NEW WINE IN OLD WINESKINS: A CASE FOR BAIL UNDER GHANA'S MILITARY JUSTICE SYSTEM

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I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the time.[1]

The different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, may render permissible within the military that which would be constitutionally impossible outside it.[2]

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[1] THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 42-43 (Paul L. Ford ed., 10th ed. 1899). *See also Letter from Jefferson to H. Tompkinson*, THE JEFFERSON MONTICELLO, https://www.monticello.org/site/jefferson/quotations-jefferson-memorial (last visited Feb. 17, 2016).

[2] Parker v. Levy, 417 U.S. 733, 758 (1974).

I. Introduction

The statement above highlights the divergent opinions that are espoused by the proponents on the reformation of the military and military justice system in Ghana. In March 2009, the 1962 Armed Forces Act (AFA), and specifically the military justice system, suffered a setback in the judgment delivered by Justice Utter Dery of the Human Rights Division of the High Court of Ghana.[3] In the case of *Nikyi v. Attorney General*,[4] the plaintiff argued that his detention of ninety days prior to his court-martial violated the Ghanaian Constitution. Under Article 14(3)(b) of the Ghanaian Constitution, an accused person must appear before court within forty-eight hours of arrest or be released.[5] In his opinion, the learned Justice noted that the length of detention of military accused before trial contrasts sharply with Article 14(3) of the Constitution. He stated,

> Section 61, Act 105 is inconsistent with the Constitution, especially Article 14(1) and 14(3)(b), in that it permits the military authorities to detain a suspect for up to [ninety] days without trial. Section 61 of Act 105 is therefore void. The Plaintiff's right to personal liberty has been violated. He suffered unnecessarily as a result of the misconception and misapplication of the laws of Ghana and as a result of outdated military laws.[6]

"New wine"[7] must be introduced to the military justice system in Ghana to comply with the Constitution. Dery's attack served as notice

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[3] Nikyi v. Att'y Gen., Suit no. HRC/6/09 (Ghana). The 1992 Constitution of Ghana designated the High Court as the Human Rights Court. GHANA CONST. 1992, Ch. 011, art. 140 (2) [hereinafter GHANA CONST.]. It states, "The High Court shall have jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by the Constitution." *Id.* S*ee also* GHANA CONST. 1992, Ch. 011, art. 33, 130, 140; Courts Act 1993 (Act 459), section 15(1)(d), as amended by Courts (Amendment) Act 2002 (Act 620) (Ghana).

[4] *Nikyi*, Suit no. HRC/6/09.

[5] Article 14 of the 1992 Constitution is listed under Chapter Five on Fundamental Human Rights and Freedoms of the 1992 Constitution. GHANA CONST. 1992, Ch. 11, art. 14. The Constitution states, "[T]he fundamental human rights and freedoms shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies." *Id.*

[6] *Nikyi*, Suit no. HRC/6/09.

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> To put fresh wine into an old wineskin, is asking for trouble. The old wineskin has assumed a definite shape and is no longer pliable. It is fixed and somewhat brittle. The activity of new wine will stress it

that there are deficiencies in the administration of justice within the military concerning the concept of due process. It has brought to light the fact that civilian courts in Ghana will ignore the established principles of the military justice system, providing bail to a military accused for non-capital offenses.[8]

Indeed, the AFA must be reformed. However, changes within the military are usually slow due to the perceived fear of their future effects on the military objective of having well-disciplined soldiers.[9] "However, if change is inevitable, what changes should be made? Why should change occur?"[10] Any considered changes must be critically assessed before change is implemented.

There is no simple formula for determining whether the critics of the military justice system are on target. However, "the military must adopt a new philosophy and policy in the treatment of the military accused awaiting trial for a non-capital offense."[11] Courts-martial under Ghana's military justice system are not permitted to try rape, murder, or manslaughter cases.[12] These cases are handed over to the civilian courts

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> beyond its ability to yield. And so both the wine and the skin are lost. We can't put new ideas into old mind-sets. We can't get new results with old behaviors.

Reverend Wayne Manning, *How to Stop Putting New Wine into Old Wineskins*, UNITY, http://www.unity.org/resources/articles/how-stop-putting-new-wine-old-wineskins (last visited Feb. 17, 2016); *see also* CRAIG S. KEENER, A COMMENTARY ON THE GOSPEL OF MATTHEW 300-01 (1999). The author uses this description to show that the "new wine" cannot be sustained by the "old wineskin" of the Armed Forces Act. The Armed Forces Act must be reformed in order for it to withstand the "new wine" of the introduction of a bail system and other systemic changes under the military justice system in Ghana.

[8] Under the military justice system in Ghana, bail is not provided to military accused in either capital or non-capital cases. In the opinion of the court in the *Nikyi* case, bail must be given to military accused once the offense committed is determined not capital, and if the circumstances permit. *Nikyi*, Suit no. HRC/6/09.

[9] The Judge Advocate Gen.'s Legal Ctr. and Sch., Criminal Law Division, *Magistrates Program*, ARMY LAW., Nov. 1974, at 18.

[10] William Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to Be Changed?*, 48 A.F. L. REV. 185 (2000).

[11] I.S. STOUFFER, THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE 379 (1949).

[12] Article 79 of the Armed Forces Act (AFA) provides in part that a service tribunal shall not try any person charged with the offense of murder, rape, or manslaughter committed in Ghana. ARMED FORCES ACT, § 57 (1960) (Ghana) [hereinafter 1960 AFA]. *See also* GHANA ARMED FORCES REG. vol II, Article 102.23 (C.I.12) (1969) [hereinafter AFR]. Military members accused of such offenses are referred to civilian authorities and courts to be tried under the Criminal Code of Ghana. *Id.*

to be tried. However, for those cases that are properly under the military's jurisdiction, the AFA must be reformed in order to comply with the constitution. It is an undeniable fact that the military justice system in Ghana has evolved from what it was in the 1960s and 1970s.[13] However, constitutional rights enjoyed by the Ghanaian citizens must be extended to military personnel absent compelling justification.[14] Justice and fairness have an effect on morale and discipline in command,[15] and there is a compelling need for the military to introduce changes that would enhance fairness in the military justice system.

The first part of this paper analyzes the concept of pre-trial release and the factors that are taken into consideration in granting bail as it pertains under the Constitution of Ghana and the Criminal Procedure Code of Ghana. The second part of this paper discusses pre-trial detention under the military justice system in Ghana and explores the merits of the military arguments made for the exemption from the bail system. Thirdly, this paper discusses the relevance of recent developments from the judiciary and the Constitution Review Commission regarding reform of the AFA to protect service persons' individual rights. Fourthly, the paper reviews the applicability of international and regional human rights treaties and laws in support of the reform of the AFA and proposes some remedial changes within the military justice system in Ghana to facilitate the introduction of the "new wine."[16] Finally, this paper discusses the mechanisms for changing Ghana's military justice system and the impact that the introduction of the "new wine"[17] will have on the administration of justice.

II. Pretrial Release under the 1992 Constitution of Ghana and the Criminal Procedure Code

A. The 1992 Constitution

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[13] Prior to the amendment of the AFA through the Armed Forces (Amendment) Law of 1983, a commanding officer could try an accused alone; the change introduced the Disciplinary Board. PROVISIONAL NATIONAL DEFENSE COUNCIL LAW, 63, 1983 (Ghana) [hereinafter PNDCL]. This was a welcomed change to the military justice system as it was perceived to be a fairer system of justice.

[14] Micheal I. Spak, *Military Justice: the Oxymoron of the 1980's*, 20 CAL. W.L REV. 436, 438 (1984).

[15] Richard R. Boller, *Pre-trial Restraint in the Military*, 50 MIL. L. REV. 71, 72 (1970).

[16] Manning, *supra* note 7.

[17] *Id*.

The constitution is the fundamental law of the land, and all other laws and regulations must necessarily derive their validity from it.[18] Therefore, a discussion of due process must begin with the constitution. The Constitution of Ghana was approved in a national referendum on April 28, 1992. It was promulgated by the Constitution of the Fourth Republic of Ghana (Promulgation) Law 1992 (PNDCL282).[19] It is the fifth Constitution of the Republic since March 6, 1957, which is when Ghana obtained its independence from the British.[20] Under Article 19 of the 1992 constitution, the right to fair trial for an accused is clearly articulated.[21] The constitution states that a person shall be presumed innocent until he is proved or has pleaded guilty.[22]

Furthermore, "a person who is arrested, restricted or detained upon reasonable suspicion of having committed or being about to commit a criminal offense under the laws of Ghana and who is not released shall be brought before a court within forty-eight hours after the arrest, restriction or detention."[23] In addition, the Constitution states that a person may be deprived of his liberty and called before the court to answer an order of the court or in execution of a sentence ordered by the court.[24]

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[18] Article 1(2) of the Constitution stipulates that any other law found to be inconsistent with any provision of the Constitution shall be void. *See* GHANA CONST., *supra* note 3, art. 1(2) (1992).

[19] *See* PNDCL, *supra* note 13. Provincial National Defense Council (PNDCL) was the name adopted by the military Junta at the time. Law 282 of the PNDCL was amended by the Constitution of Republic of Ghana (Amendment) Act of 1996 (Act 527). GHANA CONST., *supra* note 3.

[20] The First Ghana Constitution was in 1957; the second Constitution was in 1960; the third was in 1969; and the fourth was in 1979. *Constitution of the Republic of Ghana*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/wipolex/en/details.jsp?id=9414 (last visited Jan. 29, 2015).

[21] *See* GHANA CONST. art. 19 (1992).

[22] *Id.* art. 19(2)(c).

[23] *Id.* art. 14(3).

[24] *Id.* art. 14(1). Other instances when a person can be deprived of his liberty include the execution of a court order punishing him for contempt of court, a person suffering from an infectious or contagious disease, a person of unsound mind, a person addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community. *Id.* art. 14(1) a–g.

