

# The development of Uganda's military justice system and the right to a fair trial: Old wine in new bottles?

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**Abstract:** *Justice demands that all organs and persons that exercise judicial power should adhere to the standards comprised in the right to a fair trial. In the last two decades, many countries have introduced reforms aimed at ensuring that the administration of justice through military tribunals conforms to these standards. In Uganda, the extent to which the country's successive military legal frameworks have been progressive in doing this is contestable. This article analyses the historical foundation and evolution of Uganda's military justice system with respect to the legal protection of the right to a fair trial. The analysis is largely based on desk review. The development of Uganda's military justice system may be categorised into five major stages: military justice during the colonial era (1895-1962); military justice in the immediate post-independence period (1962-1971); military justice in the Amin era (1971-1979); military justice under the NRA Codes of Conduct (1986-1992); and military justice under the 2005 Uganda Peoples' Defence Forces Act (2005 to date). Although compared to the colonial times, there have been some improvements, many of which are said to be or passed off as reforms in the area of protecting fair trial rights in the administration of justice by military courts and are superficial. Many reforms introduced especially after the 1964 Armed Forces Act are reminiscent of the early colonial times, during which time the administration of military justice hardly provided any strong guarantees for the protection and enjoyment of the right to a fair trial.*

**Key words:** *fair; justice; law; military; rights*

## 1 Introduction

The right to a fair trial is provided for in several international human rights instruments to which Uganda is party. Key among these is the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup> and the African Charter on Human and Peoples' Rights (African Charter).<sup>2</sup> In the

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1 Adopted 16 December 1966; GA Res 2200A (XXI) UN Doc A/6316 (entered into force 23 March 1976). Uganda acceded to the ICCPR on 21 June 1995.

2 Adopted 27 June 1981 (entered into force 21 October 1986). Uganda ratified the African Charter on 10 May 1986.

former, the right to a fair trial is provided for in article 14 and in the latter in article 7. As party to these treaties, in the absence of any reservations, Uganda is obligated to fulfil its obligations in good faith.

The right to a fair trial as provided for in article 14 of ICCPR and other international human rights instruments encompasses the following elements: the right to a fair and public hearing by a competent, independent and impartial tribunal; the presumption of innocence until proven guilty; the right to be promptly informed of the nature and cause of the charge; the right to adequate time and facilities for the preparation of one's defence; the right to communicate with counsel of one's own choice; the right to be tried without undue delay; the right to be tried in one's presence; and the right to defend oneself in person or through legal assistance of one's own choice. It also includes the right of the accused person to examine, or have examined, the witnesses testifying against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; have the free assistance of an interpreter if he or she cannot understand or speak the language used in court; and not to be compelled to testify against him or herself or to confess guilt. Fair trial rights also include the right to have one's conviction and sentence reviewed by a higher tribunal, and the right against double jeopardy. Together, the guarantees provided for in article 14 of ICCPR constitute the minimum international human rights standards for ensuring a fair trial. These apply to military tribunals in full as they do to the ordinary courts (Human Rights Committee 2007; African Commission on Human and Peoples' Rights 2005).

Before the adoption and entry into force of ICCPR, the major international instrument that provided for the right to a fair trial was the Universal Declaration of Human Rights (Universal Declaration).<sup>3</sup> In the Universal Declaration the right to a fair trial is provided for in articles 10 and 11. In totality, these provisions provide for the major elements of the right to a fair trial as provided for in ICCPR. They provide for equality before courts; the right to a fair and public hearing; the right to an independent and impartial tribunal; the presumption of innocence; and guarantees necessary for the preparation of one's defence when charged with a criminal offence. At the time of its adoption as a declaration, the Universal Declaration was not intended to be legally binding (Hannum 1995). As such, its value in protecting human rights, in general, and the right to a fair trial, in particular, was limited. It was for this reason that the international community in 1966 adopted ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) to transform the rights provided for in the Universal Declaration into legally-binding rights.

This article analyses the legal protection of the right to a fair trial in the administration of Uganda's military justice over the years. For the most part it focuses on the legal instruments governing Uganda's military justice during the different periods. An analysis of the national legal instruments is made against the minimum international human rights standards

3 Adopted 10 December 1948 by the UN General Assembly Resolution 217(III). Prior to the Universal Declaration, the right to a fair trial existed as a rule of customary international law (Robinson 2009). Robinson points out that over the centuries little has changed regarding the major elements of the right to a fair trial.

summarised above. The article also analyses relevant case law where the records exist.<sup>4</sup> The article is divided into eight sections. Section 1 is the introduction. In section 2 the protection of the right to a fair trial in Uganda's military justice system during the colonial times (1895-1962) is examined. Section 3 analyses the protection of the right to a fair trial in Uganda's military justice system during the immediate post-independence era (1962-1971). Section 4 highlights some of the major issues concerning the protection and enjoyment of the right to a fair trial in the administration of justice during the Amin era (1971-1979).<sup>5</sup> Section 5 analyses the protection of the right to a fair trial under Museveni's National Resistance Army (NRA) Codes of Conduct (1986-1992). In section 6 some observations are made about the protection of the right to a fair trial under NRA Statute 1992 (later renamed 'UPDF Act 1992'). The analysis in this section is not done in any substantial detail because, for the most part, the provisions dealing with the right to a fair trial in NRA Statute 1992/UPDF Act 1992 essentially are the same as those contained in the UPDF Act 2005 which is analysed in section 7. Section 8 concludes the article.

