REPORT ON THE RESEARCH SEMINAR ON THE ROLE OF THE GENERAL COURT MARSHAL (GCM) IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN UGANDA AND THE RIGHT TO A SPEEDY TRIAL BEFORE THE UGANDA HUMAN RIGHTS COMMISSION (UHRC)

AUGUST 10, 2006

The seminar which opened at 9.00 am, was chaired by Mr. Godber Tumushabe, who welcomed everyone to what he hoped would be a fruitful exchange of ideas. He requested all those present to introduce themselves. He informed the invited participants that the research seminar was organized by HURIPEC where two papers on cutting edge issues, that needed to be sharpened to a higher level, would be presented. He called upon the Director of HURIPEC to make opening remarks.

The Director said that HURIPEC was making an attempt to break out of the Ivory Tower and to go public everywhere; to engage with policy-makers, the media, activists, and other stake-holders to promote human rights. He used the example of public health to demonstrate the necessity of engaging the public in debates that would be helpful in combating environmental degradation in harmful practices like the rampant reclamation of swamps and allocation of forests to investors. By the same token, human rights require this type of engagement.

He re-emphasized the research mission of HURIPEC in economic rights, decentralization and good governance. This last aspect of governance is critical in all its aspects and covers economics, politics, and culture. He invoked yet another example of the fees policy in Makerere University as an issue of governance that needs to be thoroughly debated.

He said that the two areas were chosen for a number of reasons: first, the trial of Dr. Kiiza-Besigye could easily be called "the trial of the century". Unfortunately, it had drawn too much media attention but with a glaring lack of scholarly scrutiny. This was an anomaly that was being addressed by the seminar. However, he hastened to caution that the presentation would not focus on the innocence or guilt of the Dr. Kiiza-Besigye, but on the concepts of civilian and military justice implicated in the trial. Secondly, the issue of speedy trials by the UHRC should incite the participants to make a scholarly input with regards to both constitutional and internal reforms. He counseled the discussion to focus on broad and substantive issues rather than on grammar and semantics. This would help in producing water-tight papers that are less prone to scholarly challenges on grounds of sloppy scholarship.

Mr. Ronald Naluwairo presented a paper entitled, "***The Trials and Tribulations of Rt. Col. Dr. Kiiza- Besigye & 22 Others: Re-Evaluating the Role of the General Court Marshal in Administration of Criminal Justice in Uganda"***. He gave his major objective as identifying the strengths and weaknesses of the GCM and to provide policy recommendations for enhancing its role in the administration of justice in Uganda. He proceeded to give the background to his paper dating back to the Military Tribunals Decree, 1973, enacted and passed by Gen. Idi Amin Dada, the President and legislator of the Republic of Uganda on June 25, 1973. He summarized the history of military violence in Uganda perpetrated by the armed forces characterized by impunity, bloodshed, heinous crimes, and gross violation of human rights. He narrated in detail the facts behind the trial of Dr. Kiiza-Besigye and 22 others before the GCM beginning from his retirement from the army in 2000, his contesting in the Presidential elections in 2001, his court petition against President Museveni, his house arrest, his exile in South Africa,

his return to contest in the 2006 Presidential elections which he lost, his subsequent arrest, imprisonment and being charged with 22 others for having engaged in rebellion, treason, and misprision of treason (on top of a separate charge of rape) under the Penal Code Act.

Naluwairo related the drama that occurred on November 16, 2005 at the High Court when it granted bail to Dr. Kiiza-Besigye and 14 others. However, men dressed in black (the so-called "Black Mambas") disrupted proceedings and re-arrested them. The next day saw them charged before the GCM with terrorism and being in illegal possession of fire-arms using the same facts tendered in the High Court trial. Thereafter, concurrent trials before the High Court and the GCM proceeded until Justice Kasule of the Constitutional Court issued an injunction to the GCM to stay proceedings, as Justice Bosco Katutsi of the High Court ordered for the immediate release of Dr. Kiiza-Besigye from Luzira prison. The Uganda Law Commission also tendered a public interest petition to the Constitutional Court to question the legality of the GCM trial, which it subsequently pronounced illegal. The Executive refused to accept the ruling. Gen. David Tinyefuza and President Museveni were particularly upset, the latter vowing to fight the ruling, "legally and politically". The government later caved into pressure from various quarters and Besigye, who had earlier been acquitted of rape charges, was granted bail. His 22 co-accused, however, remained in custody.