B. The Criminal Procedure Code

The Criminal Procedure Code of 1960[25] contains the criteria used by the court to grant or refuse bail to a person who is charged with an offense before it. The Act contains important general provisions as well as specific criteria for the granting of bail and the discharging of suspects in custody.[26] The conditions for the release of an accused in non-capital cases prior to trial are also discussed under the Criminal Procedure Code:

> The basic purpose of bail from the society's point of view has always been and still is to ensure the accused's reappearance for trial . . . . Pretrial release allows a man accused of a crime to keep the fabric of his life intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence of probation . . . . It permits the accused to take active part in planning his defense with his counsel . . . .[27]

The Criminal Procedure Code of Ghana allows for release in non–capital cases prior to trial, and it provides that a court shall refuse to grant bail if it is satisfied that the accused:

> (a) may not appear to stand trial;
> (b) may interfere with any witness or evidence, or in any way hamper police investigations;
> (c) may commit a further offence when on bail; or
> (d) is charged with an offence punishable by imprisonment exceeding six months which is alleged to have been committed while on bail.[28]

Furthermore, to determine the condition or conditions that must be taken into consideration to assure the court of the accused's presence in future court proceedings, the magistrate must also consider the nature of the accusation[29] and the nature of the evidence in support of the

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[25] CRIMINAL PROCEDURE CODE Act 30 (1960) (Ghana) [hereinafter CPC]. The Criminal Procedure Code of Ghana was enacted by the First Republic in 1960. *Id.* It was amended by the Criminal Procedure Code (Amendment) Decree, 1975, N.R.C.D 309.
[26] *Id.* § 98.
[27] STUART S. NAGEL, THE RIGHTS OF THE ACCUSED IN LAW AND ACTION 177-78 (1972).
[28] *See* CPC, *supra* note 25, § 96(5).
[29] *Id.* § 96(6).

accusation.[30] Also, the magistrate shall consider the severity of the punishment that conviction will entail.[31] In addition, the court shall take into consideration whether the defendant, having been released on bail on any previous occasion, has willfully failed to comply with the conditions of any recognizance entered into by him on that occasion.[32] Other factors include whether the defendant has a fixed place of abode in Ghana, is gainfully employed,[33] and whether the sureties are independent, of good character, and of sufficient means.[34]

III. Military Justice in the Ghana Armed Forces

A. Historical Context of the Armed Forces Act of Ghana

The military justice system in Ghana owes its birth to the British military justice system[35] and has been modeled after the British military justice system.[36] Prior to the attainment of independence from the British in 1957, the British Army Act of 1955 was used to administer the armed forces in the Gold Coast.[37] In 1962, the AFA was enacted by the existing Parliament to regulate and administer the military.[38] The purpose of the Act is to ensure that good order and discipline is preserved.

The last major change to the military justice system in Ghana occurred in 1983 with the introduction of trial by a disciplinary board instead of by

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[30] *Id.* § 96 (6)(b).
[31] *Id.* § 96 (6)(c).
[32] *Id.* § 96 (6)(d).
[33] *Id.* § 96 (6)(e).
[34] *Id.* § 96 (6)(f).
[35] Ghana, then the Gold Coast, was a colony of Britain until she gained independence in 1957 and achieved Republican status in 1960. *Political History*, GHANA WEB, http://www.ghanaweb.com/GhanaHomePage/republic/polit_hist.php (last visited Feb. 17, 2016).
[36] Thomas Allotey, Comparative Study: The Military Justice System in Ghana and the United States (Pre-trial through Post-trial): Need For Reforms in Ghana's Military Justice System 3 (2001) (unpublished thesis, The Judge Advocate General's Legal Center and School) [hereinafter Allotey Thesis].
[37] *See* AFR, *supra* note 12, art. 112.04. Though the British Act of 1955 is no longer in use, reference is still made to it in relation to court–martial procedures. "The rules of the British Army Act, 1955 shall apply to the Armed Forces Regulations, unless the provisions of these Rules or any part thereof are included in or inconsistent with the provisions of these Regulations." This regulation is also known as Constitutional Instrument 12 (CI 12).
[38] *See* AFA, *supra* note 12.

a sole commanding officer.[39] This change was a major improvement to the system, and it was instituted to right previous wrongs in the system. Such reform shows that some injustices that existed have been rectified, though it left untouched the pre-trial detention system under the military justice system in Ghana.

B. The Practice of Pre-trial Detention under Ghana's Military Justice System

In Ghana, servicemembers are subject to the Armed Forces Act (Act 105) and the Armed Forces Regulations;[40] they are the primary sources of criminal law within the military. Under the AFA, custody prior to trial is a matter of command discretion. A person against whom a charge has been preferred need not necessarily be placed under arrest.[41] The

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[39] THE PROVISIONAL NATIONAL DEFENSE COUNCIL (ESTABLISHMENT) PROCLAMATION §§ 9, 10 (1981) [hereinafter P.N.D.C. PROCLAMATION] states:

> 9(1) Notwithstanding the suspension of the 1979 Constitution and until provision is otherwise made by law—
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> (a) all courts in existence immediately before the 31st day of December, 1981, shall continue in existence with the same powers, duties and functions under the existing law subject to this Proclamation and laws issued thereunder . . . .
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> 10(1) Notwithstanding the provisions of section 9 of this Proclamation, there shall be established independently of the said courts, Public Tribunals for the trial and punishment of offenses specified by law.
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> 10(2) Notwithstanding the provisions of section 9 of this Proclamation the Public Tribunals established under subsection (1) of this section shall not be subject to the supervisory jurisdiction of any court and accordingly it shall not be lawful for any court to entertain any application for an order or writ in the nature of habeas corpus, certiorari, mandamus, prohibition, *quo warranto* injunction or declaration in respect of any decision, judgment, finding, ruling, order or proceeding of any such Tribunal.

Id. Another notable change was the inclusion of an enlisted servicemember to sit on the disciplinary board in a case in which the accused was also an enlisted servicemember. *See* AFA, *supra* note 12, Act 105, § 63 (1).

[40] The Armed Forces Regulations (AFRs) contain the trial procedures under the military justice system, and the rules of evidence. *See generally* AFR, *supra* note 12, art. 105.

[41] *Id*. art. 105.01 (stating that the expression "arrest" relates to the apprehension of an alleged offender and also to his custody from the time of the apprehension until the case has been disposed of).

circumstances surrounding each case are considered when determining whether arrest is appropriate.[42] Also, an officer may arrest a person without warrant or order if the person has committed or is suspected of committing a crime. In addition, if the person has been charged under the AFA for committing a service offense, he may be arrested without a warrant.[43]

It is the responsibility of the arresting officer to provide to the accused a written signed account stating the reasons the accused is held in custody.[44] In any case, where the accused is not provided with an account in writing within twenty-four hours, the officer or man in whose custody the accused has been committed shall discharge him from custody.[45] It is also the duty of the person who receives the accused to report the arrest to superior authority.[46]

The pre-trial custodial provisions under the AFA are further expanded in the Armed Forces Regulations Vol.II (Discipline) (CI.12).[47] Under Article 105.13 (When Close Custody Advisable),[48] it is provided that when practical, an alleged offender who has been arrested should be held in close custody if:

> 1. the offense is of a serious nature;
> 2. the offense is accompanied by drunkenness, violence or insubordination;
> 3. it is likely that he would otherwise continue the offense or commit another offense; or
> 4. close custody is considered necessary for his protection or safety.[49]

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[42] *Id*.
[43] *See* AFA, *supra* note 12, § 57.
[44] *Id.* § 60.
[45] *See* AFR, *supra* note 12, art. 105.19.
[46] *See* AFA, *supra* note 12, § 60(3).
[47] *See* AFR, *supra* note 12, art. 105.
[48] *Id*. art 105.01 (Close custody involves restraint under escort or guard, whether in confinement or not.).
[49] *Id.* art. 105.13.

In addition, every alleged offender who is under arrest in open custody[50] shall continue to be in open custody until he is placed in closed custody or discharged from custody.[51]

1. Protections Listed in the Armed Forces Act

Under the AFA, officers are to be held accountable for placing anyone in pretrial confinement arbitrarily.[52] Section 35 of the AFA provides,

> Every person subject to the Code of Service Discipline who unnecessarily detains any other person subject thereto in arrest or confinement without bringing him to trial, or fails to bring that other person's case before the proper authority for investigation, shall be guilty of an offence . . . .[53]

The Armed Forces Act provides additional protections to service members in pre-trial confinement by mandating a pre-trial processing timeline. Where the arrested person remains in custody for eight days without a summary trial or court-martial, the commanding officer shall submit to the appropriate superior authority a report necessitating the delay.[54] This report shall be sent out every eight days until the accused is tried. In any case, if there is no trial after the expiration of twenty-eight days from the time of custody, the accused shall be entitled to send to the President (or his appointee) a petition to be freed from custody or for a disposal of the case against him.[55]

Finally, upon the expiration of a period of ninety days of continuous custody without trial, the accused shall be released.[56] Section 61(3) of the AFA provides that a person released from custody shall not be subject to re–arrest for the same offence except on the written orders of an authority having power to convene a court-martial for his trial.[57] The purpose is to

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[50] *Id*. art. 101.01 (Open custody involves curtailment of privileges but not restraint under escort or guard.).
[51] *Id.* art. 105.30.
[52] *See* AFA, *supra* note 12, § 61.
[53] *Id*.
[54] *Id*. § 35.
[55] *Id*.
[56] *Id.* § 61(2).
[57] *Id*. § 61(3).

ensure that the accused enjoys the right to a speedy trial and to place the onus on the commander to prepare the case with a sense of urgency.

