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Title: **The Right to a Fair Trial in the Ethiopian Military Courts**

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Abstract

This paper examines whether the Ethiopian military courts in adjudicating the members of armed forces comply with fair trial standards enshrined in the various Human Rights instruments. The author explores the normative standards of the right to a fair trial both in the national and international Human rights laws. After a discussion and analysis of the contents of laws applicable to the Ethiopian military courts and their practices, the paper concludes with a summary and suggestions for making the courts fairer.

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Declaration

I, **Yenus Mohammed Rari**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged.

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CHAPTER-ONE

GENERAL INTRODUCTION

1.1 Back ground of the study

Although Human rights are inherent in the very essence of humanity, the existence of government is indispensible for their proper enjoyment. The importance of governments for the realization of human rights lies in the very nature of their power to regulate the communal life of their citizens through laws they enact and institutions they establish. It is ascertained in the international jurisprudence that as far as the realization of human rights is concerned, governments have four major types of duties; the duty to respect, protect, promote and fulfil. The duty to respect refers to the negative obligation of the government bodies to refrain from unlawful interference in the enjoyment of human rights. Duty to protect on the other hand is about the government's duty to prevent violation of human rights by individuals and institutions outside its structure. Promotion is about the responsibility of the government to create the awareness necessary for the development of human rights culture. Likewise, the last duty relates to the obligation of the government to furnish the conditions necessary for the enjoyment of human rights.

Establishing a reliable justice system is among the key prerequisites for the success of the government in discharging the abovementioned duties emanating from human rights laws. The idea of justice system here encompasses both the laws and institutions necessary for the fair and proper regulation of the societal life of citizens. Accordingly, governments are usually required to enact the substantive laws that determine the rights and duties of everyone in the relation between the government and citizens as well as in the relation between the citizens together with the consequences of violation of such laws. They are also required to enact the procedural laws that verify the process in which individuals suspected of violating the substantive laws may be held accountable. Both the substantive and procedural laws are indispensible for a justice to be served. But the existence of these laws alone cannot make a justice system complete. There must be appropriate institutions that supervise the implementation of the laws and take the necessary measures whenever there is a violation.

Courts are among the institutions that play a pivotal role in the administration of justice. Since courts are the legal entities that are entrusted to verify the truthfulness or other wise of the alleged violation of laws and take the necessary remedial measures, their significance for the realization of human rights laws is immense seen from the perspectives of both the victim

and the alleged law violator. Their decisions have a direct effect on the personal or property rights of individuals. The importance of courts in the protection of human rights is not limited to provision of remedies for victims through the application of laws. The fact that the victims have received a legal remedy contributes to avoid further human rights violation by preventing the later from taking any act of vengeance.

Traditionally it was believed that members of the armed forces are not entitled to enjoy human rights comparable to civilians. It was thought that the efficiency of the armed forces depended largely on rigorous discipline.[1] The emphases was thus, on shaping the members towards demonstrating full respect and execution of superior order under every circumstance and ensure operational effectiveness. Accordingly, protection for the human rights of members of the armed forces has not been given the necessary attention. For the proponents of the maintaining rigorous discipline, military justice system itself should focus not on the provision of justice but preservation of discipline. [2] Hence, as a consequence of the persistence of this thinking among various authorities, the administration of justice comparable to the civilian standard was almost not thinkable in the armies of earlier times.

A recent trend in the militaries of various countries on the other hand, appears to the opposite of the abovementioned experiences. Many writes are advocating for the application of the universally accepted human right standards to the military. International human rights courts are denouncing the decisions of different military courts when they are found to be passed in a manner incompatible with the minimum guarantees enshrined in human rights instruments.[3]

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[1] "Constitutional Rights of Servicemen before Courts-Martial", *Columbia Law Review*, Vol. 64, No. 1, (Jan., 1964) p.144.

[2] Daniel H. Benson, "Military Justice in the Consumer Perspective" *Arizona Law Review*, vol. 13 (1971) pp. 598-599. Benson quoted views adopted by Professor John Henry Wigmore, in support of what he described as 'the official perspective' to demonstrate what traditionally believed to be the rational for the existence of military justice and of the courts. It reads: "The prime object of military organization is Victory, not Justice . . . ; if the Army *can* do justice to its men, well and good. But Justice is always secondary; and Victory is always primary. Military justice wants *discipline-that* is, action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of masses of men. The court-martial system supplies the sanction of this discipline. It takes on the features of Justice because it must naturally perform the process of inquiring in a particular case, what was the regulation or order, and whether it was in fact obeyed. But its object is discipline."

[3] ECHR, in the case of *Findlay v. United Kingdom*, judgement of 21 January 1997, Reports 1997-I, p. 281, para.74. The court concluded that the court martial did not comply with the right to a fair trial requirements in particular with respect the central role played by Convening Authority.

As a result, some countries are already changed and in some others changes are under way to adjust the condition of their system of military justice administration. Some countries have taken measures even to the extent of abolishing military courts and transfer their power to the civilian courts.

1.2 The Notion of the Right to a Fair Trial in general

Fairness in procedural terms, principally aims to achieve equality before the law. That is, both equality between the parties, and equality of treatment with other defendants. The assessment of the fairness or otherwise of a trial require the consideration of many things. Sieghar pointed out two levels at which such fairness must be observed. He mentioned in the first place that "the content of the laws that the legislature pass must be fair and reasonable. [...] and secondly, the procedures, or methods used to enforce the laws must be fair and reasonable."[4] But there must be certain standard on the basis of which the fairness and reasonability of at both levels can be measured.

The standards that can be used to measure the reasonableness and fairness of judicial systems could be different. Seen from the perspective protecting human rights of the accused however, the minimum guarantees stipulated in the core international human rights treaties and the constitution of the country concerned should always be taken in to account. In other words, any reduction or denial of the minimum guarantees enshrined in the above mentioned important documents through enactment of subsidiary legislation is considered to be an indication of unfairness. Likewise, when the courts are failed to properly apply the laws and arbitrariness is prevailed in the process of decision making, this also amounts to another cause for the violation.

Many international human rights instruments associate the right to fair trial with the independence, impartiality and competence of the judiciary as well as other human rights of suspected or accused persons.[5] The Universal Declaration of Human Rights (here in after UDHR) for instance, provides that:

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[4] Paul Sieghar, The Lawful Rights of Mankind, (1985) Oxford University press, p.133

[5] See e.g. Art 10 of the Universal Declaration of Human Rights;Art14(1) of the International Covenant on Civil and Political Rights; Art 7(a),(b) and (d) of the African Charter on Human and Peoples' Rights; Art 6(1) of the European Convention on Human Rights; and Art 8(1) of the American convention on Human Rights.

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.[6]

The right to fair trial recognized in the UDHR has become legally binding on all states as part of customary international law. Moreover, it has been reaffirmed and elaborated since 1948 in legally binding treaties such as the International Covenant on Civil and Political Rights, adopted by the United Nations (UN) General Assembly in 1966. Fair trial principles have been also recognized and specified in numerous other international and regional treaties and non-treaty standards, adopted by the United Nations and by regional intergovernmental bodies.

The fair trial guarantees most relevant to the trial stage, or otherwise known as, "*rights of accused persons*" include: the right to equality before the courts, the right to be tried by a competent, independent, and impartial tribunal, the right to presumption of innocence, the right to a fair and public hearing, the right to a trial without undue delay**,** the right not to be compelled to testify against oneself, the right to defend oneself in person or through legal counsel of one's choice, and the right to appeal.[7] In addition to these procedural guarantees, adherence to the principles of legality such as: Freedom from retroactive application of criminal laws and the prohibition on double jeopardy are provided as parts and parcels of the fair trial rights.[8]

1.3 The Military Justice System: An Overview

The military justice system as the name itself indicates is a justice system that operates only within the military organization. The jurisdiction of military justice systems is usually limited to the adjudication of some service related criminal cases and individuals that have direct association with the military organization. Accordingly, the militaries of many countries have the judicial institutions and laws separate from, but simulated to, the civilian justice system.

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[6] Universal Declaration of Human Rights (UDHR), art 10.

[7] International Covenant on Civil and Political Rights (ICCPR) art.14.

[8] Id., arts 15 &16

However, the extensive involvement of the commanding officers at different stages of the criminal justice administration is notable in the military justice system.

In the military justice system of various countries particularly in those countries adopting the court-martial system, the commanders have an absolute control over the administration of criminal justice administration. They make the decision to bring the case to the court-martial's attention, determine the organization and composition of the court, participate in the process of decision making and exercise the power of confirming the decision of the court.[9] The usual power of military commanders of every country, including that of ours, to consider cases involving minor breach of military laws and inflict punishments that affect the personal and property rights of soldiers has also an aspect of justice administration not comparable with its civilian counterpart.

Military courts form part of the institutions constituting the military justice system. Taking in to account their composition and the manner of their establishment, we may generally categorize military courts in to two. Courts that are convened by the concerned military commander as necessary on ad-hoc basis are often known as court-martial.[10] The second category of military courts is permanent that usually comprise of military judges appointed to serve for a specified period of time or for life time. The congregation of the judges of the courts may be from civilians, from the military personnel or from both depending on the system preferred by the concerned country. Evidences indicate that the origin of the system of courts-martial is the Great Britain. Later on, the system was adopted by almost all of its colonies and some other countries not colonized by Britain including Ethiopia.[11] Although there are countries which are still using the method of court martial, but the validity of decisions passed through this mechanism are exposed in recent times to immense critics for their incompatibility with international human rights standards.

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[9] Mark Oakes, The Armed Forces Bill, Bill 4 of 2000-2001, (2001) Research paper 01/03 International Affairs and Defence Section House of Commons library, posted at: http://www.parliament.uk/documents/commons/lib/research/rp2001/rp01-003.pdf. Accessed on 02/01/2011

[10] Bryan A Garner, *Black's Law Dictionary,* (1999), 7th. ed. P 362

[11]The Imperial Army Proclamation, 1944, proc. No. 68, Neg. Gaz. Year 3, no.11 establishes court-martial system identical with that of the Britain.

Like many other countries of the world, Ethiopia has a Military justice system that is designed to provide the service of justice within the military. The current Ethiopian military justice system consists of departments simulated to the regular criminal justice administration. Accordingly, it comprises: the Defence Crime Prevention Department, the Department for Legal Advice and Preparation of legal documents, the Defence Criminal Investigation and Prosecution Department (the Rehabilitation Centre is also under this department) and finally, the Department of Military Courts, (the office of military legal counsels is under this department). The criminal proceedings involve in most of the cases similar procedure that are followed by ordinary justice administration agencies.

Proclamation No 27/96 (herein after the Defence proclamation or the proclamation) is the legal foundation for the establishment of the existing Ethiopian Military Courts. [12] As it can be inferred from the contents of this proclamation, the name court- martial is eliminated. The extensive power of the convening authority prevailing during the era of Hailesellasie I is also not explicitly recognized. Never the less, the courts established by virtue of the above mentioned proclamation are not permanent.[13] Besides, the empowerment of military commanders of the lower units accountable to the ministry to appoint military judges as they want was demonstrated absence of complete departure from the court-martial method of the past. With the view to adjust some deficiencies of the system under that proclamation, an amendment was made on it for two times. The focus of the first amending proclamation, i.e. proclamation No 123/ 98, was on improving some problems observed relating to the criminal investigation and courts were not at issue. In the last amending proclamation, i.e. proclamation No 343/2003 however, the issues of independence, appointment and removal of judges, and the permanence of the courts are briefly touched.[14]Accordingly, the adjustments made by this amending proclamation have demonstrated, at least theoretically, the desire to make improvements in that field.

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[12] The Defence Forces Proclamation, 1996, proclamation No.27/96, Federal Neg. Gaz. Year 2 no.15, under Art 25 establishes two types of Military courts; namely, 'the Primary Military Court' and the 'Appellate Military Court'.

