



**JIMMA UNIVERSITY**

**COLLEGE OF LAW AND GOVERNANCE**

**SCHOOL OF LAW**

**THE INDEPENDENCE OF MILITARY TRIBUNAL:  
APPRAISAL OF THE ETHIOPIAN MILITARY TRIBUNALS IN  
LIGHT OF INTERNATIONAL HUMAN RIGHTS LAW  
A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE  
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CRIMINAL LAW**

**BY: ERMIYAS GETACHEW GEBRE**

**ID NO. RM. 0731/2010**

**ADVISORS: MR. ZELALEM SHIFERAW WOLDEMICHAEL (LL. B, LL.M &  
ASSISTANT PROFESSOR IN LAW)**

**MR. ABAY ADDIS (LL. B, LL.M)**

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**JIMMA/ ETHIOPIA**

## **Declaration**

‘I declare that this thesis titled **The Right to Trial by Independent Tribunal: Appraisal of Ethiopian Military Courts in light of International Human Rights Law** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as a complete reference’s.

.....

Ermiyas Getachew

Advisors:

Signature .....

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## **List of Abbreviations and Acronyms**

**ACHR -American Convention on Human Rights**

**ACHPR -African Charter on Human and Peoples Rights**

**ADHR -American Declaration of Human Rights**

**AU-African Union**

**CoE -Council of Europe CM -Committee of Ministers**

**Et al-And Others**

**EU -European Union**

**ECHR-European Convention on Human Rights**

**ECtHR- European Court of Human Rights**

**FDRE- Federal Democratic Republic of Ethiopia**

**IACHR -Inter-American Commission on Human Rights**

**ICCPR- International Covenant on Civil and Political Rights**

**OAU-Organization of African Unity OAS -Organization of American States**

**Para-Paragraph**

**Paras-Paragraphs**

**PDRE- People Democratic Republic of Ethiopia**

**UN-United Nations**

**UDHR- Universal Declaration of Human Rights**

**UNHRC- United Nations Human Rights Committee**

**UNGA -UN General Assembly**

**Vs-Versus**

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# Chapter One

## Introduction

### 1.1. Background of the Study

Universal and regional human rights laws guarantees the right to a fair proceedings before independent tribunal established by law.<sup>1</sup> The concept of independence of judiciary postulates institutional as well as individual attributes.<sup>2</sup> With respect to the institutional aspect, the separation of the executive and the judiciary is particularly important. This was emphasized by the UNs Special Rapporteur on the independence of judges and lawyers through stating that ‘The principle of the separation of powers, [...] is the bedrock upon which the requirements of judicial independence and impartiality are founded.’<sup>3</sup> The HRC in its General Comment No.13 also states that the notion of ‘Competence, impartiality and independence of the judiciary [...] established by law raised issues about the actual independence of the judiciary from the executive and the legislative branches of the government.’<sup>4</sup> Therefore, the existence of independence judiciary that is free from interference and pressure from other branches of government and which can guarantee due process of law is crucial for the enjoyment of human rights.<sup>5</sup>

Concerning to personal independence, the autonomy of the judges is the crucial point. In this regard, where the judges are under the control or influence of other branches of the government other than the judiciary, their independence would be threatened. This means that, the independence of the judges would seriously have been endangered where, among others, the

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<sup>1</sup> At the international level, article 10 of the UDHR, articles 14 of the ICCPR. At the regional level, article 6 of the ECHR, articles XVIII and XXVI of the American Declaration on the Rights and Duties of Man, articles 8 and 25 of the American Convention on Human Rights, and articles 7 and 26 of the African Charter on Human and People’s Rights. Several declaratory instruments are also worth mentioning: The Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors. Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58

<sup>2</sup> Sepulveda M et al, *Universal and Regional Human Rights Protection: Cases and Commentaries*, (University for Peace, 2004) at 490

<sup>3</sup> United Nations Document E/CN.4/1995/39, paragraph 55

<sup>4</sup> HRC General Comment 13, paragraph 3, of United Nations document HRI/GEN/1/Rev.1.

<sup>5</sup> Federico Guzman, ‘Military jurisdiction and international law: Military courts and gross human rights violations’ [vol.1], International Commission of Jurists Colombian Commission of Jurists, at 9



executive or the legislative branches of the government have the exclusive power of control or to influence the remuneration of judges, appoint and remove judges, issue instructions to judges or threat to transfer judges to other posts.<sup>6</sup>

Looking to Ethiopian legal framework on independence of judiciary in general, the constitution explicitly recognize both the institutional and personal independence by setting out provisions for separation of powers<sup>7</sup> and the establishment of independence judiciary as well as the freedom of courts from interference or influence of any governmental body, official or from any other source.<sup>8</sup> As it was pointed out hitherto, the doctrine of separation of power supposed to be an essential structural design to ensure the institutional independence for Ethiopian courts by providing a shield for them against interference of other branches of the government.<sup>9</sup> Thus, by virtue of the doctrine of separation of powers, the Ethiopian judiciary can ensure the observance of fundamental rights by keeping the other branches of the government in check as to their compliance with fundamental rights and freedoms enshrined in the constitution as well international human rights instruments to which Ethiopia is a party. Moreover, to keep the institutional independence of the courts properly, the constitution also requires the allocation of necessary budget that would be administered by themselves.<sup>10</sup>

Similarly, in order to safeguard the personal independence of judges in Ethiopian judiciary, in principle, the constitution declares a comprehensive freedom for them to exercise their judicial activities independently and obliges them not to be directed by order or interest of any governmental body or officials except of the law.<sup>11</sup> It also maintains the tenure security of judges by prohibiting the removal before retirement age except for the conditions provided by the law.<sup>12</sup> Such removal decisions also shall be made by the Federal Judicial Administration Council,

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<sup>6</sup> HRC General Comment No.32, paragraph 19.

<sup>7</sup> Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year No.1, 21st August, 1995, articles 50(2), 55 (1), 72(1), 79(1)

<sup>8</sup>Ibid. Articles 78(1) & 79 (2)

<sup>9</sup> Charles Kinnane, 'Administrative law: Some Observations on Separation of Powers'[1952]American Bar Association Journal, at 19

<sup>10</sup> FDRE Constitution (n 7) article 79 (6&7)

<sup>11</sup> Ibid. article 79(3)

<sup>12</sup> Ibid. Art.79(4). Such conditions include violation of disciplinary rules, gross incompetency, or illness that prevent the judge from carrying out his responsibilities.

which likewise decide issues of appointments, promotions, disciplinary complaints, and other conditions of employment.<sup>13</sup>

However, the provisions of the constitution on the independence of judiciary are only the starting point in the process of securing judicial independence. Because, the existence of such provisions alone do not ensure the independency of judiciary in general, the military courts in particular. This is due to the fact that, the independence of the judiciary depends on the totality of a favorable environment created and backed by all state organs than a mere stipulation of the constitution.<sup>14</sup> For instance, there are many laws<sup>15</sup> in Ethiopia adopted by the legislature which limit or otherwise abdicate the independency of judiciary.<sup>16</sup> Therefore, in assessing the independence of the judiciary in general and the military courts in particular, reviewing the concrete independence of Ethiopian military courts would be a main concern of this study than a mere appraisal of the legal provisions.

However, the issue whether military courts have been indebted to observe internationally guaranteed right to independence tribunal with full respect of judicial guarantees like their civilian counterparts remains open to question. On this point, it is important to mention the well-known quotation of French statesman Georges Clemenceau that states “Military justice is to justice what military music is to music” reflects the enormous debate that military courts have always prompted.<sup>17</sup> The main controversy on the system is, among others, due to the distinct nature of military justice system.<sup>18</sup> Because of its nature, military courts in a number of countries integrated with the defense forces or the executive with stricter rules and procedures for the

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<sup>13</sup> Ibid. Art.81

<sup>14</sup> Yemane Kassa, ‘Dealing with Justifiability: In Defense of Judicial Power of Ethiopia’ [2015] Vol.3, No.1, Mekelle University Law Journal, at 60

<sup>15</sup> See for instance the Federal Civil Servants Proclamation, Proclamation No.515/2007, Art.74-77; the Reenactment of Urban Land Lease Holding Proclamation, Proclamation No.272/2002 Arts 17-19, Agency for Government Houses Establishment Proclamation, proclamation No.555/2007 Arts 6 and 12, A proclamation to Provide the Expropriation of Land Holdings for Public Purpose and Payment of Compensation Proclamation No.455/2005, Income Tax Proclamation, Proclamation No.286/2005, etc.

