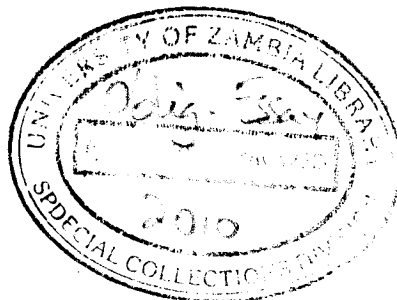


THE ROLE OF THE MILITARY JUSTICE SYSTEM IN PRESERVATION OF THE INSTITUTION



BY

PETER EVANS NZALA

UNZA, MARCH, 2010

DECLARATION

I, PETER EVANS NZALA, declare that this research paper is my original work and that where material has been used in this document from distinguished authors, the same has been acknowledged.

25th March 2010

Peter Evans Nzala

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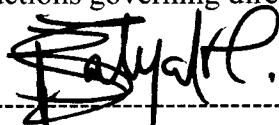
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25th March 2010

Date



DR. NGOSA SIMBYAKULA
(SUPERVISOR)

THE ROLE OF THE MILITARY JUSTICE SYSTEM IN
PRESERVATION OF THE INSTITUTION

A DIRECTED RESEARCH, L410, SUBMITTED TO THE UNIVERSITY OF ZAMBIA
IN PARTIAL SATISFACTION OF THE BACHELOR OF LAW DEGREE

BY

PETER EVANS NZALA

COMPUTER NUMBER: 99330741

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MARCH, 2010

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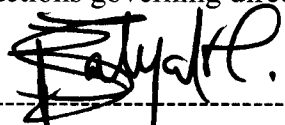
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DEDICATION

This is for inspiring you to keep reading regardless of your age.

ACKNOWLEDGEMENT

I wish to firstly give thanks and praise to God Almighty for the opportunity of life and his unlimited and unconditional love. Nothing is possible without his divine wish and blessings.

I extend my sincerely thanks, to my Supervisor, Dr. Ngosa Simbyakula for his time and guidance. You are very accommodating, patient and you were always available for consultation whenever I needed clarifications. Thank you very much, Sir, for your assistance and guidance.

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Lastly, but not the least, I thank all the Lecturers and Tutors at the School of Law. It was every informative course and I appreciate your tireless effort to get some of us to begin understanding the Law.

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The United States of America Manual of Courts-Martial

The United States of America Department of Defence Directive 5525.7

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CHAPTER ONE: THE CONCEPT OF MILITARY JUSTICE

1.0 Introduction

Every state has an inherent right to protect and safeguard its national borders, air space and territorial waters from acts of aggression. This is a right that is universally recognized and has been duly noted by international organizations such as the United Nations and the African Union. Each individual state thus takes responsibility for its destiny and protection of its interests. It is for this reason that most of the states incorporate in their constitutions the establishment and role of their respective military forces. It has been demonstrated many times before that national security can never be guaranteed. Field Marshal Helmut Von Moltke, the Germany Commander who led the Germany Forces against France during the Franco-Prussian war of 1871, once remarked that “Eternal peace is a dream. And not even a beautiful one...War is an integral part of the divine order of things, the fate of human kind, the inevitable activity of nations”¹. The Field Marshal was making the comment at the time his boss the Prussian Chancellor Otto Von Bismark shared the same sentiment by stating that “We don’t live alone in Europe, but with three other powers who hate and envy us”². It is with this knowledge that states equip, train and maintain forces to defend and deter aggression.

¹ A.J. Echevarria II, Moltke and the Germany Traditions: His Theories and Legacies, Vol XXXVI, No.1, Spring '96. p96

² A.J. Echevarria II, Moltke and the Germany Traditions: His Theories and Legacies, Vol XXXVI, No.1 Spring '96, p94

Maintenance of Defence Forces however has a number of challenges among them being the discipline of the men in uniform. Thus in addition to the training of military personnel on professionalism and the need for them to live out the good values there is a code of military conduct to regulate their behaviour. This code of conduct for members of the Defence Forces is a special law designed to expeditiously deal with matters pertaining to discipline in the Force. Members of the Defence Force are hence subject to the general laws of their country which affect all citizens alike and the special law which only affects members of the Defence Force.

The Special Law for the Defence Forces (which is also referred to as Military Law) enables them as institutions to self regulate and cleanse themselves of the bad elements. In so doing the societies in which the Defence Forces operate gain confidence in the Institutions because they can clearly see that they can uphold own integrity without employing other measures to control them. The more therefore the Forces are seen to handle their matters diligently and to ensure that wrong doers receive appropriate punishment for their crimes, the more the general populous will have confidence in their Defence Forces.

1.1 Statement of Problem

The manner in which offences committed by members of the Defence Force are

dealt with, may lead to the Defence Force as a whole being resented by the society who in the first place created it and whom it is created to serve and yet only the offenders should suffer consequences of their crimes.

Recent trials of former Service Chiefs in Zambia, demonstrated exactly the opposite of how best to handle disciplinary cases involving members of the Defence Force. Adverse reporting and comments on the Defence Institutions and not only the erring Generals was like a trial of the Defence Force itself.

1.2 Purpose of Study

This essay is an attempt to examine the extent to which the military justice system assists in the upholding of the image of the Defence Force in the community it serves.

1.3 Objective of the Essay

Generally this essay is endeavours to make a contribution and enable society as whole to understand and appreciate the Defence Force as an institution of society created for the well being of society and that as a creation of society it requires the continued support of society for it to fulfill the roles for which it was created.

Specifically the study attempts to show that cases involving members of the Defence Force are better handled by the Military Justice System than the Civil

Courts. This is so because negative publicity has the tendency of alienating the Defence Force which is a national institution and yet this can be avoided without necessarily condoning crimes by utilization of the Military Justice System. It is worthy noting that when individuals commit crimes they should suffer the consequences of their actions but the Institution should not be on trial because of these individuals' actions. In this regard therefore the study has endeavoured to highlight methods by which the Civil authorities (Ministry of Justice) and the Defence Force authorities can harmonise the investigation and prosecution of criminal cases involving members of the Defence Force in which they both have jurisdiction without necessarily compromising discipline and corruption but at the same time saving the Institution from undue disgrace.

1.4 Methodology

The study has been undertaken mostly through desk research which comprised analysis of some statutes and writings of distinguished authors and analysis of cases involving members of the Defence Forces.

The study has also included opinions collected through interviews from some members of the Defence Force and indeed members of the legal fraternity.

1.5 Operational Definitions of Concept

For the purpose of this study the following definitions will be used:

Commanding Officer: This in relation to a person means the officer commanding a unit or detachment to which the person belongs or is detached. Thus for a person under the posted strength of No. 1 Flying Station, the officer commanding No. 1 Flying Station is his commanding officer.³

Appropriate Superior Officer: This in relation to an accused person of the Rank of lieutenant and below and of warrant officer means any officer of the Defence Force not below the rank of lieutenant colonel who is not the commanding officer of such a person. In relation to officers of rank of major and above and warrant officer, any officer of the Defence Force not below the rank of colonel⁴.

Summary of Evidence: This means a record of evidence of the Prosecution witnesses taken by the commanding officer of the accused person or by any other officer on the direction of the commanding officer of the accused person in the presence of the accused person. The accused person being accorded an opportunity to cross-examine the witnesses⁵.

³ Section 84 (1) (a) of the Defence Act Chapter 106 of the Laws of Zambia (2000 Edition)

⁴ Section 84 (1) (b) of the Defence Act Chapter 106 of the Laws of Zambia (2000 Edition)

⁵ Section 8 of the Defence Force (Procedure) Rules, Section 131 of the Defence Act Chapter 106 of the Laws of Zambia (2000 Edition)

Abstract of Evidence: This means a record of evidence of the prosecution witnesses taken by the commanding officer of the accused person or any other officer on direction of such a commanding officer in the absence of the accused person⁶.

Stoppages: This means a deduction from salary as compensation to state for loss occasioned by wrongful act or negligence.⁷

Forfeiture of pay: Deduction of money from pay for absence from duty without leave, or for a term of imprisonment when not working in his official functions or as imposed by when found guilty of an offence under the Act.⁸

1.6 Literature Review

In Zambia the specific law for Defence Forces is found in the Defence Act, Chapter 106 of the Laws of Zambia and the general law is the Penal Code, Chapter 87 of the Laws of Zambia. In its preamble, the Defence Act stipulates, inter alia, that the Act provides for the creation and maintenance of the Defence Force comprising of the an Army and an Air Force. It provides for discipline in

⁶ Section 9 of the Defence Force (Procedure) Rules, Section 131 of the Defence Act Chapter 106 of the Laws of Zambia (2000 Edition)

⁷ Section 157 of the Defence Act, Chapter 106 of the Laws of Zambia

⁸ Section 155 of the Defence Act, Chapter 106 of the Laws of Zambia

the Defence Force and for trial and punishment of members of the Defence Force who commit such military and civil offences as are stipulated in the Act. This research has analysed this provision in order to show its effect on the administration of justice in the Defence Force.