[13]Id., art 25 the introductory part states that " there shall be the following Military Courts to hear cases brought pursuant to article 26 of this proclamation and to be established, *as necessary*, by officials referred to under article 29.(emphasis added)

[14] The Defence Forces Proclamation,(id.) No.343/2003, (herein after the 2003 proclamation) Federal Neg. Gaz. Year 9 no.63, under Art 29

The military courts established in accordance with the above mentioned proclamations have a hierarchical relation in performing their judicial business. Accordingly, the primary military courts are empowered to exercise first instance jurisdiction over all offences[15] and individuals[16] determined to be subject to the military courts jurisdiction. The appellate military court on the other hand, has the jurisdiction to hear, on appeal, cases in which a sentence of imprisonment exceeding two years is imposed by primary military court.[17]

The number of primary military court benches functioning this time is five; which are sited at the respective head quarters of the ministry of national defence, Air Force and that of the Commands. With the exception of the primary military court that found at the defence head quarter which comprises four professional judges, only one professional judge is assigned to each of the remaining primary military courts. However, each of these courts has an average of three or four non-lawyer military judges that works on a part time basis. The number of judges sit at a trial varies depending on the severity of the punishments that the criminal charge may entail.[18]

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[15]The Defence Forces Proclamation, cite above at note 12, Art 26. This article provides that the "military courts shall have jurisdiction over military offences enumerated in the penal code (Articles 296-331)."The penal code to which this provision is referring to was repealed in 2005. Since then, the courts are exercising jurisdiction over the counterpart military crimes provided under the criminal code of Federal Democratic Republic of Ethiopia (the criminal code) of 2005 under the counterpart arts 284-322. The types of acts identified both under these articles of the criminal code as military offences include: offences related to breaches of liability to serve such as: desertion, Absence without leave, Voluntary failure to rejoin the force. Secondly, offences related to abuse of military power Such as: unlawful exemption from service, abuse of authority, and threats or violence against an inferior. Third, offences related to breaches of military duty; Such as: insults or threats to or assaults up on a superior officer, insubordination, breaches of guard duty, mutiny, etc... Finally, offences endangering the safety, moral or power of the armed forces; such as: demoralization of troops, failure to report danger and cowardice. The types of crimes mentioned at third and final place in particular are punishable to the extent of life imprisonment or death depending on the circumstances of the case. In addition to the abovementioned military offences, the courts are empowered to adjudicate all crimes (including non-military) when such crimes are committed by members of armed forces on combat duty.

[16] Ibid. The three categories of individuals subject to the jurisdiction of the courts includes: soldiers, civilians accompanied the military units on combat duty outside Ethiopia and prisoners of war.

[17] id. Art. 31.

[18] Id art. 30(3) states that: In the case of offences punishable with a term of imprisonment over two years, the number of judges who sit in primary military courts shall be five; all military officers. And this number may be reduced to three when five officers are unavailable. For offences punishable with a term of imprisonment not more than two years on the other hand, the number of trial judges must be three; all military officers on active duty.

The appellate military court, currently, has only one bench. The judges that sit in this court are three; i.e. one civilian and two military officers.[19] Unless there is a fundamental error of law, the appellate military court is the highest judicial organ within the military that can make a final determination of criminal cases. In the case of fundamental error of law, the proclamation provides for the possibility of review of the case by the Federal Supreme Court on the basis of cassation.[20]

1.4. Statement of the research problem

Cognizant to its fundamental importance for the realization of many other rights, the right to a fair trial is provided under almost all human rights instruments. On the contrary, nothing is mentioned in these instruments as to the application or otherwise of such fair trial standards in the military courts, except in the Geneva Convention Relative to the Prisoners of War.[21]

On the top of that, due to the very nature of the military courts, their subordination to an executive body and their specialized jurisdiction, the capability of these courts to fulfil the fair trial standard is often in suspicion. Justice Douglas as cited in Daniel reached the heart of the matter when he observed that a civilian trial is held in an atmosphere conducive to the protection of individual rights, "while a court-martial is marked by the age-old manifest destiny of retributive justice."[22]

At the national level, The Constitution of the Federal Democratic Republic of Ethiopia (herein after the Constitution) stipulates very important provisions that set standard for

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[19]The 2003 proclamation, cited above at note 14

[20] The Defence Forces Proclamation, cite above at note 12, art 321

[21] The Geneva Convention Relative to the Prisoners of War, 1949, art.84 provides that "A prisoner of war shall be tried only by a military court, unless the existing laws of the detaining power expressly permit the civil courts to try a member of the armed forces of the detaining power in respect of the particular offence alleged to have been committed by the prisoner of war." It strictly prohibits the trial of a prisoner of war by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, the procedure of which does not afford the accused the rights and means of defence provided for in its article 105. The essential guarantees provided under this article 105 includes: the right to have an assistant, an advocate or counsel, and an interpreter; the right for the communication of the charge or charges and relevant documents; the right to get sufficient time for the preparation of defence. Etc…

[22] Benson, cited above at note 2, p. 597

competence, independence, and impartiality of the judiciary.[23] These provisions are very important in the sense that they lay down generally the powers and constitutional guarantees necessary[24] for institutional independence of the federal and state courts. They also provide for the freedom of individual judges working in federal and state courts from any interference or influence in the exercise of their function.[25] Nevertheless, it is not clear whether or not those principles enshrined in constitution apply to military judges and military courts.

Hence, absence of adequate national or international human rights provision that explicitly establish the application of fair trial standards to military courts has created the problem of uncertainty.

Moreover, the Defence forces proclamation No 27/1996 and the subsequently enacted two amending proclamations, empower the military commanders to appoint military judges. On the other hand, the criteria and procedures necessary for selecting persons capable to the judicial function, particularly the level professional competence required and other criteria to be fulfilled are not sufficiently defined in the proclamation. The proclamation has also failed to establish an appropriate mechanism of judicial administration that encourage the independence and impartiality of the judges and their commitment for the realization of the right to fair trial. Consequently, the role of the commanding officers of various levels regarding the promotion, transfer and removal is remaining unrestricted. What is more, imprecision in some provisions of the proclamation and differences in the interpretation and application create an obstacle in ensuring adequate protection for the rights of the accused to a fair trial.

Retaining one's own legal counsel using one's own means is not prohibited by the proclamation. However, the discretion to accept or reject the retained counsel is given to the military court. Besides, many doubt whether the lower level of income and the remoteness of areas of operation of majority of the members of armed forces permit to retain a legal counsel of their choice. Even in the case of government appointed counsel, the question whether the criteria used to assign those counsels is fair or not requires further consideration.

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[23] The Constitution of the Federal Democratic Republic of Ethiopia, 1995, proc No. 1, Fed. Neg. Gaz. Year 1, no.1 See generally arts 78-81

[24] Id., art 78

[25] The FDRE constitution, cited above at note 23, art 79

The Defence proclamation renders the decisions of the primary military courts below two years imprisonment non appealable. The said provision mentioned 'imprisonment' as a type of punishment against which the appellate review can be sought. Consequently, this has the implication of making all the remaining types of criminal punishments non appealable. Therefore, the constitutionality of this limitation and the issues whether the fair trial standards can be achieved by limiting the right to appeal in the court system full of judges with inadequate knowledge of law are questionable.

The effects of the aforementioned issues and other related matters on the enjoyment of the right to fair trial shall be examined in the subsequent chapters of this study. Accordingly, the study calls for an investigation in a number of research questions:

- ♦What are the contents of the fair trial guarantees available under different human rights instruments and the condition of their application to the military courts?
- ♦ Do the Ethiopian military courts fulfil the requirements of independence and impartiality?
- ♦ Does the Ethiopian military court system allow the Accused, to effectively defend himself in person or through representation by the legal counsel of his choice?
- ♦ Do the condition of appeal of the military courts system satisfies the fair trial requirements enshrined in the constitution and international human rights instruments?

1.5. Objective of the study

This study has the objective of examining the situation of the right to fair trial in the Ethiopian military courts system in light of internationally recognized rights of the accused person to be tried by an independent and impartial court, to effectively defend himself in person or through representation by legal counsel of his choice and the right to appeal.

1.6 Literature Review

Although one can hardly found domestic writings on the specific issue of the rights of members of armed forces, there are lots of foreign literatures on the subject matter. For instance:

A book by well known authors Wayne R. LaFave and Jerald H. Israel on the criminal procedure is much importance for the current research. This book analyses the American laws governing all of the major steps in the criminal justice process starting from investigation and ending with post appeal procedures. The goals for having a law that governs the criminal justice process among which respecting the dignity of the individual is one, are well described in the book. [26]

The authors described human dignity itself as a norm which consist many other specific values. According to them, "privacy, autonomy, and freedom from humiliation and abuse" [27] are among the values that human dignity encompasses. This and other theories incorporated in the book have a greater importance in developing conceptual frame works to this research. Besides, they helps to examine whether in the military criminal justice system there is a clear understanding of the importance of respecting laws regulating the process. However, the differences in legal system of America and Ethiopia and difference in the actors of the process as well as the manner of conducting the process limits the application of some of the issues raised in this book to our country. Besides, issues related with military justice are not touched in this book.

A book by Arnold S. Trebach (1961) under the topic "*Constitutional Rights and the Criminal Process*" made a description of the criminal justice process step by step, from arrest through conviction and appeal. Together with such description, it incorporated an extensive discussion of many court cases and the type and scope of rights that individuals may enjoy through that process. These are very important for the current study in that they help to assess similar happenings within the context of this study. Never the less, as the main focus of that work is on the American criminal justice process which is a common law legal system, it do not answer what may create a problem in countries like us where the role of actors of the process such as: contesting parties and judges is significantly different from common law legal system.

Benson in his article called "Military Justice in the Customer Perspective" after thoroughly describing the numerous critics forwarded against the American Military Justice system by different scholars, pointed out the unfairness of the system in terms of ensuring the equal

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[26] LaFave R.Wayne and Jerald H. Israel, *Criminal Procedure (*2nd ed.), West Publishing co. 1992. p.312

[27] Ibid.

participation of the members in the process of justice administration. According to him, the administration of the entire process in the context of the American military justice system is under the absolute dominance of the officers of various ranks. The non-commissioned officers and other low ranking members of the armed forces as per his assertion has little or no role in making judicial decisions. However, the focus of this author was only on ensuring the equal participation of the members which in fact would bring a positive impact on fairness of the hearing.

Likewise, in an article published by the Columbian Law Review Association Inc, under the topic "Constitutional Rights of Service men before the Courts Martial", the denial of military personnel to enjoy the bill of rights in spite of the enactment the rights for all without making any distinction as civilian or soldier is indicated. The main reason for this denial as pointed out in this publication was the lack of judicial supervision by federal courts over the activities of the military justice with the belief that persons subject to courts-martial possess only those rights granted them by congress. The document further elaborated the gradual changes observed on this traditional assumption and positive measures taken by the Supreme Court to extend the application of the bill of rights to service personnel. Never the less, only the right to be represented by a legal counsel was discussed in this publication mainly based on the bill of rights of rights of the country.

Sherman in his contribution under the title "Military justice Without Military Control" made a very good analysis about the traditional justification for establishing a separate justice system for the military and their irrelevance in the contemporary world. Although his focus was on the demonstration of the need for making adjustments on the jurisdiction of the court-martial, he has made an excellent explanation about the significance of making such an adjustment for the protection of the right to be tried by an independent and impartial court.

