fact in determining that charging and arraigning the Petitioner before the GCM was inconsistent with Art 28 (1) and 44 (c) of the Constitution.*

This ground related to the status of the Respondent as a civilian appearing before a military Court for offences in the UPDF Act. Counsel argued that, as regards Arts 28(1) and 44(c), arraigning and charging the Respondent before the GCM together with other members subject to military law was in

pursuance of the law; to wit a law passed by Parliament as empowered by the Constitution. He referred to **A.G. vs Uganda Law Society** ***S.C. Con. Appeal No.1 of 2006***; and ***Namugerwa Hadijah vs A.G*** (supra) for the proposition that, ***"[F]or an offence under the Act other than the UPDF Act to be within the jurisdiction of the GCM, it must have been committed by a person subject to military law."*** Counsel submitted that s. 2 of the Act clearly excludes civilians from trial in the GCM except those who aid and abet a person subject to military law or civilians who voluntarily possess arms, ammunitions or equipment ordinarily the monopoly of the UPDF under s. 119 (1)(h) & (g). He referred to ***S.C.C.A No. 4 of 2012 Namugerwa Hadijja Vs The DPP & A.G.***

To cement his argument, he submitted that this position of law is similar to that of the United States, Canada, United Kingdom, Ghana and Kenya. For this, he referred to ***Reid v Covert - U.S Supreme Court 354 U.S.1 (1957) ; S.166*** *of the* ***Canada Defence Forces Act; Schedule 3 of the Armed Forces Act 2006 UK; s.12 (1)(e), (f)*** & ***(g) of the Armed Forces of Ghana;*** and ***s.55(1) Kenya Defence Forces Act No. 25 of 2012.*** According to Counsel, the respondent fell within the ambit of s. 119(1) (g) the moment he was charged with 22 other persons with offences under the Act of contriving a plot to overthrow the Government of Uganda by force of arms. In other words, not naming him as an accomplice in the charge sheet was not fatal or necessary for the charge against the Respondent to conform to Art 28(12). He further argued that, since the offences in the charge sheet have accompanying penalties, breach of Art 28 (12) does not arise. Counsel concluded that trying serving military officers and civilians under s. 119 (1) (g) & (h) of the UPDF Act, is consistent with Art 28 (1) and 44 (c) of the Constitution because the GCM is bound to observe the

right to a fair hearing and other human rights under Chapter 4 of the Constitution.

In reply, and agreeing with the majority decision of the Constitutional Court, Counsel for the Respondent submitted that charging and arraigning the Respondent, a civilian, on a charge that did not name him as an accomplice to a disclosed principal named in the charge sheet was unconstitutional. Counsel argued that indeed the charge sheet did not state that the Respondent aided or abetted any offence; thus the trial was inconsistent with Articles 28 (12) and 44 (c); hence, the Constitutional Court was right to hold as they did. He however further raised new arguments, which were not the basis of the Constitutional Court decision - that the offence is similar to treason under the Penal Code, which is triable by the High Court. He also alluded to the unfairness of the proceedings that lacked impartiality and independence by pointing out that the Respondent is a political leader in the opposition charged with a political offence of attempting to remove the government to which the 'court' officials are answerable. He asked this Court to perform its duty of defending Constitutional individual rights threatened by congressional legislation. He referred to Cheborion Barishaki JA's judgment in ***Human Rights Network Uganda & 4 others v Attorney General Const. Petition No 56***; and Earl Warren CJ in ***Trop v Dulles US (1956),*** cited therein.

In rejoinder, Counsel for the Appellant/Cross Respondent argued that the UPDF (Rules of Procedure S.I 307-1) already makes provision for a Court Martial to satisfy itself that a civilian as an accused person is one subject to military law and that the charge sheet/ indictment is correct. He pointed out that before taking plea, the accused is also given a right to object to the

charge on the ground that it is not correct in law or not properly framed in accordance with the regulations, as specifically provided for under rule 25(1)(f) & (g) and rule 35 (1). In response to the submission on interference with the DPPS's office, Counsel submitted that Art 120 (3)(b) specifically excludes the DPP from instituting criminal proceedings in a court martial which further highlights the competence of the GCM to ensure that one is being charged in accordance with the Act.

Ground 4

The learned majority Justices of the Constitutional Court erred in law in finding that section 119 (1) (h) of the UPDF Act is inconsistent with Art 28 (1) and 44 (c) of the Constitution.

Counsel challenged the finding of the Constitutional Court that s. 119 (1) (h) is unconstitutional. He submitted that the impugned s. 119 (1) (h) which grants the GCM jurisdiction over persons found in unlawful possession of the ammunitions, arms or equipment and other stores ordinarily in the possession of the UPDF is prescribed by Parliament and Constitutional. No right to a fair hearing under Art 28(1) is contravened as it applies only to those who voluntarily bring themselves within that provision, who then become subject to military law. He alluded to the importance of s.119 (1) (h) which can be seen from the seriousness of the charges that may arise under it by referring to ***Namugerwa Hadijjah v The A.G*** (supra) where the Appellant's brother was found with the 'Black star' pistol ordinarily a monopoly of the UPDF and remanded to Kigo prison. He also submitted that the GCM comprises persons with sufficient training, exposure and experience in military matters who are best suited to adjudicate on matters of this nature in comparison to the civil Courts. With these submissions, Counsel for the

Appellant prayed that this Court allows the appeal and sets aside the decision of the learned Majority Justices of the Constitutional Court and award costs to the Appellant.

On the other hand, Counsel for the Respondent concurred with Kasule JA's dissenting opinion that section 119 (1) (h) is unconstitutional. According to Counsel, this provision is an entry point into the Court martial route away from civilian courts' jurisdiction. Alternatively, he reiterated the need for fact finding as a preliminary point, whenever a civilian is to appear before a military Court, to establish if the military Court has jurisdiction over such a person before the jurisdiction of the military Court is activated. According to Counsel, the finding that an accused was in possession of military stores should be made by the Judiciary in a prehearing; otherwise an accused person will be found guilty by a court martial, of possession, on proof only of this first ingredient of possession. He argued that suspicion in such a case, is not enough to bestow jurisdiction and to derogate on the right to a fair hearing.

In rejoinder, Counsel for the Appellant submitted first that s. 119 (1) (h) does not require a pre-hearing on a double fact-finding before the civil Court as submitted by Counsel for the Appellant. He argued that the burden to establish the ingredient of the offence of whether one is subject to the UPDF Act for purposes of trial lies upon the prosecution. He further argued that criminal jurisdiction is a creature of statute and as the law stands, the GCM assumes such jurisdiction once a person is charged with a service offence provided for under the UPDF Act. He pointed out that rule 40(1) of the Rules made under the UPDF Act mandates the accused to take plea on a charge; the accused is provided an opportunity to defend themselves in line with Art 28.

Lastly, he argued that the Respondent did not submit any evidence that s. 119 (1) (h) is inconsistent with the Constitution.

The cross appeal

In the cross appeal, Counsel for the Respondent/Cross Appellant argued that a civilian cannot be tried with a person subject to military law, under the Constitution. He submitted that military discipline, not civilians, is the focus of the UPDF Act. He pointed out first that it was intended, from the restrictive nature of article 210, that service offences should apply only to the military. This intention of Parliament is in consonance with the definition of 'service' in s. 2 where it is defined to mean '*service in the Defence Forces or means a component of the Defence forces enumerated in s.3 (2) including land, air any other prescribed by Parliament.'* Second, the purpose and effect of legislation is relevant while interpreting the Constitution to ascertain the constitutionality of the impugned provisions.

He referred to ***A.G v Salvatori Abuki S.C Constitutional Appeal 1 of 1998; Constitutional Petition No. 56 of 2013 Human Rights Network Uganda & 4 others v Attorney General.*** He argued that in this case, the effect of s. 2 and s.179 that a civilian could be charged in a military court was not the intention of the drafters of the Constitution and Parliament. He also reiterated his argument on ground one and two that the UPDF Act is a restrictive Act; and the courts martial are comparable to other professional organs established by the Prisons Act, Police Act, the Dental Practitioners' Act and the Nurses and Midwives Act to deal with only their members, and not the entire public who have not opted to be part of the organization. He prayed that the cross appeal be allowed with costs, part of the decision of the learned majority justices of the

Constitutional Court be set aside/reversed, and the appeal be dismissed with costs.

In response to the cross appeal, Counsel for the Appellant agreed with the finding of the majority justices of the Constitutional Court that s. 119 (1) (g) is consistent with the Constitution. According to him, the Supreme Court in ***Namugerwa Hadijja v A.G S.C. Civ. Appeal 4 of 2012*** had already held that a civilian can be tried alongside military officers for offences under the UPDF Act if they have aided and abetted the same. It is thus only civilians who voluntarily subject themselves to the jurisdiction of the GCM in the circumstances provided in 119 (1) (g) who are subject to its jurisdiction; this can be likened to *volenti non fit injuria*. In comparison, he also pointed out that even the Advocates Act empowers the Law Council to discipline any person who carries out the work of a nature normally performed by an advocate or who purports to act or pretends to be an advocate. He explained that the import of s. 119 (1)(g) is because military laws are designed with special interest of national security and it is therefore possible for a civilian to commit acts which affect national security ordinarily committed by persons subject to military law. He urged this Court to consider the rationale of creation of offences in the UPDF Act, which includes the secrecy and integrity of operational matters of the defense forces under powers vested upon the UPDF by virtue of Art 209 of the Constitution; under this the Courts Martial are clothed with jurisdiction.

CONSIDERATION AND DETERMINATION OF THE APPEAL

This appeal first came up for hearing in this Court in 2022. From that time, to its final disposal today, it has suffered an unprecedented affliction by a host of adversities. There is thus, an imperative need to clarify on what

transpired within that period. The grave and persistent series of events that characterized the lifespan of this appeal began with fire gutting the Chambers of the Chief Justice on the Supreme Court building at Kololo on 27thApril, 2022; followed by water flooding parts of the building. This resulted in a condemnation of the Kololo Supreme Court Building as being unfit for occupation; thereby leaving the Justices of the Court with no office accommodation. Thereafter two Justices of the Court, namely Justice Paul Mugamba and Justice Ezekiel Muhanguzi, who were part of the panel for this appeal, retired. This therefore necessitated a reconstitution of the panel.

In November 2022, the Court was able to secure a temporary home, and more Justices were appointed to the Court. The Court then embarked on the process of reconstitution of the panel, with a view to sitting by December that year to re-hear the appeal. However, that December, we suffered the devastating demise of Justice Rubby Aweri Opio who had been on the panel for this appeal. This necessitated awaiting the appointment of additional Justices to this Court for the requisite reconstitution of the Coram to take place. However, in only six months thereafter,yet another tragedy struck this Court with the demise of Justice Stella Arach-Amoko in June, 2023. It was until January 2024 when two more Justices were appointed to the Supreme Court; where after, the Court was able to reconstitute the panel for this appeal. The appeal came up before the reconstituted panel on 13th May, 2024, in the new Supreme Court Building at the Judiciary Headquarters; upon which the learned Justices reserved judgment to be delivered on notice. Notice has been served on the parties for delivery of the judgment on 31st January, 2025; which is eight months from the date the appeal was reheard.

The Appellant has called upon this Court to clarify on the issue of constitutionality of several aspects of the law regarding military trials. While the contentions by the parties hereto gravitate around trials in the General Court Martial (hereinafter referred to as the GCM), the issues raised radiate to the entire military Court system. I note that the four grounds of appeal, as well as the one in the cross appeal raise cross cutting issues; which explains why some submissions by both Counsel on a particular grounds transcend such grounds and extend to other grounds. All the grounds raised contain an element of counter to the challenge raised against the competence of the GCM and, or, its status as a Court of law.

Whereas the standing of the GCM as a Court of law was not raised as a separate ground in this appeal, and yet it was a separate question for determination in the Constitutional Court, upon which the Court rendered a decision declaring them to be tribunals, it was implicit in all the grounds of appeal that it was an issue. In determining this appeal, therefore, I adopt an integrated approach, where a ground may be disposed of in the course of considering another ground. For instance, the status of the GCM as a Court has a bearing on the resolution of grounds 3 and 4, which entail the determination of the issues of personal and subject matter jurisdiction of the Court, respectively.

In this regard, I shall deal with Ground 1 of the appeal, and concentrate on whether the GCM is a Court of law. I will then deal with Ground 2 on the fairness and impartiality of the GCM; followed by Grounds 3 and the Cross Appeal, as they concern the personal jurisdiction of the Court (whether it includes trial of civilians). Last, I will deal with Ground 4 that relates to the

subject matter jurisdiction of the GCM in terms of whether persons subject to military law should be tried in the GCM for both civil and service offences.

Rules of Constitutional interpretation.

It is necessary to first deal with the rules of Constitutional interpretation I consider relevant for the resolution of the issues raised in these grounds. These have been laid down in several decisions of this Court, other Commonwealth jurisdictions, and as well, authoritative legal opinion.

1. The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency *(see Article 2 (2) of the Constitution); (Also see **Presidential Election Petition No. 2 of the 2006 (SC) Rtd Dr. Col. Kiiza Besigye v. Y. K. Museveni**).*
2. In determining the constitutionality of a legislation, its purpose and effect must be considered. Any legislation is always animated by an object the Legislature intends to achieve. This object is realized through the impact produced by operation and application of the legislation. Thus, both purpose and effect are relevant in determining constitutionality; hence, an unconstitutional purpose or effect can invalidate legislation (***see Attorney General v. Salvatori Abuki Constitutional Appeal No.1 of 1998 (SC); The Queen v Big Drug Mart Ltd (1996) LRC (C0nst.) 332).***
3. The rule of harmony, completeness and exhaustiveness has to be taken into account. This rule is to the effect that the entire Constitution has to be read together as an integral whole, with no particular provision destroying the other but each sustaining the other. ***(see P. K. Ssemwogere***

and Another v. Attorney General Constitution Appeal No. 1 of 2002 (SC), and ***The Attorney General of Tanzania v. Rev Christopher Mtikila (2010) EA 13).***

4. A constitutional provision containing a fundamental human right is a permanent provision intended to apply for eternity; therefore, it should be accorded dynamic, progressive, liberal, and flexible, construction; keeping in view the ideals cherished and approved of by the people, as well as their social, economic, and political cultural values so as to extend the benefit of the same to the maximum possible; ***(see Okello Okello John Livingstone and 6 others v. The Attorney General and Another Constitutional Petition No 1 of 2005),*** and ***South Dakota v. South Carolina 192, USA 268. 1940).***
5. Where words or phrases are clear and unambiguous, they must be accorded their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.
6. Where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous, a liberal, generous, or purposeful interpretation should be given to it; ***(see Attorney General v Major David Tinyefunza Constitutional Appeal No. I of 1997 (SC).***
7. The history of the country and the legislative history of the Constitution is also relevant and useful guide to constitutional interpretation; ***(see: Okello John Livingstone and 6 others v. Attorney General and Another*** - *(Supra).*
8. The National objectives and Directive principles of State policy are an imperative for the interpretation of the Constitution. Article 8A of the Constitution as amended is instructive for the applicability of these objectives. It provides thus:

(i) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.

(ii) Parliament shall make laws for purposes of giving full effect to clause (1) of this Article.

In interpreting provisions of the Constitution, regard shall also be had to the obligations under international treaties to which Uganda has acceded as a dualist State by virtue of ratifications; and those that apply by virtue of Art. 287 of the Constitution, which provides:

"287. International agreements, treaties and conventions.

Where—

(a) any treaty, agreement or convention with any country or international organisation was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or

(b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention;

the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it."

Objective XXVIII is also instructive as to the direction Uganda should take in her move as a democracy. It provides as follows:

"XXVIII . Foreign policy objectives.

(i) The foreign policy of Uganda shall be based on the principles of—

(a) promotion of the national interest of Uganda;

(b) respect for international law and treaty obligations;

(c) peaceful coexistence and nonalignment;

...

(ii) Uganda shall actively participate in international and regional organisations that stand for peace and for the well-being and progress of humanity.

(iii) The State shall promote regional and pan-African cultural, economic and political cooperation and integration." ***(Emphasis added)***

Uganda is a party to a number of Conventions such as the Universal Declaration of Human Rights (UDHR), International Charter on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples Rights (African Charter) and is bound to uphold their provisions as well, by virtue of Art. 287 of the Constitution. The decisions and recommendations made by bodies or Commissions such as the Human Rights Committee and Special Rapporteurs in promoting observance of these Conventions, though not binding, are of great relevance.

It is worthy to note that Uganda has unique obligations under treaties she is party to within the African Union (AU) framework. Uganda is a member of the African Union (AU) by virtue of its accession to the Organisation of African Unity (OAU) Charter in 1963. By virtue of the OAU Constitutive Act, 1999, the OAU was renamed the African Union; and the Court of Justice of the AU was established. One of the most notable treaties touching on human rights

established under the AU is the African Charter on Human and Peoples' Rights (the Banjul or African Charter), (***Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982), Entered into Force 21 October 1986).*** That Charter established the ***African Commission*** to oversee its implementation.

Then in 1998, a protocol created *The African Court on Human and People's Rights* that became operational in 2006, to complement the African Commission by curing the lacuna of the absence of legally enforceable judgments. A Malaba Protocol of 2014 merged the *African Court on Human and People's Rights* and the Court of Justice of the African Union into '*The African Court of Justice and Human Rights*' as the forum of human rights litigation and interpretation of the OAU Charter and its other instruments. The recommendations of the African Commission are thus of immense weight; and the decisions of *The African Court of Justice and Human Rights* are binding on Uganda. In interpreting our Constitution, effect is given to its provisions; several whereof are mirrored within the African Charter itself.

There are also other International Conventions with bodies created there under; to which Uganda is not a party, but are relevant for persuasive best practices. Such conventions include, among others, the American Declaration of the Rights and Duties of Man; the American Convention on Human Rights and its Inter-American Commission on Human Rights; and the European Convention on Human Rights with its European Court of Human Rights.

Counsel for both parties have cited several authorities - some even conflicting - to support their respective arguments. Such authorities include ***2nd Lt. Ogwang Ambrose v A.G Court of Appeal Criminal Appeal No. 107 of 2013*** and ***Sgt Paul Kalemera***

v A.G Supreme Court Criminal Appeal No. 18 of 1994 (unreported). The source of the conflict, leading to the dissenting decisions in the Constitutional Court, is that one of these cases was an ordinary criminal appeal in the Court of Appeal where the Court was not exercising the power of interpretation under Article 137 of the Constitution to declare certain sections or acts unconstitutional; while the Supreme Court in the other was merely applying the substantive law as it is, to the facts before it with no concern as to their constitutionality. Other relevant authorities that have since been delivered since the hearing of this appeal and upon which Counsel in this petition have had no opportunity to submit are; ***Rtd. Capt. Amon Byarugaba & 169 Ors Const. Petition No. 44 of 2015 delivered on 15th Dec 2022*** and ***2nd Lt Ogwang Ambrose v Uganda SC Crim Appeal No. 48 of 2021 delivered on 11th Dec 2024*** . The appeals to this Court in these cases, if any, have not yet been disposed of in this Court. The latter was still an ordinary appeal. It is in the former that the Constitutional Court considered and declared itself explicitly, albeit on only two of the issues arising in this appeal. These are; the jurisdiction of the military courts under s. 119 (1) g & (h) of the UPDF Act to try civilians; and violation of Art 28 (1) of the Constitution by the absence of fair trial minimum guarantees. Since the appeal in the current petition has a wider purview, its determination has a direct bearing on all these cases.

It thus falls on this Court to ensure certainty in the application of the law; by clearly spelling out the principles that should guide on how to structure and/or handle matters concerning discipline in the UPDF. This will ensure that the provisions of Art. 209 of the Constitution are given effect to, without affecting other provisions of the Constitution. It will also ensure the enforcement of the provisions of Chapter 4 of the Constitution.

I note that the appeal turns on four broad issues. First, is whether military courts are 'courts' or 'tribunals'. Second, is subject matter jurisdiction, hence, what offences are triable in military Courts. Third, is personal jurisdiction; thus who can be charged before military courts. Fourth is whether military Courts are fair and impartial. With regard to the first three issues, the majority Justices of the Constitutional Court based their analysis of the nature of military Courts vis-à-vis the ordinary or civil Courts provided for in Chapter 8 of the Constitution. They held that military Courts are mere tribunals; and also held - which is the basis of ground 2, that military Courts are not clothed with the requisite competence, independence, and impartiality provided for under Art 28(1) of the Constitution, to handle criminal cases under ss. 2, 179, and 119 (1) (h) of the UPDF Act.

They also relied on a restricted interpretation of Art 210 in holding that the creation of the military Courts with power to try, not just military offences dealing with military discipline, but even civil offences under other enactments for both civilians and persons subject to military law is unconstitutional. In essence, the majority Justices of the Constitutional Court held that the persons who are liable for trial in courts Martial, are only those who are subject to military law owing to their having submitted themselves to the jurisdiction of the Court by virtue of the oath they have taken in that regard. However, even then, such liability is strictly only for disciplinary offences provided for under part VI of the UPDF Act.

The specific issues for this Court to resolve, arising out of the Constitutional Court decision, the grounds of appeal, and cross appeal are:

1. *Whether the Courts Martial are Courts established under the Constitution or are mere tribunals.*
2. *Whether the Courts Martial can be/or are independent and impartial within the meaning of Art 28 (1) of the Constitution.*
3. *Whether civilians can legally (i.e. without offending the Constitution), be liable to face trial in the Courts Martial for disciplinary offences (hereinafter called military, disciplinary or service offences), stipulated in Part VI of the UPDF Act.*
4. *Whether civilians can constitutionally or legally be tried in the Courts Martial for civil offences not comprised in Part VI of the UPDF Act; but are instead provided for in other legislations.*
5. *Whether it is constitutional for persons subject to military law to be tried in the Courts Martial, for offences outside the UPDF Act (herein after called civil offences).*
6. *Whether it is constitutional for civilians to be tried by the Courts Martial as principals for offences under s. 119 (1) (h) of the UPDF Act; yet these also exist as civilian offences?*

During the period after hearing this appeal, the laws of Uganda were revised; and while this did not affect the content of the Act, it affected both the citation and arrangement of the sections of the Act. Thus, the UPDF Act, 2005, is now cited as the UPDF Act Cap 330; while the impugned sections 2, 119 (1) (g) & (h), and 179, have changed to sections 1, 117 (g) & (h), and 177, respectively. The impugned section 197, which established the GCM has changed to section 195. Otherwise, there is no change in the content.

Ground 1.

This ground faults the Constitutional Court for its finding that the GCM is not a Court of law, but a specialized tribunal that should limit itself to disciplinary offences within the UPDF Act. Accordingly, the Court nullified sections 2, 179, and 119 (1) (h) of the UPDF Act, for extending its jurisdiction to jurisdiction that has been conferred on the Judiciary by the Constitution. This question was raised in the Constitutional petition in the terms of whether "*S. 197 [now 195] of the UPDF Act 2005 is inconsistent with Articles 28(1), 126(1), 129(1) and 257(1) (d) of the Constitution to the extent that it purports to create a court of law without Constitutional authority*." That section establishes the GCM and provides for its structure, jurisdiction, and revisionary powers. The Court resolved this issue together with the issue of the independence, fairness and impartiality of the Courts Martial.

In my considered view, I find the two issues to be distinct and independent of each other. The GCM's legal status as a 'Court', its structure and procedures ('fairness, independence and impartiality'), and its competence in terms of jurisdiction, are distinct from each other. Its status as a Court arises from its establishment as such, by law; but not its composition, or the manner of its operation. Similarly, its status as a Court is not determined by its exercise of judicial power; as in some cases, tribunals also exercise some judicial power. I will advert to this in the course of this judgment.

Is the GCM lawfully established as a Court of law?

This requires a scrutiny of the relevant Constitutional provisions and Act establishing the GCM. The Constitution establishes the superior and subordinate Courts in Uganda. Article 129 of the Constitution provides:

"***129. The courts of judicature.***

(1) The judicial power of 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, including qadhis' courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament."

It is clear from the above provisions of the Constitution that Parliament has the power under Art. 129 (1) (d) to establish other courts of law. The other provision of the Constitution under consideration in the interpretation of whether the GCM is validly established as a court of law is Article 210 of the Constitution; which vests Parliament with the power to regulate the UPDF, thus:

"210. Parliament to regulate the Uganda Peoples' Defence Forces.

Parliament shall make laws regulating the Uganda Peoples' Defence Forces and, in particular, providing for—

(a) the organs and structures of the Uganda Peoples' Defence Forces;

(b) recruitment, appointment, promotion, discipline and removal of members of the Uganda Peoples' Defence Forces and ensuring that members of the Uganda Peoples' Defence Forces are recruited from every district of Uganda;

(c) terms and conditions of service of members of the Uganda Peoples' Defence Forces; and

(d) the deployment of troops outside Uganda." ***(emphasis added)***

Article 209 provides for the function of the UPDF. It provides thus:

"209. Functions of the defence forces.

The functions of the Uganda Peoples' Defence Forces are—

(a) to preserve and defend the sovereignty and territorial integrity of Uganda;

(b) to cooperate with the civilian authority in emergency situations and in cases of natural disasters;

(c) to foster harmony and understanding between the defence forces and civilians; and

(d) to engage in productive activities for the development of Uganda."

The parties hereto are in agreement that it is only through enactment of a law that Parliament can exercise the mandate conferred upon it under Art. 129 of the Constitution to establish Courts of law. To determine whether Parliament fulfilled this mandate when it established the GCM as an organ of the UPDF under the UPDF Act, one has to give consideration to a number of things.

The long title to the UPDF Act provides thus:

"*An Act to provide for the regulation of the Uganda Peoples' Defence Forces in accordance with article 210 of the Constitution, to repeal and replace the Armed Forces Pensions Act and the Uganda Peoples' Defence Forces Act, and for other related matters.***"** ***(emphasis added)***

Structure of the courts martial as established.

The structure of the Courts martial is provided for under Part VIII of the UPDF Act, titled '*Military Courts'*. That part is further sub titled '***Summary Trial Authority'*** (s. 189-191) on the one hand, and ***'Unit Disciplinary Committees [UDCs] and Courts Martial'*** (s. 192-202) on the other. Whereas one could draw the inference from the first title to that part that it establishes only 'Courts', the further differentiation between the Summary Trial Authority (STA) on the one hand and Unit Disciplinary Committees (UDCs) and the Courts Martial in the subsequent sub heading on the other hand, indicates that Parliament provided for Unit Summary Trial Authorities (STAs) and Disciplinary Committees (UDCs) as separate organs from the Courts Martial; thus, they are tribunals.

The Act establishes two tribunals under the Summary Trial Authority; nanmely, (i) Trial by Commanding Officer or Officer Commanding and (ii) Trial by Superior Authority. The first tries junior officers or militants for offences provided for under the Act and regulations made thereunder; and the highest sentence it can pass is detention for a period not exceeding six months. Others are forfeiture of seniority, severe reprimand, reprimand, a fine not exceeding basic pay for one month, and minor punishments as may be prescribed. The second tries those who are equal to or lower in rank than the superior authority; and can pass any sentence '*in which any one or more of the punishments listed there are included*'; namely, forfeiture of seniority, severe reprimand, reprimand or fine. Section 193 (now s. 191) of the Act, provides that the offences which may be tried by a summary trial authority shall be as specified in Schedule 8 to the Act.

The schedule lists 31 offences which include; offences relating to guard duties (s.130, now s.129), disobeying lawful orders in circumstances not involving a sentence of death (s.132, now s.131), failure to execute ones duties in circumstances not involving a sentence of death (s.133, now s.132), violence to a superior officer (s.134, now s.133), insubordinate behavior (s.135, now s.134), malingering or maiming (s.137, now s.136), drunkenness (s.138, now s.137), abuse of and violence to inferiors (s.140, now s.139), false accusation (s.141, now s.140), quarrels and disturbances (s.142, now s.141), improper use and driving of vehicles (ss.157 & 158, now ss.156 & 157), disorders (s.143, now s.142), escape from custody (s.167, now s.166), and conspiracy (s.179, now s. 178).

As already noted, albeit that the UDCs are grouped together with Courts martial, separate from the STAs, they are not expressly established by Parliament as Courts. My conclusion is that they are tribunals as well, and I treat them as such. The UDCs have the power to try any non-capital offence under s. 193 (3) (now s.195 (3)) of the UPDF Act; and to impose any sentence authorized by law (see s.193(4), now s.195(4). By virtue of the impugned provisions of the Act, the UDCs can try military personnel and their alleged civilian accomplices with virtually any offence triable by magistrates Courts; and pass any sentence that magistrates can.

