

Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal

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Summary

The United Nations Human Rights Committee has emphasised that the right to a fair trial (which includes the right to an independent and impartial tribunal) applies in full to military courts as it does to the ordinary civilian courts. Based mainly on Uganda's military justice legal framework, this article critically examines the compliance of the country's military courts with the right to an independent and impartial tribunal. It is established that Uganda's military courts fall far short of meeting the essential objective conditions for guaranteeing the right to an independent and impartial tribunal. First, they do not have adequate safeguards to guarantee their institutional independence, especially from the military chain of command. Second, the judge advocates appointed to Uganda's military courts do not have adequate security of tenure. Third, the judge advocates and members of Uganda's military courts do not have financial security. To address these deficiencies, a number of recommendations are made, including establishing the office of an independent principal military judge to be in charge of appointing judge advocates to the different military tribunals; establishing the office of an independent director of military prosecutions to be in charge of prosecutions within the military justice system, including appointing

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prosecutors to the different military tribunals; providing the judge advocates with security of tenure; and prohibiting the performance of a judge advocate or member of a military court from being used to determine his or her qualification for promotion or rate of pay.

1 Introduction

The role that military courts play in the overall administration of justice in Uganda cannot be over-emphasised. Military courts play a vital and unique role in the administration of criminal justice with respect to people subject to military law.¹ Although originally designed to try serving members of the armed forces for suspected infractions of military law, and in particular the commission of military offences, the jurisdiction of Uganda's military courts has expanded significantly over the years. Military courts in Uganda now have jurisdiction over both military personnel and civilians, although in the latter case their jurisdiction is limited. Uganda's military courts also have jurisdiction over a number of crimes, many of which have no bearing on the military and, in ordinary cases, would fall under the jurisdiction of civil courts.² Unfortunately, despite the role that Uganda's military courts play in the overall administration of justice, the issue of whether they comply with the minimum international human rights standards for the administration of justice (such as the right to an independent and impartial tribunal) remains an area that rarely receives serious scholarly attention.

The right to an independent and impartial tribunal is recognised and protected by several regional and international human rights instruments to which Uganda is party. Key among these is the International Covenant on Civil and Political Rights (ICCPR)³ and the African Charter on Human and Peoples' Rights (African Charter).⁴

1 Military law is a body of rules which regulates the conduct of members of the armed forces. The major objective of military law is to ensure discipline and good order in the armed forces. See AB Dambazau *Military law terminologies* (1991) 75.

2 See generally sec 179 of the Uganda Peoples' Defence Forces Act 7 of 2005 (UPDF Act). It is not possible to establish exactly how many cases are handled by Uganda's military courts. However, between 1992 and 2009, it was reported that the General Court Martial registered 554 cases, out of which 391 were disposed of. See *The Monitor* 3 August 2009. In addition to the General Court Martial, Uganda's military courts consist of the Court Martial Appeal Court, eight division courts martial and 70 unit disciplinary committees. See R Tukachungurwa 'The legal and human rights implications of the trial of civilians in military courts in Uganda: A comparative analysis' unpublished LLM dissertation, Makerere University, 2012 11.

3 International Covenant on Civil and Political Rights, adopted 16 December 1966; GA Res 2200A (XXI) UN Doc A/6316 (entered into force 23 March 1976). Uganda acceded to ICCPR on 21 June 1995.

4 The African Charter on Human and Peoples' Rights, adopted 27 June 1981 (entered into force 21 October 1986). Uganda ratified the African Charter on 10 May 1986.

Regarding the former, the United Nations (UN) Human Rights Committee – the international body charged with the responsibility of interpreting and enforcing ICCPR, has emphasised that the right to a fair trial (which includes the right to an independent and impartial tribunal), as provided for in article 14 of ICCPR, applies to military tribunals in full just as it does to the civilian and other specialised tribunals.⁵ It has stressed that the guarantees of the right to a fair trial provided for in article 14 of ICCPR ‘cannot be limited or modified because of the military or special character of the court concerned’.⁶ The African Commission on Human and Peoples’ Rights (African Commission) has also forcefully stressed that ‘military tribunals must be subject to the same requirements of fairness, openness, and justice, independence and due process as any other process’.⁷

It is therefore clear that in the administration of military justice, military courts must comply with the right to an independent and impartial tribunal. This article analyses the compliance of Uganda’s military courts with the right to an independent and impartial tribunal as understood in international human rights law. Before doing this, it is necessary first to examine briefly the nature and scope of the right to an independent and impartial tribunal.

2 Nature and scope of the right to an independent and impartial tribunal

Like most international agreements, ICCPR (which is the main human rights instrument providing for the right to an independent and impartial tribunal) is drafted in generic terms. Although it provides for the right to an independent and impartial tribunal, it does not elaborate upon the content, nature and scope of this right. What is clear is that, as the Human Rights Committee (HRC) has emphasised, it cannot be left to the sole discretion of domestic law to determine the essential content of the guarantees contained in the right to a fair trial (which includes the right to an independent and impartial tribunal).⁸ Consequently, the nature and scope of the right to an independent and impartial tribunal can only be ascertained from a careful examination of the various human rights documents in which

5 See para 22 Human Rights Committee General Comment 32: Right to equality before courts and tribunals and to a fair trial CCPR/C/GC/32.

6 As above.

7 *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001) para 44. See also Principle 2 of the Draft Principles Governing the Administration of Justice through Military Tribunals (Principles on Military Justice) UN Doc E/CN.4/2006/58 (2006).

8 Para 4 General Comment 32 (n 5 above).

it has been expounded and the jurisprudence of the major human rights supervisory bodies and courts.

