CRIMINAL JUSTICE IN THE NAMIBIAN DEFENCE FORCE: A COMPARATIVE STUDY

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BY

THOMAS JAN LAMBERT
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SUPERVISOR	:	Dr O.C. RUPPEL / Faculty of Law / University of Namibia
EXAMINER	:	Prof M. Carnelley / Faculty of Law / University of Kwazulu-Natal

DECLARATION

I, Thomas Jan Lambert, declare hereby that this study is a true reflection of my own research and that this study or part thereof has not been submitted for a degree in any other institution of higher learning.

..... Date: .....

Thomas Jan Lambert

DEDICATION

I dedicate this work to my surviving mother and my late father for the firm foundation they laid with my upbringing. The opportunity I had, for them to teach me the values in life and always to respect others for whom and what they are.

Further, this work is also dedicated to my wife Tas, for her patience while busy with my studies and for her constant emotional support during the whole period thereof.

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ABSTRACT

The Namibian Defence Force (NDF) is 18 years in existence and, like any other organization is responsible for the maintenance of discipline within the institution. However, the legal system of the NDF contains more than the ordinary disciplinary hearings as provided for in the Public Service Act, (Act 13 of 1995) and Labour Act, (Act 6 of 1992) as it has jurisdiction over any criminal case. This study is initiated by the Permanent Secretary of the Ministry of Defence (P. Shivute, memorandum, 11 April 2008), who required an investigation into the administration of justice within the Force. This is to ensure that a fair justice system within the NDF is prevailing and that possible transgressors are ensured of their rights to a fair trial as provided for by the Namibian Constitution and other applicable laws.

Like most other defence forces, the NDF also has its own "legal system" within the force. In the case of the NDF it is provided for by the Defence Act, 2002 (Act 1 of 2002). The Defence Act, 2002 and the Code provides for the establishment of military courts, as well as the pre-trial, trial and post-trial procedures. The jurisdiction is limited to action against members of the NDF as well as certain categories of people who are, according to the provisions of the Defence Act, 2002, subject to the Code.

Almost two decades of existence is enough justification for enquiry to assess the application of the legal system within the NDF. In order to determine whether the requirements for a fair trial are complied with the main research objective is the investigation into the justice system within the military society which includes the

specific procedures, the different authorities, the rights of an accused and the assurance of a speedy trial.

The administration of justice within the military must not be regarded as an isolated system but must be seen as being subjected to the provisions of the civil justice system as well as the norms set for the society as a whole. Therefore, the rules of evidence and general principles of fair trial and principles of justice as applied by the public courts also apply to military courts.

TABLE OF CONTENTS

LIST OF ABBIVIATIONS

AWOL	Absence without official leave.
CA	Convening Authority
CODEL	Commanding Officer with Delegated Powers
CODPCA	Commanding Officer Deriving Power from Convening Authority
CS	Chief of Staff
NDF	Namibian Defence Force

DEFINITION OF KEY TERMS

"Chief of Staff" means any officer of the rank and command not below that of Brigadier-General or its equivalent who is empowered by warrant to convene general courts martial and includes, for the purposes of sections 61 and 67 of the Military Discipline Code, any officer of the rank not below the said rank who is authorized in writing by such Chief of Staff to exercise or perform in any particular case the powers and duties conferred or imposed on a Chief of Staff by sections 61 and 67, respectively.

"Civil court" means any competent court (other than a military court) in Namibia having jurisdiction in criminal matters.

"Code" means the Military Discipline Code made under the provisions of Section 39 of the Defence Act, 2002 (Act 1 of 2002).

"Convening Authority" means any person empowered by warrant to convene courts martial.

"Commanding Officer Deriving Powers from a Convening Authority" means a Commanding Officer empowered, in writing by a Convening Authority under sub-section (3) of section 63 of the Military Discipline Code, to exercise all or any of the powers conferred upon a commanding officer by subsection (1) of that section.

"Commanding Officer with Delegated Power" means a commanding officer to whom powers have been delegated under section 63(4) of the Military Discipline Code.

"Defence Force" unless the context otherwise indicates, means the Namibian Defence Force.

"Defending officer" means an officer subject to the Military Discipline Code with knowledge of law assigned by a convening authority to undertake the defence at a trial by court martial of an accused not represented by a legal practitioner.

"Pay" means -

(a) in relation to any person other than a person referred to in paragraph (b), all amounts to which such person is entitled in respect of any training, duty or service undergone or performed by that person as a member of the Defence Force, but does not include amounts payable to such person under the laws relating to the grant of pension to staff members of the Public Service; and

(b) in relation to a person suspended under this Code, the net amount to which such person is entitled in respect of any training, duty or service so undergone or performed after all applicable statutory deductions have been effected.

"superior officer" in relation to a person subject to the Military Discipline Code, means any officer, warrant officer or non-commissioned officer subject to this Code who holds a higher rank than such person, or who holds the same or an equivalent rank but is in a position of authority over such person

LIST OF TABLES

LIST OF FIGURES

CHAPTER 1 : INTRODUCTION

1.1 Introduction

In order to achieve the requirements of a fair trial, as provided for in the Namibian Constitution, it is necessary to refer to the application of the justice system within the military, (the Namibian Defence Force), and not to a military justice system. This distinction is made because, 'military' and 'justice' have two different connotations. Akinseya-George (2007, p. 26) stated that the "administration of justice in the military derives from the rules and laws regulating the military system and governance. Military law is therefore the branch of public law governing military discipline and other rules regulating service in the armed forces".

1.2 Background of study

The Namibian Defence Force (NDF) is 19 years in existence and, like any other organisation, is responsible for the maintenance of discipline within the institution. However, the legal system of the NDF contains more than the ordinary disciplinary hearings as provided for in the Public Service Act, (Act 13 of 1995) and Labour Act, (Act 6 of 1992) and is unique in the sense that the military courts can try a NDF member for any offence, except a capital offence committed within the country, and can impose a sentence up to include life imprisonment. This means that a capital offence committed by a NDF member outside the country, can also be tried by a military court.

This study was initiated by the Permanent Secretary of the Ministry of Defence (P. Shivute, memorandum, 11 April 2008), who proposed an investigation into the administration of justice within the NDF. This to ensure that a fair justice system within the NDF is prevailing and that possible transgressors are guaranteed of their rights to a fair trial as provided for by the Namibian Constitution and other applicable legislation.

1.3 The problem statement

Like most other defence forces, the NDF has its own "legal system" as provided for by the Defence Act, 2002 (Act 1 of 2002). The Defence Act and the Military Discipline Code (herein after refer to as the Code) provide for the establishment of military courts, as well as the pre-trial, trial and post-trial procedures. The jurisdiction of these courts is limited to action against members of the NDF and certain categories of people who are, according to the provisions of the Defence Act, subject to the Code. Possible irregularities and / or unfairness in the legal system are anticipated in the representation at trials, the administration of justice and with the pre-trial procedures.

1.3.1 Representation at trials

There are two types of trials that may be conducted by military courts; summary trials (trial by the Chief of Staff, Convening Authority, Commanding Officer Deriving Power from a Convening Authority and Commanding Officer with Delegated Powers) and trials by courts martial (Ordinary and General Court Martial). The court in which a member has to stand trial *inter alia* depends on the offence committed, the rank and personal

particulars (e.g. previous convictions) of such member. In the case of the first mentioned court, no representation for the accused was provided for. However with the Rules, made under provision of Section 40 of the Defence Act, which came into effect on 2 September 2008, a new meaning was given to the summary trial. Before this date the trial had to be referred to a court martial for trial in case the accused wished to be represented by a legal representative at the trial. From 2 September 2008 an accused can be represented by defence council at his or her own cost during the trial.[1] While an accused may request for a defending officer during a court martial, this is not the case at a summary trial and the case have to be referred to court martial for trial. The reason for not allowing a defending officer at a summary trial could be that such defending officer may unduly influence the trial officer in case he or she is the superior officer of the trial officer.

This undue influence will not have an effect during a court martial because of the manner in which decisions are arrived at during the trial. At first, all members of the court martial are sworn in whereby they commit themselves not to divulge the vote or opinion of any member, unless required to do so by law.[2] Secondly, the vote of the members of a court martial on any question, finding or sentence is taken by ballot and the president of that court must destroy the ballot papers after the vote has been taken.[3] It still remains the prerogative of the Commanding Officer of the accused to order a preliminary investigation into the commission of the offence and to apply for the trial to be heard by a court martial. If the accused desires to be represented by a defending officer the trial needs to be transferred to a court martial, in which case the accused can face a higher penalty. The concern is that a number of cases take place whereby the accused has no

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1 Rule 22(1) MDC.
2 Section 78 MDC read with Rules 53 and 120(3) MDC.
3 See Section 90 MDC and Rule 86 MDC.

legal assistance or is assisted by an unqualified defending officer and totally depends on the integrity and fairness of the court.

1.3.2 Administration of justice.

Almost two decades of existence is enough justification for enquiry to assess the application of the justice system within the NDF. This is to investigate specific incidents in which possible unjust procedures, convictions and/or sentencing occur. The application of justice in the military must be tested against the standards in the civil courts and military courts at international levels.

The conflict of interest may well also be of concern and the composition of the justice system of the NDF must be analysed to determine whether any institutional bias can exists. This is not only limited to the prosecution, the defence or the court but also the confirmation and reviewing of cases.

1.3.3 Pre-trial procedures

Pre-trial procedures may include the arrest or warning of an offender and also the appearance of that offender before the Commanding Officer within specified periods, depending whether the offender was arrested or warned and the possible delay in the commencement of the subsequent trial. In case of absence without leave for a period exceeding 7 days,[4] the pay of the absentee is suspended and may be withheld for the period so absent.. For some, the pay of members are re-instated immediately when the

[4] No official order in this regard could be found but this is the current tradition with regard to the suspension of salaries in the case of absentees.

absentee resumes duty, the others are not so fortunate as their pay are only re-instated after the finalization of the trial. The trial can take in some cases longer than 6 months before finalised and that bring about that the affected member is left without any income for that whole period and may cause undue hardship to a member.

1.4 Research question

Article 12 of the Namibian Constitution, the right to a fair trial includes, amongst others, the trial by an independent, impartial and competent court, trial within a reasonable time, adequate time for the preparation of the defence and the presumption that an offender is innocent until proven guilty. The provisions with regard to handling of military offenders are provided for in the Defence Act, 2002 (Act 1 of 2002) which is subject to the Namibian Constitution. The research question is whether the administration of criminal justice by the military courts since the inception of the NDF has been consistent with the Constitutional requirements of justice, fair trial and the rule of law?

1.5 Research objectives

1.5.1 Main objective

In order to determine whether the requirements for a fair trial are complied with the main research objective is the investigation into the justice system within the military society which can include the pre-trial provisions, the rights to legal representation, cross-examination and the calling of witnesses, the qualification and role of the presiding

officer (inclusive the president and members in the case of a court martial), the assurance of a speedy trial and a fair punishment.

1.5.2 Specific objectives

- This study will assess the procedures and adjudication of cases within the NDF in order to determine whether institutional bias and / or ignorance to the law exist.

- As the law provides that no undue hardship may be caused by the withholding of pay. Then the policy regarding to the withholding of pay is investigated.

- Another objective is to determine whether the right to representation is granted to the accused and under which criteria a defending officer is appointed.

- In this respect it will also be determined whether the accused actually understands the nature of the variety of prescribed rights, such as the rights to cross-examination, the right against self incrimination and the right to representation.

- It will further be determined whether the record of proceedings is conducted within the prescribed manner. The record of proceedings should be done in an intelligible way in the first person (S v Haibeb, 1993) and should also be kept in a grammatically understandable language (S v Hoadoms, 1990). Failure to comply with these requisites can lead to the acquittal of the accused for that reason alone.

- A speedy trial is the Constitutional right of an accused and some important aspects for consideration is laid down in S v Heidenreich (1995). To ensure this, the following mechanisms are also built-in into the Code: For an offence not to prescribe a trial must commence within three years after the commission of the offence, and a member who has been arrested for an offence or has been warned for an offence must be charged within specific time limits. As the non compliance of these procedures does invalidate a trial it is important to determine whether it is adhered to at all times.

- It will be the ultimate objective of this study to identify inadequacies and make, where necessary, recommendations in that regard.

1.6 Significance of study

The significance of this study is underlined by the fact that it is the first time since the establishment of the NDF that such study will be conducted. It is anticipated that this study will contribute to a positive development of the legal system in the NDF. Amongst others, this can include a more transparent approach with regard to the handling of offenders before and during the trial as well as the organization to deal with these offenders.

Ultimately this study may possibly contribute to the reorganization of the legal structure within the NDF and the separation of functions such as adjudication, prosecution, defence

and reviewing. This would do away with the conflict of interest which may exist in certain positions and also limit the institutional bias which might transpire.

1.7 Limitation of the study

Like any other function or duty there are in most cases limitations as a result of financial constraints and the execution of normal duties within the employment which could delay the research.

With the literature review a limitation of concern is not the availability of legal material *per se*, but the availability of material specifically on military justice. It will not be possible to visit a number of other countries in order to acquaint oneself with the military environment of that particular country and therefore the internet will be used extensively to obtain information.

CHAPTER 2. - LITERATURE REVIEW

2.1 Introduction

The administration of justice within the military cannot be regarded as an isolated system but must be seen as being subjected to the provisions of the public justice system as well as the norms set for the society as a whole. Therefore, the rules of evidence as applied by the public courts and relevant literature also apply to military courts.[5]

2.2 Military and justice

Specific focus on the military commander and the law with regard to the trial issues, quality force management and other personnel issues which are also of concern in military justice, are captured in the Military Commander and the Law (Rives, Davis & Norton, 1998.). For comparative purposes the provisions of the Namibian Defence, the South African Defence and also the application of the military justice systems of Canada, England, Russia and United States of America, will be looked at. The Russian system might be seen as oppose to that of the other mentioned countries but is of significance because a large number of soldiers in the Namibian Defence Force were prior to Independence trained in the former Soviet Union.

Although Akinseya-George (2007, p. 26) refer to the "administration of justice in the military" the term 'military justice' is to date not commonly used in the Namibian legal vocabulary. Only the military legal system in America refers to it in Uniform Code for Military Justice (UCMJ), which is their military judicial procedure. And since 1999,

[5] Provided for by section 85 of the MDC.

after the enactment of the Military Discipline Supplementary Measures Act in South Africa[6], this term is used together with the term 'criminal justice' when it is referred to the experience required for any member of a Court of Senior Military Judge or a Court of Military Judge, which in Namibian terms referred to a General Court Martial and Ordinary Court Martial respectively.

Prof Carnelley (2005 : p. 55) in her article "The South African Military Court system – Independent, Impartial and Constitutional?" made the following remark:

> "…….. a modern code of military discipline cannot depend on arbitrary decision-making or the infliction of savage punishments, …….. Such a code must of course reflect the hierarchical structure of any army and respect the power of command. But an effective code of military discipline will buttress not only respect owed to their leaders by those who are led but also, and perhaps even more importantly, the respect owed by leaders whom they lead and which all members of a fighting force owe to each other."

The Code provides for a number of unique statutory offences which can only be committed by members of the Defence Force. Offences such as endangering of force, mutiny, absence without leave and the disobeying of lawful commands are purely military offences while some other offences are militarized / institutionalized as they are closely related to general offences. Therefore the provisions with regard to public offences generally also apply to military offences. Criminal Law by C R Snyman. (1995) provides for the identification of the requirements of a crime, the elements to be recognized as well as the punishment thereof. The giving of orders is a vital component

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[6] Sections 9 and 10 of the Military Discipline Supplementary Measures Act, 1999 (Act 16 of 1999).

of the ordinary duties in the military. These orders and the execution thereof should be within the framework of the law. The obedience to orders may be used for a ground of justification in order to exclude the unlawfulness of an otherwise illegal act and these requirements are extensively discussed in C R Snyman (above) and also in the Principles of Criminal Law (Burchell & Milton, 2002).