Naluwairo proceeded to bring out the central focus of his arguments as being the guarantee of the right to a fair hearing, which he declared to be inextricably linked to democracy and the rule of law. He outlined the characteristic elements of a fair hearing to be the following:

- The right to be tried by a competent court
- The right to be tried by an independent and impartial court
- The right to a public hearing
- The right to be charged without undue delay
- The right to legal counsel
- The right against double jeopardy etc.

Naluwairo then applied the above tenets to the trial of Dr. Kiiza-Besigye by the GCM which he described as the epitome of injustice. He submitted that the GCM was biased by virtue of the military culture that was strict with regard to chain of command; it was incompetent because of the lack of legal training on the part of court officials notably its chairman who is a fine artist; it commited a legal blunder of double jeopardy when it used the same facts of the High Court trial to charge the accused; and it was guilty of delaying the trial of, especially, the 22 people who had been arrested as far back as 2003 only to be charged in 2005 etc.

In his recommendations Naluwairo suggested that the GCM should be restricted only to military offences commited by serving officers, not retired officers like Dr. Kiiza-Besigye. It should be only be the High Court vested with the competence to try civilians. The GCM should be subordinate to the High Court and all its appeals should be to the

High Court in conformity with Art. 129(1)(d) of the Constitution, otherwise, its existence is presently unconstitutional. The officers of the GCM should have legal training, especially the chairman, who should be a retired officer and who also qualifies to be appointed as a Grade 1 magistrate. This would help to break the chain of command that breeds bias. This would differ from the present arrangement whereby Gen. Elly Tumwiine is a serving officer, answerable to the Commander-in-Chief, President Museveni, and in addition he is also a member of the High Command, the appointing authority of the GCM officers. Naluwairo concluded that the GCM is unconstitutional and its continued existence and operation is a prejudice to justice.

The participants made several comments and suggestions towards the improvement of the paper. Prof. Oloka-Onyango made the following suggestions:

- There was a need to re-visit historical facts. It is doubtful that the Military Tribunals Decree, 1973 was the beginning of military justice in Uganda, rather it goes back to the colonial days of Kings African Rifles (KAR), and could also be found in the 1964 Army Regulations. The decree marked the point at which the army was authorized to try civilians.
- There was a need to re-examine the NRA Code of Conduct and also to point out the philosophy behind the uncompromising strictness exercised by the NRA over its soldiers during the bush war. This helped to establish a difference between them and the indisciplined soldiers of the government (UNLA), which helped them to win the hearts of the "wanainchi" and to later overrun the government.
- It was necessary to incorporate the CA debate on the military justice system, where some delegates like Noble Mayombo, had strongly argued that the rights of the soldiers were being grossly violated by the mode of trials and military justice which was being designed.
- There was a need to check out the Hansard records in Parliament because there was actually a debate between 2004-2005 contesting the over-militarization of the UPDF Act. These arguments should be incorporated into the paper so as to inform the discourse in a useful way.
- It would be worthwhile to explore the trials of military officers most notably David Tinyefuza and Henry Tumukunde in order to further enrich the paper.
- There was a need to examine the constitutional reforms, specifically the great success of the civilian courts that are entrenched in Art. 126 of the constitution, and to use this as a basis to question the weaknesses that are apparent in the military tribunals.

Mr. Peter Mulira made the following suggestions:

- The title of the paper should be re-visited, specifically to correct the anomaly that the GCM is involved in the administration of criminal justice in Uganda since this is not the case. Their involvement is in military justice only.
- The paper does not point out the rationale of the GCM, eg. if the crime is commited at the frontline, then the civilian approach to justice would be completely out of place.

- The paper should critique the unnecessarily detailed nature of our constitution, which has led to the problems exemplified by the Besigye trial. For example, Art. 210 was uncalled for, because it reads like an Act of Parliament with so many details, only the punishments are missing.
- The GCM is not a court as alleged in the presentation since it is not governed by the constitution. Art. 210 only talks about "organs of UPDF" and it is only the ordinary civilian courts that were envisaged by the provision.
- The paper is totally silent on the role of the Judge Advocate. If this office is incorporated into the analysis, the paper would be qualitatively different.