2. The Reality of the Armed Forces Act

It is a tough burden, however, for the defense attorney to prove arbitrary pre-trial confinement. The onus lies on the prosecutor to prove the facts that would either show or enable the service tribunal to infer that the accuser could have brought the person in arrest or confinement to trial, or brought his case before the proper authority for investigation without ordering the person into pre-trial confinement.[58]

Despite the protections extended to the accused under the AFA, as it stands today, the AFA is prone to abuse. Our commanding officers are not trained legally and are often not neutral and detached from the case. Furthermore, although pre-trial confinement is not usually required in cases for summary trial, there have been cases when an accused has been thrown into pre-trial confinement. When it is utilized, the accused may serve more time in pre-trial confinement than his maximum exposure from the summary trial. Invariably, the accused ends up suffering unnecessarily. The AFA must remove the commanding officer as the one to order pre-trial confinement; invariably, he is not detached from the case.[59]

In a system that does not make provision for bail, trials must be carried out expeditiously. The number of people in pre-trial detention must be kept at a minimum. However, this unfortunately has not been the case on some occasions. For example, in 2013 two naval ratings[60] were accused of engaging in the sale of illegally acquired fuel.[61] This was after a report was made that one rating had been found with some gallons in his car suspected to contain fuel. The ratings were put into pre-trial confinement

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[58] *See* AFR, *supra* note 12, art. 103.28.

[59] The commander usually has an interest in the case as the conduct of the accused in the unit mirrors the ability of the commander to ensure discipline is maintained. The bias is generally seen because the commander is the same person to decide whether or not the accused will be placed in pre-trial confinement. *Id.*

[60] "Ratings" are sailors who hold neither commissioned nor warrant rank, akin to the enlisted soldier in the U.S. Army. *See* ASK ME GHANA, http://askmeghana.com/487/Ranks-ghana-army (last visited Feb. 17, 2016).

[61] The author is familiar with this unreported case and this citation is based on that professional experience.

for almost three months before they were released after an investigation found they had not engaged in any wrongdoing. They had been unnecessarily detained and punished for a crime they had not committed. Such conditions affect the career and reputation of those concerned and can raise morale issues in the unit. As in the above referenced case, the accused ends up suffering unnecessarily, and the risk of arbitrary pre–trial confinement substantially outweighs the risks of implementing reform.

Another concern is the time spent in preferring charges and taking the summary and abstract of evidence.[62] This is usually a long and detailed procedure and the accused is left to unjustly languish in custody through this time period. Also, because commanders are not legally trained, the accused suffers unjustly when decisions are made which are totally devoid of any legal backing.

Though the AFA provides for preferral of charges against an officer who improperly recommends confinement of an accused as a potential remedy, confinement itself cannot act as a justification or serve as a presumption to keep an accused in pre-trial confinement.[63] The remedy, despite its existence, is more theoretical than practical; to date no one has been prosecuted for failure to bring an accused person in pre-trial confinement to trial.[64]

Furthermore, if the accused indicates that he desires to be removed from pre-trial detention, the request has to be done when the case is referred to trial. The accused would already have suffered unjustly if he is removed eventually from pre-trial detention.

The advocates of maintaining the "old wine" have put forth several objections to the introduction of the bail system into the military justice

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[62] A summary of evidence provides the facts to support the ingredients in a charge. *See* AFR, *supra* note 12.

> [A] summary of evidence as distinct from an abstract of evidence shall be taken if the maximum punishment with which the accused is charged is death, or the accused person at any time before the charge against him is referred to higher authority, requires in writing that a summary of evidence be taken.

Id. art. 109.02 (C.I 12).

[63] *See* United States v. West, 12 U.S.C.M.A. 670, 673 (1962).

[64] This author has not seen a single prosecution for the failure to bring an accused in pre-trial confinement to trial.

system, including that it will have severe repercussions on discipline and the general administration of the armed forces.[65]

C. Military Justification for Pre-trial Detention

> No court-martial, military commander, or other military authority is empowered to accept bail for the appearance of an arrested party or to release a prisoner on bail. Bail is wholly unknown to the military law and practice; nor can a court of the United States grant bail in a military case.[66]

The above quote, though not made by a Ghanaian court, depicts the current view on bail under the military justice system in Ghana.[67] In the military, a person who is charged with a crime does not enjoy the privilege of being released on bail even if the offense is not capital. This is the source of conflict between the pundits for change and the military advocates who believe that the AFA must not be changed to include the "new wine."[68] Various arguments have been put forward by the military advocates on the need to preserve the AFA without the introduction of the "new wine."[69] Some of the arguments include the fact that it shall be a compromise on discipline, military operational needs, the "unique" nature of the military, and the need to have a law that is applicable even in deployment theaters.

1. Compromise of Discipline?

Rules are designed to instill and enforce discipline within an organization, such as the military, that has the special need to preserve cohesion, integrity, and credibility. The U.S. Army has defined discipline as a "state of mind which leads to a willingness to obey an order no matter

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[65] *See* Manning, *supra* note 7.

[66] U.S. ARMY, OFFICE OF THE JUDGE ADVOCATE, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY, 481 (1912).

[67] In the *Nikyi* case this concept was forcefully argued by the military; however, the Human Rights Court disregarded the notion and held that the military practice of refusing bail was in contrast with the 1992 Constitution. Nikyi v. Att'y Gen., Suit no. HRC/6/09 (Ghana).

[68] Manning, *supra* note 7.

[69] *Id.*

how unpleasant or dangerous the task to be performed."[70] Discipline is necessary to preserve the integrity, discipline, and coherence of the Ghana Armed Forces (GAF), without which there may not be a credible armed force capable of fulfilling its constitutional mandate—ensuring the defense of Ghana. There have always been rules regarding the pre-trial custody of members of the force.

The military's concern for discipline is one obstacle on the path to change in the area of pre-trial detention. There is an inherent conflict between individual freedoms and the military's objective of discipline and control.[71] However, the Ghanaian military, especially during the current democratic dispensation, must demonstrate that it is ready and willing to make great improvements in the military justice system. One notable area where change can be made is pre-trial detention with the introduction of the "new wine." [72] This will move the pre-trial detention to a higher degree of due process.[73]

The argument by the military that discipline will be compromised in the grant of bail in non-capital offenses is unjustified. Discipline and justice cannot be detached from each other. The grant of bail will not compromise discipline in the unit. Furthermore, the services of those military accused awaiting trial can be utilized by the military instead of keeping them in guardrooms to be fed at public expense.[74]

2. Operational Needs Argument

Advocates against the AFA reform assert that when GAF members are conducting operations (internal and external operations), the conditions are such that it would prove difficult to constitute disciplinary boards or courts-martial, before which persons arrested and detained may be arraigned. They argue that where the Commanding Officer (CO) has deployed elements of his unit to monitor or provide security for an operation, such as elections, the CO cannot turn his attention from the sensitive duties placed on his shoulders to constitute a court to hear the

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[70] R. RIVKIN, GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S 350 (N.Y. Grove Press, 1970).
[71] *See* Captain Eloy Sepulveda, A Case for Bail in the Military (1975) (unpublished thesis, The Judge Advocate Gen.'s Legal Ctr. and Sch.) [hereinafter Sepulveda Thesis].
[72] Manning, *supra* note 7.
[73] Sepulveda Thesis, *supra* note 74, at 8.
[74] *Id*.

case against a soldier suspected of committing an offense. Normally, the accused will be kept in custody until such time that there would be a lull in operations to permit administrative issues such as trials to be carried into effect; in such situations, security of the state often becomes an overriding concern.

Also, advocates against the AFA reform point out that during external operations, where soldiers commit offenses beyond the jurisdiction of the CO, the CO has to keep such soldiers in custody until a time that the appropriate authorities can attend to the issue. Their position is that military discipline and integrity (institutional and national) and national reputation in an international environment mandate that such a soldier be held immediately accountable in order to ensure mission accomplishment (although the forty-eight hour rule might be breached).

3. The Military: A Society Apart

The pundits of maintaining the status quo have argued that "the rights of men in the armed forces must meet certain overriding demands of discipline and duty that cannot be determined by civilian courts."[75] Pundits advocating for the non-reform of the AFA seem to rely on the position stated in *Parker v. Levy*, where the Court noted,

> [It] has long recognized that the military is by necessity a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[76]

Further, these pundits assert that many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.[77] Under the Armed Forces Act, offenses like

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[75] Burns v. Wilson, 346 U.S. 137, 140 (1953); *see also* Solorio v. United States, 483 U.S 435 (1987); Chappell v. Wallace, 462 U.S 296 (1983) (holding that military personnel are not barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service).

[76] Parker v. Levy, 417 U.S. 733, 743 (1974).

[77] Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962).

malingering, [78] desertion, [79] mutiny, [80] and Absence Without Leave (AWOL)[81] are unique to the military and unknown to the civilian courts. Consequently, "the adjudication of guilt or innocence and the assessment of appropriate punishment may require experience and knowledge not commonly possessed by civilian judges and jurors."[82] In the view of the military, advocates for change fail to consider that the military is unique; therefore, it must be considered whether a proposed change will have an adverse effect on discipline. "The military should support change if, and only if, the change improves the delivery of justice and preserves discipline essential for military success."[83]

Although the military has strongly emphasized its uniqueness, the military cannot be allowed to rely on its uniqueness alone to infringe on the rights of military accused by denying them the right to bail unless compelling reasons exist. As detailed further below, this paper acknowledges that any structural changes within the military must be mirrored in the AFA.