At this stage some preliminary questions must be posed to guide the analysis that follows: What are the origins of Uganda's military justice system? To what extent, if at all, did Uganda's colonial military justice legislation protect human rights, in general, and the right to a fair trial, in particular? In relation to Uganda's colonial military justice legal frameworks, how has Uganda performed over the years, in terms of guaranteeing the legal protection and enjoyment of the right to a fair trial in the administration of justice through its military tribunals? The first two questions are addressed in the next section.

## 2 Uganda's military justice system and the right to a fair trial in the colonial era (1895-1962)

Uganda was declared a British Protectorate on 19 June 1894 (Kanyehamba 2002; Morris & Read 1996). In September 1895, the British Parliament passed the Uganda Rifles Ordinance which established the Uganda Rifles as a national army.<sup>6</sup> The Uganda Rifles Ordinance 1895 was the first legal instrument to provide for the governance of Uganda's army as a national institution. Among other things it provided for the administration of military justice. The fact that the Uganda Rifles Ordinance and the immediate subsequent military legislations emanated from the British Parliament, it is tenable to argue that, in this sense, the origins of Uganda's military justice system were British. The other major legal instruments that governed Uganda's army and issues of military justice during the colonial era were the Uganda Military Force Ordinance 1899; the King's African

4 Unfortunately there are hardly any records of decided cases concerning the administration of military justice during the colonial era, the immediate post-independence period, Amin's era and the NRA Codes of Conduct epoch.

5 This article does not examine military justice and the right to a fair trial in the period 1979-1986 mainly because of a lack of credible information about this subject. The period 1979-1986 is when Uganda's political stability was at its worst. In only seven years, the country underwent a change of government five times.

6 Prior to this, each kingdom in Uganda had its own army. For an exposition of Uganda's pre-colonial armies, see Omara-Otunnu 1987.

Rifles Ordinance 1902; and the King's African Rifles Ordinance 1958 (Uganda Military Forces Ordinance 1958).<sup>7</sup> Before analysing these military legal instruments, it is important to briefly examine whether Uganda's colonial constitutional order made any provision for the protection and enjoyment of the right to a fair trial in the administration of justice. Uganda's colonial constitutions essentially were the 1902 Uganda Order-in-Council and the 1920 Uganda Order-in-Council.<sup>8</sup> Although these Constitutions contained provisions concerning the administration of justice,<sup>9</sup> they never provided for the protection and enjoyment of the right to a fair trial in the administration of justice. For the most part, the colonial Constitutions were more concerned with vesting despotic powers and authority in the Colonial Governors/Commissioners to manage the Ugandan protectorate in a manner that served the colonial interests.<sup>10</sup> To what extent then did Uganda's colonial laws protect the right to a fair trial in the administration of justice through military tribunals?

A critical analysis of Uganda's early colonial military ordinances hardly reveals any concern for human rights, in general, or the right to a fair trial, in particular. All that these Ordinances did was to vest dictatorial and arbitrary powers in the commandant, chief officers and commanding officers.<sup>11</sup> Contrary to the right to a fair trial that requires independence and impartiality in the adjudication of cases, these officers had the power to investigate, prosecute and pass judgment with respect to matters of military discipline and military offences. For instance, under section 26 of the Uganda Rifles Ordinance 1895, chief officers were given powers to inquire into and try any offence against military discipline committed by any native officer, under-officer and privates. Under the same provision, on conviction they had the power to impose sentences including imprisonment, with or without hard labour, fines, confinement to barracks and extra guards and piquets. In cases of aggravated or repeated offences, the commandant had the power to charge, investigate and convict any accused soldier and could impose sentences ranging from a reduction in rank, to imprisonment, hard labour, corporal punishment and dismissal from the force.<sup>12</sup>

The establishment of courts-martial did not make a significant difference as far as the protection and guaranteeing the enjoyment of the right to a fair trial is concerned.<sup>13</sup> The law still gave dictatorial and

7 In 1962 the King's African Rifles Ordinance 1958 was renamed the Uganda Military Forces Ordinance 1958 by the Uganda Military Forces (Constitution and Miscellaneous Provisions) Ordinance 52 of 1962.

8 The 1902 Uganda Order-in-Council was the first colonial constitution of Uganda as a British protectorate. It formally established colonial rule in Uganda. The 1920 Uganda Order-in-Council revoked certain provisions in the 1902 Order-in-Council.

9 See eg secs 15-23 of the 1902 Uganda Order-in-Council and sec 8 of the 1920 Uganda Order-in-Council. These provisions essentially deal with the establishment of courts of justice, the laws to be applied by the courts of justice, and the powers of the colonial governor in the administration of justice.

10 For a detailed analysis of the 1902 and 1920 Uganda Orders-in-Council, see Kanyeihamba 2002.

11 According to sec 2 of the Uganda Rifles Ordinance 1895, the Commandant was the Officer in Chief Command of the Uganda Rifles. Chief officers were defined in the same provision to include wing officers and all officers above the rank of wing officer.

12 Secs 30-31.

13 Sec 43 of the King's African Rifles Ordinance 1902 established two courts-martial, namely, the general court-martial and the regimental court-martial.

arbitrary powers to the commanding officers. Under section 43 of the King's African Rifles Ordinance 1902, the power to convene courts-martial and to appoint members and presidents to these courts was vested in the commanding officers. The same law also granted the commanding officers the power to confirm the findings and sentences of courts-martial.<sup>14</sup> It is significant to note that the commandant, chief officers and commanding officers were all appointed by the commissioner and were answerable to him.<sup>15</sup> Therefore, they cannot generally be regarded as having been independent from the executive and the military command influence – a requirement that is fundamental for ensuring the independence of military courts.