2.1 Right to an independent tribunal

The right to an independent tribunal is perhaps the most important guarantee in ensuring a fair trial and possibly the most important canon in the administration of justice in any democratic society. It is a major prerequisite for access to justice, without which justice remains illusory. Only an independent tribunal is able to render justice impartially on the basis of law.⁹ Further, the right to an independent tribunal is critical for securing the rule of law. Without independent courts, there can hardly be any rule of law.¹⁰ The right to an independent tribunal is also indispensable in the protection of other human rights and fundamental freedoms. It is important to emphasise in this respect that the right to an independent tribunal is protected in international human rights law, not so much for the benefit of the persons who exercise judicial power. Rather, it is protected to ensure that the persons who hold judicial office uphold the rule of law and the rights and freedoms of accused persons without fear and interference. It is for these reasons, *inter alia*, that the right to an independent tribunal occupies a central place in international human rights law. Its centrality is reflected in the fact that, along with the right to a competent and impartial tribunal, it is an absolute right,¹¹ meaning that it is not subject to any exceptions.

The right to an independent and impartial tribunal is guaranteed by both the Universal Declaration of Human Rights (Universal Declaration) and ICCPR.¹² Although the African Charter does not explicitly provide for the right to an independent tribunal, article 26 imposes an obligation on state parties to ensure that their courts are independent. In Uganda, the right to an independent and impartial tribunal is firmly secured in article 28(1) of the Constitution, which provides that in the determination of civil rights and obligations or any criminal charge, 'a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law'. In *Uganda Law Society and Jackson Karugaba v Attorney-General*,¹³ referring to articles 28(1) and 128 of

9 Office of the High Commissioner for Human Rights *Human rights in the administration of justice: A manual on human rights for judges, prosecutors and lawyers* (2003) 115.

10 S Trechsel *Human rights in criminal proceedings* (2005) 46.

11 Para 19 General Comment 32 (n 5 above).

12 See arts 10 & 14(1) respectively.

13 Constitutional Petitions 02 of 2002 and 08 of 2002 (unreported).

the Constitution,¹⁴ the Constitutional Court held that as part of the judicial system of Uganda, military courts must be independent and impartial.

What then are the essential attributes or requirements of the right to an independent tribunal? It is clear from existing jurisprudence that the notion of the independence of a tribunal involves individual as well as institutional aspects.

2.1.1 Institutional aspects of the right to an independent tribunal

Institutional independence as an aspect of the right to an independent tribunal requires, first of all, that courts should have adequate safeguards to protect them from political and other interferences, especially with respect to matters that relate to their judicial function.¹⁵ In the context of military justice, it requires that military tribunals must be free from interference, especially from the executive and the military hierarchical command with respect to matters that relate to their judicial function. They must not only be self-governing as regards their administrative and operational matters, but must also be independent in their decision making. Decisions of military courts, like those of the ordinary civil courts, should also never be subjected to revision by a non-judicial establishment.¹⁶

The basic principle upon which both the institutional and individual independence of military tribunals may be guaranteed is to ensure that members of military courts and other critical staff in the administration of military justice (like the judge advocates and prosecutors) have a status guaranteeing their independence in particular *vis-à-vis* the military hierarchy and command.¹⁷ One of the important prerequisites for ensuring the institutional independence of military tribunals is that the authority that appoints members of a tribunal must not be the same one that appoints prosecutor(s). In *R v Généreux*,¹⁸ where this was the case, delivering the judgment of the Supreme Court of Canada, Chief Justice Lord Lamer emphasised that¹⁹

14 Art 128(1) of the Constitution provides the guarantees for ensuring the independence of Uganda's courts. Among these guarantees are included the requirements that the courts should not be subject to the control or direction of any person or authority; that the judiciary should be self-accounting; and that the salaries, allowances, privileges, retirement benefits and other conciliations of service of judicial officers should not be varied to his or her disadvantage.

15 Para 19 General Comment 32 (n 5 above). See also Principle 3 of the Basic Principles on the Independence of the Judiciary, adopted 6 September 1985; UN Doc A/conf./121/22/Rev 1 1B.

16 Basic Principles on the Independence of the Judiciary (n 15 above) Principle 4. See also *Morris v United Kingdom* (2002) 34 EHRR 52 para 73.

17 See Principle 13 of the Principles on Military Justice (n 7 above).

18 *R v Généreux* [1992] CanLII 117 (SCC) 1.

19 *R v Généreux* 62.

[i]t is not acceptable that the convening authority, ie the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as triers of fact.

He stressed that, at a minimum, ‘where the same representative of the executive, the “convening authority”, appoints both the prosecutor and the triers of fact, the requirements of s 11(d) will not be met’.²⁰

To avoid a scenario where members of military courts and prosecutors are appointed by the same authority, Ireland amended its military law in 2007 to separate the functions of convening military courts and appointing the prosecutors. Under Ireland’s Defence (Amendment) Act,²¹ convening general courts martial and limited courts martial, including appointing the panel members, is the responsibility of the court martial administrator.²² In the performance of his or her duties, the independence of the court martial administrator is guaranteed.²³ The appointment of prosecutors, on the other hand, is the responsibility of the Director of Military Prosecutions.²⁴ The independence of the Director of Military Prosecutions is also protected.²⁵

It is also an essential requirement for ensuring the institutional independence of military tribunals that those persons who preside as judge advocates must be appointed by an independent establishment.²⁶ In *R v Généreux*, while holding that the appointment of the judge advocate by the Judge Advocate-General undermined the institutional independence of the general court martial, Chief Justice Lamer observed that ‘[t]he close ties between the Judge Advocate-General, who is appointed by the Governor in Council, and the Executive, is obvious’.²⁷ He emphasised that the effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence of the tribunal.²⁸ He stressed that, in order to comply with the right to an independent tribunal, the appointment of military personnel to sit as judge advocates at military tribunals should be in the hands of an independent and impartial judicial officer.²⁹

To address the concerns raised in the foregoing paragraph, Canada in 1991 amended its National Defence Act and the Queens Regulations

20 As above. Sec 11(d) of the Canadian Charter of Rights and Freedoms provides for the right to an independent tribunal, among other things.