From domestic contributions, an article published in the Ethiopian Human Rights law series volume III by Simeneh Kiros Asseffa under the title "*Normative, Institutional and practical challenges in the Administration of criminal justice in Ethiopia*" is the other important literature in the area of this research. In this article the author made some highlights on the

challenges in the administration of criminal justice. The challenges mentioned there includes: the confusion on the role of courts in the realization of constitutionally guaranteed rights. [28]

Problems associated with the law maker such as: failure of the law maker to fulfil the gaps, making laws incompatible with constitutionally recognized rights of suspects, and enactment of laws that weaken the administration of criminal justice. [29] Problems of institutions such as: failure of the office of the public prosecutor to discharge its responsibilities to supervise the investigation process, give timely decisions on whether further investigation is necessary and timely framing of criminal charge.[30]Failure of the courts to strictly implement the laws important for the protection of rights of accused person. [31]Since the military justice system inevitably subject to the basic laws of the country, many of the concerns raised in the national context applies to the military justices system also. But there are still issues peculiar to the military justice system. These includes: issues related with the role of military commanders as determiners of cases to be referred to military courts, uncertainty about the extent to which the national criminal procedure to the military, the extent of independence of the military courts and contents of some laws applicable to the military. Therefore, these main issues need further consideration.

The contribution of this research is that it examines the situation of the Ethiopian military courts in ensuring the rights of accused persons to a fair trial with particular emphasis on their compliance or otherwise with some international fair trial standards.

1.7. Scope of the Study

The right to fair trial encompasses the human rights that belong to pre trial, during trial and post trial stages of judicial proceedings. These rights are equally applicable to individuals charged for committing a crime and for individuals having a civil (private) case to be determined by court of law. However, the scope of this study is limited to the assessment of situation of some rights particularly relevant to the accused; otherwise known as, “the rights of accused persons” in the existing Ethiopian military courts.

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[28] Simeneh Kiros Asseffa “Normative, Institutional and practical challenges in the Administration of criminal justice in Ethiopia” *Ethiopian Human Rights law series* volume III, (2010) p.16

[29] Id, p.21

[30] Id, p.30

[31] Id p.35

1.8. The method of the study

The approach adopted to conduct this research is a qualitative one. The study first identifies the national and international standards of the right to fair trial. Then, it evaluates the contents of specific laws and practices of the Ethiopian military courts from the perspective of the rights of accused persons using the identified standards, relevant literatures, and background documents as interpretive measurement. Accordingly:

Analysis of contents of the pertinent provisions of the ICCPR and other relevant legal instruments, particularly, the 1985 United Nations Basic Principles on the Independence of the Judiciary is made for the purpose of identifying the legal standards of the right to fair trial.

The African Charter on Human and Peoples' Rights (1981), and the Dakar Declaration on the right to a Fair Trial are also considered in order to have an insight as to how the issue is treated at regional level.

The provisions of the FDRE constitution that deals with human rights in criminal proceeding and the independence and impartiality of the judiciary are analyzed with the view to reveal the legal foundations of the right fair trial at the national level and determine their applicability to the military court system.

The contents of laws governing the Ethiopian military courts particularly, proclamation No. 27/1996 and amendments made to it and other laws applicable to the armed forces are analyzed in order to check the compatibility of those laws with the human rights standards and their implication on the enforcement of the right to fair trial. On the top of that, an attempt was made to search other documents that describe the situation of militaries of some other countries for the purpose to appraise the place of the right in our military courts system.

Open ended questioners were prepared after the potential respondents were identified based on the preliminary investigation. Selected respondents are from four different categories of stakeholders of the military justice system. These are: military judges, military legal counsels, accused soldiers and leaders of the military justice system. Interview is also conducted with some key informants to assess the current state of understanding and gaps in the enforcement of the right to a fair trial. In addition to the above mentioned methods, personal observation

of some court proceedings are used with the view to get information that support the theoretical analysis of this study.

1.9. Limitations

Due to protection afforded to number of court records on the ground of military secrecy, the research could not have been undertaken thoroughly based on identification of court cases and an in depth analysis, which might have enabled the development of a body of human rights jurisprudence in the military courts. The scope of the Research is also general and broad because of which it was not possible to identify and elaborate on each and every practice that are inconsistent with constitutional and international human rights principles and propose recommendations. However, descriptive indications were made, though not exhaustive, to major areas of the law and practice that required in-depth analysis and revision pursuant to international and national fair trial standards.

1.10. Structure of the study

The study is organized in four chapters. This chapter is an introductory. The second chapter first identifies, though not exhaustively, human rights provisions dealing with the right to fair trial particularly relevant to the trial stage of a criminal proceeding and analyzes them. To this end, the contents of the FDRE constitution and other two important international legal documents that binding on Ethiopia, i.e. the ICCPR and the UN Basic Principles on the Independence of the judiciary are extensively discussed.

The third chapter focuses on the assessment of the right to fair trial in the Ethiopian military courts. Accordingly, the summary of information gathered from different sources through various means, together with their analysis and interpretation, is presented in this chapter. All the summary, analysis, and interpretations are structured under sub headings that conform to the objective and questions of the study. In Chapter four, which is the last section of this thesis, some concluding remarks and recommendations are suggested.

CHAPTER TWO

NORMATIVE STANDARDS OF THE RIGHT TO A FAIR TRIAL AND THEIR APPLICATION TO MILITARY COURTS

2.1 General Remarks

The minimum standards of fairness by which the trial may be judged are numerous, and are enshrined in treaties and other non-treaty standards. Since articles 10 and 11 of the UDHR acknowledged fair trial rights in 1948, they have been provided in many international and regional human rights documents, such as: ICCPR, African Charter on Human and Peoples' Rights (ACHPR), European Convention on Human Rights (ECHR), American Convention on Human Rights (ACHR), etc… The fair trial guarantees enshrined in various human rights instruments implies that they are meant to protect the human rights of suspected and accused persons during the pre trial, the trial and post trial stages of the judicial proceedings.

So, the minimum standards as rightly expressed by MacCarrick "form the core legal values, below which, derogation might prove detrimental to, or detract from, an overall conclusion by an objective observer as to whether a trial is 'fair' or otherwise." [32]

In this chapter, an attempt is made to explain and analyze the contents of some of the fair trial rights available for the accused person based on the provisions of the FDRE constitution, some core international human rights instruments and the UN Basic principles on the independence of the judiciary. The investigation as to the relevance of such fair trial standards to military courts is also in order.

2.2 Normative Standards of the Right to a Fair Trial

"In the determination of any criminal charge against him or his rights and obligations in a suit at law, every one shall be entitled to fair and public hearing by competent, independent,

[32] Gwynn MacCarrick, "The Right to a Fair Trial in International Criminal Law (Rules of Procedure and Evidence in Transition From Nuremberg to East Timor)"available at: http// www.isrcl.org/papers/2005/MacCarrickpdf. p.11 accessed on 03/2/2011

and impartial tribunal established by law."[33] This provision stipulates major fair trial guarantees available for everyone. It determines the principle to be followed in conducting the hearing; fair and public. The provision as the same time lay down the requirements to be fulfilled by institutions having the adjudicative power to strictly implement those principles; the courts must be: competent, independent and impartial courts established by law. Let us now discuss the meaning, content and scope of these elements together with their implication for the right to a fair trial.

2.2.1 The Right to a Fair and a Public Hearing

Hearing in the context of judicial proceeding refers to "A judicial session, open to the public, held for the purpose of deciding issues of fact or law." Fair hearing on the other hand, is defined as "a judicial or administrative hearing conducted in accordance with due process." [34] The idea of fairness we discuss under the present sub topic is highly related to the right to equality before the courts and before the law. But there are still some specific fair hearing requirements that can be drawn from the provisions of various human rights instruments. These includes: hearing in one's presence, ensuring the equality of arms, and ensuring the publicity of the trial. Let us see each of them briefly.

Hearing in one's presence

In criminal trials where its outcome has the potential of affecting the personal or property rights of an accused, courts in principle have the duty to secure the presence of the former. The significance of the presence of the accused in person is very important seen both from the perspective of ensuring the right of the later to effectively defend himself and enhancing the acceptability of the decision of the court. This is because the accused can defend the criminal charge nicely only when he is personally present. Likewise, the presence of the accused is important for the court so that it can get information from both sides and understand the truth. Hearing both the opposing sides is inherent in the idea of fairness and it would be difficult for a court to reach at a balanced decision without doing so.

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[33] The ICCPR, cited above at note 7, art 14(1)

[34] Garner, cited above at note 10, p.726

Never the less, this does not mean that judicial service cannot be rendered in the absence the accused always. Procedural laws often provide some circumstances under which trial in the absence of the accused or '*trial in absentia*' is possible.[35] In such limited cases specifically mentioned in the law, trial in absentia could be justifiable as the victims of violation of the law should not be left without remedy. But in all other cases, courts have the obligation to ensure the presence of the accused. Therefore, trial without securing or using all available opportunities to secure the presence of the accused could have the effect of violating the fair trial rights of the latter.

The principle of 'Equality of arms'

The second fair hearing requirement relates to the application of the principle of 'Equality of arms'. This principle as pointed out by Emmerson requires that "each litigating party must enjoy a reasonable opportunity to present his case to the court under the conditions which do not place him at substantial disadvantage vis-à-vis his opponent."[36] Representation of the weaker party (obviously the accused) by a legal counsel, as we shall see under a separate sub topic, is an indispensible prerequisite for the realization of the principle of equality of arms.

In spite of this, equal treatment of the litigating parties by the court is also very important. Courts have the duty to give equitable chance of presentation of evidences and give an appropriate value for the arguments and evidences of both parties. Some of the provisions of the constitution and article 14 of ICCPR which aimed at ensuring the fair hearing includes: the right of an accused person to examine, or have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under same conditions as witnesses against them, the right to have free assistance of an interpreter and the right of an accused persons not to be compelled to testify against themselves or to confess guilt. Moreover, the right to benefit from the principle of "exclusion of illegally obtained evidences" provided in many human rights instruments including under art.19 (5) of the constitution also serve the purpose of ensuring the fairness of a trial and discouraging the use of illegal means to obtain evidences .

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[35] The Criminal Procedure Code of Ethiopia, 1961, art 161(2) provides that trial in absentia is possible only in respect of offences punishable either with rigorous imprisonment not less than twelve years or offences that are provided for under Arts. 354-365 (offences against the Fiscal and Economic Interests of the state), which are punishable with rigorous imprisonment or fine exceeding five thousand birr.

[36] Ben Emmerson, Emma Dixon, Human Rights law and Practice, (1999) Reed Elsevier (UK) ltd. P.144

Public trial

The requirement of publicity is provided under almost all human rights instruments as an important fair trial guarantee. The purpose of this guarantee as clearly expressed by Emmerson is "to protect litigants form the administration of justice in secret with no public scrutiny, and to maintain public confidence in the courts and the administration of justice."[37] The principle of publicity thus, has much to do with the principle of 'Transparency' enshrined under article 12 of the constitution. The constitution also specifically requires trial in principle to be conducted in public.[38] The principle of publicity contributes to the protection of the rights of the accused in that the more the trials are made open to the public the more the judges try to maintain the fairness of a trial.[39] But it is important to notice that the possibility of excluding the public from all or part of the trial in some situations is recognized in the human rights instruments also. The reasons of exclusion recognized in many instruments include: morals, public order, or national security in democratic society, or when the interest of the private lives of the parties so requires.

To sum up, since the determination of a case is mostly dependent up on the arguments and evidences put forward by the litigating parties at the hearing stage, ensuring the fairness of this process is critical. Likewise, the practice of a 'democratic society' which is provided in all human rights instruments as a yardstick should be taken in to account in evaluating the appropriateness of decision of a court to exclude the attendance of the public from the trial. It should not be abused.

2.2.2. The Right to be tried by an Independent and Impartial Court Established by Law

'Independence and Impartiality'

The meaning and purposes of the concepts of independence and impartiality in the context of the judicial function are highly intertwined. Consequently, there is no agreement between scholars whether they should be treated as one or separately. Nevertheless, the jurisprudence

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[37] Id., p. 146.

