



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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WINDHOEK - 2 September 2008

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### MINISTRY OF DEFENCE

No. 223	2008
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### RULES RELATING TO MILITARY DISCIPLINE CODE: DEFENCE ACT, 2002

The Minister of Defence, in consultation with the Rules Board, has under section 40(3) of the Defence Act, 2002 (Act No. 1 of 2002) made the rules set out in the Schedule.

**C. NAMOLOH**  
**MINISTER OF DEFENCE**

Windhoek, 8 August 2008

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## PRELIMINARY

### **Definitions**

**1.** In these rules, unless the context otherwise indicates, an expression to which a meaning has been assigned in the Act or the Schedule bears that meaning, and-

“adjudant”, includes a person performing the duties of an adjudant of a unit;

“commanding officer deriving powers from a convening authority” means a commanding officer empowered, in writing by a convening authority under sub-section (3) of section 63 of the Schedule, to exercise all or any of the powers conferred upon a commanding officer by sub-section (1) of that section;

“commanding officer with delegated powers” means a commanding officer to whom powers have been delegated under section 63(4) of the Schedule;

“recording officer” means an officer appointed to record or a trial officer other than a commanding officer with delegated powers, who himself or herself records the evidence at a preliminary investigation in terms of rule 104;

“Schedule” means Schedule 1 to the Act;

“the Act” means the Defence Act, 2002 (Act No.1 of 2002); and

“trial officer” means a chief of staff, convening authority, commanding officer deriving powers from a convening authority or commanding officer with delegated powers, trying any person for an offence in respect of which such trial officer has jurisdiction.

**Offender may be warned instead of being arrested**

2. (1) Subject to the provisions of subrule (2), a person authorized under section 52 of the Schedule to arrest or order into arrest a person for an offence under this Code may if he or she has no reason to believe that such other person -

- (a) will fail to attend his or her trial;
- (b) will interfere with any witness; or
- (c) will conceal, destroy, do away or in any manner interfere with any article or thing which may be used in evidence at his or her trial;

instead of arresting or ordering such person into arrest, warn him or her that a charge under this Code mentioned by him or her will be preferred against such person.

(2) The provisions of subrule (1) does not apply in respect of a person who has or is on reasonable grounds suspected of having committed-

- (a) a capital offence;
- (b) an offence under section 4, 5, 6, 7, 10, 13, 35(a), (b) or (c), 41(a), (b), (c) or (d) of the Schedule; or
- (c) an offence under section 8, 11 or 19(1) of the Schedule while on service.

(3) For purposes of subrule (2)(c), service includes service as contemplated in section 5 of the Act.

**Arrested person to be delivered to Unit, Military Police Detachment or Police Force**

3. (1) A person who is arrested or ordered into arrest, by a person subject to this Code, for the commission of an offence under this Code must as soon as is reasonably possible be handed over by the person making the arrest to the adjutant of his or her unit or to the nearest military police or, if having regard to the time and place of the arrest it is impracticable to hand such person over to such adjutant or military police, to the police force.

(2) Notwithstanding subrule (1) where the arrested person, referred to in that subrule, was in his or her unit at the time of his or her arrest he or she must as soon as possible be confined in terms of rule 5.

(3) The arresting person, referred to in subrule (1), must when handing such arrested person over to the military police or police force obtain a committal warrant.

(4) Where an arrested person is handed over to the military police in terms of subrule (1), or caused to be taken over from the police force by the person in charge of such military police in terms of subrule (5), the person in charge of the military police concerned must, as soon as possible thereafter, cause the arrested person to be handed over to the adjutant of his or her unit together with the account of offence referred to in rule 4(a).

(5) Where an arrested person is handed over to the police force in terms of subrule (1), the arresting person must, as soon as possible thereafter, notify the adjutant of the arrested person's unit or the nearest military police and such adjutant or the person in charge of such military police must, as soon as possible thereafter, cause the arrested person to be taken over from the police force together with the account of offence referred to in rule 4(a).

### **Account of offence**

**4.** A person who is subject to this Code and who arrests a person or orders a person into arrest for an offence under this Code or who warns a person in terms of rule 2 that a charge will be preferred against him or her under this Code must -

- (a) in the case of a person who has been arrested or ordered into arrest, lodge within twenty-four hours after the arrest or order, with the person in whose charge the arrested person has in terms of rule 3(1) been delivered or where such person was arrested in his or her unit with the adjutant of such unit; or
- (b) in the case of a person who has been warned in terms of subrule 2(1) that a charge will be preferred against him or her, lodge within seven days after the date of such warning, with the adjutant of such person's unit,

an account in writing, signed by himself or herself, of the offence for which such person was arrested or warned, as the case may be.

### **Confinement of arrested persons**

**5.** (1) Subject to the provisions of subrules (2) and (3), a person arrested for an offence under this Code must, after he or she has been handed over to the adjutant of his or her unit, be kept in confinement-

- (a) in the case of an officer or warrant officer, in the living quarters under the charge of an officer or warrant officer respectively of, where possible, equal or higher rank;
- (b) in the case of a non-commissioned officer, in his or her living quarters or a guardroom under the charge of a non-commissioned officer of, where possible equal or higher rank; or
- (c) in the case of a private, in a guardroom or detention barracks.

(2) Notwithstanding subrule (1), where local conditions or other circumstances render compliance with paragraph (a), (b) or (c) of subrule (1) impossible, the person arrested may be confined in such other place which his or her commanding officer considers suitable and which does not infringe upon the human dignity of the arrested person.

(3) A person arrested for a capital offence or an offence under section 4 of the Schedule must be confined in a detention barracks, prison, police cell or lock-up.

(4) An other rank arrested for an offence under this Code may be confined in a detention barracks, prison, police cell or lock-up if, in the opinion of such person's commanding officer, the nature of the offence or any other circumstances relating to the offence render confinement therein necessary.

(5) Every person confined in terms of this rule must be deprived of arms, weapons, ammunition and such other article or instrument which may be used to effect his or her escape, endanger his or her health or safety or endanger the health or safety of others.

(6) For the purpose of subrule (1), the expression "living quarters" excludes quarters not provided by the Government and excludes further quarters occupied by the arrested person together with his or her family, if any.

**Commanding officer or convening authority may order release of person arrested or arrest of person warned**

6. The appropriate convening authority or, subject to the control of such convening authority, the commanding officer of any person who has been arrested under this Code or warned that a charge will be preferred against him or her in terms of rule 2(1) for an offence other than-

- (a) a capital offence;
- (b) an offence for which the maximum punishment prescribed in the Schedule exceeds imprisonment for a period of 5 years; or
- (c) an offence under section 13 of the Schedule,

may at any time after such arrest or warning order the arrested person to be released without prejudice to re-arrest or order the person who has been warned into arrest.

**PROCEEDINGS BEFORE TRIAL OFFICER**

**Prosecutor at trial by trial officer**

7. (1) A person charged with an offence, which offence is triable by a commanding officer, must be prosecuted by the adjutant of a unit of the Defence Force before the commanding officer of that unit, but such commanding officer may, if in his or her opinion it is desirable to appoint another person to so prosecute, appoint such other person subject to the Code to prosecute in that case.

(2) A chief of staff, convening authority or commanding officer with delegated powers may appoint a person subject to this Code and who is under his or her command, to prosecute a person charged before him or her with an offence in respect of which he or she has jurisdiction.

(3) A person appointed as prosecutor under subrule (1) or (2) must be of equal or higher rank to that of the accused.

**General duties of prosecutor at trial by trial officer**

8. The duties imposed by rule 94 upon a prosecutor at a trial by court martial apply with the necessary changes to a prosecutor at a trial by a trial officer.

**Investigation of case and framing of charge**

9. (1) Whenever the adjutant of a unit receives an account of an offence referred to in rule 4 he or she must, if a commanding officer with delegated powers has jurisdiction in that particular case, refer the account to the person appointed by such commanding officer under rule 7(2) as prosecutor, and in all other cases, immediately investigate the case or cause it to be investigated, if necessary, and on completion thereof frame a charge disclosed by the evidence obtained in the course of such investigation.

(2) A person appointed as prosecutor by a commanding officer with delegated powers under rule 7(2) must upon receipt by him or her of an account of offence in pursuance of subrule (1) and in respect of that case, exercise the powers conferred and perform the duties and functions imposed upon the adjutant of the unit in terms of subrule (1) in relation to a case which such adjutant has not referred to a prosecutor, referred to in that subrule.

- (3) The investigation of any case in terms of this rule includes -
- (a) interviews of persons able to furnish information in connection with the case;
  - (b) statements, where necessary, from any person interviewed;
  - (c) the tracing of the whereabouts of any possible witness or suspect; and
  - (d) the taking charge of any document, article or thing which may be used in evidence at the trial.

(4) An investigation referred to in this rule includes a military police investigation into an alleged offence.

#### **Persons arrested or warned to be brought before commanding officer**

**10.** (1) Any person arrested for an offence in respect of which a military court has jurisdiction and any person warned in terms of rule 2(1) shall, in the case of a person arrested, as soon as possible but not later than two days after such person has in terms of rule 3, been handed over to the adjutant of his or her unit or has been confined as provided for in rule 5, as the case may be, and in the case of a person warned, as soon as possible after the charge to be preferred against him or her has been framed, be brought, in any case-

- (a) where the charge is in terms of rule 9(1) to be framed by the adjutant of the unit, before the commanding officer of the unit by the adjutant thereof; or
- (b) where the charge is in terms of rule 9(2) to be framed by a person appointed as prosecutor by a commanding officer with delegated powers under rule 7(2) before such commanding officer by such prosecutor:

Provided that if the said period of two days expires on a Saturday, Sunday or public holiday or after four o'clock in the afternoon on the next day not being a Saturday, Sunday or public holiday, it shall be deemed to expire at four o'clock in the afternoon on such next day.

(2) During an appearance under this rule, the accused must be informed of the charges preferred against him or her and of his or her rights to legal representation.

#### **Proceedings before commanding officer with delegated powers**

**11.** (1) A commanding officer with delegated powers before whom a charged person is brought in terms of rule 10(b), may-

- (a) remand the case from time to time, for any reason he or she considers sufficient, for periods not exceeding seven days at any one time, but if the accused is not tried or dealt with in any other manner within fourteen days after the date of the first remand, such commanding officer must immediately report that fact together with the reasons for the delay to the commanding officer of the unit who must obtain such directions in the matter as the appropriate convening authority may consider necessary including the release or otherwise of the accused without prejudice to re-arrest;

- (b) if under the powers delegated to him or her under section 63(4) of the Schedule he or she has jurisdiction to try the accused for the offence charged try the accused and impose any of the punishments which he or she is under those powers authorised to impose; or
- (c) at any stage of the proceedings before him or her, if in his or her opinion having regard to the record of service of the accused or any other circumstances relating to the case the accused deserves punishment in excess of the punishments which he or she is empowered to impose, direct that the case be referred to the adjutant of the unit to be dealt with by the commanding officer from whom he derives his or her powers and must thereupon strike out any finding of guilt which may have been brought in by him or her.

(2) Whenever a direction is given under paragraph (c) of subrule (1), the prosecutor must without delay cause the charge preferred against the accused, the record of the proceedings at the trial and the statements, if any, taken in the course of the investigation of the case to be delivered to the adjutant of the unit.

(3) The provisions of rule 116 do not apply in respect of an accused who has pleaded to a charge preferred against him or her before a commanding officer with delegated powers and whose case has been referred to the adjutant of the unit under paragraph (c) of subrule (1).

#### **Duties of adjutant where case referred to commanding officer of unit**

**12.** The adjutant of a unit must within two days after receipt by him or her of the documents referred to in rule 11(2) bring the accused before the commanding officer of the unit and furnish him or her with the charge preferred against the accused and must bring the record of the proceedings before the commanding officer with delegated powers who gave that direction and may either proceed against the accused on that charge or prefer against him or her any other charge disclosed by the evidence, if any, in the record of proceedings or in the course of the investigation of the case or both such record or investigation.

#### **Evidence taken by commanding officer with delegated powers considered to have been taken by commanding officer of unit**

**13.** In any proceedings before a commanding officer of a unit, pursuant to a direction by a commanding officer with delegated powers under rule 11(1)(c), the plea tendered by the accused before and any evidence recorded by such commanding officer must be considered to have been tendered before and to have been recorded by the commanding officer with delegated powers of the unit concerned.