2.3 The military as part of the society

In the light of the above, relevant laws, are the Constitution of Namibia, Criminal Procedure Act, 1977 (Act 51 of 1977), the Police Act, 1990 (Act 19 of 1990), Public Service Act, 1995 (Act 13 of 1995) and Labour Act, 1992 (Act 6 of 1992). In this regard the provisions of the Criminal Procedure Act can be applied in order to determine whether there are any departures of the military justice system from the national justice system in the public courts in Namibia. The Police Act, 1990 (Act 19 of 1990), for example also provides for the disciplinary procedures within the police. Although the jurisdiction of the military courts is far beyond that of the courts in the police, the pre-trial procedures are worth noting. The Public Service Act, 1995 (Act 13 of 1995) only applies to the military as far as it is not in contradiction with the Defence Act, 2002 (Act 1 of 2002).[7] Especially, with the conditions of service, which include the action against transgressors, the Public Service Act can be supplementary to the military justice system.

Except for section 106 (Affirmative action) and section 107 (Unfair discrimination or harassment in employment or occupation), the Labour Act, 1992 does not apply to members of the NDF. This Labour Act, 1992 was since replaced by the Labour Act,

[7] Section 20 of the Defence Act, 2002 (Act 1 of 2002).

2007 (Act 11 of 2007), which commence on 1 November 2008, but without significant changes to the provisions regarding the members of the Defence Force. Section 5 with regard to the Prohibition of discrimination and sexual harassment in employment applies to all and the remaining of the Labour Act, 2007 only as provided for by the Defence Act, 2002. The procedures with regard to the settlement of disputes (labour) and the redress of wrongs (defence) differ greatly as the military may not use industrial action as an option to solve a dispute.

The military laws of South Africa, United States of America, Australia, Ireland and Singapore are available in libraries and the internet and were used for comparison purposes. The Namibian Defence Act, 2002 (Act No. 1 of 2002) was preceded by the South African Defence Act, 1957 (Act No. 44 of 1957). The later was only amended during April 1999 by the Military Discipline Supplementary Measures Act, 1999 (Act No. 16 of 1999) and brought about extensive changes which included different legal procedures and military courts to ensure a fair military trial and an accused's access to the High Court of South Africa. Different directorates for military judges, prosecution, defence council and directorate for reviews were established. This ensures the minimization of the conflict of interest as every function of the military justice system is controlled by its own respective personnel. Because of their British influence the Singapore Armed Force Act, 1972 (Act 7 of 1972) and the Australian Defence Force Discipline Act, 1982 (Act 152 of 1982) are also showing similarities to the Namibian Defence Act, while the military justice system in the United States which is not based on the Dutch-Roman system is well advanced and descriptive.

2.4 Presumption of innocence

The presumption of innocence signifies that the prosecution (state) must prove all the elements of a statutory crime against the accused beyond reasonable doubt and that the accused has the right to silence (Zeffert, Paizes & Skeen, 2003, p. 173-4). The onus of proof, except in the cases like insanity, always rest on the state.

2.5 Rights of the accused

Cross-examination, which is referred to as a special type of questioning, is an examination in which the truth of the opponent's evidence is challenged. Special skills are required to do cross-examination as it can "make or break" the case. The trial is the focus point of the administration of justice and, in turn, cross-examination is the focus point of the trial. (Pretorius, 1997, p. 1). During a summary trial the accused is in most cases not represented by a legal adviser or even a defending officer to assist with the cross-examination of state witnesses. The accused, does in the most times, not possess the required ability to do a proper cross-examination and this is where the trial officer should play a prominent role by supporting and guiding the accused (Pretorius, 1997, p. 288-91). This right to cross-examination must also be properly explained the accused. It is inadequate only to give the accused the right to cross-examination without explaining the nature and consequences thereof. A failure to give the accused these rights or to guide the unrepresented accused can result in the acquittal of the accused during review of the case. This right to cross-examination must also be properly recorded in the proceedings.

2.6 Institutional bias and independency

Procedural fairness requires judges and other officials to act impartially when making decisions. Galligan (1996, p. 437- 47) extensively discusses the fairness which should be a prerequisite of all legal proceedings. This would also include the confirmation and review of military proceedings which are internal administrative measures. The external review of cases of a military court is not excluded but this is limited to a Council of Review.

Administrative law (Wiechers, 1985), which is a part of public law, regulates the general and individual administrative relationship between the citizen and the state and serves as judicial control over administrative acts and can therefore also be relevant to the defence environment.

In his article "The paradigm of an independent judiciary" Diesho (2008) raised some challenges to ensure the independence of the judiciary from the influence and control of political actors. Although this article is about the broad judicial system and is politicized it can also be related to the military justice system and the military leaders. The first concern is that there are fundamental relationship between the leaders and those who are assigned by these leaders to interpret the laws independently. This is to support the Constitutional task of the Chief of the Defence Force to "make provision for a balanced structuring of the defence force and shall have the power to make suitable appointments to the defence force, to cause charges of indiscipline among members of the defence force to be investigated and prosecuted and to ensure the efficient administration of the

defence force".[8] The second difficulty is the human factor in which the courts pledge to be impartial and to be true to the intention of the lawmakers, their human bias and preferences may stand in the way of true impartiality. The military courts in which, the most cases, no specific qualification is required should be measure up to with "professionally trained jurist" as referred to by Diesho in this article. The last difficulty contains the historical, traditional, cultural and experiential differences towards the concept of law. There are cultures (authorities) where the law is supreme, whereas in others, the person in the leader is more supreme than the law.

In the case of Findlay v United Kingdom (1997, p.221) which was also cited by Prof Carnelley (2005 : p. 68) it was argued that there should be a clear distinction between the persons administrating the process and the prosecuting authority. The European Court said (paragraph 73):

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

The military justice system of the Namibian Defence Force must also be tested against the standards set, by not only by our own legislation but also that of other countries. Specifically, like in the case of the British, who were the previous rulers in a great part of Southern Africa and the influence of their laws is still an integral part of our judicial

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[8] Article 119(2) of the Namibian Constitution.

system. Not to ignore our current position, it should also be measured against the standards of other countries in the Southern African Development Community (SADC).

2.7 Law of precedent

The preliminary duty of the court is to interpret the law. However, in the execution of this function the courts also set rules which must in all cases be followed by itself and subordinate courts. Since Independence there were no reported cases relating to any matter concerning the application of military justice within the Namibian Defence Force, however some cases relevant to our procedures are; S v Appelgrein (1995) - nature and purpose of cross-examination to be explained to the accused and the accused to be assisted, where necessary, S v Haibeb (1993) - record of proceedings to be kept in an intelligible manner and in the first person, S v Kau and Others (1995) - rights to legal representation to be explained to the accused, S v Monday (2002) - unrepresented accused to be assisted in best way possible, and various other case law.

Some older South African cases are: R v Davids (1953) - provision with regard to the handing in of a copy of a written order, S v Andreas (1989) - the carrying out of orders which are manifestly unlawful as discussed by Burchell & Milton (1997, p. 198) and Mönnig and Others v Council of Review and Others (1989)- test for bias but the more recent cases which might be of great significance to us are Freedom of Expression Institute and Others v President, Ordinary Court Martial and Others (1999) and the decision of the South African Constitutional Court in the case of President, Ordinary Court Martial v Freedom of Expression Institute (1999).

2.7.1 Freedom of Expression Institute and Others Case

The justice system of Namibia is based on the South African laws and also the case laws of that country. The same also apply to the Defence Act in its current form. Therefore, the decision of the High Court of the Cape Province Division in the case of Freedom of Expression Institute and Others v President, Ordinary Court Martial and Others (1999) and the decision of the South African Constitutional Court in the case of President, Ordinary Court Martial v Freedom of Expression Institute (1999) are of great significance in the application of the administration of military justice within Namibia. These two cases must also be read together with the Military Discipline Supplementary Measures Act, 1999 of South Africa as it is of importance to follow the chronological order of the events.

In the case of Freedom of Expression Institute and Others v President, Ordinary Court Martial and Others (1999) all the subsequent issues emanated from an order by the president of the court that the court martial was to proceed *in camera*. The applicants sought and order with regard to the following:

- The unconstitutionality of the order that proceedings be held in camera, and
- The unconstitutionality of the court martial for reasons that: (a) the convening authority had the power to order that proceedings be held in camera; (b) the prosecutor had no discretion to withdraw charges without the consent of the convening authority; (c) the prosecutor could not accept

> a plea of guilty to a lesser charge without the consent of the convening authority; (d) neither the prosecutor not the members of the ordinary court martial need be legally trained; and (e) the accused was deprived to the right to appeal to the High Court against the finding and sentence of a court martial.

An application was done for a number of sections in the Defence Act, 1957 (Act 41 of 1957) and sections and rules of that Code, relating to the trial of an offender before an ordinary court martial, to be declared unconstitutional according to specific provisions of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996). These included sections 104 – 112 of the Defence Act, 1957, sections 56 – 60, 67, 71, 73 and 78(3) of that Military Discipline Code and also rules 38 – 96 of that Military Discipline Code.[9]

The case was heard by the High Court (Cape Province Division) during November 1998 and was decided upon on 18 December 1998 and it was:

> "Held, that to the extent that s 78(3) of the Code empowered the convening authority to order that the proceedings of an ordinary court martial be held in camera, thereby inviting arbitrary interference by an executive official with the process of the ordinary court martial, it was unconstitutional in that not only did it violate the right to a fair trial, which included the right to a public, trial before an ordinary court, protected by s 35(3)(c) of the Constitution of the Republic of South Africa Act, 1996 (Act 108 of 1996), it also violated s 4 of the Constitution,

[9] These sections and rules materially corresponds very much to sections 39 to 50 of the Defence Act, 2002 (Act 1 of 2002) as well as sections 56 to 60, 69, 73 and 80(3) and rules 38 to 95 of the Military Discipline Code.

which guaranteed everyone the right to have any dispute decided in a fair public hearing before a court or, where appropriate , another independent and impartial forum or tribunal.

Held, further, that the first respondent's ruling denying the first and second applicants *locus standi* before the court martial ran contrary to the spirit of the Constitution: the right afforded by s 38 of the Constitution to approach a competent court to seek enforcement of constitutional rights extended to anyone acting in the public interest and it could not be denied that the first and second applicants had been acting in the public interest.

Held, further, that to the extent that neither the Act nor the Code required that members of the ordinary court martial be legally qualified and thereby permitted lay members of an ordinary court martial to convict and imprison people for up to two years, they were unconstitutional in that they violated s 174(1) of the Constitution, which required that a judicial officer be an appropriately qualified woman or man who is a fit and proper person, and s 12(1)(b) read with s 35(3), which guaranteed the right not to be detained without a public trial before an ordinary court.

Held, further, given that in terms of the rules made in terms of the Act the convening authority appointed the prosecutor; that there were no requirements laid down that the prosecutor be a fit and proper person or be legally qualified; and that the prosecutor could not, for example, withdraw charges without the

permission of the convening authority, that it was self-evident that not only could someone ill-equipped to perform the prosecutor's function be appointed, but that such prosecutor could not exercise an independent judgment and discretion. Furthermore, in terms of s 96 of the Code the sentence of the court martial could not be enforced or executed until such finding and sentence had been confirmed. The law as it stood thus invited arbitrariness as it allowed executive interference with the judicial process. It therefore violated s 34 of the Constitution, which prescribed independence and impartiality as essential requirements.

Held, further, that an ordinary court martial, as presently constituted, did not conform with the concept of 'ordinary court' envisaged by s 35 (3) (c) of the Constitution. It was simply a military court *sui generis* which could be presided over by laymen notwithstanding its power to deprive convicted accused of their liberty. The rights accorded to accused persons by s 35 were accordingly violated by the manner in which they were tried before an ordinary court martial. The ordinary court martial also did not comply with ss 165, 174, 176 and 177 of the Constitution, all of which sections had as one of their main aims the promotion of the independence of judicial officers.

Held, further, as to the respondent's submission that the institution of the court martial was known all the world and should therefore not be tampered with, that, while the object of military discipline might be important, it did not require the granting of the power to convict and incarcerate an accused by a tribunal so lacking in the essentials of judicial independence. The ordinary courts, which

> enjoyed the constitutional safeguards to their independence essential to the protection of fundamental human rights, were statutorily competent to try offences under the Code. The object of military discipline could thus be achieved without any restriction at all on constitutionally guaranteed fundamental rights."
>
> "The Court accordingly declared ss 104-112 of the Act, ss 56-60, 67, 71, 73 and related sections of the Code and rules 38-96 and related rules of the Rules for Giving Effect to the First Schedule of the Defence Act unconstitutional and invalid insofar as they permitted the third and fourth applicants to be tried by an ordinary court martial convened, composed and functioning in terms of the abovementioned framework.[10] It also interdicted the reconvening of the proceedings of the ordinary court martial pending the final determination of the issue by the Constitutional Court. Section 78(3) of the Code was declared unconstitutional and invalid to the extent that it permitted a convening authority to issue orders to close ordinary court martial proceedings."

On 23 April 1999 the Military Discipline Supplementary Measures Act, 1999 was published and all the above sections and rules as well as other matters relating to military justice system within the South African National Defence Force were addressed and remediate to ensure a more just system of military law. This law was the commencement of a new era for the military justice system in South Africa.

The case of President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others (1999) was an appeal to the Constitutional Court of South Africa

[10] See above for corresponding sections and rules in the Defence Act, 2002 (Act 1 of 2002).

against the judgment of the High Court in the Freedom of Expression Institute and Others v President, Ordinary Court Martial and Others (1999) case. This was also done after the coming into operation of the Military Discipline Supplementary Measures Act, 1999 and the decision of the court is not surprising. In this case the court:

> "…… accordingly held, in an appeal in terms of s 172(2)(d) of the Constitution against the judgment and certain orders of the Cape Provincial Division of the High Court made in Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others (1999) in which certain provisions of the Defence Act 44 of 1957 and the Military Discipline Code in the First Schedule to that Act relating to courts martial were declared invalid, that the Military Discipline Supplementary Measures Act 16 of 1999 had replaced all relevant aspects of the legislative framework upon which the dispute between the parties was based. The Court held further that the basis upon which the parties had approached the High Court had disappeared and that the grant of the relief claimed, as well as any confirmation of an order of constitutional invalidity, could serve no purpose as the court martial proceedings against the third and fourth respondents, which had still been pending prior to the commencement of Act 16 of 1999, had been terminated pursuant to the provisions of s 44(2) of that Act. The Court accordingly held that a decision on the constitutional validity of the impugned provisions of the Defence Act would have no practical effect on the parties to the litigation and there were no considerations of public policy which required a decision on the constitutional validity of the said provisions to be

made. Accordingly, no order was made in respect of the appeal and confirmation proceedings."

With the case of Freedom of Expression Institute and Others v President, Ordinary Court Martial and Others (1999, p 482). It was also ruled that the court did not comply to the requirements of independence and impartiality as provided for by section 34 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996). This provision is similar to Article 12 of the Namibia Constitution which provides that "….. all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court ……." The question of independence and impartiality as a constitutional requirement was also the issue raised by Prof Carnelley (2005, p. 55) in her article "The South African Military Court system – Independent, Impartial and Constitutional? It must be borne in mind that this article of Prof Carnelley was written after the metamorphoses of the South African military justice system. She extensively argued around the security of tenure and the institutional/administrative independence surrounding the independence and the impartiality (p. 67 - 69) before arriving with the conclusion that the military courts in South Africa in general be regarded as independent and impartial.

2.8 Punishment

Rabie & Mare (1994, p. 7) consider the definition of punishment as the "intentional infliction of suffering upon an offender and expression of the community's condemnation and disapproval of the offender and his conduct" and with the actual administrative effect it is clear that the purpose of withholding the pay of a member awaiting his or her trial is

part of a punishment prior to conviction rather than the execution of a proper administrative system. Although the withholding of pay after a certain period of absence without leave has been instituted as an administrative control measure to prevent the loss of state revenue and to prompt the absentee to return to office it rather turned into a form of punishment as it was not only the money for the period of absence which is withheld but the re-instatement of the salary which is delayed.

2.9 Summary

Although there is not a lot of Namibian reference material available on military justice it is the relevance and influence of other materials on which the Namibian Defence Force can be build to perfect our own system. The above comparative view points were selected as a basis to start with the research into the justice system within the Namibian Defence Force.

CHAPTER 3. : RESEARCH METHODOLOGY

3.1 Introduction

This chapter explains the methods used in carrying out this study. Specific attention is given to the collection of information and the analysis thereof. This chapter will also deal with the general perspective, the research context and the participants (Glatthorn, 1998, p. 152 - 161).