4. World-Wide Deployment and Constitutional Reach

> *The military has argued for a separate system primarily grounded on the rationale that world-wide deployment of large numbers of military personnel with unique disciplinary requirements mandates a flexible, separate jurisprudence capable of operating in times of peace or conflict.*[84]

According to the advocates against reforming the AFA, soldiers may be stationed outside Ghana, where constitutional protections cannot be extended to them. They may also commit crimes that are outside the jurisdiction of Ghanaian civilian courts.[85] Consequently, there is a need

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[78] *See* AFA, *supra* note 12, § 34.
[79] *Id*. § 27.
[80] *Id*. § 19.
[81] *Id*. § 29.
[82] Professor Joseph W. Bishop Jr., *Perspective: The Case for Military Justice*, 62 MIL. L. REV. 219 (1973).
[83] Moorman, *supra* note 10, at 190.
[84] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE (6th ed., 2004).
[85] Ghana has troops on United Nation Peacekeeping duties in Congo, Lebanon, Liberia, and Sudan. *Peacekeeping Contributor Profile: Ghana*, PROVIDING FOR PEACEKEEPING,

for a justice system that can go wherever the troops go. Under the AFA, "every person subject to the Code of Service Discipline[86] alleged to have committed a service offence may be charged, dealt with, and tried under the Code of Service Discipline, whether the alleged offence was committed in Ghana or out of Ghana."[87] This is the justification used to prevent the introduction of the "new wine."[88] According to objectors, bail cannot be enforced in operational theaters. However, this reason does not justify their call for non-reform of the AFA, as exceptions may be made during emergencies and deployment.

Despite the views posited by military pundits, recent developments in Ghana highlight the need for reformation of the AFA. Discussion of the reformation of the AFA from the judiciary and the Constitution Review Commission shall be considered next.

IV. Recent Developments on the Need for Reformation of the Armed Forces Act

The Judiciary and the Constitutional Review Commission have identified defects in the administration of justice under the military justice system and called for the reform of the AFA. This highlights the fact that they are ready to take strides to rectify the problem. The opinions of the "reform movement" on the injustices suffered by accused persons point to the need to a reform of the AFA. However, some conflicting opinions exist within the judicial system on the need for AFA reform.

A. The Judicial Reform Movement

As provided in the *Nikyi v Attorney General* opinion, the High Court seemed to echo,

> When a court finds that the Constitution prohibits a particular practice, neither the agency nor Congress has the power to alter the text on which the conclusion rests.

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http://www.providingforpeacekeeping.org/2014/04/03/contributor-profile-ghana/ (last visited Feb. 17, 2016).

[86] CODE OF SERVICE DISCIPLINE (Nov. 1, 1999) (Ghana). *See also* AFA, *supra* note 12.

[87] *See* AFR, *supra* note 12, art 102.20.

[88] Manning, *supra* note 7.

> The decision therefore denies the agency the power to alter the text on which the conclusion rests. The decision therefore denies the agency power to infringe on an individual interest in pursuit of its own purposes, even if authorized to do by statute, and vests in the courts the final say on what circumstances, if any, warrant infringement of that interest.[89]

Nikyi was deployed as the finance officer to the Ghanaian Battalion with the United Nation's Mission in Congo in July 2008.[90] On his return to Ghana, an audit report found that he could not account for the funds he had been given as the finance officer for the battalion. He was arrested and placed into custody in accordance with service regulations, and he was subsequently charged and put before a court-martial. The Plaintiff, through his counsel, applied for bail, which was refused by the General Court-Martial. He subsequently applied for bail under Article 14(4) of the Constitution at the Human Rights Division of the High Court and was released.[91]

The Attorney General and the GAF applied to the High Court for a review of its decision on the grounds, *inter alia*, that the Plaintiff, being a military officer, was subject to military law and so could be held in custody in accordance with military regulations.[92] The court, however, held that

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[89] James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 180 (1983-1984). Though this quote cannot be found in the judgment delivered by the court in the *Nikyi* case, the author uses it to highlight the conclusion of the learned justice in the *Nikyi* case that the military cannot be allowed to follow their own procedure when the Constitution which is the supreme law of the land expressly prohibits it. Nikyi v. Att'y Gen., Suit no. HRC/6/09 (Ghana). Article 1(2) of the Constitution of Ghana states that "the Constitution shall be the supreme law Ghana and any other law found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency be void." GHANA CONST., *supra* note 3.

[90] *Nikyi* Suit no. HRC/6/09.

[91] Article14(4) of the Constitution states,

> Where a person arrested, restricted or detained under . . . this article is not tried within a reasonable time, then without prejudice to any further proceeding that may be brought against him, he shall be released, either conditionally or unconditionally or upon reasonable conditions, including in particular conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

GHANA CONST., *supra* note 3, art. 14 (4) (1992).

[92] *Nikyi* Suit no. HRC/6/09.

according to the constitution, the maximum period a person may remain in custody without a trial is forty-eight hours.[93]

The Human Rights Division of the High Court noted that the 1992 Constitution of Ghana makes it clear that "the fundamental human rights and freedoms enshrined in the constitution shall not be interfered with in any manner, and shall be respected and upheld by the Executive, Legislature, and Judiciary and all other organs of government and its agencies."[94] The military was therefore not exempt from this requirement. "A decision that a practice is unconstitutional prevents the armed forces from exercising a particular power over their members despite their own conclusion that it furthers the performance of their legitimate functions."[95]

Typically, the courts are experts in constitutional law, and their view of the proper constitutional balance must therefore prevail.[96] The recognition in *Nikyi v. Attorney General*[97] that military personnel are entitled to constitutional due process, which is a fundamental protection, carries with it the message that the courts are prepared to intervene in cases with human rights dimensions, even when a military accused is involved.

Despite the finding in *Nikyi v. Attorney General*,[98] there are differing opinions within the judiciary with respect to extending constitutional protections to military servicemembers. For example, in the case of *The Republic v. The Chief of Defense Staff and Attorney General*,[99] the applicant filed an application in the High Court for a writ of habeas corpus. The issue was whether the applicant was entitled to the relief of habeas corpus taking into consideration the fact that he was a service member and subject to military discipline. The Judge refused the application stating that the application of the AFA constituted an exception to the forty-eight hour rule in the Constitution.[100] It was the opinion of the Court that "the detainee could always rely on the procedures in the AFA on delays in trials and not resort to the issue of a writ of habeas corpus."[101]

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[93] *Id.*
[94] GHANA CONST., *supra* note 3, art. 12(1).
[95] Hirschhorn, *supra* note 89, at 180.
[96] *Id.*
[97] *Nikyi* Suit no. HRC/6/09.
[98] *Id.*
[99] The Republic v. The Chief of Defense Staff and Attorney General, Suit No. AP 44/07 (Ghana).
[100] GHANA CONST. art. 14(3) (1992).
[101] *The Republic* Suit No. AP 44/07. *See also* Republic v. Edmund Mensah Suit No.1/2009 (Ghana). Though this case does not relate to bail but fraternization, the court held that the

B. The Constitution Review Commission

Constitutionalism has become a critical issue in today's world.[102] Consequently, it is "considered necessary to articulate elaborate provisions in Constitutions, which guarantee the basic human and peoples' rights of the citizenry."[103] In particular, human rights issues have, since the establishment of the 1992 Constitution in Ghana, taken center stage in the political, economic, and social lives of Ghanaians.[104] This is more so because after Ghana's independence from colonial rule, the country witnessed cases of abuse and blatant disregard of human rights.[105]

In light of the above, the Constitution Review Commission (CRC)[106] was established on January 11, 2010, to review the current Constitution of

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prevention of marriage between an officer and an enlisted by the regulations of the Armed Forces did not constitute discrimination or a breach of fundamental liberties. *Id. See also* EMMANUEL KWABENA QUANSAH, THE GHANA LEGAL SYSTEM (2011) ("A High Court judge may refuse to follow a judgment of another High Court, being a judge of co-ordinate jurisdiction. However, in order to maintain certainty of judicial decisions, this refusal to follow a previous judgment of a colleague will normally be resorted to where there is a compelling reason for doing so.") In *Asare v. Dzeny*, the Court of Appeal noted that "a judge of the High Court is not bound to follow the decision of another judge of co-equal jurisdiction; he may do so as a matter of judicial comity." *Asare v. Dzeny*, 1976 1 GLR (Ghana).

[102] A. Kodzo Paaku Kludze, *Constitutional Rights and Their Relationships with International Human Rights in Ghana*, 41 ISR. L. REV. 678 (2008), http://ssrn.com/abstract =1333634.

[103] *Id*.

[104] CONSTITUTIONAL REVIEW COMMISSION OF INQUIRY, REPORT OF REVIEW (2011) [hereinafter CRC REPORT].

[105] Human rights abuses in Ghana were widespread after independence and included unlawful and arbitrary arrest; unlawful detention; confiscation of property; executions; torture; and open flogging, amongst others. *2010 Human Rights Report: Ghana*, U.S. DEPARTMENT OF STATE, http://www.state.gov/j/drl/rls/hrrpt/2010/af/154349.htm (last visited Feb. 17, 2016). For example, three Judges were abducted from their homes and murdered during the era of the Armed Forces Revolutionary Council (AFRC). *Ghana: Rawlings & Tsikata Cannot Escape Blame for Murders So Foul*, ALL AFRICA, http://allafrica.com/stories/201307031575.html (last visited Feb. 17, 2016). They adjudicated cases in which they ordered the release of persons who had been sentenced to long terms of imprisonment, during the rule of the AFRC. *Id.*

[106] The Constitution Review Commission of Inquiry Instrument 2010 (C.I. 64) created the Commission. CRC REPORT, *supra* note 104. The Constitutional Instrument makes provision for the membership of the CRC, the appointment of its members, terms of reference and mode of operation. *Id. See also* Rep. of the Constitution Review Commission (2011), presented to the President of Ghana by Professor John Evans Atta

Ghana, its related laws, and the continued advancement of jurisprudence in Ghana. The CRC found that the 1992 Constitution created a framework for "the nurturing of a vibrant democracy in Ghana" which had been denied by military overthrows of previous constitutional democracies.[107] Furthermore, during the review process, the Commission identified that there is an urgent need for the reformation of the military justice system and called for an amendment to the AFA to bring it in tune with the constitution.