#### **Commanding officer deriving powers from convening authority**

**14.** (1) Subject to the provisions of rule 18 a commanding officer deriving powers from a convening authority, where a person is brought before him or her in pursuance of rule 10(a) or direction under rule 11(1)(c), may -

- (a) remand the case from time to time for any reason which he or she considers sufficient, for periods not exceeding seven days at any one time, but if the accused is not tried or dealt with in any way within fourteen days after the date of the first remand such commanding officer must immediately report that fact together with the reasons for the delay to the appropriate convening authority who may give such directions in the manner as he or she may consider necessary including the release or otherwise of the accused without prejudice to re-arrest;

- (b) if he or she has jurisdiction to try the accused for the offence charged try the accused;
- (c) direct that a preliminary investigation be held and upon completion thereof either try the accused if he or she has jurisdiction in the case or submit the original and certified copy of the record of proceedings of the investigation to the appropriate convening authority with an application for the trial of the accused by a court martial on a charge sheet reflecting such charges as are in his or her opinion disclosed by the evidence.

(2) The provisions of rule 17(2) apply with the necessary changes in respect of a preliminary investigation directed in terms of paragraph (c) of subrule (1).

#### **Penal jurisdiction of commanding officer deriving powers from convening authority**

**15.** (1) A commanding officer deriving powers from a convening authority may, within the limits of the powers conferred upon him or her by such convening authority, try any person other than an officer or warrant officer, who is subject to this Code and who is under his or her command for -

- (a) an offence for which the maximum punishment prescribed in the Schedule does not exceed imprisonment for a period of one year; or
- (b) an offence under section 20 or 21 of the Schedule after the case has been remitted to him or her in terms of rule 19(c), where the amount or the value involved therein does not exceed N\$2 000; or
- (c) a civil offence of theft where the amount or value involved therein does not exceed N\$2 000.

(2) A commanding officer referred to in subrule (1) may upon conviction sentence the offender -

- (a) other than an offender who is an officer or warrant officer to any punishment prescribed by section 63(1) of the Schedule which he or she is empowered by the convening authority in question to impose;
- (b) in the case of a non-commissioned officer, to extra duties for a period not exceeding 21 days; or
- (c) in the case of a private, to-
  - (i) confinement to barracks for a period not exceeding 21 days; or
  - (ii) extra duties for a period not exceeding 21 days.

(3) The execution of a sentence of extra duties and confinement to barracks must be as stipulated by Defence Force orders.

#### **Deprivation of pay instead of detention or confinement to barracks**

**16.** (1) A commanding officer on service, who has convicted an offender, may if it is impracticable owing to the exigencies of the service to impose punishment of detention or confinement to barracks, instead of imposing such punishment, sentence the offender to be deprived of his or her pay in an amount calculated at the rate of one-quarter day's pay for each day of detention or each day of confinement to barracks which, but for this rule, he or she would have imposed upon the offender.

(2) Subrule (1) may at any time be applied by the commanding officer of a ship of the Defence Force while such ship is at sea or to any portion or member of the Defence Force serving outside Namibia.

#### **Duties of commanding officer without jurisdiction deriving powers from convening authority**

**17.** (1) Subject to the provisions of rule 18, a commanding officer deriving powers from a convening authority must whenever a person charged with an offence in respect of which such commanding officer has no jurisdiction is brought before him or her in terms of rule 10, direct that a preliminary investigation be held in the case and may remand the case from time to time for periods not exceeding seven days at any one time until such preliminary investigation has been completed.

(2) If a preliminary investigation referred to in subrule (1) is not completed within fourteen days after the date of the first remand the commanding officer must immediately report that fact together with the reasons for the delay to the appropriate convening authority who may give such directions in the matter as he or she may consider necessary including the release or otherwise of the accused without prejudice to re-arrest.

(3) Upon completion of the preliminary investigation, referred to in subrule (1), the accused must as soon as reasonably possible be brought before such commanding officer who must, if he or she is satisfied that all the available evidence has been recorded, remand the case for the consideration of the appropriate convening authority.

(4) As soon as possible, but not later than seven days after the date of the remand referred to under subrule (3), such commanding officer must apply to the appropriate convening authority for the trial of the accused by a court martial on a charge sheet reflecting such charges as are in his or her opinion disclosed by the evidence and furnish the convening authority with the original and a certified copy of the evidence taken at the preliminary investigation and such exhibits produced thereat as he or she may consider necessary.

#### **Duties of commanding officer when officer or warrant officer brought before him or her**

**18.** (1) A commanding officer deriving powers from a convening authority must, whenever an officer of rank up to and including lieutenant-colonel or its equivalent or a warrant officer charged with an offence is brought before him or her in terms of rule 10 and if the investigation of the case is complete, remand the case for the consideration of the appropriate chief of staff or convening authority, as the case may be.

(2) If the investigation of a case referred to in subrule (1) is not complete, the commanding officer may remand the case from time to time for further investigation for periods not exceeding seven days at any one time and upon completion of the investigation remand the case as provided in that subrule.

(3) If the investigation referred to in subrule (1) is not completed within fourteen days after the date of the first remand the commanding officer must immediately report that fact together with the reasons for the delay to the appropriate chief of staff or convening authority, as the case may be, who must give such directions in the matter as he or she may consider necessary including the release or otherwise of the accused without prejudice to re-arrest.

(4) Within seven days after the date of the remand of a case in terms of subrule (1) or (2) the commanding officer must cause the accused, the witness, any statements taken in the course of the investigation, and any document, article or thing that may be used in evidence at the trial to be delivered to the person appointed by the chief of staff or convening authority, as the case may be, under rule 7(2) as prosecutor together with a charge sheet reflecting such charges as are, in his or her opinion, disclosed by the evidence.

**Powers of convening authority**

**19.** Whenever a convening authority receives an application for the trial of any person by court martial, submitted to him or her in terms of rule 14(1)(c) rule or 17(4), he or she may-

- (a) direct that the preliminary or military police investigation be re-opened for further evidence and thereafter be resubmitted to him or her;
- (b) if the commanding officer concerned has jurisdiction in the case, remit the case to such commanding officer to be tried by him or her;
- (c) where the evidence discloses an offence under section 20 or 21 of the Schedule and the amount or value of the property involved does not exceed N\$2 000, remit the case to the commanding officer for the trial on a charge under one or the other of those sections as the case may be;
- (d) subject to the provisions of section 75 of the Schedule, convene an ordinary court martial for the trial of the accused;
- (e) submit the original and certified copy of the record of the preliminary or military police investigation to the appropriate officer empowered to convene general courts martial with an application for the trial of the accused by a general court martial on a charge framed by him or her; or
- (f) decline to take any action in the matter if in his or her opinion the evidence discloses no offence and release the accused without prejudice to re-arrest.

**Powers of chief of staff and convening authority when officer or warrant officer brought before him or her**

**20.** (1) Whenever a case remanded in terms of rule 18, is brought before a chief of staff for consideration he or she may-

- (a) try the accused if he or she has jurisdiction in the case;
- (b) direct that a preliminary investigation be held and upon completion of such investigation try the accused, if he or she has jurisdiction in the case, on a charge framed by the prosecutor appointed by him or her under rule 7(2);
- (c) subject to the provisions of section 72 of the Schedule, convene a general court martial for the trial of the accused; or
- (d) decline to take any action in the matter if in his or her opinion the evidence discloses no offence and release the accused without prejudice to re-arrest.

(2) Whenever a case remanded in terms of rule 18, is brought before a convening authority for consideration he or she may-

- (a) try the accused if he or she has jurisdiction in the case; or
- (b) direct that a preliminary investigation be held and upon completion of such investigation try the accused, if he or she has jurisdiction, on a charge framed by the prosecutor appointed by him or her under rule 7(2) or exercise any of the powers or duties conferred upon a convening authority by paragraph (d), (e) or (f) of rule 19.

**Penal jurisdiction of chief of staff and convening authority**

**21.** (1) A chief of staff may try any officer of the rank of lieutenant-colonel or major or officer of equivalent rank who is subject to this Code, for any offence for which the maximum punishment prescribed in the Schedule does not exceed imprisonment for a period of one year and may on conviction sentence the offender to any of the punishments prescribed in section 61 of the Schedule.

(2) A convening authority may try an officer below field rank or a warrant-officer who is subject to this Code, for any offence for which the maximum punishment prescribed in the Schedule does not exceed imprisonment for a period of one year and may on conviction sentence the offender to the punishment prescribed in section 62 of the Schedule or to -

- (a) reversion from an acting or temporary rank to his or her substantive rank;
- (b) extra duties for a period not exceeding 21 days; or
- (c) a reprimand.

**Proceedings before trial officer held in private**

**22.** (1) The proceedings before a trial officer must be conducted in private in the presence of the accused and such officials as are necessary for the proper conduct of the trial and if the accused so wishes a defence council at his or her own cost.

(2) The inadvertent presence of an unauthorised person at any such trial does not invalidate such proceedings.

**Recusal of trial officer**

**23.** (1) A trial officer before whom an accused is brought for trial must recuse himself or herself whenever any of the grounds specified in rule 45(1) apply to him or her in relation to the trial.

(2) Whenever a commanding officer with delegated powers recuses himself or herself in terms of subrule (1) he or she must give full particulars of the reasons for recusal to the officer from whom he or she receives such delegated powers.

**Accused to plead to every charge**

**24.** The prosecutor must, at a trial conducted by a trial officer, read to the accused each charge preferred against him or her and the trial officer must call upon the accused to plead separately to each charge.

**Accused refusing or failing to plead**

**25.** An accused who refuses or fails to plead to a charge when called upon to do so in terms of rule 24 is considered to have pleaded not guilty to the charge.

**Rights of accused before pleading**

**26.** (1) An accused arraigned before a trial officer may, when called upon to plead in terms of rule 24, before pleading to any such charge object -

- (a) in terms of section 64 of the Schedule, to be tried by the trial officer;

- (b) to the trial on the ground that the court trying him or her lacks the necessary jurisdiction; or
- (c) to any charge on the ground that it does not disclose any offence cognizable by that court.

(2) Where an objection made in terms of paragraph (a) of subrule (1) is upheld, the trial officer must remand the case for trial by another officer as provided in section 64(3) of the Schedule.

(3) Where an objection made in terms of paragraph (b) of subrule (1) is upheld, the trial officer must take such steps as may be required under this Code for the trial of the accused by a court of competent jurisdiction.

(4) The provisions of rule 59 apply with the necessary changes in respect of any objection made under paragraph (c) of subrule (1).

### **Pleas**

**27.** (1) Whenever an accused is called upon in terms of rule 24 to plead to a charge, he or she may plead any of the pleas referred to in rule 60.

(2) The provisions of rule 60(2) and of rule 61 apply with the necessary changes in respect of any trial by a trial officer.

### **Procedure on plea of guilty**

**28.** (1) Whenever an accused arraigned before a trial officer pleads guilty to a charge, the trial officer may enter a finding of guilty and sentence the accused to a fine not exceeding N\$750 or to detention for a period not exceeding 21 days.

- (2) A trial officer may, with regards to an accused who has pleaded guilty to a charge, if -
  - (a) in his or her opinion the offence with which the accused is charged merits a sentence of a fine exceeding N\$750;
  - (b) in his or her opinion the offence with which the accused is charged merits a sentence of detention exceeding a period of 21 days; or
  - (c) requested by the prosecutor to do so,

question the accused with reference to the alleged facts of the case for which he or she is arraigned, so as to ascertain whether he or she admits the allegations to the charge to which he or she has pleaded guilty, and where the trial officer is satisfied that the accused is guilty of that offence such trial officer may convict such accused and impose upon him or her any competent sentence for that offence, but where a preliminary or military police investigation was made the trial officer may peruse statements obtained in that investigations instead of questioning the accused.

(3) An accused may call a witness or give evidence under oath in relation to a charge to which he or she has pleaded guilty.

### **Change of plea of guilty**

**29.** (1) An accused who has pleaded guilty to a charge or a trial officer to whom it appears from any evidence tendered or statement made in terms of subrule (2) or (3) of rule 28 that the accused -

- (a) intended to plead not guilty; or
- (b) has a valid defence to the charge,

may, if it is necessary or desirable to do so, at any time prior to the announcement of the finding on the charge in question change the plea of guilty to one of not guilty.

(2) Whenever a plea has been changed to one of not guilty in terms of subrule (1), the trial must proceed as if that plea had originally been entered and the prosecutor and the accused may call any witness not previously called or re-call any witness.

#### **Procedure on plea of not guilty**

**30.** The provisions of rule 63, 66 up to and including 73 and the provisions of rule 75 and 78 apply with the necessary changes in respect of the trial by a trial officer of an accused who has pleaded not guilty to a charge.

#### **Change of plea of not guilty**

**31.** An accused who has pleaded not guilty to a charge may at any time before the announcement of the finding thereon, change his or her plea to one of guilty and the provisions of rule 28 apply in relation to such plea.

#### **Finding and sentence**

**32.** (1) After hearing evidence led at a trial in terms of rule 30 the trial officer must record and announce the finding on each charge.

- (2) If the accused is found guilty on a charge the trial officer must -
  - (a) peruse the accused's record of service produced by the prosecutor of the court trying the accused;
  - (b) hear the evidence tendered or submission made by the parties in respect of sentencing; and
  - (c) record, sign, date and announce the sentence.