<sup>16</sup> Kassa (n 14) at 60

<sup>17</sup> Guzman (n 5) at 10

<sup>18</sup> Military justice is a distinct legal system that applies to members of armed forces and, in some cases, civilians. The main purpose of military justice is to preserve discipline and good order in the armed forces. Structures, rules and procedures in military justice can be substantially different from their civilian counterparts. Usually, military justice operates in a separate court system with stricter rules and procedures in order to enforce internal discipline and to ensure the operational effectiveness of the armed forces. See Michael Gibson, ‘International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility While Precluding Impunity’ [2008] Vol. 4, No.1, Journal of International Law and International Relations, at 16

purpose to enforce internal discipline and ensure the operational effectiveness of the armed forces and therefore their structures, rules and procedures can be substantially different from their civilian counterparts.<sup>19</sup>

While a number of human rights groups contends a distinct nature of military justice by asserting that it is outdated in the modern age and claims its civilianization.<sup>20</sup> The main rationale for the civilianization is to ensure civilian supremacy<sup>21</sup> and at the same time, to reinforce public confidence in the operation of military system.<sup>22</sup> According to this argument, so far as the judges of military courts are not part of the military hierarchy, the presence of civilian judges in military courts would reinforce the independence of that courts.<sup>23</sup> This is because in most of the cases, military judges are active members of the armed forces they are subordinate to the command chain that would seriously jeopardize their independence.<sup>24</sup> For this reason, Scholars like Michael Gibson,<sup>25</sup> Ronald Naluwairo,<sup>26</sup> advocates the advancement of the system.

On the other hand, many staunch defenders of military justice system have traditionally brushed off any criticisms of it by claiming that the arguments used against the system are anti-militarist.<sup>27</sup> Scholars who argues in line of a separate military justice system emphasizes that military case should be prosecuted, defended and judged by persons who understand the life of soldiers and the risk they face as well as the choice they have to make,<sup>28</sup> whereas civilian judges typically lacks the necessary expertise in military affairs as a result they cannot give proper justice.<sup>29</sup> They also further assert the issue of access to justice to support their argument by

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<sup>19</sup> Guzman (n 5) at 10

<sup>20</sup> Michelle Nel, 'Military Law Practitioners and Academic Discourse: A Sine Qua Non for Developing Military Law' [2017] Vol.45 No.2, South African Journal of Military Law, at 13

<sup>21</sup>The Human Rights Committee has repeatedly stated that States must take steps to ensure that military forces are subject to civilian authority. *See* Concluding Observations on Romania, 28 July 1999, UN Doc CCPR/C/79/Add.111, para. 10. *See also* Concluding Observations on Peru, 15 November 2000, UN Doc CCPR/CO/70/PER, para. 10; Concluding Observations on El Salvador, para 15; Concluding Observations on Tunisia, 10 November 1994, UN Doc CCPR/C/79/Add.43, para.14; and Concluding Observations on Nepal, 10 November 1994, UN Doc CCPR/C/79/Add.42, para.18.

<sup>22</sup> Mindia Vashakmadze, 'Understanding Military Justice: A Practice Note' (DCAF: 2018) at 6. Available at <[www.dcaf.ch](http://www.dcaf.ch)> (accessed in February, 2019)

<sup>23</sup> *Ibid.*

<sup>24</sup> Guzman (n 5) at 10

<sup>25</sup> Gibson (n 18)at16

<sup>26</sup>Ronald Naluwairo, 'Military Courts and Human Rights: A Critical Analysis of the Compliance of Uganda's Military Justice with the Right to an Independent and Impartial Tribunal' [2012] Vol. 12, AHRLJ, at 253

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

pointing out that the prosecutors and courts must have sufficient access to areas where troops are deployed.<sup>30</sup> Notwithstanding of this argument, different international human rights bodies and mechanisms have confirmed that military justice has been considered an integral part of the general justice system, to which the international standards of independence tribunal shall be fully applicable.<sup>31</sup>

When we see the trends of military justice in many jurisdictions, particularly in Europe and Western countries, there have been numerous changes. These changes includes shifting from military to civilian jurisdiction, reducing the competency of military courts, abolishing military courts at all.<sup>32</sup> A number of countries abolished military jurisdiction completely.<sup>33</sup> Many countries have abolished military courts in peacetime.<sup>34</sup> Other countries have introduced safeguards into their constitutions or legislation in order to ensure that gross human rights violations and the trial of civilians are removed from military jurisdiction.<sup>35</sup> Several countries have also amended their laws to ensure fair trial.<sup>36</sup> Human rights influence has been seen to be

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<sup>30</sup>Arne Willy Dahl, *International trends in Military Justice* (2011)

<sup>31</sup>See the UN Draft Principles Governing the Administration of Justice through Military Tribunals, UN Principles on Military Justice, U.N. Doc. E/CN.4/2006/58 (2006), paras.3, 10 and 11 and Resolutions 2004/32 and 2005/30. The HRC has also reaffirmed the position that the right to a fair trial as provided for in article 14 of ICCPR, applies to military tribunals in full just as it does to the civilian and other specialized tribunals. The African Commission on Human and Peoples' Rights, in its decision upon *Civil Liberties Organization & Others v Nigeria* (2001), has stressed that 'military tribunals must be subject to the same requirements of fairness, openness, and justice, independence and due process as any other process'. See *Civil Liberties Organization & Others v Nigeria* (2001) AHRLR 75 para 44. See also Naluwairo, (n 26) at 253.

<sup>32</sup> Dahl (n 30)

<sup>33</sup> For instance, The Czech Republic abolished its military courts system in 1993 as a result of political and socio-economic changes in the country. Civilian judicial organs assume the tasks of military courts. Moldova abolished the military courts and military prosecutors in 2010; with the former integrated into the system of ordinary judiciary. The competences of first instance military courts were transferred to the first instance courts of general jurisdiction. This change was implemented as a part of broader judicial reforms. Belarus abolished the system of military justice (military prosecution and military courts) in 2014. The tasks of prosecuting and trying military service personnel shifted to the ordinary judiciary and prosecution. See Vashakmadze (n 23) at 12

<sup>34</sup> For instance, the military courts jurisdiction in time of peace abolished by Germany, Sweden, Austria, Denmark and more recently by Belgium. See Edward Sherman, 'Military Justice Without Military Control' [1973]Articles by Maurer Faculty, Paper 2265.1398. Available at <[www.repository.law.indiana.edu/facpub/2265](http://www.repository.law.indiana.edu/facpub/2265)>

<sup>35</sup> For instance, France, Netherlands, Switzerland's, Italy, Norway and Canada all adopted reforms which resulted in fairness courts-martial with expanded civilian court jurisdiction and review power.

<sup>36</sup> Ibid. For instance, since 1996 UK Army law has undergone extensively change to ensure that it more reflects the provisions of European Covenant on Human Rights following the European Court of Human Rights decision in *Findlay v UK*. See Arne Willy Dahl, *International trends in Military Justice* (2011). Similarly, in Africa, since the adoption of the new constitution of Democratic Republic Congo in 2005, the decisions of military courts became subject to review by civilian high court and the constitution placed military judges under the supervision of the Judicial Service Commission with respect to career management and the supervision of internal discipline. See AFriMAP and Open Society Initiative for South Africa, 'The Democratic Republic Congo Military Justice and Human Rights - An Urgent Need to Complete Reforms' [2009] Discussion Paper, at 5

particularly strong in states parties to the European Convention on Human Rights and states affiliated to such states, typically Australia, Canada and New Zealand.<sup>37</sup>

Concerning to the issue whether or not establishing military courts in Ethiopia has constitutional ground, in this regard the FDRE Constitution, in principle, confers the judicial powers to the federal and state level regular courts.<sup>38</sup> However, there is a stipulation that implicates the judicial power may be exercised by institutions other than regular courts.<sup>39</sup> The reading of the provision of article 78(4) of the constitution reveals that special or *ad hoc* courts or institutions that follows legally prescribed procedures may be established to carryout activities assigned by the law.<sup>40</sup> Within the ambit of this provision, institutions like Civil Servant and Tax Appeal Tribunals and similar organs which may be established by the House of People Representatives can be assumed as to special or *ad hoc* courts provided that they do have follow legally prescribed procedures.<sup>41</sup> Therefore, establishing distinct military courts shall not be considered as unconstitutional as far as they do follow due process of law in discharging their judicial responsibilities.

To conclude, in order to maintain the effectiveness and combat readiness of the army, one may appreciate the establishment of a distinct military courts with stricter rules and procedures. It is however equally important to take into attention the fact that ensuring justice through independent military courts would be essential not only to comply with the country human rights obligations but it is indispensable to ensure accountability in the army. To this end, a delicate balance needs to be kept between these two competing interests. Throughout this study the researcher, therefore, will assess the compliance of Ethiopian military justice system with that of the international standards of the right independent tribunal and attempt will be made to point out the importance of guaranteeing this right to ensure justice and human rights as well as accountability in the army without losing sight of the uniqueness of the military environment.