Mr. Livingstone Ssewanyana made the following contributions:

- The paper needs to incorporate more literature, specifically, the recent Entebbe conference of Judges where their Lordships presented a paper whose content would be indispensable to this presentation.
- Justice Twinomujuni's paper on the right to bail would inform the paper in a useful way because the right to bail is at the center of this debate. This right, it should be pointed out, is absolute (see the ***Tumushabe*** case). Therefore, the defiant stance of the GCM in refusing bail to the suspects represents impunity.
- There is a need to re-examine the recommendation that the JSC take over the appointment of the officers of the GCM since it is weakened by the fact that the appointments into the GCM are themselves shrouded in secrecy and there is no guaranteeing the independence of that very institution.

Mr. Ben Twinomugisha made the following suggestions:

- The title needs to be inverted to reflect the fact that, "the administration of justice" is the broader theme, and "the trials and tribulations of Dr. Kiiza-Besigye & 22 others" is the sub-theme.
- It is necessary to reflect on the early jurisdiction of the Courts Martial as an introduction and a starting point of the discourse.
- There is also a need to incorporate the politics of the trial in the paper which can be sourced from the media because it influenced the judges in a substantial way.

Mr. Ojambo made the following suggestions:

- The format should be re-visited because it is story-like, and the narrative aspect should be converted into a critique.
- The paper should accept the reality of military justice, which exists everywhere. This fact should form the starting point of the discourse, to guide it to look at the standard, and to question whether it ought to operate like a civilian court.
- There is a need to remove the mind-set and accept the real difference between military and civilian justice, with a clear division of standards and principles.
- It would be useful to examine and internalize the British system, only then will the presentation become both objective and balanced.

Other contributions from the participants were the following:

- The recommendations should be revisited to sharpen and to narrow them down because they are too general. For example, whether constitutional reform is necessary or whether it is a question of administrative measures that will bring the desired effects in the operation of the GCM.
- There is a need to clarify that there are two sets of PRA suspects. The first set of 22 were arrested in the DRC, 7 of who were granted amnesty, and 15 are still incarcerated. The second set of 22, were arrested within Uganda, among them Dr. Kiiza-Besigye's brother, and 11 of them were legally detained.
- There is a need to incorporate other factors that negate the independence of the GCM such as the raid of the High Court by "the Black Mambas". It was after this incident that the GCM proceedings were instituted. These were summary in nature, presided by a chairman lacking in legal training, and who would ignore and even overrule any advice of the Judge Advocate, giving the impression that he was the Alpha and Omega in the proceedings.
- The decisions of the constitutional court were not unanimous, and there is a need to analyze this fact. On the question of contempt of the GCM, Gen. Tumwiine himself was also probably in contempt of the Constitutional Court for defying its ruling to stay proceedings.
- There is a need to critique the composition of the Constitutional Court and the political leanings of the judges. The question of independence too, is questionable across the board- both in the GCM and among the civilian courts.
- It is true that the GCM is legally independent, but not in practice because the input of the Judge Advocate (who is of lower rank than the chairman whom he advises), cannot establish any semblance of impartiality. The paper should consider the argument that the legal counsel for Dr. Kizza-Besigye, were in contempt of the GCM judging from what happened.
- The Nigerian experience can help to inform the recommendations in the paper where a whole Department of Legal Services in the military has revolutionized military justice, and it is successful because lawyers in the military are quite respected. Moreover, the curriculum gives due regard to training serving officers.
- In Nigeria the GCM and the High Court are at the same level because appeals from both, end in the civilian Court of Appeal.

Mr. Isaac Bakayana presented a paper entitled, "***From Protection To Violation? Analyzing The Right To A Speedy Trial At The Uganda Human Rights Commission***". Bakayana submitted that he had worked with the UHRC, therefore, he speaks from the point of view of an insider. He recounted a few experiences he had while working with the organization. One time he traveled to Gulu and a "mwanainchi" told him that the UHRC was a useless institution; on another occasion he discovered a case which had been filed way back in 1997, that was only resolved in 2005.