3.2 The general perspective

This research contain mostly qualitative but will also include some quantitative elements. The quantitative component of the research was the gathering of data, from the Defence Force records and through questionnaires which were completed by members of the Defence Force. It includes information about trials comprising of the types of offences committed, the time frame from the commission of the offence to the appearance before the prescribed authorities, the commencement of the actual trial till the completion of the deduction of the fine or other court orders, the rank parameters of the offenders and the type of punishment imposed. Further data collection with regard to the general view and perception of the justice system within the military will be obtained with the completion of questionnaires. The qualitative part of the research was mostly done through personal observations during trials, the scrutinizing of actual trial records and the comparison thereof with the justice systems of other defence forces and the provisions of public trials.

3.3 The research context

This study was conducted in the normal military lines of the Defence Force and six units were randomly selected for participation

For the purpose of trial records only courts martial were considered. The rationale is that the summary trials in the Defence Force were up to 2008 with the implementation of the Rules only considered as departmental hearings and not as courts *per se*. As stated above, if the offence was of a more serious nature or in case a defence council was needed the case has to be referred to a court martial for trial.

3.4 The Research Participants

Members of the Defence Force were targeted for the gathering of information and no preference was made to any specific group or selection of people. However, commanders and trial officers were not targeted as it is highly unlikely that they would implicate themselves for the non-compliance of any legal provision with regard to their personal functions.

3.5 Instruments used in data collection

The above information which is necessary to complete this research was obtained in the form of desk top research, official registers and documents, observations, interviews and questionnaires.

3.5.1 Desk top research

To commence with this investigation, it was paramount to carry out some desk top research and consider the provisions of the Namibian Constitution which ensure a fair trial to all offenders. The specific sections of the Defence Act, 2002 (Act 1 of 2002) and the Code was scrutinized and compared with the corresponding provisions in the Criminal Procedure Act, 1977 (Act 51 of 1977) and other related laws. The literature of various authors, like C. R. Snyman, E. du Toit, S. van der Merwe, A. Paizes, J. P. Pretorius, D. T. Zeffert served to determine the standard of proof and measures of the procedures. The application of the justice system within the NDF was reviewed. This knowledge was used to enforce and evaluate the information which was obtained through the other research instruments, like interviews, personal observation, questionnaires and formal records and statistics.

Military Discipline Codes of other countries were equally found to be of value in order to conduct a comparison with other countries. England, which is also a commonwealth country, is taken as an example because some of our laws, including the Defence Acts of South Africa and also Namibia originate from English law. Because of colonialism the English law has a great influence on the military related laws in a majority of commonwealth countries.

The Namibian Law Reports in which the decisions of the Supreme Court and High Court of Namibia are reported is also of significance, because many decisions, especially those with regard to the rights of the unrepresented accused are important to the application of

military justice. Some of the decisions are related to the right to legal representation, the right to cross-examination, and the right to address the court which must be explained to the accused. The manner in which the records are taken down is also of utmost importance. Where the accused was denied these rights or if the record of the proceedings was not kept in a proper manner it can lead to the accused to be acquitted.

3.5.2 Official registers and documents

The records of General and Ordinary Courts Martial must, according to the Code, be preserved for 7 years and 3 years respectively. It is common knowledge that none of these proceedings since the establishment of the NDF have been destroyed but although it is accessible it was not perused because it would have led to introspection and by this defeat the purpose of this investigation.

Registers, in which all the cases (courts martial and summary trials) are recorded, were available at the legal offices. These records contain the type and date of the offence, the particulars of the accused, the type of court and the outcome of the case. In case of conviction, the sentence and court orders, if any, are also reflected in this register. With these records the prevalence of specific offences in the military, the distribution of offences and courts and the period in which cases are finalized was determined.

An average of 248 charges is tried annually by court martial. A gradual decrease in charges tried is experienced as it went from 241 tried in 2003 to 203 tried in 2008. However, some unexpected increase was experience during the reporting year 2004 as a total of 326 charges were tried. This increase was due to the trial of one case of

Deficiency in stores, stocks or moneys[11] which consist of 33 charges. A further reason for this increase is also the accumulation of charges as in one particular case a member was charged for 14 counts of absence without leave.

Absence without leave is the most common offence for which members are tried and count for about 77% of all the charges. The information obtained from official registers is indicated in Figure 3.5.2.1 and shows that the other most common charges which mostly relates to theft, assault and disobedience are of no significance.

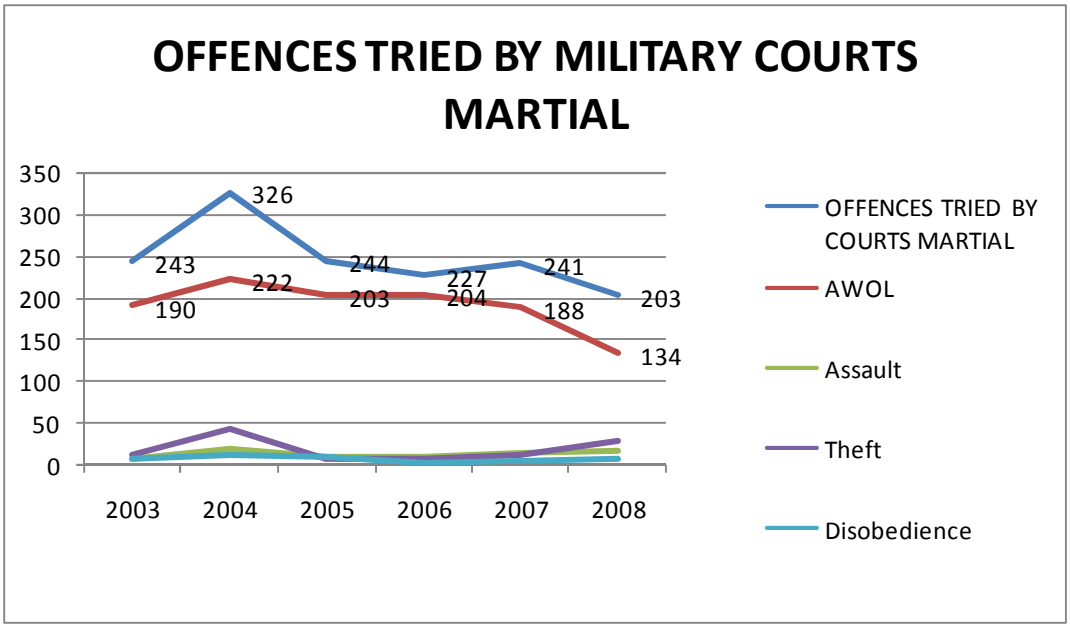

Figure 3.5.2.1 Analysis of the different offences tried by courts martial.

Another register of significance is the Register for the Suspension of Pay in which all the suspension and re-instatement of pay in the case of absence without leave is recorded. With these records it can be determined whether undue suffering was caused because of

[11] Contravening section 26 MDC.

the unnecessarily long suspension of pay. These records together with personal questionnaires were used to determine whether the suspension of salary has any effect on the period of absence. The information of 28 different offices from over the whole Defence Force was used to calculate this information but no evidence could be found that the reduction of absence without leave cases were as a result of the suspension of salaries.

The events of the pay being suspended vary from 204 in 2003 to 119 in 2008. Comparing this to the cases of absence without leave been tried by the courts martial there is no noteworthy correlation to be found. This is because of the non-existence of official orders with regard to the suspension of pay. Section 127 of the Code only makes provision for pay to be suspended but no order as to when and how it should be done exist. Another reason in this regard is also the fact that numerous pay are suspended and is never brought to trial.

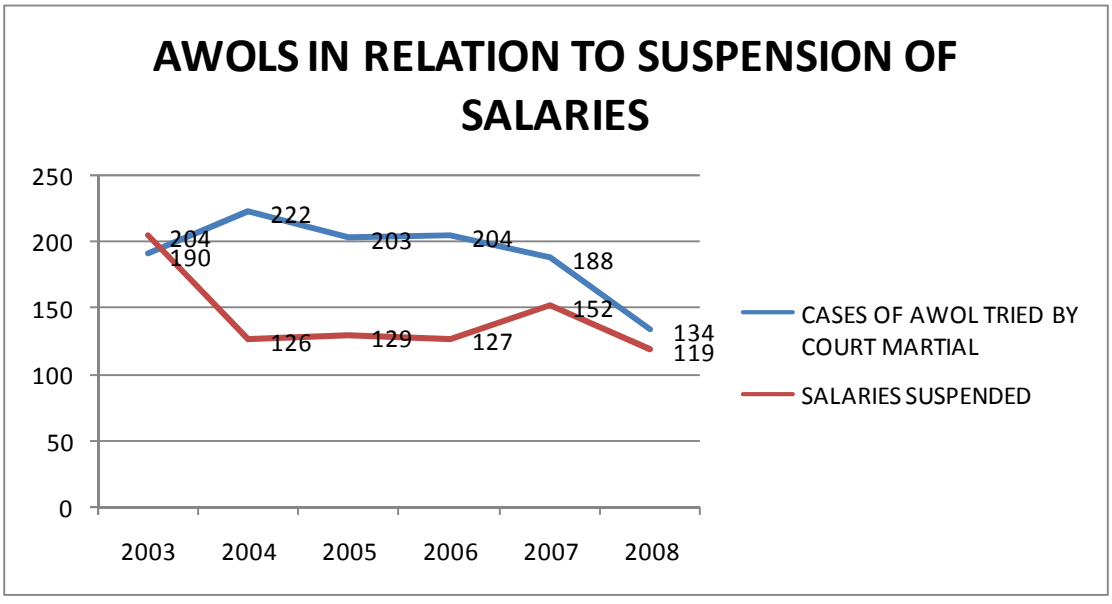

Figure 3.5.2.2 Analysis to determine the relation between cases of absence without leave and the suspension of salaries.

As stated above that no official orders exist for the suspension or re-instatement of pay it is tradition in the Defence Force that the pay of a member is suspended after 7 days (one week) of absence. With the collection and processing of data it was found that the average days absence in the case where the pay was suspended are very consistent and various from 36 (2005) to 26 (2007). A very interesting tendency is found in Figure 3.5.2.3 with the correlation between the periods absent with regard to trial and periods of absence with regard to the suspension of salaries. During the first part of the recording period, the days absent with regard to trials were very incoherent and there was no correlation with the days of absence in the case of the suspension of salary but in the last two years it is about the same.

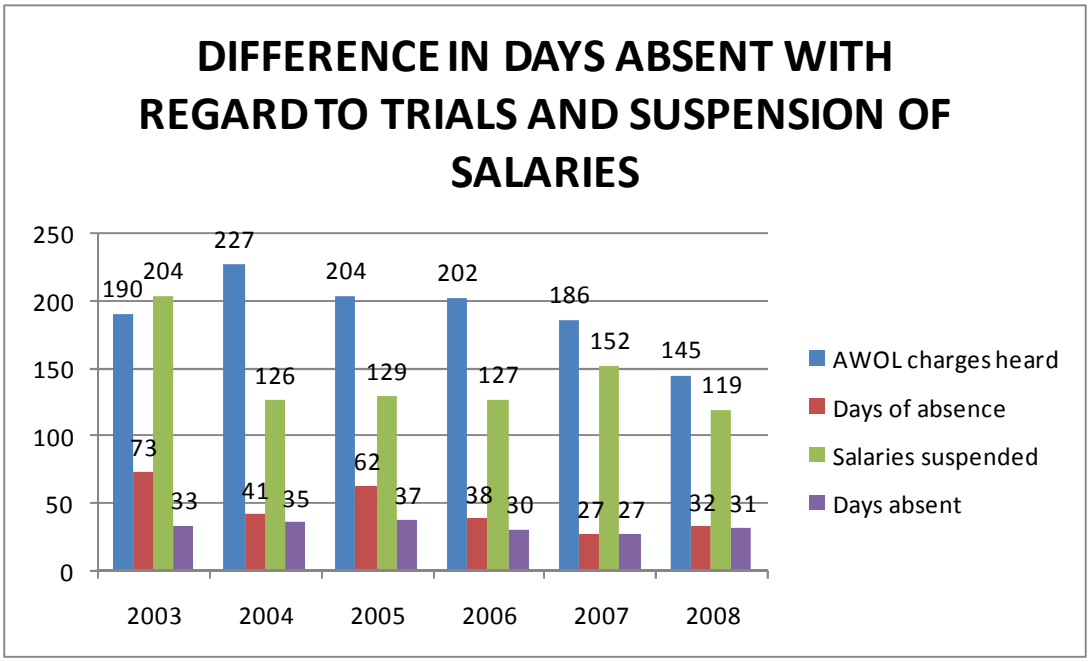

Figure 3.5.2.3 Data to indicate the difference between the periods of absence in which persons are tried and the periods in which the salaries of members were suspended.

3.5.3 Observations

To be allowed presence as an observer during trials would have been of value for this study but to be a part of the trial procedures as a president or member of a court martial, the trial officer in a summary trial, or a prosecutor or defending officer in a court martial is of unequaled value. The knowledge gained while executing these functions is not to evaluate the specific procedures but to evaluate the entire military justice system and it was also used, in this regard, to its full extend during this research.

3.5.4 Questionnaires

For the completion and collection of questionnaires 6 units were selected. Members were randomly selected and called to a room where they could complete the questionnaires without any external influence. The purpose of the exercise was explained to the participants and so also the confidentiality of their answers. Although provision was made for the entering of personal particulars on the front pages of the questionnaires they were ensured of the protection of their identity. Care was taken not to unduly influence any of the participants because of superiority over them.

In order to have a broad spectrum of the general understanding of military law and the justice system within the military it was not only necessary to involve members who have been tried by military courts and possess first-hand experience in this regard but also the

ordinary members who never clashed with the law. Two different questionnaires were compiled for completion.

The first questionnaire is completed by members who have already been tried, whether convicted or acquitted, by a military court. Pro forma trial documents are in use, but, with the results of this data which were obtain it is certain that all the required rights are not given to the accused person. During personal interviews this fact was established by the completion and assessment of the form as per Appendix A. For this exercise 81 members irrespective of their age, sex, rank and educational background were selected. The aim with this questionnaire was twofold, firstly to establish whether the general rights (e.g. rights legal representation, cross-examination, address to the court, to remain silent, to give evidence in mitigation and the writing of a representation) was given to the accused and secondly whether the accused was conversant with the proceedings and informed about certain procedures and decisions (e.g. introduction to court, meaning of cross-examination, reasons for conviction or acquittal and reason for sentence).

The ideal situation is to maximize the rights given and to minimize the non-compliance thereof. Units E and F in Figure 3.5.4.1 below is an indication of a healthy application of the rights given to the accused while the records of Units C and D is not so admirable.

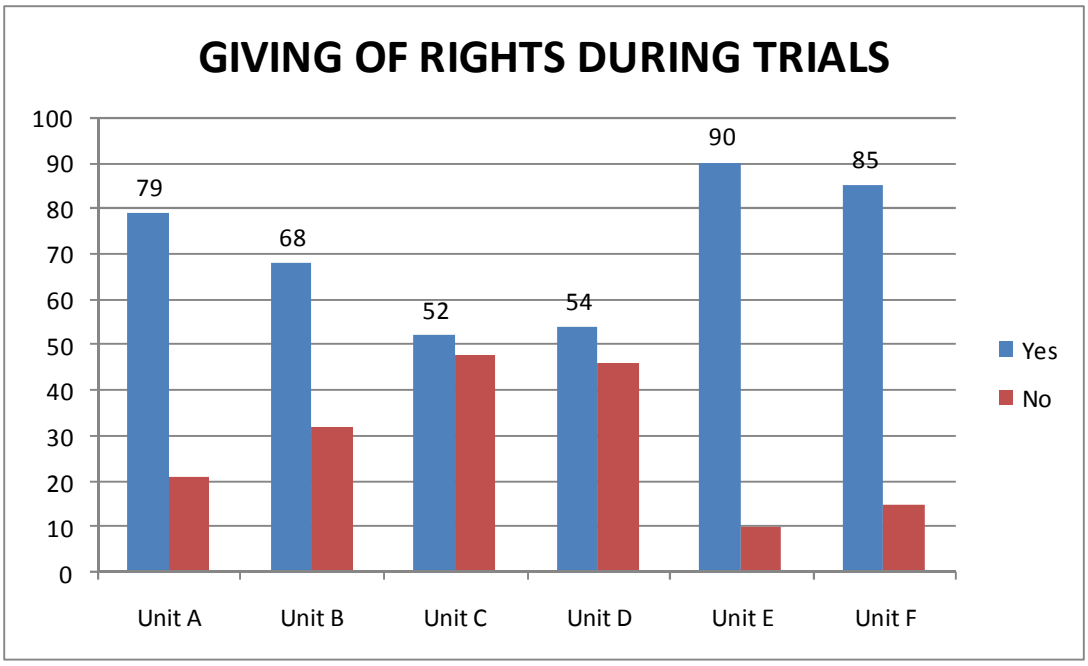

Figure 3.5.4.1 Analysis to determine whether basic rights were given to accused persons in different units.