[38] The FDRE Constitution cited above at note 23, art 20(1).

[39] Emmerson, cited above at note 36, p. 146.

of the Canadian Supreme Court in this regard has received a wider acceptance. In the *Valente* case, the Canadian Supreme Court held as follows:

> Although recognizing the 'close relationship' between the two, they are nevertheless separate and distinct requirements. Specifically, impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "independent", however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship with others, particularly to the Executive Branch of government, that rests on the objective conditions or guarantees.[40]

This assertion indicates that the requirement of independence is about ensuring the freedom of courts from external interference in their judicial function. Impartiality on the other hand, focuses on the realization of neutrality concerning the determination of specific case brought before courts of law. Whatever meaning we may give to these concepts, their incorporation in almost all human rights instruments has one ultimate goal to achieve. That is to protect individuals against arbitrary deprivation of human rights.

The determination of criminal charges brought against an individual by a neutral court is one of the main and important fair trial safeguards. This is ascertained by the United Nations General Assembly in adopting a resolution on the issue of human rights in the administration of justice when it acknowledges that:

> [T]he administration of justice, including the law enforcement and prosecutorial agencies, and especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights, are essential to the full and non-

[40] *Valente* [1985] SCR 673, 23 CCC 3d 193 (Can. 1985), at 201–202.

> discriminatory realization of human rights and indispensable to democratization and sustainable development .[41]

The 1985 United Nations Basic Principles on the independence of the judiciary (The basic principles) is an important declaratory document that must be considered in dealing with the issue of the independence and impartiality. [42] This instrument stipulates detailed principles that must be applied to fulfil the requirement of independence and impartiality. It stipulates for instance that:

> "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[43]

As one can understand from the reading of this provision, evidences brought before the court and the provisions of pertinent law are the only things that must be taken in to account in determining the merit of a particular case. The Basic principles lay down various activities to be done by member states to ensure the true independence and impartiality of the judiciary. Accordingly, the recognition of independence of the judiciary in constitutions or other laws of the concerned country in precise terms is considered to be an initial step that gives assurance for the protection of the judiciary against undue influences from different corners.[44] Moreover, the UN member states are obliged to ensure: the independence of the courts as to financial matters by allocating adequate budget that safeguards effective performance of the judicial functions;[45] independence as to decision making by preventing

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[41] United Nations General Assembly Resolution, No.50/181, Human Rights in the Administration of Justice (1995)

[42] See General Assembly resolutions 40/32 of 29 November 1985 & 40/146 of 13 December 1985. This document was endorsed by unanimous consent of the General Assembly. Consequently, it is presumed that it has a binding effect on all the member states by virtue of the principles of customary international law.

[43] Id.,, principle 2.

[44] Basic Principles cited above at n 42, para 1.

[45] Id., principle 7

any inappropriate or unwarranted interference with judicial process and revision of court decisions by extra judicial body; [46] independence as to administrative matters,[47]by setting aside the internal judicial administrative matters like assignment of cases to a particular judge, to the court concerned.

With regard to the individual aspect of independence, the Basic principles states that "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualification in law."[48] The requirements of 'integrity', 'ability', and 'appropriate' set under this provision are general and do not tell us what exactly amounts to such standards. Nevertheless, it clearly shows the significance of emphasizing on the use of personal integrity and professional qualification as criteria for appointment of judges.

The condition of treatment of judges after appointment is also well articulated. In this connection, the basic principles provides that: "The term of office of judges, their independence, security, adequate remuneration, Conditions of service, pensions and the age of retirement shall be adequately secured by law."[49]To realize personal independence of judges thus, mere recognition of the judicial independence would not suffice. All administrative issues of the judge should be regulated by law. The fulfilment of these administrative matters encourages the judge to undertake his professional duty neutrally by preventing him from begging the executive branch or receive bribe from individuals. The appointment of judges for short period of guaranteed term of office is usually considered as one of the treats against the independence of judges. There are countries which don't limit the term of office and appoint judges for life time (until their retirement age). Other countries on the other hand, fix a maximum term of office that a judge can serve. The general trend is however, towards making term of office until the retirement age. Some writers suggest that a reasonable term of office should not be less than ten years.[50] In any case, the term of office of judges should not be as short as to make the judges vulnerable to improper influence.

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[46] Id., principle 4

[47] Id., principle 14

[48] Id.,principle10.

[49] Id., principle11.

[50] UN doc. E/CN.4/2000/61/Add, Report on the Mission to Guatemala, para.169(c).

Accountability of judges also forms part of the issues that obviously arose in connection with the personal independence of judges. I hope it is clear from the ideas raised above that the creation of the principle of independence is not for the personal benefit of judges. Its aim is to protect human beings against the violation of human rights by ensuring the neutrality of the protector of those rights.[51] So, judges cannot and should not violate the human rights or other laws under the guise of independence. Whenever such violation is happened however, judges must also responsible for their wrong deeds like any other law violator. While there is no disagreement about the need for judicial discipline among judges, the question arises as to how to decide on possible sanctions in cases of misconduct and who should decide? The United Nations Basic principles address this issue. One of its principles for instance, partly provides that:

> A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. …All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.[52]

At least two conclusions can be drawn from this provision. First, there must be a system and appropriate procedure through which cases involving judicial misconduct can be decided. And secondly, the judge concerned like any citizen have the right to enjoy all fair hearing guarantees we have seen so far. In other words, absence of an impartial body that is authorized to deal with the issue of judicial misconduct and/or clear procedure of accountability can undermine the independence of a given judicial authority.

Finally, it is important to note that the government is not the only body in charge of ensuring independence and impartiality. Individual judges have also the responsibility to respect those principles. As it was plainly described by the HRC, the notion of impartiality "implies that judges must not harbour preconceptions about the matter put before them, and that they must

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[51] International Commission of Jurists, International Principles on The Independence and Accountability of Judges, Lawyers and Prosecutors, *Practitioners' Guide Series* (2004), No.1, p.3.

[52] Basic Principles, cited above at note 42, principle 17

not act in ways that promote the interest of one of the parties."[53] So, the point here is that the person sitting as a judge shouldn't be the one who due to different reasons interested in the outcome of the case. Consequently, the judge in that situation also duty bound as a matter of judicial ethics to withdraw himself. Likewise, the court concerned is also under obligation to make sure that the court members assigned to adjudicate a specific case are not exposed even indirectly to situations that affect their impartiality.

2.2.3. The Right to be represented by a Legal Counsel of one's choice

Ensuring the representation of the accused by legal counsel is the other standard which is very essential to preserve the fairness of a trial. The FDRE constitution provides this specific right as follows.

> Accused persons have the right to be represented by *legal counsel of their choice*, and, if do not have sufficient means to pay for it and *miscarriage of justice would result*, to be provided with legal representation at state expense.[54] (Emphasis added)

Similar standards are provided under article 14(3) (d) of the ICCPR. Other international and regional human rights instruments also specifically guarantee this right. What we can understand from the abovementioned constitutional provision is that it is the accused person himself who chooses the legal counsel that can represent him. Accordingly, he can choose any person provided that the person is the one who is trained in law, licensed for legal counselling and the accused can cover the required expenses. On the other hand, the provision also tells us that the accused person has the right to have government appointed counsel when he lacks sufficient many required to hire the legal counsel of his choice and when this would result in miscarriage of justice. The point that worth consideration in this connection is what amounts to 'miscarriage of justice'?

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[53] Communication No.387/1989, *Arvo O. Karttunen V. Finland* (views adopted on 23 October 1992), in UN doc. GAOR, A/48/40 (vol. 2), p.120, para. 7.2

[54] The FDRE constitution, cited above at note 23, art 20(5)

Black's Law Dictionary defines miscarriage of justice as: "A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of crime."[55] In different legal systems including that of ours, it seems that miscarriage of justice is presumed to be resulted when an indigent accused charged with a serious crime that entail a severe penalty is tried without having a legal counsel. Because courts usually allow a government appointed legal counsel only for defendants charged with serious crimes punishable with long term of imprisonment or death. In some other countries like United States of America on the other hand, the tendency is towards extending the right to government appointed counsel even to persons charged for misdemeanour cases particularly to cases that are punishable with imprisonment.[56]

Despite the advantages of government-appointed counsel for an indigent, the defendant's right to choose a particular counsel in this case is usually limited. It is the court that determine as to the identity of the counsel that should represent the defendant. In case of self sponsored counsel however, the defendant is free, as can be understood from the wordings of both the national and international human rights standards, to choose any one.

Concerning the manner of representation, both the retained and government appointed legal counsels have the duty to effectively defend the accused. In order for effective defence to be realized, again human right standards require that: the accused must be given adequate time and facilities for preparation of defence and communicate with his legal counsel.[57] What is more, the constitution requires that the accused and his counsel must be given the chance to examine the witnesses of the prosecution and to get the attendance and examination of the defence witnesses.[58]

To conclude, the accused person's right to be represented by legal counsel of his choice is a constitutionally guaranteed right that may not subject to any limitation. In determining whether trial of an accused without a counsel results in miscarriage of justice, it is essential to adopt the wider interpretation of the concept so as to ensure the maximum protection for the accused person's right to fair trial.

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[55] Garner, cited above at note 10, p.1013

[56] LaFave, R. Wayne and Jerold H. Israel, cited above at note 26, pp.334-335.

[57] See e.g. arts 21(2) of the FDRE constitution & 14(3), (d) of the ICCPR.

[58] The FDRE Constitution cited above at note 23, art 20(4).

2.2.4. The Right to Appeal

Appeal in the context of justice administration refers to the situation where a party aggrieved by the decision of the lower court may demand the reconsideration of the case by a higher court authorized to make such review. Since this mechanism allows correction of erroneous decision that could be passed by judges of lower court due to different reasons, its significance in affording adequate protection for the right of the accused is enormous.

Cognizant to this importance, almost all international human rights instruments incorporate appeal as one feature of the right to a fair trial. The ICCPR for instance provides that:

> "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law."[59]

As one may understand from the contents of this provision, no person may be denied the right to appeal so long as he is convicted and sentenced by decision of any court of law. Pursuant to this provision, the severity or otherwise of the penalty is immaterial for the enjoyment of the right to appeal. The focus of this provision however, appears to be only on protecting the right of the convicted person. The issues whether the prosecuting authority has similar right or not and whether appeals on other matters for instance against an order is possible or not are unclear from the readings of the above mentioned provision.

Under the FDRE constitution on the other hand, the right is articulated in the manner that both the parties can enjoy it. Article 20(6) provides plainly that: "All persons have the right to appeal to the competent court against an order or a judgment of the court which first heard the case." Hence, the scope of the right to appeal in the constitution is broader in the sense that it allows the enjoyment of the right both by the plaintiff and defendant. The scope of the right to appeal provided under the constitution again is not limited to criminal convictions. It may extend to court orders. Perhaps the most important point to be noticed from both the above provisions is that in providing the right to appeal, they do not make a distinction on the

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[59] The ICCPR, cited above at note 7, art 14(5)

nature of the judgment and severity of the penalty. They simply provide it as a right of every one aggrieved of criminal trials.

2.3 The Application of Fair Trial Standards to the Military

International human rights instruments in providing all the fair trial standards we have seen so far do not make any distinction between ordinary and military courts. They emphasizes those rights simply as entitlements of every person suspected or accused for committing a crime; or, a person who has a legal claim (civil claim) that can be determined by courts of law. This shows that fair trial standards are applicable to all individuals whether he is military or civilian. This means all judicial bodies including the military courts so long as they are in charge of adjudicating legal issues have the duty to implement those standards. The jurisprudence of various international and regional treaty bodies is also strengthens this assertion.