In its deliberations, the CRC noted the High Court's decision in the *Nikyi* case and submitted that "the much glorified right to liberty upheld by the Constitution, which is the supreme law of the land, cannot be diminished by the military justice system or the AFA."[108] The CRC looked at this through the aperture of human rights. In their opinion, Article 61 of the AFA has "an impact on the rule of law, access to justice and adherence to human rights standards."[109] Consequently, the AFA by its own provisions must be in sync with the constitution and its human rights provisions.

The Commission further pointed out that "human rights are not gifts provided by the state, but rather the most fundamental values of democracy."[110] It is therefore not a surprise that Chapter 5 of the constitution is titled "Fundamental Human Rights and Freedoms" and has detailed provisions which run from Article 12 to 33. In addition, Chapter 6 of the Constitution is titled "Directive Principles of State Policy." These directives "expand the human rights and freedoms by linking to international obligations of Ghana pursuant to treaties, protocols and

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Mills, Executive Summary. The Constitution Review Commission is a presidential Commission of Inquiry set up in January 2010 to consult with the people of Ghana on the operation of the 1992 Constitution and on any changes that need to be made to the Constitution. *The Constitution Review Commission*, CONSTITUTION, http://www.constitutionnet.org/vl/item/constitution-review-commission-final-report. The Commission was also tasked to present a draft bill for the amendment of the Constitution in the event that any changes are warranted. *Id.*

[107] CONSULTATIVE REVIEW OF THE OPERATION OF THE 1992 CONSTITUTION OF GHANA (October 2009).

[108] CRC REPORT, *supra* note 104.

[109] *Id*.

[110] Lazlo Keleman, Restriction of Human Rights in the Military: The Standard of Legitimacy 34 (1996) (unpublished thesis, The Judge Advocate Gen.'s Legal Ctr. and Sch.).

agreements and those arising from membership of regional and other international groupings."[111]

The Commission further identified that the failure to provide bail under the military justice system and the detention of an accused person for a period up to ninety days without trial is of a penal nature because it deprives a person of his freedom, which is a denial of a fundamental human right as enshrined in the constitution.[112] The concept of bail, in the context of the presumption of innocence, is a human right.[113]

According to the CRC, the most commonly repeated adage in modern criminal justice system is the presumption of innocence, or in other words, accused persons are deemed innocent until proven guilty.[114] Therefore, in the view of the CRC, the bail system and its procedures must, as a matter of necessity, be assessed and applied to the military justice system in light of the overall constitutional legal framework consisting of fundamental principles of criminal justice and human rights values entrenched in the constitution. [115] Furthermore, the CRC posits that the AFA, and specifically Article 61, must be amended to meet the requirements of the constitution. [116]

The Commission indicated that determining the proper role assigned to the military in a democratic society has been a troublesome problem for every nation which has aspired to a free political life.[117] It acknowledged that "the military establishment is a necessary organ of government; however, the reach of its power must be carefully limited lest it upsets the delicate balance between freedom and order."[118]

Under the Commission's direction, a Bill was prepared for introduction in Parliament for the start of bail in the military. This reflects the current environment in Parliament that it is prepared to go to any extent

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111 Kludze, *supra* note 102, at 684.
112 CRC REPORT, *supra* note 104, at 577.
113 Tafara Goro, *Restoring the Right to Bail and the Presumption of Innocence*, UNIV. OF ZIMBABWE STUDENT J., June 2013.
114 *Id*.
115 *Id*.
116 CRC REPORT, *supra* note 104, at 578.
117 Warren, *supra* note 77, at 181-82.
118 *Id*.

to ensure that the interests of justice are served without concern that military good order and discipline will be compromised.[119]

Furthermore, the Commission noted that it is critical that "various agencies of state and individuals must devise and adopt innovative procedures that at once ensure fidelity to the constitution."[120] In the view of the CRC, there is no express provision in the Constitution of Ghana that bar military personnel from enjoying the human rights guaranteed in the constitution. Since Ghana has ratified several international and regional human rights treaties, the CRC believes the country must strive to meet internationally accepted standards on human rights.

V. International and Regional Law on Human Rights

A. Introduction

> *One right recognized in human rights jurisprudence as pivotal in the promotion of a criminal justice system that satisfies international human rights standards is a fair trial, which includes the right to bail. The institution of bail traces its origins to international conventions that protect and guarantee the fundamental rights of the individual to the presumption of innocence and due process of the law.*[121]

Human rights advocacy has received attention in the international and regional arena with much concern over the potential for abuse of individual rights by the state security apparatus and law enforcement agents in the enforcement of penal laws.[122] The international community has been dedicated to the intervention in potential abuse of individual rights through international instruments such as the Universal Declaration

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[119] Sepulveda Thesis, *supra* note 74, at 11.
[120] CRC REPORT, *supra* note 104, at 577.
[121] Amoo S.K., *The Bail Jurisprudence of Ghana, Namibia, South Africa and Zambia*, FORUM ON PUBLIC POLICY, Summer 2008.
[122] *Id*.; Goro, *supra* note 113, at 1.

for Human Rights,[123] the International Convention on Civil and Political Rights,[124] and the African Charter on Human and People's Rights.[125]

1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights.[126] It was adopted by the United Nations (UN) General Assembly on December 10, 1948,[127] and is generally agreed to be the foundation of international human rights law.[128] It has inspired a rich body of legally binding international human rights treaties, and represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings.[129] The International Bill of Human Rights[130] consists of the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social, and Cultural Rights; and the International Covenant on Civil and Political Rights.[131] A part of the preamble of the UDHR states:

> As a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive

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123 *History of the Universal Declaration of Human Rights*, UNITED NATIONS, http://www.un.org/en/documents/ udhr/history.shtml [hereinafter UDHR].

124 The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. *Fact Sheet No. 2*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf (last visited Feb. 16, 2016) [hereinafter ICCPR].

125 *Understanding the African Charter on Human and Peoples' Rights, How does the African Charter interact with or enrich the international law project?*, THINK AFRICA PRESS, http://thinkafricapress.com/international-law-africa/african-charter-human-peoples-rights (last visited 15 Feb. 2016) [hereinafter African Charter]. *See also* FATSAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA 46 (2003).

126 UDHR, *supra* note 123.

127 *Id.*

128 *Id.*

129 *Id*.

130 *See* ICCPR, *supra* note 124.

131 *Id*.

> measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[132]

Specifically, the UDHR states that no one shall be subjected to arbitrary arrest, detention or exile.[133] Therefore, Ghana must strive to live up to the expectations of the Declaration.

2. The International Convention on Civil and Political Rights

The International Convention on Civil and Political Rights (ICCPR) was adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A [XXI] of December 16, 1966 and entered into force on March 23, 1976.[134] According to the ICCPR, "each State Party must undertake to respect and ensure that all individuals within its territory and subject to its jurisdiction are afforded the rights recognized under the convention without any discrimination whatsoever." [135] Furthermore, where it is not already provided for by existing legislative or other measures, "each State Party to the present Covenant must undertake to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant."[136] A key provision within the ICCPR is that everyone has the right to liberty and security of person and no one shall be subjected to arbitrary arrest or detention.[137]

The Convention also states that it shall not be the general rule that persons awaiting trial shall be detained in custody.[138] An accused may be released subject to guarantees to appear for trial, at any other stage of the

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[132] *See* UDHR, *supra* note 123; *see also Universal Declaration of Human Rights*, UNITED NATIONS, G.A. Res. 217, pmbl, http://www.un.org/en/documents/udhr/ (last visited Feb. 15, 2016) [hereinafter Universal Declaration].
[133] Universal Declaration, *supra* note 132, art. 9.
[134] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI) U.N. GAOR, 21st Sess., Supp. No. 9, U.N. Doc. A/6309 (Mar. 23, 1976) [hereinafter International Covenant].
[135] *See* International Covenant, *supra* note 134, art. 2(1).
[136] *Id.* art. 2(2).
[137] *Id.* art. 9(1).
[138] *Id.* art. 9(3).

judicial proceedings.[139] Ghana ratified the convention on September 7, 2007, and accordingly must adhere to it.[140] Therefore, the ban on arbitrary pre-trial detention must be the rule rather than the exception in Ghana.

B. The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR) also known as the Banjul Charter is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent.[141] It was adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity (now the African Union) on June 27, 1981, in Nairobi, Kenya, and entered into force on October 21, 1986, after the ratification of the Charter by twenty-five States.[142]

The need for the Charter has been questioned in light of the already universal application of United Nations instruments for upholding human rights. However, its creation follows in the footsteps of other regional bodies in the creation of their own unique regional human rights systems, notably the European Convention on Human Rights (ECHR).[143]

Since its creation, the Charter has had significant normative impact on the status of human rights on the African continent.[144] The Charter states that "member states who are parties to the Charter shall recognize the

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[139] *Id.*

[140] Ghana ratified the ICCPR on 7 September 2000. ICCPR, *supra* note 124.

[141] *African Charter on Human and People's Rights*, AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS, http://www.achpr.org/instruments/achpr/ (last visited Feb. 17, 2016). Ghana is a member of the African Union and signed and ratified the treaty in September 2000. *Id.*

[142] *Id.*

[143] The Council of Europe dedicates a website to discuss rights and landmark judgments.

> The European Convention on Human Rights is the first Council of Europe's convention and the cornerstone of all its activities. It was adopted in 1950 and entered into force in 1953. Its ratification is a prerequisite for joining the Organization. The Convention established the European Court of Human Rights (ECtHR).

A Convention to protect your rights and liberties, COUNCIL OF EUROPE, http://human-rights-convention.org/ (last visited Feb. 16, 2016).