(3) Whenever an accused is convicted by a trial officer of more than one offence such trial officer must impose only one sentence in respect of all the charges.

#### **Publication of sentence**

- 33.** Full particulars of -
  - (a) an accused sentenced by a trial officer;
  - (b) the offence of which he or she was convicted of; and
  - (c) the sentence imposed upon him or her,

must be published in the orders of the unit to which the accused belongs.

**Evidence to be given under oath**

**34.** (1) A person called as a witness at a trial before a trial officer must give his or her oral evidence under oath.

(2) For the purposes of subrule (1), a trial officer is empowered to administer the oath.

**Recording of proceedings**

**35.** A trial officer must record or supervise the recording of-

- (a) the particulars and evidence of each witness called at the trial either in the narrative or in the form of question and answer or partly in the one form and partly in the other;
- (b) any question and answer in terms of rule 28(2)(c) and any statement made by an accused under rule 28(3) as applied to proceedings before a trial officer as contemplated in terms of rule 30;
- (c) every plea tendered or objection made by an accused together with the salient points of any evidence or argument submitted in support thereof or in opposition thereto;
- (d) the changing of any plea;
- (e) the ruling on an objection and the finding on a plea; and
- (f) the justification of the finding and sentence.

**Conversion of trial into preliminary investigation**

**36.** (1) A trial officer other than a commanding officer with delegated powers may at any time during a trial which was not preceded by a preliminary or military police investigation discontinue the trial and direct that a preliminary investigation be held or convert the proceedings into a preliminary investigation and thereafter deal with the case in accordance with the provisions of rule 104.

(2) A trial which has been discontinued in terms of subrule (1) is deemed not to have been held.

(3) Whenever a proceeding is converted into a preliminary investigation in terms of subrule (1), the trial officer must endorse the record to the effect that the evidence taken up to the time of such conversion has been correctly recorded and thereupon such evidence is considered to have been recorded in accordance with the applicable provisions of rule 104.

(4) After conversion of any proceedings in terms of subrule (1), the trial officer may or, at the request of the accused, must recall a witness for further examination.

(5) Whenever a trial officer, other than a commanding officer with delegated powers, has convicted an accused he or she may if in his or her opinion, having regard to the accused's record of service or for any other reason, the accused should be sentenced to punishment beyond his or her jurisdiction -

- (a) strike out his or her finding;
- (b) convert the proceedings into a preliminary investigation; and

(c) take the steps required under this Code for bringing the accused to trial before another military court having jurisdiction to impose such punishment.

(6) The provisions of subrules (3) and (4) apply with the necessary changes in respect of a proceeding converted into a preliminary investigation in terms of subrule (5).

(7) The provisions of rule 116 do not apply in respect of an accused who has pleaded to a charge against him or her and whose trial has been converted into a preliminary investigation in terms of this rule.

### **Joint trials before trial officer**

**37.** More than one person may be charged jointly in the same charge sheet and with the same offence before a trial officer.

## **TRIAL BY COURT MARTIAL**

### **Preparation of charge**

**38.** (1) Whenever a convening authority decides to convene a court martial for the trial of a person which is subject to this Code, he or she may prefer against the accused any charge which in his or her opinion is disclosed by the evidence taken at the preliminary or military police investigation.

(2) The convening authority referred to in subrule (1) must frame a charge referred to in subrule (1) or cause it to be framed under his or her directions, but the provisions of this rule must be considered to have been complied with if the convening authority, where he or she decides to prefer against the accused any charge or charges mentioned in the application for the trial of the accused by court martial, is satisfied that such charge or charges comply with the applicable provisions of this Code and must endorse the charge sheet submitted with the application to the effect that the accused is to be tried by court martial on that charge or those charges.

### **Appointment of members and other officers of a court martial**

**39.** (1) A convening authority must in respect of every court martial to be convened by him or her, appoint-

- (a) a president and other members of the court;
- (b) such waiting members and officers under instruction as he or she considers expedient;
- (c) a prosecutor;
- (d) if the accused will not be represented by a legal practitioner at the trial, a defending officer; and
- (e) in the case of a general court martial or an ordinary court martial in respect of which he or she is of the opinion that such appointment is necessary or desirable, a judge-advocate.

(2) Whenever an accused has requested that his or her defence at his or her trial be undertaken by an officer named by him or her and such request can with due regard to the exigencies of the service be acceded to, that officer must be appointed as defending officer.

**Waiting members**

**40.** (1) A person may not be appointed as a waiting member of a court martial unless he or she is eligible for service as a member of the court martial concerned.

(2) A person appointed as a waiting member of a court martial must at all times hold himself or herself available for service as a member of that court but may, when the court is composed of members in respect of whom no objection has been made and sustained, be excused by the president from further attendance at the trial.

**Officers under instruction**

**41.** An officer of the Defence Force may be appointed as an officer under instruction at a court martial and an officer so appointed must attend all the proceedings of that court, whether open or closed, but may not take part in the proceedings, deliberations or decisions of that court.

**Prosecutor**

**42.** An officer of the Defence Force may be appointed as prosecutor in a court martial if the convening authority is of the opinion that that officer is suitably qualified to prosecute a person charged before that court and is of equal or higher rank to the accused or to the highest rank of any accused in a joint trial.

**Defending officer**

**43.** An officer of the Defence Force may be appointed as defending officer to undertake the defence of a person charged with an offence before a court martial and who is not represented by a legal practitioner.

**Qualifications of judge-advocate**

- 44.** A person may be appointed as judge-advocate of a court martial if he or she-
- (a) is entitled to practice and appear as a legal practitioner before High Court or any other court in Namibia;
  - (b) is a magistrate;
  - (c) is duly qualified to be admitted as a legal practitioner as contemplated in section 5(1) of the Legal Practitioners Act, 1995 (Act No. 15 of 1995); or
  - (d) is an officer of the Defence Force and, in the opinion of the convening authority concerned, has the necessary legal knowledge and experience to perform properly the functions of a judge-advocate either generally or in a particular case.

**Recusal of members of court martial or judge-advocate**

**45.** (1) A person appointed as a member, waiting member or judge-advocate of a court martial and who-

- (a) is related to an accused or the complainant by affinity or consanguinity in the first or second degree;
- (b) has such knowledge concerning the facts of the case to be heard by the court that his or her decision is likely to be prejudiced thereby;

- (c) bears an accused to be tried by the court martial, such animosity as is likely to prejudice his or her decision; or
- (d) for any other reason is likely to prejudice his or her decision,

must recuse himself or herself and notify the convening authority of that fact in writing before the date on which the court is due to assemble giving full particulars of the reasons for such recusal.

(2) A person appointed as a member or judge-advocate of a court martial who on the date on which the court is due to assemble or any date thereafter-

- (a) becomes related to an accused or the complainant by affinity in the first or second degree;
- (b) gains such knowledge concerning the facts of the case to be heard by the court that his or her decision is likely to be prejudiced thereby;
- (c) develops towards an accused who is being tried by the court martial, such animosity as is likely to prejudice his or her decision; or
- (d) becomes aware of any reason likely to prejudice his or her decision,

must recuse himself or herself and immediately notify the president of the court of that fact giving full particulars of the reasons for the recusal or, if the president recuses himself or herself such president of the court must act in accordance with subrule(1).

(3) On receipt of reasons for recusal, referred to in subrule (1) or (2), the president must immediately furnish full particulars thereof to the appropriate convening authority and if the court is in session or after it has been assembled pursuant to the convening order, the president must adjourn that court for a specific period pending the instructions of such convening authority.

(4) No person who has recused himself or herself in terms of subrule (1) or subrule (2) is required or permitted to serve on the court martial in question unless, in the opinion of the convening authority, the reasons advanced for the recusal do not fall within the provisions of paragraph (a), (b), (c) or (d) of subrule (1), or subrule (2) as the case may be.

### **Convening of court martial**

**46.** A court martial is convened by means of a convening order issued under the hand of a convening authority having jurisdiction or issued under the hand of an officer under the command of such a convening authority duly authorised to issue and sign orders in the name and on behalf of such convening authority.

### **Contents of convening order**

- 47.** (1) Every convening order must set forth-
- (a) the full names, rank and force number of the accused to be tried under that order;
  - (b) the time and place for the assembling of the court martial;
  - (c) the full names and rank of the president and every other member of the court martial and the unit or service of the Defence Force to which the president and every such member belongs;

- (d) the full names and rank of every waiting member and officer under instructions, if one has been appointed;
- (e) where a judge-advocate has been appointed to the court martial, his or her full names and rank;
- (f) the full names and rank of the prosecutor; and
- (g) where a defending officer has been appointed, his or her full names and rank.

(2) A convening authority may in a convening order issued by him or her, authorise the court martial referred to therein to try, in addition to the accused mentioned therein, any other person brought before it for trial on a charge sheet signed by such convening authority.

**Duties of convening authority and commanding officer of accused after court martial has been convened**

**48.** (1) A convening authority must as soon as possible after a court martial has been convened by him or her, but not later than two days before the trial is due to commence, furnish

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- (a) the president with the original of-
  - (i) the convening order; and
  - (ii) the charge sheet;
- (b) each of the other members of that court, the waiting members and the officers under instruction, with a copy of the convening order;
- (c) the accused and the judge-advocate, if one has been appointed, with a copy of each of the documents mentioned in sub-paragraph (i) and (ii) of paragraph (a) and a certified copy of the record of the preliminary or military police investigation held in connection with the case;
- (d) the prosecutor with a copy of the documents, mentioned in paragraph (c) together with the exhibits produced at the preliminary or military police investigation and the record of service of the accused;
- (e) the commanding officer of the accused with a copy of-
  - (i) the convening order;
  - (ii) the charge sheet; and
  - (iii) a list of the witnesses required to give evidence at the trial.

(2) A commanding officer must upon receipt by him or her of the documents mentioned in paragraph (e) of subrule (1) arrange for the attendance of the accused and all the witnesses at the trial at the time and place specified in the convening order.

**Proceedings of court martial in closed court**

**49.** (1) A court martial must at the time and place specified in the convening order assemble in closed court and the president must satisfy himself or herself-

- (a) that the members and judge-advocate, if one is appointed, are present and qualified to serve on the court martial;
- (b) that the waiting members are present and qualified to serve as members of the court martial concerned;
- (c) that the charge sheet and the convening order is properly signed by the appropriate authority and are in all other respects in order.

(2) If a member of the court martial is, in the opinion of the president, not qualified to serve on that court the president may discharge such member from service and, subject to subrule (3), call upon a qualified waiting member to take the place of such discharged member.

(3) If no qualified waiting member, referred to in subrule (2), is available for service on the court martial the president must immediately advise the convening authority to that effect who may thereupon appoint another qualified officer to take the place of the discharged member and amend the original convening order accordingly, but where, in consequence of the discharge in terms of subrule (2) of any member of a court martial, the number of members thereof is not reduced below the minimum number required in terms of this Code the president may either advise the convening authority in accordance with this subrule or proceed with the trial.

(4) Whenever the judge-advocate fails to attend the court martial at the time and place specified in the convening order or the president is not satisfied that the judge-advocate in attendance is qualified to serve on that court, the president must forthwith advise the convening authority who must take such steps as may be necessary for the attendance at that court of a judge-advocate or, if he or she agrees with the president that the judge-advocate in attendance is not qualified, for the appointment to the court of a duly qualified judge-advocate.

(5) Whenever the president is not satisfied that the convening order or charge sheet is properly signed or that it is in all other respects in order he or she must advise the convening authority who must sign it if he or she agrees with the president and is satisfied that it is the convening order issued or the charge sheet preferred by him or her or remedy any other defect therein by suitably amending the convening order or charge sheet, as the case may be, or by substituting it with a new convening order or charge sheet.

(6) Whenever a person mentioned in a convening order fails to attend the court martial at the time and place specified therein the president of the court must advise the convening authority accordingly.

### **Proceeding of court martial in open court**

**50.** Whenever the president of a court martial is satisfied that the court is properly constituted as provided in section 74 or 75 of the Schedule, as the case may be, the court must, subject to the provisions of section 80(3) of the Schedule, be opened and the trial must proceed in the presence of the accused, his or her legal representative and the prosecutor.

### **Objections to members of court martial**

**51.** (1) Whenever a court martial has been opened as provided in rule 50 the president must read to the accused the names of the members of the court and must, as every name is read to the accused, ask the accused if he or she objects to be tried by that member.

(2) Where the accused objects under section 77 of the Schedule to be tried by the president or any other member, the president or such other member, as the case may be, must withdraw while the objection concerned is being determined and the remaining members must thereupon hear the objection and any argument or evidence that may be advanced or tendered in support of or against the objection.