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<sup>37</sup> Dahl (n 30)

<sup>38</sup> See FDRE Constitution Art.79(1)

<sup>39</sup> Ibid. In this regard article 78(4) of the constitution provides that ‘Special or *ad hoc* courts which take judicial power away from regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established.’

<sup>40</sup> The constitutional stipulation of ‘Special or *ad hoc* courts that follow legally prescribed procedures’ refers to that due process of law must be observed when institutions exercise judicial function involving individual rights. See Kassa (n 14) at 61

<sup>41</sup> Minute of the Constitutional Assembly of the Transitional Government of Ethiopia, Discussion of the Assembly on Art.78(4), (Vol.5, December 01, 1994)

## 1.2. Statements of the Problem

The Ethiopian Defence Forces, since its reorganization under a new statute<sup>42</sup> has achieved significant advancement towards transforming itself into organization that has internalized constitutional values and norms, and in accepting civilian control and authority.<sup>43</sup> However, it is hard to find this progress in the military justice system. This is because, when considering of the nature and structure of military justice system, one would raise the question of whether the right to independent tribunal has an exception. This is due to the fact that, the legislations of Ethiopia do not ensure adequate safeguarding to guarantee the institutional as well as personal independence of the military courts as institution and judges as individuals, especially from the military chain of command and the executive.

Military courts, in Ethiopia, typically categorized as separate justice system, to this end they did not form part of the general judiciary of the country, rather they are integrated with the Ministry of Defense Forces. As a result, they are made up of military officials who are subject to the military hierarchy and discipline.<sup>44</sup> The judges thereof often had not received adequate training that required to undertake judicial tasks as well as they do not enjoy sufficient security of tenure which is essential to safeguard their personal independence. The most serious defects thereto would seem due to their structure and institutional position. Therefore, because of the nature and structure, it is hard to find the attributes of institutional and personal independence of judiciary in the military courts of Ethiopia.

In addition to the structural problem of the military courts highlighted hitherto, the country international obligation of ensuring independent tribunal would be undermined where the possibility of reviewing the decisions of military courts by other independent organs has been

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<sup>42</sup> FDRE Constitution and other subsequent laws

<sup>43</sup> Mulugeta Gebrehiwot Berhe, 'The Ethiopian Post-Transition Defence Review: Building a National Army from a Revolutionary Democratic Army' [2016] Africa Politics, African Peace, at 17

<sup>44</sup> At this juncture, it may be important to explain the reason why this researcher is motivated to work on the issue. The main cause is attributable to the timing of the ratification of the Amnesty Proclamation No.1096/2018 by Ethiopian House of People Representatives that grants amnesty for persons implicated, charged and convicted for several crimes including offences for the violation of some of military laws. Following of the ratification of this law, several members of defense forces detained in different civil Prisons and Correction Centers of the country revealed that, among many things, the military courts to which they had appeared were not independent especially from the military chain of command as well as the executive. This incidental fact released through different National Medias motivated me to examine the country military justice system in line of the international standards of independence tribunal.

narrow. In this regard, the Cassation Division of the Federal Supreme Court of Ethiopia has been vested with the power to review the final decisions of military courts on the question of fundamental error of law,<sup>45</sup> while error of facts yet not reviewed by independent body. Accordingly, although the Federal Supreme Court has apprehended few decisions on military cases, while it did nothing to examine the cases in line of the right to independence tribunal recognized by international human rights laws to which Ethiopia is a party.<sup>46</sup>

Therefore, all these particulars had impressed this researcher to investigate predominantly the issues of whether State Parties to the international human rights instruments, including ICCPR & ACHPR, are indebted to ensure their military courts comply with the international standards of independence tribunal, just like their civilian counterparts. If this is so, whether the Ethiopian military courts would comply with that standards. Hence, the extent to which Ethiopian military courts complies with the international standards of independence tribunal will be the major focus of the thesis.

### **1.3. Research Questions**

The analysis in the thesis is guided by and seeks to answer the following major and specific questions:

1. What are the criteria to measure the independence of Ethiopian military courts and judges?
2. Do Ethiopian laws provides full guarantees for military courts and judges in the way that complies with the international standards of independent tribunal?
3. Do Ethiopian military courts and judges objectively independent?

### **1.4. Objectives of the study**

The study has both general and specific objectives.

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<sup>45</sup>See Article 40 of Defence Force Proclamations No 1100/2019 (25th Year No.19 Addis Ababa, 19th January, 2019)

<sup>46</sup> In one of its decisions, the court has confirmed the military courts jurisdiction on crimes relates to financial administration to which the defendant was prosecuted and convicted by military courts for crimes of “Use of Forged and Breach of Trust” stipulated under articles 386 & 642 of the 1957 Penal Code. *See* the Federal Supreme Court Cassation Division, judgement on the jurisdiction of military courts on crimes other than military offences, File No.3336, Vol.9

#### **1.4.1. General objective:**

The overall objective of this study is to examine the compliance of Ethiopian military tribunals with the minimum international standards of independent tribunal guaranteed by international and regional human rights laws to which Ethiopia is a party.

#### **1.4.2. Specific objectives:**

1. To examine the nature and scope of the right to independent tribunal in order to determine whether it apply on military courts, and its implication in Ethiopian military justice system;
2. To determine the compliance of Ethiopian military courts with minimum international standards of independent tribunal
3. To show how Ethiopian military courts and judges objectively independent

#### **1.5. Significance of the study**

The major significance of this study would be identifying the shortcoming of the Ethiopian law of military courts that require reform in order for enabling the country to comply with the international standards of independence tribunal and providing appropriate recommendations. In this way, the thesis will have expected to be a very important contribution for the process of legislations reforms that recently ongoing in the country in general, in the military justice system in particular. This will greatly essential to ensure that members of the Ethiopia Defense Forces and other peoples who are subject to the jurisdiction of military courts would enjoy their right to independence tribunal guaranteed by international human rights laws to which Ethiopia is a party.

Furthermore, due to the fact that the question of independence of military courts in Ethiopia is an area that has hardly been researched and written about, this thesis will also provide a very useful information on the subject for academics, law and policy makers, legal practitioners, students and military personnel.

#### **1.6. Limitation of the study**

Owing to the required page and time limitation as well as for purposes of manageability, the thesis mainly focusses on the appraisal of the Ethiopian military courts framework in line of the international standards of the right to independent tribunal. In doing so, the researcher will



mainly focus on analysing of the normative and institutional framework. Therefore, the paper will only seek to study the extent how the Ethiopian law safeguards the independence of military courts as institution, military judges as individuals. It does not seek to compare between individual cases entertained by such courts. Any mention of specific cases is an attempt to illustrate part of the study of the legal frame work and should not be viewed as an attempt to compare such individual cases. The absence of sufficient scholarly writing, in particular the failure to have any comprehensive analytical research on the question of independence of Ethiopian military courts and the possible administrative challenges to access the cases of military courts possibly will limit the analysis of the study.

## **1.7. Research Methodology**

### **1.7.1. Research Methods**

Since the main concern of the study is to appraise the compliance of Ethiopian military courts framework with that of international standards of the right to trial by independent tribunal, it is important to analyse the laws enshrined in both international human rights instruments to which Ethiopia is a party and relevant domestic legislations. The issue in relation to legal framework will be addressed through examining relevant legislations. Although to provide a comprehensive finding, it is also essential to investigate how these legislations are applied in practice. This is because whatever the legislations may safeguards the independence of military courts, the practice and behavior of the military judges can still compromise it. Accordingly, empirical assessment is important to address the issues. For this reason, both legal and social science research methodology will be employed in the study.

#### **1.7.1.1. Sources of Data**

The study will mainly rely on primary and secondary sources. Primary sources including international, regional and national legal instruments such as treaties, protocols, charters, covenants, and legislations will be utilized. Key-informant questionnaires and interview will be employed. Secondary data source including books and journals and articles and electronic searches, will also be utilized.

### **1.7.1.2. Data Collection Techniques and Tools**

Key informant questionnaires and interview will be employed as a means to collect data. This technique will be used to exploit the experience, opinions, practices regarding the issue of independence of military courts of Ethiopia. Questionnaires will be distributed to judges of military courts, military prosecutors, and members of military defense council. Interview will be conducted with higher officials of both Primary and Appellate Military Courts.

Questionnaires for key informants and interview with higher officials of the military courts will be utilized to collect the required data from the primary sources. The questionnaires will be closed and open-ended, whereas the interview questions will be open-ended, structured and semi-structured. Check lists will also be utilized for questionnaires and interview as a means to make sure availability of the required information for the study. Such questionnaires and interview questions have been prepared in *Amharic* language to avoid misinterpretation and misunderstanding on the parts of the respondents.