The Courts Martial listed are the *Division Court Martial* established under s. 196, (now s.192), the *General Courts Martial* under s.197 (now s.195, the *Court Martial Appeal Court* established under s.199 (now s. 197), and the *Field Court Martial* under s.200 (now s.198). Since the focus is on the GCM, I

consider it prudent to, fully, set out the provisions section 195 of the Act, which establishes the GCM, thus:

"195. General Court Martial.

(1) There shall be a General Court Martial for the Defence Forces, which shall consist of—

(a) a Chairperson who shall not be below the rank of Lieutenant Colonel;

(b) two senior officers;

(c) two junior officers;

(d) a Political Commissar; and

(e) one non-commissioned officer,

all of whom shall be appointed by the High Command for a period of one year.

(2) The General Court Martial shall have unlimited original jurisdiction under this Act and shall hear and determine all appeals referred to it from decisions of Division Courts Martial and Unit Disciplinary Committees.

(3) The General Court Martial shall have revisionary powers in respect of any finding, sentence or order made or imposed by any Summary Trial Authority or Unit Disciplinary Committee, to be exercised in accordance with the provisions of Part XIII of this Act.

(4) The General Court Martial may sit at any place."

Counsel for the Respondent argued that the establishment of a Court Martial as a Court could not be done under Art 210; but only under Article 129, and by an amendment to the Constitution under Art 259 and/or a referendum

under Art 260 because it in effected amounted to an amendment of Art 128 (1) of the Constitution. Article 128(1) provides for the independence of the Judiciary. Regarding the first argument, it is clear that the long title provides that the Act is passed under Art 210. However, I do not consider that failure to indicate Article 129, instead of 210 as was done in the long title of the UPDF Act alone, is enough to take away the Parliament's power given to create a court under Art 129(1) (d). The GCM is part of the courts of judicature referred to under Chapter 8- albeit with a special limited jurisdiction. By analogy, the Industrial Court established under the Labour Disputes (Arbitration and Settlement) Act 8 of 2006 is a special court established under Art 129; albeit that Art. 129 is not referred to in the Act. However, it would do well for Parliament to indicate Art 129 (1) (d) when creating a Court.

The second argument for consideration is whether the creation of a court under Art. 129(1) (d) requires an amendment of the Constitution and/or a referendum. Under Article 259 of the Constitution, an amendment of the Constitution can only be done by an Act of Parliament whose sole purpose is the amendment of the Constitution, and pursuant to the requisite Parliamentary procedure for such amendment. It provides:

"259. Amendment of the Constitution.

(1) Subject to the provisions of this Constitution, Parliament may amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in this Chapter.

(2) This Constitution shall not be amended except <u>by an Act of Parliament</u>—

(a) *the sole purpose of which is to amend this Constitution; and*

(b) *the Act has been passed in accordance with this Chapter.* "

Article 260 provides for circumstances that require a referendum for an amendment to be effected, and the requisite Parliamentary quorum that must be satisfied. It provides as follows:

"260. Amendments requiring a referendum.

(1) A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this article shall not be taken as passed unless—

(a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

(b) it has been referred to a decision of the people and approved by them in a referendum.

(2) The provisions referred to in clause (1) of this article are—

(a) this article;

(b) Chapter One—articles l and 2;

(c) Chapter Four—article 44;

(d) Chapter Five—articles 69, 74 and 75;

(e) Chapter Six—article 79(2);

(f) Chapter Seven—article 105(1);

(g) Chapter Eight—article 128(1); and

(h) Chapter Sixteen." ***(Emphasis added)***

The relevant provision here is Art. 128 (1); which falls under Chapter Eight of the Constitution, which covers the Judiciary. It provides that:

"[*I*]*n the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority*."

I have duly given consideration to these provisions. Article 129 that establishes the Courts of Judicature, Art. 128 that provides for the independence of the Judiciary, then Arts. 259 and 260 quoted herein above in *extenso*, do not stipulate that the creation of a Court per se requires an amendment of the Constitution. Article 129 merely lists the Courts of record and provides that the creation of other subordinate Courts shall be as established by laws made by Parliament. The UPDF Act is one of those laws; and s. 195(1) thereof establishes the GCM. It is also evident from Article 257, which is the interpretation provision of the Constitution, that the Constitution contemplates the existence of the Courts martial. There, it is provided that:

"(2) In this Constitution—

(a) unless the context otherwise requires, a reference to an office in the public service includes—

... ...

(i) a reference to the office of Chief Justice, Deputy Chief Justice, Principal Judge, a justice of the Supreme Court or a justice of Appeal, or a judge of the High Court and the office of a member of any other court of law established by or under the authority of this Constitution, <u>other than a court-martial,</u> being an office the

emoluments of which are paid directly from the Consolidated Fund or directly out of monies provided by Parliament; and

(ii) *a reference to the office of a member of the Uganda Police Force, the Uganda Prisons Service, the education service and the health service;*" ***(Emphasis added)***

Article 120 (3) of the Constitution also specifically provides that the function of the DPP is to *"institute criminal proceedings against any person or authority in any Court with competent jurisdiction, other than a Court martial."*

It was thus contemplated that owing to the unique nature of the military, issues of military discipline should be handled by special Courts (courts martial) and military tribunals (UDCs and STAs). Counsel for the Appellant made extensive submission on this; arguing that due to the need to swiftly and firmly deal with disciplinary issues in a way that enhances the functions of the UPDF as is provided for under Article 209 of the Constitution, the military courts have been created to exercise the judicial powers the UPDF Act has conferred on them.

I have also considered the recent Constitutional Court decision in ***Rtd. Cpt. Amon Byarugaba & 2 Ors. v A.G*** *(supra).* I noted earlier that the status of a Court is distinct from the issue of its independence, impartiality or jurisdiction. In her lead judgment in ***Rtd. Cpt. Amon Byarugaba & 2 Ors. v A.G*** (supra), Musoke JCC, as she was, with whom the majority of the panel concurred, stated thus:

"*In the present case, the 1995 Constitution places limits on Parliament's Legislative power with regards to establishment of courts of judicature to try civilians to the circumstances stipulated under Article 129, namely*

power to establish a subordinate court of judicature. The other courts of judicature were established by the framers and listed under Article 129(1), and these are the Supreme Court, the Court of Appeal and the High Court. In my view, Article 129 (1) sets out an exclusive list of courts which may exercise judicial power with regards to civilians. Therefore, for that purpose, Parliament has no power to establish a court under another provision of the 1995 Constitution. Certainly, it could not proceed to do so under Article 210, which concerns the UPDF, for the framers of the 1995 Constitution never intended for the UPDF to be vested with judicial functions in respect of civilians.

Therefore, the question whether military courts have jurisdiction to try civilians, must be answered in the negative."

The learned Justices of the Constitutional Court merged the issue of establishment by law, with the jurisdiction to try civilians and the exercise of judicial power; and thereby came to the conclusion that the GCM was a tribunal, and not a Court. I consider it prudent to determine the issue on jurisdiction raised under Grounds 3 and 4 and the cross appeal, separately.

Parity with other courts

The issue whether the GCM is a court, was conclusively settled in ***A.G v Tumushabe - Constitutional Court Petition No.18 of 2005***, and ***A.G. vs Uganda Law Society - S.C. Const. Appeal No. 1 of 2006;*** where this Court decisively held that the General Court Martial is a court, albeit that it is subordinate to the High Court. In ***A.G. vs Uganda Law Society*** *(supra)*, Mulenga JSC who delivered the lead judgment faulted the Constitutional Court, and noted thus:

"As correctly submitted by learned counsel for the respondent, in ***Joseph Tumushabe***'s case *(supra), this Court upheld the majority decision of the Constitutional Court in that case that the General Court Martial is a subordinate court. However, in the instant case the Constitutional Court had earlier held by majority of 3 to 2 that its decision in* ***Joseph Tumushabe***'s case *(supra) was wrong and refused to follow it. Clearly that holding cannot be sustained since the final decision of this Court in* ***Joseph Tumushabe***'s case *(supra) must prevail. That alone should be sufficient to dispose of the cross-appeal as finally presented by the learned counsel for the respondent." (****Emphasis added****)*

It is quite clear that Mulenga JSC faulted the Constitutional Court for its decision, made in utter disregard for the rule of precedence, since this Court had already authoritatively pronounced itself on the specific point of law under consideration by the Constitutional Court. In ***A.G vs Tumushabe Supreme Court Const. Appeal No. 3 of 2005*** and ***A.G vs ULS Supreme Court Const. Appeal No. 1 of 2006***, this Court reiterated its holding that the GCM is a subordinate court to the High Court. Under the cardinal rule of precedent and *stare decisis*, a Court of law is under duty to uphold its previous decision on a particular matter; save in exceptional cases, where the previous decision is distinguishable, or has been overruled by a higher Court on appeal, or was arrived at *per incuriam* (i.e. without taking into account a law in force, or a binding precedent).

The Supreme Court being the highest Court of the land may, and should indeed, depart from its previous decision when it finds it is the proper thing to do in the interest of justice. I wish to be emphatic in holding the view that

these two decisions of ***A.G v ULS*** *(supra)* and ***A.G v Tumushabe*** *(supra)* are still good law on the status of the GCM as a court. As I have already noted with regard to creation of Courts, it is clear from a proper reading and better appreciation of Article 129 of the Constitution that in addition to the Courts created by the Constitution, Parliament has the power to create only subordinate Courts. It would do well if Parliament clearly stipulates in the law enacted, the status of a Court created; namely that it is a subordinate Court, as the Magistrates Courts Act does. This would avoid such questions as those that arose in the ***A.G v ULS*** and ***A.G v Tumushabe*** cases *(supra)*.

I note that in ***A.G vs Tumushabe - S.C Const. Appeal No. 3 of 2005***, this Court came to the conclusion that since the GCM exercised judicial power, it must be a court. To arrive at this position, this Court did not base its decision on the provisions of Art. 129 or Art. 210, which empower Parliament to establish military courts. In holding that the General Court Martial is a Court, Mulenga JSC, with whom the others agreed, stated thus:

> *"Judicial power under Art 126 is derived from the people and shall be exercised by courts established under the Constitution in conformity with the law, values, norms and aspirations of the people. This principle embraces all judicial power exercised by civilian courts and military courts.*
> *... ... ...*
> *While the Parliament established the courts martial as organs of the UPDF, the authority to vest them with judicial power must be construed as derived from this Constitutional principle, for only 'courts established under the Constitution have that mandate."* (***My emphasis***)

The Court further held that:

> *"Therefore although the Courts Martial are a specialized 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. They are not parallel but complementary to the civilian courts, hence the convergence at the Court of Appeal." (**Emphasis added**)*

The use of the phrase "*deemed to be established"* is noteworthy. The inference one can draw from it is that this Court (per Mulenga JSC) treated the matter as if there was no clear grounding in the Constitution for the establishment of such a court; and yet, as I have already specifically pointed out, the provisions of the Constitution, under which the GCM is established, is unmistakably clear.

In the ***A.G vs Tumushabe*** case (supra), this Court also seized the fact of convergence of appeals from the Court Martial Appeal Court and the High Court, at the Court of Appeal, to buttress its finding regarding the complementary nature of the Courts Martial to that of the civil Courts. I believe the fact of convergence of the appeals in the Court of Appeal was a wrong premise to base the complementarity of the Courts Martial to the *civil* Courts. It is equally noteworthy that the case of ***A.G v Tumushabe*** (supra) was decided before the UPDF Act 2005 came into force. As was recently pointed out in the Court of Appeal decision in ***PTE Muhumuza Zepha v Uganda Criminal Appeal No. 31 of 2016,*** since the right to appeal is a creature of statute, the right of appeal from the Court Martial Appeal Court to the civilian Court of Appeal

is no longer available following the repeal of the National Resistance Army (Court Martial Appeal Court) Regulations and the Judicature Statute; which had respectively granted this right of appeal under r. 17 (2), and section 14, thereof. Thus, I am unable to agree that the convergence of the military Court with the civil Court, at the Court of Appeal, is a material legitimate basis for justifying the establishment of the GCM as a complementary court, or even as a court for that matter. I reiterate my view that the procedure and appellate jurisdiction of a Court differs from the issue of its establishment as a Court of law.

I would therefore hold that the General Court Martial is not merely a complementary court to 'civil' Courts. It is established as a court; which is however seized with a specialized jurisdiction. I will advert to this in this judgment. Suffice to note here that the complementary nature of the GCM and military courts in general stems from the unique functions of the UPDF as reflected in Art 209 of the Constitution; and the unique needs of the military. The legality of the establishment of the GCM is based on the authority conferred on Parliament under Art. 129 of the Constitution to create a subordinate Court of law, and the provision of Art. 210 thereof to create the organs of the UPDF; both of which mandates, Parliament has duly executed.

Exercise of judicial power & tribunals

Before I take leave of this issue, I would like to address myself to the aspect of the exercise of judicial power by courts and military tribunals, upon which the learned Justices of Appeal based their decision in ***Rtd Capt. Amon Byarugaba*** (supra). As a general rule, in a democratic society or dispensation, every aspect of judicial power must be exercised by a competent authority

established by law. In this regard, ordinarily, a unique characteristic or attribute of Courts, as contradistinguished from tribunals, is the former's mandate to exercise judicial powers, as contrasted with the quasi-judicial powers exercised by the latter.

Judicial power, exercised by the judicial arm of government as an institution, as is provided for in the Constitution, refers to the authority vested in the Courts of Judicature whose judicial officers interpret and apply the law, resolve disputes, and administer justice generally. Article 257 of the Constitution - the interpretation provisions - defines judicial power as follows:

"***257. Interpretation.***

(1) In this Constitution, unless the context otherwise requires—

(a) "Act of Parliament" means a law made by Parliament;

... ...

... ...

(p) "judicial power" means the power to dispense justice among persons and between persons and the State under the laws of Uganda;"

It involves hearing cases, interpreting laws, issuing judgments, and, in some cases, determining the constitutionality of laws or government actions. In this sense, judicial power is characterized by jurisdiction over all aspects of human life. The judiciary's primary function as one of the three arms or branches of government in a typical democratic system, alongside the executive and legislative arms or branches, is to ensure that laws are applied fairly and consistently, uphold individual rights, and settle legal disputes according to established legal principles and procedures. Due to the

importance of this power, more safeguards are usually in place to ensure that the Judiciary exercises it with impartiality and fairness during proceedings; which, usually, are more that those possessed by a tribunal. It extends, inter alia, to elements such as the structure, procedures and composition of the Court. These hallmarks usually exist to ensure that the Court and the judicial arm of government as a whole adjudicates disputes with fairness; which is the subject of Ground 2 of the appeal.

In a narrower sense, judicial power generally uniquely involves an exercise of power to interfere with the personal liberty of persons who appear before it; and this usually falls exclusively within the realm of ordinary Courts of law, although there is no express bar to criminal exercise of jurisdiction by some tribunals. As a characteristic, the moment an entity can hear criminal cases and give custodial sentences or detain its suspects during hearing, the entity exercises judicial power regardless of its title as a court or tribunal. In other words, the exercise of judicial power is not in all cases what differentiates a court from a tribunal. The jurisdiction of Courts and tribunals to exercise judicial power in a matter usually depends on the law. In our jurisdiction, it would appear that this is the position provided for in Article 28 (1) of the Constitution; which states as follows:

"*(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law." (**emphasis added**)*

This is also reflected in the *International Covenant on Civil and Political Rights (ICCPR),* wherein Article 14, paragraph 1, states that:

"All persons shall be equal before the courts and tribunals ... [and] [i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". (emphasis added)

When it comes specifically to the military, judicial power may be exercised by civilian manned specialized military Courts, or separate military Courts and/or military tribunals; depending on the jurisdiction or country in question. For instance, the USA has both military Courts and military tribunals, but they serve different purposes and operate under different circumstances and under different legal frameworks. Military Courts, known as courts-martial, are established within the military justice system to handle disciplinary matters and criminal cases involving members of the armed forces under the Uniform Code of Military Justice (UCMJ). There are three levels of courts-martial; namely, summary, special, and general. The Courts-martial are the military's Courts of original jurisdiction, with appellate review taking place in Military Service Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces. Decisions of the United States Court of Appeals for the Armed Forces are then reviewable by the U.S. Supreme Court.

Similar to the United States, military Courts in Canada handle matters related to the military, including cases involving military personnel accused of

offenses as provided under the National Defence Act. They follow procedures specific to the military justice system and are distinct from the civilian Court system. The Court Martial Appeal Court of Canada (CMAC) is a specialized appellate Court; and the highest military appellate Court in the Canadian military justice system. However, the judges who sit on the CMAC are civilian judges appointed from the superior Courts of various Canadian provinces. Despite the civilian nature of its judges, the CMAC's jurisdiction is specific to military matters, and it operates within the framework of military law.

A hybrid military Court system, involving trial of both military personnel and civilians, is that of the UK. Military law in the UK is primarily governed by the Armed Forces Act, which sets out offenses, procedures for trials, and sentencing guidelines specific to military personnel. The UK Military Court Service provides a criminal Court for the Royal Navy, Army, and Royal Air Force, in the Court Martial, and as well in the Summary Appeal and Service Civilian Court. Decisions of the Court Martial can be appealed to the Court Martial Appeal Court, which consists of civilian judges. Trials involve a Judge Advocate who is legally qualified and oversees proceedings, along with a board of military personnel (for Court Martial cases) or a single Judge Advocate (for Summary Hearings).

Israel, on the other hand, operates a specialized military Court system. The military Courts have jurisdiction over offenses committed by members of the military; but they operate within the framework of the civilian legal system, and are subject to oversight by the Israeli Supreme Court, which helps ensure compliance with constitutional and human rights standards. Egypt is an example of a country where a separate military judiciary as opposed to

civilian Courts have been historically used to try military officers and civilians. The Egyptian military judiciary is now a division of the armed forces; but has in the past faced much criticism internationally for trying civilians and lacking basic tenets of a fair hearing. As per Article 3 of the Military Judiciary Law, as amended in 2010, military judges now have legal immunity against dismissal, as is the case with civilian judges, as is stipulated in the last paragraph of the 2014 Constitution; which states that:

"*Members of the military judiciary shall be independent and may not be dismissed. They shall have all the guarantees, rights and duties stipulated for members of the judiciary.*"

Aside from Military Courts, many other countries also utilize military tribunals as part of their military justice systems, each with its own set of laws and procedures governing the conduct of these tribunals. In the US, for instance, Military tribunals are designed to judicially try members of enemy forces during wartime, operating outside the scope of conventional criminal and civil proceedings. Military tribunals are distinct from Courts-martial; and are an inquisitorial system based on charges brought by military authorities, prosecuted by a military authority, judged by military officers, who can pass sentence against a member of an enemy army. The judges are military officers and fulfill the role of jurors. They are convened in extraordinary circumstances, such as during times of war or in cases involving enemy combatants. Military tribunals thus often involve non-civilian defendants and are designed to address legal matters that fall outside the jurisdiction of civilian Courts.

Accordingly, it follows that judicial power may be exercised by ordinary Courts, or specialized military courts or tribunals; depending on the law of the land in question. Further, the military justice set up of any State depends a lot on the legal, institutional, societal considerations of the particular State. Different countries adopt different approaches based on their legal traditions, institutional structures, and societal values. Of course, whether the set up meets the standards of justice in a democratic society would be another matter. Of indispensable imperative in the exercise of judicial power by any entity in a democratic society, be it Courts or tribunals, the crucial factors will be its establishment under the law, and the safeguards that ensure independence, fairness, and impartiality, in the exercise of the judicial power.

I am concerned in the instant appeal with the Ugandan laws, institutional structures, and societal values, to which I will restrict myself in the determination of the issues before this Court; albeit that I may make reference to international covenants and other jurisdictions for purposes of benefitting from best practices therefrom. Under the UPDF Act the Courts martial, and even the Unit Disciplinary Committees (UDCs) and Summary Trial Authorities (STAs) that are tribunals, have the jurisdiction to try offences; and sentences that they can impose range from caution to custodial sentences. The UDC has powers under (s. 193 (3), now s.195 (3) to try any person for a non-capital offence, and can under s. 193 (4), now s.195 (4) impose any sentence authorised by law. The STA consists of two tribunals; with one having a commanding officer or officer commanding conducting summary trial, while the other has a Superior Authority conducting trial. The maximum sentence a Commanding officer or officer commanding can impose is detention for a period of up to six months. Section 191(3) **(now s,19...)** of

the Act, and Schedule 8 thereto list the offences triable by a STA. It is thus clear that the powers of the courts martial, the UDCs and STAs can properly be called judicial power; even though not all of them are established as courts. The issue whether the UDCs and STAs as tribunals are exercising the judicial power fairly and impartially will be determined by the resolution of the issue regarding independence and impartiality of the GCM in the light of the requirements specified under the provisions of Arts. 289 (1) & 44 of the Ugandan Constitution. This involves the consideration as to whether they are granted the power by the Constitution to do so, even if they are not established as courts of law. Tribunals that exercise judicial power, as opposed to quasi-judicial power, would be an exception.

I have already pointed out that Art 28 (1) of the 1995 Constitution appears to envisage the exercise of judicial power by both tribunals and Courts. However, the same Constitution limits the categories of entities that can restrict the liberty of any person in their exercise of judicial power, in the narrower sense explained above. This is discernible from Article 23 of the Constitution, which only expressly allows Courts to interfere with the right to personal liberty, through Court orders; where it provides thus:

*"**23. Protection of personal liberty.***

(1) No person shall be deprived of personal liberty except in any of the following cases—

(a) in execution of the sentence or order of a court, whether established for Uganda or another country or of an international court or tribunal in respect of a criminal

offence of which that person has been convicted, or of an order of a court punishing the person for contempt of court;

(b) in execution of the order of a court made to secure the fulfilment of any obligation imposed on that person by law;

(c) for the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda;

... ...

... ...

(6) Where a person is arrested in respect of a criminal offence—

(a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable;

(b) 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 sixty days;

(c) in the case of an offence triable only by the High Court, the person shall be released on bail on such conditions as the court considers reasonable, if the person has been remanded in custody for one hundred twenty days before the case is committed to the High Court."

Article 126 (1), of the Constitution also provides that:

"*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 the law, values, norms and aspirations of the people.*"

Under Arts. 23, 126 (1), and 129 (1), of the Constitution, it is only the Courts that are granted the mandate to interfere with personal liberty in the sense of custodial sentences or any legal detention of a suspect for an extended period of time during a hearing. Therefore, in the Ugandan framework of military courts, it is only the courts martial that are established as courts of law under the Constitution that can properly or legally be said to exercise judicial power when hearing offences criminal or disciplinary, with the power to impose custodial sentences and detain suspects. The UDC is not established as a court under Arts 210 or 129 of the Constitution. The UDC and STAs are in fact tribunals; hence, whatever judicial powers they exercise are unconstitutional, as they do so without lawful authority.

Ground 2.

The main issue in Ground 2 of the appeal is whether the GCM in its current setting, is indeed independent and impartial as required of a court. Its resolution delves into the requirement of independence and observance of the right to a fair hearing and impartiality by any authority exercising judicial power in Uganda. It requires this Court to examine the legal structure and procedures of the military Courts as established by Parliament under the UPDF Act 2005 and regulations made thereunder to determine whether it offers a fair hearing to those who appear before it; or whether its hearings are in contravention of Art 28(1) and 44 (c) of the Constitution.

I first give a brief background to and break down the structure of military courts in Uganda in more detail. This is also relevant in answering all the grounds of appeal. As I have already explained, under the disciplinary structure of the **UPDF Act** there are organs established as courts of law; and tribunals that are not referred to as court, but exercise judicial power. These are respectively the Court Martial Appeal Courts (CAMA), the General Court Martial (GCM), (Division Court Martial (DCM) on the one hand; then the Unit Disciplinary Committees (UDCs) and the Summary Trial Authorities (STAs), on the other hand.

I already laid down the structure of the courts martial, UDCs and STAs. There is not much change in the structure of the military Courts and tribunals from the situation obtaining prior to the 1995 Constitution. ***The Report of the Uganda Constitutional Commission***, published by the Government of Uganda, Uganda Printing and Publishing Corporation, Entebbe (herein referred to as *'**The Odoki Commission Report**'*) at page 375, explains the system of military Courts. I note that the UDCs also appear under Courts in this Report:

> *"14:83 There are five levels of court specified. They are unit disciplinary committee, division court martial, general court martial, field court martial and court martial appeal court. The unit disciplinary committee and division court martial deal with matters arising within particular units at battalion and division levels respectively, while a field court martial handles matters arising during a military operation where it is impractical to involve the unit committee or division court martial... Each of these courts comprises a chairman of a specified rank and other*

members from a mixture of ranks (some senior officers, junior officers and non-commissioned officers). The general court martial has both original and appellate jurisdiction over all offences and persons subject to the military law. It can sit anywhere in Uganda. The members are appointed by the High Command of the NRA to hold office for a period of one year. At any proceeding of this military court, there must be a secretary to record the proceedings; army legal officer to advise on the law and procedure; and a prosecutor, who may be an intelligence or security officer. The court martial appeal court hears and determines all appeals to it under the statute from decisions of the general court martial."

Noting some changes as regards the composition of the military Court, and specifically the role of the Judge Advocate, The ***Odoki Commission Report*** further explained thus:

"*14:84 In any military court, the verdict is by majority opinion. A significant difference between the existing military courts and those replaced by statute No. 3 of 1992 (the Armed Forces Act of 1964) is that a military court was previously presided over by a judge advocate who was appointed by the Chief Justice and consisted of not less than three officers of the armed forces. The current structure has decentralised military courts so that they are accessible to the soldiers and are presided over by the army officers.*" ***(Emphasis added)***

This new dispensation still obtains in the 1995 Constitution; as not all Courts have the Judge Advocate as the presiding officer in them anymore. In terms

of current legislation, the UPDF Act lays out the structure and procedure of the Courts martial and the regulations made thereunder. The Division Court Martial (DCM) is established under s.194 (now s.192) of the UPDF Act, with unlimited original jurisdiction. Its membership comprises a chairperson of the rank of Major or above; two senior officers; two junior officers; a political commissar and one non-commissioned officer. All these are appointed by the High command for a period of one year. The General Court Martial (GCM) established under s.197 (now s.195) of the Act consists of a Chairperson of the rank of Lieutenant Colonel and above, two senior officers, two junior officers, two junior officers, a political commissar, and one non-commissioned officer; also appointed by the High Command for a period of one year. The GCM's jurisdiction is similar to that of the DCM, except that the GCM also hears appeals from both the DCM and has revisionary powers over findings, orders or sentences imposed or made by any STAs and UDCs. When hearing an appeal in a capital offence, the quorum of the DCM and GCM is all members, while in all other cases, it is five members. The Court Martial Appeal Court established under s.199 (now s.197) of the Act handles only appeals from the GCM. Its membership comprises a chairperson who is an advocate qualified to be appointed a high Court Judge of Uganda, two senior officers of the UPDF, and two advocates who are members of the UPDF. The Registrar of that Court is a legally qualified person also appointed by the High Command. When hearing an appeal in a capital offence, the quorum of the CMAC and GCM is five members, while in all other cases, it is three members.

The convening authority for these Courts is the High Command or any other authority as may be authorized by the High Command under s. 196 (now s.

194); and also Regulation 22 of the UPDF (Rules of Procedure) Regulations 307-1 on appointment of members and chairman by the High Command). The High Command is established under s.15 (now s.14) of the Act; and comprises the President of Uganda who is the Chairperson, the Minister of Defence, members of the High Command as at 26th January 1986 whose names are set out in the 2nd Schedule to the Act; the Chief of Defence Forces, the Deputy Chief of Defence Forces, all service commanders, the Chief of Staff, all Service Chiefs of Staff; all Chiefs of the Services of the Defence Forces, all commanders of any formations higher than a Division, which the president may, in consultation with the High Command establish, all Division Commanders, officers commanding equivalent units of the Defence Forces, and the Commandant of the General Headquarters, and such other commanders and experts, as are from time to time co-opted by the President to advise the High Command. Their mandate includes advising the President in emergencies, at war or perform any other duties conferred by the High Command or as the President may direct.

The Courts martial (and UDCs) reach their decisions by majority opinion that is binding on all the members of the Court (see: s.201, now s.199 of the Act). Section 209 (now s.207) provides that the Courts procedure should *'as far as practicable'* be the same as those in civil Courts; except where it is expressly provided to the contrary under the UPDF Act, or regulations made thereunder. What is manifest from the foregoing, with regard to Courts martial, is that:

(i) With the exception of the CMAC, there is no legal requirement for a person qualified in law, to form part of the Coram.

(ii) The Judge Advocate's role is wholly advisory, as he or she does not form part of the Court that deliberates on the verdict and sentence.