The second, a general questionnaire with the aim to establish the preference and knowledge of the participants with regard to issues such as by whom they would be prefer to be represented, whether they know their rights to legal representation during summary trials, whether they would prefer to be tried by officers of their units and what the reasons are for the Rule 10 appearance before the Commanding Officer. For this exercise 71 members irrespective of their age, sex, rank and educational background were selected. With the issue of representation during a military trial 48% of the participants selected to represent by a defending officer, while 35% selected to be represented by a legal practitioner, while 17% opted to defend themselves during a military trial. Although these questionnaires were completed towards the end of 2008, shortly after the commencement of the Rules to the Defence Act, on 2 September 2008, already 30% of the participants were aware of the fact that an offender could be represented by his or her

legal representative during a summary trial. It is legally provided for that a summary trial is conducted in close court but 53% with a population Standard Deviation of 17.24 the participants were of the opinion that it should be conducted in an open court. The legal duty upon a Commanding Officer when a member appears in terms of Rule 10 is to inform the accused about the charges against him or her and his or her right to legal representation. Further it is also for the Commanding Officer to acquaint himself about the affairs in the unit and also to stop prescription. With the questions relating to the Rule 10 appearance a multiple choice was given but still 14% of the participants claimed that they do not know any reason for this action. Of the four issues (number of members attending military law courses, members prefer to be tried by their own units, the summary trial to be conducted in open court and whether the convictions are displayed in the unit) in Figure 3.5.4.2 it is the issue that the convictions are displayed in the units with an arithmetic mean of 64 and a sample standard deviation of 12,34 is the most consistent while the arithmetic mean of 48,33 with an sample standard deviation of 22,48 of the issue to be tried by the own unit shows the most inconsistency.

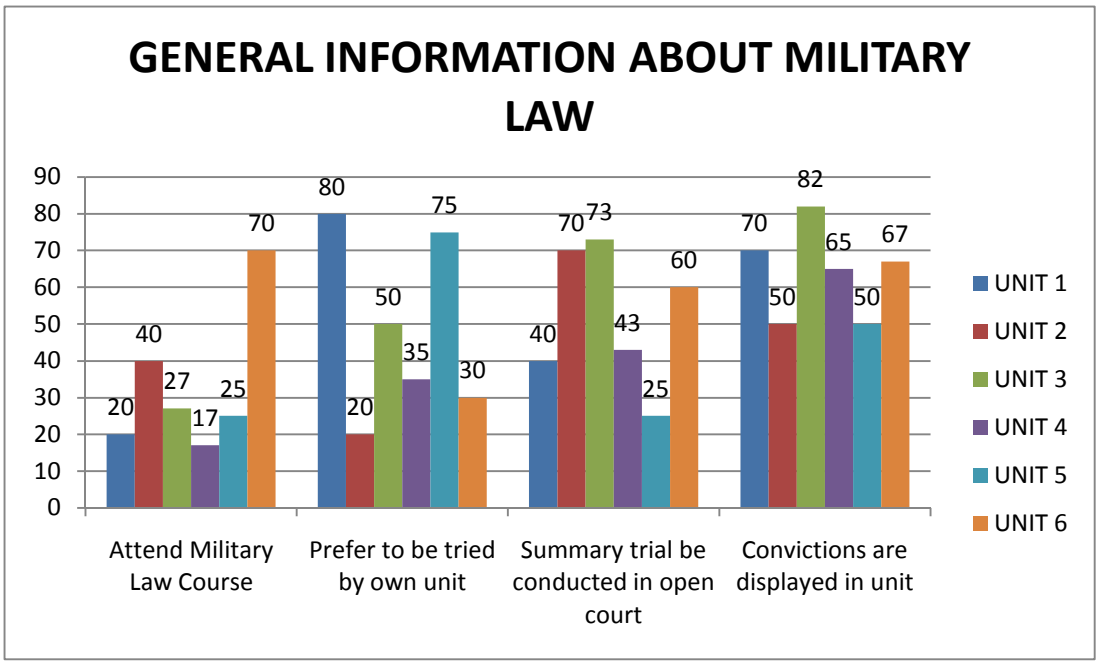

Figure 3.5.4.2 Analysis to establish the general knowledge and perception of military law of the ordinary members.

3.6 Procedures used

Document analysis was used to analyze the events surrounding the evaluation of the trial related data. With the gathering of data from the existing records in the Defence Force the Office of the Defence Legal Advisor and Directorate Personnel (Admin Section) was approached to submit the information about the trials held, records about pay suspended and also information extracted from the personal files of members. Access to all trial records was also made possible and the proceedings could be perused to see that it corresponds with the other information gathered. In order to maintain confidentiality, the data with regard to specific units and members are withheld, but this does not at all reflect a less valuable result. All these records are original and the authenticity thereof is

not in doubt as it is the records which are exclusively used for the recording of this information.

A survey was conducted in 6 units of the Defence Force which includes infantry and artillery units as well as Special Force and a Naval Unit. The questionnaires were completed in separate areas to exclude external influence and the participants were requested not to be influenced by other participants. In few cases it was necessary to make use of interpreters to explain the contents of the questionnaire to the participant. Only members of the Defence Force were requested to complete the survey and no civilians in the employment of the Ministry of Defence were used. Participants were put at ease and to achieve a more credible response they were ensured about the confidentiality of their responses.

3.7 Data analysis

All the data from the trial records and the suspension of salary records obtained over a period of six years (from 2003 to 2008) and the records of the questionnaires were entered onto Microsoft Excel sheets from where it could be analyzed. In order to reduce this data and to select the specific sample of personal files to be drawn for the determination of the suspension and re-instatement of pay 60 of these files were quasi-randomly selected from the records of the population of 1115 entries in applicable register (Welman, Kruger & Mitchel, 2005). From this data it is learned that 31 (52%) cases in which the pay were suspended was indeed brought to book and tried for their behavior. The others resigned, went on retirement because of medical reasons, passed

away or were not held accountable at all and in 4 cases the particulars of the members were unknown to the Personnel Office.

The data with regard to the courts martial consisted of a population of 1484 entries and were not reduced in any manner in order to achieve maximum accuracy. This equally was the case with the data in respect of the suspension and re-instatement of pay where the total population of 1115 was considered.

In order to determine whether the requirements for a speedy trial are met only the information regarding AWOL was considered. The rationale for this selection is that AWOL is the most common offence and the dates when this unlawful absence was terminated is indicates in the applicable reports. This while the dates on which other offences are committed are not reported.

The processed data is displayed in narrative text as well as tables and graphs in order to motivate an argument.

3.8. Research ethics

Research ethics, such as objectivity, non-fabrication, the right to anonymity and confidentiality, and the right not to be harmed in any manner (Mouton, 2006) are at all times be adhered to. The specific ethics, for example the publication of confidential information of the NDF and the undue influence of superiority over subjects from whom information is required are at all times respected.

3.9 Summary of Methodology

This chapter explained the methods being used to investigate the application of justice within a military environment. This includes not only quantitative elements but also contains qualitative elements to provide evidence in this work. Some of these data were reflected in broad in this chapter but will be reflected more in detail in the following chapter.

CHAPTER 4 – NAMIBIAN DEFENCE FORCE JUDICIAL SYSTEM

4.1 Introduction

Some external related issues were already discussed and analyses done on issues which could have an influence and effect on the justice system within the Namibian Defence Force. Taking all these factors into consideration it is time to discuss and analyze the system within to determine whether these influences will have a positive or negative impact. This chapter will commence with the background of the military justice, the place thereof within the Namibian Defence Force and ultimately the justice system within the Namibian Defence Force.

4.2 The place of military justice

Although no direct reference to military justice is made in the laws governing the Namibian Defence Force is mainly regulated by the Military Discipline Code (MDC) which is made under the provisions of section 39 of the Defence Act, 2002. In order to understand the Namibian Defence Force judicial system it is also necessary to consider the meanings of the administration of criminal justice and the administration of military justice. Although the one is related to the ordinary judicial system in the country and the other relates to the military, the last mentioned cannot be used without the other.

One of the differences between crimes and delicts is that the trial in the case of a crime is governed by rules of criminal procedure while the trial in a delict is governed by rules of civil procedure. (Snyman C R, 2008). It is then obvious that crimes will be heard in

criminal courts while delicts will be mediated in civil courts. However, in a military perspective all criminal cases will be heard by civil courts. This only means that it is a civil court is a non-military court presiding over criminal cases.

The members of the Namibian Defence Force are ordinary citizens and therefore have the same status as any ordinary citizen of this country. Thus the laws of the country equally apply to these members. The Namibian courts cannot generally try offences which are committed outside the country, but, because of the nature of the work of the Namibian Defence Force it is necessitated to execute their duties beyond the borders of the country and the laws of the country accompany the members wherever they are deployed for service. The Military Law applies only to specific individuals and only applies when specific conditions are met. This chapter deals with the source and authority of the Military Law, the uniqueness thereof and also the application thereof.

The word “service” in the Defence Act does not narrate directly to the ordinary meaning of being in service of or to do a duty but to the specific duty which was imposed on the Defence Force. The primary task of the Defence Force, as provided for in Article 118 (1) of the Namibian Constitution, is to defend the territory and national interests of Namibia. In the Defence Act “service in defence of Namibia” has a special definition and means:

> “Military service and operations in defence of Namibia -
>
> (a) in time of national defence, or

(b) for the prevention or suppression of any armed conflict which, in the opinion of the President, may be a threat to the security of Namibia."

Any member of the Defence Force may be require to perform service at any place outside Namibia whenever necessary and the President may, with concurrence of the Cabinet, under certain conditions deploy members of the Defence Force outside Namibia to ward off any attack directed at Namibia and also in compliance with a resolution of ten Security Council of the United Nations or the African Union or the Southern African Development Community or in the execution of an obligation arising from a bilateral or multilateral agreement of which Namibia is a party.[12] At the most times, while being on service, the soldier are beyond the borders of Namibia and therefore specific conditions are prescribed in the Code to accommodate the handling of the administration of justice while being so on service. Some offences[13] can only be committed while on service while others,[14] when committed while on service, are more serious. A Board of Review[15] is also established purely to review cases beyond the borders of Namibia while such members are on service. Further, to protect members, no emoluments attachment order may be issued in respect of the pay of any member of the Defence Force while such member is on service outside Namibia.[16]

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12 Section 32 of the Defence Act, 2002 (Act 1 of 2002).

13 Endangering forces (section 4 MDC).

14 Offences relating to signals, watchwords and disclosure of information (section 8 MDC), Interference with guards, sentries or watch keepers (section 11 MDC), dereliction of duty by sentry or watch keeper (section 12 MDC, desertion (section 13 MDC) and disobeying of a lawful command (section 19(1) MDC).

15 Section 144 MDC.

16 Section 131 MDC.

4.3 Sources and authority of military law

Article 119(2) of the Namibian Constitution empowers the Chief of the Defence Force to "make suitable appointments in the defence force, to cause charges of indiscipline among members of the defence force to be investigated and prosecuted and to ensure the efficient administration of the defence force" while military courts are established under section 42 of the Defence Act.. The Defence Act, 2002[17] provides for the Code, which can for all purposes be considered as the provisions for the administration of military justice.

This Code consists of Schedule 1 to the Act and the Rules which gives effect to Schedule 1. Schedule 1 is enacted by proclamation in the *Gazette* by the President with the approval by resolution of the National Assembly and primarily provides for the various distinctive military offences, the different authorities and courts in the Namibian Defence Force with their functions, powers and limitations. The Rules are more procedural of nature and prescribe the pre-trial, trial and post-trial procedures. This also includes the provisions with regard to charge sheets and the procuring of the attendance of witnesses, whether they are subject to the Code or not.

For this prosecution of members the defence must also be within the ambit of the Namibian Constitution and the provisions with regard to a fair trial also apply. The requirements of independency, impartiality and competency as provided for by Article 12 of the Namibian Constitution will equally be prerequisites. As independency can be considered as a specific structural requirement, impartiality refers to a state of mind and competence refers to knowledge. The judicial authorities as set out in Table 4.7.1 only

[17] Section 39 of the Defence Act, 2002 (Act 1 of 2002).

refers to a hierarchy of the legal system as a whole but does not reflect the independence of the court. It must be borne in mind that the court is only a part of the legal system which could also include the prosecution, defence and reviewing authorities. In order to be impartial it is also necessary to encompass the required knowledge about an issue. Except for a legal practitioner and defending officer which are defined in the Code there are no specific qualifications required for the presiding officer or members of a court or the prosecutor.

4.4 Development of the Namibian military law

With the Independence of Namibia on 21 March 1989 the South African Defence Act, 1957 (Act 44 of 1957) remained in force with some amendments done in the Defence Amendment Act, 1990 (Act 20 of 1990). These amendment only affected the principle Act and not the Military Discipline Code. In 2002 this Defence Act was repealed and replaced with the Defence Act, 2002 (Act 1 of 2002). This replacement also included Schedule 1 to the Act but excluded the Rules, which were only repealed and replaced on 2 September 2008. None of the above amendments did drastically change the original provisions of Defence Act, 1957 (Act 44 of 1957) in so far it concerns the military justice system. Only some of the jurisdiction clauses with regard to punishment were amended and provision was made for an accused to be represented by a legal council during a summary trial.

4.5 Application of Military Law

In general the Code only applies to the members of the Defence Force and does not include the civilian component who is employed in the Defence Force. Other categories of people who are also subject to the Code are the member of any reserve force who are executing service, training or duty under the Act, members who are lawfully detained by virtue of or serving a sentence of detention or imprisonment imposed under the Code or any members of an auxiliary service and medical service while being on service.[18] Another group of people who are subject to the Code is the cadets under instruction at a military training institution[19] and also those who, with the consent of the Commanding Officer of the portion of the Defence Force, accompany or perform duty with or who is under training with that portion of the Defence Force.[20]

The whole Defence Force is part of the public service at large but while the members (uniformed) are employed under the Defence Act, the civilian component of the Defence Force is employed under the provisions of the Public Serve Act, 1995 (Act 13 of 1995). This brings about that the civil component is not subject to the Code and must for all disciplinary matters be taken care of under the Public Service Act, 1995 (Act 13 of 1995). Although they might work under the supervision and control of a member of the Defence Force they cannot commit purely military offences such as disobeying a lawful command or orders or insubordination which are specified in Schedule 1 to the Defence Act.

Although a soldier is subject to the military judicial system it does not free him form also being subjected to the national laws of the country.

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18 Section 39(3) MDC.
19 Section 15(3) of the Defence Act, 2002 (Act 1 of 2002).
20 Section 2 MDC.

4.6 Uniqueness

Although the Defence Force is also an integral part of the criminal justice system at large it is very unique in the execution of the administration of its military judicial functions. The Code can, appose to the criminal procedure, be regarded as the military procedures to administrate justice within the Defence Force. With right it can also be referred to as a particular military justice system in which we have the summary trials, the trials by courts martial and the reviewing and confirming authorities. In modern Russia the military, like the civil court system, according to Nikolai P. Kovalev (2008) retains the three-level court system which consists of the lower level (garrison military courts), the intermediate (the district (fleet) military courts) and the higher level (the Military Chamber of the Supreme Court of Russia. Although it is appear quite infrequent, it is in the Russian military court system possible for a soldier to apply for a trial to be heard before a jury in cases where the death penalty can be imposed. These jurors trying soldiers are civilians. In Russia the military courts are considered as part of the civil courts as both are regulated by the same criminal procedure law and also that soldiers are entitled to the same legal rights as enjoyed by civilians. However, the Namibian military justice system is based on the South African system which was regulated by the Defence Act, 1957 (Act 44 of 1957) before it was extensively amended by the Military Discipline Supplementary Measures Act, 1999 (Act 16 of 1999) and is in many ways similar to the Canadian, American and British systems. To understand this peculiarity it is necessary to examine the different military authorities, the different military courts, some specific prescribed procedures, military offences, punishment and also the review of cases.