### **1.7.1.3. Method of Data Analysis**

The method in identifying and analysing laws and secondary legal sources relevant to the issues under the study will mainly employ literature review. While literature review is patent to the whole study, descriptive method will also be utilized. Raw data obtained by questionnaires and interview will be structured, systematically organized, and analyzed. Interview questions and questionnaires will be structured in qualitative approach. In analyzing the data, relevant tools, which are appropriate to the nature of the data obtained, will be employed to test the finding in relation to the basic questions of the study.

### **1.7.1.4. Area of Sampling**

To undertake this study, it is necessary to select some percent from the total number of military courts of the country. Hence, out of four military courts, including appellate military courts, established at North, North-West, Central and South-East of the country,<sup>47</sup> two sample courts, one from Primary Military Courts and one from Appellate Military Courts located in Addis

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<sup>47</sup> The courts are structured as to one central court and three division courts

Ababa, which is fifty percent of the total number of military courts,<sup>48</sup> selected as sampling area to collect data on the issues mentioned in the questions and objectives of the study.

#### **1.7.1.5. Respondents Sampling Techniques**

Simple random sampling will be utilized to collect primary data from the selected three categories of key informants. The first group of respondents will be selected from military judges who serve in the selected sample courts. The second category of respondents are military prosecutors who serve in the selected sample area and who have direct contact with the selected sample military courts. The third category of respondents are members of military defense council who represent the accused soldier in accordance with the relevant law. These respondents are supposed to know the issues raised in the study in relation to the military courts. For all participants, the researcher will use 25 percent of the total number. In this study, purposive sampling method has been selected because of the nature of the respondents. The reason to select this sampling method is that the nature of the issues of the study i.e. the respondents who participate in the study will be judges of military courts, military prosecutors, members of the military defense council. In addition to this, interview will be conducted with the high officials of Primary and Appellate Military Courts.

#### **1.7.2. Research Design**

In order to accomplish the research, the study will be designed in the following ways.

##### **1.7.2.1. Analysis of International and Regional Human Rights Instruments**

A critical analysis of the relevant international human rights instruments to which Ethiopia is a party will be undertaken to determine the content and scope the right to independence tribunal. In particular, relevant provisions of the UDHR, ICCPR, and the ACHPR are examined. Other regional and international human rights instruments and materials in which the right to independence tribunal has been elaborated also will be analyzed.

Accordingly, the UN HRC General Comment No. 32; the UN Principles on Military Justice; the UN Basic Principles on the Independence of the Judiciary and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa would be analyzed. Although these materials are considered to be soft law and not binding, while they serve as interpretative aids in

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<sup>48</sup> These sample courts are selected randomly because all courts have the same powers and are established as well as structured in the same way.

order for understand the content and scope of the right to independence tribunal to which this thesis has been considered to investigate.

### **1.7.2.2. Examination of Ethiopian Military Justice**

A critical examination of Ethiopian military justice legal framework starting from the establishment of the country 's army as a national institution in the Imperial Regime till now will be analyzed. Examination of these legal instruments establishes the historical foundation, origins and evolution of Ethiopian military judiciary especially as it relates to the right to independence tribunal.

### **1.7.2.3. Appraisal of Relevant Case Law**

A critical appraisal of the emerging military justice jurisprudence from the HRC, ECtHR, IACHR and ACHPR will be undertaken. This is will be further complemented by the analysis of the Concluding observations of the HRC on the periodic reports of states party to the ICCPR.

## **1.8. Literature Review**

In Ethiopia, the question of military justice and the right to access independent tribunal hardly received any scholarly attention or inquiry. For this reason, despite of the important role that the right to independent of military tribunal plays in ensuring justice, the question of administration of military justice is an area that has hardly been researched. This could be partly attributed to the fact that military justice is not considered as an integral part of the general judicial system of the country. As such, the administration of military justice is often left out of many initiatives aimed at improving the administration of justice of the country.

According to this researcher knowledge and access, in Ethiopia, until the writing of this research there is no literatures and research that directly address the issue of the right to fair trial in the military judiciary in general and the right to independent tribunal in particular. But, in 1994 James C.N. Paul, were attempted to address some of the structural and human rights issues in the military justice of Ethiopia.<sup>49</sup> The main concern of the author were to put some of his own contributions regarding the structure of the security forces that includes the military forces on the newly adopted FDRE Constitution of the 1995.

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<sup>49</sup> James Paul, 'Human Rights and the Structure of Security Forces in Constitutional Orders: The Case of Ethiopia' [1994] Wm. & Mary Bill Rts. J. 235. Available at <<http://scholarship.law.wm.edu/wmborj/vol13/iss1/7>> (accessed in February,2019)

Accordingly, the author provided some good information about human rights issues that should have been taken into account in governing the security forces in democratic constitutional order. He undoubtedly apprehended the shortcoming of the structure of the military forces of the Imperial and Dergue regimes that were dependent on the ruling parties and he appealed for the establishment of independent security forces which have to be under the control of the civil government. He also affirmed that, all these are may be realized where there has been independence judiciary with the power to hear and determine all cases alleging abuses of power by the security forces. However, as far as the article was written before the adoption the FDRE Constitution and not directly scrutinized the issue of independence of military judiciary of the country therefore it has less significant to this study.

### **1.9. Organization of the Thesis**

In addition to this introductory chapter, the research has also the following chapters. Accordingly, the second chapter examines the nature of military justice and the arguments for and against establishment of a separate military courts and also analyze and explore the historical origins and evolution of Ethiopian military justice system as well as the current Ethiopian military laws.

Chapter three focuses on the nature and meaning of the right to independence tribunal and attempts to address whether or not this right is applicable on to military courts and this chapter will also provide the indicators used to measure the compliance of the country military courts with that of the international standards of independence tribunal.

Through examining the domestic law as well as practice in Ethiopian military courts by means of empirical assessment, chapter four appraises the compliance of Ethiopia military courts framework with the right to independent tribunal. Finally, the research provides some general conclusion and major recommendation which can help to ensure compliance of Ethiopian military justice system with the right to independent tribunal.

## Chapter Two

### 2.1. Military Justice System: General Overview

#### 2.1.1. Introduction

As any criminal justice administration, the military criminal justice has its own laws that determine the unique structure and establishment of the military judiciary system. Military courts in many countries operated in separate justice system with strict rules and procedures to ensure discipline and operational effectiveness of the armed forces. Unlike the system of other countries, in Ethiopian military justice system, there is no separate and codified military code, but there are distinct courts for adjudication of military criminal matters on the basis of military laws. The laws that deal with military matters are the FDRE Constitution, provisions of the 2005 Criminal Law, and different proclamations that governs the country armed forces in general.

This chapter, therefore, review the nature of military justice in general and the historical and the current context of Ethiopian military justice system in particular.

#### 2.1.2. Nature of Military Justice System

Military justice is a distinct justice system that applies to members of armed forces and, in some cases, on civilians.<sup>50</sup> At this juncture, one may question the significance of establishing separate military courts in the presence of ordinary courts capable of rendering justice. The likely answer for this question is that, the military criminal justice operates in a distinct system with stricter rules and procedures usually for the purpose to enforce internal discipline and operational effectiveness of the armed forces.<sup>51</sup> Thus, the stricter rules and procedures with a separate judicial system could be supposed as to fundamental for maintaining the effectiveness and combat readiness of the armed forces.<sup>52</sup> In this regard the Canada Supreme Court held that

The purpose of separate system of military tribunals is to allow the armed forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military.

To maintain the armed forces a state of readiness the military must be in a position to

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<sup>50</sup>Naluwairo (n 26) at 450

<sup>51</sup>Mindia Vashakmadze, 'Understanding Military Justice: Guidebook' (DCAF:2010) at 10. Available at <[www.dcaf.ch](http://www.dcaf.ch)> (accessed in February, 2019)

<sup>52</sup>Gibson (n 18)

enforce internal discipline effectively and efficiently... There is thus a need for separate tribunals to enforce special disciplinary standards in the military.<sup>53</sup>

Accordingly, unlike the lenient rules often adopted in the case of civilians, stricter rules and procedures are imperatively adopted for personnel of armed forces due to the unique character of their military life, in which discipline, organization and hierarchy play a crucial role.<sup>54</sup> To this end, establishing a separate military courts is important to enforce such rules with the intent of ensuring combat readiness and effectiveness of the armed forces.