(iii) Decisions are by majority opinion of members of the Court.

(iv) The Courts are convened, and the members are appointed, by the High Command or some other authority delegated by the High Command.

(v) The Courts comprise military men with no differentiation as to whether they are active, about to retire, or retired.

(vi) Junior members and a political commissar form part of the quorum.

(vii) No right of appeal is created to the ordinary Courts under the Act.

(viii) The UDCs and STAs exercise judicial power under the law; as they have jurisdiction to pass custodial sentences, and thus infringing on the liberty guaranteed under Article 23 of the Constitution.

Every Court established under the Constitution must meet the criteria for a fair hearing. Similarly, tribunals entrusted with judicial power, have to apply the principles that ensure a fair hearing; and to this extent, the classification as Courts or tribunals serves no purpose.

Right to a fair hearing

The right to a fair hearing is one of the fundamental human rights that are considered an imperative in any trial. Art 28(1) of the Constitution of the Republic of Uganda 1995 as amended provides as follows:

> ***"Article 28 Right to a fair hearing.***
>
> *(1) In the determination of civil rights and obligations or <u>any criminal charge</u>, a person shall be entitled to <u>a fair</u>, speedy and public hearing before an <u>independent and impartial court or tribunal</u> established by law."*

Thereafter, it also provides a list specifying certain guarantees of the right to a fair hearing that all tribunals and Courts should provide or adhere to. Art 44 (c) of the Constitution of Uganda provides that the right to a fair hearing provided under Article 28 thereof is non-derogable. It states that:

"Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-

(c) the right to a fair hearing;"

It is thus clear that with regard to courts or tribunals, the cardinal right to a fair hearing is one that is fundamental in ensuring that justice is done.

The right to a fair trial is not peculiar to the Constitution of Uganda. There is a corpus of international conventions that similarly provide for the protection of the rights as is contained in our Constitution. Article 10 of the *UDHR* provides:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Article 14, paragraph 1, of the *ICCPR* provides that:

"All persons shall be equal before the courts and tribunals [and] [i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Article 14 also lists the minimum guarantees for the right to a fair hearing. A fair hearing connotes several elements including, among others, an independent Court or tribunal, right of appeal, right to legal representation, fair and impartial decision makers, fair legal procedures of trial that include an opportunity to prepare one's defence. Although the ICCPR does not explicitly refer to military Courts, it is accepted that Article 14 nonetheless constitutes the backbone of the Human Rights Committee's doctrine on military Courts. In the ***Human Rights Committee (HRC), General Comment No. 32 on the Right to a fair trial***, the HRC points out that the guarantees of the right to a fair trial provided for in Art 14 of the ICCPR applies to: *"all courts and tribunals including military and other specialized courts.*"

The ***Draft principles governing the administration of justice through military tribunals: Report presented by the Special Rapporteur of the Sub-Commission on the promotion and protection of Human Rights, Emmanuel Decaux (Report E/CN.4/2006/58) of the United Nations*** (also known as the Decaux Principles), though not binding, is instructive with regard to the general international legal trend. Principle No. 2 thereof provides for respect for the norms of international law in the following terms:

> *"Military tribunals must apply internationally recognized standards and procedures guaranteeing a fair trial in all circumstances, including the rules of international humanitarian law.*"

The requirement for a fair hearing applies to all stages of the due process, from investigation to trial. Principle No. 13 provides:

"The organization and functioning of military courts must fully ensure the right of every person to a competent, independent and impartial tribunal, during all stages of the procedure, both the investigation and the trial."

Article 7 of the African Charter states:

1. Every individual shall have the right to have his cause heard. This comprises ... (d) The right to be tried within a reasonable time by an impartial court or tribunal."

In its ***Principles and guidelines on the right to a fair trial and legal assistance in Africa***, the African Commission adopted the ***Dakar Declaration and Recommendations on the Right to a fair trial in Africa*** in which it emphasized that while exercising their functions military Courts should respect fair trial standards. This provision is in line with that of the *Human Rights Committee*. As already noted, Art. 7 of the African Charter provides for a right to a tribunal that is competent and impartial. Art. 26 thereof also provides that all states parties should ensure that their courts and tribunals are independent.

Judicial power, even though it is limited in jurisdiction, has been devolved to the military Courts to be exercised in line with the Constitution, while respecting the fundamental rights and freedoms of individuals appearing before them. It goes without saying therefore that all persons, including military personnel or persons subject to military law are entitled to the non-derogable right of a fair hearing.

The Constitution (see: Article 21) and the three Conventions referred to, all provide for the principle of equality of persons before the law. The right to a

fair hearing thus applies to all and sundry; including civilians or persons subject to military law. A person does not therefore, by joining the army, forfeit this right. As noted by Prof. Marita Carnelly in ***"The South African Military Court system - Independent, Impartial and Constitutional? Scientia Militaria, South African Journal of Military Studies, Vol 33, No. 2, 2005***, that:

> *"[A]lthough a soldier becomes subject to the military system, he does not cease to be a citizen and his rights, as a citizen remain relevant, albeit in an amended form. But whatever legislation is applicable, it must still be interpreted in light of the supreme law."*

According to ***Halsbury's Laws of England (Vol 3) 2019***, at para 203:

> *"It is one of the cardinal features of the law of England that a person does not, by enlisting in or entering the armed forces, thereby cease to be a citizen, so as to deprive him of his rights or to exempt him from his liabilities under the ordinary law of the land. He does, however, in his capacity as a member of those forces, incur additional responsibilities, for he becomes subject to service law."*

Thus, military personnel do not submit to the military tribunals at their own risk. It is the duty of the State to ensure at all times that all Courts and tribunals that are established meet the criteria of a fair hearing (See: Art 20 of the Constitution). These rights apply to a member of the forces just as it applies to a civilian; except that the characteristics of military life must be considered (see: ***R v Spear [2002] UKHL 31*** at ***4-5; R (on the application of Smith) v Secretary of State for Defence [2010] UKSC 29, [2011] AC 1, [2010] 3 All ER 1067;*** and ***Engel v Netherlands (1976) 1 EHRR 647*** at ***[54], EctHR.***

In ***R v Spear & Anor; R v Boyd; R v Williams & other appeals and applications [UKHL] 31,*** the House of Lords considered the import of Art 6-1 of the Convention, which is similar to Art. 28(1) of the Constitution, and came to a similar conclusion. Indeed, it noted that while disciplinary rules and procedures may vary from State to State, there are three principles that command acceptance in any liberal democratic dispensation that adheres to the rule of law. I find the principles expounded by Lord Bingham of Cornhill, persuasive, and quite applicable in the instant case; hence, I restate it here in *extenso*:

> *"First, a man does not by becoming a soldier cease to be a citizen. On becoming a soldier he subjects himself to duties and exposes himself to the risk of penalties to which a civilian is not subject or exposed. But he remains subject to almost every law, including the criminal law, which binds other citizens and continues to enjoy almost all the same rights, including the right (if a charge of serious misconduct is made against him) to a fair trial before an independent and impartial tribunal ... ...*
>
> *Thirdly, and whatever the practice in former times, a modern code of military discipline cannot depend on arbitrary decision-making or the infliction of savage punishments, nor can it depend on inherited habits of deference or gradations of class distinction. Such a code must of course reflect the hierarchical structure of any army and respect the power of command. But an effective code of military discipline will buttress not only the respect owed to their leaders by those who are led but also, and perhaps even more importantly, the respect owed by leaders to those whom they lead and which all members of a fighting force owe to each other."* ***(Emphasis added)***

The requirement for a fair hearing transcends boundaries and applies to all Courts wherever they belong; including the Field Court Martial. Lord Bingham pronounced himself on this point in ***R v Spear*** (supra) as follows:

> *"[15] ... <u>But a court-martial either is or is not an independent and impartial tribunal. If it is, it can properly try civil as well as purely military offences. If it is not, it cannot, compatibly with art 6(1), try military offences, which may carry a severe sentence of imprisonment or detention.</u> Nor, leaving aside issues concerning the territorial reach of the convention, and leaving aside also the special conditions in which a field general court-martial may be held, can it be compatible with the standard required by art 6(1) to subject service personnel accused of civil offences committed abroad to trial by court-martial if such is not an independent and impartial tribunal."* ***(Emphasis added)***

I therefore consider the impugned provisions in light of the principle of equality. This also fits into my earlier finding that all tribunals and Courts that exercise judicial power are duty bound to adhere to the right to a fair hearing.

Can a military court be independent, fair & impartial?

A military Court can be independent, fair, and impartial. Thus, trial of a person by Courts Martial does not *ipso facto* occasion a violation of the person's right to a fair hearing provided for under Art 28 (1) of the Constitution. That provision does not specify the composition of or procedure adopted by such a Court or tribunal, other than listing the procedural safeguards required for a fair hearing. However, as noted earlier,

Article 128 (1) of the Constitution also imposes a requirement as to objective independence of the Courts or tribunals exercising judicial power as a safeguard to a fair hearing. In ***Morris v United Kingdom 34 EHRR 1253,*** at ***1274***, para 59, the European Court explicitly held as follows:

> *"... [the court] recalls its own case law which illustrates that a military court can, in principle, constitute an 'independent and impartial tribunal' for the purposes of article 6(1) of the Convention. For example, in the above-mentioned* ***Engel v The Netherlands (No 1)*** *case, the court found that the Dutch Supreme Military Court, composed of two civilian justices of the Supreme Court and four military officers, was such a tribunal. However, the Convention will only tolerate such courts as long as sufficient safeguards are in place to guarantee their independence and impartiality." (****Emphasis added)***

Commenting on this holding in ***Morris v UK*** (supra), Lord Roger stated in ***R v Spear*** (supra), thus:

> *"While it is perhaps possible to detect some lack of enthusiasm in the use of the term "tolerate", the passage shows clearly that, in principle, a military court can constitute an independent and impartial tribunal in terms of art 6(1). What is required is that there should be sufficient safeguards of the independence and impartiality of its members."*

This position is similar to that taken by Canada, the European Court of Human Rights, and the United Kingdom. Lord Bingham exhaustively explained this in ***R v Spear*** (supra) as follows:

"[6] The practice of other states is not dissimilar to our own. So much appears from such decisions as ***MacKay v The Queen (1980) 114 DLR (3rd) 393 at 413-414, 416-418, 419-421, 423-426; In re Tracey, Ex p Ryon (1989) 166 CLR 518 at 543-544; R v Généreux (1992) 88 DLR (4th) 110 at 135-136, 156-157.*** *That there is a rational basis for the practice is made plain in those decisions, and in the statement of Air Chief Marshal Sir Anthony Bagnall, the Vice Chief of the Defence Staff which is before the House. In* ***Findlay v United Kingdom (1997) 24 EHRR 221*** *the defendant was charged with a number of offences of which the more serious were offences against the ordinary criminal law.*

The European Court of Human Rights found serious breaches of art 6 (1) of the convention in the structure and procedure under which courts-martial were then conducted, and a number of changes were made in the Armed Forces Act 1996. The effect of these changes was well summarised by Laws LJ in the first of the judgments under appeal: ***R v Spear; R v Boyd [2001] EWCA Crim 3, [2001] QB 804, [2001] 2 WLR 1692 at pp 812-813*** *of the former published report, para 18.*

There is, however, nothing in the judgment of the European Court in ***Findlay,*** *or in the earlier case of* ***Engel v The Netherlands (No 1) (1976) 1 EHRR 647*** *or in the more recent case of* ***Morris v United Kingdom (2002) 34 EHRR 1253,*** *to suggest that trial by court-martial ... necessarily involves a violation of rights protected by art 6(1).*

[7] Lord Thomas of Gresford QC directed his initial challenge on behalf of the second group of Appellants to the terms of s 70 of the Army Act 1955, which he criticised as incompatible with art 6(1). The short answer to this point is that given by Mr Havers QC, that this section does not engage art

*6(1) at all. While the section provides that persons subject to military law who commit civil offences shall (save in the case of certain offences) be guilty of offences against the section, it makes no provision governing the constitution of the tribunal by which such persons shall be tried nor the procedure to be followed." (**Emphasis added**)*

Historical context & Art 8A

While I take into consideration the position of the law obtaining in other jurisdictions, the historical context in which the 1995 Constitution was made, which is clearly laid down in the National Objectives and Directive Principles of State Policy now a provision of Art. 8A of the Constitution as amended, is an imperative in the determination of this appeal.

The backdrop to the creation of the UPDF as a democratic people centered force in Uganda is an important narrative. It affords an understanding of the context in which it was established; and the creation of the military Courts. After independence in 1962, the military was instrumental in the determination of political power disputes. Its intervention was decisive in the removal and installation of governments; and it was often cited in massive violation of human rights. For this reason, prior to the making of the 1995 Constitution, views of Ugandans were sought; and taken into consideration. According to the ***Report of the Uganda Constitutional Commission: Analysis and Recommendations, 28th May 1993*** (The Odoki Commission Report), at page 359:

"*The military has played a major role in Uganda since independence and at times that role has not been positive in terms of the progress of democratization and the promotion of the rule of law."*

At page 364, it is noted thus:

"*It is against this sad background discussed in the previous section where the military has over a period of many years not only molested its people but also installed unpopular governments and sustained them in power that the people gave their views and concerns about the principles they believe should govern the military in future."*

At p.36, the Report considers what transpired in Uganda owing to the role of the military in the politics of the country. It is recollected thus:

"*From the mid-1960s, civilian governments depended heavily on army support, and as a result the army became an ever more important political actor. Under Amin's regime, army personnel dominated the political scene, and even took important administrative positions, as district commissioners and even local administration chiefs. Army personnel did not have training or experience for such political and administrative roles and were often intent on self enrichment. As a result, terrible abuses occurred and the democratic rights of the people were often totally ignored. Many people are therefore concerned that the future role of the army should be strictly limited.*

Lack of discipline:

14.28 In general, the people believe that for most of the period since 1971, the army has suffered a severe lack of discipline ... Low morale and clear lack of a clear sense saw many soldiers commit offences of all kinds with impunity. They used their guns to terrorise innocent people and enrich themselves."

The army was implicated in various human rights violations; and so extensive was the trauma that some people felt the army should be abolished altogether. At p. 368 the Report continues:

> ***"Section 3: Analysis of and recommendations on proposals on the army***
> *14.45 The commission accepts that abolition of the army is not possible because Uganda, like any other country, has borders to defend. Government has a duty under the Constitution to defend its citizens and their properties from any aggression, be it internal or external and to guarantee peace and stability within the country. To do so it requires an organ enabling it to use force when necessary and that organ is the army. National defence, peace and stability are, after all pre-requisites to democracy and economic development."*

Military Courts are also bound by the Constitution; and the Constitution represents the will of the people. According to the Odoki Report at p. 365, it is stated:

> **"*Respect for the constitution.***
> *14.38 Elsewhere in this report we have emphasized the fundamental principle derived from the people's views that the people are sovereign. All governmental and political power comes from the people, and the constitution itself is a statement of the people's will. The army provided for by that Constitution must always respect the Constitution and act within the limits set by it. It must always respect the democratic principles and the fundamental rights of the people provided for in the Constitution.*"

The preamble to the 1995 Constitution, as amended, is reflective in this regard, and is cognizant of the political instability Uganda has gone through since she attained independence from colonial Britain. It provides:

"*The Preamble.*

WE THE PEOPLE OF UGANDA:

RECALLING our history which has been characterised by political and constitutional instability;

RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;

COMMITTED to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;

EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;

NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda:

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.

FOR GOD AND MY COUNTRY."

Thus, in interpreting the provisions of the Constitution and the UPDF Act, I urge that care is taken to keep our history in mind to ensure that there is no recurrence of our experience of the past, by putting in place laws and rules that will make the military accountable to the people, and military Courts are effective. This can be assured in part, if there is in place an independent and impartial Court as is required under the Constitution.

First, I would like to clarify on the issue before the Court. The Attorney General insisted that there had been no actual proof that the Court that tried the Respondent was not independent or impartial. The Respondent however, challenged the independence and impartiality not only of the actual individual proceedings in which he took part but the whole system of military Courts; that the structure of the GCM or certain aspects of it cannot enable these Courts to provide a fair hearing. The argument of Counsel for the Appellant cannot stand; and this is not a novel issue. In a Constitutional petition, the structure of a Court can be challenged without such actual proof. A similar issue was raised in ***R v Spear*** (supra) where Lord Roger stated:

> *"[41] Lord Thomas's submission that the Appellants' rights under art 6(1) had been infringed did not depend on any specific circumstances relating to their trials or to the individuals who had made up the courts-martial: rather, his was a general challenge to the system of trial of civil offences allegedly committed in the United Kingdom by courts-martial duly set up in accordance with the legislation. [*He submitted that,] *[i]n such cases courts-martial did not constitute an independent and impartial tribunal."*

An individual who challenges the independence of a tribunal need not prove an actual lack of independence (see: ***R v Genereux)*** (supra). Similarly, this is an objection to the system of trial within the GCM in its current structure. I have already noted that under the Constitution, the right of any person, civilian or soldier, to be accorded a fair hearing before an independent and impartial Court or tribunal, is non–derogable. Military Courts must respect this right. Article 221 of the Constitution enjoins the UPDF to observe the fundamental rights and freedoms in Chapter Four, when it states thus:

'[I]t shall be the duty of the UPDF and any other armed force established in Uganda ... to observe and respect human rights and freedoms in the performance of their functions."

International bodies and soft law also recognize this need for the observance of human rights and freedoms as already explained.

Test for independence an d impartiality

What may be considered to pass the test for independence and impartiality, and thus ensure a fair hearing in military Courts, has been a subject of wide consideration and discourse. Courts within the Commonwealth jurisdictions, and the European Court of Human rights, have been categoric on what qualifies a Court to be considered to be independent, and impartial. In our case, Art 28(1) of the Constitution is the point of reference because it has provisions for legal safeguards to ensure that a fair hearing takes place.

Independence

The provision for the independence of the Court, as I have pointed out, is contained in Art. 128(1) of the Constitution; which is that: "[*I]n the exercise of*

judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority. Clauses 128 (2) to (8) are all geared towards ensuring and maintaining this independence.

To determine whether the Courts Martial or the persons manning the Courts are independent in the exercise of their judicial powers requires an examination of the laws and procedure under which the Courts operate. From this, one can then determine whether a reasonable person, familiar with the Constitution, the laws setting up the military Courts, and their structure, would perceive and be satisfied that these Courts are independent. In ***R v Genereux*** (supra) Michel Généreux was a corporal in the Canadian Forces. He was charged with drug possession for the purpose of trafficking in violation of section 4 of the *Narcotics Control Act* and for desertion in violation of section 88(1) of the *National Defence Act*. In the General Court Martial he was convicted for both offences, which was upheld in the Court Martial Appeal Court. The issue before the Supreme Court was whether the GCM was independent and impartial for the purpose of s. 11(d) of the Canadian Charter of Rights and Freedoms. The Court explained that:

> *"The first step in our inquiry, therefore, must be to consider whether the proceedings of the General Court Martial infringed the appellant's rights under s. 11(d) of the Charter. The status of a General Court Martial, in an objective sense, as revealed by the statutory and regulatory provisions which governed its constitution and proceedings at the time of the appellant's trial, must be examined to determine whether the institution has the essential characteristics of an independent and impartial tribunal. In the course of this examination the appropriate test to be applied under s. 11(d) should be borne*

*in mind: would a reasonable person, familiar with the constitution and structure of the General Court Martial, conclude that the tribunal enjoys the protections necessary for judicial independence?" **(Emphasis added)***

The Court also emphasized that independence of the Court has nothing to do with the good faith of the members of the Court martial; but rather with regard to the available protections accorded judicial officers that promote independence and objective impartiality. The Court further explained thus:

*"I emphasize, however, that the independence of a tribunal is to be determined on the basis of the objective status of that tribunal. This objective status is revealed by an examination of the legislative provisions governing the tribunal's constitution and proceedings, irrespective of the actual good faith of the adjudicator. Practice or tradition, as mentioned by this Court in **Valente** (p. 702), is not sufficient to support a finding of independence where the status of the tribunal itself does not support such a finding."*

Counsel for the Appellant emphasized that fairness in the GCM is assured because the members of the GCM take an oath to uphold the Constitution and administer justice. Indeed, it is the norm that judicial officers take an oath to render justice; and this places the duty on the respective judicial officer to exercise the judicial power with independence of mind, and impartiality. The recognition of the importance of the oath in ensuring that there is independence and impartiality of the members of the Courts Martial, or any other Court, is universal; and cannot be overstated. Lord Roger stated in ***R v Spear*** (supra), noted at para 67-68, as follows:

"The European Court too has recognised that the jurors' oath, to faithfully try the case and to give a true verdict according to the evidence, and their obligation to have regard to the directions given by the presiding judge will generally be sufficient to safeguard their independence and impartiality. This is so even in cases where there is reason to believe that one or more members of the jury may actually be prejudiced against the accused. I refer to the well-known decisions in ***Pullar v United Kingdom (1996) 22 EHRR 391, 405,*** *para 40, and* ***Gregory v United Kingdom (1997) 25 EHRR 577, 593–595****, paras 43–48.*

[68] In the cases under appeal these particular safeguards were present. The oath taken by the members of the court required them to well and truly try the accused "according to the evidence" and to do justice according to the relevant 1955 Act "without partiality, favour or affection".

Indeed oath taking instils in the person taking the oath, and reminds such a person of solemnity of, and the need for, the duty to do justice; which can only be achieved when the person acts independently and impartially. However, this subjective undertaking of exercise of duty is only truly guaranteed when it operates alongside objective safeguards that can satisfy a reasonable person that the appearance of partiality is eradicated; and the judicial officer is acting with an independent mind, and is insulated from extraneous factors such as undue influence.

Impartiality- both subjective and objective

On the issue of impartiality, the South African Court stated in ***The President of the Republic of South Africa & others v South African Rugby Football Union & others- 1999 (4) S.A. 147 (C.C.)*** (the ***SARFU*** case) that an impartial mind is one, which is: *"...*

open to persuasion by the evidence and the submissions of counsel." Impartiality is determined by the absence of bias, objective or perceived. In this regard, objective impartiality is akin to independence. On this, the *Human Rights Committee* stated in ***General Comment No. 32,*** para 21, as follows:

> *"The requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial." (**Emphasis added**)*

Principle 13 of the ***Decaux Principles*** recommends that:

> *"Regarding the concept of an independent and impartial tribunal, a large body of case law has spelled out the subjective as well as the objective content of independence and impartiality. Particular emphasis has been placed on the English adage that "justice should not only be done but should be seen to be done." It is also important to emphasize that the Human Rights Committee has stated that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception."* (***Emphasis added***)

This Court enunciated the test for impartiality in the case of ***In Re: An application for recusal of Hon. Justice Alfonse Chigamoy Owiny – Dollo, C.J. - Miscellaneous Application No. 03 of 2021 (Arising from Presidential Election Petition No. 01 of 2021 – Kyagulanyi Ssentamu Robert vs Yoweri Kaguta Museveni Tibuhaburwa & 2 Ors.),*** where I explained that the test for bias is:

"... *whether a reasonable, objective and informed person, acting on the correct facts, would reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case."*

See also the ***SARFU*** case (supra), and ***Porter v Magill [2001] UKHL*** *67.* It is clear that in impartiality, appearances are of importance in order to satisfy the subjective requirement (see also ***R v Spear*** *(supra),* and ***Findlay v United Kingdom*** *(supra).*

In the instant case before this Court, the Respondent makes no allegation that the members of the tribunal were actually biased. I would thus recast the issue of independence and impartiality of the members of the Court, as follows*:*

"Whether a fair minded and informed observer would conclude that the safeguards for a fair hearing in the court martial were adequate to guarantee the independence and impartiality of members of the Courts martial."

The Canadian case of ***R v Geneureux*** (supra), the United Kingdom case of ***Findlay v U.K.***, and decisions from other Commonwealth countries, as well as European Courts of Human Rights, have pointed out provisions of the law that vitiate the independence and impartiality of the Court. The safeguards that ensure independence and objective impartiality of the Court are, *inter alia*, the manner of appointment of members of the Court, appointment of legally qualified persons thereto, and security of tenure as provided for in the terms of office. Other safeguards include independence from influence within the military hierarchy, and freedom from influence emanating from outside. Lord Roger noted in ***R v Spear & Anor*** (supra) that:

"... in substance, the court-martial must be guarded from the risk of influence by the prosecution and guarded from the risk of influence by the relevant Service authorities, especially superior officers who might wish to secure some particular result, supposedly in the interests of the morale or discipline of the Service or of some particular unit."

R. Naluwairo in his work:***"Improving the administration of justice by military courts in Africa: An appraisal of the jurisprudence of the African Commission on Human and People's rights" (2019)19 African Human Rights Law Journal 43-61*** has, flowing from an examination of the instruments and documents of the African Commission and UN Human Rights Committee, classified the determinants for a fair hearing into four key factors, as follows:

"First ... it is critical to ensure that they are truly independent of the executive branch of government. This requirement is in line with the doctrine of separation of powers, which in context demands a separation of judicial from executive functions and powers in order to have a proper system of checks and balances. Second, the critical aspects to consider in determining whether military courts are truly independent from the executive are the method of appointment/designation of their members; the length of their tenure; the existence of protection against external pressures; and the issue of real or perceived independence. Third, having legally qualified persons as members of military courts is an important measure not only in guaranteeing the independence of military courts, but also their competence and impartiality. Fourth, in the particular context of trials of civilians in military courts staffed with and presided over by active servicemen, because active servicemen are part and parcel of the executive,

and under their military codes they are obligated to respect the military chain of command. Where these military personnel are adequately insulated from obeying orders and the command influence when performing their judicial functions the threat of not being impartial can largely be reduced." ***(Emphasis added)***

Principle 13 of the ***Decaux Principles*** also presents some of the safeguards for independence and objective impartiality in the following terms:

"The persons selected to fulfill the functions of magistrate in military courts must be of integrity and competence and demonstrate the necessary training and legal qualifications. The statute of military magistrates must guarantee their independence and impartiality, in particular in relation to the military hierarchy..." ***(Emphasis added)***

In ***Marcel Wetsh'okonda Koso & Ors v DRC (Koso case) (2008) AHRL 93 (ACHPR 2008),*** the African Commission noted that independence of a military Court refers to independence vi-a-vis the executive. It also observed that as is the case with civil Courts, in determining the independence of military Courts, consideration should be given to the:

"mode of designation of its members, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence."

Similarly, in ***Findlay v United Kingdom (1997) 24 EHRR 221*** at 244-245, para 73, the European Court of Human Rights noted thus:

"The court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

The concepts of independence and objective impartiality are closely linked and the court will consider them together as they relate to the present case."

It is noteworthy that following these decisions, the respective countries amended their Military laws to provide for sufficient safeguards to ensure a fair hearing.

With the benefit of these authorities and instruments enunciating the law on the issue of independence and impartiality of Courts Martial, I proceed to examine the structure and procedure of the Courts Martial in Uganda; to assess how they fare in this regard.

(a)Legal qualification

It is an imperative and a legal requirement that anyone who sits in a Court to dispense justice is legally trained, if they are to truly render justice; as it is done with regard to the ordinary Courts. It is from the legal training that a

judicial officer gains the competence to properly evaluate the evidence before Court, and correctly apply the relevant or applicable law thereto, with impartiality and independence of mind. Indeed, the international standards as expounded by the Human Rights Committee in ***General Comment No. 32 of 2007*** and the ***UN Basic Principles on the independence of the judiciary*** provide for similar requirements. It has defined independence of the Courts, with regard to legal qualification of the adjudicators, in the following terms:

> *"[It refers] to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure... the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature." (**emphasis added**)*

In his work, regarding the need for legally qualified adjudicators, ***R. Naluwairo (2019)*** (supra), has made the same point; noting that:

"[I]t is arguable that legally qualified members of military courts are less likely to be influenced by external factors. They are more likely to adjudicate cases based on the law and fact, unlike members who are ignorant of the law."

Principle 10 of the ***UN Basic Principles of the Judiciary provides for qualifications, selection and training of persons exercising judicial power*** recommends as follows:

> *"10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or*

other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory." ***(emphasis added)***

Marcel Wetsh'okonda Koso & Ors v DRC (Koso case) (2008) AHRL 93 (ACHPR 2008), was a request to the African Commission to declare that by a mere submission of their case to a military Court, the majority of whom had no legal qualification, Art 26 of the Charter had been violated. The military Court comprised five members; only one of whom had the necessary legal training. The Commission emphasized in its decision that the ability of a Court to offer justice depends on the competence and quality of its members; it urged the DRC to introduce measures to guarantee independence of such Courts. Relying on ***Amnesty International & Ors v Sudan (2000) AHRLR 297 (ACHPR 1999),*** the Commission held that depriving Courts of qualified staff to guarantee their impartiality constitutes a violation of Article 26 of the African Charter.