Part V of the Defence Act deals with discipline and trials and punishment for military offences. In particular Section 49 deals with offences in relation to public and service property while Section 73 deals with civil offences. The study has analysed and compared these provisions with those provided under the Penal Code. The study has also analysed and compared punishment provided for officers and other ranks under the Defence Act against those provided under the Penal Code.

Trials by courts-martial and the powers of courts-martial have also been the subject of this study. Section 103 of the Defence Act provides for petitions against finding or sentence or both and Section 2 of the Defence Act indicates that the court of appeal is the Supreme Court for Zambia. The implication of these provisions has also been analysed.

Section 73 of the Defence Act provides that a person convicted by court-martial for an offence shall first, if the corresponding civil offence is treason or murder, be liable to suffer death and secondly, if any other offence be liable to suffer punishment or punishments which the civil court could award for corresponding

civil offence. The study has thus demonstrated through such articles that an individual member of the Defence Force who commits an offence is liable to suffer the same punishment whether he or she is tried by courts-martial or by civil courts.

In the United States of America, the equivalent of the Defence Act is referred to as the Uniformed Code of Military Justice. The Uniformed Code of Military Justice is supplemented by the Manual of Courts- Martial. In order to streamline procedures for investigations and trials of members who are subject to the Uniformed Code of Military Justice who commit offences in which both the Department of Defence and the Department of Justice have concurrent jurisdiction the two departments signed a Memorandum of Understanding (MOU). The policy behind the MOU is for the Department of Defence to maintain effective working relationship with the Department of Justice in investigations and prosecution of crimes involving Defence programmes, operations or personnel of the Department of Defence. The MOU stipulates, inter alia, that it is not intended to confer any rights, benefits, privileges or form of due process procedure upon individuals, associations, corporations, or other persons or entities. The purpose of the MOU is merely to establish policy for the two departments with regard to investigation and prosecution of criminal matters over which they have concurrent jurisdiction. The study has analysed these documents and illustrated that although the Department of Justice has the primary responsibility to enforce Federal Laws in the U.S.A., the Department of Defence

has the responsibility for the integrity of its programmes, operations and installations and for discipline of the Armed Forces. An analysis has also been undertaken on America's position with regard to the International Criminal Court.

The study has examined the writings of Sam C. Sarkesian and Thomas M. Gannon on professionalism and Arthur J. Dyck on ethical bases of military professionalism. This was aimed at showing that society is the main client for the Defence Forces and the need for the Defence Force to maintain the trust and confidence of society where they live and operate.

The study has also analysed the recent trials of senior Defence Force personnel such as the former Commandant of the Zambia National Service, Lt. General Funjika, and former Commanders of the Zambia Air Force, Lt. General Singogo and Lt. General Kayumba, and former Commander of the Zambia Army, Lt. General Musengule to show the impact these trials have had on the image of the Defence Force in Zambia and among the International Community, as well as the effect they have had on the hierarchy within the Defence Force.

1.7 Operation of the Military Law

Military Law consists of statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of commanders. Military Law includes jurisdiction exercised by courts-martial and jurisdiction exercised

by commanders with respect to non judicial punishment⁹ which in Zambia is referred to as investigation and summary dealing with charges¹⁰.

As already alluded to, the purpose of Military Law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment thereby strengthening the national security of the country¹¹.

It is important to note that Military Law is exercised by courts-martial and by commanders with respect to non judicial punishment or summary trials. This basically entails that the court-martial is the formal legal entity for dispensing justice in the Defence Force. Commanders at various levels may however deal summarily with certain cases¹². Non judicial punishment or summary trials provide commanders with an essential and prompt means of maintaining good order and military discipline and also promotes positive behaviour changes in service members without the stigma of a courts-martial conviction¹³. Thus less serious and minor offences are disposed off utilizing non judicial punishment or summary trials. Serious matters are referred for courts-martial trials. We wish in this chapter to high light some of the punishments available under summary trials while punishments for serious offences dealt with by courts-martial will be

⁹ Part I: Preamble of The Manual for Courts-Martial United States (2000 Edition) p1-1

¹⁰ The Defence Act Chapter 106 of the Laws of Zambia (1995 Edition) p45

¹¹ Part I: Preamble of the Manual for Courts-Martial United States (2000 Edition) p I-1

¹² Article 15 of the Uniformed Code of Military Justice United States, and Section 80 of the Defence Act Chapter 106 of the Laws of Zambia (1995 Edition)

¹³Part V: Manual for Courts-Martial United States (2000 Edition) p V-1, and at Appendix 2 : Uniformed Code of Military Justice Chapter 47, Subchapter III

adequately covered in subsequent chapters. This will assist in demonstrating that in the same way the hierarchy system of courts exists in the Civil Justice System, similar trial procedures and the court hierarchy system exists in the Defence Forces.

Non judicial punishment or summary trials reduce on the number of cases that have to be referred to courts-martial. Further these procedures do not apply to include or limit administrative corrective measures that promote efficiency and good order and discipline such as counseling, admonitions, reprimands, reproofs, censures, criticisms, rebukes, extra military instruction and administrative withholding of certain privileges¹⁴.

Non judicial punishments or summary trials are subject to certain limitation the primary one being that they may not be imposed upon any member of the Defence Force who has before the non judicial punishment or summary trial demanded trial by court-martial in lieu of non judicial punishment or summary trial¹⁵.

In terms of punishments, article 15(b) of the American Uniformed Code of Military Justice¹⁶ provides that, any commander may in addition to or in lieu of admonition or reprimand impose one or more of the provided punishments for minor offences without the intervention of a court-martial. He may award upon

¹⁴ Part V: Manual for Courts-Martial United States (2000 Edition) p V-2

¹⁵ Part V: Manual for Courts-Martial United States (2000 Edition) p V-2 , and Sub section 81(8) of the Defence Act Chapter 106 of the Laws of Zambia (1995 Edition)

¹⁶ Appendix II of the Manual for Courts-Martial United States (2000 Edition)

officers under his command, some restriction to certain privileges and facilities for specified limits with or without suspension from duty for not more than 30 consecutive days. If sentence is imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command, he may award, Confinement in quarters for not more than 30 consecutive days, Forfeiture of not more than one half month's pay for two months, Restriction to certain specified limits with or without suspension from duty for not more than 60 consecutive days, or Detention of not more than one half of one month's pay per month for three months.

Upon other personnel (non commissioned ranks) and if imposed upon personnel attached or embarked in a vessel, Confinement on bread and water or Diminished rations for not more than three consecutive days, Correctional custody for not more than seven consecutive days, Forfeiture of not more than seven days pay, Reduction to the next inferior pay grade if the grade from which demoted is within the promotion authority of officer imposing reduction, Extra duties including fatigue or other duties for not more than 14 consecutive days, or Detention for not more than 14 consecutive days.

In Zambia, the Defence Act¹⁷ provides under section 81 and section 82 punishments when dealing with summary trials. In case of officers and warrant officers after investigating a charge, the Commanding Officer, unless he has

¹⁷ Chapter 106 of the Laws of Zambia

dismissed the charge, submit it in a prescribed manner to higher authority¹⁸. The prescribed manner means that the Commanding Officer should cause a summary of evidence or an abstract of evidence to be taken and a record of the same submitted to the Appropriate Superior Authority¹⁹. In essence this entails that the commanding officer has no jurisdiction on charges against officers and warrant officers he can only hear them and then submit to Appropriate Superior Officer or Court-Martial. If the Appropriate Superior Authority records a finding of guilty, he may award one or more of the provided punishments. He may award, Forfeiture of seniority, A fine of sum not exceeding the equivalent of twenty eight days' pay, Severe reprimand or reprimand, Where the offence has occasioned any expense, loss or damage, he may award stoppages. He may however not award both forfeiture of seniority of rank and a fine²⁰.

As regards Non Commissioned Officers and Soldiers, the Commanding Officer may summarily deal with the charges and if he records a finding of guilty may award one or more of the provided punishments. If the accused is a non commissioned officer he may award, A fine of a sum not exceeding the equivalent of seven days' pay, Severe reprimand or reprimand, Admonition and where the offence has occasioned any expense, loss or damage, he may award stoppages.

If accused is a soldier, he may award, Detention for a period not exceeding twenty eight days, or, if accused is on active service, field punishment for a period not

¹⁸ Section 82 (1) of the Defence Act, Chapter 106 of the Laws of Zambia (2000 Edition)

¹⁹ Section 84(1) (b) of the Defence Act, Chapter 106 of the Laws of Zambia (2000 Edition)

²⁰ Section 82(5) of the Defence Act, Chapter 106 of the Laws of Zambia (2000 Edition)

exceeding twenty eight days, A fine of a sum not exceeding the equivalent of seven days' pay, Extra guard or pickets or Admonition and where the offence has occasioned any expense, loss or damage, he may award stoppages²¹.