Uganda's colonial military justice legal frameworks were also silent on many other aspects critical for the protection and enjoyment of the right to a fair trial. For instance, there was no requirement for military courts to be legally competent, nor was there any provision requiring their proceedings to be public. The issue here is not so much that Uganda's colonial military justice legal frameworks should have provided adequate guarantees for the protection of the right to a fair trial and other human rights as expected under contemporary human rights law. Rather, the concern is that much of the essence of the colonial military legislation continues to feature in the country's military laws. However, it is important to observe that military justice systems of the time, including those in Western countries, generally were arbitrary and tyrannical in nature. They were 'heavily disciplinarian and generally emphasised the iron hand of discipline over fairness, human rights and justice' (Sherman 1973). In Uganda's case, however, the arbitrariness of the military justice system could have been compounded by the ideology of racial supremacy. As Oloka-Onyango (1993) observes, this ideology refused to equate colonial subjects to other species of humankind, particularly *homo colonialis*.

Towards the end of the colonial era, the administration of justice through Uganda's military tribunals started improving especially in terms of providing guarantees to ensure fair trials. For example, under the Uganda Military Forces Ordinance 1958, an officer who convened courts-martial could not serve as a member of the same court.<sup>16</sup> This Ordinance also granted an accused soldier the right, based on reasonable grounds, to object to any member of a court-martial, including the president.<sup>17</sup> As a way of improving on the legal competence of courts-martial, provision was made for the appointment of judge advocates to advise courts-martial on issues of law and procedure.<sup>18</sup> Most significant to note is that the 1985 Uganda Military Forces Ordinance provided for the right of appeal to a civilian court. Any person convicted by a court-martial could, with leave of the High Court, appeal to the High Court against their conviction.<sup>19</sup> This development set in motion the process of 'civilianisation' of Uganda's

14 Secs 44(a) & (b).

15 According to sec 3 of the King's African Rifles Ordinance 1902, the commissioner was the head of the colonial government and Her Majesty Queen Victoria's representative in Uganda.

16 Sec 80(1).

17 Sec 82(1).

18 Sec 116.

19 Sec 112.

military justice, which is critical for ensuring the independence of military courts and their scrutiny to ensure that they do not abuse their powers.

Three major reasons could explain the positive reforms witnessed towards the end of the colonial era. First, the mission of the colonial government had largely been accomplished, and therefore it was no longer necessary to keep the tyrannical grip over the army, including in the area of military justice. Second, after World War II, Britain, like many other Western countries, started reforming its military justice system to make it more humane and fair (Sherman 1973). This process could also have had an impact on the reforms subsequently introduced in Uganda and other colonies. Third, the governance reforms that took place in Uganda's Legislative Council (LEGCO) from 1945 onwards could also have had a strong bearing on the progressive military justice reforms.<sup>20</sup> In 1945, Africans were for the first time admitted to the LEGCO.<sup>21</sup> Three Africans representing Buganda, Bunyoro and Busoga were admitted to the LEGCO in 1945, but by 1958 African representation had grown to 12. Originally, Uganda's LEGCO was a preserve of Europeans. It was composed of seven Europeans with the colonial governor serving as its president. It is probable that the African members of LEGCO humanised what would otherwise have been tyrannical military justice legislation.

In summary, Uganda's military justice laws enacted during the colonial times were less concerned with the protection and enjoyment of the right to a fair trial, in particular, and human rights, in general. However, towards the end of colonialism the country's military laws started providing for some guarantees for the protection and enjoyment of the right to a fair trial in the administration of military justice. The next section analyses the legal protection of the right to a fair trial in the administration of military justice in the immediate post-independence era.

### **3 Right to a fair trial in Uganda's military justice during the immediate post-independence era (1962-1971)**

The attainment of Uganda's independence in October 1962 marked an important era in the protection of human rights in the country, at least insofar as their recognition in the country's legal framework was concerned. Chapter III of Uganda's Independence Constitution contained extensive provisions for the protection of individual rights and freedoms.<sup>22</sup> The right to a fair trial was provided for in section 24. In its totality, section 24 of the Ugandan Independence Constitution provided for the right to a fair trial in similar terms as stipulated in ICCPR.<sup>23</sup> The 1966 and 1967 Constitutions also comprehensively provided for the right to a fair trial as their 1962 predecessor did. In fact, sections 24 and 15 of the 1966 and 1967 Constitutions, which provided for the right to a fair trial

20 Uganda's LEGCO was established by the 1920 Order-in-Council. Sec 8 of this Order-in-Council gave the LEGCO the power and authority to make laws, constitute courts, make rules for the administration of justice, and to make provisions for peace, order and good governance of Uganda as a British protectorate.

21 For a brief history of Uganda's LEGCO, see Okello 2015.

22 This Constitution was attached as a schedule to the Uganda (Independence) Order-in-Council, 1962, passed by the Imperial Parliament on 2 October 1962.

23 The right to a fair trial as stipulated in the ICCPR is summarised in sec 1 of this article.

respectively, reproduced word for word section 24 of the 1962 Constitution. It is therefore correct to conclude that at least with respect to the right to a fair trial, the 1962, 1966 and 1967 Constitutions provided adequate guarantees for its protection. This being the case, the key question to ask at this point is to what extent the immediate post-independence military legal frameworks guaranteed the fair trial rights in the administration of justice by military courts.