In ***Law Office of Ghazi Suleiman v Sudan (2003) AHRLR 134 (ACHPR 2003),*** the Commission held that: "depriving *the court of qualified staff to ensure its impartiality is detrimental to the right to have one's cause heard by competent organs".* In ***The President of the Republic of South Africa & others v South African Rugby Football Union & others- 1999 (4) S.A. 147 (C.C.)*** while examining the test for bias, the Court considered the significance of legal training in the judicial office. The Constitutional Court noted at para 39-44, thus:

"Before looking at the manner in which the test is applied, it is necessary to mention two considerations built into the test itself. These are the nature of the judicial office and the character of bias in this context...

In applying the test for recusal, courts have recognized a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence ...

*The test should be applied on the assumption that a reasonable litigant would take these considerations into account. A presumption in favour of judges' impartiality must therefore be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased." (**emphasis added**)*

Currently, the General Court Martial, Division Court Martial and even the UDCs and STAs as tribunals exercising judicial power have no legally qualified personnel on their Coram; yet their jurisdiction is not limited only to disciplinary breaches, but extends to crimes or offences that are also triable by the civil Courts. This includes serious offences that attract custodial sentence of over six months, and the death penalty. These untrained persons can issue decisions on questions of law and fact. The decision of the Judge Advocate in the Court Martial Appeal Court, who in any case is not a full member of the Court, is merely advisory; as it is not binding on the panel. This loophole was recognized and pointed out in ***Uganda Law Society & Jackson Karugaba v A.G Constitutional Petition No. 2 of 2002 & 8 of 2002***, where after considering the guarantees of independence of a Court under Art 128 of the Constitution, Twinomujuni JA had this to say about the GCM:

*"My conclusion here is that military courts must be manned by soldiers. Being appointed by the President to perform judicial functions is not of its self-such a big deal as long as they are professionally trained to perform such duties and they are accorded protections and privileges as all other judicial officers in civilian courts to enable them perform their judicial function independently and impartially." (**Emphasis added**)*

Mulenga JSC also noted in ***A.G v Uganda Law Society – Supreme Court Constitutional Appeal No. 1 of 2006***, as follows:

"There is no doubt that military courts are special courts. But they are all the same, and in a court, justice must not only be done, but must be seen to be done. The military criminal justice system like any other criminal justice system is a legal system and should be entrusted to those who are learned in the art of administration of criminal justice so that the job of adjudication can be thoroughly administered ... ... In other words, the system needs those who are first of all lawyers (learned and experienced in adjudication) before they are service personnel"

He alluded to the options available; and cited some jurisdictions that use the jury system, where adjudication is still controlled by a military judge who is a lawyer while the jury consists of members of the armed force. The other, was a system where the military may have a special commissioning of magistrates and judges to do a proper job of administration of justice. In that scenario, the Chief Justice allocates the judicial officers to the military tribunals. Another option, is a system manned by military officers; but the Judge advocate's opinion on matters of law prevails, and is binding. Last, a

standing Court Martial, which is separate from the army and military prosecuting arm, and is an integral part of the Judiciary, is another option.

In our jurisdiction, the absence of legally trained personnel in the exercise of judicial power in the GCM and the other military Courts or tribunals, is at variance with the situation obtaining in the civil Courts. This presents two parallel and contrasting standards in the administration of justice. The civil Courts are competent as they meet the standards laid down in the Constitution; while the Courts martial function in sharp converse thereto, and this is inimical to the right to a fair hearing before an independent and impartial Court. Hence, it adversely discriminates against persons who appear before the Courts martial. The consequence of this is that it renders the functioning of the Courts Martial unconstitutional.

(b)Composition of the court by military personnel

Counsel for the Respondent argued that the composition of the court that includes army personnel who are answerable to their superiors is a derogation of the right to a fair hearing by in essence creating the appearance of bias or objective partiality. As already noted, previously, military courts were presided over by a judge advocate who was appointed by the Chief Justice and consisted of not less than three officers of the armed forces. That changed with the enactment of Statute No. 3 of 1992; and this was captured in the 1995 Constitution.

This issue gives rise to two distinct questions. First, whether a parallel system of military courts or tribunals, staffed by members of the military who are aware of and sensitive to military concerns, by its very nature, inconsistent

with Art 28 (1) of the Constitution. Second, if the answer to the first question is in the positive, whether that is the end of the matter. However, if it is in the negative, then the next question is whether the General Court Martial, as constituted at the time the Respondent was charged under the UPDF Act and regulations made thereunder, is an independent tribunal for the purposes of Art 28 (1). Various jurisdictions have taken different positions in this regard. Some Commonwealth jurisdictions have found that having military officers or a mixture of both civilians and members of the military exercising adjudicatory role in a military Court does not contravene their Constitutions; but only if there are sufficient safeguards in place that ensure the members of the Court are independent and impartial.

In ***R v Genereux*** (supra), the Canadian Court held that the answer to the first question is in the negative. In ***MacKay v The Queen [1980] 2 SCR 370*** (supra), Mackyntire J explained the advantages of having military personnel on the Coram, thus:

> *"It is said that by the nature of his close association with the military community and his identification with the military society, the officer is unsuited to exercise this judicial office. It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned*

to maintain the required standards of efficiency and discipline – which includes the welfare of their men – are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others."

The Court denied that this difference created inequality when compared with the civilian counterparts who appeared in ordinary Courts when it noted that:

"Furthermore, the problems and the needs of the armed services, being in many respects special to the military, may well from time to time require the special knowledge possessed by officers of experience who, in this respect, may be better suited for the exercise of judicial duty in military courts than their civilian counterparts. It has been recognized that wide powers of discipline may be safely accorded in professional associations to senior members of such professions. The controlling bodies of most professions such as those of law, medicine, accountancy, engineering, among others, are given this power. I am unable to say that the close identification of such disciplinary bodies with the profession concerned, taken with the seniority enjoyed by such officers within their professional group, has ever been recognised as a disqualifying factor on grounds of bias or otherwise. Rather it seems that the need for special knowledge and experience in professional matters has been recognized as a reason for the creation of disciplinary tribunals within the separate professions.

It must also be remembered that while this appeal concerned only the armed services serving in Canada, the position of forces serving abroad not being in issue, it must be recognized that in service abroad the officers must assume the judicial role by reason of the absence of any civil legal processes.

*The character of the officer for independence and impartiality will surely not vary because he is serving overseas. The practical necessities of the service require the performance of this function by officers of the service and I find no offence to the Canadian Bill of Rights in this respect. I would add that there now exists a Court Martial Appeal Court, a professional Court of Appeal with a general appellate jurisdiction over the courts martial. This is, in my view, a significant safeguard and its creation is a realistic and practical step toward the provision of that protection which is required in the circumstances." **(Emphasis added)***

It is however vital to note that a decision in the Canadian Court system is subject to supervision by a military Court staffed with civilian judges as already pointed out. It is also important to note that there were two dissenting voices in that appeal; to which I will advert. This reasoning was adopted by the United Kingdom in ***R v Spear & Anor*** (supra) where, at para 57, Lord Roger explained that:

"[A]rt 6 does not require that the members of the tribunal should not share the values of the military community to which they belong any more than it requires that the judge or members of the jury in a civil court should be divorced from the values of the wider community of which they form part. What matters is that, while sharing the values of the Service community, the members of the court-martial should put aside any prejudices which they may have and act – and be seen to act – independently and impartially in deciding the issues in the case before them."

In ***R v Genereux*** (supra), the Court noted that the special status of the military allows for military personnel to sit in the military Courts. The Judge observed as follows:

> *"This, in itself, is not sufficient to constitute a violation of s. 11(d) of the Charter. In my opinion the Charter was not intended to undermine the existence of self-disciplinary organizations such as, for example, the Canadian Armed Forces and the Royal Canadian Mounted Police. The existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by the compelling principles discussed above. An accused's right to be tried by an independent and impartial tribunal, guaranteed by s. 11(d) of the Charter, must be interpreted in this context.*
>
> *In this regard, I agree with the conclusion reached by James B. Fay in Part IV of his considered study of Canadian military law* ***("Canadian Military Criminal Law: An Examination of Military Justice" (1975), 23 Chitty's L.J. 228,*** *at p. 248):*
>
> > *'In a military organization, such as the Canadian Forces, there cannot ever be a truly independent military judiciary; the reason is that the military officer must be involved in the administration of discipline at all levels. A major strength of the present military judicial system rests in the use of trained military officers, who are also legal officers, to sit on courts martial in judicial roles. If this connection were to be severed, (and true independence could only be achieved by such severance), the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the*

military knowledge and experience which today helps him to meet his responsibilities effectively. Neither the Forces nor the accused would benefit from such a separation.'"

However, the European Court has taken a strict approach in a recent case of ***Mustafa v Bulgaria Request No. 1230/17***, decided on 28th November, 2019, when it rejected trial of civilians by military judges. In that case, civilian judges were appointed to the military Courts where they were incorporated into the army and assigned a rank. In holding that the judges in military Courts should be civilians without any military ranks, the Court noted as follows:

"It is true that, with regard to the status of military judges, the Bulgarian law provided for a regime very similar to that of the statute of civil judges (see paragraphs 13 and 16 above). In addition, the same procedural rules apply in cases examined by military courts and in those dealt with by ordinary criminal courts. However, elements such as the submission of military judges to military discipline, their formal membership in the military body, as well as the status of military tribunal jurors, who are by definition army officers, suggest that military courts in Bulgarian law cannot be considered as equivalent to ordinary courts. The Court considers that these characteristics of courts military personnel are likely to raise certain doubts as to their independence and impartiality ..."

The Court then concluded that there had been breach of the right to a fair hearing; and held thus:

"49. In view of the aforementioned elements, examined in particular in the light of the developments at the international level set out above (see

paragraphs 17-20 above), the Court considers that the doubts harbored by the applicant as to the independence and impartiality of military courts may be regarded as objectively justified (see, mutatis mutandis, Maszni, cited above, § 59, Ergin, cited above, § 54, and Incal, cited above, § 72 in fine).

50. Accordingly, there has been a violation of Article 6 § 1 of the Convention."

The African Commission has taken a stance similar to the European Court. The jurisprudence of the African Commission is clear that the Courts should not be composed of active servicemen. In ***Law Office of Ghazi Suleiman v Sudan (2003) AHRLR 134 (ACHPR 2003)*** (***Law office case***), where a military Court established by a Presidential decree, comprising four members three of whom were in active service, tried civilians. The contention was that the military Court was neither independent nor impartial, as the members thereof had been carefully chosen by the President. According to the Commission, at para 64, the composition of the military Court alone was evidence of partiality. It held that trying civilians in military Courts presided over by active servicemen still under military regulations violated the right to a fair trial because the military Court was dominated by servicemen who were part and parcel of the executive. Similarly, in the case of ***Constitutional Rights Project in respect of Lekwot & Ors) v Nigeria (2000) AHRLR 183 (ACHPR 195)*** para 14 (***Lekwot case***), the special tribunal was composed of one judge and four members of the armed forces. The Commission observed that the composition of the commission alone created, "*the appearance, if not actual lack, of impartiality."* The tribunal did not appear to be impartial, as it was '*composed of persons belonging to the executive branch that passed the civil Disturbance Act'* in addition to the fact that the three active servicemen remained subject

to the military chain of command; hence, it had violated the principle that provides for a fair trial without actual or perceived bias. In ***Marcel Wetsh'okonda Koso & Ors v DRC (2008) AHRL 93 (ACHPR 2008)*** (Koso case), civilians and soldiers accused of theft of fuel were tried together in a military court. The African Commission held:

> "*85. Furthermore, in its ruling on the* ***Media Rights Agenda v Nigeria*** *case* ***[(2000) AHRLR 262 (ACHPR 2000)*** *para 66], the Commission decided as follows: 'It could not be said that the trial and conviction of Malaolu by a special military tribunal presided over by a serving military officer ... took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in article 7 of the Charter.'*"

This position is similar to that taken by Laskin CJ and Estey J in their dissenting judgment in ***Mackay v The Queen*** (supra) cited above. This case was in respect of trial of service men in the military Court, for civil offences. The contention was that special treatment and special provision for the regulation of the armed forces, in their character as such, represents a reasonable classification, which so long as there is positive discrimination in the regulation, may well be compatible with the Bill of Rights. Laskin CJ understood the contention to be that in respect of s. 120 of the National Defence Act, there was a clear departure from an internal military code by the provision for prosecution of offences under the ordinary criminal law, by military tribunals, but without putting the accused members of the armed forces in the same position under that law as other members of the public are, when similarly charged. He noted thus:

"*It is fundamental that when a person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, he or she is entitled to be tried before a court of justice, separate from the prosecution and free from any suspicion of influence of or dependency on others. There is nothing in such a case, where the person charged is in the armed forces, that calls for any special skill of a superior officer, as would be the case if a strictly service or discipline offence, relating to military activity, was involved. There has therefore, been a breach of s. 2(f) of the Bill of Rights in that the accused, charged with a criminal offence, was entitled to be tried by an independent and impartial tribunal.*" (***emphasis added***)

At page 374, he went ahead to hold that the Appellant had not been treated equally. He said:

"*The appellant is also entitled to succeed on the ground that he was denied equality before the law, contrary to s. 1(b) of the Bill of Rights. There cannot be in this country two such disparate ways of trying offences against the ordinary law, depending on whether the accused is a member of the armed forces or not. In the Drybones case it was Indians and here it is members of the armed forces who were under disabilities; treated differently, in short, from other persons in respect of the application to them of the same law. Section 120 of the National Defence Act must be held to be inoperative in so far as it subjects members of the armed forces to a different and, indeed, more onerous liability for a breach of ordinary law than are other persons in Canada who are also governed by that law.*"

I consider the stance by the African Commission and the dissenting opinion of Laskin CJ to be in consonance with our Constitution and as a better way to move away from our turbulent past as noted in our history earlier enumerated. It is in line with Art 21 of our Constitution, which provides for equality of all under the law.

I am bound to follow the route that will ensure an impartial and fair trial both objectively and subjectively viewed by any reasonable person. Active service men are under the chain of command and maybe influenced through the chain of command. The law and history shows us how influential the chain of command is on justice in military courts. See: ***R. Naluwairo*** (supra) on courts martial during the government of Idi Amin. Furthermore, the oath taken by the members of a military court under r. 27 of the UPDF (Rules of Procedure) Regulations binds them to their chain of command. The oath of allegiance taken by the military is in the 5th Schedule thereof; and provides for allegiance to the President who is also a member of the High Command and convener of the military Courts. It reads:

"I, ..., Swear by the almighty God/do solemnly and sincerely declare and affirm that I will be faithful to and bear <u>true allegiance to the President</u> and the Republic of Uganda and that I will, as in duty bound, honestly and faithfully defend him/her and the Constitution of the Republic of Uganda against all enemies, and <u>I will observe and obey all lawful orders of the officers set over me</u>. I promise to teach and uphold in all officers and militants that may from time to time be placed under my command good discipline, bravery and trust in the Country, so help me God." ***(Emphasis added)***

In stark contrast, the Judicial Oath in the Oaths Act Cap 19, which is taken by a judge appointed to the civil Court reads as follows:

"I, _____swear in the name of the Almighty God/solemnly affirm that I will well and truly exercise the judicial functions entrusted to me and will do right to all manner of people in accordance with the Constitution of the Republic of Uganda as by law established and in accordance with the laws and usage of the Republic of Uganda without fear or favour, affection or ill will. (So help me God.)" (***Emphasis added***)

I find that the presence of military personnel as members of the Courts martial is not, by itself, evidence of the Court's lack of independence and impartiality. However when viewed by an objective reasonable person, there is a difference between active servicemen under the chain of command, and former servicemen who are in retirement, or about to retire, and are therefore not influenced by any hope of promotions. This is exacerbated by the lack of provisions in the law, which would operate to reduce the pressure of outside influence; and, as well, the lack of other safeguards, e.g. security of tenure (see ***R v Spear; Findlay v United Kingdom; Morris v United Kingdom*** (supra). This, taken together with the non-inclusion of a legally qualified judge on the panel to rule on legal issues, denies the Courts martial the independence and impartiality, which would have clothed them with competence.

There is a difference between a military Court presided over by a qualified judge, with military officers akin to jurors or assessors, and one having only military officers who are in active service, with no legal training whatsoever, and are subject to the chain of command. I hold the view that the right to a

fair hearing applies to all persons without discrimination; hence, military personnel in active service do not lose these rights merely by reason of serving in the army. The military Courts or tribunals before which anyone appears for trial must be independent and an impartial Court of law or tribunal duly established to exercise judicial power in accordance with our Constitution. The trial by military personnel gives a perception of bias or partiality; especially due to the fear that the active service men or women who are members of the GCM can be easily influenced by being subject to the chain of command. Therefore, GCM and the other Courts martial in our jurisdiction, in their current respective composition are evidently neither independent nor impartial; hence, subjecting any person to trial by any of them is unconstitutional.

(c) Manner of appointment of its members.

I have alluded to this in my analysis of the composition of the Court by military personnel. JSC Twinomujuni JA held in ***Law Society & Jackson Karugaba v A.G Constitutional Petition No. 2 of 2002 & 8 of 2002*** that mere appointment of the members of the Court by the High Command is not in itself sufficient to deprive a Court of the requisite impartiality and independence that is an imperative in its function. I reproduce what the learned Justice said:

> *"My conclusion here is that military courts must be manned by soldiers. Being appointed by the President to perform judicial functions is not of its self-such a big deal as long as they are professionally trained to perform such duties and they are accorded protections and privileges as all other judicial officers in civilian courts to enable them to perform their judicial function independently and impartially."*

I agree with the learned Justice; but only in part. There is the military personnel sitting on a tribunal that handles purely disciplinary matters, and only imposes such punishment as reprimand, demotion, dismissal, compensation, on the one hand, and military personnel sitting in a Court, which has the competence to try persons for crimes, which attract such penalties such as custodial sentence, or even the death sentence. I am of the opinion that there is need to distinguish between the two in determining the issues concerning the Courts martial. Appointment to the service disciplinary organs, is normally limited to administrative matters, whereby the fact of the presiding officers being subject to the chain of command does not occasion any miscarriage of justice; unlike with the appointment to the Courts martial handing substantive judicial matters where it could occasion injustice.

Second, the provisions for the appointment of personnel on the Courts martial must be in conformity with the provisions for the appointment of judicial officers in the civil Courts; and thereby avoid having two parallel Court systems pursuing the same or similar subject matters. Third, the effect of the appointment must be considered alongside other safeguards, such as the term of office, and security of tenure. Admittedly, the President who is the Commander in Chief appoints the judicial officers of the civil Courts. However, these judicial officers do not take oath of allegiance to the President; but to the Constitution. Furthermore, they are not bound to take orders from the President. It is the safeguards provided for in Art. 128 (8) (1)-(9) of the Constitution that insulates them from external influence or consequences; thus guaranteeing their independence.

I would therefore hold that the appointment of an officer on the Courts martial by the President or the High Command might not necessarily suffice to deprive the Court of the requisite independence for the exercise of judicial power. However, this must be taken together with the provisions for other safeguards for the promotion and guarantee of the independence of the Courts martial; and then determine the effect of such appointment on the independence and impartiality of the members of the Court.

(d)Term of office (security of tenure)

This relates to the appointment of the members of the court including the Judge Advocate. The appointment of members of the courts martial is by the High Command and for a period of one year only though eligible for reappointment. There are also 'waiting members' who are appointed and can be called upon to sit in court as and when needed to realize Coram. See r. 21 & 23 of the UPDF Act (Rules of Procedure). This term of office is relatively short and the members do not have protections of security of tenure available to civil judges in Art 128. In ***R v Geneureux*** (supra), the considerations taken into account in relation to a Judge Advocate who was appointed for a short period only were examined. The Court noted:

> *"Unlike the situation of the ordinary courts, a judge advocate is appointed to sit on a General Court Martial <u>on an ad hoc basis.</u> This temporary appointment reflects the nature of the General Court Martial, which is convened when necessary to deal with a breach of the Code of Service Discipline. <u>At the conclusion of this type of court martial, the judge advocate and members return to their usual roles within the military.</u> <u>For the members of the General Court Martial, this means a return to their regular duties as</u>*

officers. For the judge advocate, it means a return to legal duties within the Office of the Judge Advocate General."

The fact that a member of the Court is appointed only for a short period of time, and on an *ad hoc* basis, means that such a person may have no cushion against external influence by the one who appoints him or convenes the Court. Indeed the Court went ahead in the ***R v Geneureux*** case (supra), to note as follows:

"It is my conclusion that this arrangement does not guarantee a judge advocate sufficient security of tenure to satisfy the requirements of s. 11(d) of the Charter. The National Defence Act and regulations fail to protect a judge advocate against the discretionary or arbitrary interference of the executive. The Judge Advocate General, who had the legal authority to appoint a judge advocate at a General Court Martial, is not independent of but is rather a part of the executive. Indeed, the Judge Advocate General serves as the agent of the executive in supervising prosecutions.

Furthermore, under the regulations in force at the time of the appellant's trial, the judge advocate was appointed solely on a case by case basis. As a result, there was no objective guarantee that his or her career as military judge would not be affected by decisions tending in favour of an accused rather than the prosecution. A reasonable person might well have entertained an apprehension that a legal officer's occupation as a military judge would be affected by his or her performance in earlier cases. Nothing in what I have said here should be taken to impugn the integrity of the judge advocate who presided at the appellant's trial, nor to suggest that judge advocates in fact are influenced by career concerns in the discharge of their adjudicative

duties. The point is, however, that a reasonable person could well have entertained the apprehension that the person chosen as judge advocate had been selected because he or she had satisfied the interests of the executive, or at least has not seriously disappointed the executive's expectations, in previous proceedings. Any system of military tribunals which does not banish such apprehensions will be defective in terms of s. 11(d). At the very least, therefore, the essential condition of security of tenure, in this context, requires security from interference by the executive for a fixed period of time. An officer's position as military judge should not, during a certain period of time, depend on the discretion of the executive." (***Emphasis added***)

I find this proposition of the law quite persuasive; and therefore reach the conclusion that the provisions of the law governing the Courts Martial do not guarantee their independence or impartiality. This owes to the fact that the members of the Court have only occasional short term of office, with no security of tenure, and are appointed by senior military officers who, out of the Court, are their direct supervisors; unlike what obtains in the civil Courts presided over by civilian judges.

(e) Convening authority & prosecuting authority

The convening authority performs an important role in the Court Martial judicial process, because the law grants it the dual role of the Court and that of the DPP. Under the powers conferred on it by r.21 of the UPDF Regulations, this authority, amongst other things, determines the charges to be preferred, appoints the prosecutor, issues a convening order, determines the time of trial, and procures attendance of the witnesses. The role that is performed by the convenor, does not usurp the role that would otherwise be the purview of

the DPP; because, Article 120 (3) of the Constitution specifically provides that the function of the DPP is to *"institute criminal proceedings against any person or authority in any Court with competent jurisdiction, other than a Court martial."*

In providing for a separate prosecuting body for the Courts martial, the framers of the Constitution must have had in mind, the peculiar circumstances of the military; necessitating the creation of a special prosecuting body. Nonetheless, as has been held in other jurisdictions, in criminal prosecutions it is an imperative that the convening authority lies with Court; which enjoys guarantee of institutional independence from the body prosecuting cases in Court. See: Colonel Thomas Allotey in: ***Comparative Study: The Military Justice System In Ghana And The United States (Pretrial Through Post-Trial): Need For Reforms In Ghana's Military Justice System***, 2001, where the author advances the proposition that:

> "*In the case of a court martial, a convening authority may exercise unlawful influence through various ways including: selection of panel members; comments or statements by the convening authority; and arbitrary discharge of panel members. Post-trial comments by commanders or other senior officers on how a particular case has been determined are likely to impact on potential court members and defence witnesses.*"

The Inspectorate of Government, just like the DPP, exercises prosecuting powers in the civil Courts; but there is guarantee that in its prosecution of crimes before the civil Courts, it does not usurp the convening powers that vests in the Courts. This offers guarantee of the independence and impartiality of the Courts in the conduct of trials.

However, with regard to the Courts Martial, the situation is wholly different. The military appoints the convener of the Court from within its ranks; and similarly does so, for the prosecutor of the Court. It also appoints officers who are under its command to preside over the Court; but accords them no security of tenure in the exercise of their function as members of the Court. This situation does not portray or manifest an impartial and independent Court. Lamer CJ noted in ***R v Geneureux*** case (supra), in respect to the convening authority, as follows:

> *"I agree with the essence of Décary J.'s observations. An examination of the legislation governing the General Court Martial reveals that military officers, who are responsible to their superiors in the Department of Defence, are intimately involved in the proceedings of the tribunal. This close involvement is, in my opinion, inconsistent with s. 11(d) of the Charter. It undermines the notion of institutional independence that was articulated by this Court in Valente. The idea of a separate system of military tribunals obviously requires substantial relations between the military hierarchy and the military judicial system. The principle of institutional independence, however, requires that the General Court Martial be free from external interference with respect to matters that relate directly to the tribunal's judicial function. It is important that military tribunals be as free as possible from the interference of the members of the military hierarchy, that is, the persons who are responsible for maintaining the discipline, efficiency and morale of the Armed Forces.*
>
> *In my opinion, certain characteristics of the General Court Martial system would be very likely to cast into doubt the institutional independence of the*

tribunal in the mind of a reasonable and informed person. First, the authority that convenes the court martial (the "convening authority") may be the Minister, the Chief of the Defence Staff, an officer commanding a command, upon receipt of an application from a commanding officer, or another service authority appointed by the Minister (art. 111.05 Q.R. & O.). The convening authority, an integral part of the military hierarchy and therefore of the executive, decides when a General Court Martial shall take place.

The convening authority appoints the president and other members of the General Court Martial and decides how many members there shall be in a particular case. The convening authority, or an officer designated by the convening authority, also appoints, with the concurrence of the Judge Advocate General, the prosecutor (art. 111.23 Q.R. & O.). This fact further undermines the institutional independence of the General Court Martial. 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.

The Court recommended that to avoid concentrating in the hands of the military, the power to appoint the various persons who have roles in the operation of the Court martial, the powers of the convening authority that appoints officers of the Court, especially the judge advocate, should vest in the Judiciary. This would ensure independence and impartiality of the Court Martial. In this regard, the Judge stated thus:

"... To comply with s. 11(d) of the Charter, the appointment of a military judge to sit as judge advocate at a particular General Court Martial should be in the hands of an independent and impartial judicial officer. The effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence and impartiality of the tribunal. However, as I have concluded above, I consider that the new arts. 4.09 and 111.22 of the amended Q.R. & O. have largely remedied this defect to the extent required in the context of military tribunals.

... ...

It is not necessary, under normal circumstances, to try alleged military offenders before a tribunal in which the judge, the prosecutor, and the triers of fact, are all chosen by the executive to serve at that particular trial. Nor can it be said to be necessary that promotional opportunities, and hence the financial prospects within the military establishment, for officers serving on such tribunals should be capable of being affected by senior officers' assessments of their performance in the course of the trial. I note again that the amendments to the Q.R. & O. which came into affect after the appellant's trial have alleviated this latter problem. However, this appeal falls to be decided on the constitutionality of the structure of the General Court Martial in place at the time of trial.

In short, the structure of the General Court Martial with which we are here concerned incorporated features which, in the eyes of a reasonable person, could call the independence and impartiality of the tribunal into question, and are not necessary to attain either military discipline or military justice. This structure, therefore cannot be said to have impaired the appellant's s. 11(d)

*rights "as little as possible". The proportionality test prescribed in Oakes is thus not satisfied." (**Emphasis added**)*

In ***Morris v UK Application*** (supra), the Court also considered the position of convening officer assumed by the General Officer Commanding to whom the president and four members of the Court were ultimately answerable. They were all, subordinate in rank to the Commanding officer; and served in units stationed within the London Department. None of them had legal training. The Applicant alleged he and been denied a fair hearing before an independent and impartial tribunal on account of the structural defects in the Court martial system. The Court agreed with him. See also: ***Findlay v UK*** (supra).

I find these authorities I have cited herein above, quite persuasive in the proposition of the law they have expounded. Since the military courts or tribunals in this case are exercising judicial power, albeit specialized one, they should conform to the basic character of the ordinary Courts in terms of safeguards to independence and impartiality enumerated in Art 128. The wide powers of the convening authority over members of the court for a particular trial does not provide protection of the members of the military court from outside influence. Currently, the wide powers of the convening authority allows that authority to appoint members with no legal training, and for short terms in office without security for tenure, and the appointment of the prosecutor and judge advocate. Objectively viewed, it is evident that the Court lacks independence; hence, it cannot be seen to be impartial. Accordingly then, its constitution and exercise of judicial function is unconstitutional, as it violates Art 28 (1) and 44 (c) of the Constitution.