## **2.2. Military Courts in Ethiopian Criminal Justice System**

Ethiopia has long history in military justice system. The modern military justice system commenced during the reign of Emperor Haile Selassie after the adoption of the first Army Proclamation No. 68/1944. In the current Ethiopia, more than 140,000 estimated active-military personnel<sup>55</sup> are subject to military justice system of the country established under the guidance of Ministry of National Defence Force. Whereas the military courts in Ethiopia have played a vital and unique role in the administration of military criminal justice of the country, however, the structure of military court has been questioned due to its compliance of the standards of independence, impartial and competent tribunal. In this section, the study will address the origin and nature of military justice system in Ethiopia context.

### **2.2.1. Historical Background of Military Courts in Ethiopia**

#### **2.2.1.1. Military Courts During the Emperor Regime**

As far as military justice system of Ethiopia has concerned, the modern military justice system commenced from the reign of Haile Selassie. While before Haile Selassie, the country were ruled under the stronghold of different Kings and Rases<sup>56</sup> and due to this fact it is very much hard to talk about the military courts of Ethiopia before the reign of Haile Selassie. In other words, this means that, in Ethiopian judicial history, there was no separate military courts and written regulation for the establishment of independent military courts before the reign of Haile Selassie.

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<sup>53</sup>See *R v Genereux* [1992]1 SCR 259, 293.*R v Mackay* [1980]2 SCR 370

<sup>54</sup>Naluwairo (n 26) at 450

<sup>55</sup> See <[www.globalfirepower.com](http://www.globalfirepower.com)> country profile of military personnel. (accessed on 18 May, 2019)

<sup>56</sup> Ministry of FDRE Defence Forces Public Relation Office, 'Establishment and History of Ethiopian Defence Forces', (February 28/2019), (in *Amharic*) available at <[www.fdrenod.gov.et](http://www.fdrenod.gov.et)>(accessed on 11 May, 2019 )

Thus, for the first time it was the 1931 Constitution that provided two separate systems of courts. These are, the regular courts and special courts. The constitution also listed some provisions for the separation of the judiciary from the legislative organ of the government.<sup>57</sup> Despite the existence of such provisions, however, there were overlapping powers of the executive and the judiciary branches of the government.<sup>58</sup> This is due to the fact that the Emperor and Executive were authorized with extensive power from appointing the judges to revising the decisions of judiciary which were a serious impediment for the independency of Ethiopian courts.

Unlike the 1931 Constitution, the 1955 Revised Constitution of Ethiopia had a declaration about the separation of the judiciary both from the executive and legislative branches of the government and also stipulated the independence of the judiciary.<sup>59</sup> Despite of the general provisions for both institutional<sup>60</sup> and personal,<sup>61</sup> independence of judiciary, the overlapping powers of the executive and the judiciary persistently maintained by the 1955 Revised Constitution.<sup>62</sup> This is due to the fact that the ‘Emperor were constitutional empowered to revise the decisions of all courts through *Zufan Chilot* for the purpose of maintaining justice which obviously undermine the judicial power vested to the courts and their independence from executive organ of the government.’<sup>63</sup> Therefore, as far the Constitutions of Ethiopia during Haile Selassie reign concerned, one can conclude that both the 1931 and the 1955 Constitutions were not fully guaranteed the independence of the judiciary in general, the independence of military courts in particular.<sup>64</sup>

With regard to other legislations those subordinate to the constitution vis-a-vis the military justice system of Ethiopia, there were Proclamation No.68/1944, the 1957 Penal Code and 1961 Criminal Procedure Code of Ethiopia. Proclamation No.68/1944,<sup>65</sup> was the first dispersed

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<sup>57</sup> Ki Vibhute, ‘The Judicial System of Ethiopia: From Empire and Military Junta to Federal Democratic Republic’ [2013]7 Malawi Law Journal, at 103

<sup>58</sup> Bereket Haile Selassie, ‘Constitutional Development in Ethiopia’ [1966]10 Journal of African Law 72, at 87-89

<sup>59</sup> Vibhute (n 57) at 103

<sup>60</sup> Article 108 of the Revised Constitution of the 1955 (hereinafter the 1955 Constitution) stipulates that “Judicial power shall be vested in the Supreme Imperial Courts and ‘other courts’ established by law and shall be exercised by the courts in accordance by the law and in the ‘Name of the Emperor’.” This provision also authorizes the military courts to have jurisdiction on active military personnel.

<sup>61</sup> Article 110 of the 1955 Constitution declares the personal independence of the judges

<sup>62</sup> Selassie (n 58) at 87-89

<sup>63</sup> Vibhute (n 57) at 104

<sup>64</sup> Paul Brietzke, ‘Law, Development and the Ethiopian Revolution’ [1979] Oriental and African Studies of the University of London, Dissertation, at 173

<sup>65</sup> Imperial Army Proclamation No 68/1944 for the establishment and government of Imperial Army



legislation in Ethiopia military criminal justice system.<sup>66</sup> But, it were dealt only vaguely about military organization, power of the commanding officers, discipline and the military courts. Notwithstanding of this fact, the Proclamation were had two aspects; the disciplinary and criminal aspects. For the disciplinary aspect, the soldier would be liable and administrative measures would be taken, if there is violation of the army regulation.<sup>67</sup> The commanders had had the power to take such disciplinary measures. Furthermore, the proclamation were granted the commanding officer an extensive powers in the administration of military justice system to arrest, to order investigation, to select the members of martial courts as well as defense council.<sup>68</sup>

Concerning to the criminal aspect, the soldier would be liable if there is a violation of the military penal provisions of the proclamation<sup>69</sup> and it was the military court which had the power to entertain the criminal aspect of the proclamation. The military courts were had jurisdiction on military offences including desertion, preparing false military documents, muting and insubordination.<sup>70</sup> However, military courts were not had jurisdiction on non-military offences such as homicide, rape. These offences were under the jurisdiction of civil courts even if they are committed by members of the army.<sup>71</sup> However, the military courts were not independent because they were under the control of the Emperor.<sup>72</sup>

Likewise, after the enactment of the Penal Code of 1957 and Criminal Procedure Code of 1961 as well, the members of Ethiopian Army Forces continued to be tried by military courts, if there was a violation of military penal provisions incorporated from article 296 to 331 of the Penal Code.<sup>73</sup> Whilst the 1961 Criminal Procedure Code of Ethiopia altered some of the provisions of the 1944 Proclamation No 68/1944 by declaring the applicability of the provisions of the Code to all persons equally.<sup>74</sup> However, neither of these legislations incorporated provisions for the independency of military courts. Therefore, the 1944 Proclamation and others subsequent

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<sup>66</sup> Even if before this Proclamation, the 1930 Penal Code provides some of military offences, there was no separate military justice system and all military offences were subject to the civil justice system.

<sup>67</sup> This can be identified easily through reading article 34 of the Proclamation No.68/1944

<sup>68</sup> Ibid. Article 44

<sup>69</sup> Ibid. Article 35 & 36

<sup>70</sup> Ibid. Article 43

<sup>71</sup> Ibid.

<sup>72</sup> As per Article 45 of the proclamation, the Emperor authorized to conform the decision passed by military courts.

<sup>73</sup> The Ethiopian Criminal Procedure Code Proclamation No.185/1961 vested military courts with the power of trying military offences incorporated from article 296 to 331 of the Penal Code. See article 5(2) and 1<sup>st</sup> Column of the 1<sup>st</sup> Schedule of the Code.

<sup>74</sup> Ibid. Article 1

legislations of Ethiopia, were not secured the independency of the military courts but according to this writer view, the period could be assumed as a pure introduction of a military justice system in Ethiopian judicial history.

### **2.2.1.2. Military Courts During the Dergue Regime**

After Dergue came into power, the 1955 Revised Constitution of Ethiopia suspended by Proclamation No.1/1974. Regarding this period, some argues that there was no rule of law, no formal investigation, prosecution, and litigation and also decision were made randomly without having knowledge.<sup>75</sup> Additionally, there were countless special tribunals that were usurped the power of the regular courts established by the Regime. The Regime also crated Special Courts Martial to try certain types of offences. The regular courts were left to deal with petty and ordinary matters of no interest to the government.<sup>76</sup>

However, after the adoption of the PDRE Constitution of the 1987, judicial power was vested in Supreme Court, which was the highest judicial organ.<sup>77</sup> Accordingly, the Supreme Court was bestowed with the power to supervise the judicial functions of all courts in the country.<sup>78</sup> The PDRE Constitution made the Supreme Court, at least in principle,<sup>79</sup>an autonomous and independent judicial institution, leaving the High Court and other Courts under the Control of the Ministry of Law and Justice.<sup>80</sup> Within the Supreme Court there was military division with the power to review and control the decisions and functions of subordinate military courts. Accordingly, military courts after the adoption of the PDRE Constitution and other subsequent legislations were under the guidance of the Military Division of the Supreme Court of PDRE.<sup>81</sup>

Furthermore, Proclamation No.11/1987 abolished the Special Courts Martial established by Proclamation No.1/1974, and established the permanent military courts with other justice machinery, like military prosecution. There were three levels of courts established by the proclamation such as, Primary Military Courts, Military High Court and Military Division in the

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<sup>75</sup> Menghistu Fisseha-Tsion, 'Highlights of the Constitution of Peoples Democratic Republic of Ethiopia(PDRE); A Critical Review of the Main Issues' [1988]14 Review of Socialist Law, No.2, 129-180,

<sup>76</sup>Vibhute (n 57) at 105

<sup>77</sup> The 1987 PDRE Constitution, articles 100(1) &102(1). The Constitution designated the Supreme Court as the highest judicial institution and it was also authorized to review any case from any court of the country.