(3) If the objection referred to in subrule (2) against the president is upheld or if there is an equality of votes, the court must adjourn and the most senior ranking member of such remaining members must report to the convening authority who must as soon as possible thereafter appoint any other qualified officer as president of that court martial.

(4) If the objection against the president is overruled or where the accused does not object to be tried by the president, the court martial must hear separately every objection against any other member of the court martial and must hear any argument advanced or evidence tendered in support of or against the objection.

(5) Where objection has been made against a member other than the president and such objection has not yet been decided, the member in question may hear an objection against other members and take part in the deliberations and vote thereon.

(6) Whenever an objection against a member other than the president is upheld, the president must discharge such member from further service on the court martial and call upon any other waiting member to take the place of such discharged member.

(7) Where no qualified waiting member is available to take the place of a member discharged in terms of subrule (6), the president of the court martial must adjourn the court and report to the convening authority who must appoint another officer to take the place of such discharged member, but if the number of members of the court martial is, in consequence of the discharge of such member, not reduced below the minimum number required in terms of this Code the proceedings may, if the court considers it expedient or on the instructions of the convening authority, be continued before the remaining members.

(8) An accused arraigned before a court martial may object under section 77 of the Schedule to be tried by a person appointed under subrule (3) as president of the court martial or a person called upon in terms of subrule (6) or appointed in terms of subrule (7) to take the place of a discharged member, and the provisions of this rule applies with the necessary changes in relation to all matters connected with such objection.

### **No objection against certain officers**

**52.** An accused arraigned before a court martial may not object against the judge-advocate, the prosecutor, an officer under instruction, or a waiting member who has not been called upon to take the place of a member discharged in terms of rule 51(6).

### **Members of court martial and judge advocate to take oath or make affirmation**

**53.** Whenever a court martial is composed of members in respect of whom no objection has been made and sustained, the applicable oath prescribed by rule 120 must in accordance with the provisions of section 78(1) of the Schedule be administered to the members, the judge-advocate and any officers under instruction and, unless otherwise provided in this Code, the proceedings of the court thereafter must be conducted in the presence of all such members and such judge-advocate.

### **Interpreter and shorthand writer to take oath or make affirmation**

**54.** An interpreter or shorthand writer must, prior to performing duties at a court martial, be sworn in and for that purpose the president or judge-advocate may administer to such interpreter or shorthand writer the appropriate oath prescribed by rule 120, but an interpreter or shorthand writer who has been duly sworn in, in respect of a case, may perform the duties of interpreter or shorthand writer, as the case may be, in any other case mentioned in or authorised to be heard by the convening order issued in relation to the case in respect of which such interpreter or shorthand writer was been sworn in.

**Rights of accused not supplied with documents or unable to prepare defence**

**55.** The president of a court martial which is satisfied that the accused has not been furnished in terms of rule 48(1)(c) with the documents and record mentioned therein or that the accused has not had sufficient time to prepare his or her defence may on application made by the accused, before pleading to any charge, adjourn the proceedings to a date fixed by the court in order for such documents to be supplied to the accused or that he or she may prepare his or her defence.

**Accused to plead to every charge**

**56.** The prosecutor must, after the members of a court martial, the interpreter or shorthand writer have been sworn in, read to the accused every charge preferred against him or her and the president must call upon the accused to plead separately to each charge.

**Rights of accused before pleading at court martial**

**57.** An accused arraigned before a court martial may, when called upon to plead in terms of rule 56, before pleading object-

- (a) to the trial on the ground that that court lacks the necessary jurisdiction as provided for in section 72 or 73 of the Schedule, as the case may be;
- (b) to any charge on the ground that it does not disclose an offence cognizable by that court; or
- (c) to both the trial and any charge on the grounds mentioned in paragraphs (a) and (b).

**Procedure on objection to jurisdiction**

**58.** (1) Whenever an objection has been made under rule 57(a), the court martial must hear evidence or arguments tendered in support of or against the objection and record its finding thereon.

(2) If the court referred to in subrule (1) overrules the objection the trial must proceed.

(3) If the court martial upholds the objection, it must announce its finding in open court and thereupon report such finding to the convening authority who must take such steps as may be required under this Code for the trial of the accused by court martial of competent jurisdiction and may order that the accused be released from arrest without prejudice to re-arrest.

**Procedure on objection to charge**

**59.** (1) Whenever an objection has been made under rule 57(b), the court martial must hear evidence tendered in support of or against the objection and record a finding thereon.

(2) If the court martial finds that the objection is well founded but that the defect can, without prejudice to the accused in his or her defence, be remedied by an amendment of the charge the court may direct the prosecutor to amend the charge and may adjourn for a period which, in the opinion of that court, will be sufficient to enable the accused to prepare his or her defence to the charge as amended.

(3) If the court martial finds that the objection is well founded and that the defect in the charge cannot be remedied without prejudice to the accused in his or her defence it must uphold the objection and dismiss the charge.

(4) A person arraigned on a charge dismissed in terms of subrule (3) must be considered to have been found not guilty of that charge.

(5) If the court martial overrules such objection the trial must proceed on the charge against which the objection was made.

### **Pleas at trial by court martial**

**60.** (1) Whenever an accused called upon to plead to a charge in terms of rule 56 has not objected in terms of rule 57 or has objected in terms of that rule and the objection has been overruled he or she may plead -

- (a) that he or she is guilty of the offence charged of or of any other offence of which he or she could in terms of section 89 of the Schedule be convicted on that charge;
- (b) that he or she is not guilty;
- (c) that he or she has already been convicted of the offence with which he or she is charged;
- (d) that he or she has already been acquitted of the offence with which he or she is charged;
- (e) that he or she has received Presidential pardon for the offence charged;
- (f) that by virtue of section 58 or 59 of the Schedule or of rule 117, as the case may be, he or she is not triable for the offence with which he or she is charged; or
- (g) that under rule 115 he or she has been freed and discharged from all liability to prosecution for the offence charged.

(2) Two or more pleas may be pleaded together, but the plea of guilty may not be pleaded with any other plea to the same charge.

(3) An accused who fails or refuses to plead to a charge when called upon to do so in terms of rule 56 must be considered to have pleaded not guilty to that charge.

(4) Whenever an accused pleads not guilty to the offence charged he or she, or his or her legal representative may make a statement indicating the basis of his or her defence.

### **Pleas other than guilty or not guilty**

**61.** Where an accused in a court martial tenders a plea other than guilty or not guilty the court must hear and record evidence or argument tendered in support or rebuttal thereof and if it upholds the plea the court must acquit the accused, but if it overrules the plea the court must require the accused to plead guilty or not guilty to the charge and thereupon proceed with the trial in terms of this Code.

### **Procedure on plea of guilty**

**62.** (1) Whenever an accused before a court martial pleads guilty to a charge the court must peruse the preliminary or military police investigation or question the accused with reference to the alleged facts of the case in order to ascertain whether the offence was actually committed by the accused and whether he or she admits the allegations in the charge to which he or she has pleaded guilty and if so satisfied convict the accused on his or her plea of guilty to that charge and impose a competent sentence, but that court must if it is not so satisfied or where an accused pleads guilty to a capital offence enter a plea of not guilty.

(2) Whenever an accused pleads guilty to an offence, of which he or she could in terms of section 89 of the Schedule be found guilty on the charge preferred against him or her, the prosecutor may accept the plea or endeavour to prove the guilt of the accused on the charge set forth in the charge sheet.

(3) The provisions of subrule (1) applies with the necessary changes in respect of a plea of guilty which has been accepted by a prosecutor in accordance with the provisions of subrule (2).

#### **Amendment of charge after plea**

**63.** Whenever in the course of a trial by court martial there appears, after the accused has pleaded either guilty or not guilty to a charge, to be a variance between the statement of the offence in that charge and the evidence offered in proof thereof or where there appears to be any other error in the charge the court may, at any time prior to announcing its finding, if it considers that the defect can, without prejudice to the accused in his or her defence, be remedied by an amendment of the charge direct the prosecutor to suitably amend the charge and may adjourn the court for any period which in its opinion is sufficient to enable the accused to prepare his or her defence to the charge as amended.

#### **Change of plea of not guilty**

**64.** An accused who has pleaded not guilty to a charge may, at any time prior to the announcement of the finding thereon, change his or her plea to one of guilty and the provisions of rule 62(1) applies in respect of such changed plea.

#### **Power to withdraw charge or stop prosecution**

65. The prosecutor may with the consent of the convening authority -

- (a) withdraw a charge prior to the accused pleading to that charge, in which event the accused is not entitled to a verdict of acquittal in respect of that charge;
- (b) stop the prosecution at any time after an accused has pleaded, but prior to conviction in respect of that charge, in which event the court martial trying the accused must acquit the accused in respect of that charge.

#### **Opening address by prosecutor**

**66.** Whenever an accused has pleaded not guilty to any charge preferred against him or her the prosecutor may, and if required by the court martial the prosecutor must, make an opening address by explaining the charge preferred against the accused and without commenting thereon give an outline of the evidence which he or she intends to adduce in support of such charge.

#### **Evidence for the prosecution**

**67.** (1) After the opening address as provided for under rule 66, if any, the prosecutor must lead the evidence of the witnesses for the prosecution.

(2) A witness may be cross-examined by the accused and thereafter re-examined by the prosecutor in relation to the evidence given under cross-examination.

(3) Where the prosecutor is himself or herself a witness for the prosecution he or she must as far as possible give evidence before calling any other witness and may, after being cross-examined by the accused, give such further evidence in relation to his or her evidence under cross-examination as he or she may consider necessary.

(4) Whenever a prosecutor at a court martial intends to call a witness whose evidence was not taken at the preliminary or military police investigation, he or she must within a reasonable time before the witness is called, advise the accused thereof and furnish him or her with a copy of a statement made by the witness containing the evidence which the prosecutor intends to adduce.

(5) Whenever a prosecutor calls a witness referred to in subrule (4), but fails to comply with the provisions of that subrule, the court must after the witness has given his or her evidence either adjourn the proceedings or, upon the request of the accused, allow the cross-examination of the witness to be postponed.

(6) Subject to the provisions of rule 94(2), a prosecutor is not obliged to call all the witnesses who gave evidence at the preliminary or military police investigation, but where a prosecutor closes the case for the prosecution without having called all such witnesses he or she must advise the court thereof and make any witness not called by him or her available for the purpose of being called either by the accused or by the court.

(7) The prosecutor may at any time before he or she closes the case for the prosecution produce to the court martial any document or other evidence which on its mere production is admissible in evidence.

(8) When the prosecutor has adduced all the evidence which he or she wishes to lead in proof of the charges preferred against the accused he or she must close the case for the prosecution.

### **Rights of accused at close of case for prosecution**

- 68.** Upon the close of the case for the prosecution, the accused may-
- (a) apply to be acquitted of any charge preferred against him or her on the ground that no prima facie case has been established against him or her;
  - (b) close his or her case without tendering any evidence in his or her defence; or
  - (c) tender evidence in his or her defence and thereafter close his or her case.

### **Meaning of prima facie**

**69.** For the purpose of rule 68, a prima facie case is considered established against an accused if on the evidence on record a reasonable person might convict the accused of the charge preferred against him or her or of any other charge of which he or she could in terms of section 89 of the Schedule be convicted on.

### **Rights of accused where application for acquittal is refused**

**70.** Whenever an application in terms of rule 68(a) is refused the accused may in terms of paragraph (b) of that rule close his or her case without tendering evidence, or in terms of paragraph (c) of that rule tender evidence in his or her defence.

### **Opening address by defence**

**71.** Before tendering evidence for the defence in terms of rule 68(c), an accused may make an opening address by outlining, without commenting thereon, the evidence which he or she intends to rely upon in his or her defence.

**Evidence for defence**

**72.** (1) After the opening address as provided for under rule 71, if any, the accused may give evidence himself or herself, lead evidence of witnesses for the defence and thereafter close the case for the defence.

(2) A witness for the defence, and where the accused gives evidence the accused himself or herself, may be cross-examined by the prosecutor and such witnesses may thereafter be re-examined by the accused or, in the case of the accused, by his or her legal representative, in relation to evidence given under cross-examination.

**Court martial may examine, recall or call witnesses**

**73.** A member of a court martial may put to a witness such questions as he or she considers necessary for the purpose of arriving at a just decision in the case and the court may at the request of the prosecutor, the accused, the judge-advocate or mero motu recall a witness or call a person as a witness.

**Judge-advocate may examine witnesses**

**74.** A judge-advocate may advise the president to put to a witness further questions as will in his or her opinion assist the court martial in arriving at a just decision in the case.

**Prosecution and defence may address court martial at conclusion of evidence.**

**75.** (1) After all the evidence has been adduced the prosecutor may address the court martial and thereafter the accused may address that court.

(2) The prosecutor may reply on any matter of law raised by the accused in his or her address referred to in subrule (1) and may, with leave of the court, reply on any matter of fact raised by the accused in his or her address.