(f) Existence of other guarantees against outside pressures (also objective impartiality).

Most of the determinants of independence and impartiality of Courts have been institutional. The other aspect of fair hearing is the legal procedure available to a suspect who appears before the GCM. Procedures of fair trial are to be observed by all Courts and tribunals that are an integral part of the judicial system. Principle 5 of the ***UN Basic Principles on the Independence of the Judiciary*** states in para 3 that everyone:

> "*... shall have the right to be tried by ordinary courts or tribunals using established legal procedures*" ... ... "*tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."*

Para. 8 of the ***Basic Principles*** enjoins States that have military Courts or special criminal tribunals for trying criminal offenders, to ensure that such Courts or tribunals are an integral part of the general judicial system; and that such Courts apply due procedures that are recognized according to international law as guarantees of a fair trial, which includes the right to appeal against conviction and sentence. In our jurisdiction, provision for fair legal process is contained under Art. 28 of the Constitution; which I restate here below:

> "***28. Right to a fair hearing.***
>
> *(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.*

(2) Nothing in clause (1) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society.

(3) Every person who is charged with a criminal offence shall—

(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;

(b) be informed immediately, in a language that the person understands, of the nature of the offence;

(c) be given adequate time and facilities for the preparation of his or her defence;

(d) be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice;

(e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State;

(f) be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial;

(g) be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.

(4) Nothing done under the authority of any law shall be held to be inconsistent with—

(a) clause (3)(a) of this article, to the extent that the law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts;

(b) clause (3)(g) of this article, to the extent that the law imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused are to be paid their expenses out of public funds.

(5) Except with his or her consent, the trial of any person shall not take place in the absence of that person unless the person so conducts himself or herself as to render the continuance of the proceedings in the presence of that person impracticable and the court makes an order for the person to be removed and the trial to proceed in the absence of that person.

(6) A person tried for any criminal offence, or any person authorised by him or her, shall, after the judgment in respect of that offence, be entitled to a copy of the proceedings upon payment of a fee prescribed by law.

(7) No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.

(8) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.

(9) 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 proceedings relating to the conviction or acquittal.

(10) No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.

(11) Where a person is being tried for a criminal offence, neither that person nor the spouse of that person shall be compelled to give evidence against that person.

(12) Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law."

Other provisions for a fair trial are contained in other articles, and refer to rights such as the right of appeal in capital cases, the right to be free from torture during the trial process, among others; which is enjoyed by civilians in ordinary trials. These provisions for fair trial apply, without exception, to all institutions exercising judicial power. Thus, the GCM and other military Courts are obliged to strictly adhere to them in the exercise of their judicial function. This is in pursuit of the cardinal rule for non-derogation from the right to a fair hearing and the requirement for equal treatment of all persons who appear before the Courts and tribunals; and free from any discrimination that is not sanctioned by the Constitution.

Non-adherence to a fair hearing has a double-edged effect. The obvious one is the denial of an accused person the right to the due process. The other may have an adverse effect on the public. Mulenga JSC pointed out in ***A.G v ULS*** (supra) that:

"It is not only that breach of a fair hearing works injustice on the accused person but some accused person may also escape punishment under the guise that they were not given fair hearing. Now is the time to attend to the military Court justice system and carry out a holistic reform therein."

Out of the minimum guarantees for a fair hearing in Article 28, I will only consider a few. One of these is the right to adequate time and facilities for the preparation of a defense and to be tried without undue delay. The other is the foreclosure of the right of appeal.

Right to adequate time and facilities for the preparation of a defense and to be tried without undue delay

It is clear from the ***Odoki Commission Report*** (supra) that informed the promulgation of the 1995 Constitution that Ugandans expressed concern and fears about military Courts; and reasons for this, included the denial of the right to legal representation of one's choice. This was captured in the Report, at page 375, thus:

> ***"Problems with the military courts.***
> *14:85 Some people have expressed dissatisfaction and fears about the military courts in their views submitted to the Commission. They observe that although such courts have jurisdiction to hear capital offences and give punishments ranging from caution (warning) to death, the accused is not allowed legal representation of his or her own choice. It is normally the military court that appoints a legal advocate to advise the accused during trial. Such advocates are army members; civilian advocates are not allowed in the military tribunals."* ***(Emphasis added)***

The UPDF Regulations provide that a defending officer or advocate shall be appointed to defend an accused who has been remanded for trial by court-martial, unless the accused states in writing that he does not wish such an appointment to be made; in which case, the accused will be allowed to

procure his own advocate and at his or her own expense. The provision at first glance appears to go over and above what is required in criminal proceeding sin civil courts, which only procure advocates for those facing trial for offences attracting the death penalty or imprisonment for life. According to a Report by the Human Rights Watch, ***"Righting Military injustice: Addressing Uganda's unlawful prosecution of civilians in Military Courts", 27th July 2011,*** the situation is not as good as it seems.

"Although persons tried before military courts are legally entitled to be represented by a UPDF lawyer, or at their own expense by another lawyer of their choosing, the capacity to exercise the right to a defense is minimal. The UPDF defense lawyer is an active member of the armed forces, who has responsibility for all the files before a specific military court. Before they appear in court to enter a plea, defendants are often not provided with details of the charges against them, or information about the evidence against them. Nor do they have the opportunity to discuss a defense with their lawyer. Resources provided to mount a defense are minimal. Civilians before courts martial are routinely denied bail, and often spend months, even years, awaiting trial."

They give an example of one instance out of their trial observation notes of General Court Martial, June 29, 2010 *"here an accused inquired in open court to at least know the name of his UPDF lawyer whom he had never met. The judge advocate told the accused not to question the State."* This situation ensues in addition to the fact that there is limited Judiciary oversight over the activities of the Courts martial.

The conclusion is that a fair trial under the GCM is not guaranteed under this head since the procedure applied therein contravenes the provision of Art 28 of the 1995 Constitution on the minimum guarantees requisite for fair trial; and there is limited avenue for complaint by accused, and limited civilian court oversight over its activities.. Owing to this, the procedure of trial under the GCM is unconstitutional flowing from the lack of the right of appeal to civilian courts.

Foreclosure of the right of appeal

There is international consensus that military laws and other legislations should never foreclose the right of appeal from decisions of military Courts. Article 7 (1) (a) of the African charter provides that: *'[e]very individual shall have ... (a) the right to appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.*" (See: ***Media Rights Agenda v Nigeria (2000) AHRLR 262 (ACHPR 2000)*** (herein otherwise referred to as Media Rights Case), and ***Law Office of Ghazi Suleiman v Sudan (2003) AHRLR 134 (ACHPR 2003)*** (herein otherwise referred to as Law office case). A general foreclosure of the right of appeal to ordinary Courts, inclusive of convictions for non-capital offences, is by any legal standard unacceptable; and is, in our jurisdiction, clearly unconstitutional.

In Canada, the Court Martial Appeal Court of Canada established under the National Defence Act is manned by civilian judges. The civil Court of Appeal of Canada also sits as the Canadian Military Court of Appeal, and is the final Court of appeal in military matters. The decisions of the Court Martial Appeal

Court of Canada may be appealed to the Supreme Court of Canada from conviction, acquittal or sentence, as of right, where a justice of the Court Martial Appeal Court of Canada dissents on a question of law. Otherwise, leave to appeal must be granted before one appeals. The guarantee for fair trial here is that a person convicted by a military Court has access to a Court manned by civilian or common law judges.

Second, when it comes to capital offences, the Constitution provides for the right of appeal up to the highest Court of appeal. Questions as to what the highest court of appeal in military matters was debated and was a concern in before promulgation of the 1995 Constitution. The ***Odoki Commission Report*** notes this as a concern of the people at p. 376:

> *"14:87 There is overwhelming support from those commenting on the issue that in cases of capital offences the accused should have the right to appeal not only to the court martial appeal court but also to the supreme court ..."*
> *14:90 Recommendation:*
> *(a) Military courts and disciplinary tribunals should exist in army units and security organs*
> *(b) The field court martial should be abolished in order to give the accused a fair and just trial by giving him or he time to prepare his or her defence.*
> *(c) All members of the army and the members of the military courts in particular should be educated about military law and members of military courts should receive introductory courses in administration of justice before any court starts its duties.*

(d) Any soldier convicted of a capital offence should have the right to appeal to the Supreme Court."

Article 22 of the 1995 Constitution as amended provides:

"*No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court."*

The Constitution lists the Courts of record from the highest to the lowest; with the highest appellate Court referred to in the Constitution being the Supreme Court. There is no parallel judicial system with its own separate highest appellate Court when it comes to capital offences; especially due to the seriousness of the penalty, which involves the taking of life - the very bedrock and building block of all other rights. For the pronouncement on the application of the Constitution to the military courts in Uganda including the Field Court Martial, see the case of ***ULS & Karugaba v A.G Constitutional Petitions No. 02 0f 2002 and 08 of 2002***.

In some countries such as Canada, the military Courts do not even have jurisdiction over capital offences. Their broad criminal and military law jurisdiction exists for alleged offences committed within Canada. However, for the offences of murder, manslaughter, and abduction of a minor, if it is alleged to have been committed in Canada by military personnel, then the accused person must be tried in civil Courts.

I have also already held that the military Courts are Courts of law. However, they do not satisfy the requirements for Courts to handle capital cases, moreover as final Courts. I will revert to this later. The right of appeal in capital offences equally applies to civilians and persons subject to military law. Accordingly then, denying persons subject to military law the right of appeal infringes on their right to a fair hearing; and would thus be unconstitutional.

It has recently been held by the Court of Appeal that the right of appeal to the ordinary Courts from military Courts is unavailable since the UPDF Act does not provide for it (See: **PTE Muhumuza Zepha v Uganda Court Appeal Criminal App. No. 31 of 2016** (supra) delivered in February 2020. The Court also noted that:

"*The expression "highest appellate court" does not necessarily mean the Supreme Court of Uganda or the Court of Appeal of Uganda but the highest appellate court prescribed by Parliament. For purposes of the Uganda People's Defence Forces Act, the highest appellate Court is the Court – Martial Appeal Court unless otherwise prescribed by Parliament in future."*

I cannot agree with this construction given the clear provisions of Art 22 of our Constitution, and the construction I have already given to it. Besides s. 6(1) of the Law Revision (Penalties In Criminal Matters) (Miscellaneous Amendments) Act, 2021 provides as follows:

"*Confirmation of a sentence of death. (1) Where court passes a death of death on any person, the registrar of that court shall, where the convicted person does not appeal the sentence within the prescribed time, transmit to the Supreme Court a copy of the*

judgment and proceedings of that court within thirty days after the conviction for confirmation."

This provision should be read together with section 6 (7) and 6 (6) (a) of the same Act, which grants the Supreme Court as the highest appellate Court in the land a supervisory role over the death penalty. Section 6(7) provides "*a sentence of death imposed by a court of judicature or a court or tribunal established under the U.P.D.F Act, 2005 shall only be carried out after it has been confirmed by the highest appellate court and upon an order of the President issued under subsection 6(a*)." As a matter of interpretation, '**S**upreme **C**ourt' in section 6(1) of the Law Revision (Criminal Penalties) (supra) as opposed to 'supreme court' clearly refers to the one Supreme Court of Uganda under the 1995 Constitution. The interpretation that 'highest appellate court' does not refer to the Supreme Court limits the rights of military personnel as compared to civilians in capital cases, in a way that is not justified under Art 43.

In the case at hand the Respondent/Cross Appellant was charged in the GCM, with offences that are all capital offences, for which, on conviction, a person is liable to be sentenced to the penalty of death. There is currently no right of appeal from the courts martial to the Supreme Court. Any law where there is no provision for the right of appeal to the Supreme Court for a person who, upon trial and conviction, is liable to suffer the penalty of death, is inimical to the right to a fair hearing; hence, it contravenes Arts. 22 (1), 21, 28. and 44 of the Constitution.

Conclusion

Having regard to what I have discussed above on this issue in the light of the rights to a fair trial enshrined in our Constitution, I find that the safeguards for independence and impartiality of the military Court system in Uganda, and their procedures for trial do not guarantee a fair trial. It is evident that the GCM lacks the independence and impartiality required under the Constitution for it to subject the Respondent to a fair trial. The misgivings of the Respondent that the General Court Martial was not objectively independent and impartial was justified. This situation is precisely what Twinomujuni JA addressed in ***ULS & Karugaba v A.G*** (supra) when he stated thus:

> "*In my humble opinion, 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."*

Therefore, in the light of my finding that the GCM is not a fair and impartial Court, the arraignment of the Respondent before the GCM, to face trial therein, is unconstitutional as it contravenes Arts. 128, 28, and 44 (c) of the Constitution. I am therefore in full concurrence with the Constitutional Court in this regard; and accordingly, Ground 2 of the appeal fails.

The next two grounds concern the competence of military courts. Competence is used in various contexts. According to ***Black's Law Dictionary, Bryan A. Garner, 8th Edition*** at p. 302, competence refers to "*the capacity of an official body to do something.*" It is also defined as a "*basic or minimal ability to do something.*" In terms of military courts, I will consider competence in terms of their jurisdiction; which falls in two categories. First, which is

covered under Ground 3 of the appeal, and the cross appeal, is the personal jurisdiction. This is with regard to the persons that can lawfully be tried by these courts. Second, which is covered under Ground 4 of the appeal, is the subject matter jurisdiction. This pertains to the offences triable by these courts.

Ground 3, and the Cross-Appeal.

The issue touching on the competence of the GCM raised in Ground 3, the cross appeal, and to some extent Grounds 1 and 4 of the appeal, pertains to persons who can be lawfully arraigned and tried before the GCM or what I also termed personal jurisdiction. This is pursuant to the wide jurisdiction accorded the GCM, to try civilians both for military and civil offences; whether as accomplices under the impugned s. 119 (1) (g) (now 117 (1)(g)) of the UPDF Act, or as principals under s. 119 (1) (h) (now 117(1)(h)) of the Act, for unlawful possession of the items specified therein. Both sections of the Act derive legitimacy from the impugned sections 2 (now s. 1) and 179 (now s.177) of the UPDF Act.

I have already found that the provisions for the Military Courts do not have the requisite safeguards that would ensure fairness and impartiality in the exercise of their judicial function. I should point out that even if they passed the test for fairness and impartiality, it would still be incumbent on this Court to determine whether, or not, it is constitutional to try civilians in the GCM or other military courts/tribunals. The question whether or not civilians should be triable in the military tribunals or 'courts' should be determined

both by the Constitutional provisions in that regard, and best practices obtaining in a democratic society.

I will first set out the impugned provisions. Under the UPDF Act, only persons subject to military law can be subjected to trial in a Court Martial for a service offence. A service offence is defined in section 2 of the Act thus:

> "*service offence" means an offence under this Act or any other Act for the time being in force, committed by a person while subject to military law;"*

In ***A.G v Uganda Law Society*** (supra), Mulenga JSC authoritatively espoused the position of the law regarding personal jurisdiction of the Court Martial, as follows:

> *"I agree that the appellant's contention is untenable. For an offence under an Act other than the UPDF Act to be within the jurisdiction of the General Court Martial, it must have been committed by a person subject to military law. In the instant case it was not alleged, let alone shown, that the accused persons committed either of the two offences while they were subject to military law. Without that link neither of the two offences can be called a service offence within the meaning of the said definition." (**Emphasis added**)*

Persons subject to military law are listed under the impugned section 119 (1) (g) & (h) (now 117 (1) (g) & (h)) of the UPDF Act, as follows:

> *"**119. Persons subject to military law.***
>
> *(1) The following persons shall be subject to military law-*
>
> *(a) every officer and militant of a Regular Force;*

(b) every officer and militant of the Reserve Forces and any prescribed force when he or she is—

(i) undergoing drill or training whether in uniform or not;

(ii) in uniform;

(iii) on duty;

(iv) on continuing full time military service;

(v) on active service;

(vi) in or on any vessel, vehicle or aircraft of the Defence Forces or any defence establishment or work for defence;

(vii) serving with any unit of a Regular Force; or

(viii) present, whether in uniform or not, at any drill or training of a unit of the Defence Forces;

(c) subject to such exceptions, adaptations, and modifications as the Defence Forces Council may by regulations, prescribe, a person who under any arrangement is attached or seconded as an officer or a militant to any Service or force of the Defence Forces;

(d) every person, not otherwise subject to military law, who is serving in the position of an officer or a militant of any force raised and maintained outside Uganda and commanded by an officer of the Defence Forces;

(e) every person, not otherwise subject to military law, who voluntarily accompanies any unit or other element of the Defence Forces which is on service in any place;

(f) every person, not otherwise subject to military law, while serving with the Defence Forces under an engagement by which he or she has agreed to be subject to military law;

(g) every person, not otherwise subject to military law, who aids or abets the commission of a service offence;

(h) every person found in unlawful possession of—

(i) arms, ammunition or equipment ordinarily being the monopoly of the Defence Forces; or

(ii) other classified stores as prescribed. ***(Emphasis added)***

Both paragraphs (g) and (h) of section 117 (1) of the Act are wide enough to encompass civilians within its purview.

Section 117 (1) (h).

This provision does not provide for the penalty a person found in unlawful possession of the items listed therein. However, section 179 (now s.177) of the Act cures this by bringing the penalty provisions in other enactments into application, by providing thus:

"179. Service trial of civil offences.

(1) A person subject to military law, who does or omits to do an act—

(a) in Uganda, which constitutes an offence under the Penal Code Act or any other enactment;

(b) outside Uganda, which would constitute an offence under the Penal Code Act or any other enactment if it had taken place in Uganda, commits a service offence and is, on

conviction, liable to a punishment as prescribed in subsection (2).

(2) Where a military court convicts a person under subsection (1), the military court shall impose a penalty in accordance with the relevant enactment and may, in addition to that penalty, impose the penalty of dismissal with disgrace from the Defence Forces or any less punishment prescribed by this Act."

With regard to the penalty for the offence of unlawful possession under section 119 (1) (h),by virtue of s.179, reference can thus be made to the penalty in the Firearms Act and the Penal Code Act, on unlawful possession of firearms and government stores respectively. By virtue of the provision of section 4 of the Firearms Act Cap 320, as amended, a civilian convicted of unlawful possession of arms and equipment specified under s. 117 (1) (h) of the UPDF Act is liable to 10 years imprisonment or to a fine not exceeding 60 currency points. Under section 296 of the Penal Code Act Cap 128, the offence is a misdemeanor, which attracts a penalty of not more than 3 years imprisonment. Section 117 (1) (h) of the UPDF Act is also operationalized by the *Uganda Peoples' Defence Forces (Arms, Ammunition And Equipment Ordinarily The Monopoly of The Defence Forces) Regulations, No. 13, 2006,* which lists the arms and equipment s. 119 (1) (h) of the UPDF Act refers to.

Section 119(1) (g).

When section 119 (1) (g) of the Act is read together with sections 1 and 179 of the Act, they have the effect of providing that a civilian is liable, as an accomplice to a person subject to military law; whether for an offence falling both within and outside the UPDF Act. A key ingredient for the sustenance of

the charge against a suspect as an accomplice is the naming, in the charge sheet, of a principal alleged to have committed the offence; which the person charged together with the principal allegedly aided or abetted. This is clearly what the ordinary meaning of the words used in the provision mean. I would accordingly agree with the majority decision of the Constitutional Court that in failing to name, in the charge sheet, the principal to whom the Respondent was allegedly an accomplice, rendered his being charged before the Court Martial under the provisions of the then s. 119 (1) (h) of the UPDF Act, unlawful, for being defective. However, should it be determined that the military court has no jurisdiction to determine matters involving civilians at all, this finding will be of no effect.

It is important to note that hitherto, the issue of the lawfulness of trial of a civilian in a Court Martial has not been directly considered in this Court. Admittedly, a similar issue was raised in the Supreme Court case of ***Attorney General vs ULS*** (supra); albeit that it was not argued. In that case, the charges against the accused persons before the General Court Martial were, unlike the instant one, not offences under the UPDF Act, but those incorporated from other enactments pursuant to the provision of s. 179 of the UPDF Act 2005. One of the offences was terrorism contrary to section 7(1) (b) and (2) (j) of the *Anti-Terrorism Act, 14, of 2002*; while the other, which was in the alternative, was the offence of "Unlawful Possession of Firearms contrary to section the then 3 (1), and (2) of the *Firearms Act*. The Supreme Court noted that an issue had been raised in that case in the Constitutional Court, in ***Constitutional Petition No. 18 of 2005***, thus: *"(4) Whether the joint trials of civilians and members of Defence Forces in military court for offences under the UPDF Act is inconsistent with Articles 28 (1), 126 (1) and 210 of the Constitution".* However, that issue

was abandoned in the Supreme Court. It has now presented itself before this Court again, affording the Court the opportunity to pronounce ourselves on the matter; and bring closure thereto.

Regarding the instant appeal before this Court, the divergence in opinion within the Constitutional Court on the lawfulness of trial of civilians in the Courts Martial, hinged on two decisions: ***Namugerwa Hadijah v The DPP & A.G Supreme Court Civil Appeal No. 04 0f 2012*** (The Namugerwa case) and ***2nd Lt. Ambrose Ogwang v Uganda Court of Appeal Criminal Appeal No. 107 of 2013*** (The Lt. Ogwang case**)**. It is thus important to set them out here in more detail. The appeal in the ***Namugerwa*** case originated from a *habeas corpus* application made by the Appellant in the High Court for the release of her brother from detention. The contention in the High Court was that the detainee was a civilian over whom the General Court Martial had no jurisdiction; hence, he was being unlawfully detained. The application and subsequent appeal to the Court of Appeal failed; hence her appeal to the Supreme Court.

The Supreme Court found that a proper reading of s. 119 (1) (g) and (h), s. 179 (1) and s. 2 of the UPDF Act, showed that they do not exempt civilians from trial in military Courts. The Court observed as follows:

> *"From the above cited provisions, it is clear to me that civilians in Uganda can become subject to military law, and once they become subject to military law they will be tried by the General Court Martial. I am unable to see any exemption of civilians from the application of section 179 of the Act once they become subject to military law under section 119 (1) (g) and (h) of the UPDF Act."*

The Court had however realized the troubling nature of the provisions of sections 119 (1) (g) and (h) of the UPDF Act; which allow trial of civilians in military Courts as accomplices, and for other civil offences under any enactment. The Court felt obliged to apply the law as it is; but it noted as follows:

> *"Ordinarily civilians who are not involved in fighting wars should be tried by civilian courts, not military courts. Therefore, s. 119(1) (g) and (h) of the UPDF Act is rather unusual. However, the constitutionality of this section was upheld by the Constitutional Court in* ***Uganda Law Society vs. Attorney General*** *(supra) and when its decision was appealed to this court the constitutionality of the section was not raised and argued by the cross appellant (Uganda Law Society), and so this court did not address. Therefore, until section 119 (1) (g) and (h) of the UPDF Act is repealed or declared to be unconstitutional by a competent court, it will remain valid, effective and enforceable regardless of the misgivings of human rights advocates about it."* ***(Emphasis added)***

In the ***2nd Lt Ogwang*** case, the Appellant was tried and convicted by Divisional Court Martial, of murder; and was sentenced to suffer death. His appeal to the GCM and to the Court Martial Appeal Court (CMAC) under the repealed UPDF Act Cap 307, failed. He then appealed further to the Court of Appeal; which held that the military Courts were not Courts as provided for under Cap. 8 of the Constitution, but were tribunals otherwise known as quasi-judicial bodies. The Court held that the Courts Martial were incompetent to try civilians due to the fact that they are not clothed with the independence or impartiality guaranteed under Art. 28 (1) of the Constitution. The Court

further held that quasi-judicial bodies must observe certain principles of law; and must have limited jurisdiction, similar to that of the disciplinary courts of the Police Force, and other bodies with such courts.

As I have already pointed out, I concur with Madrama Izama JCC in his dissenting judgment in the constitutional petition that has given rise to the instant appeal, that the cases of ***2nd Lt Ogwang*** *and* ***Namugerwa Hadijah*** being ordinary appeals, the decisions therein were not binding on the Constitutional Court; hence, it was up to the Supreme Court to clarify on this issue. Therefore, it means that ***2nd Lt Ogwang*** was decided *per incuriam***.** The question in this issue is therefore whether, or not, in a typical progressive democratic society, civilians may be tried in the military courts.

In considering the constitutionality of the impugned sections, 2, 179, and 119 (1) (h) & (g) as revised, I will consider our international obligations under the International Conventions, our Constitution, our history, international State practices, and the purpose and effect test.

International jurisprudence & conventions

While there is no international treaty, to which Uganda is a party, which contains an express provision prohibiting the trial of civilians by military courts, there is nonetheless international consensus that the jurisdiction of such courts needs to be restricted. Three reasons are discernible for this proposition. First, is the general rule that it is ordinary courts that guarantee a fair and impartial hearing that should have general jurisdiction over civilians. Second, is that military discipline mostly concerns acts or omissions of military personnel, which specialized military courts are set up

to handle. Third, is the complaints to international human rights bodies over violation of the rights to a fair hearing in military courts or tribunals.

Ordinary courts guarantee a fair and impartial hearing.

There is global advocacy for civilians to be tried only in ordinary Courts. This view is in line with the expert opinion of the United Nations (See: ***Human Rights Report of the Working Group on Arbitrary Detention, 30th June 2014)***. On the competence of military courts to try civilians, Principle No. 5 of the ***Decaux Principles*** (supra) states as follows:

> *"Military courts must, as a matter of principle, be incompetent to try civilians. In all circumstances, the State ensures that civilians accused of a criminal offense, whatever its nature, are tried in civil courts.*"

At the sixty-eighth session of the UN General Assembly held on August 7, 2013, the Secretary-General of the United Nations transmitted to the Assembly the report of the Special Rapporteur on the independence of judges and lawyers for consideration. The relevant paragraphs of this report read as follows:

> *"The Special Rapporteur wishes to stress that trying civilians before military or special tribunals raises serious doubts as to the independence of the judiciary declared by military tribunals and respect for the guarantees set out in article 14 of the Covenant. It therefore considers that the competence of military courts should be restricted to strictly military offenses committed by members of the personnel of the armed forces. (...)*
>
> *V. Conclusions (...)*

It appears from the case law on military tribunals by the Committee on human rights and international and regional human rights mechanisms that the independence and impartiality of these courts, the trial of civilians or soldiers accused of serious human rights violations and the guarantees of a fair trial before these courts are a serious problem. (...)

100. All military tribunals must try only members of the armed forces who have committed a military offense or a breach of military discipline.

101. The trial of civilians by military courts should be prohibited, subject to the sole exception provided in paragraph 102 below. Any military tribunal established on the territory of a State may in no case exercise its jurisdiction over civilians accused of a criminal offense in that territory."

This view is also similar to that of the European Court of Human Rights. See: ***Mustafa v Bulgaria Request No. 1230/17, decided on 28th November, 2019.*** In ***Mustafa v Bulgaria*** (supra) the European Court of Human Rights reasoned that:

"Situations in which a military tribunal exercises jurisdiction over a civilian for acts directed against the armed forces may give rise to reasonable doubts as to the objective impartiality of such a tribunal (Ergin, cited above, § 49). The Court considers that this is all the more so when it comes to common law offenses, taking into account, in particular, the evolution of the conception of the role of military tribunals at the international level ... A judicial system in which a military court is called upon to try a non-military person can easily be seen as destroying the necessary distance between the court and the parties to criminal proceedings, even if there are measures of sufficient protection to guarantee the independence of this jurisdiction (Ergin, cited above, § 49).

The Inter-American Commission on Human Rights (IACHR) is an autonomous organ of the Organization of American States (OAS) whose mission is to promote and protect human rights in the American hemisphere. It investigates human rights violations, monitors the human rights situation in member states, and advocates for the protection of human rights throughout the region.