The HRC has been explained in its General comment No.32 the relevance of fair trial guarantees under the ICCPR to all courts. Although the issue of civilians tried by military courts was the cause for the adoption of that general comment, but the content of that comment clearly indicates the scope of application of such standards. According to the committee, the provisions of article 14 of the covenant "apply to all courts and tribunals within the scope of that article whether ordinary or specialized."[60] This means, all courts including military courts existing within the jurisdiction of member states have the obligation to implement the fair trial standards we have seen so far.

The African Commission on Human and Peoples' Rights in its opinion concerning military courts also expressed more specifically that:

> In many African countries Military courts and Special tribunals exist alongside the regular judicial institutions. The purpose of Military courts is to determine offences of a purely military nature committed

[60] UN Human Rights Committee (HRC), General comment no.32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 august 2007, CCPR/C/GC/32, available at: http://www.unhcr.org/refworld/docid/478b2b2f2. Html [accessed 5 January 2010] para. 22.

> by military personnel. While exercising this function, military courts are required to respect fair trial standards.[61]

Moreover, the recognition of the right to a fair trial as non derogable right in African Union Principles and Guidelines for Fair trial and Legal Aid in Africa has made the application of such standards to military courts more robust. It reads:

> No circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial.[62]

In the Ethiopian constitution, the issue of military courts in general and the application of fair trial standards to them are not expressly mentioned. Nevertheless, the application of all fair trial standards to the courts can be justified on account of different grounds. The principle of supremacy of the constitution[63] is obviously the first justification. Since the major fair trial rights such as: the rights of arrested and accused persons are explicitly enumerated in the constitution, we may safely conclude that the military cannot and should not act contrary to these constitutional norms.

The second reason presupposes the recognition of military personnel as subjects of the fair trial rights. This is to mean that as per all human rights instruments including the constitution, every human being is declared to be the beneficiary of the fair trial rights, without making any distinction of status as to civilian or military. The only constitutional provision that may be construed as a restriction on the enjoyment of some the rights and fundamental freedoms included in chapter three is the prohibition of political partisanship.[64] Again a person joining the armed forces becomes subject to military law. As a result certain rights and freedoms may

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[61] ACHPR, Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria, Communication No. 224/98; decision adopted during the 28th session, 23October-6 November2000, para. 62

[62] Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights 2000, para. R

[63] The FDRE Constitution cited above at note 23, Art 9

[64] Id., Art. 87(5) states: "the armed forces shall carry out their functions free of any partisanship to any political organization(s)."

be restricted in order to preserve military discipline and readiness. For example, a civilian who fails to attend his or her place of work cannot be subject to criminal proceedings, but a member of the armed forces who does so without leave commits a punishable offence under the criminal code.[65] This shows that with the exception of the above mentioned differences, members of armed forces have equal rights and deserve a treatment of military courts which strictly adhere to the constitutional standards.

Thirdly, the constitution imposes on all government bodies the duty to respect and enforce human rights.[66] Hence, military courts have the duty to follow such standards in trying the men in the uniform. More specifically, the obligation of the armed forces under the FDRE constitution can also be cited as the additional justification. The armed forces have the obligation to obey the constitution at all times.[67] Obedience for the constitution means nothing other than respecting and enforcing the fundamental rights and freedoms incorporated therein. Most fair trial standards, as we have repeatedly said, are included in chapter three of the FDRE constitution. Then it follows that, military courts, as one part of the armed forces, have the duty to implement those constitutional standards.

To summarize, the analysis of the contents of the international and regional instruments, the precedent of monitoring bodies as well as the provisions of the constitution and other relevant documents show that, military courts like any other ordinary courts, have the duty to respect fair trial rights.

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[65] The Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, Proclamation No 414, art. 289.

[66] The FDRE Constitution cited above at note 23 Art. 13(1)

[67] Id., Art. 87(4)

CHAPTER THREE

THE RIGHT TO A FAIR TRIAL IN THE ETHIOPIAN MILITARY COURTS

Ethiopian military justice has undergone considerable changes, particularly over the last fourteen years through the enactment of the defence proclamations of 1996, 1998 and 2003. The first legislation (proclamation No 27/96) made it possible to establish military courts that follow the procedures applicable to the civilian courts. However, the courts established under this legislation were not permanent in nature; it was up to the concerned commanding officer to establish the then courts. In the latest proclamation No 343/2003, some adjustments were observed in the legal and institutional framework of the courts. The courts established by the new proclamation appear to be permanent. The power to appoint judges is also restricted only to the top government officials. Besides, slight modification on the accused persons' right to defend himself through the legal counsel of his choice is also made. Hence, the successive reforms of military justice have tended towards the progressive integration of ordinary criminal procedure rules into military justice procedures and the establishment of a permanent court system responsible for enforcing justice in relation to the military crimes stipulated under the criminal code.

Although it has marked in an obvious positive difference in relation to the previous legislative framework and practices, [68] the legislative reform of 2003 remained insufficient and allowed obstacles to the right to a fair trial to persist in military courts. This chapter examines the compliance of Ethiopian military courts with some fair trial standards enshrined in the international human rights instruments and the FDRE constitution. Accordingly, compliance with the following components of the right to a fair trial is examined: The right to be tried by an independent and impartial court, the right to legal representation (counsel) and the right to appeal. We examine only these three components of the right to a fair trial because the researcher believes that thorough examination of the situation of the courts with regard to these components is expressive of both the problems and solutions of the rest components.

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[68] The Imperial Army proclamation, cited above at note 11, under its Art.43(1) for instance, vested the power to confirm the conviction or sentences passed by court martial on the convening authority who is may be the accuser, or the officer who appointed the court martial, or an officer commanding the specific military unit.

3.1 The Independence and Impartiality of the courts

To evaluate the independence and impartiality of the Ethiopian military courts, one needs to look at the standard criteria and conditions for judicial independence discussed in chapter two. Accordingly, the independence and impartiality of the courts is assessed based on the discussion of the conditions of appointment, security of tenure, grounds of disqualification and accountability of the military judges. We now turn to the evaluation of the laws and practices of the Ethiopian military courts based on these standards.

3.1.1 Appointment of Judges

Under article 29 of proclamation 27/96, the power to appoint military judges was conferred up on the commanding officers of various levels including the corps and Air Force commanders. Later on, this provision is amended and replaced by a new provision. The new provision reads:

> 1) (a) Military judges sitting in the primary Military courts shall be appointed by the council [of commanders] up on recommendation by the General Chief of staff.
>
> (b) In the Appellate Military court there shall sit one Civilian judge and two officers to be appointed by the commander-in Chief of the Armed Forces up on the recommendation by the minister.[69]

So, the new provision empowers only the Council of Defence Commanders which is the top-most executive body in the military and the prime minister to appoint the judges of primary military courts and appellate military court respectively. This restriction can unquestionably reduce the influences that may come from the commanders of lower military units. Moreover, the appointment of the judges by the abovementioned top officials for the term of office of five years manifests the need to maintain permanent military courts as opposed to a court-martial which may be convened only where the commanding officer so demands. However, a question may arise as to how these top officials identify officers that fits to the purpose. Thus, it worth considering the procedure followed and the criteria used to appoint the military judges.

[69] The 2003 proclamation, cited above at note 14, art 29(1)

The Procedures for the Appointment of Military Judges

As it can be inferred from the above mentioned provision, the Chief of staff and the minister are the two officials in charge of selecting and proposing individuals capable for the judicial function. The detail of procedures to be followed in the process of selecting military judges is not indicated in the proclamation. In practice however, the above mentioned higher authorities delegate the military commanders of lower units to propose any officer that they think fit to the purpose and then confirm the appointments.[70] It is notable in the existing military courts system that there is no an independent judicial administration body which proposes individuals capable to the position based on objective criteria. So, the role of the professionals existing in the military courts is not visible both in the law and practice. All the officials who propose and confirm the appointment are from the executive body. The involvement of the lower level military unit commanders also shows that there is still high probability for the right of the accused to be affected when the former nominate officers which are loyal to them. The problem may become even more serious when these judges are assigned, as it was usually done, to serve in the military unit of the commander who proposed their appointment. As rightly expressed by one writer:

> The rule of law is not secure when the body for its enforcement is composed of judges who either fear challenging the government or are already predisposed towards declaring its deed legal. If at all possible, when judges have no interest in the issue of the case and no bias towards either of the parties, all citizens are put on an equal footing before the law and are able to protect their rights and security against encroachment by others. [71]

Absence adequate participation of judges and other professionals of law in the process of appointment also have many implications on the independence of the courts. First, it may results in the appointment of judges loyal only to the appointing authority. Secondly, since

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[70] As per the Personal observation of this researcher during the last two appointments held at the central command the role of the judge and other professionals of that particular unit were limited to the follow up of its timely completion.

[71] Christopher Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis" *The American Journal of Comparative Law*,(1996) vol.44 p 606

the members of the appointing authority have no detailed knowledge of the profession of the judicial office, individuals not fit to this purpose may come to position. Generally, the domination of the process by the commanding officers has the potential to affect the independence and impartiality of the courts.

Thus, the nomination of judges should be made by a separate military judicial administration consists of the professionals of law. The higher military officials should select and appoint the judges only among the list of nominees proposed by this judicial administration body. This is important to minimize the excessive power of the executive branch in the administration of military courts and strengthen their independence as well as their commitment for the protection for the rights of the accused.

The Criteria for the Appointment of Military Judges

Article 30 of the proclamation is the pertinent provision that should be referred in order to understand the criteria for selecting individuals capable for the judicial purpose. The requirements provided in two sub articles of this article read as follows: the first sub article provides that:

> "Any officer on active duty and having legal skills may sit in a primary military court."[72]

And the second sub articles states that:

> "Officers sitting in the military court, pursuant to sub article (1); (2) and (3) of this article shall be at least similar in military rank [with the accused]."[73]

Let us now discuss the three major elements of the above mentioned requirements; namely: 'any officer on active duty', 'having the legal skills' and 'at least similar in military rank with the accused' and their implication to the fairness of the trial and independence of the courts.

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[72] The Defence Forces Proclamation cited above at note 12, art. 30(1) para 1

[73] Id., Art. 30(5)

'*Any officer on active duty*': in the context of the Ethiopian military the term 'officer' refers only to military ranks ranging from second-lieutenant to general.[74] According to this requirement thus, all members of the armed forces below the military rank of second-lieutenant are not eligible to be appointed as a military judge whatever their legal background may be. The second component of this requirement (on active duty) also excludes retired officers and offices which are fired from the ministry due to different reasons. We have seen that independence and impartiality of the judges is an important prerequisite for the realization of the right to fair trial. The issue here is thus, whether these officers qualify the principle of independence and impartiality.

Using only officers as military judges is a common practice of almost all militaries of the world. Never the less, writers are challenging this practice nowadays for its non-participatory nature and its unfairness.[75]

Consequently, there are countries which have taken practical measure to avoid the use of officers and care for the right of the accused to be tried by an independent and impartial court either by using civilian judges in the military courts [76] or totally abolishing the military courts and transferring its functions to civilian courts. [77]

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[74] Id., general provisions para 4

[75]Benson, cited above at note 2, p. 609, for instance, asserted regarding the dominance of officers in the entire administration of the American Military Justice system and the focus of the prosecution on the enlisted men and lower ranked members that: "our system of military justice regularly and systematically deprives whole men of the right to participate in the judicial system under which they must live for a significant part of their lives. It imposes guilt upon these same whole men, and they resent and chafe under the arbitrary functioning of such a system. This situation is not only unsatisfactory, but also unnecessary."