The Defence Force (Procedure) Rules²² made pursuant to the Defence Act²³ provide all the necessary rules of procedure in dealing with offences involving service personnel. Investigation of charges by the Commanding Officers is adequately covered under Section 6 the Defence Force (Procedure) Rules²⁴. A summary of evidence mentioned above is covered under section 8 of these rules. This as earlier stated entails that the Commanding Officer or an Officer on the Commanding Officer's direction takes a record of evidence of the prosecution witnesses in the presence of the accused who shall be allowed to cross-examine any prosecution witness. An abstract of evidence follows the same procedure as a summary of evidence except that evidence of the prosecution witnesses is taken in the absence of the accused²⁵. Summary or abstract of evidence must be taken for all cases that may be referred to appropriate superior authority or court-martial²⁶. A record of the summary or abstract of evidence enables the Commanding Officer

²¹ Section 81(3) of the Defence Act, Chapter 106 of the Laws of Zambia (2000 Edition)

²² Statutory Instrument 68 of 1964

²³ Section 131 of the Defence Act, Chapter 106 of the Laws of Zambia(2000 Edition)

²⁴ Section 6 of Defence Force (Procedure) Rules; Section 131 of the Defence Act Chapter 106 of the Laws of Zambia

²⁵ Section 9 of Defence Force (Procedure) Rules; Section 131 of the Defence Act Chapter 106 of the Laws of Zambia

²⁶ Section 12 of Defence Force (Procedure) Rules; Section 131 of the Defence Act Chapter 106 of the Laws of Zambia

to study the case and decide whether to dismiss it, deal with it himself or referred it to appropriate authority or court-martial²⁷.

1.8 Organisation of Essay

We have endeavoured in this chapter to illustrate the existence, purpose and operation of military law. We have covered trials and punishments available for cases that have not and need not be referred to courts-martial.

Chapter two deal with the important subject of society as a client for the Defence Force and how military professionalism attempts to ameliorate the evils that the men in uniform may commit in societies where they operate.

Chapter three looks at the operation of the military justice system in the International Arena with special reference to International Military Tribunals and the approach taken by the United States of America

Chapter Four examines the Military Justice System as it currently exists in Zambia

Chapter Five contains a summary and recommendations.

²⁷ Section 11 of Defence Force (Procedure) Rules; Section 131 of the Defence Act Chapter 106 of the Laws of Zambia

CHAPTER TWO: SOCIETY AS A CLIENT

2.0 Introduction

The Military Professional's clients are the people of his country. It is for this reason that the faithfulness to fellow citizens is expressed appropriately by the military in a vow to uphold the Constitution of the country. It is essential for governments and the military professional himself to ensure that the image of the Defence Force is held in high esteem so that it is endeared to the society in which it exists and operates. We have in this chapter endeavoured to illustrate the need for cordial and harmonious relationship between the Defence Force and the general citizenry.

The basic themes of military professionalism are said to be integrity, obedience, loyalty, commitment, trust, honour and service. Without honour and trust the professional soldier is but a trained killer. With honour and trust he becomes a man of gentlemanly conduct professing loyalty to a person or group devoting himself to expertise, responsibility and corporateness of the profession of arms¹.

2.1 Professionalism and Ethics

The roots of professionalism and ethics in the various spheres of human activity are in history as old as man himself. The notion of professionalism and ethics can be traced to activities in human society that had influence on governance. We wish to delve here into the social contract theories that were proclaimed in early

¹ D.Bletz. The Role of the Military Professional in U.S. Foreign Policy, Special Studies (New York Praeger, 1972), p6

centuries and their influence on governance in a democratic society. Thomas Hobbes (1588-1679) a natural law philosopher contended in those early days that in order to escape from a state of affairs in which each man “is a wolf to every other man” (*homo homini lupus*), men entered into a social contract whereby they surrendered their rights to a sovereign ruler. In return for absolute subservience to him, the ruler guaranteed peace and greater security to each person than he might otherwise have had².

The social contract advocated by Thomas Hobbes provided for absolute subservience and was workable and effective in a totalitarian state where a Dictator could rule as he pleased with little regard for those who had surrendered their rights to the state in order to enable governance in the first place. This inevitably placed the general populous at the mercy of the ruler. The ruler thus used institutions of government including the military not only for protection of the governed from internal and external aggression against their lives, freedoms and property but often to disadvantage them. The ruler thus became a menace to the same people he was supposed to protect under the social contract.

In later years other natural law philosophers modified the social contract perception. John Locke (1632-1704) contrasted the absolutism advocated by Hobbes and stated that the power of the state can never be supposed to extend further than the common good. According to Locke in a state of nature all men were equal and should not be harmed. He stated that because of insecurity men

² L.B. Curzon, Jurisprudence (Macdonald and Evans, Ltd, 1979) p 65

entered into a social contract whereby the majority gives power to government which will then be obliged to protect the individual and that if the government forgets its trust it can be replaced³. Thus the power of the state was not to rule in a purely arbitrary way but that its power was for preservation. It could not be used to destroy, enslave or to impoverish the governed.

Further modification to the social contract theory was propounded by Jean Jacques Rousseau (1712-1778) who suggested that there was a time that men lived in freedom equality and happiness but that these qualities of living had vanished as civilization advanced. In his social contract theory Rousseau stated that the original state of nature could no longer be endured as men were in danger of perishing and that in order to maintain themselves men came together and pooled their strength in a way that would enable them to withstand any resistance to external sources. He called this the general will (*la volonte generale*). The people could thus through the general will control business of government while the elected few would actually carry out the business of governing. The general will was thus the only legal authority in the state. The ruler only governed by delegation and could be removed whenever rejected by the general will⁴.

In a democratic dispensation it can be deduced from the later natural law philosophers that governments and their institutions have delegated authority and serve at the pleasure of the general populous. For so long as the general populous

³ L.B.Curzon, Jurisprudence (MacDonald and Evans Ltd, 1979) p 67-68

⁴ L.B.Curzon, Jurisprudence (MacDonald and Evans Ltd) p67-68

or society are happy with the performance of government it remains in power whereas if it breaches its trust it is removed by society and cast aside and a new one replaces it. In order to continue operating in a manner befitting the expectations of the general populous or society, government and all institutions that serve society have developed certain professional ways of conducting their businesses and a number of ethics which should be observed by the professionals. This helps uphold the confidence that the society has in government and its institutions. The Defence Force is one such an institution that requires operating in a professional manner in order for the society to continue appreciating its existence and role. The characteristics of a profession are primarily service and competence. One may then ask the question as to what is the special area of competence or expertise of the military. The answer to this question is basically the skill the military should have in providing security. The next question would be as to who the military provide this special vocation or skill, to which the answer is the state and per se the members of that state.

Society creates the military for provision of security. This is the benevolent purpose for the military even though it utilizes violence, force and other destructive means to fulfill this purpose. In order for society to continue trusting the military which is an entity authorized to keep and use weapons violently against hostile elements for the purpose of providing security to society and its interests, there is need to have civil control over the military. Military professionalism therefore demands that the military professional and

establishments must be well trained, committed and dedicated to political neutrality. The military professional and establishment must shun under all circumstances any interference with the constitutional function or legitimate process of government, identify itself as part of the people and the nation and should assume unwavering loyalty to the system of government and obedience to whoever exercises legal authority.

Political neutrality is thus a cornerstone of military professionalism and special care is often taken to avoid the appearance of partisanship in the military. Society places defence officials in position of great trust and expects them to live up to that trust. In a democracy military officials must understand that they are accountable to society for their actions and that society expects military personnel to abide by high ethical standards. Military personnel may for example not use their positions or weapons for self enrichment. In the neighbouring Democratic Republic of Congo the tendency by military personnel to resort to mounting illegal road blocks and collection of illegal tariffs from the general populous whenever government delay in payment of their salaries has led to the people of that country to despise and resent the army. The ethical standards are founded on the military concept of duty, honour and public service.

Duty implies not only the obligation to do one's job conscientiously, but also to do so within ethically acceptable norms⁵. The ethical aspect of duty for military

⁵ Arthur J. Dyck: Ethical Basis of the Military Profession, Parameters, Journal of the US Army War College Vol. X, No. 1 p 43

professional is firstly a knowledge of basic moral principles and secondly military moral responsibilities and ethical guidelines that specify how best to recognize and maintain the specific obligation to clients⁶. Every military person must know that orders may at times be unlawful or immoral, and that it is not always one's duty to obey them. For example orders to rape women and ransack property in an invaded village can never be lawful and a soldier who obeys such an order will personally be guilty of such war crimes and crimes against humanity. A soldier's duty in military actions involving killing or risk of killing human being may be justified under the just-war criteria. The just-war criteria justifies killings where the action contemplated has a just cause, just intention, sanctioned by higher lawful authority, public declaration of what is contemplated, due proportion that is less evil following from acting rather than not acting in the manner contemplated, reasonable hope for success, last resort after all reasonable pacific alternatives have been tried and employment of just means to minimize risk to innocent noncombatants, avoiding terrorism and torture⁷. Any thing done contrary to these standards is unethical and will not be accepted by the society. The military would thus have abandoned its official duty, would have lost credibility and would have become irrelevant to society.