4.7 Military judicial authorities

With the military courts it is maybe not the structure of the court system *per se* which is so unique but rather the composition of these courts and its function within the bigger administrative environment. It will not do justice only to refer to the courts but reference should also be made to the authorities, and more specific about the roles of the Chief of Staff of Personnel and of a convening authority, appointed under the Code which has its own jurisdiction and functions.

4.7.1 Authorities appointed under the Military Discipline Code

The President, as the Commander-in-Chief of the Defence Force, is the most superior authority followed by the Chief of the Defence Force. Following are the Chief of Staff, Convening Authority, Commanding Officer Deriving Powers from Convening Authority[21] and the Commanding Officer with Delegated Powers.[22] The first two authorities is in relation to the positions they hold while the Chief of Staff is an "officer of the rank and command not below that of brigadier or its equivalent who is empowered by warrant to convene general courts martial …."[23].

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[21] In Rule 1 MDC "commanding officer deriving powers from convening authority" is defined as a commanding officer empowered, in writing by a convening authority under subsection (3) of section 63 MDC, to exercise all or any of the powers conferred upon a commanding officer by sub-section (1) of that section

[22] In Rule 1 MDC "commanding officer with delegated powers" is defined as a commanding officer to whom powers have been delegated under section 63(4) MDC.

[23] Section 1 MDC defines the term "chief of staff".

The Commanding Officer Deriving Power from a Convening Authority and the Commanding Officer with Delegated Power are both officers and their authorities are only to conduct summary trials. Table 4.7.1.1 gives an overall picture of the different authorities.

JUDICIAL AUTHORITIES			
	Appointment	**Delegation of power**	**Court function**
President	Constitutional appointment as Commander-in-Chief.	Issue warrant to the CDF to convene general courts martial	Convene general courts martial
Chief of the Defence Force (CDF)	Constitutional appointment	Issue warrants to a Chief of Staff to convene general courts martial	Convene general courts martial
Chief of Staff (CS)	Sect 68(c) MDC read with Sect 1 MDC. Be at least a Brigadier-General	Issue warrants to convene ordinary courts martial.	1. Convene general courts martial 2. Summarily try Major and Lieutenant Colonel
Convening Authority (CA)	Sect 69 MDC. Be at least a Lieutenant-Colonel	Confer power to a Commanding Officer to summarily try certain members	1. Convene ordinary courts martial 2. Summarily try Warrant Officer to Captain
CODPCA	Sect 63 (3) MDC Be an officer	Delegate all or some power to a CODEL to summarily try	May summarily try from Private to Staff Sergeant under command
CODEL	Sect 63 (4) MDC Be an officer	May not delegate any power	May summarily try from Private to Staff Sergeant under command

Table 4.7.1.1 The different judicial authorities in the Defence Force.

4.7.2 The role of the Chief of Staff Personnel

Another authority which may not have a specific convening or trial function is the Chief of Staff of Personnel in the Defence Force. This officer will receive the record of proceedings in the case of a summary trial held by a Convening Authority, after being

reviewed by a Chief of Staff and also the record of proceedings of a court martial which was convened by an officer commanding command and being reviewed by a Chief of Staff and may in the case of any of the above cases which are not in accordance with justice refer it with his or her views to the Chief of the Defence Force.[24] It is also the duty of the Chief of Staff Personnel to prepare the records of proceedings for submission to the council of review in the case of automatic review and when the review by the council of review is applied for by the offender.[25] Other functions of the Chief of Staff Personnel provided for by the Code includes the authority to order that a sentence of imprisonment or field punishment be served in a detention barracks,[26] duties with regard to the handling of mentally ill offenders,[27] the re-instatement of pay after acquittal by a competent court or in case of an undue delay in the finalization of a case in which the salary of a member was withheld,[28] the preservation of the records of courts martial[29] and the authority to sign committal and release warrants.[30] Nothing in the Code prohibit a Chief of Staff Personnel to be appointed as a convening authority but the coincidence thereof might cause a conflict of interest.

4.7.3 Role of a convening authority

The term convening authority when used in the Code refers to an authority which may convene ordinary courts martial and summarily try a member with the rank from Warrant

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24 See sections 66(3) 107 (3) and 109 MDC.
25 Rules 97, 98 and 100 MDC.
26 Se 119 MDC.
27 Sections 123 and 124 MDC.
28 Section 127(5) MDC.
29 Rule 121 MDC.
30 Rule 124 MDC.

Officer to Captain and for that purpose may not be below the rank of Lieutenant-Colonel[31] but in general means any person who is empowered to convene courts martial[32]

The convening authority is the spill around which the whole military legal system turns and has extensive areas of permitted involvement to in the military justice system. It is this single authority to whom the application for a trial is done and who receives the investigation into the allege offence. Upon receiving the investigation the convening authority may direct that the investigation be re-opened for further investigation, remit the case to a court which has jurisdiction for the offender to be tried summarily, convene a court martial for the trial of the offender or may decline to take any action in the matter.[33] After an offender is summary tried and convicted the proceedings will be forwarded to the convening authority for review. In the case of a court martial it will be convened under the hand of the convening authority,[34] who will determine the time and place of the trial and appoint all the members of the court, the prosecutor and, when needed, a defending officer.[35] Upon a conviction by this court martial the proceedings first have to be send to the convening authority for confirmation before the sentence may be promulgated and executed.

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31 Sect 69 MDC.

32 Sect 1 MDC - Which may include the President, the Chief of the Defence Force and the Chief of Staff.

33 Rule 19 MDC.

34 Rule 46 MDC.

35 Rule 47 MDC.

4.8 Military courts

A military court means "any court or officer deriving jurisdiction from the Code or from an officer to try persons subject to the Code who are charged under the code with offences and to impose punishment."[36] Here it is referred a court martial which consist of officers (not less than three) who are so appointed and a summary trial which consist of one officer who is appointed as trial officer. Courts martial and summary trials have different authorities, depending on the type of offence being committed, the rank of the offender, and in some instances also merely on the decision of the convening authority.

The two types of courts martial are the general and ordinary courts martial. In the case of the general court martial it is composed[37] of at least three members and in the case of a capital offence of not less than five members. These members include the president who must not be below the rank of Colonel and at least one rank higher than the accused. These members must have hold commissioned rank for not less than three years but if any of them holds a degree in law it is only necessary to holds commissioned rank for not less than one year. A general court martial has the jurisdiction[38] to try any person who is subject to the Code for any offence (other than a civil capital offence or culpable homicide committed within Namibia and grave breaches under the Geneva Conventions Act, 2003 (Act 15 of 2003)) and can impose any sentence under section 92 of the Code. A capital civil offence referred to above and which is excluded by the Code includes treason, murder and rape[39] while in the case of any grave breaches committed under the provisions of the Geneva Conventions Act, 2003 (Act 15 of 2003) it is specified that such

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36 See section 1 of the Defence Act, 2002 (Act 1 of 2002) for the definition of "military court".
37 Section 74 MDC.
38 Section 73 MDC.
39 Sect 56 MDC.

an offence may not be tried by any court martial or military court.[40] The quandary is that under normal circumstances the jurisdiction of the civil courts are limited within the borders of Namibia while in the case of an offence under the Geneva Conventions Act, 2003 (Act 15 of 2003) a trial is limited to a civil court and explicitly exclude a trial by court martial or military court. In the case of a general court martial being convened by the President the court may not consist of more than five members, appointed by the president, who may be no other person other than an officer of the Defence Force or a judge or retired judge of the Supreme Court or High Court of Namibia or a practicing legal practitioner of at least ten years' standing.

Like a general court martial, an ordinary court martial is also composed of at least three officers of the Defence Force who hold commissioned rank for not less than three years but in this case the president may not be below the rank of captain. An ordinary court martial may try any member, other than an officer, for any offence (other than the offences which is excluded for trial by a general court martial and offences under sections 4 and 5 of the Code) and may impose any penalty under section 92 of the Code, except imprisonment for a period exceeding two years. Because of the nature of the offence of scandalous behaviour, one of the elements of the offence is that it can only be committed by an officer and can thus not be tried by an ordinary court martial. With the offences under the Code the maximum punishment, for any specific offence, is expressed in "year imprisonment" and the general perception is that all offences with a maximum sentence exceeding two years must be tried by general court martial.[41] This is incorrect as it

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[40] In section 1 of the Geneva Conventions Act, 2003 (Act 15 of 2003) the definition of "'court' does not include a court martial or other military court".

remains the prerogative of the convening authority to determine in which court the case should be heard, provided that it is not an officer or another offence prohibited by law to be heard by an ordinary court martial. Every offence is considered on its own merits and in case the convening authority is of the opinion that the offence does not valid a sentence exceeding two years imprisonment, order that that offence be tried by an ordinary court martial. Section 73 of the Code clearly states that:

> "An ordinary court martial has jurisdiction to try …… any offence (other than a capital offence or culpable homicide committed by such person within Namibia or an offence under section 4 or 5), and may in respect of any such offence impose any penalty which could be imposed thereof by a general court martial, except imprisonment for a period exceeding two years".

With the composition of a general court martial the president must be at least one rank higher than the accused and only one member may be of the same or equal rank of the accused. In the case of an ordinary court martial a crisis like superiority over the accused will not occur as all the members are officers and only other ranks may be tried by ordinary court martial.

The following type of military court is the summary trial which could be a summary trial by the Chief of Staff, the Convening Authority, the Commanding Officer Deriving Powers from a Convening Authority (CODPCA) and the Commanding Officer with Delegated Powers (CODEL). Any member subject to the Code from Private up to and

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[41] Offences under sections 6, 7, 8 (while on service), 10, 11 (while on service), 12 (while on service), 13, 15, 16, 18, 19(1) (while on service), 20 (1) (a) or (c), 21 and 22 MDC.

including a Lieutenant-Colonel may be tried summarily for any offence for which the maximum punishment prescribed in the Code does not exceed imprisonment for a period of one year. In the case of a summary trial by a chief of staff the trial officer will not be below that of a Brigadier-General who may try summarily an officer with the rank of Major to Lieutenant-Colonel under his or her command.[42] The next summary trial is that of a Convening Authority in which the trial officer may not be of a rank lower than that of Lieutenant-Colonel who may summarily try any member with the rank of Warrant-Officer to Captain under his or her command.[43] The aforementioned authorities (Chief of Staff and Convening Authorities) are trial officers as well as convening authorities for courts martial while the Commanding Officer Deriving Power from a Convening Authority and Commanding Officer With Delegated Power only have authority to try members from Privates to the rank of Staff-Sergeant under their command. As the title indicated that it is a 'Commanding Officer' Deriving Power from a Convening Authority or 'Commanding Officer' with Delegated Powers but the legal meaning is not *per se* a Commanding Officer of a unit as it is commonly known in the military but only an officer so appointed in a judicial authority.[44] The Commanding Officer Deriving Power from a Convening Authority may delegate all or some of his or her power to the Commanding Officer with Delegated Power. This delegation of power can limit the specific offences to be tried, it can exclude a specific rank group or it may limit the maximum punishment to be imposed.

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42 Sect 61 MDC

43 Sect 62 MDC read with Rule 21 (2) MDC.

44 A "commanding officer" means any officer who has been empowered under section 63(3) MDC and includes any officer who has been empowered as a CODEL. See sect 63 (5) MDC.

COURTS		
TYPE OF COURT	COMPOSITION	JURISDICTION
Court Martial		
General Court Martial	At least a Colonel as president with not less than two other members	May try any member subject to the Code for any offence (except capital offence and culpable homicide committed within Namibia and offence under Geneva Conventions Act, 2003)
Ordinary Court Martial	At least a Captain as president with not less than two other members.	May try any member (other than an officer) subject to the Code for any offence (except section 4 or 5 MDC, a capital offence and culpable homicide committed within Namibia and offence under Geneva Conventions Act, 2003)
Summary Trial		
Chief of Staff	Trial officer with rank not below that of Brigadier-General	May try summarily an officer from Major to Lieutenant Colonel.
Convening Authority	Trial officer with rank not below that of Lieutenant-Colonel	May try summarily any member with the rank from Warrant Officer to Captain.
Officer Deriving Powers from Convening Authority	An officer	May try summarily an other rank from Private to Staff Sergeant.
Commanding Officer with Delegated Powers	An officer	May try summarily an other rank from Private to Staff Sergeant.

Table 4.8.1 The different military courts in the Defence Force, its composition and jurisdiction.

Having discussed all the different military courts it is imperative to know in which court the offender should be tried as it will have an influence on some pre-trial procedures to be followed. These factors might be obligatory or in some cases depends on the discretion of the commanding officer or the Convening Authority. When determining the specific court consideration must always given to the type of offence being committed, the manner in which the offence was committed, the rank of the offender as well as the personal particulars, like previous convictions of the offender. The question with regard to the offence is mainly to determine whether it will be a trial by a civil court, court martial or summary trial while the rank and other personal particulars will be more about

the specific court (type of court martial or summary trial) in which the trial will take place. All offences cannot be tried by a military court and must be referred to the civil courts for trial. These are capital offences and culpable homicide committed within the country and any of the grave breaches as provided for in the Geneva Conventions Act, 2003 (Act 15 of 2003). With the definition of the proscription of the various military offences the maximum punishment is expressed in year imprisonment and no option of a fine or any other punishment is given. All offences (except in the case of an offence of theft[45] where the value of the stolen items does not exceed N$2 000) for which the maximum sentence prescribed by the Code exceeds one year imprisonment may not be tried by a summary trial and must be referred to a court martial for trial.

Although the Code provide that a military court having jurisdiction may try any civil offence (other than treason, murder, rape or culpable homicide)[46] this jurisdiction is, except in the case of theft which may be tried by a Commanding Officer Deriving Power from a Convening Authority or Commanding Officer with Delegated Power, only limited to courts martial. This statement is made because of the following:

> The provisions of sections 61 (Chief of Staff), 62 (Convening Authority) and 63 (Commanding Officer) which deals with the jurisdiction of summary trials provide that this authority may try summarily any offence *as prescribed*.[47]

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[45] Theft of public property or property from an institution or from another member who is subject to the MDC (Section 20 MDC).

[46] Capital offences committed outside Namibia (Section 56 MDC).

[47] In terms of section 1 MDC – "prescribed" means prescribed by rule made under section 40 of the Defence Act, 2002. In this case as prescribed by rules 15 and 21 MDC.

> Rule 15 of the Code which deals with the jurisdiction of a Commanding Officer Deriving Powers from a Convening Authority provides that an offence *for which the maximum punishment in the Schedule does not* exceed one year imprisonment and offence under section 20 and 21 of the Code where the amount of the value involved therein does not exceed N$2 000 and a civil offence of theft where the amount or value involved therein does not exceed N$2 000.
>
> Rule 21 (1) and (2) of the Code which deals with the jurisdiction of the Chief of Staff and Convening Authority only provide for the summary trial of a member for an offence *for which the maximum punishment prescribed in the Schedule does not* exceed imprisonment for a period of one year. This rule is very specific about the offences which may be tried by these two authorities.

After determining in which court a specific offence may be tried it is further necessary to establish in which court the offender will be tried. If the offence may be summarily tried it is further provided that a Private to Staff Sergeant may be tried by a Commanding Officer Deriving Power from a Convening Authority or Commanding Officer with Delegated Power while a member with the rank of Warrant officer up to and including a Captain may be tried summarily by a Convening Authority and an officer with the rank of Major or lieutenant Colonel may be summarily tried by a Chief of Staff. No provision for a summary trial is made for an officer with the rank of Colonel and above and the implication is that such an officer may thus only be tried by court martial. It is not only

the rank of the offender to be considered but it may also be other factors like previous convictions[48] which might necessitate a trial by a court martial in lieu of a summary trial.

In case offender ask for a defending officer, it can also be referred to a court martial and as no provision is made during a summary trial for the representation by a defending officer this case will also have to be referred for trial to a court martial.

4.9 Pre-trial Procedures

Pre-trial procedures consist of any action which is by law compelled to be taken but also include action which is likely to be taken. Each and every event will firstly require some form of investigation before it is brought to the court for trial. Every suspect, whether arrested or only warned for the offence, must be handed to the adjutant of the unit and will subsequently have to appear before the commanding officer. In the case of a member being absent from the unit without leave it is also likely that his or her pay will be suspended while so absent.