In September 1964, the Parliament of Uganda passed the Armed Forces Act which repealed and replaced the Uganda Military Forces Ordinance 1958 as the major legal framework for the establishment, maintenance and discipline of the Ugandan military forces. Four key developments regarding the right to a fair trial in this law are worth noting. First, although it maintained summary trials by commanding officers, it granted the accused persons the right to elect to be tried by court-martial.<sup>24</sup> Second, it disqualified officers responsible for convening courts-martial, prosecutors, the commanding officer of the accused person, provost officers and any person who prior to the court-martial participated in the investigations from serving on the courts-martial.<sup>25</sup> This was a critical provision for ensuring the independence and impartiality of courts-martial. Third, it provided for the appointment of judge advocates at a general court-martial by the Chief Justice in consultation with the Attorney-General.<sup>26</sup> This position contrasts with that under the Uganda Military Forces Ordinance 1958 where the responsibility to appoint judge advocates was vested in the governor and the convening officers of courts-martial. This development was critical not only for guaranteeing that the persons who appointed judge advocates were competent, but also for ensuring their independence from the convening authorities of courts-martial and the army command influence. Fourth, the 1964 Armed Forces Act established the Court-Martial Appeal Court to hear and determine all appeals referred to it from decisions of the general court-martial and the disciplinary court-martial.<sup>27</sup> The Court Martial Appeal Court replaced the High Court as the last appellate court on issues of military justice. Beyond the mere replacement of the High Court, the Court-Martial Appeal Court came along with important reforms. The Court-Martial Appeal Court was to be composed of the Chief Justice and all puisne judges of the High Court, with the Registrar of the High Court serving as its Registrar.<sup>28</sup> It was to be duly constituted if it consisted of an uneven number of judges, not less than three summoned in accordance with the directions given by the Chief Justice.<sup>29</sup> It is arguable, at least in theory, that the reconstitution of this Court, with the Chief Justice as a member, strengthened the right of appeal and enhanced the quality of military justice. It also enhanced civilian scrutiny of military justice, which is a critical element in checking excesses of military tribunals.

In spite of the safeguards for the protection of the right to a fair trial in the 1964 Armed Forces Act and the Constitution, Uganda's immediate

24 Sec 63.

25 Secs 69 & 74.

26 Sec 68.

27 Sec 89(1).

28 Sec 89(2) and Regulation 1 of the Armed Forces (Court-Martial Appeal Court) Regulations, SI 163/66.

29 Regulation 2(2) of the Armed Forces (Court-Martial Appeal Court) Regulations.

post-independence military courts, especially during President Idi Amin's era, often were convened and acted contrary to the law. Because of the profound effects of Amin's regime on the protection and enjoyment of right to a fair trial in the administration of justice through Uganda's military tribunals, the next section highlights some of issues that arose during this era.

#### 4 Amin's military justice and the right to a fair trial (1971-1979)

President Idi Amin assumed power in January 1971 after a successful military *coup* against the Apollo Milton Obote-led government. Through Legal Notice 1 of 1971, Amin amended and suspended different provisions in the 1967 Constitution. The major provisions suspended were those related to the exercise of executive powers and the authority of parliament. He conferred upon himself both the executive powers and legislative authority. He became the President, the legislature and the law. He governed the country through decrees. It is worth noting though that Amin did not suspend the Bill of Rights that included the guarantees of the right to a fair trial. This notwithstanding, through different actions and inactions the human rights provisions in the 1967 Constitution, including those that related to fair trial rights, became dead-letter laws (Khiddu-Makubuya 1994; Mubangizi 2005).

In total disregard and violation of the Constitution and the provisions of the 1964 Armed Forces Act, Amin's military tribunals violated all the tenets of the right to a fair trial. First, the tribunals were composed of illiterate individuals who had no basic understanding of the law (Onoria 2003). Second, they were often staffed with serving military men whose only basis of appointment was loyalty to President Amin and the fact that they could be relied upon to convict whoever was deemed an opponent to the regime (International Commission of Jurists 1977). Third, Amin's military tribunals often proceeded on the premise that suspects were guilty of the offences with which they were charged. For instance, in one of the incidents a suspected rebel was sentenced to death by firing squad on the basis of 'curious entries' in his diary which he could not explain (International Commission for Jurists 1977). In the Amin era, the right to a fair trial within a reasonable time was understood to mean instant (in)justice and, on conviction, the tribunals normally had a standard sentence, which was death by firing squad (Onoria 2003). Accused persons were often denied their right to legal representation by counsel of their choice because the regime considered lawyers 'a nuisance not to be tolerated' (International Commission for Jurists 1977). As Amnesty International (1978) observed:

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

In Decree 12 of 1973, President Amin substantially widened the jurisdiction of Uganda's military tribunals to include the trial of civilians accused of committing capital offences. For instance, under section 4 powers were given to the President to order trials of civilians by military tribunals where he was satisfied that their acts were calculated to intimidate or alarm members of the public or to bring the military government under contempt or disrepute.

In conclusion, it is a fallacy to talk about the enjoyment of the right to a fair trial in the administration of military justice during Amin's era. While the Constitution and military law provided for the right to a fair trial in good measure, it was never enjoyed in the administration of justice by military tribunals. This partly confirms the observation by Oloka-Onyango (2006) that 'the protection and enjoyment of fundamental human rights in Uganda's criminal justice system generally, is very much dependent on the prevailing system of governance in the country'. The period during which the enjoyment of the right to a fair trial in the administration of justice by Uganda's military tribunals was at its lowest is the time when the military was in absolute control of governance of the country, at least as far as being explicitly at the helm of state affairs with Amin the field marshal as President and his word constituting law. This possibly points to the fact that military governments are the worst guarantors of human rights and fundamental freedoms.