Honour in the military is associated with courage, fairness and complete trustworthiness on the part of the professional. A coward soldier is more dangerous than the enemy because he gives society the hope that they are secure

⁶ Arthur J. Dyck: Ethical Basis of the Military Profession, Parameters, Journal of the US War College Vol. X, No.1 p43

⁷ Ibid p 44

and they relax and become less alert and yet they have no protection whatsoever. Cowardice is therefore dishonourable and cannot be endearing to society. Fairness is a cornerstone of every justice system and fair and equal treatment enhances confidence in any system. As for being trustworthy one can hardly contemplate a society placing weapons in the hands of people they cannot trust. Society would live in perpetual fear.

The third criteria of ethical standards is public service and it entails that military profession is a calling and personnel serving therein should not be soldiers of fortune or mercenaries. Military personnel must be committed to service and civil authorities should enhance this by ensuring that they do not use the military for corrupt purposes or for partisan political interests. Civil authorities and society as a whole equally have an obligation to promote and sustain professionalism and ethics in the military. As pointed out in the Democratic Republic of Congo scenario, civil authorities can easily undermine military professionalism by non payment of salaries and by denying the military conducive conditions of service as well as by poor provision of combat means.

2.2 Conclusion

We have endeavoured in this chapter to highlight the importance of upholding the image of the Defence Force in society by way of inculcating and maintenance of military professionalism. We shall in the next chapter deal with the substantive

issue of the military justice system. We will deal with a comparative study of its application in the international arena before embarking on what is currently prevailing in a Zambia.

CHAPTER THREE: AN OUTLOOK AT THE MILITARY JUSTICE SYSTEM IN

THE INTERNATIONAL ARENA

3.0 Introduction

In this chapter we examine some of the ways in which military personnel are dealt with in the International Forum and by some developed countries. This will help us make an objective analysis of our own Zambian Military Justice System. This is an important exercise bearing in mind that we live in a world which is now a global village. Our actions and systems are the basis on which the International Community gauges us when deciding whether we abide by the rule of law and good governance.

3.1 International Military Tribunals

One of the major problems that followed the end of the Second World War was how to deal with personnel that committed heinous crimes during the war. The crimes committed during the war were so severe and appalling that at the end of the war the International community was angry with the Nazis and Japanese and revenge filled the minds of many leaders in the victorious Allied Forces camps. Stalin the Russian leader at the time of World War Two had stated that after an Allied victory some fifty thousand Germans should simply be shot out of hand. He stated on 29th November 1943 during a tripartite dinner attended by Britain's

Churchill, America's Roosevelt and himself that "the whole might of Hitler's mightiest armies depended on some fifty thousand officers and technicians. Fifty thousand must be shot"¹. Churchill was opposed to such actions and remarked at the time that the British parliament would never tolerate mass shootings. In reply to Stalin's demand he said "I would rather be taken out in the garden here and now and be shot myself than sully my country's honour by such infamy"². Roosevelt's macabre comment was that 'only forty-nine thousand' should be shot. This apparently prevented a heated argument between Stalin and Churchill. Even in London certain prominent and influential circles considered the best solution to be the summary shooting without trial of certain named German war criminals³. On 6th June 1945 Allies assumed supreme governmental authority over defeated Germany. It had by then been agreed by the Allies that an International Military Tribunal be set up to try war criminals.

In the lead up to the tribunal words of wisdom were uttered as early as December 1943 by Lord Simon in the House of Lords in London. He stated inter alia that "From our point of view.... We must never fail however deeply we are tried and however fundamentally we are moved by the sufferings of others, to do justice according to justice. There must be no mass executions of great number of nameless people merely because there have been executions on the other side. We shall never do any good to our own standards, our own reputation and to the ultimate reform of the world if what we do is not reasonably consistent with

¹ Werner Maser: Nuremberg: A Nation on Trial. Translated from Germany by Richard Barry, p. 25

² Ibid

³ Ibid

justice.....Whatever happens do not let us depart from the principle that war criminals shall be dealt with because they are proved to be criminals and not because they belong to a race led by a maniac and a murderer who has brought *this frightful evil upon the world*"⁴. This was an important statement by His Lordship because it is consistent with the reasoning adopted as early as the fourteenth century when many crimes were punishable with death. At that time, a need arose for some way of differentiating between those of evil intention and others less blameworthy. As a result of the social and religious pressure at the time one of the cardinal principles of criminal law developed which was expressed as "*actus non facit reum, nisi mens sit rea*."⁵ This means that 'a person cannot be convicted and punished in a proceeding of criminal nature unless it can be shown that he had a guilty mind.'⁶ This is the basis of the requirement in criminal law that the *actus reus* and the *mens rea* must coincide before a person can be convicted of commissioning any crime.

On 2nd May 1945, Justice Robert H. Jackson a United States Supreme Court Judge was appointed to represent the US on the International Military Tribunal and was also appointed Chief Prosecutor. He stated, inter alia, that "the tribunal had no wish to annihilate Germany or exact vengeance but to hand over the guilty to the law and set new international standards for the future"⁷. Justice Jackson proposed that trial should deal with major criminals for whose crimes no

⁴ Werner Maser: Nuremberg, A Nation on Trial p 28

⁵ Ian McLean and Peter Morrish: Harris's Criminal Law (Reprint 2000) p 15

⁶ Ibid

⁷ Werner Maser: Nuremberg, A Nation on Trial p 28

particular geographic location could be determined. “The little men, those who had lynched crews of Allied aircraft who had baled out or force landed, those that had served as guards in concentration camps or held some subordinate position in a murder squad, should be dealt with by existing military legal system. We shall accuse a large number of individuals and officials who were in authority in government, in military establishment including the General Staff, and in financial, industrial and economic life... who...are provable to be common criminals...Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan”⁸. On 21st November 1945, the first trial in history for crimes against the peace of the world, the Nuremberg trial, commenced. Justice Jackson in his opening submission stated, inter alia, that “The wrongs which we seek to condemn and punish have been calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated...This quest represents the practical effort to utilize international law to meet the greatest menace of our times-aggressive war”⁹.The world needs to commend the Heads of governments of Allied Forces and other honourable and reasonable men of the immediate post world war era such as Lord Simon and Justice Jackson for the wisdom in instituting legal mechanisms for dealing with heinous crimes. Even the most evil person must be given his day in court. If emotions had carried the day in the days immediately after the Second World War, summary executions would have taken place without

⁸ Werner Maser: Nuremberg: A Nation on Trial p28

⁹ Werner Maser: Nuremberg: A Nation on Trial p85-86

trial as initially advocated by Stalin and other angry men and precedent would have been set whereby killings of human beings convicted only by their association with a group that committed crimes would have taken place without regard to the fact that in the group there could be innocent as well as less guilty individuals. Reason thus prevailed over emotions and the due process was embarked on to ensure a fair trial for the accused persons.

The Nuremberg Trial was hence the launch of International Military Tribunals that have since become a common feature in dealing with major crimes associated with armed conflicts in modern society. The spirit of these tribunals is that common sense demands that law shall not stop with punishment of petty crimes committed by soldiers and little people but should also net the men who possess great power and make deliberate decisions to use that power to set in motion activities that harm many innocent men and women including children. The world can no longer tolerate despots and war mongering leaders who cause untold miseries to many people and destabilise world peace and development. Atrocities of the Second World War have led states united under the United Nations umbrella to put in place measures to prevent the recurrence of another world war. Deterrent and retributive punishments have also been put in place to deal with leaders that may advocate or perpetrate war crimes.

On 1st June 2002, the Rome Statute on the International Criminal Court came into force. Unlike the previous international military tribunals which were being set up

to deal with criminals for particular events on an adhoc basis, the International Criminal Court (ICC) is now established as a permanent institution which has power to exercise its jurisdiction over persons for most serious crimes of international concern and is complimentary to national criminal jurisdictions¹⁰. The spirit of the Nuremberg Trial is clearly replicated here in that the crimes perpetrated by small men are left to be dealt with by national criminal jurisdiction while those involving national leaders who set in motion their war machineries and cause untold miseries to human society are investigated and tried by this international criminal court.