In the Defence Force various different forms of investigations can take place in order to bring the offender to justice. The first is the so called summary investigation whereby a member, who is also appointed as prosecutor in the case, is tasked to investigate a specific case and to frame the charge sheet according to the evidence which is obtained. This investigation can include the interview of persons who can give any evidence, the taking of statements, the tracing of witnesses and suspects and the taking charge of any

[48] Rule 36 (5) MDC provides for the conversion of a summary trial into a preliminary investigation on the ground of the record of service of the accused or any other factor which maybe a reason for the trial officer to impose punishment beyond his or her jurisdiction.

document, article or other exhibit which might be used in evidence at the trial and is the only pre-requisite for a summary trial.

In the case of a court martial it must be preceded by either a preliminary investigation or an investigation lodge by the military police. The commanding officer, if he or she is appointed as a Commanding Officer Deriving Power from a Convening Authority may order an officer to conduct a preliminary investigation to be held into the allege offence. An investigation held by the military police also falls in the category of a summary investigation but the only difference is that a member of the military police, with the rank of Corporal or higher, is also appointed as a commissioner of oaths and may therefore take sworn statements and in the case of a person appointed to hold a summary investigation may not necessarily be a commissioner of oaths an may therefore not take sworn statements.

The finding of a board of inquiry in relation to absence without leave may have the same force and effect of a finding of guilty by a court martial on a charge of desertion and a copy thereof handed to the court is prima facie proof of such persons' absence without leave or of any deficiency.[49] In all other cases where the character or military reputation of a member is affected, the commanding officer, who may order a preliminary investigation, may convert the board into a preliminary investigation and can request for the trial of the member by military court.[50]

Article 11 (3) of the Namibian Constitution provides that:

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[49] Section 134 MDC.
[50] Rule 107 MDC.

> "All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer".

Since the Independence of Namibia there is no reported case in the Namibian courts whereby a trial was nullified because of the non-compliance of this Article. This particular provision in the Code is more stringent and in case an offender is not brought before his or her commanding officer within a prescribed time, the case prescribes and the offender cannot be tried for the same offence. The specific periods within which an offender must appear before the commanding officer is within 6 months after he or she has been released if he or she was arrested for the offence and if he or she was only warned, within 3 months after such warning.

In case a member is absent without the necessary leave being granted and his or her whereabouts is not known the pay of such member may be suspended for this period so absent. In this regard section 127(4) of the Code provides as follows:

> "…… the full the full pay of any person who is subject to this Code, or such portion thereof as the Chief of the Defence Force or an officer authorized thereto by him or her may determine, must be withheld as from the date upon which such person has been absent without leave, was arrested or taken into custody or

> detained as prisoner of war or admitted to hospital or released from arrest or custody, whether on bail or on such person's own recognizance or otherwise, for the period during which such person is so absent, under arrest or in custody, a prisoner of war, in hospital or released from arrest or custody, until such time as it has been established whether such person forfeits his or her pay in terms of subsection (1) or (3)."

It is an unwritten order in the Defence Force that this request for the suspension of pay is done after the member has been so absent for a period of 7 days. This suspension has a dual function, firstly to prevent the government to suffer any unnecessary losses and also to deter members to be absent without the necessary permission. When a member return to the unit after this absence his salary should be re-instated and the unit will then consider the action to take with regard to the absence. In some cases sickleave or vacation leave could be recorded and in case it is decided that the absence was not authorized all the documents will be prepared for a subsequent trial. Upon return of the member to the unit, the unit completes a request for the re-instatement of the pay and forwards it to the Defence Headquarters where the re-instatement must be approved by the Legal Office. From there it is forward to Personnel Administration where an advice is made out for further action by the Defence Pay Office.

As the delay in trials is already addressed in this paper, the concern is not so much the fact that this part of the pay is withheld awaiting the trial but the suffering that result from the delay to re-instate the pay after the member return to the unit. This delay is caused by the probable dawdling administration, not only in the unit but also at the Defence

Headquarters but does not include the possible delay at the Defence Pay Office where the salary must actually be re-instated and the money be handed to the concerned member. During 2008 an example recorded is that of a member who was absent for 12 days and after he returned to his unit it took the unit 274 days to request for the re-instatement of the pay of this member. In other cases during the same year members were absent for 7 days and 14 days and it took the unit 171 days and 266 days respectively to request for the re-instate of their pay. The record for the Defence headquarters is not better as in one case during 2008 a member was absent for 14 days. It took the unit 1 one day to request for the re-instatement of the salary and it took 226 days to approve this request. These are the extremes and the average state of affairs is recorded in Figure 4.9.1.

From the records obtained from 2003 to 2008 data is compiled and in Figure 4.9.1 the average delay of the unit and also the Defence Headquarters is projected and compared with the average days absent which appears to be very consistent. It took the unit anything from 39 to 72 days after the member return to the unit, to request for the re-instatement of his or her pay. Calculating this data it gives an arithmetic mean of 50 while the sample standard deviation is at 13,36. The period it takes the units to re-instate the salaries is longer than the period of absence and appear to be very inconsistent when considering an arithmetic mean of 32,17 and with a sample standard deviation of only 3,6 with regard to the days absent. In the case of the Defence Headquarters there is a gradual improvement as this part of the administration at first took 30 days in 2003 and improved to 9 days in 2008. The data reflect a arithmetic mean of only 19,17 and a sample standard deviation of 7,9.

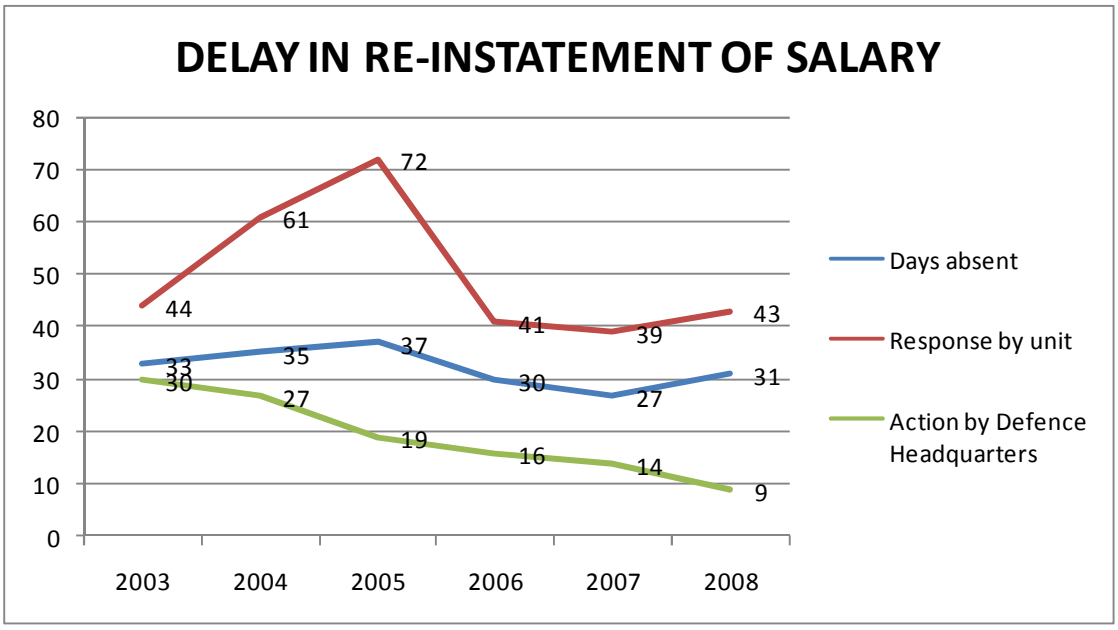

Figure 4.9.1 Analysis to determine the periods of delay in the re-instatement of salary comparing to average days absent.

From the above it is clear that a member whose pay has been suspended will have to survive without pay for about two months after he or she return to the unit.

4.10 The right to a fair trial

'Military' and 'discipline' can be used synonymic and because it is the duty and responsibility of every commander to achieve the highest level of discipline in his/her office or unit some form of bias cannot be excluded in the fulfillment of this task. It is also the same commander or an officer under his/her command who will try a subordinate summarily for any indiscipline behaviour. In the most cases this accused is not represented at the trial and there is legal and moral duty upon this trial officer to be impartial and to assist this accused. The basic rights to a fair trial include the right to

legal representation, to call witnesses, to give evidence and to cross-examine State witnesses and must be explain explained to the accused as well as recorded in the record of proceeding. (S v Willemse, 1990). In S v Appelgrein (1995) it was ruled that the unrepresented accused must be assisted where necessary. Also in S v Monday (2001) it was ruled that the court must assist the accused in the best way possible and that an adverse inference should not be drawn in case of the failure to cross-examine a witness. The rights to a fair trial are vested in the rights being given to the accused at the trial and also the possible irregular command influence which may surface.

4.10.1 Rights given by the court

The defending officers whom may be appointed during courts martial to assist the accused in his or her defence are ordinary officers of the Defence Force and there is no requirement that these officers must acquire any formal legal qualification.[51] For this reason it still remains the duty of the court to ensure that all the rights of the accused is complied with. With a population of 81 which were obtained during the questionnaires for members who have been tried by military courts, 60 (74%) were tried summarily while 21 (26%) were tried by court martial. Table 4.10.1.1 (which is expressed in percentage) shows the compliance to some of the general rights to be given to the accused during the trial. It is obvious that the defence has, after the closing of the State's case, the opportunity to bring their case to the court and for that reason the right to give evidence in defence is reflected to be the highest in this Table. This while giving the right to address the court after the closing of the State's case is only 54%. The right to

[51] In section 1 MDC a 'defending officer" is defined as "an officer subject to this Code with knowledge of law assigned by a convening authority to undertake the defence at a trial by a court martial of an accused not represented by a legal practitioner.

cross-examine is only given in 74% of the cases while the right to remain silent is 66% and the right to write a representation to the convening authority is 65%. Considering the members who were not given their rights and it could calculate to an unfair trial.

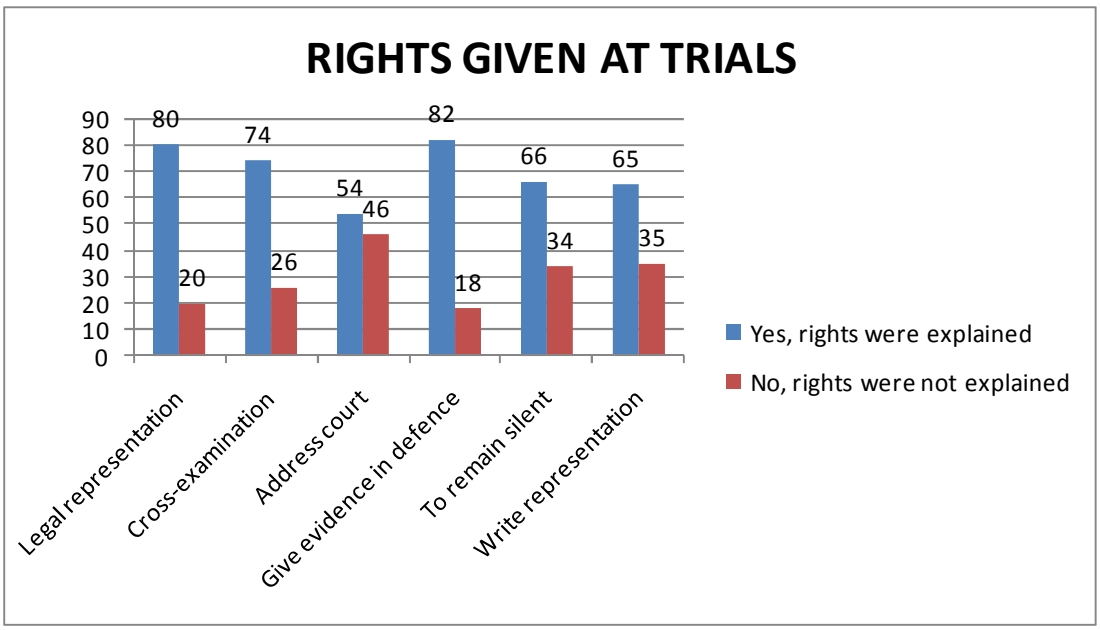

Figure 4.10.1.1 Analysis to determine the percentage of rights given to the accused during trial.

Calculating the data obtained from the six units scientifically the question of legal representation shows the most divergent opinions with a sample standard deviation of 39,01 while the question of writing a representation shows a sample standard deviation of 18,62.

To ensure that these rights are given to the accused the Namibian Defence Force make use of *pro forma* forms for courts martial and summary trials and all these rights are included in these forms. In the case of the summary trial document some of these rights

are explained *verbatim* but there is no written acknowledgement that it was indeed explained.

4.10.2 Irregular command influence

Although the independence of the judicial system within the Defence Force is not explicitly guaranteed in the Defence Act, 2002 (Act 1 of 2002) or the Code made hereunder, the independence of the judicial system at large is ensured by the Constitution of Namibia. For this purpose Art 12 (1) of the Namibian Constitution provides that:

> In the determination of …… any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law ……..”

In the United States of America some statutory measures are in place and unlawful command influence is defined as the “intentional or inadvertent act tending to impact on the trial process in such a way as to affect the impartiality of the trial process”. (Defence Institute of International Studies, 2003). Article 37 of the Uniformed Code of Military Justice prohibits conduct on the part of anyone subject to the code in attempting to unlawfully influence the judicial process:

> “No authority convening a general, special, or summary court-martial, nor any other Commanding Officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his

functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. …. "

Section 107 of the Singapore Armed Force Act, 1972 (Act 7 of 1972), which is also based on the Commonwealth system, ensure this independence from the military authority and also prohibits unlawful influence:

"(1) In matters of adjudication, presidents and other members of subordinate military courts shall not be subject to the authority of their commanders, or to any other authority, except the law.

(2) No person shall attempt to coerce or by any unauthorised means influence the action or proceedings of a subordinate military court or any president or, where applicable, other member thereof."

When referring to a fair trial it in the military it is also needed to consider the phrases "military" and "command". This might brings about institutional bias. Marc Ellie in his book review on "An History of Russian Military Courts" by N Petuhkov(2005) stated:

"Indeed, military courts don't come down to a mere code of military justice. They are a distinct jurisdiction within the court system. In particular, the judges and procurors who embody the branch of military justice are career military

personnel. Doesn't their subordination to the Defence Ministry for promotions, salaries and housing contradict the principle of autonomous justice?"

Petuhkov denies this question and claims that certain specific military offences and behaviour should remain within the military and he also compares the military justice systems of other countries.

4.11 Assurance a speedy trial

When considering a speedy trial it is equally important to consider the accused person as well as the offence. Already in the year 1215 with the issuing of the Magna Carta by King John of England (Hildegarde, 2001) it was determined in the Magna Carta (clause 40) that "to no one will we sell, to no one will we refuse or delay, right or justice". The Namibian Constitution in Article 12(1)(b) ensure that "a trial …… shall take place within a reasonable time, failing which the accused shall be released". Some significant reported cases in this regard are S v Heidenreich (1995, 1998), Malama-Kean v Magistrate for the district of Oshakati NO and Another (2001) and Malama-Kean v Magistrate for the district of Oshakati and Another (2002). The most obvious assumption in this Article is that the trial must take place within a 'reasonable time' and that it only applies to the 'release' of an accused person who is under arrest and that it does not secure a speedy trial *per se*. In the case of Heidenreich which was send for review after the magistrate doubt his own decision there was some lengthy discussion about the meaning of the word 'release' in Article 12 of the Constitution, but, the issue in question was whether the magistrate was correct in his decision that the case did not take place within a reasonable

time as required. In this case it was held that the trial was within a reasonable time and the order to release the accused was set aside. In the case of Malama-Kean v Magistrate for the District of Oshakati NO and Others (2001) the meaning of the word 'release' was again an issue in this case for review by the High Court of Namibia. When defining crimes, one of the rules embodied in the principles of legality is that the law according to Snyman ((2008, p 36 – 37) must be interpret narrowly rather than broadly, but, in the Republic of Namibia v Cultura 2000 and Another (1994, p. 418) the general approach when construing constitutional provisions is the provisions are to be broadly, liberally purposively interpreted. The last mentioned case was also referred to in the Malama-Kean Case (2001) but another aspect for consideration in this case was the work of H M Seervai as sited on page 278:

> "…. a broad and liberal spirit should inspire those whose duty it is to interpret the Constitution; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interest of any legal or constitutional theory, or even for the purposes of supplying omissions or correcting supposed errors."