**Opinion by judge-advocate**

**76.** (1) The judge-advocate, if one has been appointed, must after the closing addresses, if any, referred to in rule 75 explain and express his or her opinion on any legal issue raised during the trial.

(2) A member of the court martial may at any time request the judge-advocate to explain a legal issue raised during the trial, but where such explanation is required when that court is closed to consider its finding the request must be made and the explanation given in the presence of the accused, his or her legal representative and the prosecutor after that court has been specially opened for that purpose.

**Finding to be considered in closed court**

**77.** (1) After the opinion of the judge-advocate, if one has been appointed, is expressed as provided for in rule 76 or where a judge-advocate has not been appointed, after the closing addresses referred to in rule 75, the court must close for the purpose of considering its finding.

(2) No person other than the members of the court martial and any officers under instruction may be present during the deliberations of the court after it has been closed for the purpose specified in subrule (1).

**Quantum of evidence required for conviction**

**78.** (1) A court martial may after the accused has closed his or her case, whether without or after tendering evidence in his or her defence, convict the accused of the offence charged or any other offence of which he or she could under section 89 of the Schedule be convicted on the charge if, on the evidence led at the trial, it is satisfied beyond a reasonable doubt that he or she is guilty of the offence in question.

(2) The decision referred to in subrule (1) must be arrived at as provided for under rule 86.

**Announcement of finding**

**79.** The finding of the court martial on every charge preferred against an accused must be announced in open court and if the accused is acquitted on all the charges and no other charges are pending against him or her, he or she must, if arrested or detained, be released from such arrest or from such detention.

**Procedure after conviction**

**80.** (1) Where an accused is convicted of an offence the prosecutor must, after the announcement of the court martial's finding, read and produce to that court the accused's record of service and may lead evidence regarding the prevalence in the Defence Force of any such offence of which the accused has been convicted.

(2) The president must ask the accused whether he or she admits or denies the statements contained in his or her record of service produced in terms of subrule (1) and if he or she denies such statement the court martial must hear and record any evidence or argument that may be tendered by the prosecutor in proof, or by the accused in rebuttal, thereof and must in closed court consider, and in open court announce, its finding thereon.

(3) The accused may, after his or her record of service has been produced and evidence, if any, has been led in terms of subrule (1) tender evidence in mitigation of sentence and a witness giving such evidence may be -

- (a) cross-examined by the prosecutor;
- (b) re-examined by the accused in relation to such evidence given under cross-examination; and
- (c) questioned by the court martial.

(4) The prosecutor may after evidence has been tendered, as contemplated in subrule (3), address the court martial on the question of sentence and the accused may then address that court in mitigation of sentence.

(5) After hearing such addresses, if any, the court martial must close for the purpose of considering the sentence.

(6) When the sentence of the court martial has been determined in accordance with this Code the president must record it on the record of the proceedings, date and sign it and forthwith announce it in open court.

(7) When announcing the sentence of a court martial in terms of subrule (6), the president of the court must inform the accused that the sentence will not be enforced or executed unless and until the finding and sentence have been confirmed in accordance with the applicable

provisions of this Code and that he or she has the right under section 101 of the Schedule to lodge such written representation as he or she may wish to make concerning the validity or justice of any finding or the sentence to the confirming authority within forty-eight hours after the sentence.

### **Detention of accused pending confirmation of finding and sentence**

**81.** (1) Subject to the provisions of subrules (2) and (3) an accused who has been convicted and sentenced by a court martial must be detained in custody pending confirmation of the finding and sentence, but the appropriate convening authority may direct that, pending such confirmation, the accused be released from custody without prejudice to re-arrest.

- (2) An accused who has been sentenced by a court martial-
  - (a) to a reprimand;
  - (b) save as provided in subrule (3), to a fine;
  - (c) to reduction to a lower rank, to non-commissioned rank or to the ranks; or
  - (d) to reduction in seniority in rank,

must be released from custody immediately after the announcement of the sentence.

(3) An accused whose trial has been proceeded with or commenced at a time when he or she was no longer subject to this Code must if he or she is sentenced to a fine be released from custody upon payment of such fine.

### **Confirmation of finding and sentence**

**82.** (1) The president or, if one was appointed, the judge-advocate must, as soon as possible after the announcement of the sentence, submit the record of the proceedings to the officer who convened the court martial for confirmation.

(2) If the officer who convened the court martial is not empowered to confirm all or any of the findings and the sentence, or reserves confirmation of a finding or the sentence in terms of section 103 of the Schedule, he or she must without delay submit the record of the proceedings to the officer under whose warrant he or she convened that court.

(3) A confirming authority may not confirm a finding or sentence of a court martial prior to the expiration of the period of forty-eight hours within which any representations referred to in section 101 of the Schedule may be made.

### **Publication and promulgation of sentence**

**83.** Every sentence of a court martial must, as soon as possible after confirmation thereof, be promulgated either on parade according to the custom of the service or in such manner as the accused's commanding officer may direct and be published in unit orders, but no sentence referred to in section 104 of the Schedule may be so promulgated or published unless and until the proceedings of the case have been reviewed.

### **Recording of evidence**

**84.** (1) The president or, if one was appointed, the judge-advocate is responsible for the proper recording of the evidence led at the trial in a court martial.

(2) Evidence led during a trial must be recorded in the form of question and answer or in narrative form or partly in the one and partly in the other as the president or, if one was appointed, the judge-advocate may direct or decide and the record of such evidence must clearly indicate which evidence was given during examination in chief, under cross-examination or in re-examination.

### **Recording of proceedings**

**85.** (1) The president or, if one was appointed, the judge-advocate is responsible for the keeping of a proper record of the proceedings at the trial.

- (2) Such record, referred to in subrule (1), must be clear and concise and must reflect-
- (a) the evidence led at the trial;
  - (b) any application, objection, plea, submission or argument made in the course of the trial;
  - (c) any explanation given or opinion expressed by the judge-advocate in terms of rules 76 and 93; and
  - (d) the ruling of the court martial on any application, objection, plea, submission or argument.

(3) A documentary exhibit produced at the trial must be attached to and such exhibit forms part of the record of proceedings.

(4) Where a written address or written heads of argument has been submitted to the court martial in relation to an application, objection, plea, or submission the president or, if one was appointed, the judge-advocate must note in the record any departure from or amplification of such address or heads of argument which emerges from the oral address delivered in relation thereto.

(5) The president or, if one was appointed, judge-advocate must mark or supervise the marking in alphabetical order of all documentary exhibits produced at the trial and must mark in numerical order all other exhibits produced thereat.

### **How decisions or vote of court martial to be arrived at or determined**

**86.** (1) A court martial may be closed for the purpose of considering its decision on any question arising at the trial, but must be closed for the purpose laid down in rule 80(2) and of considering its finding and the sentence.

(2) Whenever it is necessary for a court martial to consider any question the president must call upon each member of that court in order of seniority, commencing with the most junior member, to express his or her views on such question in the presence of the other members and the president must after all the members have expressed their views express his or her own view on that question.

(3) The vote of the members of a court martial on any question must be taken by ballot and the president of that court must destroy all ballot papers immediately after such vote has been taken.

### **Members of court martial to take oath or make affirmation only once in relation to a case**

**87.** (1) The members of a court martial who have been sworn in as provided in section 78 of the Schedule in relation to a case must be considered to have been so sworn in, in relation to any other case thereafter brought before court martial for trial.

(2) The provisions of subrule (1) does not affect the right of an accused appearing before such court martial in a subsequent case to object in terms of section 77 of the Schedule to a member of that court and whenever an objection against such member is made and sustained an officer, against whom no such objection has been made and sustained, called upon or appointed to take the place of such member must be sworn in as provided in section 78 of the Schedule.

#### **Accused may consult his or her legal representative and procure witnesses**

**88.** An accused to be tried by court martial must, whether or not he or she is in custody, be afforded every reasonable opportunity and facility -

- (a) of consulting with his or her legal representative;
- (b) of interviewing prospective defence witnesses, either by himself or herself or together with his or her legal representative; and
- (c) of procuring the presence of any witness at his or her trial.

#### **Legal representative may speak for accused**

**89.** At a trial by court martial the legal representative for the accused may in all respects act and speak for and on behalf of the accused, but the legal representative may not on behalf of an accused tender a plea of guilty or not guilty to a charge, or give evidence.

#### **Illness of accused**

**90.** (1) Whenever it appears to a court martial that the accused is medically unfit to stand trial or to continue with his or her trial, whether from the production of a medical certificate or from a medical examination of the accused caused to be made as a consequence of such certificate or otherwise, the court martial may adjourn the proceedings for a period not exceeding fourteen days at any one time.

(2) If the adjournment referred to in subrule (1) is for a period exceeding three days the president of the court martial must forthwith advise the convening authority of the adjournment and the convening authority may thereupon, with due regard to the nature of the offence and the period during which the accused is likely to be unable to stand his or her trial, release the accused without prejudice to re-arrest.

(3) The convening authority may, at any time during the adjournment referred to in subrule (1), direct that the court martial be dissolved in so far as the trial of the accused is concerned and the proceedings before such court must thereupon lapse.

(4) The provisions of rule 116 do not apply in respect of an accused arraigned before a court martial which has been dissolved in terms of subrule (3) and any such accused who has been released from arrest without prejudice to re-arrest in terms of subrule (2) may, notwithstanding the provisions of rule 117(1) be tried de novo by any other court at any time when he or she is medically fit to stand his or her trial.

#### **Separation of trials**

**91.** (1) Whenever an application has been made under section 83(2) of the Schedule by an accused in a court martial to be tried separately from any other accused, joined with him or her in the same charge sheet, the court must hear evidence or any argument tendered in support thereof or in opposition thereto and record a ruling thereon.

- (2) If the application, referred to in subrule (1), is -
- (a) granted that court must direct that the trial of that accused be held separately from the trial of any other accused joined with such accused in the same charge sheet; and
- (b) refused that court must proceed with the trial of all the accused as charged.
- (3) Where any trials have been separated in terms of this rule or section 83(3) of the Schedule the prosecutor may determine the sequence in which those trials are to be held.

### **General duties of president of court martial**

**92.** (1) In addition to the duties otherwise imposed upon him or her by this Code the president of a court martial must ensure that -

- (a) the trial is conducted in accordance with this Code, the Namibian Constitution and in a manner befitting a court of justice;
- (b) the accused does not suffer any disadvantage due to his or her position within the defence force, his or her ignorance or incapacity to examine or cross-examine witnesses, or to make his or her own defence clear and intelligible, or otherwise; and
- (c) an officer under instruction does not express an opinion to the court martial on a matter relating to the trial or on the sentence prior to the announcement in open court of the finding and sentence, if any.

(2) Where a judge-advocate has not been appointed to a court martial the president of that court is responsible for the safe custody of the record of the proceedings and of every exhibit produced at the trial.

### **General duties of judge-advocate**

**93.** In addition to the duties otherwise imposed upon him or her by this Code a judge-advocate must at any time after he or she has been appointed to act as such at a court martial -

- (a) when requested to do so, furnish the accused or the prosecutor with his or her opinion on any question of law or procedure in relation to the trial or any charge, but where such a request is made during any sitting of that court the permission of that court must be obtained;
- (b) advise that court of any defect in its constitution or in the charge sheet or any charge;
- (c) advise that court on any question of law or procedure that may arise during the trial;
- (d) be present at every sitting of that court whether in open or closed court, except when the court has been closed to consider the finding and the sentence, if any;
- (e) equally with the president of that court, ensure that the accused does not suffer any disadvantage for any of the reasons specified in rule 92(1)(a); and
- (f) be responsible for the safe custody of the record of the proceedings of that court and of any exhibit produced thereat.

**General duties of prosecutor and legal representative**

**94.** (1) In addition to the duties otherwise imposed by this Code, it is the duty of every prosecutor and of any legal representative representing an accused at a trial by court martial-

- (a) to assist the court in the administration of justice;
- (b) to treat the court and every member thereof and the judge-advocate with due respect;
- (c) to present the case of the accused fairly;
- (d) to act in conformity with the provisions of this Code and the practice of the civil courts in Namibia, in relation to the examination, cross-examination and re-examination of witnesses;
- (e) not to refer to any matter which is not relevant to a charge preferred against the accused; and
- (f) not to state as a fact, any matter which has not been proved or which is not intended to be proved in evidence.

(2) In addition to the duties imposed by subrule (1), the prosecutor must bring before that court the whole transaction on which any charge is based and must not take any unfair advantage of or withhold from that court any evidence in favour of the accused, but where a prosecutor closes the case for the prosecution in terms of rule 67(6) without having called all the witnesses who gave evidence at the preliminary or military police investigation and advises the court that any witness not called by him or her is available to be called either by the court or the accused, he or she must not thereby be considered to have failed to comply with the provisions of this subrule.