[76] As it is expressed in Sherman for instance, "[the British] Courts-martial are presided over by members of the Judge Advocate General's office, an independent civilian agency despite its retention of the traditional military title. The Office is composed of the civilian Judge Advocate General and some twenty judicial officers or "judge advocates," all of whom must be barristers with prior legal or judicial experience. On appointment by the Crown these judge advocates are given a full orientation on military structure, history, and traditions." See Edward F. Sherman, Military Justice without Military Control, *The Yale Law Journal*, Vol. 82, No. 7 (1973), p.1404, the Yale Law Journal Company, Inc. http://www.jstor.org/stable/795571 Accessed: 22/12/2010 06:22

[77] Ibid, it is mentioned in this contribution that "In 1949 Sweden abolished its court-martial system; military offenses previously found in the court-martial code were added to the civilian criminal code, but made applicable only to servicemen."

As it can be observed from the practice of the Ethiopian military courts, the majority of officers appointed as military judges (approximately 80 %) are not full time judges. They perform the judicial function only on the part-time basis as an additional work to their primary responsibility in the command structure. As part of their responsibility in the command structure, the part-time judges undertake the administration of discipline of the members of armed forces. The commanding officers in particular perform various activities even in relation to the prosecution. For instance, they may refer the case to investigators so that they conduct investigation regarding the alleged violation of military law, determine whether a criminal charge should be brought against the suspect before the military court, and they may assign a prosecutor that follow up the case.[78] On the other hand, the same officers are expected to try and inflict penalties on the accused soldiers in their judicial capacity.

This is a clear indication of merger between the functions of the prosecution and that of the judicial administration that could highly weaken the independence and impartiality of the courts. Hence, the courts in this situation are not capable to guarantee the right to a fair trial if not in reality, in appearance.

Some arguments in favour of the use of these officers as judges focus mainly on the officers' improved military expertise and its significance to easily understand acts that constitute military crimes. The supporters of this idea strongly believe that the trial of military crimes by a civilian or other judge lacking sufficient experience of the military life would discourage the maintenance of military discipline and operational effectiveness.[79] Never the less, this justification would not be acceptable for various reasons. First, the criminal code proves the instances where the same military offence incorporated therein can be tried by a civilian judge and civilian court where they are committed by the members of police forces or where the offence has such an international character.[80] So, the same logic can apply to the military. Second, the constituting elements of all military crimes provided in the criminal code themselves are purposely designed in the manner suitable to achieve stringent military discipline required. Hence, understanding and applying those provisions is not beyond the capacity of any judge qualified in the knowledge of law.

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[78] The Defence Forces Proclamation (id), 1998, proclamation No.123/98, Federal Neg. Gaz. Year 4 no.53, art 33

[79] An informal discussion with my friends at the Ethiopian Military Justice department, Addis Ababa, is partly used to describe the justifications.

[80] The Criminal Code of the FDRE, cited above at note 65, art. 340

Thirdly, the complexity of military offences should not be exaggerated; and even in cases where matters demanding sophisticated military knowledge appear before the court, the judge lacking such knowledge is legally empowered to call up on any expert and use him as an expert witness.[81] Therefore, military offences like any other criminal acts committed by individuals having special expertise can be adjudicated by any legally qualified and competent judges.

Accordingly, the idea of military expertise should not be used as an excuse to use individuals whose competence, independence and impartiality is questionable. The duties of the commanding officers and that of the judicial branch should be distinguished. Emphasis should be given to the independence and impartiality as well as professional competence of the judges than their military rank. This is very important for persuasive determination of the merit of cases affecting the personal and property rights of the accused soldier.

'*…having legal skills…*' this is the other element of the requirements provided in the proclamation for the appointment of officers as judges. The term 'skill' is vague. Moreover, the proclamation has also failed to define it. As a consequence, the exact level of legal expertise expected for the position of military judge is not clear. In the absence of that specific definition thus, it is appropriate to consider the general meaning of the word, the obligation of states to enhance the professional skill of the judges, the practice of the domestic and foreign counter parts of the Ethiopian military courts and evaluate its applicability to the latter.

Black's Law Dictionary defines the word 'skill' as: "Ability; proficiency, esp. The practical and familiar knowledge of the principles and processes of an art, science, or trade, combined with the ability to apply them appropriately, with readiness and dexterity."[82] This definition as one may clearly understand expresses 'skill' as a cumulative result of having the theoretical knowledge about the philosophy and procedures of a specific field of work (study) as well as the competence to correctly put them in to practice. Accordingly, 'having legal skill' could be roughly understood as: accumulation of adequate acquaintances of the profession of law and the aptitude to properly implement them.

[81] The Criminal Procedure Code of Ethiopia, cited above at note 35, art. 143

[82] Garner cited above at note 10, p. 1392

The acceptability and fairness or otherwise of a particular justice system is mainly depends up on the performances of its courts and the quality of its judges. It is submitted also that professional competence has much to do with the independence and impartiality of the court.[83] Due to this reason, individuals with high calibre and advanced legal education as well as better professional experience are usually assigned to the position of judge. The significance attached to the professional skill of judge is also plain in the statutes governing the South African military courts. [84] Thus, both the domestic foreign experiences shows that the legal expertise of individuals assigned to the position of judge must be better as compared to other lawyers.

The practice of the Ethiopian military courts appears to the opposite. The current military prosecutors and legal counsel for instance, holds at least a diploma or degree in law. On the contrary, the number of certified in that level and actually working as full time military judges is very few. Almost all of the currently working part-time military judges undertake the judicial function only based on the training they receive for few days on the basic ideas of procedural and substantive laws.[85] The reason for using officers lacking adequate knowledge of law, as expressed by many respondents, is the shortage of legal professionals.[86] It is true that the number of members of the armed forces qualified in the knowledge of law is not enough as compared to the size of jurisdiction of the courts. However, the issue worth considering in this connection is whether shortage of professionals should be used as an excuse to undermine the protection for the individual's right to a fair trial. It is well known that states have the duty to undertake various activities for the realization of human rights. For instance, the duty of states in connection with the specific issue of legal education and

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[83] See Report of UN Special Rapporteur on the independence of judges and lawyers who noted that the highly hierarchical structure of the armed forces and the lack of legal training for many officers on military tribunals make it unlikely that they will be independent and impartial. UN Doc.: E/CN.4/1998/Add.2,30 March 1998, para 130.

[84] Marita Carnelley, "The South African Military Court System-Independent, Impartial and Constitutional?" citing the Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA); (s 14). S 13(2) & (s 9(1) (a)). Expressed that appropriate legal qualification by holding a degree in law; and with not less than five years experience as a practicing advocate or attorney of the High Court of South Africa are required to take the position of a military judge in the South African Military Courts.

[85] An interview with 'Confidential' cite above at note 73.

[86] Opinions expressed by directors, prosecutors, judges, defence lawyers and legal advisers of all Commands and that of the Air Force and some professionals working at the Defence Headquarter are used to describe the current situation of the courts.

training is provided in the Principles and Guidelines for Fair trial and Legal Aid in Africa, as follows:

> States shall ensure that judicial officials have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of accused persons, victims and other litigants and of human rights and fundamental freedoms recognized by national and international law.[87]

Hence, the obligation of states with respect to the judicial function includes the provision of adequate legal education.

In the context of the Ethiopian military courts, there are additional factors that aggravate the shortage of professionals. First, having regard to the rank of officer required in the proclamation, there is no way for the recruitment of lawyers capable to the position of military judge from the civilian society. Besides, the military justice system has no its own mechanism of replacing the lawyers that depart the institution. Second, the same requirement disqualifies the non-officer lawyers who in fact are qualified in the knowledge of law. In other words, whatever one's professional qualification of law may be, Masters or PhD, he may not appointed as a military judge unless he has got the minimum of the military rank of second-lieutenant. Thirdly, even after his appointment following the qualification of the rank requirement, a professional judge is deemed to be not competent to adjudicate all accused officers with senior military rank. These facts show the minimal attention given to the professional competence of the judges. So, the researcher strongly believes that lack of qualified lawyers could not be raised as a valid justification in the absence of any undertaking to address these root causes of the problem. Accordingly, to put in practice the individuals' right to be tried by competent judge and to make the decisions of military courts more persuasive, the condition in which most adjudicative works can be done by professionally qualified judge should be facilitated. Additional requirements relating to the professional competence and personal integrity of the nominees must be incorporated. The criterion for

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[87] Principles and Guidelines for Fair trial and Legal Aid in Africa cited above at note 61, para. B

the appointment of the appellate military court judges must also be indicated. A mechanism should be devised to ensure the effective utilization of lawyers.

'*…at least, similar in military rank [with the accused]*': as per this requirement, an officer appointed as a military judge is deemed to be not competent to adjudicate all accused officers who are his seniors in terms of the military rank. The main source of this requirement is perhaps the hierarchical principle persistent in the military life. Whatever the rational for the inclusion of this requirement may be, it is clear that the focus is not on the protection of the human rights of the accused persons. The weaknesses of this requirement in promoting the implementation of the right to a fair trial in the context of the Ethiopian military courts can be seen from different perspectives. From the accused persons' point of view, it may result in undue delay in his trial when a minimum of three judges holding a military rank equal or greater than his own are not available.

On the other hand, military judges generally do not hold the highest ranks in the military units under their jurisdiction. Consequently, due to the hierarchical principle according to which a member of the armed forces may only be judged by judges of a rank equal to or higher than their own rank, higher ranking officers have generally the chance to escape prosecution. This in turn has the effect of obstructing the principle of equality before the law which is the heart of the right to a fair trial. What is more, this requirement as we have seen earlier, limits the effective utilization of the professional judges.

Therefore, in order to ensure the accused persons right to speedy trial and equality before the law, the equal rank requirement should be either removed or the mechanism in which civilians take the entire positions of military judges should be devised. The focus should be on the integrity and professional competence of the judges rather than on the rank.

3.1.2 Tenure and Accountability

The condition of the security of tenure is the other indicator of the situation of independence. To understand the condition of security of tenure of the military judges it is important to consider the following three consecutive provisions of article 29 of the proclamation relating to the issue of tenure.

2. The term of service for judges both in primary and appellate military courts shall be five years.

3. Judges can be removed because of illness or when decided that they are inefficient in performance on their work and when committing disciplinary offense.

4. When it is stipulated by other law regarding termination.

The first sub article as one may easily observe stipulates the length of the term of office. The last two sub articles on the other hand specify the grounds for removal of military judges. The term of office of the military judges fixed in the proclamation appears to be incompatible with the requirements of the security of tenure. The shortcomings in this respect can be expressed both in terms lack of legitimacy and non-reasonableness of the duration. There is clear inconsistency between this provision and the provision of the constitution on the same issue. To be specific, according to the principle enshrined in the FDRE constitution, a judge in principle may not be removed from his duties before he reach the retirement age provided in the law.[88]If the word 'judge' mentioned in the constitution includes the military judges also, the limitation imposed on the term of office of the later by the proclamation appears to be lack legitimacy.

Tenure either for life or until a specified retirement age as we have seen earlier is the strongest way to provide assurance for the independence of judges. If that discussion is followed thus, it can be argued also that the term of office provided in the proclamation is as short as to render the Ethiopian military courts system non-independent.

Coming to the last two sub articles dealing with the grounds for removal of judges, we found four grounds on the basis of which a judge may be removed from the position of judgeship. These are; illness, inefficiency, committing disciplinary offense, and when the conditions for the termination provided in other laws are fulfilled. The later requirement as one can easily understand presuppose the existence of other law that determine additional grounds for the removal of judges. However, it is not clear as to which exact law may be used as additional

[88]The FDRE Constitution cited above at note 23, art 79(4)

ground. Consequently, no one can be certain whether the judges have adequate protection against arbitrary removal; and this would create a sense of insecurity among the military judges.