Although the case of Malama-Kean was further forwarded to the Supreme Court for judgment it was ordered that Malama-Kean be released from her bail conditions provided that she attends her trial on the said date. When the Malama-Kean case (2002) was reviewed by the Supreme Court it was concluded that the word 'release' as used in Article 12(1)(b) of the Namibian Constitution can mean either that an accused may be released from the trial before plea, be acquitted after plea or a permanent stay of prosecution either before or subsequent to a plea. In which case it is not within the

jurisdiction of a magistrate's court to order a permanent stay of prosecution as this authority is only vested in the High Court.

The Defense Institute of International Legal Studies in their Executive Seminar for Namibia (2003. p. 11-3) stated the United States Supreme Court has ruled that the purpose of speedy trial with regard to the protection of the accused in the Sixth Amendment to the United States Constitution is to:

a. prevent undue and oppressive pretrial incarceration,

b. prevent the incarceration of those who are ultimately found not guilty,

c. limit the anxiety accompanying public accusation, and

d. diminish delays that may cripple a defendant's ability to prepare an adequate defence.

The above reasons were arrived at in the United States v MacDonald (1982) and adopted in United States v Loud Hawk (1986) and were also referred to in S v Heidenreich (1995, p. 240)

To ensure a speedy trial in the Defence Force various mechanisms is enacted in the Defence Act. Certain procedures with regard to the warning or arrest of the offender exist and the appearance before the commanding officer is regarded as administrative guidelines and no proof of the non-compliance of these procedures to invalidate the trial is recorded in the Namibian Defence Force. As stated above, it is not only applicable to consider the offender but in some cases it is equally important to consider the offence. Section 18 of the Criminal Procedure Act, 1977 (Act No. 51 of 1957) provides that "any

offence, other than an offence in respect of which the sentence of life imprisonment may be imposed, shall, unless some other period is expressly provided by law, lapse after the expiration of a period of twenty years from the time the offence was committed".

In line with the Criminal Procedure Act, in order to stop prescription in the military justice system the trial against an offender must commence within three years after the commission of the offence. The offences which are not influenced by this provision are any offence for which a sentence of life imprisonment may be given, an offence of endangering the safety of forces, mutiny, desertion and fraudulent enlistment. Rule 117 of the Code provides that a member who has been arrested must be brought before his or her commanding officer within 6 months from being released and in case of a member has being warned, such member must be brought before his or her commanding officer within 3 months after being warned. In case these time framings are not met the case has prescribe and the offender can therefore not stands trial in a court. Any person who commits an offence and for any reason ceased to be subject to the Code must be tried and punished within three months after he or she so ceased.

These are the legal provisions, but, within which period can an offender expect to be tried? For the purpose of calculating this data only cases of absence without leave was considered. The reason for this is that there is a definite date, on which this absence terminates and the calculation can, for this reason be more accurate. The period in which an absentee was tried after he or she returns to his or her unit and in Figure 4.11.1 compared with the amount of absence without leave charges but no correlation could be

found. With the records obtained from 2003 to 2008 it was found that the average days within which an offender is charges could be from 85 to 135 days. Calculating this data conclude to an arithmetic means of 98 and a sample standard deviation of 17,69.

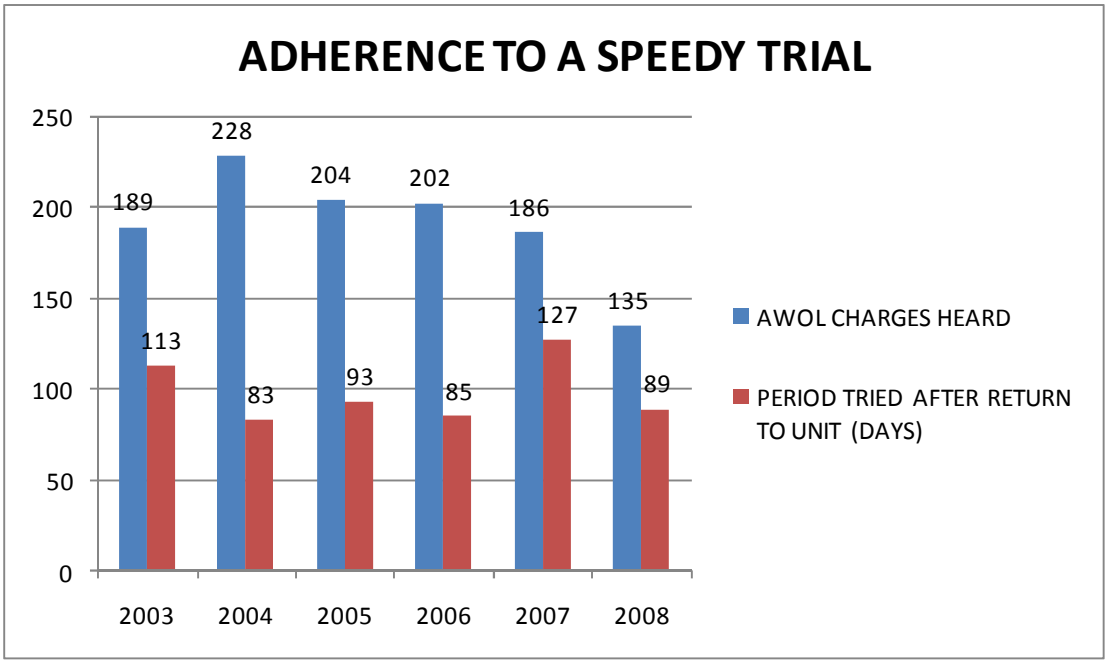

Figure 4.11.1 Analysis to determine the period in which an offender is tried after the commission of the offence in relation to absence without leave cases heard.

The stopping of prescription is not the only measure to determine whether a speedy trial was held. The actual period which lapse after the commission of the offence, before the trial is held, is the determining fact to establish whether the rights of the accused was protected as determined by the case United States v Loud Hawk (1986). With the data in Figure 4.11.1 it was established that the average delay in cases is about 3 months (98 days). None of these cases prescribed in terms of Section 58 of the Code but, during the reporting period, in 59 cases the trials were delayed for periods longer than 300 days.

4.12 Fair punishment

One of the unique characteristics of the military justice is that a military court can impose not only a sentence to the equivalent to the maximum sentence in the High Court but can also impose sentences which are prescribed specially for the military environment. These are sentences like, discharge, detention, reduction to lower rank, reduction in seniority in rank, reversion from acting or temporary non-commissioned rank to substantive rank, confinement to barracks and extra duties. The authority of each of the military courts is limited by the provisions in the Code

A concern is also raised whether it is fair justice where a lay person can impose a sentence of imprisonment. In the case De Lange v Smuts NO and Others (1998) as quoted by Freedom of Expression Institute and Others v President, Court Martial (p. 480) it was decided that:

> "Committing a person to prison is the ultimate deprivation of liberty. Therefore, to the extent that the provisions under review permit lay members of the ordinary court martial to convict and imprison people for up to two years, they are undoubtedly unconstitutional."

In order to impose the most suitable sentence a variety of sentences are available for military offenders. Some of the possible sentences which are provided for by the Code cannot be enforced as no facilities are established or it is not properly defined. A sentence of detention[52] cannot be executed because no detention barracks are established for that purpose. For some less serious offences at summary trials it is also provided for

[52] Section 92 MDC.

that sentences of confinement to barracks or extra duties[53] can be imposed but as it is not defined in any Defence Force Orders as required by the Code the execution thereof is not possible.

There are no records, equivalent to that of the law of precedent, kept in the Namibian Defence Force to determine whether a certain standard of sentencing is acknowledged in the Defence Force and therefore it will not be possible the measure whether the punishment is indeed fair and just.

4.13 Confirmation and review of cases

The Defence Act, 2002 (Act 1 of 2002) provides for the confirmation and review of cases in which an accused in convicted but this does not include an appeal to the High Court of Namibia. Except in the case of a capital offence or an offence where severe sentence was given which must be reviewed by a Council of Review, the Code only provides for internal review and in this regard section 45 of the Defence Act, 2002 (Act 1 of 2002) is clear:

> "*Subject to the Code*, every person who is convicted of an offence by a military court *has the right to a speedy and competent review of the proceedings* of the case to ensure -
>
> (a) that the proceedings are in accordance with justice; and
>
> (b) that any finding or sentence is either correct, valid and appropriate, or remedied."

[53] Rules 15(2) and 21(2) MDC.

The only confirming and reviewing authorities provided for in the Code are the ones indicated in Tables 4.13.1 and 4.13.2 and this does not include any external authority other than a Council of Review appointed by the Minister of Defence. The appointment, function and duties of the Council of Review will be discussed hereunder but it is worth to mention that according to rule 97(4) of the Code "whenever the proceedings of a case are to be reviewed by the council of review in terms of sub-rule (1), such proceedings are *not reviewable by any other reviewing authority*".

Acquittal not subject to confirmation[54] and a sentence is enforced only after it has been confirmed by a confirming authority.[55] This is also when the sentence will be published.[56] However, in the case of a capital offence and in other cases where a severe punishment such as dismissal of an officer, discharge of a warrant officer or imprisonment for imprisonment for a period of three months or more[57] is imposed the sentence may not be enforced prior to review by a Council of Review which is appointed for that specific case. The automatic confirmation and review of a verdict of guilty of a court martial is set out in Table 4.13.1.

AUTOMATIC CONFIRMATION AND REVIEW OF COURT MARTIAL				
COURT	CONFIRMATION	REVIEW		
Court martial convened by Officer Commanding Command,	President to send proceedings to Confirming Authority who may confirm.[58]	CS after 3 days exercise powers i.t.o sec 114(1 – 3) MDC.	If not according to justice the COS Pers send it with views to CDF.	CDF may exercise powers i.t.o sec 114 (1-3) MDC

54 Section 98 MDC.
55 Sections 97 and 105 and rule 80(7) MDC.
56 Rule 83 MDC.
57 Section 104 MDC.
58 Rule 82 MDC.

group or Brigade	Confirming Authority to send to CS	Must be send to COS Pers		
Convened by Chief of Staff or Divisional Commander	President to send proceedings to Confirming Authority and who confirm.[59]	CS must after commencement send to CDF. CDF may after 3 days exercise powers i.t.o. sec 114(1-3) MDC.[60]		
Convened by Convening Authority (Sec 69(1)(b) MDC appointment	President to send proceedings to Confirming Authority who may confirm.[61]	Only be send to Council of Review upon application of the offender for case to be reviewed by Council of Review.[62]		

Table 4.13.1 Procedures with regard to the automatic confirmation and review of the different courts martial

In the case of a summary trial the case never go for confirmation but is only send for review and the sentence commence immediately after it has been announced in court.[63] Table 4.13.2 summarizes the review of a summary trial and it is clear that a verdict of guilty, except that in the case of a trial by a Commanding Officer with Delegated Power, will be reviewed by the next higher authority.

AUTOMATIC REVIEW FOR SUMMARY TRIAL				
COURT	ACTION	REVIEW	ACTION 2	REVIEW 2
CS	After conviction send for review to CDF.	CDF after 3 days exercise powers i.t.o. s114 MDC.[64]		
CA	After conviction send for review to CS.	CS after 3 days exercise powers i.t.o s114 MDC. Must send to COS Pers.[65]	If not according to justice send to CDF.[66]	CDF may exercise powers i.t.o s114 MDC.[67]

59 Rule 82 MDC.
60 Section 108 MDC.
61 Rule 82 MDC.
62 Section 111 and rule 98 MDC.
63 Section 117 MDC.
64 Section 67 MDC.
65 Section 66 MDC.
66 Section 109 MDC.

CODPCA	After conviction send for review to CA.	CA after 3 days exercise powers i.t.o. s114 MDC.[68]	
CODEL	After conviction send to CODPCA, who will send for review to CA	CA after 3 days exercise powers i.t.o. s114 MDC.[69]	

Table 4.13.2 Procedures with regard to the automatic review of the different summarily trials.

With the confirmation and reviewing functions it will also be necessary to look at the functions and rights of the prosecutor, the accused as well as the different confirming and reviewing authorities.

4.13.1 Function of the prosecutor

In the Code there is no provision expressly for the prosecuting authority to approach a higher authority with regard to any matter which could be considered during confirmation or review but may in case where the offender apply for the case to be referred for review by a Council of Review, the prosecutor may submit written representations.[70] After receiving a copy of the application of the offender for the case to be reviewed by a Council of Review the prosecutor must within 7 days furnish the chief of staff with such representation, he or she wish to make.[71]

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67 Section 109 MDC.
68 Section 65 MDC.
69 Section 65 MDC.
70 Section 112 MDC.
71 Rule 98 MDC.

4.13.2 Rights of an accused with regard to confirmation and review

An accused is only entitled to address any conviction or sentence imposed on him during the trial by a military court as prescribed by the Code and the right to appeal to the High Court or any other civilian court in Namibia is not prescribed therein. For the purpose of taking his or her case to a higher authority for review the accused may;

> within 48hrs after having been sentenced by court martial, lodge any representation to the confirming authority concerning the finding or the sentence,[72] or
>
> when case is to be send for review, within 3 days from conviction write representation to reviewing authority concerning the facts or law of the case as he or she wish to make,[73] and or
>
> apply for the case to be reviewed by a Council of Review.[74]

4.13.3 Confirmation and reviewing authorities

Except for the Chief of the Defence Force, all the authorities such as the Confirming Authority, Reviewing Authority, Council of Review and Boards of Review concerned with the confirmation and review of cases are not permanent structural positions or appointments but are appointed on an ad hoc basis only. No specific legal training is needed and the only requirement, other than to be an officer in the Defence Force, is in

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72 Section 101 and rule 80(7) MDC.
73 Section 110 MDC.
74 Rule 98 MDC.

the case of a Council of Review where: in the case of a capital offence three judges or retired judges from the Supreme Court of Namibia or the High Court of Namibia of whom one will be appointed as chairperson and in all other matters where one judge or retired judge from the Supreme Court of Namibia or the High Court of Namibia will be appointed as chairperson.

The Confirming Authority is any authority who convened a court martial. After a conviction the president of the court martial or judge president, if one was appointed, will forward the record of proceedings to the person who convened the court for confirmation. The functions of the confirming authority are set out in Table 4.13.3.1. Whether or not a case is to be forward for review to a Council of Review the confirming authority must still exercise the powers conferred upon a confirming authority and if the sentence, as confirmed, is within the provisions of section 104 of the Code the proceedings together with his or her comments and observations must be forwarded to the Council of Review.[75]

Depending on the court the reviewing authority may be any authority from a Convening Authority, a Chief of Staff or the Chief of the Defence Force. This authority may exercise all the power as prescribed to a Council of Review but in the execution of its duty may not increase any sentence or court order made with the loss or damage of public property or property belonging to an institution.

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[75] Rule 97 MDC.

The Minister of Defence may appoint a Council of Review[76] and except for an event where the accused request for the review by a Council of Review all cases in which an officer is dismissed, a warrant officer is discharged or imprisonment of three months and longer is imposed must be reviewed by this council.[77] For comparison the functions and duties of the Council of Review is entered in Table 4.13.3.1 opposite that of the Confirming Authority.

CONFIRMING AUTHORITY[78]	**COUNCIL OF REVIEW[79]**
May confirm the finding or some of the findings. (if that authority confirms the finding or any of the findings, confirm the sentence)	May endorse the finding or the finding and sentence.
May refuse to confirm the finding or any of the findings. (Whenever a confirming authority has refused to confirm any finding of a court martial, the accused is deemed to have been acquitted of the charge to which that finding relates.)	May quash the finding and set aside the sentence.
	Substitute for the finding any finding which the evidence on record supports beyond a reasonable doubt and which could have been brought on the charge by the court martial under section 89 MDC.
May vary the finding or the sentence, or both If a finding or sentence of a court martial has been ambiguously expressed or seemingly incorrectly recorded, the confirming authority - (a) may refer the case back to the court martial to record an unambiguous or correctly worded finding or sentence; or (b) may himself or herself record an unambiguous or correctly worded finding or sentence, but in doing so the confirming authority must give the offender the benefit of any reasonable doubt arising out of the finding or sentence as recorded by the court martial.	If it has endorsed the finding or substituted a finding, vary the sentence. The council of review may correct any patent error in the finding or sentence as recorded in respect of any case referred to it. The council of review may refer back to a court martial any finding or sentence not clearly or correctly recorded or any invalid sentence, to be clearly and correctly recorded or to impose a valid sentence, and where it is not reasonably practicable in the opinion of the council of review so to refer back to the court martial any finding or sentence, the council of review may itself - (a) record a finding or sentence; or

[76] Section 143 MDC.
[77] Section 104 and rule 97 MDC.
[78] Section 102 MDC.
[79] Sections 114, 143 and 144 and rules 100 and 101 MDC.