<sup>78</sup> Ibid. Article 102(2)

<sup>79</sup> This is because, despite such constitutional provisions, in practice, it is obvious that there was no functionally autonomous and independence courts in the country.

<sup>80</sup> Vibhute (n 57) at 1050

<sup>81</sup> Proclamation to Establish Supreme Court of PDRE No.9/1987

Supreme Court.<sup>82</sup> The judges of military courts were appointed by the Republic President for the terms of 5 years, among the candidates proposed by Ministry of National Defence Forces based on their legal knowledge and good conducts.<sup>83</sup> The appointed judges also must necessarily be superior in rank than the accused.<sup>84</sup> In this respect among other things, appointing military judges for fixed 5 years term had alone constitute a big pressure on the military courts.

Military courts were also had their own criminal jurisdiction over person, who are subject to the proclamation. According to Article 16 of the Proclamation, they were assumed personal jurisdiction where: *First*, the person is a military member and commits military offence provided under the 1957 Penal Code of Ethiopia; or when one member commits offence against another member. At this juncture, it is important that the offence must be committed against members only and it should be crime under the Penal Code of Ethiopia. *Second*, members and non-members damaged the property of the armed forces. *Third*, members of the army or police force or other persons having obligations of military service committed any offence while they are on combat duty. *Fourth*, military courts had also been competent to see cases if, while the person is in a military training; and in the training; commits an offence.

Military courts also had different material jurisdiction, but the jurisdiction depends exclusively on the maximum penalty that can be imposed for the violation of the Penal Code and the rank, post of a defendant. Accordingly, the Primary Military Court had jurisdiction over person's holding the military rank of Lieutenant Colonels and below or its equivalent when charged with an offence specified under article 16 sub articles 1 to 5 of the proclamation and where the penalty provided for such offence does not exceed 10 years' rigorous imprisonment.

The Military High Court had the appellate jurisdiction upon the final decision of Primary Military Courts and also had first instance jurisdiction on matters which were fall under article 16 sub articles 1 to 5 provided that the offence had been committed by person's holding the rank of Lieutenant or equivalent, Brigadier Commanders or equivalent and military rank of Council or equivalent.

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<sup>82</sup> Ibid. Articles 32 to 33

<sup>83</sup> Ibid. Articles 5 to 7

<sup>84</sup> Ibid.

Finally, the Military Division of Supreme Court had the highest judicial power over military matters. The court had had appellate jurisdiction against the final decision of Military High Court. It also had first instance jurisdiction on offences specified under article 16 sub articles 1 to 6 provided that the offences had been committed by person's holding military rank of Brigadier General or above and Division Commander or above. The court also further had the power to entertain matter of change of venue. Therefore, in order to understand the historical background of military courts in Ethiopia legal system, having discussed the Ethiopian military courts from their origin to that of the Dergue Regime this much the crucial aspiration of this study is to deal with the current military courts, which is the case of the FDRE military courts. So, the current military justice system will be considered subsequently.

### **2.2.2. Military Courts in the Current Criminal Justice System of Ethiopia**

In the current Ethiopia, the FDRE Defence Force has been established to protect the sovereignty of the country and to ensure the respect of the constitution.<sup>85</sup>The Defence Force has not been created to maintain the Regime of the day in power or to advance its interests. This principle makes the Defence Force accountable to the people at all times and reinforce to obligations of all the armed force personnel to ensure the rule of law and human rights enshrined in the constitution. In order to achieve this goal thoroughly, it is important to establish independent military courts with sufficient powers not only to safeguard the human rights of army personnel but also to secure the constitutional principle of accountability<sup>86</sup>in the armed forces which is a key element to ensure the rule of law in the country.

### **2.2.3. Nature and powers of Military Courts in the Current Ethiopia**

In the current military justice system of Ethiopia, there are two levels of military courts namely, the Primary Military Court and the Appellate Military Court.<sup>87</sup>These courts are organized under Ministry of National Defense Forces and most of the judges of these courts are composed of

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<sup>85</sup>See Article 87 of the FDRE Constitution and the Preamble of the Defence Forces Proclamation No. 1100/2019

<sup>86</sup>Article 12 of the FDRE Constitution provides the principle of accountability as a pillar for constitutionalism. Furthermore, for the National Defence Forces to be credible, and to function as a guardian of peace in the eyes of the population, it must be accountable at several levels. In general, the Defence Forces should be accountable to civilian authorities in the execution of its mission. This means that, the members of the Defence Forces who commits a civil crime must be tried in civil courts, in other words, the army and its members cannot be allowed to be above the law. They like all members of the society, must conduct themselves within the framework of the law of the land and be held accountable if they violate those laws. At the same time, the national army must be held accountable by military laws.

<sup>87</sup> Article 37 of Proclamation No 1100/2019

military personnel appointed by Council of Commanders and Commander in Chief of the Armed Force who may have interest in the outcome<sup>88</sup> of the case that would undermine the principle of separation of powers that is vital for assurance of the independence of that courts.<sup>89</sup> In Ethiopia, the only civil court that has the power to see military matter is a Federal Supreme court. Here, the Federal Supreme court has cassation power over any final decision made by military court of Ethiopia whenever there is a basic error of law.<sup>90</sup>

In the criminal justice system of numerous countries, Defence Forces personnel are essentially subject to two criminal law jurisdictions.<sup>91</sup> They are subject to civil as well as military criminal law jurisdictions. Civilian law includes the same criminal laws that all of us are bound by. Military law includes the military offences that would not normally apply to civilian.<sup>92</sup> Likewise, in Ethiopia, since Ministry of the FDRE Defence Forces has been in charge of adjudicating military criminal cases specifically assigned to it by law through military courts,<sup>93</sup> its members have to subject two criminal law jurisdictions.<sup>94</sup> It is beyond the scope of this study to address the jurisdiction of regular courts of Ethiopian on Defence Force personnel and the whole jurisdictions of Ethiopian military courts thoroughly. However, I make the following remarks about the jurisdiction of Ethiopia military courts.

With regard to Primary Military Court of Ethiopia, the court has broad jurisdiction to hear a wide range of offences, including uniquely military offences provided from article 284 to 322 of the FDRE Criminal Code,<sup>95</sup> as well as offences with close civilian correspondents, such as assaulting officials,<sup>96</sup> and offences which are found in the special part of criminal law, such as murder, rape,

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<sup>88</sup> Ibid. Article 44(2&3)

<sup>89</sup> This is due to the fact that the Council of Defence Commanders has the power of appointing judges who sets in the Primary Military Courts for the terms of 5 years upon recommendation by the General Chief of Staff and as per Art.26 of Proclamation No 1100/2019, the General Chief of Staff also authorized to preside over the meetings of the Council

<sup>90</sup> Ibid. Article 40

<sup>91</sup> Emma Norton, 'Military Justice Second-rate Justice' [2019] Liberty House, at 36. Available at: <[www.LiB%2010%20Military%20Justice%20Report%202020-01-09-pdf](http://www.LiB%2010%20Military%20Justice%20Report%202020-01-09-pdf)> (accessed on 27 April 2019)

<sup>92</sup> Ibid.

<sup>93</sup> Articles 28 to 48 of Proclamation No.1100/2019

<sup>94</sup> If member of Ethiopian Defence Forces has committed offences enumerated from articles 285 to 322 of the Criminal Code, the military courts of Ethiopia assume jurisdiction over the alleged offence. While if the alleged offence is an offence out of articles 285 to 322 of the Criminal Code, in such a case the Ethiopian regular courts assume jurisdiction unless such offence committed by Defence Force Personnel against another personnel. See article 38 of Proclamation No. 1100/2019

<sup>95</sup> Ibid. Article 38(1)(a)

<sup>96</sup> See Article 324 of the FDRE Criminal Code

and bodily injury and so on. Here, in this respect article 38(1)(b) provides that ‘The Primary Military Court shall have jurisdiction over offences of murder or bodily assault committed among members of the Defence Forces or offences the member of the Defence Forces committed against the property of the Ministry’.