21 Act 24 of 2007.

22 Sec 184B(4).

23 Sec 184A(4).

24 Secs 184C(1) & 184F(1).

25 Sec 184E(2).

26 Judge advocates are the persons who advise military courts on issues of law and procedure.

27 *R v Généreux* (n 18 above) 63.

28 As above.

29 As above.

and Orders for the Canadian Forces. These amendments took away the power to appoint judge advocates from the Judge Advocate-General and vested it in the Chief Military Trial Judge whose independence was guaranteed.³⁰ Commenting on this development, the Supreme Court of Canada expressed satisfaction that these changes had remedied the defect in the old military justice legal regime.³¹

2.1.2 Aspects relevant for ensuring independence of individuals

As is the case with civilian judges, the three factors considered key for ensuring the individual independence of military judges are the manner of appointment, security of tenure and financial security. The Human Rights Committee has thus stressed that states should take specific measures protecting judges from any form of political influence in their decision making through the constitution or adoption of laws establishing clear procedures and objective criteria for 'the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary'.³²

Regarding the manner of appointment of persons to judicial office, two points must be emphasised. First, the method of judicial selection must safeguard against judicial appointments for improper motives and must ensure that only individuals of integrity and ability with appropriate training are appointed.³³ The Draft Principles Governing the Administration of Justice through Military Tribunals (Principles on Military Justice) thus state that the persons selected to perform the functions of judges in military courts 'must display integrity and competence and show proof of the necessary legal training and qualifications'.³⁴ It is explicitly stated that³⁵

[t]he legal competence and ethical standards of military judges, as judges who are fully aware of their duties and responsibilities, form an intrinsic part of their independence and impartiality.

In *Media Rights Agenda v Nigeria*,³⁶ the African Commission held that the selection of serving military officers, with little or no knowledge of law, as members of the special military tribunal that tried Malaolu, contravened Principle 10 of the Basic Principles on the Independence of the Judiciary. In *Incal v Turkey*,³⁷ the European Court of Human Rights (European Court) observed that the status of the military judges

30 See art 111.22 of the Queen's Regulations and Orders for the Canadian Forces.

31 *R v Généreux* (n 18 above) 58.

32 Para 19 General Comment 32 (n 5 above). See also Principle 11 of the Basic Principles on the Independence of the Judiciary (n 15 above).

33 Principle 10 Basic Principles on the Independence of the Judiciary (n 15 above).

34 Principle 13 Principles on Military Justice (n 7 above).

35 Para 47 Principles on Military Justice (n 7 above).

36 (2000) AHRLR 262 (ACHPR 2000) para 60.

37 *Incal v Turkey* (2000) 29 EHRR 449 para 67.

who were required by law to undergo the same professional (legal) training as their civilian counterparts provided certain guarantees of independence and impartiality to the national security court in question.

Second, the appointment of military personnel to judicial office must ensure their protection *vis-à-vis* the military hierarchy, avoiding any direct or indirect subordination, whether in the organisation and operation of the military justice system itself or in terms of career development.³⁸ In *Incal v Turkey*,³⁹ the European Court held that among the issues that made the Izmir National Security Court's independence questionable was the fact that it was comprised of servicemen who still belonged to the army, which in turn took orders from the executive. The Court was concerned that such members remained subject to military discipline and that assessment reports were compiled on them by the army for that purpose.⁴⁰

The essence of security of tenure as an important aspect in securing the individual independence of judges is that their tenure must be secured against interference by the executive or other appointing authority in a discretionary or arbitrary manner. The Basic Principles on the Independence of the Judiciary accordingly provide that '[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists'.⁴¹ An important requirement for guaranteeing security of tenure is that, once appointed or elected judge, one should only be dismissed on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.⁴² The judge affected must be afforded a full opportunity to be heard. In *Mundy Busyo and Others v Democratic Republic of Congo*,⁴³ where 315 judges were dismissed by the President without following established procedures, the HRC held that these dismissals constituted an attack on the independence of the judiciary.

Another key factor in ensuring security of tenure is the duration of the term of office of the judges. The HRC has previously noted that '[t]he election of judges by popular vote for a fixed maximum term of six years does not ensure their independence and impartiality'.⁴⁴ In *Incal v Turkey*, where the major complaint was that the Izmir National Security Court, which was comprised of military judges, was not

38 Para 46 Principles on Military Justice (n 7 above).

39 *Incal v Turkey* (n 37 above) para 68.

40 As above. See also the concerns expressed by the European Court in *Findlay v United Kingdom* (1997) 24 EHRR 211 paras 75 & 76.

41 Principle 12 Basic Principles on the Independence of the Judiciary (n 15 above).

42 Para 20 General Comment 32 (n 5 above).

43 Para 5.2 UN Doc CCPR/C/78/D/933/2000 (2003).

44 Para 8 HRC Concluding Observations: Armenia CCPR/C/79/Add 100.

independent, the European Court held that among the aspects that made the independence of those judges questionable was that their term of office was only four years and subject to renewal.⁴⁵

The final major essential condition for ensuring the independence of judicial officers is the issue of financial security. As was well explained by the Supreme Court of Canada, the essence of financial security as an essential condition for securing the independence of a tribunal is that 'the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence'.⁴⁶ In *R v Généreux*,⁴⁷ it was held that the requirement of financial security will not be satisfied if the executive is in a position to reward or punish the conduct of members of the military tribunal and the judge advocate by granting or withholding benefits in the form of promotions and salary increases or bonuses. Salaries, allowances, pensions and other remunerations and benefits of military judges, like their civilian counterparts, must not therefore depend on the grace or favour of the executive or the military hierarchy. As required by Principle 11 of the Basic Principles on the Independence of the Judiciary, they must be adequately secured by law. They must be secured in a way that does not allow the executive or its representative to influence or manipulate the judges.