**Death or absence of judge-advocate**

**95.** (1) If after the commencement of a trial by court martial the judge-advocate, if one has been appointed, dies or is for any other reason, including recusal under rule 45, unable to attend the trial proceedings the president must report to the convening authority who must in the case of such death or where, in his or her opinion, it is inexpedient to delay the continuance of the proceedings, dissolve the court martial and may thereupon, in his or her discretion release the accused without prejudice to re-arrest.

(2) The provisions of rule 116 does not apply in respect of an accused arraigned before a court martial which has been dissolved under subrule (1) and any such accused who has been released from arrest without prejudice to re-arrest may, notwithstanding the provisions of subrule (1) of rule 117, at any time thereafter be tried de novo by any other court.

**REVIEW OF FINDING AND SENTENCE****Review of sentences passed by commanding officer with delegated powers**

**96.** A commanding officer with delegated powers who has convicted an offender must as soon as possible cause the record of proceedings to be forwarded to the commanding officer, from whom he or she derives such powers, for subsequent submission to the appropriate convening authority for review, in terms of section 65 of the Schedule.

**Review of sentences of life imprisonment and other severe sentences**

**97.** (1) A confirming authority who has exercised the powers conferred upon him or her by section 102 of the Schedule in respect of any court martial, or where a confirming authority has reserved confirmation of any finding or the sentence of any court martial in terms of section 103 of the Schedule must if the sentence, as confirmed or varied by him or her is a sentence referred to in section 104 of the Schedule, as soon as possible after the expiration of a period of three days from the date of confirmation or variation of the sentence submit the record of proceedings and the exhibits produced at the trial to the chief of staff for subsequent submission, within a period of three days from such submission to the chief of staff, to the council of review or the nearest board of review.

(2) Whenever a confirming authority submits a record of proceedings and exhibits for review as provided in subrule (1), he or she may for the information of the council or board of review make such comments and observations thereon as he or she may consider necessary.

(3) The chief of staff must, upon receipt by him or her of the record of proceedings referred to in subrule (1), cause a sufficient number of typewritten copies thereof and of any representations, comments or observations that may have been made by the confirming authority in terms of subrule (2) or by the offender in terms of section 110 of the Schedule, and without delay furnish the chairperson of the council of review or the chairperson of the nearest board of review with the original and one copy, and to furnish each other member of the council or such board, as the case may be, with one copy thereof.

(4) Whenever the proceedings of a case are to be reviewed by the council of review in terms of subrule (1), such proceedings are not reviewable by any other reviewing authority.

**Application by offender for review by council of review**

**98.** (1) An offender may apply within three months after the date of his or her conviction, in terms of section 111 of the Schedule, for the review of the proceedings of his or her case by the council of review and must in such application specify the grounds on which the review is sought.

(2) The council of review may after the expiration of a period of three months from the date of conviction of any offender, but not later than two years after that date, on good cause shown by such offender grant him or her leave to apply for review by the council of the proceedings of his or her case and such application must specify the grounds on which the review is sought.

(3) An application under subrule (1) or (2) must be handed to the offender's commanding officer who must submit it to the chief of staff through the normal service channels.

(4) The chief of staff must, upon receipt by him or her of an application under subrule (1) or (2), cause at least five copies of the application thereof and of the record of the proceedings of the case to be made and must furnish the prosecutor with one copy of such application and of the record of proceedings.

(5) The prosecutor may within seven days, after receipt by him or her of the documents referred to in subrule (4), furnish the chief of staff with such representations as he or she may wish to make in relation to the grounds upon which the offender has applied for the review of the proceedings of his or her case.

(6) The chief of staff must as soon as possible after receipt by him or her of the prosecutor's representations in terms of subrule (5), if any, cause at least five copies thereof to be made and must as soon as possible thereafter furnish the offender with one copy thereof and the chairperson of the council of review with the original and one copy of the application for review, the record of proceedings and the prosecutor's representations, and must furnish each other member of the council with one copy of such representation and application.

**Meaning of expression “chief of staff” in rules 97 and 98**

**99.** A reference to the chief of staff in rule 97 or 98 must in relation to a case heard during service, be construed as including a reference to the local representative of the chief of staff personnel.

**Review by council of review**

**100.** (1) The council of review must, at a time and place fixed by the chairperson thereof, review in private the proceedings of a case referred to it in terms of the Military Discipline Code.

(2) Whenever a case referred to in section 113 of the Schedule is to be reviewed by the council of review the chief of staff personnel must timely notify the offender, or his or her legal representative, and the officer who prosecuted at the trial, or such other person appointed in terms of that section to appear before the Council on behalf of the prosecution, of the time and place fixed in terms of subrule (1).

(3) The council of review must, in a case reviewed by it, endorse its decision upon the record of the proceedings and if it interferes in any manner with a finding or sentence the council of review must furnish written reasons for such interference.

(4) Whenever the council of review has endorsed, substituted, varied or increased any sentence, the sentence so endorsed, substituted, varied or increased must be executed with immediate effect.

**Powers, duties and qualifications of members of Board of Review**

**101.** (1) The powers and duties of the board of review is the same as those conferred upon a council of review in section 114 of the Schedule.

(2) The chairperson, appointed by the Chief of the Defence Force in terms of section 144 of the Schedule, must hold the rank of colonel, the equivalent of the rank of colonel, or higher.

(3) The board of review must consist of -

(a) at least one member with experience in the field on service;

(b) at least one member who holds a degree in law from the University of Namibia, or an equivalent qualification in law from a university or a comparable educational institution situated outside Namibia which has been prescribed by the Minister of Justice under subsection (4)(a) of the Legal Practitioners Act, 1995 (Act No. 15 of 1995);

(c) members holding a rank of not lower than the rank of the convicted person or the most senior in rank of the convicted persons in a joint trial, and not more than one member may be of the same rank of the convicted or the most senior in rank in a joint trial.

**CHARGE SHEET AND CHARGES****Charge sheets and errors in description of accused**

**102.** (1) A charge sheet must be prepared in respect of each person to be tried by a military court and must set forth the force number, rank and full names of the accused and the unit to which he or she belongs together with all the charges on which the accused is to be tried.

(2) Any number of charges, whether in the alternative or otherwise, may be preferred against an accused in the same charge sheet, but where an accused is charged with a contravention of section 47 of the Schedule in that he or she committed the crime of murder, only the charge of murder may be preferred against the accused in a charge sheet.

(3) Unless the description and other particulars relating to the accused as set forth in the charge sheet sufficiently disclose that the accused is subject to this Code, the charge sheet must contain an express averment to that effect.

(4) A charge sheet is not invalid by reason only of a mistake in the number, rank, name or unit of the accused unless the accused objects thereto before pleading to any charge set forth therein and proves to the satisfaction of the court that such mistake may prejudice him or her in his or her defence.

(5) Whenever an accused objects in terms of subrule (4) and the court is satisfied that such mistake may prejudice the accused, that court may rectify such mistake by suitably amending the charge sheet and if the accused so requests, adjourn the case to enable the accused to prepare his or her defence.

(6) Whenever a mistake referred to in subrule (4) is brought to the notice of the court after the accused has pleaded to any charge, that court may rectify the mistake by suitably amending the charge sheet.

(7) Every charge sheet prepared in respect of the trial of an accused by the court must be signed and dated by the authority who convened that court.

## **Charges**

**103.** (1) A charge may only allege one offence and no offence may be described in the alternative in the same charge, but where a number of offences are provided for in the same section or in any one paragraph of the Schedule or any other law, any number of such offences may be described in the alternative in the same charge.

(2) A charge must state the offence with which the accused is charged and particulars of the act or omission constituting that offence.

(3) The offence with which the accused is charged must -

- (a) refer to the applicable section of the Schedule or of any other law which it is alleged the accused contravened; and
- (b) include the particulars of the act or omission constituting the offence giving details as to -
  - (i) the time and place at which the offence is alleged to have been committed; and
  - (ii) the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

## PRELIMINARY INVESTIGATIONS AND BOARDS OF INQUIRY

### Preliminary Investigations

**104.** (1) An officer who directs that a preliminary investigation be held in respect of allegations made against a person subject to this Code, hereafter in this rule called the accused, must appoint an officer as recording officer to record the evidence available in relation to such allegations or any other allegation against such person that may be disclosed in the evidence.

(2) Whenever a recording officer cannot, for whatever reason, complete a preliminary investigation the officer who appointed him or her may appoint another recording officer to continue with the recording of the evidence.

(3) An accused may not object to any recording officer.

(4) The proceedings at a preliminary investigation must be held in private in the presence of -

- (a) the accused;
- (b) an escort, if the accused is under arrest or detention;
- (c) an interpreter, if necessary;
- (d) any witness giving evidence; and
- (e) such other officials as may be required for the proper conduct of the proceedings.

(5) The recording officer must, prior to recording any evidence, advise the accused -

- (a) of the offence in respect of which the preliminary investigation is to be held and that if the evidence discloses any other offence, such offence will also be inquired into during the proceedings;
- (b) of the nature of the proceedings of the preliminary investigation and that such proceedings does not constitute a trial; and
- (c) that he or she has the right to cross-examine witnesses, to give evidence himself or herself or make a statement and to call witnesses.

(6) The evidence of a witness called at a preliminary investigation must be given orally under oath and for that purpose, and for the purpose of swearing in any interpreter or shorthand writer, the recording officer is empowered to administer to such witness, interpreter or shorthand writer the appropriate oath prescribed by rule 120.

(7) The evidence taken at a preliminary investigation must be recorded by or under the supervision of the recording officer, in the narrative or in the form of question and answer or partly in the one and partly in the other as the recording officer may determine.

(8) A witness may be cross-examined by the accused and may thereafter be re-examined by the recording officer in relation to any evidence given by him or her under cross-examination and may at any stage of the proceedings be recalled by the recording officer for the purpose of being further examined or cross-examined, as the case may be.

(9) The evidence recorded must be read to the witness concerned who may cause such amendments or additions to be made thereto as he or she may consider necessary and the accused and the recording officer may question the witness on any such amendment or addition.

(10) The witness and the recording officer must sign the evidence recorded and initial any amendment or addition made in terms of subrule (9), but the provisions of this subrule does not apply in the instance of evidence recorded by mechanical means and which appears from the records that the witness was properly sworn in, in terms of subrule (6).

(11) Whenever a person cannot, by reason of his or her illness or the exigencies of the service or for any other reason which the recording officer considers sufficient, attend a preliminary investigation to give evidence a sworn statement purporting to have been signed by such person may be read to the accused and must thereupon form part of the record of the proceedings of the preliminary investigation.

(12) The recording officer must after recording the evidence of the witnesses called by him or her -

- (a) frame such charges as are disclosed by the evidence;
- (b) read such charges to the accused; and
- (c) explain to such accused that he or she has the right to call witnesses and to give evidence himself or herself or to make a statement.

(13) Whenever a recording officer explains to an accused his or her rights under subrule (12), he or she must warn the accused that -

- (a) he or she is not obliged to avail himself or herself of those rights; and
- (b) if that accused elects to give evidence personally or to make a statement, such evidence or statement will be recorded and may be used in evidence at his or her trial.

(14) The recording officer must record the fact that the accused has been warned in terms of subrule (13) and must thereafter record the evidence given by a witness called by the accused or any evidence given or statement made by the accused himself or herself.

(15) A witness called by the accused and the accused, if he or she gives evidence, may be examined by the recording officer and thereafter any such witness may be re-examined by the accused, and the accused himself or herself may give such evidence, in relation to his or her evidence under such examination, as he or she may consider necessary.

(16) Whenever an accused makes a statement, the recording officer may put such questions to him or her as may serve to elucidate any matter raised in that statement.

(17) The provisions of subrules (9) and (10) apply, with the necessary changes, in respect of the evidence given by a witness called by the accused and any evidence given or statement made by the accused.

(18) Upon completion of a preliminary investigation, the recording officer must sign and date the record of the proceedings or a certified copy of the evidence recorded by mechanical means and deliver them without delay to the officer who directed the investigation to be held.

(19) Whenever a person subject to this Code is joined with an accused against whom a preliminary investigation is being or has been held, the recording officer must -

- (a) advise such person in accordance with the provisions of subrule (5);
- (b) read to him or her the evidence recorded up to the time of such joinder; and
- (c) if he or she so requests, recall any witness for the purpose of being cross-examined by such person.

(20) A recording officer must whenever it appears to him or her that an accused in respect of whom the preliminary investigation is being held has a mental illness or mental defect, report to the officer who appointed him or her and such officer may thereupon take such steps for the medical examination of the accused as he or she may consider necessary.

(21) Any evidence given or statement made by an accused at a preliminary investigation subsequent to the warning provided for in subrule (13) must, if it purports to be signed as provided for in subrule (17) or recorded by mechanical means in terms of subrule (10), be admissible in evidence on its mere production to any military court.