[144] *See* African Charter, *supra* note 125.

rights, duties, and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."[145]

Specific to individuals, the ACHPR specifies that all people shall have the right to liberty and to personal security of his person including freedom from arbitrary arrest or detention.[146] To ensure a fair trial, every individual shall be presumed innocent until proved guilty by a competent court or tribunal.[147]

Finally, member states are charged with the responsibility and duty to promote human rights.[148] This further emphasizes the point that Ghana must implement reform of the AFA that is also consistent with this Charter. Since Ghana has ratified the Charter, it must endeavor to uphold the rights guaranteed to individuals under the Charter, ensuring application of international and regional human rights law.

C. The Constitution and Application of International Treaties and Law.

The constitutions of many modern states, such as Ghana, now seek to incorporate International Human Rights as enforceable constitutional rights to make them cognizable by the domestic courts and tribunals.[149] Since Ghana attained independence in 1957, she has become party to numerous international, African, and regional human rights instruments.[150] In the 1992 Constitution of Ghana, the provisions of the Universal Declaration of Human Rights and the African Charter on Human and People's Rights are entrenched as constitutional provisions. Since the drafters and framers of the constitution relied on the principles of the international human rights law enshrined in treaties and declarations, there are many similarities between the domestic law and some principles of international human rights law.[151]

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[145] African Commission on Human and Peoples Rights, *African Charter on Human and People's Rights*, art. 1 (1987).
[146] *Id*. art. 6.
[147] *Id*. art. 7(b).
[148] *Id.* art. 25.
[149] Kludze, *supra* note 102, at 677.
[150] Emmanuel K Quansah, *An examination of the use of International law as an interpretative tool in human rights litigation in Ghana and Botswana*, *in* INT'L L. AND DOM. HUM. RIGHTS LITIGATION IN AFRICA 27, 30 (2010).
[151] Kludze, *supra* note 102, at 677.

The 1992 Constitution of Ghana does not expressly define the relationship between international law and national law.[152] Furthermore, in Ghana, treaties are not self–executing[153] such as may exist in other countries, and therefore not a standalone legal basis to enforce rights in the domestic law. Ghana subscribes to the dualist approach,[154] to the incorporation of international law into national law.[155] Consequently, to enforce obligations, Parliament must adopt the provision of the treaty in question to make it part of laws of the land.[156] In other words, if a treaty is to affect the municipal laws of Ghana, there must be an enabling legislation that specifically declares the treaty provision to be a law of the land.[157] In the celebrated case of *NPP v. Attorney General*,[158] the court held:

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[152] Quansah, *supra* note 150, at 37.

[153] U.S CONST. art VI, clause 2.

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby . . . .

Id.

[154] As a dualist state, the Republic is required to ratify a treaty internationally and then proceed to ratify the treaty in accordance with the Constitution. *See* GOV'T OF GHANA, REPUBLIC OF GHANA TREATY MANUAL, http://legal.un.org/avl/documents/scans/Ghana TreatyManual2009.pdf?teil=II&j (last visited Feb. 17, 2016). Two steps are required: the international intervention followed by the domestic process in order to transform the treaty from international law to domestic legislation. *Id.*

[155] Quansah, *supra* note 150, at 37.

[156] Article 11 of the Constitution of Ghana does not mention international law as part of the laws of Ghana.

> The hierarchy of laws established by article 11 of the 1992 Constitution does not expressly mention international law as part of the laws of Ghana. However, the article includes amongst such laws, "enactments made by or under the authority of parliament; any orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution . . . ."

GHANA CONST., s*upra* note 3, art. 11.

[157] Article 75(2) of the 1992 Constitution of Ghana states that the president is vested with the power to execute or to cause to be executed treaties, agreements, or conventions in the name of Ghana, subject to ratification by an Act of Parliament supported by the votes of more than one-half of all members of parliament. GHANA CONST., s*upra* note 3, art. 75(2).

[158] NPP v. Attorney General (1996-97 SCGLR 729) (Ghana).

> Laws, municipal or otherwise, which are found to be inconsistent with the Constitution, cannot be binding on the state whatever their nature. International law, including infra African enactments, are not binding on Ghana until such laws have been adopted or ratified by municipal laws . . . . This is a principle of public international law which recognizes the sovereignty of State as prerequisite for international relationship and law.[159]

The constitution, however, does not totally disregard treaties and agreements entered into by Ghana.[160] Article 37(3) of the constitution states,

> In the discharge of the obligations stated in clause (2) of this article, the State shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes.[161]

Furthermore, article 40 of the 1992 Constitution on international relations stipulates, among other things, that the government "shall promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means."[162] In the case of *NPP v. Inspector General of Police*,[163] Archer CJ stated,[164]

> Ghana is a signatory to this African Charter and member states of the [Organization of African Unity] and parties to the Charter are expected to recognize the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think that the fact that Ghana

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159 *Id*.
160 Kludze, *supra* note 102, at 682.
161 GHANA CONST. art. 37(3) (1992).
162 *Id.* art. 40(c).
163 NPP v. Inspector General of Police (1993-94) 2 GLR 459, also reported in AHRLC 138 (GhSC 1993).
164 Justice Archer was the Chief Justice of Ghana at the time of this judgment. GNA, *State Burial for Archer*, MODERN GHANA (June 4, 2002), http://www.modernghana.com/news/23162/1/state-burial-for-archer.html.

> has not passed specific legislation to give effect to the Charter means that the Charter cannot be relied upon.[165]

The above cases show that the courts of Ghana are inclined to consider international treaties even if they have not been incorporated into the domestic law of Ghana.

VI. Proposals for Change to Implement Due Process

The introduction of "new wine"[166] into the military justice system of Ghana for non-capital offenses will be hollow unless systemic changes are made within the military justice system. These include increase in manpower, the addition of military defense counsel and magistrates/judges, and checks against undue command influence. Undoubtedly, these systemic issues constitute hurdles that may obstruct the reform of the AFA. Nevertheless, they are not insurmountable and must be made in order to properly align the AFA with the constitution.

A. Increase in Manpower

Manpower is needed for the successful attainment of the mission and vision of the armed forces. The legal directorate of the Ghana Armed Forces is no exception. Presently, the legal directorate is woefully understaffed and is responsible for providing legal advice to the army, navy, and air force.[167] In addition, legal officers carry out prosecutorial duties, prepare contracts, and lecture on military law and rules of engagement to troops preparing for deployment, among other responsibilities.[168]

In addition to its own national security requirements, the Ghana Armed Forces contributes troops to United Nations Peacekeeping Operations.[169] Each of these missions requires a legal officer (judge advocate). This further compounds the manpower issue, as the entire Armed Forces boasts less than fifty legal officers.[170] The roles and

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165 NPP v. Inspector General of Police (1993-94) 2 GLR 459.
166 Manning, *supra* note 7.
167 Based upon the author's experience as a legal officer in the Navy of Ghana.
168 Allotey Thesis, *supra* note 36, at 7.
169 *See Peacekeeping*, *supra* note 85.
170 Based upon the author's experience as a legal officer in the Navy of Ghana.

functions of the armed forces require legal officers who are well motivated. It is important that this situation is remedied as the pressure on the few legal officers affects the output of the legal officers.

B. Introduction of Defense Counsel

> Representation by counsel is crucial to the effectuation of all the other procedural protections which the legal system offers to the defendant. If those protections are to be meaningful and not merely a sham, it is essential that each defendant have legal assistance to realize their intended benefits.[171]

The 1992 Constitution of Ghana, in Article 19 on Fundamental Human Rights, states that one vital ingredient to ensure a fair trial is that "the accused must be permitted to defend himself before the court in person or by a lawyer of his choice."[172] As far back as 2007, Parliament recognized this, and recommended that defense counsel be provided for military accused.[173] Unfortunately, this goal has not been realized.

As it stands, the burden rests with the accused to make vital decisions regarding pleas and what evidence is relevant without the guarantee of counsel. Under the AFA, a summary of evidence[174] or an abstract of

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[171] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 13 (Approved Draft 1968).

[172] GHANA CONST. art 19 (1992).

[173] GHANA PARLIAMENTARY DEBATE (4th ser.) 1997.

> It was noted by a Member of Parliament, Joseph Darko Mensah that the punishments for offenses established under the Armed Forces Act range from the death penalty, life imprisonment, two to ten years imprisonment amongst others. Therefore, there is an urgent need to establish a Ghana Armed Forces Defense Counsel office to undertake the defense of all those who are subject to the code of service discipline. In his opinion, there is a need to put measures in place to engage defense counsel in the Armed Forces to defend those who require such services to avoid miscarriage of justice.

Id. *See also* Allotey Thesis, *supra* note 36.

[174] AFR, *supra* note 12, art 109.02. The Regulation states that a summary of evidence shall be taken if:

evidence[175] must be taken before trial. A summary of evidence provides the facts that will support the necessary ingredients in a charge.[176] After all the evidence against the accused has been given, the accused shall be asked:

> Do you wish to say anything? You are not obliged to do so, but if you wish, you may give evidence on oath, or you may make a statement without being sworn. Any evidence you give or statement you make will be taken down in writing and may be given in evidence.[177]

Despite the implications a sworn statement would have, the accused is not given the facilities to prepare his defense adequately.[178] The commanding officer may permit counsel or an officer who assisted the accused to be present to advise the accused.[179] The defense counsel simply serves as an advisor, but is not permitted to cross-examine witnesses.[180] Under the AFA, the accused is the one allowed to cross-examine the witnesses.[181] The importance of cross-examination in any case cannot be over emphasized. A great disservice is done to the accused, and justice may elude him.