To guarantee the financial security of the judge advocates and members of military courts, jurisdictions like Canada prohibit an officer's performance as a member of a military court or as a military trial judge from being used to determine his qualifications for promotion or rate of pay. In *R v Généreux*,⁴⁸ the Supreme Court of Canada commented that this prohibition was sufficient to guarantee the financial security of judge advocates and members of the military courts.

A key question that may be posed is the following: With all the above factors in mind, what constitutes a legitimate test for determining the independence of a particular tribunal? This was succinctly stated by Lamer CJ as follows:⁴⁹

An individual who wishes to challenge the independence of a tribunal ... need not prove an actual lack of independence. Instead, the test for this purpose is the same as the test for determining whether a decision maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent ... The perception must, however ... be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

45 *Incal v Turkey* (n 37 above) para 68.

46 *Valente v Queen* [1985] 2 SCR 704.

47 *R v Généreux* (n 18 above) 58.

48 *R v Généreux* 60.

49 *R v Généreux* 36.

The European Court has also stated in a series of cases that, in determining whether there is a legitimate reason to fear that a particular tribunal lacks independence or impartiality, the standpoint of the accused is important without being decisive. It has stressed that what is decisive is whether the doubts of the accused can be held to be objectively justified.⁵⁰

One last important question to ask here is: In the context of military tribunals, do all the requirements of the right to an independent tribunal apply to the members of the tribunal as they do to the judge advocates? In *Holm v Sweden*⁵¹ the European Court explicitly stated that the principles established in its case law regarding the independence and impartiality of tribunals 'apply to *jurors* as they do to professional judges and *lay judges*'.⁵² From this perspective it is possible to conclude that the general rule is that all the requirements of independence of tribunals apply to the members of military courts as they do to judge advocates. This is important because both the judge advocates and the members of a military court play judicial roles and they therefore need to be independent. While the judge advocates advise and rule on issues of law and procedure, the members of the court decide the guilt or innocence of the accused and, if found guilty, the sentence.

Nonetheless, depending on the organisation of a particular country's military justice system and the safeguards it provides for the different players, the guarantees for securing the independence of judicial officers may not have to apply equally (or) to all players in the system. At the end of it all, the ultimate test is to establish whether, taken as a whole, a tribunal can be said to be independent. With respect to the issue of security of tenure, the general position taken by the European Court, for instance, is that the members of military courts, like the jurors in the civil courts, do not necessarily require security of tenure to guarantee their independence as long as there are other effective safeguards to secure their independence.⁵³ Although from the European perspective, the European Court has good reasons for taking this general position where, for instance, the safeguards offered by a particular military justice system are not adequate to secure the independence of the judge advocates, and their role in the proceedings and decisions of court is not significant as is the case in countries like Uganda,⁵⁴ the issue of security of tenure

50 See eg *Incal v Turkey* (n 37 above) para 71 and *Gunes v Turkey* (Application 31893/96) judgment of 25 September 2001, para 46.

51 *Holm v Sweden*, judgment of 25 November 1993, Series A 279-A para 30. See also *Cooper v United Kingdom* [2003] EHR 48843/99 para 123.

52 My emphasis.

53 See eg *Cooper v United Kingdom* (n 51 above) paras 120-125.

54 R Naluwairo 'Military justice, human rights and the law: An appraisal of the right to a fair trial in Uganda's military justice system' unpublished PhD thesis, University of London, 2011 171.

of the members of military courts becomes important. At the end of it all, the question will be whether, taken as a whole, a tribunal can be said to be independent.

2.2 Right to an impartial tribunal

Closely related to the right to an independent tribunal is the right to a tribunal which is impartial. The right to an impartial tribunal is protected as part and parcel of the right to a fair trial by both the Universal Declaration and ICCPR.⁵⁵ The requirement for impartiality of a tribunal has two aspects. First, the tribunal must be subjectively free of personal bias. The HRC has thus stated that persons who exercise judicial power must not be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them.⁵⁶

Second, the tribunal must also appear to reasonable observers to be impartial.⁵⁷ In *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*,⁵⁸ the African Commission was faced with the issue of a special tribunal which consisted of one retired judge, one member of the armed forces and one member of the police force. While observing that the tribunal was composed of persons belonging largely to the executive branch of government, the same branch that passed the Robbery and Firearms Decree, the African Commission held that '[r] egardless of the character of the individual members of such tribunal, its composition alone creates the appearance, if not actual lack, of impartiality'.⁵⁹ As a result, it held that the tribunal in question violated article 7(1)(d) of the African Charter which guarantees the right to an impartial tribunal.⁶⁰

The requirement that a tribunal must appear to reasonable observers to be impartial is the embodiment of the important principle in the administration of justice that 'justice must not only be done, but should manifestly and undoubtedly be seen to be done'.⁶¹ This principle is very important for instilling public confidence in the ability of the tribunal to execute its functions in a neutral manner. The European Court has emphasised that the appearance of a tribunal is important because 'what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings'.⁶²

55 Arts 10 & 14(1) respectively.

56 Para 21 General Comment 32 (n 5 above).

57 As above.

58 (2000) AHRLR 180 (ACHPR 1995).

59 *Constitutional Rights Project* case (n 58 above) para 14 (my emphasis).

60 As above.

61 *Dictum* by Lord Hewart in *R v Sussex Justices ex parte McCarthy* (1924) 1 KB 256 259.