## 5 Museveni's NRA Codes of Conduct (1986-1992) and the right to a fair trial

President Museveni's National Resistance Movement (NRM) government was ushered into power in 1986 through Legal Notice 1 of 1986. As was the case with Legal Notice 1 of 1971 which ushered Amin into power, Legal Notice 1 of 1986 suspended certain provisions in the 1967 Constitution, especially those concerning executive power and legislative authority. However, Legal Notice 1 of 1986, in a similar fashion as Legal Notice 1 of 1971, did not suspend or amend the fair trial rights guarantees contained in section 15 of the 1967 Constitution. All organs exercising judicial power therefore were expected to respect and uphold these rights.

With respect to the administration of military justice, the NRM government introduced and maintained two rigid codes: the Code of Conduct for the National Resistance Army (NRA) and the NRA Operational Code of Conduct (together referred to as 'the NRA Codes of Conduct').<sup>30</sup> The NRA Codes of Conduct provided the main governance framework for Uganda's army. They were originally designed to regulate the behaviour and conduct of the NRA soldiers during its five-year bush war against the Obote government. They were subsequently appended as a schedule to Legal Notice 1 of 1986 which ushered the NRM into power. Legal Notice 1 of 1986 modified but did not repeal the 1964 Armed Forces

30 The Code of Conduct for the NRA applied in situations when the soldiers were not engaged in field operations. The NRA Operational Code of Conduct applied in situations when the soldiers were engaged in field operations.

Act. The Act continued in operation to the extent that it was not modified by the proclamation.<sup>31</sup>

The NRA Codes of Conduct had far-reaching consequences for the protection and enjoyment of the right to a fair trial in Uganda's military justice system. As compared to the provisions in the 1964 Armed Forces Act, the NRA Codes of Conduct were a big setback as regards the protection and enjoyment of the right to a fair trial in the administration of justice by Uganda's military courts. They abolished the Court-Martial Appeal Court and established the General Court-Martial as the supreme trial organ of the military justice system.<sup>32</sup> As discussed earlier, the Court-Martial Appeal Court was an important area where critical reforms for the protection of the right to a fair trial had been made. By abolishing the Court-Martial Appeal Court, the NRA Codes of Conduct in effect negated the soldiers' rights of appeal and removed the country's military justice system from any scrutiny by civilian authority. This was a substantial setback. They also removed the power to appoint judge advocates from the Chief Justice and vested it in the Chairperson of the High Command.<sup>33</sup> The High Command was given power to appoint both the members of courts-martial and the prosecutors.<sup>34</sup> Inconsistent with the right to a fair trial, the High Command – a non-judicial body – was given the power to vary decisions of courts-martial.<sup>35</sup> The NRA Operational Code of Conduct required all minutes of the proceedings of the general court-martial and unit tribunals to be sent to the High Command for perusal<sup>36</sup> and it had the prerogative to revise, quash, or suspend any sentence of courts-martial.<sup>37</sup>

Plausibly, the most draconian provisions in the NRA Codes of Conduct with respect to the protection and enjoyment of the right to a fair trial were sections 25(iv) and (vi) of the NRA Operational Code of Conduct. Section 25(iv) stipulated that where a unit tribunal or field court-martial was found to be guilty of a gross contravention of the provisions of the Code, either in substance or procedure, the High Command would suspend such court, set up a provisional court, and all members or any one of them would be charged. As punishment they could be dismissed or demoted from their substantive rank and could suffer any other punishments laid down in the Codes up to the maximum sentence of death. Section 25(vi) provided that where members of a Unit Tribunal or court martial failed to execute their duty under the Code, or in any other way neglected or favoured an accused, they would be charged of conspiracy and would be dismissed by the High Command and could suffer any additional punishment as the High Command would determine. Together, the above provisions constituted the most serious affront to the

31 In April 1987 Legal Notice 1 of 1986 was amended by Legal Notice 1 of 1986 (Amendment) Decree 1987 which substituted the schedule to Legal Notice 1 of 1986 with the one that was annexed to it. The NRA Codes as comprised in the substituted schedule are the focus of the discussion in this section.

32 Sec 10 of the Code of Conduct for NRA.

33 Sec 10(viii) of the Code of Conduct of NRA. The High Command was composed of the top military commanders of NRA. It was chaired by the Commander in Chief and President of the Republic of Uganda.

34 Secs 10(ii) & (vi) of the Code of Conduct of NRA.

35 According to Principle 4 of the Basic Principles on the Independence of the Judiciary, endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

36 Sec 7(i) of the NRA Operational Code of Conduct.

37 Sec 9 of the NRA Operational Code of Conduct.

protection and enjoyment of the right to a fair trial in the administration of justice by Uganda's military courts. They directly impinged on the courts-martial's independence from the military hierarchy and the executive. They went far beyond what is acceptable for any tribunal that purports to exercise judicial power in a democratic society.

In summary, the NRA Codes of Conduct were a big setback as regards the protection and enjoyment of the right to a fair trial in Uganda's military justice. The question that should be asked at this point is: Given NRM's commitment to democracy and human rights in its Ten-Point Programme, why were the NRA Codes of Conduct inimical to the protection and enjoyment of the right to a fair trial in the administration of justice by military tribunals?<sup>38</sup> Two reasons could explain this. The first was the need to enforce strict military discipline in an army that had expanded so much to bring on board soldiers from former military regimes whose record concerning human rights was questionable (Naluwairo 2011). Second, perhaps NRM/A viewed judges at the time as part of the 'old order' that could not be trusted to exercise oversight over the revolutionary NRA. Whatever the reasons, what the NRA Codes of Conduct did was to take the country's military justice back to the pre-1958 traditions.