The ICC has its seat at The Hague in the Netherlands but the court is mandated to sit elsewhere and wherever it considers it desirable as provided by the Statute¹¹.The ICC has international legal personality and may exercise its functions and power as provided by statute on the territory of any state party and by special agreement on territory of any other state.¹² Jurisdiction of the ICC is limited to the most hideous crimes of concern to the international community. Four crimes are listed in the statute. These are genocide, crimes against humanity, war crimes and crimes of aggression.¹³

The Rome Statute on the International Criminal Court is however an International Convention and as such is applicable to states that are party to the Convention. It

¹⁰ Rome Statute of International Criminal Court, Article 1

¹¹ Ibid, Article 3

¹² Ibid, Article 4

¹³ Ibid, Article 5

follows the '*pacta sunt servanda*' principle advocated by natural law philosopher Hugo Grotius which entails that agreement must be abided by. The US which was one of the major Allied powers that initiated the Nuremberg International Military Tribunal is not party to the Rome Statute on the ICC as it endeavours to shield its troops from international scrutiny. The ICC has been operating successfully and has dealt with cases arising from conflicts in Liberia, Yugoslavia, Bosnia and the Democratic Republic of Congo. The Yugoslav war crimes tribunal sitting in The Hague for crimes committed against ethnic Albanians in Kosovo in the late 1990s found five Serb Leaders guilty but acquitted former President of Kosovo Milan Milutinovic. The convicted leaders were ex-Yugoslavia Deputy Prime Minister Nikola Sainovic, former Defence Minister Dragoljub Ojdanic, ex- generals Neboya Pavkovic and Vladimir Lazarevic and former Serbian Public Security Services Chief Sreten Lukic. Milutinovic was found not guilty of the offences as he was seen as mere a figurehead of Slobodan Milosevic, the then President of Yugoslavia who died in custody in 2006 in The Hague before a verdict could be delivered in his own trial.¹⁴ As the United States is not party to the ICC Statute its troops cannot readily be subjected to the ICC jurisdiction. In January 2000 an American Staff Sergeant, Frank J. Ronghi of the Airborne Division of US Army raped and murdered an 11 year old girl called Merita Shabiu in the Kosovan town of Vitina. The body of Merita was discovered in the snow covered countryside near the southwestern Kosovo town of Vitina on 11th January, 2000. At first, the American would not allow UN Police to investigate the case. However American own Military Police uncovered conclusive evidence of the savage death of the

¹⁴ Ian Black and agencies : The Guardian .co.uk, Thursday 26th February 2009

girl. Staff Sergeant Ronghi was subsequently arrested. He was charged with rape and pre-meditated murder and was convicted by court-martial sitting in Germany and sentenced to life imprisonment.¹⁵ One may state here that the Americans go too far in protecting their troops in order to preserve the image of their Defence Force. That however is the seriousness they attach to preservation of their military institutions and American interests. It is worthy noting that the US has been involved in various conflicts the world over but its troops are not subject to the ICC. This is a deliberate stance by the American government to shields its troops from scrutiny by the International Community. The US views the protection of the image of its Defence Forces as cardinal to its national security and foreign relations.

3.2 The US Military Justice System

In the United States of America, the equivalent of the Zambian Defence Act is referred to as the Uniformed Code of Military Justice. The Uniformed Code of Military Justice is supplemented by the Manual of Courts-Martial. There are four agencies through which military law is exercised. The first agency are the Commanders who using non judicial procedures, which we discussed in Chapter one, mete out various disciplinary measures to members of the Defence Force for minor offences that do not require trial by court-martial. The second agency are the courts of inquiry which investigate cases and make various recommendations for either certain administrative measures to be taken or disciplinary measures

¹⁵ Kim Sengupta : The Independent, Friday 3rd November 2000

including recommendation for trial by court-martials. The third are military tribunals or military commissions that may be convened to try personnel especially where the matters may involve aspects of the International humanitarian Law or Law of War. The fourth agency is the courts-martial.¹⁶

The US Uniformed Code of Military Justice (UCMJ) spells out the jurisdiction of courts-martial. It provides for three kinds of courts-martial. The general courts-martial consisting of one military judge and not less than five members, the special courts-martial consisting of one military judge and not less than three members and summary courts-martial consisting of one commissioned officer. Each armed force has courts-martial jurisdiction over persons subject to the UCMJ in that particular force. Exercise of jurisdiction by one armed force over personnel of another armed force has to be by special regulations prescribed by the President.¹⁷

General Courts-Martial have jurisdiction to try persons subject to the UCMJ and may adjudge any punishment not forbidden by the UCMJ including the penalty of death. Special Courts-Martial have jurisdiction to try persons subject to the UCMJ for any non capital offence made punishable under the code. Summary Courts-Martial have jurisdiction to try persons subject to the UCMJ except officers and cadets.¹⁸

¹⁶ Part 1 Preamble of the US Manual for Courts-Martial p I-1

¹⁷ Appendix 2 , SubChapter IV US Manual for Courts-Martial p A2-6

¹⁸ Appendix 2, SubChapter IV US Manual for Courts-Martial p A2-6

Articles 77-134 of the UCMJ are the punitive articles and cover a wide range of offences.¹⁹ Interestingly other than purely military offences, there are criminal offences such as robbery, wastage, spoilage or destruction of property other than military property of the United States, burglary, house breaking, rape and carnal knowledge, murder and manslaughter, forgery and frauds against the United States. These and many others are within the jurisdiction of courts-martial. It is however important to note here that these offences can equally be dealt with by District and Federal Courts which have jurisdiction over all criminal matters occasioned in the United States of America. It is in cases that the Department of Justice (DoJ) and the Department of Defence (DoD) through courts-martial are said to have concurrent jurisdiction over the offences.

The punishments available under the UCMJ are listed at Appendix 12 of the Manual for Courts-Martial.²⁰ These include the penalty of death for such offences as desertion in time of war, assaulting or willfully disobeying a commissioned officer in times of war, mutiny and sedition, aiding the enemy, misbehaviour before enemy, spying, murder and rape. The offence of burglary attracts the maximum penalty of ten years confinement or imprisonment, robbery attracts a maximum penalty of fifteen years confinement, frauds against the United States attract the maximum penalty of five years confinement while smaller offences such as disorderly conduct and drunkenness attract penalties of between one to six months confinement. The seriousness on morality in the United States Armed

¹⁹ Appendix 2, SubChapter X, Ibid p A2-24

²⁰ Appendix 12: Manual for Courts-Martial p A12-1-6

Force is illustrated by inclusion in the UCMJ of offences such as adultery which attracts the maximum penalty of one year confinement, wrongful cohabitation which is punishable with a maximum penalty of four months and bigamy which is punishable with a maximum penalty of two years.

In the United States of America the DoJ has the primary responsibility to enforce Federal Laws while the DoD has the responsibility for integrity of its programmes, operations and installations and for discipline of the Armed Forces. Thus despite the jurisdiction given to the military justice system over offences committed by members of the Defence Forces who inevitably are subject to the UCMJ the primary responsibility for enforcement of laws vests in the DoJ. However as the laws of the land have conferred jurisdiction to the military justice system, a need arises to streamline procedures for investigation and prosecution of offences committed by members of the Defence for which both the DoD and the DoJ have concurrent jurisdiction. The two departments signed a Memorandum of Understanding (MOU). The MOU is referred to as the Department of Defence Directive 5525.⁷²¹ The MOU stipulates, inter alia, that it is not intended to confer any rights, benefits, privileges or form of due process procedure upon individuals, associations, corporations, or other persons or entities. The purpose of the MOU is merely to establish policy for the two Departments with regard to investigation and prosecution of criminal matters over which they have concurrent jurisdiction.

²¹ Appendix 3, Manual for Courts-Martial p A3-1

In all corruption matters the DoD shall obtain the concurrence of the DoJ Prosecutor or Federal Bureau of Investigation (FBI) before initiating any independent investigation preliminary to any action under the UCMJ. The Department of Defence investigative agencies are further obliged to refer to FBI all allegations of bribery and conflict of interest involving military and civilian personnel of the Department of Defence arising from Department of Defence Operations. All bribery and conflict of interest allegations against present, retired, or former Generals will be considered significant for purpose of referral to the FBI. However in determining whether the matter is significant for purpose of referral to FBI, the following factor should be taken into consideration: sensitivity of DoD programme, amount of money in alleged bribe, number of DoD personnel implicated, impact on affected DoD programme and with respect to military personnel, whether the matter normally would be handled under the UCMJ. As for frauds against the DoD and embezzlement of Government Property, the DoD and the DoJ have the investigative responsibility. However whenever a matter under investigation by the DoD agency is identified as a matter which would warrant federal prosecution then the DoD will confer with the United States Attorney General, the DoJ and the FBI. At this conference criminal investigative responsibility is determined by the DoJ in conjunction with the DoD. In essence therefore decision is made based on how best to handle the cases. Where a determination is made that the matter need to be handled without undue publicity and that in the interest of upholding the image of the United States Armed Forces it is best delegated to the military justice system for prosecution and trial then it is

so delegated. Thus such a matter will be handled by the military justice system but in the handling of the matter discipline is not compromised. The exchange of information and coordination in the investigation ensures that the expertise and net work of the FBI and the investigative agencies of the DoJ and DoD are fully utilized in establishing the facts in every particular case. This provides for effective prosecution of cases and transparency between the arms of government charged with the task of investigating and prosecuting cases.