62 See *Daktaras v Lithuania*, judgment of 10 October 2000, para 32. See also *Valente v The Queen* (n 46 above) 689.

With specific regard to military judges, the international community generally recognises that the concept of impartiality is a complex one. It is acknowledged that parties to proceedings before military tribunals have good reason to view the military judge as an officer who is capable of being ‘a judge in his own cause’ in any case involving the armed forces as an institution.⁶³ That is why it is critical that everything should be done to minimise any doubts as to the impartiality of military judges and therefore of the tribunals over which they preside. It is submitted that guaranteeing the independence of military courts, as discussed above, is one strong factor that can help in this respect. The presence of civilian judges in the composition of military tribunals is also considered to be an important factor that can help reinforce the impartiality of military tribunals.⁶⁴

3 Compliance of Uganda’s military courts with the right to an independent and impartial tribunal

From a structural point of view, Uganda’s military courts comprise of a summary trial authority, unit disciplinary committees and courts martial.⁶⁵ Under courts martial, the Uganda Peoples’ Defence Forces Act (UPDF Act) provides for a four-tier military court system, that is, field courts martial; division courts martial; the general court martial; and the court martial appeal court.⁶⁶ The relevant details about these courts will be examined in the analysis that follows.

3.1 Compliance with the right to an independent tribunal

As pointed out in section 2.1.2, the test for assessing compliance of any tribunal with the right to an independent tribunal is an objective one. The key question is whether, given the essential objective conditions of judicial independence analysed above, an informed and reasonable person can perceive the tribunal to be independent.

3.1.1 Institutional independence of Uganda’s military courts

It was confirmed in section 2.1 that the notion of institutional independence requires that military courts enjoy a status or have sufficient safeguards which guarantee their independence from the military hierarchy and the executive with respect to matters that relate directly to their exercise of judicial function. A critical analysis of Uganda’s military justice legal framework, however,

63 Para 46 Principles on Military Justice (n 7 above).

64 As above.

65 Sec 2 of the UPDF Act (n 2 above) defines ‘military court’ to mean a summary trial authority, a unit disciplinary committee or a court martial.

66 See the definition of ‘court martial’ in sec 2 of the UPDF Act.

reveals that the executive and the military hierarchy are in a position to determine or influence certain administrative aspects of military tribunals that relate directly to the exercise of their judicial function. For instance, the law does not protect judge advocates and members of military courts against redeployment or transfer to non-judicial military duties during their term of office. It is submitted that, through the unfettered discretion and power to redeploy or transfer judge advocates and members of the military courts to non-judicial functions at any time and replacing them with reserve members,⁶⁷ the military leadership and the executive can technically within certain limits determine who actually finally sits on a court to hear particular cases. This is an administrative matter that relates directly to the exercise of judicial function by military courts. One of the ways in which this shortcoming can be addressed is to amend Uganda's military law and require that, except in cases of military exigencies, judge advocates are not redeployed or transferred to non-judicial functions which would affect the carrying out of their judicial responsibilities. In case of military exigencies, the transfer of a judge advocate to non-judicial functions should be approved by the Principal Military Judge (proposed below) who must satisfy himself or herself as to whether the situation necessitates redeployment.

Another issue that puts the institutional independence of Uganda's military courts in serious doubt concerns the appointing authority of the key players in the country's military justice system, namely, the prosecutors, the judge advocates and the members of military courts. It is apparent from the examination of Uganda's military justice legal framework that members of military courts and prosecutors are appointed by the same authority, namely, the High Command which is a representative of the executive.⁶⁸ It is also the High Command which appoints the advocates/para-legals who serve as judge advocates at the different military courts.⁶⁹ Moreover, the High Command,

67 Under sec 198 of the UPDF Act, in the case of division courts martial and the general court martial, the High Command is given powers to appoint reserve members, any of whom may be called upon to sit as a member of the court for the purposes of constituting a full court or realising a quorum.

68 See secs 194, 197(1) & 202(c) of the UPDF Act. The High Command is comprised of mainly the top military hierarchy of the UPDF. According to sec 15(1) of the UPDF Act, it is comprised of the President; the Minister responsible for defence; members of the High Command on 26 January 1986; the Chief of Defence Forces; all service commanders; the Chief of Staff; all Service Chiefs of Staff; all Chiefs of the Services of the Defence Forces; all commanders of any formations higher than a division and all Division Commanders, *inter alia*. A disturbing issue with this composition is that the law entrenches certain individuals as members of the High Command, ie members of the High Command on 26 January 1986. The names of these individuals are listed in the third schedule to the UPDF Act. While the contribution of these individuals to the liberation of Uganda is highly appreciated, in a true democracy, it is not acceptable to entrench individuals in legal frameworks.

69 See sec 202(b) of the UPDF Act.

which appoints members of military courts, the judge advocates and prosecutors, also has the power to convene military courts at any time.⁷⁰ Given this arrangement, Uganda's military courts cannot be said to be institutionally independent.

To address Uganda's military courts' institutional problematic issues highlighted above, two major recommendations can be made. First, it is proposed that Uganda establishes the office of an independent Principal Military Judge (PMJ). The power to appoint judge advocates to the different military tribunals should vest in this office. To safeguard the independence of the office of the PMJ, the PMJ should enjoy sufficient security of tenure and should be insulated against the military chain of command. The PMJ could be appointed for a fixed term of ten years and should only be removable from office on the same conditions and following the same procedure governing the removal of a High Court judge.⁷¹ During his or her tenure, the PMJ should not be eligible for promotion and should not be subject to army performance-related reports. Appointment as PMJ should be the last posting in one's military career.

Second, it is also recommended that Uganda's military system should establish the office of an independent Director of Military Prosecutions (DMP) along the lines of the Director of Public Prosecutions (DPP). It is this office that should have the power to appoint prosecutors to the different military tribunals and undertake decision making in respect of the prosecution of criminal and quasi-criminal matters in the military justice system. The DMP should enjoy sufficient security of tenure and should be insulated against the military chain of command, as has been proposed in respect of the PMJ. If successfully undertaken, these recommendations can go a long way to addressing the unfortunate situation where the High Command (which is a representative of the executive) appoints the prosecutors, judge advocates and members of military courts. A number of countries, including the United Kingdom, Ireland, Canada and South Africa, have undertaken similar reforms to secure the institutional independence of their military tribunals.