## 6 From the NRA Codes of Conduct to the NRA Statute 1992

In 1992 the NRA Statute 1992 (later renamed the UPDF Act 1992)<sup>39</sup> was enacted by the National Resistance Council (NRC)<sup>40</sup> to replace the NRA Codes of Conduct and the 1964 Armed Forces Act. As it is not intended to discuss the NRA Statute in any detail for the reasons given at the beginning of this article, only a few issues about this law are highlighted in this section as a precursor to the analysis in the section that follows.

The NRA Statute 1992 did not introduce any significant reforms in the area of military justice, especially as far as the protection of the right to a fair trial is concerned. It retained many aspects of the NRA Codes of Conduct the provisions of which, as discussed earlier, fell far below the acceptable minimum international human rights standards for the administration of justice. This, however, is not surprising. During the parliamentary debates leading to the enactment of this law, Major General David Tinyefuza, then Minister of State for Defence, pointed out that the NRA Bill was intended, among other things, to make 'provision for the maintenance of enhanced discipline in the armed forces by retaining the Code of Conduct and the Operational Code of Conduct' (Republic of Uganda 1991-1992). Mrs Gertrude Njuba, a historical member of the NRA, made the point even clearer when she informed members of the NRC that 'the origins of the NRA Bill were in the desire to legalise the two Codes of Conduct of NRA' (Republic of Uganda 1991-1992).

38 The Ten-Point Programme was NRM's plan of action for Uganda's social, political, economic and social development. The first point in this plan of action was democracy.

39 This change in title was as a result of the change in name of Uganda's military forces from the NRA to the UPDF.

40 NRC served as Uganda's Parliament in the first years of the NRM rule. It was initially comprised of 38 leading cadres of the NRM and NRA who became members by virtue of their service to NRM during the guerilla war against the government of President Apollo Milton Obote.

The NRA Statute 1992, like its predecessor, the NRA Codes of Conduct, was too harsh. In fact, during the parliamentary debates, many members of the NRC expressed concern over the harshness of the NRA Bill which unfortunately was passed into law without any significant changes. In particular, they were concerned about the death penalty which had been laid down as the sentence for a number of offences. Hon Karuhanga, a member of the NRC, for instance observed:

I randomly opened the Bill and on page 14 and 15, I found that at the conclusion of every section, suffering death is the punishment. Now, on just two pages, there are four times you can die in this Bill. To me, it seems that the Bill has been brought so that we finish our soldiers (Republic of Uganda 1991-1992).

Arguing that the Bill was ‘terribly harsh’, another member of the NRC, Hon Kisamba Mugerwa, observed that the Bill in total outlined 54 incidences where a soldier could die. He noted that at that rate the country could find itself without anybody in the army (Republic of Uganda 1991-1992). On the other hand, government and the military leadership justified the harshness of the NRA Bill and, indeed, the retention of the NRA Codes of Conduct on the ground that it was critical for the maintenance of military discipline. It was argued that since the harshness underlying the NRA Codes of Conduct had proved efficient in maintaining discipline during the NRA guerrilla war and the first five years of the NRM in power, there was no need to change the *status quo*.<sup>41</sup> From this perspective, it is untenable to conclude that the NRA Statute of 1992 was nothing but ‘old wine in new bottles’, at least as far as the protection of the right to a fair trial is concerned.

In early 2000, the Ugandan legal fraternity under their umbrella organization – the Uganda Law Society (ULS) – started challenging the constitutionality of several provisions of the country’s military law, including those that had a direct bearing on the right to a fair trial. Two cases are worth mentioning here. In *Uganda Law Society v Attorney-General*<sup>42</sup> the applicants (ULS) sought to challenge the constitutionality of the NRA Statute 1992 insofar as it provided for the passing of the death sentence without the right of appeal to the Supreme Court. The application sought an injunction to restrain the state from carrying out the death sentence passed by a field court-martial until the petition had been heard. The Attorney-General argued that article 22(1) of the Constitution<sup>43</sup> did not apply to decisions passed by the field court-martial as it was not a court of judicature and that, even if it was, by virtue of articles 137(5) and (12) of the Constitution, article 22(1) was never intended to apply to field courts-martial. The Constitutional Court in its ruling observed that the primary objective of field courts-martial was to administer instant justice and instil discipline among the men and women in the armed forces at the front line and that, to that extent; it could not be bogged down by appeal procedures. It further observed that the

41 See eg the submissions of Major General David Tinyefuza, Mrs Gertrude Njuba, Lt Col Jeje Odongo and Major General Elly Tumwine.

42 Constitutional Application 7/2003.

43 This provision states that 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 where the conviction and sentence have been confirmed by the highest appellate court.

Constitution regarded field courts-martial as special courts which were established to maintain law and order and military discipline in a field operation, where to employ the normal court structures would create problems for the field commander. It argued that although death was an end to everything, it had to be balanced with the higher objectives the punishment was intended to achieve. It argued that the necessity for the death sentence in a field operation could not be underestimated for in a field operation, tough decisions and actions are a *sine qua non*. It held that on a balance of convenience, it was not proper to suspend the operation of the provisions which permitted the field courts-martial to pass death sentences without the right of appeal to the Supreme Court.<sup>44</sup>

For a court which is specifically charged with the duty of interpreting and upholding the Constitution to defend the military's objective in having the death sentence at the expense of the accused's constitutionally and internationally-guaranteed right of appeal, was shocking, to say the least. As guarantors and defenders of human rights and freedoms, courts are expected to interpret provisions that seek to curtail fundamental human rights very restrictively. On this occasion, the Constitutional Court failed in this noble duty.