According to this provision, matters to be under the jurisdiction of military court, the offences must be committed only against person’s subject to military law or against the property of Ethiopian Defence Forces and which do not affect the person or property of civilians. This means that criminal cases, no matter how much serious, where both the victim and accused are the members of Ethiopian Defence Forces - most likely to be dealt with within the military justice system and not the civilian justice system.

The court also has broad jurisdictional reach, extending to all members of the Defence Forces<sup>97</sup>and civilian<sup>98</sup>deployed along with members of the Defence Forces on ground of general mobilization or the declaration a state of war<sup>99</sup>or upon civilian on mission along with a section of an army deployed abroad while on task or active combat.<sup>100</sup> It also applies on Prisoners Of War held by Ethiopian Defence Forces as if they were members of the Ethiopian Defence Forces.<sup>101</sup>

Finally, the Ethiopian military law bestows the powers to adjudicate all matters, including cases that involves death penalty, for the Primary Military Courts and the Appellate Military Court has only appellate jurisdiction on the cases disposed by the Primary Military Court<sup>102</sup>which enable the court to entertain every case within its competence that may come before it. Accordingly, every members of the Defence Forces including the Commanders are subject to the jurisdiction of Primary Military Court. As per the proclamation, the Appellate Military Court has no first instance jurisdiction while it has the power to confirm, vary or reverse the cases disposed by Primary Military Court.<sup>103</sup>

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<sup>97</sup> Article 2(4) of Proclamation No 1100/2019 defines “member of Defence Forces” as to a person who render military services on a permanent basis in the FDRE Defence Forces

<sup>98</sup> Article 2(19) of Proclamation No 1100/2019 defines “civilian” as to any person who is not a member of the Defence Forces.

<sup>99</sup> Ibid. Article 38(1)(e)

<sup>100</sup> Ibid. Article 38(1)(d)

<sup>101</sup> Ibid. Article 38(1)(f)

<sup>102</sup> Ibid. Article 39(1)

<sup>103</sup> Ibid.

### **2.3. Summary**

Military justice system is a distinct judicial system in which stricter rules and procedures applies on members of the armed forces. The system has been designed in this way to ensure discipline and operational effectiveness of the armed forces. However, this justification has been complained by different scholars and human rights advocacies groups. In order to maintain the combat readiness and effectiveness of defense forces, this writer does not negate the need of having strict discipline and hierarchic chain of command in the military life. However, this does not mean that, the relationship among the commander and members of defense forces not required to be democratic. This is because, if the defense forces as institution is not democratic internally it cannot maintain democratic relations with the civil society. To this end, members of the defense forces as individuals will lose their commitments to respect and defend the human rights of the citizens because of they themselves are being denied of their human rights internally. Accordingly, the relationship between the commander and members of the defense forces should be advanced to reflect human rights in the army in general and military justice system in particular.

In Ethiopia judicial history, military justice system has long far place commencing from reign of Emperor Haile Selassie. But the system, just like other countries military judicial system has been subject to complain for how far human rights issues are recognized in its overall activities. Therefore, the next chapter will review the applicability of the international standards of independent tribunal upon military justice system in general.

## Chapter 3

### 3.1. The Right to Independent Tribunal Vis-à-vis Military Courts

#### 3.1.1. Introduction

The basic institutional framework that enable enjoyment of the right to a fair trial is that the proceedings in any criminal cases should be undertaken by independent courts established by law. The justification thereto may be is to avoid arbitrariness and bias that would potentially arise if criminal proceedings are conducted by a political body.<sup>104</sup> However, due to the fact that the provisions of international human rights instruments on fair trial are drafted in generic terms, so, the interpretation and application of right to independent tribunal significantly vary from one state to another.

Therefore, at this juncture, it is important to address the issue of whether the international standards of independence of judiciary apply to military courts. In order to address this issue, thus, this chapter is devoted to the analysis of the concept, content and scope of the right to independent tribunal guaranteed by international human rights instruments to which Ethiopia is a party. For this reason, special attention will be given to ICCPR<sup>105</sup> and ACHPR<sup>106</sup> and other relevant soft laws that provides illustration to the principle of judicial independence .<sup>107</sup> Therefore, this chapter measures the application of the minimum international standards of independent tribunal on military courts and will end up through providing summary.

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<sup>104</sup> Lawyers Committee for Human Rights, *What Is a Fair Trial? A Basic Guide to Legal Standards and Practice* (2000), at 13 & 14.

<sup>105</sup> The International Covenant on Civil and Political Rights, adopted 16 December 1966 & entered into force on 23 March 1976. Ethiopia ratified the ICCPR in 1993 but has not ratified the Optional Protocols on an individual complaint mechanism.

<sup>106</sup> African Charter On Human and Peoples' Rights (here in after African Charter), opened for signature 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5 & entered into force 21 October 1986. Ethiopia ratified the Banjul Charter in 1998.

<sup>107</sup> These include; the UN Human Rights Committee 's General Comment's on the Right to Equality before Courts and Tribunals and to a Fair Trial, the UN Basic Principles on the Independence of the Judiciary (hereinafter referred to as "the UN Basic Principles"), the UN Draft Principles Governing the Administration of Justice through Military Tribunals (hereinafter referred to as "the UN Principles on Military Justice"), Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (hereinafter referred to as "the African Commission Principles") and the Dakar Declaration on the Right to a Fair Trial in Africa. Additionally, it can also be deduced from analysing the jurisprudence of the HRC. The jurisprudence from other regional human rights bodies, in particular the ACHPR, IAHRCT and the ECtHR, is also important in this regard. See also Naluwairo (n 26) at 450



### 3.1.2. General Concept of Independence of Judiciary

The independence of judiciary is essentially relates to as to whether the court is autonomous and free from executive and legislative influence, free from the influence of the parties and other sources of potential interests such as the private interests of third parties.<sup>108</sup> According to Kelly, it can be described as to ‘...the right and the duty of judges to perform the function of judicial adjudication, through application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution.’<sup>109</sup>

Thus, independence of the judiciary means that the decision-maker are free to act independently while deciding on case, to examine the case solely on the basis of the fact and in accordance with the law, without any interference, pressures or improper influence from any branch of government or elsewhere. It also means that the persons appointed as judges are selected primarily on the basis of their legal knowledge.<sup>110</sup> Thus, to ensure independency, the military courts as institutions must be independent from the legislative and executive branches of the government as well as from the military hierarchy.<sup>111</sup>

### 3.1.3. The Content and Scope of the Right to Independence Tribunal

Article 10 of the UDHR provides that ‘Everyone is entitled in full equality to a fair trial and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’<sup>112</sup> Similarly, article 14(1) of the ICCPR, provides that ‘...in the determination of any criminal charges against him, or if his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent,

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<sup>108</sup> Manfred Nowak, *United Nation Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> revised edition, N.P. Engel, Publisher, 2005) at 320

<sup>109</sup> Kelly F., *An Independent Judiciary: The Case of the Rule of Law* (International Center for Criminal Justice Reform and Criminal Justice Policy, 1997) at 2. Available at: <[www.icclr.law.ubc.ca/publications/Reports/AnIndependentJudiciary.pdf](http://www.icclr.law.ubc.ca/publications/Reports/AnIndependentJudiciary.pdf)>

<sup>110</sup> See UN Basic Principles. See also, Amnesty International, *Fair Trials Manual*, (2<sup>nd</sup>ed. 2014) at 108. Available at: <[www.amnesty.org/ailib/intcam/fairtrial/indxftm-b.htm#12-4](http://www.amnesty.org/ailib/intcam/fairtrial/indxftm-b.htm#12-4)> (accessed in April, 2019).

<sup>111</sup> See HRC General Comment No. 32, paragraph 18, 19.

<sup>112</sup> Adopted and proclaimed by General Assembly Resolution 217 A(III) of 10 December 1948. The UDHR was adopted as a declaratory instrument not meant to be binding. However, some scholars have argued that ‘by virtue of its widespread acceptance, it has gradually assumed as customary international law.’ For further discussion, see Phillip H., ‘Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously’ [2002]2 Columbia Law Review, at 33.

independent and impartial tribunal established by law.’<sup>113</sup> These two instruments are considered as to the first international human rights instruments that have attempted to guarantee the right to independent tribunal.