3.1.2 Independence of judge advocates and members of military courts

One of the major guarantees for ensuring the independence of a tribunal as analysed above is security of tenure. As was pointed out, this means tenure, whether until the age of retirement, for a fixed term

⁷⁰ Sec 196(1) UPDF Act.

⁷¹ According to art 144 of the Constitution, a High Court judge can only be removed from office on recommendation of an independent tribunal (comprised of three persons being either judges, former judges or advocates of at least ten years' standing) that he or she is unable to perform the functions of his or her office arising from infirmity of the body or mind, misbehaviour or misconduct, or incompetence.

or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner. Going by the jurisprudence from the European Court referred to earlier,⁷² in the context of military justice, the question of security of tenure is most relevant for judge advocates. It is therefore important to first examine whether Uganda's judge advocates enjoy sufficient security of tenure to guarantee their independence, in particular, and that of the military courts in general.

Surprisingly, the UPDF Act and its regulations are silent about the issue of the tenure of judge advocates. This silence of the law on such an important question *prima facie* means that judge advocates in Uganda do not enjoy any security of tenure and can therefore not be said to be independent. Although in practice it is said that the tenure of judge advocates is the same as that of the members of military courts to which they are appointed, and that this is usually made clear in the instrument of appointment,⁷³ as will shortly be argued in respect of the members of military courts, this kind of tenure cannot guarantee their independence. To guarantee their security of tenure, it is proposed that judge advocates should be appointed for a renewable fixed term of six years and this should be clearly stated in the law. The law should also explicitly spell out the conditions under which the tenure of a judge advocate can be renewed.

Another aspect concerned with security of tenure of judge advocates worth pointing out is that the country's military justice legal framework is completely silent on the circumstances, let alone the procedure and manner in which they can be removed or suspended before expiry of their tenure. This means that the appointing authority enjoys absolute discretion in the matter. This is a major loophole. To address this shortcoming, it is recommended that the law should clearly spell out the circumstances and manner under which judge advocates can be removed prematurely. It is proposed that these circumstances should be similar to those pertaining to the removal of judicial officers in the civilian justice system, namely, they should only be removed prematurely from their offices for inability to perform the functions of their offices arising from infirmity of the body or mind, misbehaviour or misconduct unbecoming of a judicial officer, or incompetence.⁷⁴

Given the finding that Uganda's judge advocates do not have sufficient security of tenure to guarantee their independence, it becomes important to establish whether the members of military courts have security of tenure which, if taken together with other safeguards, can guarantee their independence and that of the courts to which they are appointed. Unfortunately, the security of tenure of the members of Uganda's military courts, including the Chairpersons,

72 *Cooper v United Kingdom* (n 51 above).

73 Informal discussion with a former member of the Court Martial Appeal Court.

74 See art 144(2) of the Constitution.

is also not guaranteed. Starting with the members of Uganda's topmost military court, namely, the Court Martial Appeal Court, the UPDF Act and all other regulations made thereunder are silent about the issue of tenure of these members. This *prima facie* means that, inconsistent with the right to an independent tribunal, members of the topmost military court in Uganda do not enjoy any security of tenure. They serve at the pleasure of their appointing authority, namely, the Commander-in-Chief of the UPDF who is also the President of Uganda.⁷⁵ Members of the Court Martial Appeal Court cannot therefore be said to be independent.

Although it may be argued that members of Uganda's military courts and judge advocates are full-time military officers who enjoy security of tenure as military officers, this argument is not tenable. The requirement in international human rights law is that security of tenure must be in respect of their judicial office and not as military officers. The security of tenure of members of military tribunals as military officers cannot guarantee their independence as they remain subject to military discipline and dependent on the military chain of command and the executive for promotions and other benefits. Dismissing the reasoning that military judges already have a practical equivalent of tenure since they can normally serve out a career leading to retirement by reason of longevity, Fidell argues that '[t]hat is like saying a civilian judge would be sufficiently protected if he or she were assured of a non-judicial civil service job until eligible for retirement'.⁷⁶ He rightly points out that 'banishing a judge to a billet that pays the same but does not involve judging is no way to protect either the substance or the appearance of judicial independence'.⁷⁷ It is not enough that the instruments of appointment of the members of court and the judge advocates may stipulate their tenure. The right to an independent tribunal requires their tenure as persons who exercise judicial power to be '*adequately secured by law*'.⁷⁸

With respect to members of the general court martial, the division courts martial and the judge advocates appointed to those courts, these are appointed for a period of one year.⁷⁹ While it is appreciated

75 Regulation 3(1) of the UPDF (Court Martial Appeal Court) Regulations, Statutory Instrument 307-1. It is worth observing that many important aspects of the Court Martial Appeal Court are not stipulated in the principal legislation (ie the UPDF Act), but are instead provided for in the regulations. One of the major implications of this arrangement is that many aspects of this court can be changed at any time by the Minister responsible for defence without parliamentary oversight or approval.

76 ER Fidell 'Military judges and military justice: The path to judicial independence' (1990) 74 *Judicature* 18-19.

77 Fidell (n 76 above) 19.

78 Principle 11 Basic Principles on the Independence of the Judiciary (n 15 above) (my emphasis).

79 See secs 197(1) & 194 of the UPDF Act and n 75 above.

that the tenure of members of military courts and judge advocates need not necessarily be the same as that of civilian judges, it is submitted that a period of one year is too short to secure their independence. As the United Nations Special Rapporteur on the Independence of Judges and Lawyers pointed out, even a term of five years is too short for security of tenure of judges.⁸⁰ The fact that all the members of the general courts martial and division courts martial are eligible for re-appointment makes the problem even worse as the criterion for re-appointment is unknown.⁸¹ It could be that, given their short tenure, members would work towards pleasing their superiors and the appointing authority so as to secure their re-appointment.