(22) Whenever a preliminary investigation has been held in respect of allegations made against an accused such accused may not object to a charge preferred against him or her at his or her trial before any military court on the ground that such charge was not preferred against him or her at the preliminary investigation or that it differs in any respect from the charge preferred against him or her at such investigation.

### **Boards of inquiry**

- 105.** (1) A board of inquiry may be convened -
- (a) in the case of an inquiry into absence of leave referred to in section 134 of the Schedule, by the commanding officer of the absent person, or
  - (b) in the case of a board referred to in section 135 of the Schedule, by -
    - (i) the Chief of the Defence Force;
    - (ii) any chief of staff or head of a section;
    - (iii) any officer commanding a regional command or the equivalent of an air force or navy or an equivalent command or formation; or
    - (iv) the commanding officer of any other body of troops, subject to such limitations as may be imposed by the chief of staff.

(2) An officer mentioned in paragraph (b) of subrule (1) may issue a certificate signed by him or her, to any officer under his or her command, authorising such officer to convene boards of inquiry or any particular board of inquiry and may in such certificate limit such authority in any manner he or she considers necessary.

(3) A board of inquiry must be convened by the written order of an officer mentioned in subrule (1) or an officer authorised thereto in terms of subrule (2) and such board of inquiry must consist of such officers, warrant officers or non-commissioned officers as the officer convening the board may determine.

(4) The order referred to in subrule (3) must designate one of the officers serving on the board as president.

(5) An officer convening a board of inquiry may appoint any other officer or other suitable person as secretary of the board and such secretary must perform such duties as the president may require him or her to perform.

(6) Every convening order must set forth the number, rank, full names and unit of every member or any secretary of the board.

(7) The terms of reference of any board of inquiry must be set out clearly and specifically in the convening order and must indicate whether the board is required to report on the matter referred to it for investigation, to express its views on any aspect thereof or to make any recommendation in connection therewith, but where any matter to be investigated by a board of inquiry is in the opinion of the officer convening the board of a secret or confidential nature, the convening order may state that fact and that the terms of reference will be communicated to the president personally in writing.

(8) The evidence of every witness called by a board of inquiry must be given orally on oath and must be recorded by, or under the supervision of, the president, but where, with due regard to the exigencies of the service or by reason of his or her illness, a witness cannot attend or where undue expense would be incurred by the attendance of any witness or where the evidence of a witness is of a purely formal nature a sworn statement by the witness in question may be admitted by the board in evidence, but where such evidence affects the character or military reputation of a person subject to this Code the witness concerned must be called to give oral evidence if required by the person who's character or military reputation is so affected.

(9) The president of any board of inquiry must, subject to any directions to the contrary given by the officer who convened the board, determine -

- (a) the time and place of every meeting of the board;
- (b) the witnesses to be called by the board;
- (c) the order in which witnesses are to be called; and
- (d) whether the proceedings or any part thereof must be conducted in private.

(10) The record of the proceedings of a board of inquiry must be dated and signed by every member of the board and submitted without delay to the officer who convened the board, but where any member disagrees with any report, finding, conclusion or view expressed or recommendation made by an other member or members on any matter, he or she may as part of the proceedings furnish his or her own report or express his or her own finding, conclusion or view or recommendation in relation to that matter.

(11) Whenever the matter to be investigated by a board of inquiry affects the character or military reputation of a person who is subject to this Code, the person whose character or military reputation is affected is entitled to be present at every meeting of that board where evidence is called -

- (a) to cross-examine any witness;
- (b) to give evidence himself or herself; and
- (c) to call witnesses.

(12) The president of the board must timeously notify such person of the time and place of every such meeting and advise him or her of the rights conferred upon him or her by subrule (11).

(13) Whenever in the course of the investigations of a board of inquiry evidence is given affecting the character or military reputation of a person subject to this Code the person concerned must be notified of the fact that such evidence has been given and must be allowed every reasonable opportunity of cross-examining every witness who gave such evidence, giving evidence himself or herself and calling witnesses.

(14) A person referred to in subrule (11) or (13), who's character or military reputation is affected, may at any stage of the proceedings determined by the board address the board on the evidence heard by it affecting his or her character or reputation and may in the exercise of his or her rights under this rule be represented by legal practitioner.

(15) The record of the proceedings of any board of inquiry must on its mere production in any military court be admissible in evidence as proof of the fact that any confession, admission, statement or answer to a question recorded therein was made or given before that board by the person who appears from such record to have made or given it, but not as proof of the truth of such confession, admission, statement or answer.

(16) The provisions of subrules (11), (12) and (13) do not apply in relation to a board of inquiry convened under section 134 of the Schedule.

### **President of board of inquiry**

**106.** Any reference in this Code to the president of a board of inquiry means, whenever a board consists of one officer, such officer.

### **Record of proceedings of board of inquiry considered to be record of proceedings of preliminary investigation**

**107.** (1) Whenever a board of inquiry has taken evidence affecting the character or military reputation of a person subject to this Code and such person is thereafter charged with an offence disclosed by the evidence recorded by that board, an officer authorised or required by this Code to direct that a preliminary investigation be held in relation to the allegations made against such person may, if he or she is satisfied after perusal of the record of the proceedings of the board that the provisions of subrule (11) or (13) of rule 105, as the case may be, has been complied with by that board, issue a certificate under his or her hand stating that he or she is so satisfied and thereupon a preliminary investigation must be considered to have been held in relation to those allegations and the record of the proceedings of the board of inquiry must be considered to be a record of the proceedings of such preliminary investigation.

(2) A certificate issued under subrule (1) must be attached to and form part of the record of the proceedings.

### **WITNESSES**

#### **Procuring attendance of witnesses not subject to Code**

**108.** (1) A person not subject to this Code may be subpoenaed, in the form as set out in the appendix to these rules -

- (a) to attend a board of inquiry, preliminary investigation or military court; or
- (b) to produce any document or thing at such board of inquiry, preliminary investigation or military court.

(2) A subpoena referred to in subrule (1) must be signed, in the case of a subpoena issued for the attendance of a person at -

- (a) a board of inquiry, by the president of the board;
- (b) a preliminary investigation, by the recording officer;
- (c) a trial by a trial officer, by the trial officer concerned; or
- (d) a court martial, by the commanding officer of the accused or after that court has assembled, by the president of that court.

(3) A subpoena, referred to in subrule (1), may be served by any person subject to this Code or any member of the Police Force on the person whose attendance is required at such board of inquiry, preliminary investigation or military court by delivering a copy of such subpoena -

- (a) to the person referred to therein; or
- (b) to any person of the age of sixteen years or older who -
  - (i) resides at the residence of the person subpoenaed; or
  - (ii) is employed at the place of business of the person subpoenaed.

(4) The person serving the subpoena referred to in subrule (3) must explain the nature and exigencies thereof to the person to whom it is delivered and must exhibit to him or her, if required by such person, the original thereof.

#### **Procuring attendance of witnesses subject to Code**

**109.** The commanding officer of any person who is subject to this Code, who is required to attend any board of inquiry, preliminary investigation or military court to give evidence or to produce any document or thing thereat, must make, on the instructions of the person who would have been required in terms of rule 108(2) to sign a subpoena for the attendance of the witness, had he or she not been subject to this Code, the necessary arrangements for the attendance of the witness at such board of inquiry, preliminary investigation or military court in accordance with such instructions.

#### **Appropriate officer to issue subpoena or give instructions**

**110.** The appropriate officer referred to in rule 108(2) when requested to do so by any person whose character or military reputation has been affected by the evidence led at a board of inquiry or by any person in respect of whom a preliminary investigation is being held or by any prosecutor at or accused appearing before a military court -

- (a) take such steps as may be required for the issue of a subpoena for the attendance at the board of inquiry, preliminary investigation or military court in question, of a person not subject to this Code and the service thereof on that person, as provided in rule 108, or
- (b) instruct the commanding officer of any person subject to this Code to make the necessary arrangements for the attendance of that person at the board of inquiry, preliminary investigation or military court in question, as provided in rule 109.

#### **Person calling witness to defray cost of attendance if evidence not material**

**111.** Whenever any person, whether subject to this Code or not, attends any board of inquiry, preliminary investigation or military court at the instance of any person whose character or military reputation has been affected by the evidence -

- (a) led at the board of inquiry;
- (b) of any person in respect of whom the preliminary investigation is being held; or
- (c) of any person appearing before the military court,

and the president of the board, the recording officer, the trial officer or the president of the court martial, as the case may be, certifies in writing that the evidence of that person was not or, if he or she did not in fact give evidence would not have been, material to any of the issues before the board, investigation or court, as the case may be, an amount equal, in the case of a person not subject to this Code, to the amount of the traveling expenses and witness fees to which that person is entitled by virtue of such attendance or, in the case of a person subject to this Code, to the amount of any costs incurred by the Government in securing his or her attendance, must be deducted from the pay of the person at whose instance such person attended the board, investigation or court.

#### **Witness fees**

**112.** (1) A witness not subject to this Code and who attended a board of inquiry, preliminary investigation or military court within Namibia must be furnished with a certificate signed, in the case of -

- (a) a board of inquiry, by the president of the board;
- (b) a preliminary investigation, by the recording officer; or
- (c) a military court, by the trial office or the president of the court martial who tried the accused,

setting forth the particulars specified in subrule (2) and may on production by him or her of such certificate to the Chief of the Defence Force be paid witness fees at public expense at the rate prescribed in respect of the attendance of witnesses in criminal trials in a magistrate's court.

- (2) The certificate referred to in subrule (1) must state -
  - (a) the full names and address of the witness;
  - (b) the nature of the proceedings he or she attended;
  - (c) the date, place and period of attendance;
  - (d) the distance from the place of residence of the witness to the place where he or she attended the board, investigation or court; and
  - (e) whether the witness has been transported to the place where he or she attended the board, investigation or court by public transport.

#### **Witness may give evidence in language of his or her choice**

**113.** A person called to give evidence before a military court, preliminary investigation or board of inquiry is entitled to give evidence in the language of his or her choice and any evidence so given must at the request of the accused person appearing before such court, any person against whom such preliminary investigation is being held or any person whose character or military reputation is affected by the evidence given at any such board of inquiry, be interpreted to such accused or affected person by an interpreter duly sworn in, in terms of rule 120.

## GENERAL

### **Record of service must not be disclosed to military court before conviction**

**114.** The record of service of a person tried by a military court must not be disclosed to the court or any member thereof, unless and until such time that the person is convicted of the charge preferred against him or her.

### **Incriminating evidence by witness for prosecution**

**115.** (1) Whenever the prosecutor at a military trial informs the court that a person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor -

(a) that court, if satisfied that such witness is otherwise a competent witness for the prosecution, must inform such witness -

(i) that he or she is obliged to give evidence at the proceedings in question;

(ii) that questions may be put to him or her which may incriminate him or her with regard to the offence specified by the prosecutor;

(iii) that he or she is obliged to answer any question put to him or her, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him or her with regard to the offence so specified or with regard to any offence in respect of which he or she could in terms of section 89 of the Schedule be found guilty on;

(iv) that if he or she answers the questions posed to him or her in a frank and honest manner, he or she will not be prosecuted with regard to an offence in respect of which he or she has incriminated himself or herself and in terms of which he or she could in terms of section 89 of the Schedule be found guilty; and

(b) such witness must thereupon give evidence and answer any question posed to him or her, whether by the prosecution, the accused or the court.

(2) If a witness referred to in subrule (1), in the opinion of the court, answers frankly and honestly all questions put to him or her -

(a) such witness must, subject to the provisions of subrule (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which he or she could in terms of section 89 of the Schedule be found guilty on; and

(b) the court must cause such discharge to be entered on the record of the proceedings in question.

(3) The discharge referred to in subrule (2) is of no legal force or effect if it is given at a preliminary investigation and the witness concerned does not at any trial arising out of the preliminary investigation answer, in the opinion of the court, frankly and honestly all questions put to him or her at such trial, whether by the prosecution, the accused or the court.

(4) Where a witness gives evidence under this rule and is not discharged from prosecution in respect of the offence in question, such evidence is not admissible in evidence against him or her at any trial in respect of such offence or any offence in respect of which he or she could in terms of section 89 of the Schedule be found guilty on.

**Accused entitled to verdict after pleading**

**116.** Except as specially provided for in this Code, a person who has pleaded to any charge preferred against him or her in proceedings before a military court is entitled to a verdict.

**Persons released from arrest without prejudice to re-arrest and persons warned, to be prosecuted within specified periods**

**117.** (1) Subject to the provisions of section 58 of the Schedule and of subrule (3), no person arrested for an offence and thereafter released from arrest without prejudice to re-arrest, in terms of these rules, may after the expiration of a period of six months from the date of such release be liable to be charged by a military court with such or any other offence on the same facts.