It is important to note also that the implementation of the remaining three grounds mentioned above invite a direct interference in to the judicial business. The issue whether a particular judge is inefficient and/or committed disciplinary offence for instance, requires among other things the assessment of the actual performance and personal behaviours of that judge. The specific basis for action against a judge is also equally an important issue .The constitution vests the power to determine the issues involving the administration of the judges of civilian courts on the judicial administration council.[89] In the case of the military courts on the other hand, the proclamation does not indicate how and by whom the judges may be removed from their position. In the absence of clear legal provisions thus, resort must be to the practices of the system concerning the administration of military judges.

The system of administration of the current military judges is largely indistinguishable with system of administration applicable to all other members of the armed forces. The commanding officers of various levels are empowered to determine the promotion, salary, transfer, removal, housing and similar matters concerning the administration of all members of armed forces[90] which obviously include military judges. Consequently, there are many instances where judges are removed from their judicial position even before the expiry of the fixed term of office. Of course, the cause for most of such removal is not disciplinary. It is due to the transfer of the judges to another duty based on decision of command; and sometimes the relocations may be advantageous for the judges themselves. Nevertheless, removal of judges for the reason other than those specified in the law would create uncertainty and deters the independence and impartiality of the courts. In other words, the wide discretion of the commanding authority in relation to the administration of judges has the potential to induce the later to execute their judicial function to the linking of the appointing authorities rather than acting neutrally.

Therefore, the researcher has the opinion that in order to improve the condition of independence and impartiality of the military courts, it is essential to establish an independent

[89] Id., art. 79 (4)

[90] See generally The Defence proclamation, cited above at note 12, arts. 10-24

judicial administrative body in which both the professionals and members of the commanding authority fairly represented. Adopting a judicial code of ethics suitable to the specific circumstances of the military jurisdiction is very important to ensure the accountability of the judges for misbehaviour and encourage their commitment for the fairness of the trials. Likewise, to cope up with the principle of independence and other fair trial standards provided in various human rights instruments, the Ethiopian military courts need to apply the life time term of office provided in the constitution.

3.1.3 Grounds for Disqualification of Judges

Legally determining the objective standards on the basis of which the judges' lack of impartiality may be presumed is the other alternative important for the preservation of the principle of impartiality. In article 30(1) of the proclamation prohibits trial of an accused by a judge who is a member of his home unit without the consent of the former. This provision seems intended to exclude the judges having a prior knowledge of the circumstances of the case and that of the accused. However, at least some two shortcomings of the law can be suggested in this connection. First, the proclamation does not exhaustively list the factors that might affect impartiality and should serve as a ground for withdrawal of judges. There are many issues that may affect the impartiality of a judge in the context of the military. Some of the reasons that can serve as ground for recusal of a judge in the South African military courts system for instance includes:

> Where the presiding judge [...] (a) is, or during the trial becomes, related to any accused or the complainant by affinity or consanguinity in the first or second degree; (b) has, or during the trial gains, such knowledge concerning the facts of the case to be heard by the court that his or her decision is likely to prejudiced thereby; (c) bears any accused, or during the trial develops towards any accused, such animosity as is likely to prejudice his or her decision; or (d)signed as a witness on the accused's election to be heard at a commanding officer's disciplinary hearing.[91]

[91] Marita Carnelley, cited above at note 84, p.71

The second problem of the law relates to the vagueness of the term 'home unit'. This term can be used to refer to military departments of various levels. One may consider for instance, in the case of the Ethiopian military, a specific Command, Division or Regiment as his home unit depending on the context in which he speaks of. Hence, it is not clear to which exact level of unit the term applies.

When we see the facts on the ground, currently, leaders of some Divisions are using to try accused persons belonging to their own Division. All the lay judges undertake the judicial role only as additional work on a part time basis as they have a regular business of administering the army in the command structure to which they are subordinate. Some of them are even commanders by themselves. So, these officers are assuming both the role of the executive and that of the judiciary. Moreover, the issues as to whether the accused soldier should ask for withdrawal of a judge or the judge himself vacate is not clear. What is more, due to the primary leadership role of the lay judges in the command structure (the executive), there is a suspicion that their impartiality could be highly compromised through their exposure to information suggesting that the potential accused is guilty.

Thus, in order to avoid the challenges with respect to impartiality of the military courts and increase the level of protection for the rights of the accused, clear and sufficient grounds of disqualification particularly relevant in the context of military should be legally determined.

3.2 Challenges and Opportunities in realizing the Principle of Equality of Arms

The principle of equality of arms as we have seen in the discussion under the previous chapter is one of the features of the wider concept of the right to a fair trial the aims at equal treatment of the litigating parties. It mainly emphasizes the maintenance of a fair balance between the prosecution and the defence. In order to assess the existence or otherwise of such a balance in the Ethiopian Military courts system, the researcher has used three criteria that are supposed to be helpful to understand the situation. These are, the condition to exercise the right to a government appointed legal counsel, the possibility to be represented by a legal counsel of one's choice and the state of balance between the litigants in making effective preparation and presentation of evidences.

3.2.1 The Condition to exercise Right to a Government Appointed Legal Counsel

It is specifically stated in proclamation no 343/03 that "The state shall provide a defence counsel to a person charged with an offence punishable with imprisonment of not less than five years and is unable to retain a counsel."[92] Hence, in order to get a government appointed legal counsel in the military courts, two cumulative conditions must be fulfilled. The accused must be an indigent; and the penalty attached to the specific provision of the criminal code alleged to have been transgressed by the accused must be punishable with the minimum of five years imprisonment or above. The restriction on the right to government appointed legal counsel is not exclusive to the military courts. In the Federal courts too, an indigent has no right to government appointed counsel unless his indigence is proved and the offence as serious as to entail a severe punishment.[93] The justification for limiting the right to a government appointed counsel as it was repeatedly explained by various authorities is nothing but the scarcity of resource prevailing in the country.

So, the restriction can be understood as an attempt to allocate the limited resource of the country to selected cases that are supposed to be result in 'miscarriage of justice' indicated in the constitution if the accused is not represented by legal counsel. Accordingly, what the drafters of the proclamation had in mind while excluding offences punishable with less than five years imprisonment seems that 'miscarriage of justice' would not result in such cases. However, the researcher has some doubts whether the interpretation of the concept of 'Miscarriage of justice' in the specific situation of the military courts should be limited only to offences punishable above five years imprisonment; and whether the practices of the military courts in this connection advances the protection for the right to a fair trial.

The case load of the military courts as compared to that of civilian courts most of the times is very small. On the top of that, currently there are at least some two salaried military legal counsels in each command and at the head quarter. Thus, the government may not incur additional costs by extending the scope of the right even to the indigents accused for committing the less serious offences.

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[92] The 2003 proclamation, cited above at note 14, art. 34 (2)

[93]Murado Abdo "The indigent's Right to Defense Counsel in Ethiopia" *Ethiopian Human rights Law Series,* vol.3, January 2010 p.146

As a matter of practice in the military courts, the assignment of the salaried military legal counsels for those individuals accused for committing offenses punishable with the term of imprisonment more than five years is automatic. This is to say that as the researcher personally observed for the last four years that the courts habitually assign legal counsel for those accused persons without proving their indigence. Hence, the denial of a government sponsored counsel for those who in fact so deserves[94] and the provision of the service to others without due regard to their economic capability demonstrates the lack of equal treatment of the accused persons in the military courts system.

Therefore, this researcher strongly believes that the persistent justification of scarcity of resource would not be overestimated in the context of the military courts having the salaried legal counsels dealing with the relatively small number of cases. Accordingly, the service should be extended to all persons accused for violating all types of offences in order to enhance the fairness of the trials of the military courts.

3.2.2 The Possibility to be represented by a Legal Counsel of one's choice

The constitution as we have seen under chapter two do not put any limitation on the right of the accused to be represented by a legal counsel of his choice. The phrase "...unable to retain a counsel" also shows that individuals subject to the jurisdiction of the military courts in principle have the right to retain a legal counsel of their choice provided that they cover the expenses necessary for that purpose. Never the less, the power given to the courts under one of the provisions of proclamation No 343/03 makes the full enjoyment of this right doubt full. The provision states "The court may decide that the defence counsel to be appointed shall be from among the members of the defence forces."[95] So, the proclamation gives the court the discretionary power to limit the accused person's right to choose counsel without clarifying the specific grounds on the basis of which such restriction should be made.

In an attempt to explore the practices of the courts in this regard, the researcher has come to understand that the tendency of the accused persons subject the jurisdiction of the courts

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[94] The researcher personally knows that roughly about 85% of individuals accused for committing military offences like: absence without leave, infringement of general service regulation, making an incomplete or inaccurate official statements, Drunkenness on active duty and so forth; all of which are punishable with imprisonment below five years are the non-commissioned officers and ordinary soldiers with lower payment and which do not have access and opportunity to get and hire the legal counsel of their choice.

[95] The 2003 Proclamation, cited above at note 14, art. 34 (3)

towards hiring for instance, a civilian legal counsel is very minimal. As per the view of my respondent lack of resource and lack of awareness about the extent of their right in this connection could be the main reasons for opting only to the military legal counsels.[96] The respondents further told the researcher that they have witnessed two instances where the request of the accused persons to hire a civilian legal counsel of their choice was denied by the court on the grounds of military secrecy. [97]

But the researcher doubts whether military secrecy was the real cause or should be used as a ground to limit the constitutionally guaranteed right to choose any legal counsel. In the case *Military prosecutor Vs Col. Tesfaye* and *et.al* which is the latest case among the above mentioned two cases for example, despite the use of 'military secrecy' as a justification for excluding the civilian legal counsel, but other necessary precautions were not taken by the judges for the preservation of the military secrecy. Because the researcher has thought that the trial was public. All the families of the accused persons including other civilians, as well as, members of armed forces and perhaps the media men[98] were there. So, this shows that the real reason for excluding the civilian legal counsel in this specific case was not the issue of military secrecy.

One may argue to the opposite that military secrecy was really at stake in that specific case and the conduct of the trial in public was by mistake. But even in that case restricting the right to be represented by a civilian legal counsel is not convincing for two reasons. First, the articulation of the constitutional provision concerning the right to counsel may not allow restriction this right. It simply states the right to be represented by a legal counsel of one's '*choice*' as the right of every accused person. Hence, putting a limitation on the exercise of this right contrary to what is provided in the constitution is not legitimate by virtue of the principle of constitutional supremacy.[99] Secondly, it must be noted that the legal counsel has the obligation not to disclose the facts which are secret or declared to be secret by the court

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[96]Interviews made with Directors, military judges, military legal counsels and some other members of armed forces at different times is used to describe the situation regarding the right to a legal counsel.

[97] An interview with 'Confidential' cite above at note 71 above.

[98] The researcher did not recognize the specific media men attended the trial. However, he personally read and heard the entire news about the trial proceeding presented in the 'Reporter' news paper and the VOA radio programme Amharic service respectively.

[99] The FDRE constitution, cited above at n 23 , art 9

that comes to his knowledge in the course of the proceeding. The breach of this legal obligation is also punishable under the criminal code.[100]

3.2.3 The State of balance between the litigants in making Effective Preparation and Presentation of Evidences

The time given and the opportunity to access the necessary evidences and get the attendance and examination of witness are the most decisive factors for the effectiveness of preparation and presentation of litigations. Accordingly, the time and opportunities given to the litigating parties for preparation and presentation must be fair and reasonable. To show the fairness and reasonableness or otherwise of the military courts treatment with this respect, it is important to briefly describe the procedures followed in the actual operation of the military justice system before and during the trial stages.

The time consumed by the prosecution part begins from the moment where the commission of the crime is reported to the concerned commanding officer. The commanding officer after receiving the report usually takes some time to determine whether the case should be resolved through administrative mechanisms or brought before the military courts. If the commanding officer is opted for the second alternative, he will give an order to an investigator or group of investigators so that a formal investigation will be conducted.[101] The investigation of the case also often conducted by military investigators assigned to the specific military unit (regiment) for several days while the suspect is in custody. In order to file a criminal charge against the suspect under consideration again, the investigation report must be sent to the command head quarter where prosecutors having adequate knowledge of law are found. Due to the distant location of the military courts[102] from the area of operation of most members of the armed forces, the courts are not in full control of the conduct of the prosecuting authorities at the pre trial stage. As a result, the prosecution side is using the time it thinks adequate for preparation almost free from supervision by the courts.