As is the case with the Court Martial Appeal Court, there is no stipulated tenure for the members of the unit disciplinary committees. *Prima facie*, this means that they do not enjoy security of tenure and, as such, cannot be said to be independent. The fact that half of the members of the unit disciplinary committees are members by virtue of their offices in those units makes no difference in terms of ensuring their independence.⁸² In fact, it may be argued that this very fact compromises their independence even further. It follows from the above submissions, therefore, that members of the unit disciplinary committees, like those of the Court Martial Appeal Court, the general court martial and division courts martial, can also not be said to be independent as they do not have security of tenure. In *Uganda Law Society and Jackson Karugaba v The Attorney-General*,⁸³ the Constitutional Court rightly concluded that it was 'not possible for Uganda's military courts to be independent and impartial given the current laws under which they are constituted and the military structure within which they operate'. The Court emphasised that in order for these courts to be independent and impartial, they 'must have security of tenure and other privileges enjoyed by other judicial officers in the Uganda[n] judiciary'.⁸⁴

With respect to the question of financial security as another essential condition for guaranteeing the right to an independent tribunal, this was considered in *R v Génereux* to be relevant for both judge advocates and members of military courts. In this case it was held that the requirement of financial security will not be satisfied if the executive is in a position to reward or punish the conduct of

80 Para 169(c) Report on the Mission to Guatemala, UN Doc E/CN.4/2000/61/Add.1.

81 According to sec 198(a) of the UPDF Act, all members of the division courts martial and the general court martial are eligible for re-appointment.

82 According to sec 195(1) of the UPDF Act, a unit disciplinary committee is comprised of the Chairperson who should not be below the rank of captain, the administrative officer of the unit, the political commissar of the unit, the regiment sergeant major of the unit, two junior officers and one private.

83 n 13 above.

84 As above.

members of the military tribunal and judge advocates by granting or withholding benefits in the form of promotions and salary increases or bonuses.⁸⁵ The pertinent issue to address, therefore, is whether, according to Uganda's military legal framework, the executive and the military hierarchy are in a position to reward or punish the conduct of judge advocates and members of military courts by granting or withholding benefits in the form of promotions and salary increases or bonuses.

In addressing this question, it is important to highlight the fact that the judge advocates and members of military courts are first and foremost serving members of the UPDF. As members of the UPDF they are then assigned judicial functions in the different military courts. The salaries and other financial benefits of members of the UPDF, like in many other armed forces, are largely determined according to status and rank in the army. The question of promotion therefore becomes pertinent to the issue of salaries and other financial benefits of soldiers. According to the UPDF Act, one of the major considerations for promotion and therefore an increase in salary and other benefits is performance. Performance is to a large extent determined according to evaluation reports by the commanding officers of the respective soldiers.⁸⁶ In *R v Généreux*, delivering the majority decision of the Supreme Court of Canada, Justice Lamer correctly noted that '[a]n officer's performance evaluation could potentially reflect his superior's satisfaction or dissatisfaction with his conduct at a court martial'.⁸⁷ He emphasised that, by granting or denying a salary increase or bonus on the basis of a performance evaluation, the executive might effectively reward or punish an officer for his or her performance as a member of military court.⁸⁸ In light of this authority, the following can be noted about Uganda's military justice legal framework.

First, there is no formal prohibition in the legal framework against evaluating an officer on the basis of his or her performance at a military court, so that nothing stops a commanding officer from exactly doing that, something that they may actually be doing. After all, performance evaluation reports are confidential.⁸⁹ The failure of Uganda's military justice system to formally and expressly prohibit evaluating soldiers for promotional purposes based on their performance at military courts is a big shortcoming in terms of guaranteeing the financial security of those members. This deficiency can be addressed by including a specific provision in Uganda's military law to prohibit an officer's performance as a judge advocate or member of a military court from being used to determine his or her qualifications for promotion or rate

85 *R v Généreux* (n 18 above) 58.

86 Sec 55(1)(f) UPDF Act.

87 *R v Généreux* (n 18 above) 59.

88 As above.

89 Sec 55(1)(f) UPDF Act.

of pay. This is what countries like Ireland and Canada have done. In *R v Généreux*, the Supreme Court of Canada was satisfied that such a provision was adequate to guarantee the financial security of judge advocates and panel members of military courts.⁹⁰

Second, other than the specific lack of a prohibition against evaluating members of military tribunals on the basis of their performance at military courts, there are generally no specific measures in Uganda's military justice legal framework for the determination of conditions of service for judge advocates as judicial officers, as is required by the right to an independent tribunal.⁹¹ To address this shortcoming, it is recommended that Uganda should establish a Military Judicial Service Committee to determine the conditions of service of persons appointed to judicial office in the military justice system. This committee should preferably be a committee of the Judicial Service Commission.

3.2 Compliance with the right to an impartial tribunal

It was highlighted in section 2.2 that the test for impartiality of a tribunal is both subjective and objective. It is subjective in the sense that a tribunal must be free of personal prejudice or bias. It is objective in the sense that a tribunal must appear to reasonable observers to be impartial. A tribunal must offer sufficient guarantees to exclude any legitimate doubts.⁹² By its nature, the subjective test depends on each particular case. As the analysis in this article is mainly based on the military justice legal framework and not individual cases, the impartiality of Uganda's military tribunals from the subjective point of view is not part of the assessment that follows. Suffice it to emphasise that, however subjectively impartial a tribunal is, it cannot comply with the right to an impartial tribunal if, from an objective point of view, it cannot be said to be impartial.