In its 1997 and 1998 reports, the IACHR noted that:

> *"Citizens must be judged pursuant to ordinary law and justice and by their natural judges. Thus civilians should not be subject to Military tribunals. Military justice has merely a disciplinary nature and can only be used to try armed forces personnel in active service for misdemeanours or offences pertaining to their function."*

See also: ***Annual Report of the Inter-American Commission on Human Rights - 1997. Organization of American States document OEA/Ser.L/V/II.98, doc.6, 17 February 1998, Chapter VII, Point 1;*** and ***Annual Report of the Inter American Commission on Human Rights - 1998. Organization of American States document OEA/Ser.L/V/II. 102, doc. 6 rev., 16 April 1999, Chapter VII.*** See also ***Cantoral Benavides v Peru - Judgment of 18th August 2000 Series C No. 69 para 112-113.***

The IACHR restated this position in ***Castillo Petruzzi et al v Peru - Judgment of 30th May 1999 Series C No. 52, para 128-130*** that:

> *"[a] basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law".*

Citing the United Nations Basic Principles on the Independence of the Judiciary, the Court said that:

> "*States are not to create '[tribunals that do not use the duly established procedures of the legal process [...] to displace the jurisdiction belonging to the ordinary courts or judicial tribunals*."

See also: ***The Annual Report of the Inter-American Commission on Human Rights – 1996; Organization of American States document OEA/Ser. L/V/II.95, doc. 7 rev., 14 March 1997, Chapter VII,*** that:

> *"Member states that have not already done so take the legislative and other measures necessary, pursuant to Article 2 of the American Convention, to ensure that civilians charged with criminal offences of any kind be tried by ordinary courts which offer all the essential guarantees of independence and impartiality, and that the jurisdiction of military tribunals be confined to strictly military offences."*

The position of the Inter-American Commission of Human Rights (IACHR) is similar to that of the African Commission. Some of the relevant principles currently governing military trials within the African Region, which discourage civilian trials in military courts, are:

(i) *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.*

(ii) *Principles and Guidelines on Human and Peoples Rights While Countering Terrorism in Africa.*

(iii) *Resolution on the Right to a Fair Trial and Legal Assistance in Africa.*

(iv) *Resolution on the Right to Recourse and Fair Trial.*

(v) Resolution on the Respect and Strengthening of the Independence of The Judiciary.

In adopting the ***Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa****, at its 26th ordinary session held in November 1999 in Kigali, Rwanda*, the African Commission stated that:

> *'[T]he purpose of military courts is to determine offences of a purely military nature committed by military personnel ... [They should not in any circumstances whatsoever have jurisdiction over civilians.'*

It has also stated this position in its ***Principles and Guidelines on the Right of a Fair trial and Legal Assistance in Africa***, adopted in 2003 and has maintained this position in its individual communications, concluding observations, and recommendations in periodic state reports. In the ***Media Rights Agenda v Nigeria (2000) AHRLR 262 (ACHPR 2000)***, the Commission found that the arraignment, trial and conviction of a civilian by a special military tribunal, presided over by serving military officer, was a violation of ***Article 7 of the African Charter*** and ***Principle 5 of the UN Basic Principles on independence of the Judiciary***. Article 7 emphasizes the importance of fair trial guarantees, including the right to appeal to ordinary courts of law, the presumption of innocence before a competent court or tribunal, the right to legal representation, and the right to a trial within a reasonable time by an impartial court or tribunal. See also: ***Marcel Wetsh'okonda Koso & Ors v DRC (2008)*** *(supra)* and ***Media Rights Agenda v Nigeria*** *case* ***[(2000) AHRLR 262 (ACHPR 2000)***; where the African Commission held that the establishment of a military court whose jurisdiction extended to

hearing of civil acts perpetrated by civilians, was a blatant violation of article 7 of the African Charter.

Purpose of creation.

Military courts or tribunals are created to deal with discipline and regulation of the army. This rationale is well expressed in ***'R. Naluwairo, "Improving the administration of justice by military courts in Africa: An appraisal of the jurisprudence of the African Commission on Human and People's rights" (2019)19 African Human Rights Law Journal 43-61'***, at page 5, as follows:

> "*First, since the existence of military courts in many countries is largely justified by the need to maintain military discipline, it makes sense to restrict their jurisdiction to only acts and omissions and only committed by those individuals whose acts and omissions can negatively impact military discipline. For the most part these acts and omissions are military offences and the individuals whose acts and omissions mainly impact on military discipline are serving military personnel."*

Evidence of violation

In many African countries, like in many other States, it has increasingly been realized that many civilians have been tried by military courts that lack the safeguards of independence and impartiality accorded ordinary Courts. Many African states have previously had poor record with regard to the fairness, independence, and impartiality of military courts. This has been captured in ***R. Naluwairo, "Improving the administration of justice by military courts in Africa: An appraisal of the jurisprudence of the African Commission on Human and People's rights" (2019)19 African Human Rights Law Journal 43-61***, at page 44, where he points out that**:**

"Almost all African countries have military courts alongside civilian or ordinary courts. The main function of military courts is to administer justice with respect to military personnel and other persons subject to military law. This arrangement is mainly for the purposes of maintenance of military discipline which is considered critical for military efficiency ... The administration of justice by military courts ... in Africa raises many concerns that can lead an informed and objective person to conclude that what many of these courts actually do is to dispense 'injustice' rather than 'justice', as the case should be. The situation is mainly because military courts in African countries do not adhere to internationally- accepted principles for the administration of justice, which makes it easy for these principles to be abused by the executive. For the most part, the ... principles are ... what are comprised in the right to a fair trial. The right to a fair trial is provided for in article 7 of the African Charter on Human and People's Rights and article 14 of the International Covenant on Civil and Political Rights (ICCPR)."

Indeed an examination of the *African Commission's* jurisprudence paints a bleak picture of the lack of respect for human rights in the administration of military justice. For this reason, the *African Commission*'s position over the years has inched towards abolition of trial of civilians in military courts. R. Naluwairo in his work: ***"Improving the administration of justice by military courts in Africa ..."*** (supra), at p. 58, has attempted to explain the reason for the subsequent change in decision of the Commission as follows:

"*A question may be posed at this point: Why did the African Commission depart from its decision in the Civil Liberties case now rigidly to insist that*

*military courts should not have jurisdiction over civilians? First, since the existence of military courts in many countries is largely justified by the need to maintain military discipline, it makes sense to restrict their jurisdiction to only acts and omissions and only committed by those individuals whose acts and omissions can negatively impact on military discipline. For the most part these acts and omissions are military offences and the individuals whose acts and omissions mainly impact on military discipline are serving military personnel. Second, it is arguable that the other reason why the African Commission does not accept the trial of civilians by military courts is because of their bad track record as far as respecting the right to a fair trial and other human rights is concerned. As some of the cases analysed in the article have demonstrated, incidents of violations of fair trial rights by military courts in African countries are numerous. These range from staffing military courts with legally incompetent serving military personnel; holding trials in camera; adjudging accused persons guilty until proven otherwise; denying accused persons their right to counsel of their choice; and foreclosing possibilities of appeal from their decisions. In many cases the military courts also employ arbitrary procedures. In some countries, such as Uganda, for instance during Amin's regime, military courts could even conduct trials in the absence of accused persons, who would simply be informed of the court's decision and sentence. (**Emphasis added**)*

It is clear that in international jurisprudence, even if the move is generally to restrict civilian trial in military courts and tribunals, the practice oscillates between complete abolition of civilian trial in military courts and trial of civilians only in a certain category of cases as an exception. These categories include employees and dependants accompanying military personnel abroad,

among others. In the United States of America, that category has been further limited in ***Reid v Covert, 354 U.S. 1 (1957); Kinsella v United States ex re. Singleton, 361 U.S 23 (1960); McElroy v Unites States ex rel. Guagliardo,*** consolidated with ***Wilson v Bohlender, 361 U.S 281(1960); Grisham v Hagan 361 US 278 (1960)***; where the Court held that employees and dependants cannot be tried in military courts for both capital and non-capital offences.

Trial of civilians is sometimes permitted under International humanitarian law, declaration of martial law in a State, and those civilians who are assimilated in the military. The legal position in the United Kingdom is that a category of assimilated civilians are liable to trial in the military courts. ***Halsbury's Laws of England (Volume 3, 2019)*** explains in para 203 as follows:

> *"The disciplinary provisions of these codes are largely contained in the Armed Forces Act 2006, which provides a uniform service disciplinary code for the Royal Navy, the Army, and the Royal Air Force. This code of discipline for the armed forces is part of the ordinary law of the land, although it is applicable only to persons expressly made subject to it, either as members of the Royal Navy, the Army or the Royal Air Force, or as belonging to certain specified categories of civilians associated with the armed forces. It is not to be confused with what is called martial law, which comes into operation only when a state of actual war, or of insurrection or rebellion amounting to war, exists."*

However, it should be remembered that in the UK, civilians can be tried in military Courts. However, unlike in Uganda, they have safeguards within their

military structure since they have the courts martial, and the service civilian court with the power to try civilians.

There has been a move to find a middle ground that justifiably limits the category of civilians triable in military courts or tribunals. See: ***The Yale Draft Principles for Governing Administration of Justice through Military Tribunals***; and ***The Human Rights Committee observed in paragraph 22 of its General Comment No. 32*** that the trial of civilians by military or special courts should be done only in exceptional circumstances. Trials by military courts should be limited to cases where the State party to the Covenant can demonstrate *in concreto* that recourse to such courts is necessary and justified by *"objective and serious reasons"* and only where, in relation to the specific class or category of persons and offenses in question, ordinary civil courts are not in a position to undertake such trials. It is therefore incumbent on the State party, which seeks to try civilians before military courts to demonstrate, in relation to the specific category of persons in question that:

(a) The ordinary courts are not competent to hear the case.

(b) Other alternative forms of special or high-security civilian courts are inadequate for the task; hence, recourse to military courts is unavoidable.

(c) Referral to military courts guarantees full respect for the rights of the accused, as prescribed by article 14 of the Covenant.

Ugandan jurisprudence and the History of Uganda

Purpose and effect test

In the face of these divergent views, I find guidance in the principles of constitutional interpretation, one of which is the purpose and effect of creation of the military courts. The objective of any legislation has to be unmistakably clear; and the statement of purpose should, to the extent possible, be kept separate from the means adopted to achieve it (See ***R v Moriarity [2015] 1 R.C.S 485 at 498***). Court can examine the text, context and scheme of legislation in order to infer its purpose.

The purpose and effect test in principles of Constitutional interpretation is vital in determining the constitutionality of legislation. In ***The Queen v Big Drug Mart Ltd (1996) LRC (C0nst.) 332,*** in expounding on the importance of both the purpose and effect, Dickson J who delivered the judgment of the Court noted thus:

> *"In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity."*

He further explained:

"In short, I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose."

The purpose of the military courts provided for under the Constitution and the UPDF Act, as is discernible from the several decisions, principles and recommendations, I have cited or referred to above, is to promote and ensure discipline in the military. Courts martial, or tribunals, are specialized courts meant to serve the functions provided for in Art. 209 of the Constitution; for which they require the highest form of discipline. This is abundantly clear from the powers conferred on Parliament under Art. 210 of the Constitution to create organs of the UPDF that would promote the intended discipline. Therefore, with regard to the military, as can be seen from their structure, rules and procedures, conducting trial of civilians generally does not fit within their mandate.

The current effect of trial of civilians in the military courts for criminal offences is that they will not partake in the rights enjoyed by their civilian counterparts who appear in the civilian Courts for the same offences. This includes the right to a fair hearing discussed in the resolution of ground 2

under Art 28 (1) and as provided in the International Covenants discussed above. Worse still, such persons can face trial for offences whose trial are within the purview of the ordinary Courts; with the military courts having the right to impose the death penalty, and yet the law as it stands does not avail the convict the right to appeal to the Supreme Court. Is this limitation on their rights to appear before a civilian Court justifiable under Article 43 of this Constitution?

Article 43 provides that certain rights can be restricted in the public interest as justified in a democratic society. It states thus:

*"**43. General limitation on fundamental and other human rights and freedoms.***

(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit—

(a) political persecution;

(b) detention without trial;

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."

The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. See: ***Charles Onyango Obbo & Anor. vs Attorney General – Supreme Court Constitutional Appeal 2 of 2002.*** Therein Mulenga JSC observed:

"...[by] virtue of the provision in clause (1), the constitutional protection of

one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right or freedom "prejudices" the human right of another person; and (b) where such exercise "prejudice" the public interest. It follows therefore, that subject to clause (2), any law that derogates from any human right in order to prevent prejudice to the rights or freedoms of others or the public interest, is not inconsistent with the Constitution. However, the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces "a limitation upon the limitation". It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibit the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as "a limitation upon the limitation". The limitation on the enjoyment of a protected [right] in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society."

This case, therefore, brings out the point we know that the curtailment of the enjoyment of fundamental and other human rights and freedoms by Art 43 (1) of the Constitution is not without limitation. Its application is itself

fettered by being limited to what is acceptable in a free and democratic society.

According to ***Note 7*** (supra) in a report prepared by the Special Rapporteur on the independence of judges and lawyers for consideration at its sixty-eighth session, it was emphasized that:

> *"103. The burden of proving the existence of these exceptional circumstances lies with the State, these circumstances having to be established on a case-by-case basis, since it is not sufficient to refer certain categories of offenses to military courts by law in abstract."*

It is therefore incumbent on the Appellant to demonstrate that the trial of civilians by the military courts is connected to the purpose in Articles 209 and 210 of the Constitution in a way that is justifiable under Art 43 of the Constitution.

I take cognizance of the crucial need for military courts for the maintenance of discipline in the military; which thereby ensures the defence of, and security in, Uganda. I also take note of the fact that that there may be need to extend jurisdiction of the military courts to cover civilians who fall within the few exceptions in the application of the law as it obtains in other jurisdictions. However, extending the jurisdiction of the military courts to cover civilians in a blanket manner, whether they are alleged to be accomplices or alleged to have been found in possession of military store, is unacceptable. This is because it would turn out to be an unfettered limitation on the enjoyments of the rights and freedoms enshrined in Article 43 of the Constitution; which would therefore negate the letter and spirit of the

restraint imposed on the enjoyment the enjoyments of the rights and freedoms enshrined in Article 43 of the Constitution.

The general rule is that ordinary Courts alone have jurisdiction to try civilians. I am unable to find any rational or justifiable link between the need to maintain discipline in the army or the maintenance of security of the Ugandan borders, and trial of civilians in the military tribunals generally. This position is bolstered further in the light of my findings that trials in the courts martial are devoid of independence, fairness, and impartiality in the conduct of proceedings therein, and the reasons given by the various Commissions referred to that discourage trials of civilians by military courts.

The account in the ***Odoki Commission Report*** (supra) of the history of military trials in Uganda is not any better compared to the observations of the African Commission. That Report succinctly noted at page 376 that:

> "*14:87... It is also alleged that military courts tend to be more harsh with soldiers than ordinary courts are in dealing with civilians. While a soldier and civilian may commit the same criminal offence e.g armed robbery, the soldier will usually be heavily punished while the civilian will often receive a lighter sentence. There is even a suggestion that civilian courts are more careful in dealing with evidence and in considering technicalities so that more defendants are acquitted for lack of evidence. To some people, there are double standards involved. They suggest that where an offence involves both a civilian and a soldier, both defendants should be tried under the same law an in the same court. A soldier could thus be tried in either the*

*ordinary court or the court martial depending on whether a civilian co-*defendant *is involved.*"

At page 375, under the heading 'military courts' the Report does not indicate that the members of the Odoki Commission exhaustively discussed or gave much thought to the issue of trial of civilians. However even then, it is clear that at that time, only a limited category of civilians working closely with the military were triable in the military courts. The Report continues:

"*14.82 In most countries, special courts deal with disciplinary and other offences occurring among members of military forces. Uganda follows this pattern, and the NRA Statute (Statute No. 3 of 1992) provides for military courts that have jurisdiction to deal with a range of matters concerning not only members of the army but also civilians working closely with or entrusted with the secrets of the army. The statute stipulates the composition and responsibilities of military courts at different levels of the army." (emphasis added)*

It is apparent that the provisions of the UPDF Act, constitute a departure from the previous position where civilians were generally not triable before the courts martial. It is also worth noting at this point that Uganda has been on the watch list of the African Commission for trial of civilians.

The African Commission had long condemned the trial of civilians in Uganda. See: ***The African Commission Concluding Observations and Recommendations on Uganda's third periodic report, 2009***; where the Commission noted with concern that Uganda had not introduced measures to limit the many categories of civilians triable in its military courts and tribunals to what is acceptable in

international human rights law; which was contrary to what the Commission had recommended in 2006.

I am fortified in my view because the offences we are concerned with here are among those that could be classified as '*political offences*' where the State has a special interest since the charge against the accused person is that he sought to overthrow the lawful government of Uganda. This has been recognized in the treason trial of ***Castillo Petruzzi et al v Peru Judgment of 30th May 1999 Series C No. 52, para 128-130,*** where the IACHR held unequivocally as follows:

> *"[I]n the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have ..."*

Even in the Ugandan setting, the ***Odoki Commission Report*** documents people's concerns over the military's involvement in the political persecution of civilians. It noted as follows:

> *"**Politically sensitive offences***
> *14.40 Although the army should not be a political actor, it should be politically educated and sensitive. People's views agreed that the army has often been manipulated by major political actors. A politically aware army would be more conscious of the dangers of such manipulation happening in the future.*
> *14.39 The people want the army to be the servant of the people. Hence, it must always be firmly under the direction of the people's representatives,*

namely the elected civilian authorities. It should never seek to usurp that authority or to become actively involved as a major political force."

The result of my finding is that in a case where a civilian and military personnel have committed a crime, both should be tried in the civil courts. This position was also recommended In ***Mustafa v Bulgaria Application 1230/17 delivered on 28th November 2019***, the Applicant was charged with organizing and leading a criminal group with the aim of obtaining financial advantages as well as illicit cross border trafficking of goods and objects of great value for commercial purposes. Owing to the fact that one of the presumed members of the group had been a member of the armed forces at the time, all the members of the group were subjected to trial by a military court. The relevant provision of the Bulgarian 2006 Code of Criminal Procedure (ccp) provided as follows:

"1. The military courts are competent to hear offences committed by:

(1) Soldiers (...)

(2) Military Courts are also competent to hear (...) cases offences committed jointly by military personnel and civilians."

The Applicant maintained that his appearance, as a civilian, before courts composed exclusively of military personnel, in itself constituted a violation of Article 6 § 1 of the Convention, the relevant parts wherefore, in the circumstance of the instant appeal before this Court, read as follows:

"Everyone has the right to have their case heard fairly (...) by an independent and impartial tribunal, established by law, which will decide (...) on the merits of any criminal charges brought against them." The Court said:

""32. The Court observes that it cannot be argued that the Convention absolutely excludes any jurisdiction of military courts to hear cases involving civilians. However, it considers that the existence of such a competence should be examined in particular."

... ...

47. The Court accepts that the considerations relating to the connection between offenses and aiding and abetting militates in favor of the trial of all the accused by the same court. However, the need to have the case tried by a military tribunal cannot be taken as absolute. Indeed, in some cases, it could be considered to try all the accused by a civil court. Consequently, the Court cannot agree with the argument put forward by the Government that these considerations are in themselves sufficient to constitute in the present case "compelling reasons" justifying the judgment of a civilian by a military criminal court ... ...

Coincidentally, this position is in congruence with the popular views expressed by the people of Uganda during the process that preceded the framing and promulgation of the 1995 Constitution. The ***Odoki Commission Report*** (supra) states at page 376 thereof that:

"14:87 ... They suggest that where an offence involves both a civilian and a soldier, both defendants should be tried under the same law an in the same court. A soldier could thus be tried in either the ordinary court or the court martial depending on whether a civilian co-defendant is involved."

The special place occupied by the army in the constitutional organization of democratic states must be limited to the domain of national security; with

the judiciary, in principle, falling within the domain of civil society. With the existence of special rules governing the internal organization and hierarchical structure of the armed forces, the power of military criminal justice should extend to civilians only where there are compelling reasons justifying such a situation, based on a clear and predictable legal basis. The existence of such reasons justifying the extension of trials in military courts to civilians must in each case, be demonstrated to be concrete.

There is danger in attribution, in the abstract, of certain categories of offenses to the military courts by the national legislation (See para 46 of ***Mustafa v Bulgaria*** (supra); because such an attribution could place the affected civilians in a position markedly different from that of citizens tried by ordinary Courts. Although military courts could respect Convention standards to the same extent as ordinary courts, the differences in treatment relating to the nature and purpose of such courts can give rise to the problem of inequality before the courts; which should, as much as possible, be avoided.

From the peculiar facts of the instant case, as is discernible from the record of appeal, it is clear that:

(i) There were no exceptional conditions recognized, such as those provided for under international humanitarian law.

(ii) The ordinary Courts were not shown to be incapable of trying these offences.

(iii) There was no assessment of the individual circumstances apart from the fact that one of the accused was military personnel at the material time.

(iv) There was no claim that the Respondent was assimilated in the army or in active service;

(v) There are in existence other special or high-security civilian courts such as the High Court with jurisdiction to try such offences as those falling under the Anti-Terrorism Act, which have the competence to try the Respondent; hence, even if such trial were permissible with some limitation, the circumstance of this case did not warrant recourse to military courts.

In conclusion, the provisions for the blanket trial of civilians in the military courts either as principals in s. 117 (1) (h) or as accomplices in s. 117 (1) (g) does not satisfy the limitation requirements of Article 41 of the Constitution. They are unconstitutional. Likewise, the act of the trial of civilians in the civilian Courts under those provisions is unconstitutional. Civilians include retired military service men. Ground 3 of the appeal would fail; while the cross appeal succeeds.

Before I take leave of this matter, I would like to comment on and discount some arguments or rationale raised and advanced for the grant of jurisdiction to military courts over civilians to try some serious offences. One of these is that military courts are more efficient in determining cases and these could be very important to the security of the country. Indeed, Counsel for the Appellant urged this Court to be mindful and consider the need to firmly deal with such acts in the military courts, when they happen. This seems to

indicate that the military courts are more efficient in doing so. This argument is not sound. The State can establish lawful special military courts within the framework of the Constitution with the necessary minimum guarantees and resources necessary to undertake those judicial duties. Further, the State also has a duty to strengthen the ordinary Courts and thus empower them to function at an optimal capacity.

Grounds 1 and 4: Jurisdiction over subject matter.

The impugned sections of the UPDF Act under Grounds 1 and 4 of the appeal, are: s.2 (now s. 1), s.179 (now s.177), and s.119 (1) (h) (now s.117 (1) (h)). The Appellant vehemently defends and justifies the competence of military courts to try offences under all enactments. The majority decision of the Constitutional Court from which this appeal arises is that Courts martial are only competent to handle those disciplinary offences under Part VI of the UPDF Act; as they are offences concerning the maintenance of discipline in the military. This was also their decision in the more recent case of ***Rtd. Cpt. Amon Byarugaba & 3 Ors v A.G Const. Petition No. 44 of 2015***, which is pending before this Court on appeal; and which Counsel for the Respondent/Cross Appellant urged this Court to consider. This Court's decision in this appeal therefore has a direct effect thereon.

I notice that the terms 'military offence', 'disciplinary offence' or 'service offence' are used in some texts to refer to military disciplinary offences within the military court or tribunal system. In this judgment, I use these terms interchangeably to refer to those offences listed under Part VI of the UPDF Act. Section 2 (now s.1) of the UPDF Act defines a *'service offence'* to

mean:*"... an offence under this Act or any other Act for the time being in force, committed by a person while subject to military law."* (***Emphasis added***)

Section s. 119(1)(h) (now s.117 (1)(h)), provides for the offence of unlawful possession of arms, ammunition, or equipment, ordinarily being the monopoly of the Defence Forces, or other classified stores, as may be prescribed. The penalty for this offence is not provided for within that section but in s.179 (now s.177) which allows the military court to impose any penalty provided for under any other enactment; in this case the Penal Code Act and the Firearms Act. Section 2 (now s.1), together with s.179 and s.119(1)(h) (now s.177 and 117 (1)(h) respectively) of the UPDF Act are the basis for concurrent jurisdiction of the military and civilian courts in criminal offences. I need to draw attention to the provision of section 204 of the UPDF Act; which provides as follows:

"*204. Jurisdiction of civil court*
Nothing in this Act shall affect the jurisdiction of any civil court to try a person for an offence triable by that court."

Notwithstanding that section 204 of the UPDF Act does not exclude the jurisdiction of the civil Courts, there are no objective criteria for determining which of the two Courts should try a person for an offence where Courts Martial and civil Courts have concurrent jurisdiction. The practice that has been demonstrated in Uganda, is that the military establishment prefers to try both the military personnel and non-military persons in military courts, even if the offence they are accused of is only remotely related to matters of the military. Even without going into the question of the competence of the

military courts, this selective lopsided choice of the court that should exercise jurisdiction, naturally gives rise to justifiable discontent and challenge.

The Appellant indeed recognizes that the provisions are wide and renders nearly every offence subject to prosecution within the military justice system. Indeed, by virtue of the impugned sections, they include all criminal offences. Thus, it is apparent that *'Service offence'* under the UPDF Act is wider than the disciplinary offences provided for under part VI of the UPDF Act. This jurisdiction extends to cases reserved for specialized Courts, such as the Anti-corruption Court under the Anti-corruption Act, International Crimes Division under the Anti-Terrorism Act; and as well jurisdiction over disciplinary offences under the UPDF Act that duplicate offences falling under these Acts. The expansive scope of jurisdiction of the Courts Martial under the impugned provisions was disapproved of by the Constitutional Court in ***2nd Lt Ambrose Ogwang v Uganda - Court of Appeal Criminal Appeal No. 107 of 2013*** (Lt Ogwang case) where the Court stated that:

> *"The effect of s. 179 is to turn all criminal offences into service offences for persons subject to military law. The section grants jurisdiction to military courts to try all civil offences under any law rather than creating military offences."*

The question here, for consideration, is the constitutionality of this provision, in the light of Arts. 28 (1) and 44 (c) of the Constitution, which the Respondent contends requires trial of criminal offences in ordinary Courts before civil judges. Article 28 provides:

"***28. Right to a fair hearing.***

(1) In the determination of civil rights and obligations, or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law."

Article 44 provides thus:

"***44. Prohibition of derogation from particular human rights and freedoms.***

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-

... ...

(a) the right to a fair hearing;"

The argument of Counsel for the Respondent on the provision of the UPDF Act regarding this issue is in accord with the arguments in Ground 2 of this appeal, that these provisions bring civilians within the purview of military courts in usurpation of the powers granted to the judiciary by the Constitution. Having found that the Courts martial should not generally try civilians, I would narrow the issue at hand thus:

'*Should military officers be tried in the Courts martial for all civil offences in addition to disciplinary offences?*' *Does their trial in the Courts Martial for civil offences contravene Arts. 28 (1) and 44 (c) of the Constitution?*

Article 28(1) of the Constitution does not expressly bar trials of military personnel in a specialized military court, which meet the criteria discussed in ground 2. This is because judicial power can properly be given to specialised courts. However, I have already determined that every person has

a right to appear before the ordinary or civil Courts in criminal as opposed to purely disciplinary offences. Judicial power generally has been given to the Judiciary under Art 126(1). Only exceptionally are they granted to the military courts. Does that exception include trial of military personnel for crimes under other enactments?

I find the answer to this narrower issue in the determination of the purpose and effect of the impugned provisions. Counsel for the Appellant, contending that the continued trial by the GCM of both criminal and civil offences is Constitutional, argues that these sections are necessary and serve the purpose of maintaining discipline in the army by quickly dealing with any indiscipline arising within the UPDF irrespective of the Act where the offence is prescribed or offence committed. For convenience, I will restate the provisions of the Constitution and UPDF Act that provide for the objective of the impugned sections. Article 209 provides for the function of the UPDF, thus:

"209. Functions of the defence forces.

The functions of the Uganda Peoples' Defence Forces are—

(a) to preserve and defend the sovereignty and territorial integrity of Uganda;

(b) to cooperate with the civilian authority in emergency situations and in cases of natural disasters;

(c) to foster harmony and understanding between the defence forces and civilians; and

(d) to engage in productive activities for the development of Uganda.

The long title of the UPDF Act states that it is "***An Act to provide for the regulation of the Uganda Peoples' Defence Forces <u>in accordance with article 210</u> of the Constitution, to repeal and replace the Armed Forces Pensions Act and the Uganda Peoples' Defence Forces Act, and for other related matters.***" Article 210 of the Constitution confers on Parliament the authority to enact laws regulating the UPDF, as follows:

"210. Parliament to regulate the Uganda Peoples' Defence Forces.
Parliament <u>shall make laws regulating the Uganda Peoples' Defence Forces and, in particular, providing for</u>—

(a) the organs and structures of the Uganda Peoples' Defence Forces;

(b) recruitment, appointment, promotion, <u>discipline and removal of members of the Uganda Peoples' Defence Forces..."</u> (***Emphasis added***)

The importance of a disciplined army as a vital requirement was recognised at p.374 of the ***Odoki Commission Report*** (supra) thus:

> *"**Discipline and control.***
> *14.79 An army should be a disciplined body. It requires mechanisms for control on the use of arms and to enforce discipline and accountability within the institution. As already discussed, people have expressed deep concern about lack of discipline in the army over the last 25 years. The Armed Forces Act of 1964 which was supposed to regulate the discipline of the army was almost of no effect.*
> *... ... ...*
>
> *But what is most important is to have a disciplined force because even if barracks are moved into the country side, if they are undisciplined the soldiers will inconvenience the people they find there. The important thing is to educate ordinary soldiers about their role to ensure that they*

know and believe in their strict code of conduct. The command structure must be willing to enforce the code and to do so in military courts where necessary.