3.3 Conclusion

Zambia can learn some lessons from the American approach by adopting some measures the Americans apply for the purpose of dealing with culprits while at the same time preserving the image of its Defence Forces. We will proceed to the next Chapter in which we will examine the military justice system as it exists in Zambia.

CHAPTER FOUR: THE ZAMBIAN MILITARY JUSTICE SYSTEM

4.0 Introduction

Defence Force personnel as already stated are subject to the general laws of the land and to the Specific law for Defence Force. In Zambia the Specific law for the Defence Force is the Defence Act Chapter 106 of the laws of Zambia and the general law is the Penal Code, Chapter 87 of the laws of Zambia. We have endeavoured in this chapter to illustrate the availability of sufficient provisions in the Defence Act of dealing with cases involving members of the Defence Force.

4.1 General Provisions of the Defence Act

In its preamble, the Defence Act stipulates, inter alia, that the Act provides for the creation and maintenance of the Defence Force comprising of an Army and an Air Force. It also provides for discipline in the Defence Force and for trial and punishment of members who commit such military and civil offence as are stipulated in the Act.¹

Part V of the Defence Act deals with discipline and trials and punishments for military offences. Since we have already dealt with trials by Commanding Officers and Appropriate Superior Officer we shall proceed to look at trials by courts-martial. Section 86 provides that subject to the provisions of the Defence

¹ Defence Act, Chapter 106 of the Laws of Zambia, p. 12

Act, a court-martial under the Act shall have power to try any person subject to military law under the Act for any offence which under the Act is triable by court-martial and to award for any such offence any punishment authorized by the Act for that offence. A person subject to military law under the Act include; officers and soldiers of the Regular Force; officers and soldiers when attached to the Defence Force or any part thereof; members of the Home Guard under provisions of the Home Guard Act; officers and soldiers of the Auxiliary Air Force; officers of the Reserve Force under mobilization.²

4.2 Offences under the Defence Act

Offences under the Act are dealt with from section 29 to section 72. The first listed offence is that of dealing with aiding the enemy. The offence covers acts such as abandoning or delivering up any place or post which it is a person's duty to defend. It also covers any act calculated to imperil the success of operations of the Defence Force, aiding the enemy with the prosecution of hostilities having been made a prisoner of war, furnishing the enemy with arms or ammunition, harbouring or protecting an enemy who is not a prisoner of war, and causing the destruction or capture of any aircraft belonging to the Defence Force. On conviction by court-martial for an offence under this section a person is liable to suffer death or any other punishment provided by the Act.³

² Sections 206 and 202 of the Defence Act, Chapter 106 of the Laws of Zambia

³ The Defence Act, Chapter 106 of Laws of Zambia, p. 24

The second listed offence deals with communication with the enemy. This deals with communicating intelligence information and a person convicted of this offence is liable to suffer death or any other punishment provided by the Act.⁴

The Act then makes provision for the offence of cowardly behaviour when before the enemy. This offence attracts the sentence of imprisonment. A provision is made for offences against morale which relate to a person who spreads reports on operation of the Defence Force which are calculated to create despondency or unnecessary alarm. An offence dealing with becoming prisoner of war through *disobedience or willful neglect and failing to rejoin own Force is listed and is followed by offences by or in relation to sentries. This covers sleeping on the post, drunkenness on the post and abandoning the post without having been regularly relieved. Offences of looting and mutiny are provided for as is failure to suppress mutiny. All these offences attract the sentence of imprisonment or any other punishment provided by the Act.*⁵

Insubordinate behaviour, disobedience to particular orders, obstruction of provost officers and disobedience to standing orders are covered under three separate sections.⁶

Desertion and absence without leave as well as assisting and concealing desertion and absence without leave are also catered for. These are supplemented by the

⁴ Ibid, p. 25

⁵ Ibid, p. 25-28

⁶ Ibid, p. 28-29

offence of falsely obtaining or prolonging leave. Failure to perform military duties is one common offence that is provisioned for⁷ and the offences of malingering and drunkenness are covered under separate sections.⁸

The offences covered from Section 29 to Section 48 as relate to a person in relation to his performance of military duties and his conduct thereof. Offences in relation to property are covered under Sections 49, 50 and 51.⁹ We shall elaborate more on the offences in relation to property in our comparison with offence available under the Penal Code and other statutes dealing with crimes related to property.

Offences in relation to billeting and requisition of vehicles are dealt with at Sections 52 and 53. Offences in relation to flying are covered from Section 54 to 57.¹⁰ Sections 58 to 61 deal with offences relating to, and by, persons in custody.¹¹ Offences in relation to courts-martial are covered under Section 62 and 63.¹²

Miscellaneous Offences which cover; injurious disclosure; making a false statement on enlistment; making a false document; scandalous conduct of an officer; ill treatment of officers or men of inferior rank; disgraceful conduct; false

⁷ The Defence Act, Chapter 106 of the Laws of Zambia, p. 30-31

⁸ The Defence Act, Chapter 106 of the Laws of Zambia, p.31-32

⁹ Ibid, p.32-33

¹⁰ Ibid, p.35

¹¹ Ibid, p.36-37

¹² Ibid, p.37-38

accusation; attempt to commit military offences and conduct to the prejudice of good order and military discipline sum up the list of military offences. ¹³The Defence Act also caters for civil offences. ¹⁴

4.3 Punishments under the Defence Act

Punishments which may be awarded to an officer by sentence of a court-martial are set out at Section 74 of the Act. These are the Death sentence; Imprisonment; Cashiering¹⁵, Dismissal from the Defence Force; Forfeiture in the prescribed manner of seniority of rank in the Defence Force or in the corps to which the offender belongs, or in both; Fine of a sum not exceeding the equivalent of ninety days' pay; Severe reprimand or reprimand; Where the offence has occasioned any expenses, loss or damage, stoppages.¹⁶

Section 75 provides for punishments that may be awarded to soldiers and other ranks. The Section provides that under sentence of court-martial a soldier may be awarded the Death sentence; Imprisonment; Discharge with ignominy from the Defence Force; in the case of a warrant officer, dismissal from the Defence Force; Detention for a term not exceeding two years; Where the offender is on active service on day of the sentence, field punishment for period not exceeding ninety

¹³ Ibid, p.38-41

¹⁴ Ibid, p. 41

¹⁵ Stripping an officer of his rank and commission and dismissing him from service at parade ceremony

¹⁶ The Defence Act, Chapter 106 of the Laws of Zambia, p.42

days; in case of a warrant officer or non commissioned officer, reduction to the ranks or any less reduction in rank; in case of warrant officer or non commissioned officer, forfeiture in prescribed manner of seniority of rank; Where the offence is desertion, forfeiture of service; Fine of sum not exceeding the equivalent of ninety days' pay; in the case of warrant officer or non commissioned officer, severe reprimand or reprimand; Where the offence has occasioned any expenses, loss or damage, stoppages.¹⁷

Having covered the sections dealing with offences that are triable by court-martial and the available punishment which the court-martial may award to persons convicted after trial by the court we wish to focus on the offences in relation to property and civil offences.

Section 73 of the Defence Act provides that any person subject to military law under this Act, who commits a civil offence, whether in Zambia or elsewhere, shall be guilty of an offence against this section.¹⁸ Civil Offence is then described as meaning any act or omission punishable by the law of Zambia or which, if committed in Zambia would be punishable by that law.¹⁹ This section further provides that a person convicted by court-martial of an offence against this section shall if the corresponding civil offence is treason or murder, be liable to suffer death; and in any other case, be liable to suffer any punishments which the civil court could award for the corresponding civil offence, if committed in

¹⁷ The Defence Act, Chapter 106 of the Laws of Zambia, p. 42-43

¹⁸ Section 73 (1) of the Defence Act, Chapter 106 of the Laws of Zambia

¹⁹ Section 73(2) of the Defence Act, Chapter 106 of the Laws of Zambia

Zambia, being a punishment or punishments provided by this Act, or such punishment, less than the maximum punishment which a civil court could so award, as is so provided.²⁰ These provisions clearly demonstrate that a member of the Defence Force who commits an offence is liable to suffer same punishment or punishments whether he is tried by court-martial or by the civil courts.

4.4 Court-Martial under the Defence Act

A court-martial as earlier stated has power to try persons subject to military law and to award punishments as provided under the Defence Act.²¹ A court-martial may be convened by an officer not below the rank of Colonel.²² It is important to note here that a court-martial just like military tribunals is not a permanent court but is convened when there is need to dispose off offence committed by persons subject to military law.