In his paper he traced the origins of the UHRC to the fulfillment of the Paris Principles. The 1995 constitution entrenched the human rights institutions and Parliament enacted the enabling UHRC Act to operationalize them. Our own history of violence was also a contributing factor and the Commission of Inquiry into The Violation of Human Rights (between 1962-1986) was a child of this history.

He submitted that all Uganda's constitutions have guaranteed the right to a speedy trial and under Art. 28 of the 1995 Constitution, this right is a component of the right to a fair hearing. The "right to be tried without undue delay", was also enunciated in General Comment No.13 of the ICCPR. He cited a number of cases that explore the right, namely: Martin V. Tauranga, Earl Pratt and Ivan Morgan V. Jamaica, Suzan Kigula V. AG, and Clive Smart V. Trinidad and Tobago.

Bakayana explored this right in a number of historical epochs that covered the period from 1962-1995. He gave the background of the 1962 Independence Constitution as being the colonial violations of human rights of indigenous Ugandans together with the world events like the Second World War, which prompted nations to adopt the 1945 UN Charter and the 1948 UDHR. Therefore, the 1962 Constitution devoted a whole chapter 3 to entrench fundamental rights and freedoms and Art. 24 contained the relevant provision for someone to be tried in, "a reasonable time". He cited the case of Grace Ibingira and others V. AG to illustrate the violation of the right to a fair hearing. In 1966 Obote abrogated the constitution which act the courts legitimized in the case of Uganda V. Commissioner of Prisons, ex-parte Matovu, which ushered in the 1967 pigeon- hole constitution with another whole chapter 3 devoted to the protection of human rights and freedoms. Art. 8(2)(a) provided "the right to protection of the law" which covered a speedy trial. He continued and explored the 1971 military coup d'etat, which coup was justified with 18 reasons, one of which was, "…unwarranted detention without trial for long periods of a large number of people". However, the regime later turned out to be the greatest violator of human rights. The President even suspended the constitution and passed the Military Tribunals Decree, 1973 that subjected both civilians and soldiers to military justice.

The period between 1980-1986 saw the re-instatement of the 1967 Constitution but war raged in the Luwero Triangle between UNLA and Museveni's NRA rebels. There were massive violations of human rights in the war zone and when Museveni finally shot his way to power in 1986, he immediately constituted the Commission of Inquiry Into the Violations of Human Rights for the period between 1962-1986. The off-springs of this Commission were human rights institutions and structures, namely: the 1995 Constitution, the IGG, the Independent Courts, and the UHRC.

Bakayana then explored the many failures of the UHRC to execute speedy trials and these are borne out in the annual reports to Parliament as required by Art. 52 (2) of the Constitution. There is an increasing backlog of cases that leads to the violation of the right to a speedy trial. In the 1998 report, 435 cases were pending in addition to 143 cases of 1997 (approx. 50% of all the cases). In the 2002 annual report some matters lodged in 1997 were still pending, for example: Amone Peter V. AG and Sengomomwami V. AG**.**

By September 2002 some five matters filed seven years back in 1997 had not been resolved. If one expands the time frame to 2000 then the backlog of unresolved cases increases to 53.

Bakayana then examined the challenges faced by UHRC under seven heads, namely: legal dilemmas, duplication, elastic time-frames, unlimited adjournments, limited technical staff, financial constraints, and government reluctance to settle claims. He proceeded to give a number of recommendations that would resolve the problem of delayed resolution of cases, namely: developing strategic partnership with sister government agencies and organizations engaged in similar work for purposes of exchanging information and avoiding duplication, the need to amend rules of procedure to provide time frames for tribunal processes and sanctions against those officers that violate these time frames, the problem of insufficient staff is connected to that of limited finances, therefore, the Commission should venture to carry out aggressive fund raising activities and, of course, government should also be encouraged to inject in more financial resources to the Commission.

In his conclusion, Bakayana strongly argued that the UHRC needed to resuscitate the culture of respect for human rights which was dying in Uganda and this cannot be possible if the public continue to view the Commission as a perpetrator of delayed resolution of cases. There is a need, therefore, for the expeditious resolution of complaints to create confidence in the "wanainchi" that the Commission is a reliable partner in the protection of human rights.