14.81 Recommendation

All soldiers should be taught the Military Code of Conduct which should be vigorously enforced."

The word "discipline" is neither defined in the Constitution, nor in the UPDF Act. However, ***Oxford Dictionary of English, 2nd Edition, 2003, OUP***, defines the word (noun) 'discipline' as:

"the practice of training people to obey rules or a code of behaviour, using punishment to correct disobedience; the controlled behaviour resulting from such training; activity that provides mental or physical training; a system of rules of conduct."

The ***Oxford Advanced Learner's Dictionary, International Student's Edition, 2006*** defines the word as:

"*The practice of training people to obey rules and orders and punishing them if they do not; the controlled behavior or situation that results from this training; to punish somebody for something they have done; to train somebody … to obey particular rules and control the way they behave.*"

The world over, because military personnel often put themselves at risk of injury or death in the performance of their duties within and outside the State, the military justice system puts a premium on the necessity for discipline and for cohesion of military units (See: ***R v Moriarity [2015] 1 R.C.S 485***

at 505). Indeed, it is widely accepted in all democratic societies that discipline in the military establishment is an imperative, due to the critical role it plays in the life of a nation. In ***R v Spear & Anor; R v Boyd; R v Williams & other appeals and applications [UKHL] 31 at para 3***, Lord Bingham explained as follows:

> *"Since the dawning of the modern age the defence of the state against the threats and depredations of external enemies has been recognised as one of the cardinal functions of government. To this end most countries have over time established regular armed forces, in this country a navy, then an army, and then in due course an air force. The effectiveness of such forces has been recognised to depend on their being disciplined forces: that is, forces in which lawful orders will be obeyed, the law will be observed and appropriate standards of self-control and conduct will be shown."*

The Court also pointed out three principles widely accepted in democratic societies; the second of which is that:

> *"... the maintenance of the discipline essential to the effectiveness of a fighting force is as necessary in peacetime as in wartime: a force which cannot display the qualities mentioned above in time of peace cannot hope to withstand the much more testing strains and temptations of war."*

From the provision of the Constitution, and the proposition above, I would hold that the maintenance of discipline is a valid purpose of the impugned provisions of the UPDF Act.

The next question is whether the restriction in the rights of the military personnel to appear before ordinary courts is justifiable under Art 43 of the

Constitution (See ***Charles Onyango Obbo & Ors v A.G*** (supra). The proponents of the inclusion of other criminal offences within the purview of military courts justify it on the imperative need to ensure public order and welfare. Canadian military courts enjoy wide jurisdiction, just like the one conferred by the impugned provisions of the UPDF Act. In ***R v Genereux [1992] 1 S.C.R 259*** the Canadian Court alluded to the other function of the Code of Service Discipline, being the preservation of public order and welfare. It held at para 1 that:

> *"Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it also serves a public function by punishing specific conduct which threatens public order and welfare, including any act or omission punishable under the Criminal Code or any other Act of Parliament."*

The specific objective noted in ***R v Genereux*** (supra) on the public order and welfare is not a compelling consideration I need to take into account. In my considered view, since the functions of the UPDF provided in Article 209 of the Constitution do not include the maintenance of public order and welfare, it would be wrong to bring in such a consideration. Second, with regard to the Canadian jurisdiction, unlike the Ugandan experience, the outstanding feature that can give justification for the making of such additional consideration is the fact that its appellate military courts are manned by competent civilian judges who are appointed pursuant to, and clothed with the same safeguards and guarantees accorded to the judges exercising jurisdiction over ordinary Courts.

Third, history shows that discipline and public order and cohesion may result from other reasons other than the mechanism for crime and punishment. This is clear from the ***Odoki Commission Report*** (supra), which states at p. 365 thereof that:

> *"In general, the people believe that for most of the period since 1971, the army has suffered a severe lack of discipline. Low pay, poor morale and lack of clear sense of purpose saw many soldiers commit offences of all kinds with impunity. They used their guns to terrorise innocent people and enrich themselves. Criminals in uniform were rarely apprehended let alone charged or tried for the offences they committed."*

In some instances, it is not the indiscipline within the army, but rather extraneous factors such as the manipulation of the military from outside of its ranks, which is the source of the problem. The Report notes at p. 365 that:

> *"**Anti people and anti-democratic behaviour.***
> *14:30 There is concern about the general role played by the army over long periods since independence when it was an instrument for oppression of the people. Governments which had little popular support sought to stay in power through the use of terror. The people's rights to democratic participation were thereby suspended, and in the process, many other fundamental rights of people abused. The people want to be assured that never again will its national army behave this way."*

The Report went further to state that:

> *"People expressed the view that lack of discipline and terrorising of the people in part flowed from the fact that most - even at senior levels - were*

uneducated. They were ignorant about the world, human rights and freedoms and about the role a national army and patriotic soldiers should play."

Fourth, there are already mechanisms in place to exercise this public function such as the presence of the Police, the Prisons, the specific enactments against criminal conduct, and the presence of the Ordinary Courts to adjudicate and enforce them. In my view, the punishment of *specific conduct* outside what is provided for in the UPDF Act, but which threatens public welfare and order, cannot be construed to warrant grant of jurisdiction to try "*every criminal conduct"* provided for in every enactment. Otherwise, it would result in the military courts usurping the function granted to the ordinary Courts by the Constitution for the trial of those offences. It is only when it comes to trying military personnel abroad for offences committed abroad could there be a plausible argument in support for the wide jurisdiction of offences.

Even then, it would be a clear violation of the Constitution to try military personnel in a legal regime where there is no recourse to the civilian Courts by way of appeal. This has the danger of potentially plunging the country into the type of chaos that ensued when the military conducted what was a summary trial when it charged, tried, convicted and executed some of its military men in Karamoja within three days, for a capital offence; but without according them the right to appeal at all (See ***The Uganda Law Society & Jackson Karugaba vs The Attorney General - Constitutional Petitions Nos. 02 Of 2002 and 08 Of 2002).***

I otherwise make the well-considered finding that the purpose of the provisions in the UPDF Act including disciplinary offences that do not fall within the jurisdiction of the civil courts for trial by the courts martial, accords with the overall system of military justice; namely to maintain the discipline and efficiency of the military in the execution of its Constitutional mandate to preserve and protect the territorial integrity of Uganda. In ***R v Spear 2002] UKHL 31*** at ***4-5,*** Lord Bingham of Cornhill rightly stated that:

> *"The dual status of the soldier, as both soldier and citizen, raises no issue where he is said to have committed a purely military offence, that is, an offence which could not be committed by anyone who was not a soldier. Some such offences are potentially very serious: mutiny, desertion, absence without leave, striking a superior officer are examples. Since these are offences which cannot be committed by those not subject to military discipline, it is unsurprising that they cannot be tried in the ordinary courts of the land and can only be tried in a military tribunal.*

This purpose is in my opinion firmly anchored in the legislative text, when understood in its full context. It keeps the objective and means provided for in the enactment distinct; albeit that it is expressed in succinct terms and with some generality. I find that with regard to purely disciplinary offences, this is a valid purpose, whose effect I do not find useful to venture into. I will however proceed to consider the effect of the trial of military personnel for criminal offences falling within other enactments.

With regard to the effect of the legislation, it has to be shown first, that the provisions affect the liberty of persons subject to military law, and second,

that this liberty is put to risk in a way not connected to their purpose. Put differently, it must be shown that the impugned sections of the UPDF Act, enacted pursuant to Art 210 (b) of the Constitution, are overbroad in a manner that is not connected with their purpose; but instead go beyond the promotion of discipline and achievement of the functions under Art 209 and Art 210 of the Constitution.

On the liberty or rights, it is clear that the jurisdiction over civil offences granted to the military courts puts the liberty of these military personnel at risk because they carry the risk of some sort of punishment including fines, imprisonment and even death penalty when they are tried for these civil offences. In ***R v Genereux*** (supra), Wigglesworth J. noted as follows:

> *"It is clear to me that the proceedings of the General Court Martial in this case attract the application of s. 11 of the Charter for both reasons suggested by Wilson. Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare.*
>
> *... ... ...*
>
> *In any event, the appellant faced the possible penalty of imprisonment in this case. Even if the matter dealt with was not of a public nature, therefore, s. 11 of the Charter would nonetheless apply by virtue of the potential imposition of true penal consequences." (**Emphasis added**)*

Further, for persons subject to military law, post-trial possibilities of review or appeal by a person found guilty in a military court and sentenced, may differ from the ones available to those who appear in the ordinary courts. Perhaps it is important to set out that there are certain differences between trial before military courts and ordinary or civil courts; to wit, certain aspects of procedure, court composition, sentences available, limited right of appeal among others, some of them I have already dealt with in Grounds 1, 2 and 3 of this appeal. I therefore find that the impugned sections 2, 179 and 119 (1) (a) of the UPDF Act adversely affect the liberty interest of all persons subject to military law.

The effect of the impugned provisions of the Act, therefore, is that all persons subject to military law will face trial in courts that are markedly different from the ones their civilian counterparts are subjected to for the same offences. According to the Appellant's Counsel, such persons who are subject to military law will be rightly denied the right to appear before a judge in the ordinary courts, owing to their having given their consent on account of their chosen profession. This, learned counsel referred to as a case of "*volenti non fit injuria*." It is therefore incumbent on this Court to pronounce itself on whether this restriction on their right to appear in the civil courts before a common law judge is justified in a democratic society, or not.

In order for the impugned sections of the Act to pass the test for constitutionality, as alleged by the appellant, it has to be shown that the impugned provisions are not overbroad as regards the restriction on the enjoyment of rights provided for in Article 43 of the Constitution. Article 43 provides that certain rights can be restricted in the public interest as justified

in a democratic society. This second leg of the effect is what I will dwell upon; and which regard I now proceed to resolve the questions raised.

I note that the life of a soldier generally differs from that of a civilian; and this difference, where it is justifiable, is not necessarily discriminatory as to contravene the Constitution. In the South African case of ***Minister of Defence v Potsane 2002 1 SA (CC),*** the point was made that the difference between the treatment accorded soldiers, and that accorded civilians, is not an infringement on the soldiers' rights to equality of treatment under the law. It is justified when it is rational, and is founded on the legitimate purpose of establishing a viable military justice system. This Court must therefore determine whether the unlimited jurisdiction accorded military courts by the UPDF Act, which in essence limits the soldiers' rights to face trial before the ordinary Courts even for the civil offences, is justifiable in a democratic society, as is contended by learned counsel for the Appellant.

The text of the UDHR, ICCPR and African Charter are not instructive on the specific jurisdiction of military tribunals. Upon review of reports, decisions and recommendations of international bodies created to guide States in their implementation of the Conventions, I find that there is a strong inclination towards strictly limiting the jurisdiction of military courts to trial of 'military offences'. The ***Decaux Principles*** (supra) provide an insight into this. As I have noted, these Principles are the result of the efforts of the Commission on Human Rights under the Economic and Social Council, in fulfilment of the resolution of the Commission that "*the integrity of the Judicial system should be observed at all times."* Principle No. 8 thereof, concerning the functional competence of military courts, provides that:

"The jurisdiction of military courts must be limited to strictly military offenses committed by military personnel. The military courts can try persons assimilated to military status for offenses strictly related to the exercise of their assimilated function."

In 2013, the Secretary-General of the United Nations transmitted to the General Assembly a report prepared by the Special Rapporteur on the Independence of Judges and Lawyers for consideration at its sixty-eighth session. See: ***Note of 7 August 2013, from the Secretary-General of the United Nations transmitting the report of the Special Rapporteur on the independence of judges and lawyers (A / 68/285).*** The relevant paragraphs of this report read as follows:

> *"89. In so far as their specific purpose is to try offenses related to the military function, the military courts must exercise their jurisdiction only with regard to members of the armed forces perpetrating a military offense or a disciplinary fault, and only when the offense or fault does not characterize a serious violation of human rights. This principle can only be waived in exceptional circumstances and for the sole purpose of judging civilians abroad who are assimilated to armed forces personnel."*

The Note was also instructive as to what criminal offences should be tried as disciplinary offences in military courts. It emphasized that these offences should be strictly disciplinary in nature, or should affect the legally protected interest of the military. It stated:

> *"98. Jurisdiction ratione material military tribunals, jurisdictions specialized in meeting the specific disciplinary needs of the armed forces, must be limited to criminal offenses "of a strictly military nature" or, in*

other words, to offenses which, by their very nature, affect the legally protected interests of the military, military order, such as desertion, insubordination, or abandonment of post or command."

It was emphasized that for ordinary or civil offences, the military officers should appear before the ordinary Courts; except for those committed outside the jurisdiction of the state. This was the subject of para 99 of ***Note 7 of August 2013*** (supra); which states as follows:

"99. States should not invoke the concept of acts related to office to deprive the ordinary courts of their competence in favor of military courts. Ordinary criminal offenses committed by members of the armed forces must be tried before ordinary courts, unless the latter are unable to exercise their jurisdiction due to the particular circumstances of the offense (exclusively in the case of offenses committed outside the territory of the State), these cases must be expressly provided for by law."

Even on the regional legal plane, the African Commission has discouraged the trial of civil offences by military or specialized courts, or tribunals. Section L(c) of the ***Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*** provides that the jurisdiction of Special Tribunals and military courts should not include offences over which ordinary Courts have jurisdiction. The Legislature is, thus seen as breaching its duty where it establishes tribunals and Special Courts that have similar jurisdiction to the ordinary Courts. In ***Media Rights Agenda v Nigeria (2000) AHRLR 262 (ACHPR 2000)***, the African Commission held that the setting up of a special military tribunal and clothing it with jurisdiction to try treason and other related offences which

fell within the jurisdiction of the ordinary courts of Nigeria was unacceptable as it infringed on the independence of the Judiciary. The rationale for this has been explained by R. Naluwairo in ***"Improving the administration of justice by military courts in Africa: An appraisal of the jurisprudence of the African Commission on Human and People's rights" (2019)19 African Human Rights Law Journal 43-61,*** at page 56 that:

> *"Besides infringing on the independence of the judiciary, the practice of giving special tribunals and military courts the jurisdiction that belongs to ordinary courts undermines the authority of ordinary courts that cherishes democracy and the rule of law."*

In its Concluding observations on Columbia, the Human Rights Committee under the United Nations framework observed that: *"the competence of the military courts [should be] limited to internal issues of discipline and similar matters."* To the Dominican Republic where the police had their own courts, the Committee commented that: *"the National Police has its own judicial body, separate from that established by the Constitution, to try crimes and offences by its members. This is incompatible with the principle of equality before the law protected by articles 12 and 2, paragraph 3, of the Covenant."* It urged them to ensure that the jurisdiction of police tribunals is restricted to internal disciplinary matters. See: ***Columbia, UN document CCPR/C/79/Add.2, 25 September 1992,*** paragraphs 5 and 6; ***Dominican Republic, UN document CCPR/CO/71/DOM, 26 April 2001,*** paragraph 10.

The Inter American Court of Human Rights noted in ***Castillo Petruzzi et al v Peru Judgment of 30 May 1999, Series C No. 52***, paragraph 128, as follows:

"When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process are violated. The right to due process, in turn, is intimately linked to the very right of access to the Courts."

As I have already noted, Uganda is not bound by these recommendations since the Conventions do not specifically deal with military courts' jurisdiction. Nonetheless, they are immensely persuasive because they fortify and give meaning to the Ugandan constitutional provisions, as well as the provisions in the African Charter or decisions of the African Human Rights Court on fair trial.

Counsel for the Appellant set out examples of states where the courts martial or military tribunals have jurisdiction to try both criminal and disciplinary offences. While this is true, I need to point out that such a route must be taken with utmost caution; as it must meet the criteria for what is justifiable in a democratic society. It must be so done with due regard to the constitutional provisions on protection of rights. With the self-caution above in mind, it is indeed important to also note that there are indeed countries that have ratified either the UDHR, ICCPR and African Charter but have chosen to include civil offences within the purview of offences triable by military courts when committed by military personnel. It is noteworthy that in many of these jurisdictions, this obtains within the context of robust safeguards put in place for the protection of the rights to a fair trial.

The National Defence Act, 1985 of Canada provides as follows in respect of jurisdiction over subject matter:

> *"**130. (1) An act or omission.***
>
> *(a) that takes place in Canada and is punishable under Part VII, of the criminal code or any other Act of Parliament ... is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2)."*

In the Canadian case of ***MacKay v The Queen 114 DLR (3d) 393, 426*** McIntyre J said, at pp 420-421:

> *"With the greatest deference for those who hold opposing views, I am unable to conclude that a trial by court martial under the provisions of the National Defence Act of criminal offences, which are also offences at civil law, deprives the defendant of a fair hearing by an independent tribunal. From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason."*

However, most important to note is that unlike the case of Uganda, Canada's Court Martial Appeal Court of Canada (CMAC) is a military court that exists within the ordinary court system manned by civilian judges. It operates independently from the military chain of command to ensure independence, impartiality, and fairness in the appeals process. It hears appeals from decisions made by military courts martial, which are part of the military justice system.

In the United Kingdom, the Armed Forces Act 2006 sets out the offences against military law and these include both discipline offences and criminal conduct offences. Criminal conduct offences cover anything done anywhere in the world that, if done in England and Wales, would be against the civilian criminal law. The sentence that can be imposed is similar to that of the civilian Courts. The relevant section provides as follows:

"42 Criminal conduct.

(1) A person subject to service law, or a civilian subject to service discipline, commits an offence under this section if he does any act that—

(a) is punishable by the law of England and Wales; or

(b) if done in England or Wales, would be so punishable."

The UK is a signatory to the ICCPR. The Court Martial therein has global jurisdiction over all Service personnel and civilians subject to Service discipline such as family members, civilian contractors, teachers and administrative staff when serving abroad. A Judge Advocate arraigns each defendant and conducts the trial, which is broadly similar to a civilian Crown Court trial in all cases, even when dealing with a minor disciplinary or criminal offence. The Judge Advocate General is the Judicial Head of the Service Courts and has a team of Assistant Judge Advocate Generals (AJAGs). All the judges are civilians, appointed through the independent Judicial Appointments Commission from the ranks of experienced barristers or solicitors in the same way as Circuit Judges. Hence, the law provides concrete safeguards against any possible abuse of the rights of those subjected to trial by a military court. This explains the holdings in cases such as ***R v Spear*** (supra).

The issue in ***R v Spear*** (supra) was whether a trial by a court martial in the UK of an offence against the ordinary criminal law of the land is compatible with the Art 6-1 of the European Convention, either generally or in cases where the offence in question had been committed in the UK. Lord Rodger also explained the rationale for trial of both civil and military offences by military courts; which I understand to be the ability of that Court to accord safeguards to a fair trial. He rejected the argument that such a trial violated the right to a fair hearing. He said:

> *"Applying that approach, I would reject Lord Thomas's submission that, of its very nature, trial of civil offences by court-martial is incompatible with art 6(1). In principle such a trial can fully satisfy the requirements of art 6 that the tribunal should be independent and impartial and that the accused should have a fair trial.*
>
> *[51] That being so, it is not necessary to "justify" trial by court-martial, whether by reference to the history of the system here and in many other countries or by reference to the situation of the Services today. Lord Thomas suggested that the Government and the armed forces wished to retain courts-martial for civil offences for no other reason than that the system exists and the staff are there to run it. I should therefore not wish to leave unmentioned the substantial arguments that can be advanced in favour of a system of trial by court-martial that covers both military and civil offences."*

Keeping in mind our turbulent political and military history in which the military had a hand; and the fact that I have already found that the

independence, fairness and impartiality of our military courts and tribunals are lacking, I do not find this decision persuasive. It is thus necessary to justify the trial in the military court pursuant to the provisions of Article 43 and in the light of Uganda's specific circumstances and history.

It is indeed a given that the need to maintain discipline in the army is an imperative. However, this must be done with limitation. The connection of the objective is not overbroad, and is only favourable, in a society where the courts martial or military tribunals act with fairness and impartiality, as I have already discussed when dealing with Ground 3 of this appeal; especially where the military courts are manned by civilian judges, clothed with the safeguards of independence presiding over them; for instance, such as in the Israel military court is part of the civilian court system. Both the UK and Canada, which allow trials of all offences by the courts martial, have civilian Court oversight over the courts martial; which Uganda does not have. Further, the UK has a special civilian court within its military court system.

In furtherance of his contention, Counsel for the Appellant referred to s. 12 of the Ghana Armed Forces Act 1962 as an example of the provisions of the law of another State that has such a wide jurisdiction regarding service offences to cover civilians as well. I do not agree with this position. Section 12 of the Armed Forces Act 1962 of Ghana provides as follows:

> "*Part II- PERSOSN SUBJECT TO CODE OF SERVICE DISCIPLINE, SERVICE OFFENCES, ETC.*
>
> *12. (1) The following persons, and no others, shall be subject to the Code of Service Discipline:*

(a) every officer and man of each Regular Force.

....

(e) every person not otherwise subject to the Code of Service Discipline, who is serving in the position of an officer or man of any force raised and maintained out of Ghana and commanded by an officer of the Armed Forces.

(f) Every person not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Armed Forces that is on service in any place.

(g) Every person, not otherwise subject to the Code of Service Discipline, who in respect of any service offence committed or alleged to have been comitted by him, is in civil custody or in service custody; and

(h) *Every person, not otherwise subject to Service Discipline, while serving with the Armed Forces under an engagement whereby he agreed to be subject to that Code."*

These sections are not in *pari materia* with s. 119 (1) (g) & (h), and do not justify the trial of civilians or military personnel in military courts for all criminal offences; hence, they are not comparable or applicable. However, I have perused other provisions of the Ghana Act and have found that the definition of service offence in section 98, being the interpretation provision, is in *pari materia* with that in section 2 of the UPDF Act that defines a service offence. Section 98 thereof defines a service offence in the following terms:

"Service offence" means an offence under this Act or any other enactment for the time being in force, committed by a person while subject to the Code of Service Discipline ..."

Be that as it may, it is also clear that this legislation does not put Ghana on the same footing in terms of the wide jurisdiction as s. 2, 179 and 119 (1)(g) & (h) of the UPDF Act put Uganda. Under section 79 of the Ghana Armed Forces Act, there are certain offences for which no person can be tried in a military court as long as it is committed in Ghana. It provides:

> "*79 (1) Every person alleged to have committed a service offence may be charged and dealt with and tried under the Code of Service Discipline, whether the alleged offence was committed in Ghana or out of Ghana: Provided that a service tribunal shall not try any person charged with the offence of murder, rape and manslaughter, committed in Ghana*"
> ***(Emphasis added)***

The proviso clearly shows that the jurisdiction of Ghana military courts and tribunals over criminal offences is not as wide as Counsel submitted. The rationale for this proviso clearly points to the fact that thy intended that certain serious criminal offences of a capital nature committed within the jurisdiction of the criminal courts should be tried by the civil courts.

Similarly, I would not take Ghana as the yardstick for the interpretation of the UPDF Act in the light of the clear provisions of the Ugandan Constitution in this regard. Ghana also has shortcomings within its own military justice system (See: Nelson Atanga Ayamdoo**'s** article in ***Court Martial Quagmires in Ghana: Court Martial Appeals post Republic v. Lieutenant Oduro,*** in **Military Law and the Law of War Review Vol. 53, Issue 1 (2014);** and ***Republic v. Lieutenant Oduro [2007-2008] 2 SCGLR 839***.)

Counsel for the appellant also referred to s.55 of the Kenya Defence Forces Act 2012. Section 55 provides for offences not triable by the court-martial in the following terms:

"***55. Offences not triable by a court-martial***

(1) A court-martial shall not try any civilian person who is subject to this Act and charged with any of the offences under the Sexual Offences Act, 2006 (Act No. 3 of 2006) and the law relating to protection from domestic violence where that offence is committed in Kenya.

(2) Notwithstanding subsection (1), where a person who is subject to this Act commits an offence referred to under subsection (1) outside Kenya, that person shall be tried and sentenced by a court-martial."

What is noteworthy from this provision of the Kenyan law is that any provision of a law excluding civilians from trial by military court should do so in clear terms.

Second, under section 5 of the Kenyan Act, the application of the Courts martial to civilians is expressly limited. The section provides:

"***5. Application to civilians***

(1) The application of this Act to a civilian shall be limited to a person, other than a member of the Defence Forces, who—

(a) with the authority of an authorized officer, accompanies a part, unit or formation of the Defence Force that is—

(i) outside Kenya; or

(ii) on operations against the enemy; and

(b) has consented, in writing, to subject himself or herself to this Act while so accompanying that part of the Defence Forces."

It also clarifies in s.5 (3) who a person accompanying a unit or other element of the Defence Forces that is on service or active service is. Under section 132, a person who aids and abets is subject to the Act. It does not include just any civilian. A civilian under that section would have to fall under those described in s. 55 above.

Further, the Kenyan Act has more progressive provision than the UPDF Act. They have a legally trained Judge Advocate whose rulings and directions on law are binding; and has a casting vote in the decision where there is a stalemate. The Act requires that a Judge Advocate at each court-martial is a magistrate or an advocate of not less than ten years standing appointed by the Chief Justice (See Section 160, 165, 175). There is therefore some assurance of fairness in the proceedings. The Chief Justice has powers to generally regulate the administration and proceedings of the Courts martial. The Courts martial have to apply the principles of exercise of judicial authority enunciated in Art. 159 of the Kenyan Constitution (see s. 161 of the Act). section 186 of the Act provides for appeal to the High Court of Kenya from the Courts Martial.

Therefore, since the UPDF Act does not expressly exclude certain offences from the jurisdiction of the Courts martial, the military courts are conferred with jurisdiction over all offences; which, as I have pointed out, is dangerous as it leads to grave injustice. Hence, my finding that civilians should not fall within the purview of military courts in a blanket manner. As already I have

already noted, these questions touching on human rights have to be resolved in line with best practices and democratic principles. In light of the international jurisprudence and national jurisprudence already explored in the grounds 1, 2 and 3, interpretation of this Constitution should be grounded not just on the practices of other states, but also with regard to the history of Uganda and the values cherished in a progressive democratic society. Further, in light of the universal democratic trend, the advice of the African Commission remains relevant. In the ***Koso*** case (supra), the African Commission noted thus:

> *"84: In many African countries, military courts and special tribunals exist alongside regular judicial institutions. The purpose of military courts is to determine offences of a purely military nature committed by military personnel. While exercising this function, military courts are required to respect fair trial standards.*
>
> *... ... ...*
>
> *86. Consequently, in this particular case, the fact that civilians and soldiers accused of a civilian offence in this instance the theft of drums of diesel were tried by a military court presided over by military officers was a flagrant violation of the above-mentioned requirements of good justice."*

It is already clear that Art 210 of the Ugandan Constitution empowers Parliament to create organs to promote discipline in the army. Whether for the purpose of promoting discipline in the army, it is necessary to subject military personnel to trial in courts martial for civil offences, was considered in the Canadian case of ***R v Moriarity 2015] 3 R.C.S 485***; where the Court took a broad view of the meaning of discipline. In that case, the sections under

scrutiny were s. 130 (1) (a) of the National Defence Act (which is similar to s. s.179 (now s.177 of the UPDF Act). Section 117(f) of the Canadian enactment created an offence of fraud (similar to s.119(1) (h) (now s. 117 (1) (h) of the UPDF Act).

Section 117 (f) of the National Defence Act made it an offence to commit "*any act of a fraudulent nature not particularly specified in sections 73 to 128"* thereof. The Court noted that the effect of section 130 (10) (a) of the Act was to *"extend the jurisdiction of service tribunals in relation to all underlying federal offences to everyone subject to the CSD* [Code of Service Discipline]*."* The Appellants therein did not contend that there was no military nexus or direct connection with the maintenance of discipline, efficiency and morale in the military. They claimed rather that there was a lack of distinction between offences committed under military circumstances - which to them were rationally connected to discipline, efficiency, and morale - and offences committed in civil circumstances, which they argued, lack such a connection.