	(b) impose a valid sentence, but in doing so the council of review must give the offender the benefit of any reasonable doubt arising out of the finding or sentence as recorded by the court martial.
Reserve confirmation of the finding and the sentence, in whole or in part, in terms of section 103 of the MDC.	
	The council of review may increase any sentence of imprisonment, detention, field punishment, fine, reprimand or of reduction in rank.

Table 4.13.3.1 Comparison between the function and duties of the confirming and reviewing authorities.

It is only in the case of a Council of Review which should give written reasons for any interference with a finding or sentence.[80] In no case for confirmation or review it is necessary to give reasons for any alteration or change made to the finding or sentence.

A Board of Review is a similar authority as the Council of Review with the same powers and duties but is only established by the Chief of the Defence Force during service.[81]

4.14 Summary

Within this chapter the military justice proceedings within the Namibian Defence Force was extensively investigated, starting from general rules governing the military justice to the specific procedures within the Defence Force. Including in this chapter was the pre-trial proceedings, rights of the accused to a speedy and fair trial, the punishment and also the confirmation and the review of cases.

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80 Rule 100 (3) MDC.
81 Section 144 and rule 101 MDC.

CHAPTER 5 – SUMMARY AND RECOMMENDATIONS

5.1 Introduction

The Permanent Secretary for Defence initiated this study to investigate the administration of justice within the Namibian Defence Force. With this aspiration of the assurance of a fair justice system and the rights to a fair trial in mind this study was conducted methodically over a period of more than one year within the military environment of the Namibian Defence Force. It was done by investigating the system within the Namibian Defence Force and compares it to the justice system within a civil society and also the military justice systems from other countries such as South Africa, the United Kingdom, United States of America, Soviet Union and others.

5.2 Achieving the objectives.

All the set objectives were investigated and more specific attention was given to the military justice system as a whole to see whether it is in conformity of the Namibian Constitution and more individual to the rights of the accused.

One of the objectives was that the trial proceedings should be done upon a certain standard. These records of proceedings were not perused as this would have lead to an introspection and also an investigation into the duties of individuals and this would defeat the object of this research. The duty to keep record of the trial proceedings are the

functions of the president or judge-president,[82] in the case of a court martial, and the trial officer[83] in the case of a summary trial. In general these officers make use of pro forma trial forms which were found to meet the required standard. To ascertain whether the rights were given and understood by the accused persons, questionnaires in this regard was completed and analyzed.

5.3 Summary

The criminal justice as it is applied in the Namibian Defence Force or the military justice system within the Namibian Defence Force, as these two expressions can be used in tandem, is governed by the Defence Act, 2002 (Act 1 of 2002). This Act, of cause, must meet the constitutional standards and requirements in all aspects. Another aspect for consideration in the application of justice is the law of precedent which should at all times, when applicable, be applied. All these above and also the work of respected authors in this regard and the information obtained from the involved society (members of the Namibian Defence Force) will be the determining factor whether the Namibian Defence Force are within the requirements of issues such as: institutional bias, undue hardship may be caused by the withholding of salary, right to representation granted to the accused, the giving of rights to the accused and the understanding thereof, a speedy trial, and the identification of other possible inadequacies

The structure and the procedures were investigated to see whether institutional bias can and do exist. In the military, bias can be observed mainly because of the structure of the

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82 Rule 85 MDC.
83 Rule 35 MDC.

military justice system as prescribed by the Defence Act and Code. This includes the appointment of the different judicial authorities and officers of the court (President of a court martial, trial officer, prosecutor and defending officer). Another form of bias which might emerge is the expectation of an absolute obedience to orders.

Section 42 of the Defence Act, 2002 (Act 1 of 2002) provides that there are military courts which are to be convened and that their composition and jurisdiction will be a provided for by the Code. In the Code provisions are made for the appointment of different judicial authorities who may act as courts, convening-, confirming- or reviewing authorizes and also the appointment of members of the court (president and members of a court martial and trial officer in the case of a summary trial), the prosecution and the defence. The concern here is the independence of the different court functions and also the appointment of some of these authorities.

There is no independency guaranteed in the Code of any of the above authorities or court functions. Let us just for example consider a court martial; the convening authority decides that the accused must be tried for the alleged offence, while the same authority appoints the members of the court, the prosecutor and, in most cases, the defending officer[84] and the same authority further is responsible to confirm this court martial.[85] With the confirmation or review of a case, except a review by a Council of Review, the confirmation or reviewing authority do not have to give any written reason for interference with any verdict or sentence. In practice, in the Namibian Defence Force, it is even more of a concern as all the above legal function and also the legal advice to the

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84 Rule 39 MDC.
85 Rule 82 MDC.

Ministry of Defence and the Defence Force, as a whole, is controlled or administered or directly influenced by the office of the Military Legal Advisor.

Except in the case of the defence, no qualification or formal training is required for the appointment in any of these authorities or officers of the court. The accused can either be represented by a legal practitioner who has been admitted and authorized to practice as a legal practitioner in terms or the Legal Practitioners Act, 1995 (Act 15 of 1995) or an officer of the Defence Force who has "knowledge of the law". This knowledge of the law is not prescribed and it is not stated whether knowledge of military law is required. Apart from being an officer in the Namibian Defence Force there are no further qualifications associated to these appointments.

The Chief of the Defence Force is a constitutional appointment and the powers and authorities vested by the Code to the Chief of the Defence Force are attached to this position. All the other authorities are individual appointments, not attached to any specific position, except maybe a minimum rank, and is done on an *ad hoc* basis, above their normal duties,. In practice this means that one officer can, in different cases, today be a convening- and confirming authority, the next day be a president of a court martial, the next a member of a court martial, the next a trial officer, the next a prosecutor and the next day a defending officer. If we single out the duties of the prosecution and the defence, which are two complete different functions it is clear that their functions cannot be executed interchangeably. Considering further the function of the presiding officer whose duty it is to adjudicate. Should he or she not be more independent to execute this important function without any irregular command influence?

As stated, an offender may appoint his or her own legal representative on his or her own cost or may request a defending officer to defend his or her case. The issue of a legal representative was already discussed above and do not need any elaboration. The appointment of a defending officer still raises some query because this person must only be an officer with knowledge about law. The accused may request that his or her defence be undertaken by an officer named by him or her and "such request can with due regard to the exigencies of the service be acceded to, that officer must be appointed as defending officer".[86] This defending officer is "not competent to give evidence against the accused at his or her trial without the consent of the accused, concerning any fact, matter or thing" which came to his or her knowledge after being appointed as such.[87] There is no further observation of the legal professional privilege to be considered in the best interest of justice that there should be full and frank disclosures between clients and their legal advisors (van der Merwe, Morkel, Paizes and Skeen, 1983, p. 133).

Section 127 of the Code provide for the withholding of the pay of a person for the period in which this absentee was away from the work place without valid leave. In the same section it is provided that this money may be forfeited to the State in case this person was convicted by a competent court. The further provision is also that this money must be refunded to this person if he or she is acquitted for that charge or is not charge before a court within a reasonable time. The question of a speedy trial will also be addressed but in this case the concern is the undue suffering caused to this absentee with the pointless withholding of pay. In Figure 4.9.1 the data over the past 6 years reflect that it takes the

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86 Rule 39(2) MDC.
87 Section 148 MDC.

units an average of 50 days before requesting the re-instatement of the pay of this member, and when reaching the Defence Headquarters it takes an average of 19 days just to approve this re-instatement. There is no definition for undue suffering as it is a very abstract term but considering this data there is a matter of concern.

There is a legal obligation to give an accused his or her rights before, during and after the trial and the non-compliance of these rights might in some cases lead to the acquittal of the accused for that reason alone. Figure 4.10.1 above gives a reflection of these rights which are given to the accused persons. With a criminal case there is no set percentage to determine whether the constitutional requirement of a fair trial is adhered to. Either the trial is fair or it is not fair. In this case the available data reflect that 30% of the trials, with regard to the conferring of rights, are not within the requirements of fairness.

A speedy trial is the Constitutional[88] right of an accused and in S v Heidenreich (1995, p. 236) it was held that to determine whether the delay was unreasonable had to be determined according to the facts of each case and the factors to be taken into consideration are: the length of the delay, the reasons given by the State to justify the delay, the responsibility of the accused to ascertain his or her rights and the prejudice to the accused. The prescription provisions in the Code[89] are the mechanisms to ensure that action is taken against the offender within a reasonable time and also to ensure a speedy trial. The data in Figure 4.11.1 indicates that it takes about 3 months for a case of absence without leave to be heard in a military court. This while taken into consideration

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88 Article 12(1)(b) of the Namibian Constitution.

89 Section 58 and 59 and rule 117 MDC.

that these are offences committed within a close environment (the unit) and that all the witnesses and evidence is readily available.

In general the justice system within the Namibian Defence Force is found to be fair and just but a few recommendations will be made to address the areas in which some shortcomings are observed.

5.4 Recommendations

Some concerns with regard to the application of justice within the Namibian Defence Force were identified and it is the submission that it can be remedied, firstly by means of legislation and secondly by addressing it in orders in the Defence Force. These areas of concern are the independency of the court and separation of judicial functions, institutional bias and irregular command influence, educational requirements for legal officers and controlling mechanisms.

5.4.1 Independency of the court and separation of judicial functions

As it is a constitutional requirement that the court should be independent this should also be reflected in the subsidiary legislation. For the application of justice there should be at least separate judicial entities, like the court, prosecution, defence and reviewing authorities. In case a court convicts and punish an offender and this verdict or punishment is in any manner changed the court should be entitled to the reason for this changed. Our courts are not subject to the decisions of foreign courts but as our Defence

Act, emanate from the South African Defence Act and are also influenced by the Commonwealth it is likely that the decisions made in the English and South African courts on the above matter will have an influence, should this matter be taken to the court. It is a reasonable assumption that the South African National Defence Force is much bigger than the Namibian Defence Force and for that reason it would not be practical to initiate a structure as provided for by the Military Discipline Supplementary Measures Act, 1999 (Act 16 of 1999) but an alike can be adopted with the necessary changes to be suitable to Namibia. Although some provisions with regard to the prosecution authorities in this Act were challenged in the case of Minister of Defence v Potsane (2002) the appeal by the Minister of Defence was upheld.

5.4.2 Institutional bias and irregular command influence,

In case the structural issue of the legal justice system is addressed and rectified, the concern about institutional bias will significantly be resolved. Unlawful command influence is not a crime in the Namibian Defence Force and therefore no such cases are reported but it is still recommended for legislation to be put in place to criminalize such behavior. Article 37 of the Uniformed Code of Military Justice of the USA and Section 107 of the Singapore Armed Force Act (Act No 7 of 1972) are examples of the assurance of the independence of the court and also the prohibition of any external influence.

5.4.3 Requirements for military law officers

To have a fair and just legal system it will be necessary to prescribe minimum requirements for members to take any role in the execution of justice, which might be a member of a court martial, a trial officer, prosecution, defence or reviewing authority. This not needs to be a legal provision *per se* but can be prescribed in the orders of the Defence Force.

This training can be part of personnel development and members can be given the opportunity to specialize themselves in the one or other legal function. Depending on their performance, specific members can be identified to execute a specific function and the convening authority and accused, in the case of a defending officer, can then make use of these identified members. This will not influence the current legal functions of an Adjutant in a unit, but, will rather improve on his or her capabilities should he or she has the necessary training.

5.4.4 Controlling mechanisms.

To ensure accountability there will be a need to put controlling mechanisms in place to manage the suspension of salaries, trial records and also to ensure that the necessary rights are given to accused persons. These measures can be in the form of orders for the need of every service.

5.5 Conclusion

As a Senior Staff Officer (SSO), assign with the duties of a Military Legal Officer within the Namibian Defence Force I have completed this research not to criticize a system but rather to suggest improvements for Namibia to be a role model in the field of military justice as a profession.

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APPENDIX A

INTERVIEW OF OFFENDER TRIED BY SUMMARY TRIAL

1. What rank are you?

OFFICER	OTHER RANK

2. By which court were you tried?

	Summary trial	Court Martial
Type of court		

3. For which offence (s)?

4. What was the verdict of the court? (Enter Guilty or Not guilty)

Charge 1	
Charge 2	
Charge 3	

5. Were the following explained to you during the trial?

	YES	NO
The right to legal representation.		
The right to cross-examine every witness.		
The meaning of cross-examination.		
To address the court after the case for the prosecution closed		
To be acquitted on the grounds that no prima facie case existed		
The right to give evidence for your own case		
The right to call witnesses for your case		

The right to remain silent and not to give any evidence for your own defence		
The right to address the court after you closed your case.		
The right to give evidence for mitigation		
The right to submit a representation in case you were not satisfied with the conviction or sentence or both.		

6. Were you informed about the following during the trial?

	YES	NO
The identity and position of the trial officer		
The reason for conviction		
The reason for sentencing		

7. In the case of AWOL -

For what period were you on AWOL?	
Was your salary suspended? (Yes / No)	
When was your salary re-instated? (When arriving at the unit or after the trial?)	
For what reason could you not attend your duty?	
Have you applied for leave before being so absent?	

APPENDIX B
GENERAL QUESTIONNAIRE

NOTE: The completion of this questionnaire will be considered as confidential and the information requested will only be used for research purposes. The respondents are requested to answer all questions honestly and to the best of their knowledge.

1. What rank are you?

OFFICER	OTHER RANK

2. Have you ever been tried in a military court?

YES	NO

3. Are you entitled to be represented by your legal advisor during a summary trial?

YES	NO	I DO NOT KNOW

4. If you are prosecuted at a summary trial and you prefer to be represented. By whom would you prefer to be represented?

A defending officer –appointed by the NDF on your request	
A legal representative – at your own cost.	
None of the above.	

5. A summary trial must be conducted in private in the presence of the trial officer, prosecutor, accused and witness. Should this trial be open to other interested people?

YES	NO

6. In case you are found at the wrong side of the law by who would you preferred to be tried?

An officer under whose command I serve.	An officer from another unit.

7. Is the information regarding convictions displayed in the unit at a place where you have access to?

YES	NO

Every offender must within a given time appear before his or her Commanding Officer in terms of Rule 10 Code. What is the reason for this appearance?

a.	For the Commanding Officer to acquaint himself with the wrongdoers in the unit.	
b.	To be aware of the offences being committed in his unit.	
c.	To give the accused his or her rights to legal representation.	
d.	Do not know.	

APPENDIX C

CDF/500/2/6

Tel: 2049111
Ext: 2084
Enq: Lt-Col T J Lambert

Defence Headquarters
Private Bag 13307
WINDHOEK

13 January 2009

To whom it may concern

PERMISSION TO CONDUCT FIELD RESEARCH : LT-COL T J LAMBERT : MASSS

1. This serves to inform that the officer in subject is currently busy doing his thesis as partial fulfillment of the requirement for a Master of Art in Security and Strategic Study (MASSS) degree programme. The topic he is to research on is: "Criminal Justice in the Namibian Defence Force: A Comparative Study". This study is in line with the research topics that where issued by the Ministry of Defence for the MASSS students (PS Memo, dated 11 March 2008).

2. Against this background, permission is hereby granted to Lt-Col T J Lambert (SO1 Legal Trng) of the Office of the Defence legal Advisor to carry out his research and you are hereby requested to render him all necessary assistance he might require to fulfill this very important task.

REPUBLIC OF NAMIBIA
MINISTRY OF DEFENCE
2009 -01- 13
CHIEF OF DEFENCE FORCE
P/Bag 13307
WINDHOEK

M SHALLI
CHIEF OF THE DEFENCE FORCE : LT-GEN