The participants gave valuable comments to be incorporated into the paper. Mr. Ben Twinomugisha made some suggestions thus:

- That there is too much of a narrative and thus a need to convert it into a critique that relies more on analysis and reasoning.
- The need to highlight government's lack of commitment to the protection of human rights by pointing out practical and real occurances. For example, the suggestions that were mooted of abolishing the UHRC, or merging it with the Inspectorate of Government.
- There is a need to overhaul the whole section on methodology and organize it on the basis of perused cases. A table will be indispensable where these cases are arranged in time frames. Needless to say, such graphical representation would speak for itself.
- The question of backlog should not be looked at in isolation. Therefore, there is a need to do a comparative analysis with other institutions doing similar work.

Dr. Oloka-Onyango made the following suggestions:

- The need to secure advanced equipment to help speed up the resolution of complaints, especially, electronic devices in hearing and processing complaints would be a useful recommendation to incorporate in the paper.

- There is a need to draw comparisons from other jurisdiction like the USA for purposes of borrowing experiences that have worked there.
- The paper also needs to clarify the paradox regarding the reason why, in spite of all these delays in dispensing justice, complaints still continue to pour into the Commission.
- In its recommendations the paper needs to explore the possibility of passing on the liability to the offenders rather than having the government shoulder all these responsibilities of compensating claimants.
- The paper needs to recall the Commission of Inquiry involving the late Justice Emmanuel Oteng on the issue of delayed judgments.

Mr. Livingstone Ssewanyana made the following suggestions:

- There is a need for a comparative study between the performance of the UHRC with other institutions doing similar work like the courts of law, the IGG, and NGOs etc. Moreover, such a comparison should go beyond Uganda. Only then can the conclusions of this paper be justified.
- The need to examine the competence of the UHRC to award compensation to claimants or alternatively, exploring the practicality of creating a Division in the High Court to perform this task, as has been mooted by some experts.
- As a recommendation, the UHRC needs to enter into partnership with sister organizations to share information so that it is able to restrict itself to a few areas.
- There is a need to examine the manner of appointment of the commissioners and to explain any bearing this may have on their performance in office.

Other members made the following contributions and suggestions:

- The recommendation of having donors help out the government pay up compensation to the claimants is out of order because donor money is meant to support the Commission to carry out its duties, so this argument should be reflected in the paper.
- There is a need to point out the weaknesses that are inherent in the Commission with regard to financial mismanagement of its own resources. This actually prompted the donors to suspend support at one time. The support staff, for example, is too large and needs trimming.
- It should be pointed out, among the recommendations, that there is a need to carry out a re-structuring in the institution. The Commissioners are over burdened and it would be good to relieve them of administrative functions. The Commission should take advantage of an exercise that is currently going on under the auspices of Danida
- The paper needs to explore alternative methods of settlement like mediation, out of court settlement, and referring matters to other institutions like the labour office. There is a further need to move away from strict rules of procedure and to innovate traditional approaches similar to the “gachacha” of Rwanda.

- The title of this paper pauses a question. However, the paper does not appear to have answered that question, so there is a need to organize this presentation in such a way that it gives an answer to the question paused.
- It is worthwhile to explore the seeming bias of the Commission in favour of the state. Moreover, the over-emphasis on documentary evidence has always resulted in injustice. This calls for a recommendation to relax the rules so that anyone with a consistent case should be awarded redress.
- The paper should point out lack of political will to support the institutions of public accountability including UHRC, the IGG, and the Auditor General. There is glaring evidence of poor funding and staffing, frustrating and ignoring decisions and rulings, and shelving useful suggestions perpetuated by the government against these institutions.
- There is a need to re-examine duplication as an alleged challenge. It is a poor argument considering the fact that the other alternatives are worse and it is only the Commission that is viable in providing a soft landing to the claimants.
- It should be pointed out that the Commissioners job ends after delivering judgment. The Ministry of Justice takes over in paying up liabilities. The Commission is often blamed for failing to pay up as if this were its mandate.

In his closing comments the Director thanked the presenters for a commendable job well done. He also thanked the rest of the participants for providing the quorum and the contributions that would elevate the papers to excellent pieces of research work. He referred to the workshop as an in-house affair where no journalist had been invited. The presentations would subsequently be published as working papers on our web-site. Mr. Ronald Naluwairo, the coordinator of the governance project, thanked all for coming and he invited everyone to lunch and for a refund of transport dues.