They thus contended strongly that there was no rational connection between the purpose of the law - which was stated as '*maintaining discipline, efficiency and morale of the armed forces*' - and some of its effects which made the '*armed forces subject to the military justice system in the circumstances in which the offence does not directly implicate the discipline, efficiency and morale of the forces*'. The Court held that the Appellant's definition of 'discipline' was too narrow; and that the impugned sections were rationally connected to their purpose. In its opinion, read by Crowell J, the Court adopted a broad definition of 'discipline' as follows:

"Discipline is a multi-faceted trait, as complex in its nature as it is essential to the conduct of military operations. At its heart, discipline on the part of individual members of the [Canadian Armed Forces] *involves an instilled pattern of obedience, willingness to put other interests before one's own, and respect for and compliance with lawful Authority."*

The Court then held that the objective of maintaining 'discipline, efficiency and morale' was rationally connected to dealing with criminal actions committed by members of the military even when not occurring in military circumstances. The Court also further considered that such criminal actions may have an impact on discipline. I find it compelling to reproduce this part of the Court's views here in *extenso*:

"For instance, the fact that a member of the military has committed an assault in a civil context — a hypothetical scenario raised by Sergeant Arsenault — may call into question that individual's capacity to show discipline in a military environment and to respect military authorities. The fact that the offence has occurred outside a military context does not make it irrational to conclude that the prosecution of the offence is related to the discipline, efficiency and morale of the military.

Consider, as a further example, an officer who has been involved in drug trafficking. There is a rational connection between the discipline, efficiency and morale of the military and military prosecution for this conduct. There is, at the very least, a risk that loss of respect by subordinates and peers will flow from that criminal activity even if it did not occur in a military context. Similarly, a member of the military who has engaged in fraudulent conduct

is less likely to be trusted by his or her peers. Again, this risk provides a rational connection between the military prosecution for that conduct and the discipline, efficiency and morale of the military."

It is apparent that these examples support a broad understanding of the situations in which criminal conduct by members of the military is at least rationally connected to maintaining the discipline, efficiency and morale of the armed forces, even when they are not on duty, in uniform, or on a military base. However, I do not find them persuasive enough to warrant the usurpation of the jurisdiction of the civil courts. To take the example used by the Court, a criminal offence that occurs in a civil context can well be tried by a civil court with the desired end-result of maintaining discipline, morale and efficiency in the army. A military officer, who has been tried and convicted by a civil court can, accordingly, be subjected to military disciplinary process.

The disciplinary tribunal can take the necessary disciplinary action such as reprimand, demotion or even dismissal from the forces, in appropriate cases.I therefore hold the view that the trial of military personnel for criminal offences under other enactments that are not purely disciplinary offences, is unconstitutional for violating Arts. 28 (1), 44(c), 126 (1), 21 and 128(1) of the Constitution. It would do well if there was a specialised military court manned by civilian judges in the courts martial to try military personnel specifically for criminal offences in order to fulfil the unique needs of the UPDF. Under the principle of separation of powers, such a scenario would maintain the necessary distance between the courts martial and the Judiciary as the general wielder of judicial power under Art 126 (1).

There are also other vital reasons militating against trial of persons subject to military law for all offences. This Court has previously held that there are certain offences that are not triable by the Court martial. This is so where a particular Act grants jurisdiction under it only to a specific Court. It would therefore be wrong for Parliament to cause a conflict by conferring on courts martial jurisdiction to try such an offence. For instance, since terrorism can only be tried by the High Court, which is an ordinary or civil court, it would be contradictory to try it in the military courts as well; and also it would be self-defeating for an offence similar to terrorism to be created under the UPDF Act, and then persons are tried under it. In the past, it also certainly circumvented and defeated the purpose of the grant of an exclusive jurisdiction to a specific Court; and especially where, as has been pointed out, civilians were subsequently tried under the military court as accomplices. The Constitutional Court had this to say with regard to the Anti-Terrorism Act, in ***Uganda Law Society v A.G Constitutional Petition No. 18 of 2005***:

> *"The Anti-Terrorism Act, 2002 and Fire Arms Act Cap 299 and the Penal Code Act have offences which are brought under the UPDF Act as part of service offences. However, I do not agree with counsel for the respondent that by virtue of sections 2, 179 and 197 of UPDF the General Court Martial is seized with jurisdiction to try the accused in this case for the offences of terrorism and being in unlawful possession of firearms. In my view, a court be it civil or military, can only try the accused for an offence where it is seized with jurisdiction. It would not be fair to try an accused person where jurisdiction is excluded from it. A case in point is the instant petition where the accused persons are charged with terrorism charges, which are*

exclusively triable by the High Court. Section 6 of the Anti-Terrorism Act reads as follows :-

> *"(6) The offence of terrorism and any other offence punishable by more that ten years imprisonment under this Act are triable only by the High Court and bail in respect of those offence may be granted only by the High Court".*
>
> *Clearly, the General Court Martial has no jurisdiction to try that case. I am mindful of the provisions of S. 2 of (supra). It is of no effect because it cannot give jurisdiction which does not exist. 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. (**Emphasis added**)*

The Court noted further that offences that require consent of the DPP are also excluded from the jurisdiction of the Courts Martial. It said:

> *"Further, section 3 of the Anti-Terrorism Act provides that no person shall be prosecuted for an offence under this Act except with the consent of the DPP yet Article 120 (3)(b) prohibits the DPP to sign any charges prosecuted in the General Court Martial. I do not agree that it is not necessary for the DPP to sign the charge sheet. That clearly confirms the exclusion of trials of terrorism offences from the Court Martial. I am alive to the provisions of S. 2 of UPDF which define "service offence" as including "an offence under any other Act",... Be that as it may, in my view, jurisdiction can only be extended*

*to those offences where unlike in terrorism cases, the court's jurisdiction is not excluded. Giving section 2 of the UPDF Act such wide construction will end up by extending it to all criminal offences even outside its jurisdiction. I do not believe that by virtue of section 2 of UPDF Act, the General Court Martial has jurisdiction to try electoral petition offences. In the premises the General Court Martial, in the instant case, has no jurisdiction to try the accused for Terrorism as indicted in the charge sheet." (**Emphasis added**)*

The Constitutional Court's position was upheld by this Court in ***A.G. v Uganda Law Society - S.C Const. Appeal No. 1 of 2006***; in which Mulenga JSC said:

"Furthermore, the statute that created the main offence with which the accused persons were charged before the General Court Martial expressly conferred jurisdiction over it in the High Court alone to the exclusion of any other court. Section 6 of the Ant-Terrorism Act provides –

> *"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."*

It follows that the proceedings before the General Court Martial were inherently unconstitutional irrespective of the proceedings in the High Court."

I find that this holding by Mulenga JSC is still the correct position of the law that where jurisdiction is expressly excluded or where the DPP's consent is a pre-requisite, the courts martial are not competent to handle that matter so

excluded irrespective of the provision to the contrary under the impugned sections 1, 177, and 117 (1) (g) and (h) of the UPDF Act. It amounts to a duplication to grant jurisdiction to the courts martial over it, when owing to gravity of these offences Parliament conferred jurisdiction over them to ordinary Courts. The other issue for consideration is the danger posed by concurrent jurisdiction; where the military court could try a case that is also before the ordinary Court. This would necessitate the establishment of a mechanism between the courts martial and DPP to manage the cases, beyond the mere provision in the UPDF Act that the jurisdiction of the courts martial does not take away that of the civilian courts.

Concurrent trials in both military and ordinary courts for a civil offence would also be prejudicial to an accused for the simple reason that it could lead to double jeopardy as each court could potentially come up with a guilty verdict. This renders sections 2, 179, and 119(1) (h) (now ss.1, 177, and 117 (1) (h)) of the UPDF Act unconstitutional for duplicating offences triable by other enactments; and also for providing the military tribunals with judicial power to try all offences in other enactments that are triable by civilian Courts. They can lead to a violation of Art 28 which does not allow double jeopardy and also denies some persons the right to appear before the ordinary or civil courts of law.

Another point alluded to in the Court in ***A.G. v Uganda Law Society*** case (supra), which I would like to emphasize, is that where an offence attracts the death penalty, a court martial should have no jurisdiction to try it due to the fact that no right of appeal to the Supreme Court is provided for by the UPDF Act. I have already dealt with this in my resolution of ground 2 and 3. See Art 22

of the Constitution; ***PTE Muhumuza Zepha v Uganda - Court of Appeal Criminal App. No. 31 of 2016*** ; ***2nd Lt Ambrose Ogwang*** (supra); ***Sgt Klemera Frank v Uganda Criminal Appeal No. 18 of 1994*** *(unreported);* ***Uganda Law Society & Jackson Karugaba v A.G - Const Petitions Nos 2 of 2002 & 8 of 2002*** and ***Law Revision (Penalties in Criminal Matters) (Miscellaneous Amendments) Act, 2021***. Until a right of appeal is created from sentences for offences attracting life imprisonment and death penalty to the courts of record as is available to the other persons and provided for by the Constitution, the trial of criminal offences attracting those penalties is unconstitutional for violating s.28(1), 44 (c), 21 and 22 of the Constitution.

Additionally, as already noted, the GCM and other military courts are all subordinate Courts. See ***A.G V ULS Const. Appeal No. 1 of 2006***. However, I do not agree with Mulenga JSC's finding where he held that the GCM is subordinate but not lower than the High Court. According to the ***Black's Law Dictionary, Brayan A. Garner, Eight Edition*** '*subordinate*' means "*Placed in or belonging to a lower rank, class or position*" or "*subject to another's authority or control.*" Assigning the ordinary English meaning to the word 'subordinate,' all Courts martial as subordinate courts created under 129 (1)(d) can only have jurisdiction that is lower than the High Court. Saying that it is surbodinate but not lower than the High Court is contradictory and has the potential to create an absurdity when it comes to the hearing of capital offences.

If Parliament desires to grant them the jurisdiction to handle capital cases then it would need to do so in line with the Constitution. I will return to this later in an advisory opinion to explore the options that could be undertaken by Parliament to achieve this effect Constitutionally. With this finding, the

hearing by all Courts martial of offences within the jurisdiction of the Courts of record is unconstitutional under Arts. 28(1), 44(c), 128(1) and 129 91)(d).

Upon examining the objective of the law and the authorities cited, I find that the impugned provisions of the UPDF Act are overbroad, and rationally connected to the broader purpose. The trend in democratic dispensations, especially the new democracies such as Uganda, which witnessed gross human rights violations in the past, and reminds itself of its ugly past in the Preamble to the Constitution, a sober decision has to be consciously made. Sections 2 (now 1), 179 (now 177) and 119(1)(h) (now 117 (1) (h)) that allow the trial of persons subject to military law, for all offences under other enactments without any qualification is overbroad. The need to maintain discipline is no justification for the trial of members of the UPDF, who are within the country, by the military courts; and yet there is a functional judiciary. Any disciplinary action on an officer can be effected after a finding of guilt by the ordinary Court. I hereby find that sections 2 (now 1), 179 (now 177) and 119(1)(h) (now 117 (1) (h)) of the UPDF Act are unconstitutional in so far as they, without qualification, allow for trial of persons subject to military law for civil offences within the GCM and other military courts/tribunals. Basing on this analysis and finding, Grounds 1 and 4 of this appeal would fail.

Having made the findings that the provisions of the UPDF Act that confer powers on the military courts to exercise judicial powers are unconstitutional, there arises the consequential issue of the fate of those who at the time of this decision on unconstitutionality of the UPDF Act are facing charges, or undergoing trial, or have been tried and convicted before or by

the military courts. This issue was neither raised nor canvassed at the hearing of the appeal; so, this Court has not had the benefit of Counsel's opinion on the matter. Nonetheless, it is a matter of great public interest; hence, this Court has to deal with it. Issues concerning the extent to which judicial adjudication has retrospective effect, especially regarding a finding that a law or act is inconsistent with the Constitution is not novel. See: ***Duke Mabeya Gwaka v The Attorney General - Const. Petittion No. 36 of 2019***, and ***A v The Governor of Arbour Hill Prison Supreme Court of Ireland 205/2006.***

Two rules have been developed; which have gained universal recognition and application. First is that once a law has been declared unconstitutional, then applying the principle of direct review, the declaration has the force of retroactive application. Where however the accused person was convicted under a law that is later declared unconstitutional, and has either exhausted the appeals or has not pursued any appeal, the matter is taken to have been concluded. In such circumstance, the declaration of unconstitutionality of the law has no retrospective application. In retroactive application of new rules, there is a difference between civil and criminal cases. We are here concerned with the latter.

Whether a decision announcing a new rule should be given prospective or retroactive effect should be determined at the time of that decision. Thus, there is a further difference between criminal cases on direct review and those on collateral review. Direct review concerns those criminal cases where the person seeking relief arising from the new rule has not yet been tried, is undergoing trial, has been convicted but is still pursuing a direct appeal; while collateral review refers to those cases where the criminal defendant has

exhausted all direct appeals, if any. See ***Teague v Lane Director Illinois Department of Corrections et al 489 US 288 (1989).***

In Uganda, the Constitutional Court in ***Mabeya v A.G (Supra)*** examined Ugandan (***A.G v Susan Kigula & Ors (2009) UGSC 6***) and American jurisprudence (***Linkletter v Walker*** (supra), ***United States v Johnson, 457 U.S 537 (1982)*** , ***Griffith v Kentucky*** and ***Stovall v Denno [1967] 338 u.s 293***) and came to the conclusion that retroactivity should depend on the, (i) the purpose of the new rule, (ii) the extent of reliance on the new rule, and (iii) the effect on the administration of justice of the retroactive application of the new rule. The decisions following ***Linkletter*** (supra), laid down how this rule would apply to pending cases and and those on appeal, under direct review. The current American position elucidated in ***Annotated Constitution*** prepared by Congressional Research Service at the Library of Congress, and quoted in ***A v The Governor of Arbour Hill Prison*** **(**supra), stated thus:

> "*The Court has now drawn a sharp distinction between criminal cases pending on direct review and cases pending on collateral review. For cases on direct review, a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, State or Federal, pending on direct review or not yet final. (Griffith v- Kentucky [1987 479 US 314)" Thus, for collateral review in federal courts of the state courts criminal convictions, the general rule is that new rules of constitutional interpretation, announced after a defendant's conviction has become final will not be applied. Thus applications for habeous corpus based on a judicial decision subsequent to a conviction becoming final and not otherwise under direct*

appeal or review fall into the category of collateral review and therefore not entitled to rely on new rules of constitutional interpretation."

This principle is apparently not novel to our modern time; as Cicero is credited with having coined the maxim: *"Summum ius summa iniuria"* – variously translated, but classically as: *"the strictest application of the law is the greatest injustice"*. This general principle regarding the effect of a declaring a legislation unconstitutional was succinctly stated by Murray CJ in ***A vs The Governor of Arbour Hill Prison*** (supra). thus:

"143. In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional."

The learned CJ explained the meaning of a collateral attack as follows:

"A collateral attack arises where a party, outside the ambit of the original proceedings seeks to set aside the decision in a case which has already been finally decided, all legal avenues, including appeal, having been exhausted, for reasons that were not raised in the original proceedings but for reasons arising from a later court decision on the constitutionality of a statute."

He made a comparative survey and review of of various jurisdictions on the issue; and found commonality in the decisions taken by them on it. He then said:

"66. The question of retrospectivity in the form raised here is one which is material to all legal systems. The fact is that at no stage during the course of the hearing of this case was the Court's attention drawn to any system of justice in which a finding that a law is unconstitutional, even where this is deemed to be so ab initio, meant that previous and final judicial decisions based on such a law must inevitably be considered unlawful and of no effect in law. I am not aware of any legal system that does so."

Referring to the situation obtaining in the US, he stated thus:

"There are ... "transcendent considerations" which militate against complete or absolute retrospectivity. Fundamental interests of public policy requires limitations on the retroactive effect of judicial decisions. The legal order and the administration of justice is not one of perfect symmetry. As Justice Benjamin Cardozo observed at p. 161 in his seminal work The Nature of the Judicial Process (Yale University Press, 1921) "We like to picture to ourselves the field of the law as accurately mapped and plotted. We draw our little lines, and they are hardly down before we blur them." Although judicial adjudications do have retroactive effect there are important exceptions and restrictions to that effect. A line must be drawn in the interests of justice."

He further elucidated on the matter thus:

"127. ... a judgment condemning a statute for being inconsistent with or contrary to the Constitution does not mean that all which was done or decided under that statute prior to the decision on constitutionality is in all circumstances void and of no effect. It is a principle which is, for the

reasons indicated in the various judicial dicta which I have cited, consistent with the Constitution as a whole, the common law dimension of our legal system and the legal systems of many other countries in which the courts have the same or an analogous power of judicial review of the validity of laws."

He further explained that:

"84. Certainly, issues concerning the constitutionality of statutes are on a plane higher than the mere common law, they concern questions fundamental to the rule of law, the protection of rights and the very framework within which, in the words of the preamble to the Constitution, "true social order is attained". Normally those fundamental constitutional concepts, such as the rule of law, individual rights, justice and a social order based on that rule of law blend together so that the principles of constitutional justice to be applied to resolve issues may be readily deduced. On other occasions some of those considerations may be competing or even conflicting ones, where the Courts have to balance those different interests so as to do justice within the framework of the Constitution.

... ...

86. In this instance one may say in broad terms that there is a competing interest between the claim by the applicant that he stands convicted under a law which has subsequently been found to be inconsistent with the Constitution as from 1937, and the interests of justice, including the rights of the victim, where he was otherwise lawfully convicted of unlawful carnal

knowledge of a 15 year old girl, in circumstances where, as his counsel acknowledges, the conviction and sentence were not tainted by any want of fairness or injustice.

87. Thus the effect of absolute retroactivity for which the applicant argues in a sense raises competing considerations which the Court has to address having regard to the provisions generally of the Constitution and what Henchy J. alluded to as transcendent constitutional considerations, the public interest, the common good and social order."

In response to the argument that the declaration that a law is unconstitutional, the learned CJ had this to say:

"91. Absolute retroactivity based solely on the notion of an Act being void ab initio so as to render any previous final judicial decisions null would lead the Constitution to have dysfunctional effects in the administration of justice. In the area of civil law it would cause injustice to those who had accepted and acted upon the finality of judicial decisions. Rights which had become vested in third parties as a consequence of such decisions would be put in jeopardy. The application of a principle of absolute retroactivity consequent upon a declaration of unconstitutionality of an Act in the field of criminal law would render null and of no effect final verdicts or decisions affected by an Act which at the time had been presumed or acknowledged to be constitutional and otherwise had been fairly tried. Such unqualified retroactivity would be a denial of justice to the victims of crime and offend against fundamental and just interests of society."

I find these authorities quite persuasive and applicable to the current situation; because the constitutional rules declared, touch on the fundamental aspects of a criminal trial in a democratic dispensation. In the present case, we have those who have been charged, those undergoing trial, those convicted and in the process of challenging such a conviction as was the case in the ***Lt. Ogwang*** case (supra), and those whose conviction is final.

This is the situation obtaining with regards to those who have been defendants in the courts martial. I consider that the first three categories that fall under direct review can without any difficulty take benefit from the rules expounded herein as regards trial in the courts martial. However, for those whose trial is completed or who are also referred to as those on collateral review, it is my considered opinion that they fall within the exception enunciated above.

In the event, I would make the following declarations:

(i) The Summary Trial Authority (STA) and the Unit Disciplinary Committee (UDC) are respectively lawfully established under ss. 191 & 192 (now ss.189 & 190), and s. 195 (now s. 193), of the UPDF Act, as military tribunals.

(ii) The provision of section 197 (now s.195) of the UPDF Act, establishing the General Court Martial as a competent court, is constitutional.

(iii) The General Court Martial, created under s.197 (now s.195) of the UPDF Act, is a subordinate court of law; but with specialized jurisdiction.

(iv) The provisions of s.179 (1) & (2) (now 177(1) & (2)) of the UPDF Act, read together with s. 197 (2) (now s.195 (2)), which grant the subordinate military courts jurisdiction over capital offences contravene Art. 129(1) (d) and Art, 126(1), of the Constitution; hence they are unconstitutional.

(v) The provision of s. 191(3) (a) (now s.189 (3) (a), and s.195 (3) & (4) (now 193) (3) & (4)) read together with s.179 (now s.177) of the UPDF Act, which grant the STA and the UDC the exercise of judicial power of detention and imprisonment of any person tried by them, contravene Arts. 23, 126(1), and 129 (1)(d) of the Constitution; hence, they are unconstitutional.

(vi) The provisions of the UPDF Act constituting and providing for the trial procedure of the GCM, the Division Court Martial, and the Court Martial Appeal Court, do not contain any or sufficient constitutional guarantees and safeguards for them to exercise their judicial functions with independence and impartiality, which is a prerequisite for fair hearing provided for under Arts. 21, 28(1), 44(c), and 128(1) of the Constitution.

(vii) The provision of s.119(1) (g) (now s. 117 (1) (g)), of the UPDF Act, under which the Respondent, a civilian, was charged and arraigned in the General Court Martial, contravenes Arts. 28(1), 44 (c), and 21 of the Constitution; hence it is unconstitutional.

(viii) The provision of s.119(1) (g) (now s. 117 (1) (g)) is unconstitutional to the extent that it permits trial, in the courts martial, of civilians who have allegedly aided and abetted the commission of a service

offence, or ordinary criminal offence, in which a person subject to military law is a principal offender.

(ix) Sections ss. 2, 179, 119 (1) (h) and (g) (now respectively ss.1, 177, 117 (1) (h) and (g)) of the UPDF Act, are unconstitutional since they confer blanket jurisdiction on Courts Martial to try civilians.

(x) The jurisdiction conferred by ss.2, 179, and 119(1) (h), (now ss.1, 177, and 117 (1) (h), of the UPDF Act, on the GCM to try persons subject to military law for civil and, or, non-disciplinary offences committed in Uganda, unconstitutional; as they contravene Articles 209 & 210 of the Constitution.

I would accordingly propose the following orders:

(1) The declaration of the Constitutional Court that section 119(1) (g) (now s.117 (1) (g)) of the UPDF Act, which provides that any person, not otherwise subject to military law, who aids or abets a person subject to military law in the commission of a service offence is constitutional, is hereby set aside.

(2) All charges, or ongoing criminal trials, or pending trials, before the courts martial involving civilians must immediately cease and be transferred to the ordinary courts of law with competent jurisdiction.

(3) This judgment shall have no retrospective effect on any conviction made, and sentences imposed, prior to the date of this judgment; save where the conviction and sentence is being challenged in a Court of law.

(4) All pending trials, or partly heard criminal cases, that fall under the civil law courts jurisdiction, which are against members of the UPDF who are

subject to service law must be transferred to the civil Courts with competent jurisdiction.

(5) Save for the issue of the establishment of the GCM as a Court of Law, this appeal fails; and is hereby dismissed.

(6) The cross appeal is hereby allowed.

(7) The Respondent is entitled to the costs of this Appeal, and in the Constitutional Court.

ADVISORY ORDERS

Courts martial are not unconstitutional merely by their very nature of being military courts. The people of Uganda pronounced themselves in the course of the making of the 1995 Constitution, expressing their fervent desire to make a break from the ugly past that characterized life in our country; especially the grave abuse of human rights by the military. The Ugandan military has since been transformed into a professional force; and it has made remarkable contribution to ensuring regional peace, security and stability. It is rather contradictory and rather disconcerting for a military Force built on new and commendable professional dispensation to operate under the same legal framework that failed to check or avert military abuse of power; with unspeakable ramifications.

The 1995 Constitution provided the new wine, which the UPDF Act has instead, through the impugned provisions of the Act, sought to store in old wineskins as it were. This is in blatant negation of the aspirations, desire, hope, and wishes of the people of Uganda; which the framers of the 1995

Constitution meticulously enshrined, in no uncertain terms, in the Constitution.

It is noteworthy that in ***ULS & J. Karugaba v A.G*** (supra), the Constitutional Court observed that the Constitution was unfortunately being ignored; and recommended that Parliament could amend the Constitution to provide for any special needs of the military. It said:

> *"The UPDF is currently being operated under laws and practices which still contain colonial relics in total disregard of the Uganda Constitution. No attention was paid to this problem when drafting the 1995 Constitution. This Court has no powers to bend the Constitution in order to accommodate special needs [whether legitimate or not] of the army. It is only Parliament that has the power to amend the laws including the Constitution, to accommodate such special concerns of the army. So far, it has not done so. I must, therefore, stick to only such interpretation of the law that is consistent with the Constitution as it stands now."* ***(Emphasis added)***

The current military courts operate in violation of the constitutionally enshrined and securely protected rights to a fair hearing that are equally recognized universally in Conventions and other instruments. Thus, there is need for a robust legislative intervention to ensure the UPDF Act is in accord with the cherished aspirations of the people of Uganda as was unmistakably captured in the ***Odoki Commission Reprot***. It is therefore incumbent on the Executive to generate the policy, and Parliament to pass the legislation, which addresses and cures the injustice occasioned by the unconstitutional provisions of the UPDF Act, which have now been quashed, by providing for

military courts that are clothed with the constitutional safeguards of independence and impartiality that are accorded the ordinary Courts.

In recognition of the special nature of the military, legislation must be put in place that establishes and confers on the courts martial and tribunals, the powers to execute lawful jurisdiction over members of the military; and thus fulfil the function of the UPDF. However, this special exercise of jurisdiction must not infringe on the soldiers' rights to a fair hearing. The State needs to act in order to ensure that the character of military courts and tribunals meet the democratic standards and aspirations of the people, which are clearly enshrined in the Constitution. It is noteworthy that the Court advised in 2009, in ***ULS & J. Karugaba v A.G*** (supra), that for military Courts to be truly independent and impartial, there are desirable changes that the Executive needs to address. It noted as follows:

> *"In order for this to be applicable to the military courts, the article would have to be modified in such a way as to give the courts independence and impartiality without compromising their military nature. The army would have a parallel judiciary with legally trained soldiers to professionally man the courts. In order to be impartial, the court must have security of tenure and other privileges enjoyed by the other judicial officers in the Uganda judiciary. It should be noted that the definition of judicial officer contained in article 151 does not exclude persons exercising judicial power in military courts."*

I consider the need for this recommended transformation as relevant today, as it was then.

In the premises, I would make the following recommendations to the Executive and Parliament for consideration as viable alternatives for the establishment, and or creation, of military courts in Uganda:

(a) Administratively establish the General Court Martial (GCM) as a division of the High Court without the need to create a new Court, with jurisdiction to handle capital criminal cases involving both military officers and any civilians who would exceptionally fall within its ambit; with Magistrates within the division handling offences falling under their jurisdiction.

(b) Limit the functions of Unit Disciplinary Committees (UDCs) and Summary Trial Authorities (STAs) to handling strictly disciplinary offences, with no power of imposing sentences of imprisonment.

(c) Utilize the existing magistracy to handle the rest of the criminal cases (other than disciplinary offences) committed in Uganda (which are currently falling within the docket of the UDCs). The subordinate military Courts can handle criminal cases at the level of Chief Magistrate's Courts (for offences attracting life imprisonment and below). Or;

(d) With the advice of the Judicial Service Commission (JSC), appoint civilians with the requisite professional legal qualifications to serve as judicial officers in the current subordinate military courts. They would exercise jurisdiction over offences triable by subordinate courts. They

should have the same privileges and safeguards as their counterparts in the civil courts. Or;

(e) Amend the Constitution to establish superior Courts within the military Court system under Art 129; and clothe them with the requisite jurisdiction and guarantee of independence and impartiality to try specific military offences of a capital nature and all other capital offences under existing laws, committed by military personnel. Or;

(f) Provide in the UPDF Act for the High Court to sit as a Court martial with power to try all criminal capital offences within the High Court jurisdiction, and those unique to the military that attract a maximum of life and death sentences. Grant the Chief Justice powers to assign Judges to the military courts. A select number of military personnel can act as assessors. Appeals to the Court Martial Appeal Courts would follow the same format, with the Court of Appeal sitting as such. Magistrate's Courts would assume the jurisdiction over all other offences of a subordinate Court.

(g) Make provision in the UPDF Act for trial of civilians in military courts to be only under limited circumstances; and only after the State has concretely demonstrated to the court by verifiable facts, and by objective and serious reasons, the need and justification for recourse to the military court. This must only apply where in relation to the

specific class or category of persons and offences in question, ordinary courts are not in position to undertake such trial.

(h) Make provision in the UPDF Act for appeal from military courts and tribunals, corresponding to appeals in ordinary Courts.

In each of the options suggested above, the jurisdiction UDCs and STAs must be limited to that of tribunals; handling strictly disciplinary offences, with no power of detention or imprisonment, as is the case with other disciplined Forces such as the Police, and Prisons.

Dated at Kampala this *31st* day of *January* 2025.

Alfonse C. Owiny – Dollo

CHIEF JUSTICE