A court-martial shall consist of the president and not less than two officers as members. However if a court-martial is for trial of an officer or if the only punishment or maximum punishment which can be awarded in respect of the charge before the court is death, then it shall consist of the president and not less than four other officers as members.²³ An officer who convenes a court-martial or an officer who at any time between the date on which the accused was charge

²⁰ The Defence Act, Chapter 106 of the Laws of Zambia, p. 41

²¹ Section 86 of the Defence Act, Chapter 106 of the Laws of Zambia

²² Section 87(!) of the Defence Act, Chapter 106 of the Laws of Zambia

²³ Ibid, Section 88

with the offence and the date of trial, has been the commanding officer of the accused, and any other officer who has investigated the charge against the accused, shall not be president or sit as a member of the court-martial or act as judge advocate at such a court-martial.²⁴ This to prevent a situation whereby a person is a prosecutor, judge and jury in the same case.

In order to guide the court in legal and procedural matters a judge advocate may be appointed to act at a court-martial sitting. The appointment of a judge advocate to act at any court-martial may be made by the Chief Justice upon application being made to him by the Commander.²⁵ We wish to mention here that although Defence Force Officers undertake lessons in military law during their training and that passing a military law examination is a pre requisite for promotion to the rank of major in the Army and rank of Captain in the Air Force, their knowledge on legal matters cannot be compared to that of officials in the Judiciary whose substantive work is on legal issues. There is hence a need for the presence of a legal expert at a court-martial sitting.

A court-martial shall sit at such place as may be specified in the order convening the court. However a court-martial sitting at any place shall, if the convening officer directs it to sit at some other place, and may without such direction if it appears to the court that it is necessary in the interest of justice to sit at some other

²⁴ Ibid, Section 89

²⁵ Ibid, Section 127

place, adjourn for the purpose of sitting at that other place.²⁶ The court-martial shall sit in an open court and in presence of the accused. The court may however sit in camera if it is considered necessary and expedient in the interest of justice to do so.²⁷

In as regards decisions of the court-martial, every question to be determined by the court shall be by majority votes of the members of the court.²⁸ In the event of an equality of votes on the finding, the court shall acquit the accused. A finding of guilty where the only punishment the court can award is death shall have no effect unless it is reached with concurrence of all the members of the court. Where on such finding there is a majority vote but no concurrence, the court shall be dissolved and the accused may be tried by another.²⁹ Where the accused if found guilty and the court has power to sentence him to or some less punishment, sentence of death shall not be passed without the concurrence of all members of the court.³⁰ In the case of sentences other than the death sentence, the president has a second or casting vote to decide the matter.³¹

Where a court-martial finds the accused guilty on any charge, the record of the proceeding of the court-martial shall be transmitted to a confirming officer for confirmation of the finding and sentence of the court on that charge. A finding of

²⁶ Ibid, Section 90

²⁷ Ibid, Section 93

²⁸ Ibid, Section 95(!)

²⁹ Ibid, Section 95(3)

³⁰ Ibid, Section 95(4)

³¹ Ibid, Section 95(5)

guilty or sentence of the court-martial shall not be treated as a finding or sentence of the court until confirmed.³² A sentence of death shall not be carried into effect unless it has been approved by the Republican President or by the advisory committee established under the Republican Constitution.³³

A person convicted by court-martial may, with leave of the Supreme Court appeal to that court against his conviction.³⁴ It is important to note here that appeal from court-martial lie before the Supreme Court. Clearly the law place court-martial jurisdiction very high. It is therefore baffling that cases involving military personnel are submitted to subordinate courts when there is a court with higher jurisdiction within the Defence Force. We are not questioning the powers of the Director of Public Prosecutions in deciding when, where or which cases should be adjudicated. We are merely pointing out that there is an apparent vote of no confidence in the military justice by pursuing such actions and suggesting that there is need for close liaison and interaction to ensure an effective and efficient mechanism for resolving cases involving Defence Force personnel.

4.5 Recent Trial of Members of the Defence Force in Civil Courts

In the recent past former commandant of the Zambia National Service, Lt. General Wilford Joseph Funjika, former Commanders of the Zambia Air Force, Lt. General Christopher Singogo and Lt. General Sande Kayumba, and former

³² Ibid, Section 102

³³ Ibid, Section 107

³⁴ Ibid, Section 136

Commander of the Zambia Army Lt. General Geogiao Musengule were charged with various offences were tried in the Subordinated Courts of the First Class for the District of Lusaka. They were all found guilty of the charges they were tried on and were sentenced to varying prison terms. We shall examine here charges relating to two of these generals and analyse whether there would have been alternative ways of handling their cases.

We start with the cases involving Lt. General Funjika. This senior officer was charged with the offence of corrupt practices by a public officer contrary to section 29(1) and 41 of the Anti Corruption Act No. 42 of 1996. The particulars of the offence are that he, on unknown dates but between the 3rd and 5th days of December 2001, at Lusaka being a public officer, namely commander of the Zambia National Service (ZNS) corruptly procured to have fifteen thousand British Pounds paid by Semyon Holdings to his children namely, Mumbelunga Funjika and Viera Funjika as a reward or inducement for him to award or having awarded contracts to Semyon Holdings Limited for the supply of berets, jerseys and rain coats to the Zambia National Service.³⁵

Section 29(1) of the Anti Corruption Act provides that; Any public officer who, by himself, or by or in conjunction with any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain, from any person for himself or for other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do,

³⁵ SSP/87/2004

anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned, shall be guilty of an offence of Corrupt practices by or with public officers.³⁶

Section 41 of the Anti Corruption Act provides that; Any person who is guilty of an offence under this Part shall be liable- General penalty (a) upon conviction to imprisonment for a term not exceeding twelve years; (b) upon a second or subsequent conviction, to imprisonment for a term of not less than five years but not exceeding twelve years; and (c) in addition to any other penalty imposed under the Act, to forfeit to the State of any pecuniary resource, property, advantage, profit or gratification received in the commission of an offence under this Act.³⁷

If his case was to be tried by court-martial the charge sheet would have read as follows: The accused person Lt. General Wilford Joseph Funjika, an officer of the Zambia National Service (ZNS) of Headquarters, ZNS, is charged with Committing a Civil Offence Contrary to Section 73 of the Defence Act, That is to Say Corrupt Practices by Public Officer Contrary to Section 29 (1) and 41 of The Anti Corruption Commission Act No. 42 of 1996, in that he, on a date unknown but between the 3rd and 5th days of December 2001, at Lusaka being a public officer, namely commander of the Zambia National Service (ZNS) corruptly procured to have fifteen British Pounds paid by Semyon Holdings to his two

³⁶ Section 29(1) of Anti Corruption Commission Act No. 42 of 1996

³⁷ Section 41 of Anti Corruption Commission Act No. 42 of 1996

children namely, Mumbelunga Funjika and Viera Funjika as a reward or inducement for him to award or having awarded contracts to Semyon Holdings Limited for supply berets, jerseys and rain coats to the Zambia National Service.³⁸

As can be seen above there would not have been any alteration of the charge and as earlier stated section 73 provides that the same punishment that a civil court would award for such an offence would be awarded by a court-martial. In this same case of Lt. General Funjika it should be noted that the subordinate court awarded a sentence which was criticised in daily press and the High Court using its supervisory powers had to review the case before awarding a custodial punishment for the convict. It is not clear why the subordinate court had in the first instance awarded a meaningless sentence. It could have been a genuine error on the part of the magistrate or it could be that he was acting under some influence from forces outside the court. Whatever the reasons such errors are rare under court-martial trials.

Former Zambia Air Force Commander, Lt. General Christopher Singogo, was tried by two different subordinate courts charged with committing different offences. Before one subordinate court he was charged with the first count of the offence of Abuse of Authority of Office, contrary to Section 37 (1) and (2) (a) and 41 of the Anti Corruption Commission Act No. 42 of 1996. Particulars of the offence are that he on unknown dates but between 1st August 2005 and 31st July

³⁸ Second Schedule Defence Force Procedure Rules No.13 and 14, Defence Act, Chapter 106 of the Laws of Zambia, p. 53-63

2007 at Lusaka in the Lusaka District Being a person employed in the Public Service namely the Ministry of Defence as Zambia Air Force Commander unilaterally and without authority for purposes of gain did purchase two generators by disregarding Zambia National Tender Board procedures and thereafter directed that they be installed at his guest houses namely Wane Lodge in Livingstone and Wasingo Guest Inn at PHI Lusaka, a matter or transaction which concerns Zambia Air Force in the Ministry of Defence, a public body.³⁹

The second count is theft by public servant contrary to sections 272 and 277 of the Penal Code chapter 87 of the laws of Zambia. Particular of the offence are that Lt. General Singogo and Captain Joseph Phiri on dates unknown but between the 1st day of August, 2005 and the 31st July, 2007 at Lusaka District, being persons employed in the Public Service, namely, Zambia Air Force under the Ministry of Defence did steal one generator Kama KDE 19TA3 valued at K32,153,800.00 the property of the Government of the Republic of Zambia which came into their possession by virtue of their employment.⁴⁰

Lt. General Singogo was convicted as charged under the two counts and was sentence to imprisonment by the subordinate court. He has since appealed against both the verdict and sentence to the High Court of Zambia and is on bail pending the appeal.