In *Uganda Law Society & Another v Attorney-General*<sup>45</sup> the Constitutional Court departed from its decision summarised above. This case involved two soldiers of the UPDF who were indicted, tried by a field court-martial and executed on the same day for the murder of three civilians in Kotido district. The petitioners filed two applications seeking declarations that the entire process was unconstitutional. They asked the Court to, *inter alia*, revisit its decision in *Uganda Law Society v Attorney-General* discussed above. Delivering the unanimous decision of the Constitutional Court, Justice Twinomujuni held that the right of appeal applied even to the decisions of the field courts-martial. Citing Justice Mulenga's decision in the Supreme Court case of *Attorney-General v Tumushabe*,<sup>46</sup> Justice Twinomujuni rightly stated that except where the Constitution expressly exempts application of an article to any person or authority, the Constitution applies to all. He held that the denial of the right of appeal was clearly unconstitutional.

## 7 The 2005 UPDF Act and the right to a fair trial

In 1995, the Republic of Uganda adopted a new Constitution under which the 2005 UPDF Act was enacted. Before analysing the right to a fair trial in the context of the 2005 UPDF Act, it is necessary that a brief examination is done of the extent to which the 1995 Constitution protects the right to a fair trial. The 1995 Constitution repealed and replaced the 1967 Constitution and Legal Notice 1 of 1986.<sup>47</sup> Chapter 4 of the 1995 Constitution provides for the promotion of fundamental and other human rights and freedoms. The right to a fair trial is provided for in article 28. Article 28 provides for virtually all elements of the right to a fair trial as

44 For a further scholarly analysis of the Court's decision in this case, see Oloka-Onyango 2005.

45 Constitutional Petitions 2 & 8 of 2002.

46 *Attorney-General v Tumushabe*, Constitutional Appeal 3 of 2005.

47 Art 287 1995 Constitution.

stated in article 14 of ICCPR (summarised in section 1 of this article). Elements of the right to a fair trial not explicitly provided for in article 28 are also protected by virtue of article 45.<sup>48</sup> The right to a fair trial as provided for in article 28 of the 1995 Constitution is non-derogable.<sup>49</sup> In *Tumushabe*<sup>50</sup> the Supreme Court of Uganda emphasised the fact that the constitutional provisions concerning human rights apply to military courts as they do to ordinary courts except in circumstances where it is stated otherwise. In this case, the Attorney-General had argued that the Constitutional provisions on bail did not apply to military courts. Now that it is clear that the 1995 Constitution comprehensively protects the right to a fair and that this right applies to military courts in their administration of justice, the question is how progressive the 2005 UPDF Act is in ensuring that the right is enjoyed in the administration of military justice.

In 2005 the Ugandan Parliament enacted a 'new' UPDF Act which repealed and replaced the 1992 UPDF Act. This law does not provide any positive reforms in as far as the protection and enjoyment of the right to a fair trial in the administration of justice by Uganda's military courts is concerned. For the most part, the 2005 UPDF Act is a replica of the 1992 UPDF Act and the NRA Codes of Conduct. It is 'old wine in new bottles'. Akin to the UPDF Act 1992 and the NRA Codes of Conduct, the UPDF Act 2005 does not provide adequate guarantees to ensure the independence and impartiality of Uganda's military courts. Contrary to the right to an independent and impartial tribunal requirement that the tenure and financial security of people who serve as judicial officers should be secured by law, the UPDF Act 2005 is silent on the issue of security of tenure and financial security of the members of the UPDF who serve as judge advocates. The one-year tenure provided for the members of the military courts is also insufficient to guarantee their independence. In *Uganda Law Society and Jackson Karugaba v Attorney-General*, one of the major issues was whether the Kotido field court-martial accorded the accused persons a fair trial in accordance with the Constitution. The Constitutional Court concluded that given the current laws under which Uganda's military courts are constituted and operate, they cannot be independent and impartial as required by the Constitution. Although the major law governing military courts in issue then was the 1992 UPDF Act, its provisions on the composition and operations of military courts essentially are the same as those under the UPDF Act 2005. The 2005 UPDF Act like its predecessors – the UPDF Act 1992 and the NRA Codes of Conduct – does not adequately protect the institutional independence of military courts. According to sections 194, 197 and 202(c) of the Act, members of the military courts, chairpersons of the military courts, the prosecutors and the judge advocates are all appointed by the same authority, namely, the High Command. Moreover, under section 196(1), the High Command has the power to convene any military court at any time. This is also reminiscent of Uganda's military justice during the colonial times.<sup>51</sup>

48 Art 45 of the Constitution provides inter alia that the guarantees concerning the human rights and freedoms specifically provided for in Ch 4 'shall not be regarded as excluding others not specifically mentioned'.

49 See art 44 of the 1995 Constitution.

50 *Tumushabe* (n 46).

51 For a thorough analysis of the compliance of Uganda's current military justice with the right to an independent and impartial tribunal, see Naluwairo 2012.