Furthermore, during a summary trial, an accused servicemember is not represented by counsel and has no right of appeal. Though he is entitled to an adviser, "the function of the adviser is to assist the accused, both before and during trial in respect of any technical or specialized aspect of

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> (a) the maximum punishment for the offence with which the accused is charged is death, or
> (b) the accused, at any time before the charge is referred to higher authority, requires in writing that the summary of evidence be taken, or
> (c) the commanding officer is of the opinion that the interests of justice require that a summary of evidence be taken.

Id.

[175] The AFA states, among other things, that that the abstract shall consist of signed statements by such witnesses as are necessary to prove the charge. AFA, *supra* note 12, art. 109.03.

[176] Allotey Thesis, *supra* note 36, at 67.

[177] AFA, *supra* note 12, art. 109.02.

[178] Allotey Thesis, *supra* note 36, at 67.

[179] AFA, *supra* note 12, art. 108.26.

[180] *Id.* art. 109.02.

[181] *Id.* art. 109.02 (b).

the case. He is not permitted to take part in the proceedings before the court."[182]

In a trial by court-martial, the accused is also not provided with defense counsel, though he is given the opportunity to secure the services of a civilian counsel.[183] The fees charged are usually high, and many service members cannot afford the fees. Furthermore, an accused may be in custody far away from the reach of counsel, and it may be difficult, if not impossible, to secure these services. Furthermore, military law is unique, and a civilian defense counsel who is not familiar with military law may not be able to provide the requisite defense to aid his client. Indeed, "the denial of counsel to a member of the armed forces charged with a serious crime finds justification neither in the necessity nor the practice of the military and assuredly not in concepts of 'fair trial' fundamental to our way of life."[184]

It is therefore important that the right to defense counsel for a military accused be codified to ensure that charges can be preferred against any commander who disregards regulations. This provision would go a long way to ensure that the fight towards the attainment of due process is achieved.

The introduction of defense counsel will also improve the perception of the defense function in the Army.[185] An accused will be content to know that he can rely on the service to provide the requisite assistance at no cost to him when the need arises. The introduction of military judges will also contribute immensely towards the attainment of due process under the military justice system in Ghana.

C. Introduction of Military Judges/Magistrates

Introducing military judges/magistrates into the military justice system of Ghana is required in order to implement the proposed restructuring of the pre-trial confinement procedure. Military magistrates or judges will be required in order to ensure judicial efficiency and protect

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[182] *Id.* art. 111.60.
[183] *Id.*
[184] Chester J. Antieau, *Courts-Martial and the Constitution*, 33 MARQ. L. REV. 35 (1949).
[185] Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 1, 46 (1983).

against unlawful command influence. Although this may not be sufficient to remove the appearance of command control or influence the decision of whether an individual should continue in pre-trial confinement, it would be a positive step towards making bail workable under the military justice system in Ghana.[186] It will also be an effort to restructure the pre-trial confinement procedure through regulatory procedures.[187] The "decision to keep a military accused in confinement should be a judicial function and not a prosecutorial function to be carried out by the commanding officer."[188] It is envisaged that command influence in decisions may be greatly reduced if soldiers are tried by independent military judges.

Under the current military justice system in Ghana, an application is made to the chief justice who is empowered to appoint a person to officiate as judge advocate at a General Court-Martial.[189] Although the judges nominated by the chief justice are protected from the unlawful command influence of the military, it is usually very difficult to procure their services immediately. Assigned courts-martial judges from the civilian courts would usually want to dispose of their cases in the civilian courts, further delaying the time for trial of the accused.[190] This leads to a delay in the disposal of cases, and the accused may still be in pre-trial confinement during this period. It is also impossible for civilian judges to travel to areas of operation outside the country to try cases.[191]

Introducing military judges would guarantee availability of judges and increase the proficiency of adjudicating cases. The decision to place a military accused in confinement must be made by a military judge who is not responsible for the prosecution of the case. These judges would remain independent of the commander and responsible only to the judge advocate general. Furthermore, this would remove from the commander the burden of making legal decisions that should properly be in the hands of persons who are trained in law.[192]

Another option could be that military magistrates hold power that would allow an accused to be released on bail, or to impose any restrictions

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186 *See* O' Callahan v Parker, 395 U.S 258 (1969).
187 U.S. DEP'T. OF ARMY, REG. 27-10, MILITARY JUSTICE 16-3 (September 1974).
188 Sepulveda Thesis, *supra* note 74, at 39.
189 GHANA ARMED FORCES REG. vol. II, art. 111.22; *See also* Armed Forces Act § 68.
190 Allotey Thesis, *supra* note 73, at 73.
191 *Id*.
192 Henry B. Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 463 (1971).

on the accused in lieu of bail, if he determines it necessary to reasonably ensure the presence of the accused at trial. An exception to this could be provided in the case of military exigencies, such as units in a combat situation. In those cases, this exception could mirror the current system empowering commanders to make pre-trial confinement determinations.[193] However, this should be the exception and not the rule.

D. Checks on Undue Command Influence

Another factor that bears heavily on the perception of fairness in military justice is the role played by commanders. Unlawful command influence is the "mortal enemy of military justice."[194] In Ghana, although substantial changes have been made over the years in a bid to limit the influence of the commander in the trial process,[195] the specter of unlawful command influence raises its ugly head every few years.[196] Commanders historically have been attacked as an obstruction to fair implementation of the various phases of the military justice system.[197]

> Anyone with the authority to confine at his disposal and who is also given the responsibility to maintain order and discipline will find it difficult not to easily dispose of an accused by confining him rather than granting him his liberty for the period prior to the trial date of his case.[198]

It is indeed "ironic that the positive attributes of command and control which ensure the military justice system works smoothly, quickly, and justly can become the bane of the system." [199] Under the AFA, commanders can preside over the disciplinary boards they appoint.[200] Consequently, the commander can directly or indirectly exercise undue

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[193] *Id*.
[194] Moorman, *supra* note 10, at 203.
[195] One notable change was the introduction of the Disciplinary Board who will make a decision based on majority as compared to the commanding officer making the decision alone. *See* AFA, *supra* note 12.
[196] SCHLUETER, *supra* note 84, at 6. *See also* The State v. LTC John Ackon, GCM (1986) (unreported) (Ghana). In this case, the commanding officer found unacceptable the punishment meted out to the accused—and released all members of the court-martial from the armed forces without reason. *Id.*
[197] Sepulveda Thesis, *supra* note 74.
[198] *Id*.
[199] SCHLUETER, *supra* note 84, at 374.
[200] AFA, *supra* note 12, § 63(1).

influence on the very panel that he has appointed. In fact, command influence can be a threat even before an accused reaches the courtroom.[201] The convening authority could also influence the court-martial in the selection of court members.[202] It is the court-martial members, not the commander, who will determine whether or not the accused is guilty,[203] and if found guilty, what sentence to impose.[204]

Command influence is not isolated to the court-martial selection process.[205] The commanding officer may directly or indirectly exercise undue influence on the panel by any statement that he makes.[206] "The fear that the commander will unduly influence the results of a given trial is founded in part upon the patently contradictory nature of his multifaceted functions and upon empirical evidence that some commanders do indeed try to exert such influence."[207] Post-trial comments by commanders or other senior officers on how a particular case has been determined are also likely to impact potential court members of disciplinary boards.[208] Comments from commanders may result in a subordinate taking steps that he feels the general wants implemented.[209]

Furthermore, commanders are advised to exercise discretion in the determination of pre-trial custody. It has been opined that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. The absence of procedural rules based upon constitutional principle has not always produced, fair, efficient, and effective procedures."[210]

Consequently, commanders must be removed as decision-makers insofar as the determination of pretrial confinement is concerned.[211] The decision to retain an accused in pre-trial detention must be a judicial function, not to be carried out by the commander who would usually place his personal interests above that of the accused. It is appropriate that

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201 Spak, *supra* note 14, at 461.
202 AFA, *supra* note 12, art. 111.06.
203 *Id*. art. 112.49.
204 *Id*.
205 Spak, *supra* note 14, at 461.
206 Allotey Thesis, *supra* note 36, at 7.
207 Rothblatt, *supra* note 192, at 461.
208 Allotey Thesis, *supra* note 36, at 7.
209 SCHLUETER, *supra* note 84, at 6.
210 ReGault, 387 U.S. 1, 18 (1967).
211 Sepulveda Thesis, *supra* note 74.

commanders are guided by objective evaluation mechanisms to ensure that pre-trial detention is not unnecessarily arbitrary.

Most commanders are cognizant enough to avoid open attempts to influence a court-martial;[212] however, this is not so in all cases.[213] In Ghana, unlawful command influence is not specifically codified under the AFA.[214] Though a commander can be charged for conduct prejudicial to good order and discipline under section 54 of the AFA,[215] it is important for such an offense to be specifically codified in the AFA.

VII. Mechanism for Changing Ghana's Military Justice System

The Constitution of Ghana contains a provision for the establishment of the Armed Forces Council.[216] Among the responsibilities and functions of the Council is the making of regulations for the performance of its functions and for the effective and efficient administration of the Armed Forces.[217] Consequently, in order to effect any proposed changes to the Armed Forces Act and Regulations, any such changes must be submitted to the Chief of Staff.[218]

The Chief of Staff must also submit a memorandum to the Chief of Defense Staff.[219] The Minister of Defense, who is a member of the Armed Forces Council, will be informed of the proposed changes to be forwarded

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[212] SCHLUETER, *supra* note 84, at 375.

[213] *See* Allotey Thesis, *supra* note 36. In one instance the military lawyer prosecuted a Lieutenant Colonel of the Ghana Army for fraudulent misapplication of military property under section 52 of the Armed Forces Act and to the prejudice of good order and discipline under section 54 of the Armed Forces Act. *Id.* The officer was convicted and awarded the punishment of "loss of seniority." Two days later all the panel members were administratively discharged from the service for no stated reason. However, this was during the revolutionary era in Ghana. *Id.*

[214] *See generally* AFA, *supra* note 12.