Regarding the objective test, one of the important factors to consider in assessing the impartiality of tribunals is their appearance. In the *Constitutional Rights Project* case, where members of a special tribunal consisted of one retired judge, one member of the armed forces and one member of the police force, the African Commission held that '[r] egardless of the character of the individual members of such tribunal, *its composition alone creates the appearance, if not actual lack, of impartiality*'.⁹³ This is because the tribunal was essentially composed of persons belonging to the executive branch of government (which passed the decree in question) whose legal competence was also in doubt.

90 *R v Généreux* (n 18 above) 60.

91 Basic Principles on the Independence of the Judiciary (n 15 above) Principle 11.

92 *Findlay v United Kingdom* (n 40 above) para 73.

93 *Constitutional Rights Project* case (n 58 above) para 14 (my emphasis).

The pertinent question to pose at this point is: Given the structure and composition of Uganda's military courts, to what extent can they be said to be impartial? From the conclusion that Uganda's military courts do not sufficiently meet the requirements of the right to an independent tribunal as analysed in section 3.1, it is very unlikely that a court which is not independent can be impartial. Courts which are institutionally not independent from the executive and the military chain of command, whose members and judge advocates are military personnel subject to military discipline and whose tenure and financial security are not guaranteed, cannot be said to be impartial. In *Gunes v Turkey*,⁹⁴ after concluding that the military judges and the army officer in question had satisfied some of the conditions necessary to ensure an independent and impartial tribunal, the European Court nonetheless held that other aspects of their status called into question their independence and impartiality. As is the case with judge advocates and members of Uganda's military tribunals, the Court pointed out that the military judges in question were servicemen who still belonged to the army, which in turn takes orders from the executive, and that they remained subject to military discipline and assessment reports were compiled on them for that purpose.⁹⁵ On this basis, the Court argued that military judges needed favourable reports both from their administrative superiors and their judicial superiors in order to obtain promotion.⁹⁶ Finally, as is the case with members of Uganda's military tribunals, the European Court pointed out that decisions pertaining to their appointment were to a great extent taken by the administrative authorities and the army.⁹⁷

Apart from the above issues, there are also other aspects that call into question the impartiality of Uganda's military tribunals. For instance, the fact that Uganda's military justice legal framework does not ensure that military courts are sufficiently legally competent,⁹⁸ casts more doubt on their impartiality. A question can thus be raised whether courts, whose judge advocates and members are not independent and whose legal competency is questionable, can impartially administer fair justice. There is little justice that can be expected from such courts.

Also, the fact that Uganda's military courts, which are all composed of military personnel, have jurisdiction to try civilians⁹⁹ creates

94 *Gunes v Turkey* (n 50 above).

95 *Gunes v Turkey* (n 50 above) para 43.

96 As above.

97 As above.

98 Naluwairo (n 54 above) 171-174.

99 Sec 119 of the UPDF Act gives military courts jurisdiction over many categories of civilians. In *Uganda Law Society v Attorney-General of the Republic of Uganda*, Constitutional Petition 18 of 2005 (unreported), the Constitutional Court held by a majority of three to two that the trial of civilians by military courts was not inconsistent with the right to an independent and impartial tribunal as protected in art 28(1) of the Constitution. With respect to the justices of the Constitutional

reasonable doubts as to their impartiality in cases involving civilians. In *Incal v Turkey*, the National Security Court in question, composed of two civilian judges and a military judge, tried the applicant who was a civilian. While emphasising that the Court attached great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces, the European Court held that the applicant could legitimately fear that, because one of the judges was a military judge, it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case.¹⁰⁰ Accordingly, the Court held that there had been a breach of article 6(1) of the European Convention on Human Rights which guarantees the right to an independent and impartial tribunal.¹⁰¹ It can therefore safely be concluded that, from an objective point of view, Uganda's military courts cannot be said to be impartial.

4 Conclusion

The right to an independent and impartial tribunal constitutes one of the most important guarantees for ensuring a fair trial in a democratic society. Through the various objective standards it sets, it ensures that justice is not only done, but is also manifestly seen to be done. Regrettably, this article has established that Uganda's military courts cannot be said to be independent and impartial. They do not guarantee the essential objective conditions for ensuring the independence and impartiality of a tribunal. They are institutionally not independent and their members and the judge advocates do not have adequate tenure and financial security to guarantee their independence and impartiality.

Given the shortcomings of Uganda's military justice system, one wonders why countries like the United States of America are increasingly relying on Uganda's army (including providing their military personnel as part of the contingents) to undertake different military missions, especially in Africa. Are these countries not concerned about subjecting their military personnel to justice systems that do not meet the minimum international standards? It is worth noting that, when these countries contribute their forces as part of contingents to undertake joint military missions across the globe,

Court, this cannot be a correct decision. This article has firmly established that, under Uganda's current military justice legal framework, the country's military courts cannot comply with the right to an independent and impartial tribunal.

¹⁰⁰ *Incal v Turkey* (n 37 above) para 72.

¹⁰¹ As above.

under the Status of Forces Agreements,¹⁰² they normally ensure that their military personnel remain subject to the jurisdiction of their national military justice system.

In sum, there is an urgent need to reform Uganda's military justice system to ensure that the people standing trial in the country's military courts enjoy their internationally and constitutionally-protected right to an independent and impartial tribunal. This article provides the measures that can be undertaken to achieve this.

¹⁰² Status of Forces Agreements are bilateral or multilateral agreements which establish the framework under which military personnel of one country operate in another country. For a good discussion of Status of Forces Agreements, see RC Mason 'Status of Forces Agreement (SOFA): What is it, and how has it been utilised' 12 March 2012 <http://www.fas.org/sgp/crs/natsec/RL34531.pdf> (accessed 12 September 2012).