As was the case with the UPDF Act 1992, the UPDF Act 2005 also does not provide adequate guarantees to ensure that Uganda's military courts comply with the right to a competent tribunal. Contrary to the right to a competent tribunal, which in the context of military justice dictates that the trial of civilians by military courts should be limited to exceptional cases where a state can show that resorting to such trials is necessary and justified by objective and serious reasons and where, with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials (HRC 2007), the 2005 UPDF Act subjects many categories of civilians to military law and military courts *in abstracto*. According to this law, the categories of civilians that are subject to the jurisdiction of military courts include civilians who voluntarily accompany any unit or other element of the defence forces that is on service in any place; civilians who serve in the defence forces under engagements by which they agree to be subject to military law; civilians who aid or abet a person subject to military law in the commission of a service offence; civilians who are found in unlawful possession of arms, ammunitions or equipment ordinarily being the monopoly of the defence forces or other classified stores as prescribed; and civilians who commit a service offence while subject to military law.<sup>52</sup> Sections 119 and 179 of the 2005 UPDF Act that give military courts the jurisdiction over civilians and over civil offences are reminiscent of Amin's military justice.<sup>53</sup>

As was the case with its predecessors – the 1964 Armed Forces Act and the UPDF Act 1992 – the 2005 UPDF Act maintained the Court-Martial Appeal Court as the last appellate court on issues of military justice. However, unlike the Court-Martial Appeal Court established under the Armed Forces Act 1964 which was composed of the Chief Justice and puisne judges of the High Court and whose registrar was to be the registrar of High Court,<sup>54</sup> the Court-Martial Appeal Court under the 2005 UPDF Act 2005 is composed of serving members of the Uganda Peoples Defence Forces. In comparison to the UPDF Act 1992, this is another case of 'old wine in new bottles'. In comparison to the Armed Forces Act 1964, it is a serious retrogression as far as the independence and impartiality of the Court-Martial Appeal Court is concerned. It is also a serious retrogression with respect to ensuring civilian control of the army and ensuring civilian scrutiny of the administration of military justice.

Regrettably, the UPDF Act 2005 also denies certain categories of persons subject to military law the right of appeal. This is unlike its predecessor, the UPDF Act 1992. Section 227(1) of the UPDF Act 2005 provides that 'any party to the proceedings of unit disciplinary committees or courts-martial other than a field court-martial who is not satisfied with its decision shall have a right of appeal to an appellate court'. This means that inconsistent with international human rights law and the Ugandan

52 Sec 119 2005 UPDF Act.

53 For an analysis of the constitutionality of trials of civilians in Uganda's military courts, see Naluwairo 2013.

54 See sec 89 (2) of the Armed Forces Act 1964 and R.1 of the Armed Forces (Court-Martial Appeal Court) Regulations SI 163/166.

Constitution, under the 2005 UPDF Act persons tried by the field courts-martial have no right of appeal.<sup>55</sup>

With respect to the right to a public hearing, although section 212(1) of UPDF Act 2005 explicitly provides for it unlike its predecessors, some of the exceptions attached to its enjoyment are inconsistent with the right to a public hearing as understood in international human rights law. In particular, section 212(2) of the UPDF Act 2005 provides one of the exceptions to the right to a public hearing as 'public safety'. The allowable exception under article 14(1) of ICCPR and article 28(2) of Uganda's 1995 Constitution is that the public and the press may be excluded on grounds of maintaining 'public order' and not 'public safety'. While the two concepts may be closely related, they are not the same. By allowing military courts to exclude the public on grounds of ensuring 'public safety' and not 'public order', the UPDF Act 2005 gives more grounds for military courts to exclude the public than what is acceptable. The exclusion of the public from the proceedings of court on the ground of maintaining public order presupposes that courts must justify their decision to exclude the public on the basis of the circumstances that can objectively be said to be likely to cause public disorder in the courtroom. With the concept of public safety, it suffices that a military court is taking preventive measures to ensure public safety generally. Also, inconsistent with international human rights law and the Constitution, the UPDF Act 2005 does not qualify the exceptions to the right to a public hearing with the requirement that they must be justifiable or necessary in a democratic society. The requirement that the allowable exceptions to the right to a public hearing must be justifiable in a democratic society is a very important safeguard against the abuse of those exceptions under the guise of ensuring morals, public order and national security.

There is nothing significant in the 2005 UPDF Act to bolster the protection and enjoyment of the right to a fair trial. Many provisions contained therein retain the essence of the old military justice legal frameworks, especially the NRA Statute, the UPDF Act 1992 and the NRA Codes of Conduct.

## 8 Conclusion

This article is concerned with assessing the evolution of Uganda's military justice system with respect to the protection of the right to a fair trial. It is apparent that military justice legal reforms introduced over the years, especially after the 1964 Armed Forces Act, have been largely artificial, at least as far as the protection of the right to a fair trial is concerned. They are largely 'old wine in new bottles'. Like its predecessors in the early colonial times, the successive military justice legal frameworks have never provided adequate guarantees to ensure the competence, independence

55 Although art 28 of the Constitution, which provides for the right to a fair trial, does not explicitly provide for the right of appeal, art 45 of the Constitution states that '[t]he rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned'. In *Uganda Law Society & Another v Attorney-General*, the Constitutional Court invoked art 45 of the Constitution and art 7 of the African Charter on Human and Peoples' Rights to include the right of appeal as part and parcel of the rights guaranteed under art 28 of the Constitution.

and impartiality of the country's military courts. Reminiscent of the colonial times, the successive military justice systems also have never adequately protected other rights to a fair trial such as the right to a public hearing and the right of appeal. Although some scholars (Onoria 2003; Naluwairo 2011 & 2012), the Constitutional Court and the Supreme Court of Uganda have pronounced themselves on some of the critical measures that need to be undertaken to ensure that the administration of military justice in Uganda conforms to the constitutional and international standards, no visible steps have been taken to reform the country's military justice system and break it from its colonial vestiges.

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2018-10

# The development of Uganda's justice system and the right to a fair trial: Old wine in new bottles?

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Global Campus

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R Naluwairo The development of Uganda's military justice system and the  
Old wine in new bottles? (2018) 2 Global Campus Human Rights Journal  
<https://doi.org/20.500.11825/687>

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