[215] AFA, *supra* note 12, §54.

[216] GHANA CONST. art. 210 (1992). This article directs that the Armed Forces Council shall consist of the Vice-President, who shall be chairman; the Ministers responsible for defense, foreign affairs and internal affairs; the Chief of Defense Staff; The Service Chiefs; a senior Warrant Officer or its equivalent in the Armed Forces; and two other persons nominated or appointed by the President acting in consultation with the Council of State. *Id.*

[217] GHANA CONST. art. 214(2) (1992).

[218] Frederich Ebert Stifung, *The Law-making Process in Ghana: Structures and Procedures* (Jan. 2011), http://library.fes.de/pdf-files/bueros/ghana/10506.pdf.

[219] *Id.*

to the Council for deliberation.[220] If the statute is to be amended, the Legal and Constitutional Committee in Parliament responsible for deliberations on the change will be given a copy of the proposals for the initiation of the appropriate Parliamentary process.[221]

A. Statutes and Regulations Needing Amendment

The Armed Forces Act must be amended to introduce significant changes to aid in the attainment of due process. The proposed statutes and regulations requiring amendment are the appointment of a prosecutor for general and disciplinary courts-martial; addition of defense counsel; introduction of an unlawful command influence offense; and procedures for pretrial confinement review, with a few proposed exceptions.

1. Appointment of Prosecutor for General and Disciplinary Courts-Martial

Article 111.23 of the Armed Forces Regulations states that "a prosecutor shall be appointed for each general court-martial." This article should be amended to read, *"Appointment of Prosecutor and Defense Counsel for General Court Martial."* Article 111.42 of the Armed Forces Regulations also states that "a prosecutor shall be appointed for each disciplinary court-martial."[222] This article should be amended to read, "*Appointment of Prosecutor and Defense Counsel of Disciplinary Court-Martial."*

2. Introduction of the Offense of Unlawful Command Influence

To prevent the problem of unlawful command influence under the military justice system in Ghana, a section relating to the offense of unlawful command influence must be specifically codified under the AFA. The proposed amendment should read as follows:

> (1) No convening authority or commander may censure, reprimand, or admonish a court-martial or other military

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220 *Id.*
221 *Id.*
222 AFR, *supra* note 12, art 111.42.

> tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.[223]
> (2) No person subject to the code 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 such authority's judicial acts.[224]

4. Procedures for Review of Pretrial Confinement

Furthermore, it is proposed that a section be introduced under the AFA to review the necessity for an accused to remain in pre-trial confinement for a non-capital offense. Since the Constitution of Ghana states that an accused shall be brought before court within forty–eight hours, it is proposed that save military exigencies, military magistrates must review pre-trial confinement. The proposed section would read:

"A military magistrate shall, within forty-eight hours of pretrial confinement, determine the appropriateness or otherwise of continued detention and lay down conditions for the release or otherwise of the accused person."[225]

5. Exceptions

The following are proposed exceptions that may address the objections advocates against change have made:

(a) Operational Necessity:

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[223] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 104 (2012). The author believes that the specific charge of unlawful command influence, if introduced under the military justice system in Ghana as it pertains in the United States, will help minimize the problem as it would make commanders aware of the repercussions of their acts.
[224] *Id.*
[225] *Id*. R.C.M. 305.

> A military accused may remain in pretrial confinement when operational exigencies exist, thereby rendering it impracticable for the accused to come before a military magistrate within forty-eight hours of being ordered into pretrial confinement.[226]
>
> (b) At Sea:
>
> In the case of pretrial confinement at sea, the rule of appearing before a military magistrate within forty-eight hours shall not apply. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel.[227]

B. General Law and Procedure Proposed

The amended statutes and the regulations of the AFA and the Armed Forces Regulations would introduce responsibilities on the part of the Armed Forces. It shall ensure that an accused is afforded due process with the introduction of "new wine,"[228] which is greatly advocated for by the constitution. Furthermore, the powers that commanders wield in their discretion to impose pretrial custodial sentences on accused persons will be considerably whittled down, as military magistrates shall have that authority.

VIII. Impact of Change

The overall impact of change in the military justice system will align the military justice system to the democratic principles prescribed by the constitution. Although the Ghana armed forces are an all-volunteer force,[229] joining the military should not result in the forfeiture of rights granted under the constitution. Justice and fairness ultimately effect

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[226] *Id*.
[227] *Id*.
[228] Manning, *supra* note 7.
[229] PETE ROWE, THE IMPACT OF HUMAN RIGHTS LAW ON THE ARMED FORCES 68 (2006).

command discipline. Therefore, the introduction of the "new wine"[230] will greatly contribute to military effectiveness.

In addition, the introduction of defense counsel will go a long way to provide for a fair trial as prescribed by the Constitution. The checks and balances to be placed on undue command influence will insure that military lawyers and magistrates are given the statutory protection they need, and motivate them to work without any fear of repercussions from commanders prone to disregard instructions. Moreover, the introduction of military judges and magistrates will not only shield the process of pretrial confinement from unlawful command influence, but will make the process of pre-trial confinement more efficient, and insure that legal decisions are made by those who are legally trained.

IX. Conclusion

> *I know, however, of no system of criminal justice system [that] does not have great room for improvement, and the military system is, in this regard, certainly no exception*.[231]

The introduction of "new wine"[232] into the military justice system in Ghana is espoused with the full realization that there are differences between the military and civilian community. However, those differences do not negate the need for reform. "Institutions have a natural tendency to resist calls for change, especially when these calls come in the form of accusations that the institution is systematically violating the Constitution."[233] Though discipline is important for the military, authority can be abused.[234] Different standards may be justified, but it becomes too easy to rely on general arguments of military necessity to rationalize what may be essentially arbitrary.[235]

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[230] Manning, *supra* note 7.
[231] Rothblatt, *supra* note 192, at 456.
[232] Manning, *supra* note 7.
[233] Steven J. Mulroy, *Hold On: The Remarkably Resilient, Constitutionally Dubious "48-Hour Hold"* (Univ. of Memphis Working Paper), http://ssrn.com/abstract=2101137.
[234] Captain Jack E. Owen Jr., *A Hard Look at the Military Magistrate Pretrial Confinement Hearing: Gerstein and Courtney Revisited*, 88 MIL. L. REV. 3, 47 (1980).
[235] *Id*.

The practice of pre-trial confinement without bail has continued with the least justification, save that of the military's fear that it would result in the downfall of discipline.[236] Indeed, "when the authority of the military has such sweeping capacity for affecting the lives of the citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question."[237] The administration of justice under the military justice system of Ghana must be efficient, fair, and constitutional. "It must accommodate both the commander's legitimate need to promote good order and discipline and the service member's right to be free of illegal or unnecessary pretrial incarceration."[238]

Overall, the rational basis of any bail system is to promote and protect the interests of society as well as the constitutional rights of the individual. Of course, a balance must be struck to reconcile the two competing interests, and there should not be any unnecessary recognition of one of the interests to the prejudice of another.[239]

The military has come under criticism from the courts and the Constitution Review Commission because of the divergent standards between the military and the civilian requirements for justice and a fair trial. Therefore, it is only appropriate to furnish those in uniform with the same rights accorded to a civilian, especially in granting bail for a non-capital offense. Military law is dynamic and must adapt to fit the needs of the changing society from which the military draws its most precious resource, the human resource.[240]

The *Nikyi* case must be a constant reminder of the perception of unfairness that is attributed to the military justice system in Ghana. The case has brought to light that the Human Rights Court will not hesitate to apply constitutional safeguards as outlined in the Constitution, irrespective of whether the affected persons are military or civilian. The military must therefore be in line with the practice and procedure that is used in the civilian courts in granting bail for non-capital offenses. The opportunity to be granted bail is a vital step towards the attainment of due process in accordance with the constitution. The history of Ghana, with blatant

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236 RIVKIN, *supra* note 70, at 4.
237 Warren, *supra* note 77, at 181-82.
238 Owen, *supra* note 234, at 55.
239 Goro, *supra* note 113.
240 Owen, *supra* note 234, at 54-55.

disregard of human rights, must not be written again. Ghana must strive to follow the rules of international and regional human rights law that it has ratified.

Equally important to reforming the AFA so that it is constitutionally compliant is the need to make organizational changes, such as an increase in manpower, introduction of defense counsel, military magistrates, and checks on undue command influence. Without these changes, the introduction of the "new wine"[241] in the military justice system in Ghana will fail.

There is room for reform before the point is reached when change would present a substantial threat to military discipline and efficiency.[242] It is hoped that this article has brought to light the need to carry out some pertinent changes in a bid for the military to meet the due process requirements under the constitution. The preamble to the 1992 Constitution reads in part:

> We the People of Ghana, in exercise of our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity . . . and in solemn declaration and affirmation of our commitment to . . . the protection and preservation of Fundamental Human Rights and Freedoms, Unity and Stability for our nation, enact and give to ourselves this Constitution.[243]

Embedded in these words are the values underpinning Human Rights. Liberty, equality, and prosperity represent their concerns for human dignity and the wellbeing of the people.[244]

The old gospel song asks: "Will there be any stars in my crown when at evening the sun goeth down?"[245] When the history of Ghanaian military law is written, will there be any stars in its crown? Yes, there must!

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[241] Manning, *supra* note 7.
[242] Bishop, *supra* note 82, at 221.
[243] GHANA CONST. pmbl. (1992).
[244] Peter Atudiwe Atupare, Judicial Review and the Enforcement of Human Rights: The Red and Blue Lights of the Judiciary of Ghana (July 2008) (unpublished LL.M. thesis, Queen's University) (on file with the Queen's University Library system).
[245] ALISON KRAUSS, WILL THERE BE ANY STARS (Rounder 1994).