³⁹ SSP/34/2007

⁴⁰ Ibid

There are two issues of concern here. Firstly as we have pointed out in the trial of Lt. General Funjika above, if he had been tried by court-martial under Section 73 of the Defence Act as illustrated his appeal could only have been to the supreme court of Zambia as provided for under the Act. Further by having commenced the trial of the General in the subordinate court it entails that the matter will take long to be disposed of in that if he does not get what he may consider a favourable trial in the High Court he will seek leave to appeal to the Supreme Court. These offences as per the particulars on the charge sheet were committed between 2005 and 2007 and by the time they are disposed of by the supreme court it may take another ten years since trial in the High Court has not even commenced. The adage that 'justice delayed is justice denied' will surely be a reality in this case. Secondly disciplinary action is supposed to be a deterrent to would be offenders. A different message is being sent in that the accused General together with his other accused Generals Kayumba and Musengule are on bail going about their business as usual.

Lt. General Singogo appeared before another magistrate of the subordinate court charged with Abuse of authority of office contrary to Section 37(2) (a) and 41 of the Anti Corruption Commission Act No. 42 of 1996. The particulars of the charge are that he on a date unknown but between 12th January, 2001 and 30th November, 2003 at Lusaka in the District of Lusaka being a public officer namely, Deputy Air Commander of the Zambia Air Force did abuse the authority of his office by awarding a cleaning contract worthy K486,000,000.00 to Nasim Cleaning

Services Limited, a company in which he was Director and Share Holder in contravention of the Zambia Tender Board Procurement Procedures and thereby obtained advantage or profit for himself.⁴¹

Lt. General Singogo was convicted of the offence and sentenced to imprisonment. He has since appealed to the High Court of Zambia against both the verdict and sentence. He is also on bail in this case pending trial by the High Court. Here again if he is not satisfied with the decision of the High Court when it deals with his case the he will seek leave to appeal to the supreme court of Zambia. The time delay mentioned above will equally have a negative impact on delivery of justice. Cases involving another former Zambia Air Force Commander Lt. General Kayumba and those involving former Zambia Army Commander Lt. General Musengule followed a similar pattern to Lt. General Singogo's cases. These two former Commanders were also convicted by magistrates of the subordinate court and were sentenced to imprisonment. They have also since appealed to the High Court of Zambia against their convictions and sentences and are on bail pending the hearing of their cases in the said court. In the meantime they roam the streets freely and have even the chance of influencing prosecution witnesses.

4.6 Conclusion

Whereas justice can hardly be seen to have been done, the image of the Defence Force received some battering from the local press and discussions of thieving

⁴¹ SP/03/2007

generals was common in social places. In the Air Force bases and Army barracks the trust and confidence that troops had for their officers was low in that large number of senior officers involved pointed to a widespread cancer of corruption. We shall in the Chapter five of this study make proposal on the best way of handling cases involving persons who are subject to military law.

CHAPTER FIVE: HARMONISATION OF INVESTIGATIONS AND TRIAL BETWEEN CIVIL AND THE MILITARY LEGAL AUTHORITIES

5.0 Introduction

The objective of this study was to demonstrate the role that the military justice system plays in the preservation of the military institution. This we covered in the four preceding chapter. We now conclude the study by highlighting a few important issues.

5.1 Summary

We have discussed the importance of professionalism in the military and the need for the military to not only remain endeared to society but for it to be accountable to society that created it in the first place. We have looked at the military justice system in the international arena and seen how close relationship between the military justice authorities and civil justice authorities enhances cooperation in the investigation and trial of military personnel without tarnishing the image of the Defence as an institution. We looked at military tribunals which operate on adhoc basis just like courts-martial. This ensures expeditious disposal of cases. We have also looked at the provisions of military law in Zambia. In this chapter we endeavour to chart a way forward that will be in the interest of justice and that seeks to ensure a close working relationship between the civil legal authorities

which is the Ministry of Justice authorities and the Military authorities which includes Commanders and the Directorates of Legal Service of the Zambia Army and Zambia Air Force. This we shall do through recommendations.

5.2 Recommendations

This study has shown that the military justice system can handle satisfactorily most cases involving Defence Force personnel. We have shown that the Defence Act has provision for dealing with civil offence.¹ In order however to ensure transparency and that justice is seen to be done there is need for the Ministry of Justice to play a leading role in legal matters involving the Defence Force including cases requiring trial by courts-martial. The reason why the Generals mentioned in the study were ushered to civil subordinate courts instead of courts-martial for trial could be because of lack of confidence in the military courts and lack of coordination between the two government entities. This can be resolved by the Ministry of Justice playing a supervisory role and offering necessary legal advice to Defence authorities and conversely Military authorities closely liaising with the Ministry of Justice on all legal issues arising in the institution. Further full participation by civil agencies of government in investigation and prosecution of offences committed by Defence personnel will enhance collaboration between these government agencies. Where the civil agency is the first to investigate a case involving a member of the Defence Force, they should inform and involve officials from the Ministry of Defence in the continuation of the investigations.

¹ Section 73 of the Defence Act, Chapter 106 of the Laws of Zambia

The Federal Bureau of Investigations (FBI) in the USA assists in investigating cases regardless of whether they will be dealt with by District/Federal Courts or by Military Courts-Martial.

Prosecutors from the Director of Public Prosecution's Department should join military prosecutors at courts-martial sittings when offences for which persons appearing before courts-martial fall under the joint jurisdiction of both the civil and military authorities.

Zambia can learn from the American approach and sign a Memorandum of Understanding between the Defence Force and the Ministry of Justice which would spell out procedures and ways of ensuring close liaison when dealing with offences committed by Defence personnel where they have joint jurisdiction. In this way suspicion and lack of confidence in the military justice system will be removed. We fail to understand why recently Generals who were charged with corruption cases were ushered for trial to subordinate courts for offences they committed while they were serving in the Defence Force. Courts-martial which are superior to subordinate courts were available to handle the cases effectively and expeditiously.

The provision of attendance of the Judge Advocate at a court-martial sitting should be made compulsory and not as provided in the Defence Act where the Chief Justice only appoints one upon receipt of request from the Commander².

² Section 127 of the Defence Act, Chapter 106 of the Laws of Zambia

This will enhance the adherence to legal procedures and interpretation of the law by the courts-martial members.

Our civil courts have a lot of cases to deal with and the congestion of cases entails that it takes a long to be disposed them off. On the contrary courts-martial sit on an adhoc basis to dispose off cases as they arise. This offers a quick resolution and conclusion of cases which is in the interest of justice. As stipulated in the study one of the purpose of punitive measures is to act as a deterrent to would be offenders. The accused Generals currently awaiting appeals of their cases are on bail enjoying life as usual and may not have their cases concluded for some years to come and may even be acquitted in the end because they have opportunity to interfere with the witnesses. How can such a process be a deterrent to would be offenders?

Without prejudice to the need of transparency in a democratic dispensation efforts must be made to ensure that in criminal matters the individual culprits suffer the consequences of their crimes but the image of the institution they operated from should not be unnecessarily tarnished. We have stated that we have no sympathy for criminals but the sensational reporting by the daily press and the manner the cases were handled entailed that the image of an officer of general rank was tarnished and the Defence as an institution appeared to be a hub for plunderers in that almost all the former commanders were charged for corruption. This has a serious effect on the soldiers' perception of an officer. How can a man that cannot

be trusted lead troops in the field where their lives depend to a large extent on the leadership qualities of an officer. If the trials of the generals were conducted by courts-martial the soldier would know that there is no way crimes can be shielded even if it involves very senior officers. However, by referring the cases to civil subordinate courts, a vote of no confidence was passed on the military justice system.

Increased participation of civilian experts in military courts-martial may lead to unnecessary delays in disposing of cases due to unnecessary adjournment on technical grounds to buy time. The Law should therefore be amended to give the Convening Authorities powers to give datelines by which time the courts should conclude their business and submit their findings and decisions for confirmation. A trial should not be allowed to continue in perpetuity to an extent that it makes little sense and does not promote justice. In a state where, for example, a presidential term is five years there is little sense if a presidential petition were to be allowed to last five years.

A military justice system including courts-martial is a creation of the law of the country and if inadequacies are noticed in the system then measures should be taken to reform the law or indeed to equip those that preside and take decisions in the justice system with better knowledge to effectively run the system. Transparency is an important aspect in a democratic society but rather than destroy existing institutions in the name of transparency, we should merely reform

the institutions, educate and transform the officials in the institutions about the tenets of a democratic society.

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