The issue of preparation for defence on the other hand, is raised in most of the times only after the criminal charge is brought before the court. 'Mobile trial' is one of the mechanisms

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[100] The Criminal Code of the FDRE, cited above at note 65, art. 450

[101] Proclamation No.123/98, cited above at note 72.

[102] The structure of the primary military courts exercising jurisdiction over all military offences is restricted to the head quarters of the ministry (Addis Ababa) and that of the commands and the Air force.

habitually used by the military courts to ensure the expeditious disposition of the criminal cases. Accordingly, most of the activities of the legal counsel and the accused to communicate each other and prepare evidence and witnesses for the defence are expected to be done within the time in which the court may stay at that particular place. Due to limited budget allocated for the staff members conducting the trials, the trial may not stay more than an average of two days at one place. Hence, preparation of effective defence within that brief period appears to be impossible. What makes the preparation of effective defence more doubt full is the number of accused persons represented by one lawyer. As per the opinion of majority of my respondents, there were instances where more than 10 accused persons were represented by a legal counsel in a trial held at one place.

The other issue is about the situation of access to evidences and the right to get the attendance and examination of witnesses. The comparative advantage of the litigants in this respect appears to be significantly disproportional. The commanding officers as protectors of the military discipline are obviously on the side of the prosecution. Thus, the prosecution side is in a better position in accessing evidence required and ensuring the presence of witnesses in his favour. When we see from the perspective of an accused in the military on that other hands, the situation is appears to be completely different and challenging.

According to opinions of almost all of my respondents, the possibility for the accused in the military to access all the evidences and secure the presence of the witnesses he need is minimal. According to these respondents, there were many instances where various military departments demonstrated reluctance to provide documentary evidences required for the purpose of defence. They expressed also that defence witness sometimes refuse to attend the court or refuse to testify in favour of the accused. The reason for the reluctance of these individuals as per the assumption of the respondents could be a fear of reprisal on the part of their immediate leaders.

Hence, the researcher wants to emphasize that the minimum guarantee provided in the constitution in connection with the right to choose counsel and access to evidences and effectively defend oneself should be maintained in military courts in order to advance the frontier of protection for the right of the accused to a fair trial.

3.3 The Right to Appeal against the decisions of Primary Military Court

We may not found in the Defense proclamation a provision that directly stipulate appeal as of right. However, the condition of the right can be inferred from the contents of the provision that deals with the jurisdiction of the appellate court, from the preparatory works of the legislature during the drafting process and from the practice of the courts. The provision reads: "The appellate military court shall have the jurisdiction to hear, on appeal, cases in which a sentence of imprisonment exceeding two years has been passed."[103] The contrary reading of this provision gives us the message that the court has no power to hear cases on which the decision other than imprisonment or imprisonment below the specified duration is passed. Since there is no other court that is empowered to hear on appeal the decisions of the primary military court, the restriction of the power of the court regarding those cases amounts to restriction of the right to appeal also.

Although the issue why the offences punishable with punishments other than imprisonment are excluded is not clear, the researcher has informed that the intention of the law maker in restricting appealable punishments to two year and above was by considering punishments below that duration as disciplinary.[104] Whatever the intention of the law and the law maker may be, it is well known by the researcher in the actual practice that individuals sentenced below two years imprisonment are not enjoying the right. The unfairness of the restriction on the right to appeal with respect to the above mentioned offences can be justified on account of different reasons.

The first reason is obviously relates to the unconstitutionality of the provision. As we have discussed under the previous chapter, the way the right to appeal is articulated in the constitution do not allow any limitation on the right by anybody including the legislature. Thus, the restriction on this right not only violates the right of the accused to appeal but also contradicts with the constitution. Secondly, since government appointed legal counsel is prohibited under other provision of the same proclamation for offences punishable below five years term of imprisonment, the category accused persons who may be affected by the restriction of the right to appeal are not enjoying the right to government appointed counsel also. Therefore, restricting the right of these individuals magnifies the degree of unfairness.

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[103] The Defence proclamation, cited above at note 12,art. 32

[104] የኢ.ፌ.ዲ.ሪ የህዝብ ተወካዮችም/ቤት የመከላከያ ሠራዊት ለማቀቀም የተካሄደ ውይይት ቃለጉባኤ ቁ.008/88፣ ጥቅምት 23 1988 አዲስ አበባ

Writers urges for the judges working in the Ethiopian criminal justice system which is not totally adversarial to take certain measures in favour of the indigent during the trial with the view to prevent miscarriage of justice.[105] Owing to lack of adequate knowledge of law that the majority of judges working in the military courts have, the indigent in these courts may benefit few if not nothing from role of the presiding judges. Hence, this is also a clear manifestation of the imbalance prevailing in the military courts system. In order to met the fair trial standards provided in various human rights instruments and the constitution thus, the provision of the proclamation should be amended in a manner that conform with the provision of the constitution. This would enhance the level protection given to the right of the accused person.

[105] See for instance, Donovan, A. Dolores, "The Judicial Duty to protect and Enforce Constitutional Rights of Accused Persons Unrepresented by Counsel," *Ethiopian Law Review1*, August 2002 p. 38-39

CHAPTER-FOUR

CONCLUSION AND RECOMMENDATIONS

In order to make the contribution of Justice institutions particularly that of the criminal trials for the protection of human rights fruitful, preservation of the independence and impartiality of the courts, ensuring the defendant's right to be represented by a legal counsel as well as guaranteeing the right to appeal is very important.

Recognizing the independence and impartiality of the courts in the text of the law could be an initial step towards the realization of the principles. Nevertheless, it is not an end by itself. The ideas incorporated in the letter of the law should be put into practice. The independence of courts can be respected if and only if the independence of the judges is respected. In order to make the judges independent and impartial, necessary cautions must be taken from the moment of the commencement of the nomination process. The procedures and criteria used to nominate the judges must be appropriate and open to every concerned body. The nominating body should also be independent so that it can take in to account only issues necessary to create a competent judiciary. The criteria must also be set based on the professional competence and personal integrity required for assignment to specific position. Although the Ethiopian military justice system has gone through different stages to reach its current status, however, it still needs some adjustment in order to provide a free and fair judicial service expected of any democratic country.

Independent judicial administration body is one of the important institutions that the current Ethiopian military courts lack. The absence of this institution as we have discussed in body of this paper, has posed several problems against the endeavour for the preservation and independence of the courts and the standards of the right to a fair trial. Accordingly, the dominance of the commanding officers through the entire process of appointing, promoting, transferring, and removing the military judges was mentioned as the biggest threat against the independence of the judges. In connection with the issue of appointment in particular, lack of transparent procedure, the use of inadequate and inappropriate criterions are mentioned as the prevailing practice that give the courts an image of less independent institution that is incapable to ensure the right to a fair trial.

The persistent use of non-lawyers as military judges under the guise of shortage of educated manpower in the absence of efficient utilization of the existing professionals is mentioned as

an indication of the little attention given to the rights of the accused persons to be adjudicated by a competent judge. The requirements of military rank for individuals to be appointed as a military judge and to sit in a specific trial are discussed as barriers against the effective utilization of the existing professionals and realization of the right to equality before the law and the courts.

The shortness of the term of office of the Ethiopian military courts and absence of guarantee even to stay for that brief duration, the discretionary power of the commanding officers to transfer the person assigned as a judge at any time, the uncertainty about all possible grounds for removing the judge from his position and the determination of the issue of removal by the executive are discussed as the practices inconsistent with the international fair trial standards and as factors that may create sense of insecurity and deter the independence and impartiality of the courts.

Lack of a legal provision that stipulate detailed grounds on the basis of which the withdrawal of a partial judge can be sought, absence of a professional code of ethics that help to make judges accountable for possible misbehaviour, the prevailing use of part-time judges that function in double capacity as administrators of the army on the one hand, and as a judge on the other hand, are described as indicatives of problems in ensuring objective guarantees against biases.

Denial of a government sponsored counsel for those who in fact so deserves and an assignment of the same to others without due regard to their economic capability, the discretionary power given to the courts contrary to the spirit of the constitution to restrict the right to counsel of one's choice whenever they think necessary, the reluctance of some members of the commanding officers to deliver the necessary documents and defence witnesses as well as the inadequacy of the time usually allocated for the preparation of defence are thoroughly discussed as the factors that hinder the observance of the principle of equality of arms and the right to a fair trial.

The negative consequences of the limitation imposed on the right to appeal contrary to the constitutional provision and international fair trial standards is also explained in connection with the restriction imposed on the right to legal counsel and lack of professional competence of the majority of military judges. Having said these as concluding remarks, the researcher of this paper would like to recommend the following as solutions for the betterment of fairness the military court trials.

- The nomination of judges should be made by a separate military judicial administration consists of the law professionals. The higher military officials should select and appoint the judges only among the list of nominees proposed by this judicial administration body. This is important to minimize the excessive power of the executive branch in the administration of military courts and strengthen their independence as well as their commitment for the protection for the rights of the accused.

- The idea of military expertise should not be used as an excuse to use individuals whose competence, independence and impartiality is questionable. The duties of the commanding officers and that of the judicial branch should be distinguished. Emphasis should be given to the independence and impartiality as well as professional competence of the judges than their military rank. This is very important for persuasive determination of the merit of cases affecting the personal and property rights of the accused soldier.

- To put in practice the individuals' right to be tried by competent judge and to make the decisions of military courts more acceptable, the condition in which most adjudicative works can be done by professionally qualified judge should be facilitated. Additional requirements relating to the professional competence and personal integrity of the nominees must be incorporated. The criterion for the appointment of the appellate military court judges must also be indicated. A mechanism should be devised to ensure the effective utilization of lawyers.

- In order to ensure the accused person's right to speedy trial and the equality before the law, the equal rank requirement should be either removed or the mechanism in which the military courts can be presided over by civilian judges should be devised. The focus should be on the integrity and professional competence of the judges.

- The researcher has also the opinion that in order to improve the condition of independence and impartiality of the military courts, it is essential to establish an independent judicial administrative body in which both the professionals and members of the commanding authority fairly represented. Adopting a judicial code of ethics suitable to the specific circumstances of the military jurisdiction is very important to ensure the accountability of the judges for misbehaviour and encourage their commitment for the fairness of the trials. Likewise, to cope up with the principle

of independence and other fair trial standards provided in various human rights instruments, the Ethiopian military courts need to apply the life time term of office provided in the constitution.

- To avoid the challenges with respect to impartiality of the military courts and increase the level of protection for the rights of the accused, clear and sufficient grounds of disqualification particularly relevant in the context of military should be legally determined.
- This researcher strongly believes that the persistent justification of scarcity of resource would not be overestimated in the context of the military courts having the salaried legal counsels dealing with the relatively small number of cases. Accordingly, the service should be extended to all persons accused for violating all types of offences in order to enhance the fairness of the trials of the military courts.
- The desecration of the military court to restrict the right to a retained counsel of one's choice should be removed and accused persons should be allowed to exercise this constitutionally guaranteed right.
- The minimum guarantee provided in the constitution in connection with the right to choose counsel and access to evidences and effectively defend oneself should be maintained in military courts in order to advance the frontier of protection for the right of the accused to a fair trial.
- In order to meet the fair trial standards provided in various human rights instruments and the constitution thus, the provision of the proclamation should be amended in a manner that conform with the provision of the constitution. This would enhance the level protection given to the right of the accused person.

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