(2) Subject to the provisions of section 58 of the Schedule and of subrule (3), no person who has been warned in terms of rule 2 that a charge will be preferred against him or her may, after the expiration of a period of three months from the date of such warning, be liable to be charged by any military court with any offence on the facts on which such warning was given.

(3) Where a person, as a result of his or her own illness or default or any act performed by him or her, cannot be charged within the period prescribed by subrule (1) or (2), as the case may be, the period concerned must be extended by a period equal to the period taken up by such illness, default or act.

(4) For the purposes of this rule it is presumed that such person is so charged when he or she is in terms of rule 10 brought before a commanding officer deriving his or her powers from a convening authority or a commanding officer with delegated powers.

**Suspended sentences**

**118.** (1) Whenever the operation of a sentence or portion of a sentence imposed upon an offender by -

- (a) a court martial, a chief of staff or a convening authority;
- (b) a commanding officer deriving his or her powers from a convening authority; or
- (c) a commanding officer with delegated powers,

is suspended under section 95 of the Schedule and any complaint or allegation that the offender has not fulfilled any condition of the suspension of the sentence is thereafter made, the offender's commanding officer must, if the sentence was imposed by -

- (i) a court referred to in paragraph (a), refer the matter to the officer empowered to convene ordinary courts martial under whose command the offender is serving;
- (ii) a person referred to in paragraph (b), deal with the matter himself or herself in terms of subrules (2) and (7); or
- (iii) a person referred to in paragraph (c), either refer the matter to a commanding officer with delegated powers having jurisdiction in respect of the offender or deal with it himself or herself in terms of subrule (2) and (7).

(2) An officer to whom a complaint or an allegation has been referred under subrule (1) or a commanding officer who deals with such complaint or allegation under the powers conferred

upon him or her by sub-paragraph (ii) or (iii) of that subrule must, if in his or her opinion the failure complained of or alleged is such as to justify the enforcement of the sentence or the unexpired portion thereof, appoint an officer to investigate such complaint or allegation.

(3) An officer appointed under subrule (2) must hear and record evidence, in the presence of the offender, concerning the failure complained of or alleged, including such evidence as may be tendered by the offender.

(4) A witness called by an officer referred to in subrule (3) may be cross-examined by the offender and thereafter re-examined by such officer, and the offender, if he or she elects to give evidence, and any witness called by him or her may be questioned by such officer and may thereafter, in the case of the offender himself or herself, give further evidence as he or she may consider necessary, or in the case of a witness called by him or her, be re-examined by him or her, concerning any evidence given under examination by such officer.

(5) The evidence given in the course of an investigation referred to in subrule (2) must be given orally and under oath and for that purpose every officer appointed under that subrule is empowered to administer the appropriate prescribed oath to a person called to give evidence at such investigation or to interpret such evidence.

(6) The officer conducting the investigation referred to in subrule (2) must sign and date the evidence recorded, at the conclusion thereof, and submit such evidence without comment, other than on the credibility of any witness, to the officer who appointed him or her under that subrule.

(7) The officer conducting the investigation referred to in subrule (2) may if he or she is satisfied, after consideration of the evidence submitted to him or her in terms of subrule (6), that the offender has not fulfilled any condition of the suspension of the sentence which he or she could reasonably have fulfilled order that the offender be committed to serve the sentence or the unexpired portion thereof.

(8) Whenever a military court convicts an offender of an offence and it appears from the offender's record of service that the execution of a sentence or portion of a sentence imposed upon him or her, on a date prior to such conviction, was suspended in terms of section 95 of the Schedule on conditions stipulated in the said record of service -

- (a) and such sentence and the conditions of suspension have been admitted by the offender in terms of rule 80(2); or
- (b) that court finds in terms of subrule 80(2) that the sentence was in fact imposed and suspended on the said conditions,

that court may, notwithstanding anything to the contrary in this rule, with due regard to the evidence led in the case before it and any representations, whether under oath or otherwise which the offender may make in this connection, if it is satisfied that the conditions of suspension have not been complied with by the offender but could reasonably have been complied with by him or her order that the offender be committed to serve such sentence or the unexpired portion thereof.

(9) Where an offender is committed in terms of subrule (8) to serve a sentence or the unexpired portion of a sentence, such sentence or portion of a sentence must commence after expiration of any other sentence imposed upon him or her at that time or which he or she may then be serving.

## Execution of sentences

**119.** (1) A person sentenced by a military court to imprisonment or detention may not, if the sentence is in terms of section 97 of the Schedule subject to confirmation or in terms of section 104 of the Schedule subject to review, be required to perform any labour or duties in pursuance of the sentence, unless and until the sentence has been confirmed or reviewed or confirmed and reviewed in terms of either or both of those sections, as the case may be.

(2) A member of the military police to whom a person sentenced to undergo any period of field punishment has been handed over must execute such punishment in accordance with this Code and in accordance with a warrant issued by the commanding officer of the accused authorising and requiring him or her to execute such punishment.

(3) A person sentenced by a military court to imprisonment, detention or field punishment must be medically examined prior to being required to perform any duties or labour pursuant to such sentence.

(4) A sentence of imprisonment, detention or field punishment imposed upon a person for an offence at a time when such person is serving any other sentence of imprisonment, detention or field punishment, must, notwithstanding the provisions of section 117 of the Schedule, commence after the expiration of such other sentence.

## Oaths and affirmations

**120.** (1) The oath to be administered to a person in terms of any provision of this Code must be in a form, subject to the provisions of this rule, which most clearly conveys to such person the meaning of the oath and which he or she considers to be binding on his or her conscience.

(2) A person administering an oath to a witness in terms of any provisions of this Code must, except where some other form of the oath is binding on the conscience of the witness, say to the witness: "You swear that the evidence you are about to give will be the truth, the whole truth and nothing but the truth" and must require the witness to raise his or her right hand and to say "So help me God".

(3) The oath to be taken by the president and other members of a court martial must be in the following form:

"I (full name) swear that I will without fear, favour or prejudice try according to the evidence, any person brought before this court martial for trial and that I will not at any time or in any manner whatever divulge the vote or opinion of any member of this court unless required to do so in accordance with law. So help me God.".

(4) The oath to be taken by a judge-advocate must be in the following form:

"I (full name) swear that I will at this court martial, without fear, favour or prejudice and to the best of my ability, perform the duties imposed upon a judge-advocate by the Military Discipline Code. So help me God.".

(5) The oath to be taken by every officer under instruction must be in the following form:

"I (full name) swear that I will not at any time or in any manner whatever divulge the vote or opinion of any member of this court martial unless required to do so in accordance with law. So help me God.".

(6) The oath to be taken by any shorthand writer must be in the following form:

“I (full name) swear that I will faithfully, truly and to the best of my ability, take down in shorthand the proceedings of and the evidence given before this military court, preliminary investigation or board of inquiry (as the case may be) and that, when required to do so, I will similarly transcribe the same. So help me God.”.

(7) The oath to be taken by any operator must be in the following form:

“I (full name) swear that I will faithfully, truly and to the best of my ability, record the proceedings of and the evidence given before this military court, preliminary investigation or board of inquiry (as the case may be) and that, when required to do so, I will similarly transcribe the same or cause them to be transcribed. So help me God.”.

(8) The oath to be taken by any interpreter must be in the following form:

“I (full name) swear that I will faithfully, truly and to the best of my ability interpret and translate from (language) to (language) and visa versa as I must be required to do before this military court, preliminary investigation or board of inquiry (as the case may be). So help me God.”.

(9) A person who objects to take an oath may, when required to take an oath in terms of any provision of this Code, make a solemn affirmation in the place of taking the oath and such affirmation must be made in the form prescribed in this rule for the applicable oath but the words “solemnly and sincerely affirm and declare” must substitute the word “swear” and the words “So help me God” must be omitted.

(10) Whenever a person from whom it may, in terms of any provisions of this Code, be required to take an oath is owing to his or her youth or defective education unable to understand the meaning and implications of an oath he or she may be cautioned, in the place of being required to take the oath, to speak the truth, the whole truth and nothing but the truth.

### **Preservation of records of proceedings**

**121.** The record of the proceedings of every court martial must be kept in safe custody and preserved by the chief of staff personnel for a period of at least five years in the case of a general court martial and for a period of three years in the case of an ordinary court martial, from the date on which the sentence was announced in that respective court.

### **Accused may obtain copy of record of proceedings of court martial**

**122.** An accused or after the death of an accused, the next-of-kin of that accused, may on application made at any time within the period specified in rule 121 obtain a certified copy of the record of proceedings of the court martial in question.

### **Loss of record of proceedings**

**123.** (1) Whenever a convening authority is satisfied after diligent enquiries made by him or her that the record of proceedings of a court martial convened by him or her or of any trial held by him or her or by any other trial officer under his or her command is lost, he or she may issue a certificate under his or her hand stating that he or she is so satisfied and-

(a) if a copy of such record duly certified by the president or judge-advocate of the court martial in question or by such convening authority or other trial officer concerned is available, or

- (b) if no such copy is available but sufficient evidence as to the nature of the charge, the finding and sentence, if any, and the transactions of the court are contained in sworn statements made by any person who was present during the trial of the accused, and

any reference in this Code to such record must be considered to be a reference-

- (i) to such copy, or
- (ii) if the accused, or in the case of a joint trial all the accused, consent thereto to such evidence.

(2) Whenever an accused refuses consent as provided in subrule (1), he or she, and in the case of a joint trial all the accused, may be tried again before the same or any other court and the sentence of the court of which the record of proceedings have been lost must be considered to have been set aside.

(3) The provisions of rule 116 does not apply in respect of an accused, and in the case of a joint trial all the accused, who pleaded to any charge preferred against them before a military court and whose sentence is in terms of subrule (2) considered to have been set aside.

#### **Warrants of committal or release**

**124.** A warrant for the committal to or release from a prison, police cell or lock-up in within Namibia or for the committal to or release from any detention barracks of a person charged with an offence or committed or sentenced under this Code may be signed by the commanding officer or adjutant of such person or by the chief of staff personnel or by an officer appointed by such commanding officer for such purpose or beyond the borders of Namibia, by the commanding officer or adjutant of such person or by the local representative of the chief of staff personnel or the officer who confirmed or suspended the sentence.

#### **Removal of prisoners from one detention barracks to another**

**125.** A person committed to a detention barracks, whether within or beyond the borders of Namibia, to serve a sentence of detention imposed under this Code may, on the written order of the officer commanding the regional command, air force group or equivalent command or formation having jurisdiction in respect of such detention barracks, be removed from such detention barracks to any other detention barracks to serve therein the unexpired portion of his or her sentence.

#### **Forfeitures of pay**

**126.** For the purpose of calculating an amount to be forfeited in terms of section 127 of the Schedule, any period referred to in that section of twenty-four hours, must be considered to be one day.

#### **Matters not provided for**

**127.** Whenever in the application of this Code any matter arises for which no provisions have been made, such course as appears to be consistent with this Code and best calculated to do justice must be adopted.

**APPENDIX I****NAMIBIAN DEFENCE FORCE****Subpoena**

To Attend a Military Court/Preliminary Investigation

To .....  
.....  
.....,

You are hereby subpoenaed to attend in person as a witness at .....a.m./p.m. on the .....day of .....20...., at....., to give evidence before a trial officer/court martial/at a preliminary investigation concerning an offence of contravening section..... of the Military Discipline Code alleged to have been committed by No.....(Rank)..... Name.....  
.....(Unit).....

You are further required to have available and to produce in evidence at the aforesaid time and place, the following documents or articles, to wit .....

.....  
.....

As a witness, you are required to attend and to remain in attendance until the conclusion of the proceedings unless the president of the court martial/trial officer/recorder decides otherwise.

Failure to comply with this subpoena will render you liable to a fine not exceeding one hundred Namibian Dollar or to imprisonment for a period not exceeding one month.

Given under my hand at.....this.....day of.....20.....

(Sgd).....(Rank).

Designation.

Authorised Officer.

**APPENDIX II****NAMIBIAN DEFENCE FORCE****Subpoena****To Attend a Board of Inquiry**

To .....,  
.....,  
.....,

You are hereby subpoenaed to attend in person as a witness at.....a.m./p.m. on the.....  
day of.....20..., at....., to give evidence before a board of inquiry which has  
been convened in terms of the Military Discipline Code to inquire into.....

.....  
.....  
.....

As a witness, you are required to attend and to remain in attendance until the conclusion of the  
inquiry unless the president of the board decides otherwise.

Failure to comply with this subpoena will render you liable to a fine not exceeding one hundred  
Namibian Dollar or imprisonment for a period not exceeding one month.

Given under my hand at.....this.....day of .....20.....

(Sgd).....(Rank).  
Designation.  
Authorised Officer.

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