Furthermore, a number of regional instruments contained similar provisions.<sup>114</sup> In Africa, although the ACHPR does not have similar phrase, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance, provides similar phrase by stating that ‘In the determination of any criminal charge against a person, or of a person’s rights and obligations, everyone shall be entitled to a fair and public hearing by a legal constituted competent, independent and impartial judicial body.’<sup>115</sup>

Therefore, assessing the compliance of State legislations with that of international standards presupposes the analyses of the content of the right to independent tribunal. However, the international and regional provisions are drafted in general terms and do not set forth the detail content of the right to independence tribunal. Therefore, the question raised here is that as to who and how its content be determined. To come up with this problem, the HRC in its General Comment 32, has stated that

Article 14 contains guarantees that State Parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees.<sup>116</sup>

This means that, in principle, States have sovereign power to determine the manner of implementation of the right in their domestic sphere, but this does not mean that it is totally their sole discretion to determine its essential content. Moreover, beyond reporting the implementation mechanism, States cannot invoke their domestic legislations or legal tradition as defense for non-compliance of international obligations.<sup>117</sup> Hence, States are expected to exercise their sovereign

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<sup>113</sup> Article 14 of ICCPR

<sup>114</sup> See articles 7 & 26 of ACHPR; article 6 of ECHR; article 8 of ACHR; and articles 12 & 13 of Arab Charter on Human Rights.

<sup>115</sup> The African Commission Principles, Section A (1).

<sup>116</sup> See HRC General Comment No.32, para.4.

<sup>117</sup> Further, the Comment also implies that the international human rights laws have higher rank than that of domestic legislations.

power not for the purpose to override their international obligations, instead they are expected to ensure the right in their domestic legislations in line with the standards of international human rights law.

Furthermore, from the reading of the above provisions, it is clear that the right to independent tribunal applies on two kinds of proceedings. These are; proceedings involving determination of criminal charges and proceedings involving determination of rights and obligations in a suit at law.<sup>118</sup> However, there is no common understandings whether these notions constitute military proceedings. The concern here is that the notions of criminal charges and determination of rights and obligations in the suit at law leave room for some arguments that they do not apply to military courts in certain circumstances. This may be a reason for why military courts in many parts of the world have operated in ignorance of the standards of fair trial and judicial independence standards for decades. For instance, even in Europe some countries have been entered reservations of article 6 of the European Convention on Human Rights to the effect that this provision would not apply to their military courts.<sup>119</sup> This shows that there is a strong view against the application of the standards of independent tribunal to military courts.

Therefore, to determine whether the international standards of independent tribunal apply to Ethiopian military courts, it is important to have clear understandings about the meaning of the notions determination of criminal charge; rights and obligations in a suit at law; tribunal and established by law in the context of international human rights instruments.

### **3.1.3.1. Determination of Criminal Charges**

Concerning to the notion of criminal charge, the UN Human Rights Committee, stated that ‘...it relates to those acts declared punishable under domestic criminal laws.’<sup>120</sup> This means that, in ascertaining whether there is a criminal charge for the purpose of this provision, the classification of offence in the domestic criminal law is a factor that should be taken into account. It is the sovereign power of a State to place a particular act or omission as to crime. As long as the domestic criminal law classifies a particular act or omission as crime and punishable, the proceedings thereof would fall under the notion of criminal charges which requires the

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<sup>118</sup> See article 10 of UDHR; Article 14(1) of the ICCPR; Section A (1) of African Commission Principles.

<sup>119</sup> Portugal, Spain, Slovakia, Moldova, France, The Czech Republic, Turkey, Lithuania and Ukraine have reserved the application of article 6 of the European Convention on Human Rights to their military courts.

<sup>120</sup> HRC General Comment No.32, para. 15.

application of the international standards of independence tribunal. Accordingly, if certain acts or omissions are crimes and punishable under the domestic law, the proceedings against such acts or omissions should be considered as to criminal charges and then States have the obligation to ensure such proceedings should comply the international standards of independent tribunal.

In this regard, the European Court of Human Rights has clearly maintained the concept of ‘criminal charge’ in the context of ‘States sovereignty’ by emphasizing that

The convention without any doubt allows the States, in the performance of their functions as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects... The converse choice, for its part, is subject to stricter rules. If the Contracting States were able to act at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a “mixed” offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6...to satisfy itself that the disciplinary does not improperly encroach upon the criminal.<sup>121</sup>

From the Court reasoning, what is clear is that, although States have sovereign power to classify certain offence as not to a crime however it is submitted that they do not have abuse their power and deny individuals right of trial by independent tribunal through merely designating certain acts not as crime. Thus, those persons who face proceedings other than criminal, including disciplinary proceedings, may not claim the guarantee of independent tribunal so long as the proceedings are not crime. This is due to the fact that international human rights law does not impose obligations upon States to ensure disciplinary proceedings comply with the standards of independent tribunal. Therefore, any proceedings other than criminal, including disciplinary proceedings, against the soldier would not amount to determination of criminal charge for the

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<sup>121</sup>*Engel v Netherlands*, (1976)1 EHRR 647, para.81.

purpose of article 14 of ICCPR. This is because, a person appearing before the disciplinary hearing may not be considered as an accused facing criminal charges.

However, there are certain exceptional circumstances in which applying the standards of independent tribunal on proceedings other than criminal may be mandatory. This is when the nature of the offences or the seriousness of the punishment makes the proceedings to have essence of criminal. In this regard, the HRC has emphasised that ‘...the notion of criminal charge may also extend to acts that are criminal in nature with the sanctions that, regardless of their qualifications in domestic law, must be regarded as penal because of their purpose, character or severity.’<sup>122</sup> According to this interpretation, therefore, irrespective of its place in the domestic law there is a possibility that the standards of independent tribunal may apply to offences other than criminal, including disciplinary offences, depends on certain factors.

These are, *first*, where certain offences have been designated not as criminal in domestic law while the very essence of the offences have nature of crime, in such a case irrespective of the status offences in the domestic law, the proceedings against such offences amounts to determination of a criminal charge. In this respect, to determine whether a particular offence has essence of criminal, recourse is normally made to comparative law, to what is customary among other States.<sup>123</sup> *Second*, although a particular offence has been designated not as criminal in domestic law while the character, purpose or the degree of its penalty amounts to serious or involves deprivation of liberty, in such a case the proceedings amounts to determination of criminal charge which presuppose the application of the right to independent tribunal. This means that, regardless of the status of the offence with which a soldier is charged in the domestic law, if the penalty to be imposed involves deprivation of liberty or where the duration and manner of its execution is appreciably detrimental, then the proceedings will amount to determination of criminal charge, in which case the right to trial by independent tribunal will apply.<sup>124</sup> However, in determining whether or not the proceedings amounts to determination of criminal charge, it is important to note that the nature of the offence with which one is charged

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<sup>122</sup> Ibid. See also *Perterer v Austria*, UN Doc. CCPR/C/81/D/1015/2001 (2004), para.9.2.

<sup>123</sup> Trechsel S, *Human Rights in Criminal Proceedings* (Oxford University Press, Oxford, 2005) at 19

<sup>124</sup> In *Bell v United Kingdom*, (2007) ECHR 45, the European Court of Human Rights has established an important principle by asserting that the Commanding Officer imposition of penalty for breach of disciplinary offences a sentence of detention for a period of 28 days considered to be a deprivation of liberty because the penalty imposed considered sufficiently severe which was serious enough to render the charge against the accused to be of a criminal nature which attracts the application of Art 6 of the Convention.

and the penalty one may suffer are alternatives and not cumulative.<sup>125</sup> However, this does not exclude a cumulative application where a separate analysis of each criteria does not make it possible to reach a clear conclusion as to the existence of a criminal charge.<sup>126</sup>

To conclude, regardless of the designation of a particular act or omission as crime or discipline in the domestic law of a particular country, as long as the act or omission in question has criminal in nature or attract penal sanctions, then the proceedings will be amount to determination of a criminal charge, the effects of which renders the application of the right to trial by independent tribunal.<sup>127</sup>

However, when coming to Ethiopian military justice system, members of the defense forces are subject to both criminal and disciplinary proceedings. They are subject to criminal proceedings before military courts when they are prosecuted for the commission of any of the military offences in violation of the criminal law set out in articles 284 to 322 of the Criminal Code<sup>128</sup> or for offences committed during active duty in violation of any of the provisions of the criminal code<sup>129</sup> or for commission of murder or bodily assault against another soldier or for offence against the property of the Ministry of Defence Forces.<sup>130</sup> Likewise, they are subject to disciplinary proceedings in accordance with the Disciplinary Regulation issued by Council of Ministers.<sup>131</sup> They are subject to disciplinary proceedings tried by the Commanders whenever they are committed minor offences in violation of the provisions of military laws, regulations, directives or standing orders which cannot be brought before a military court.<sup>132</sup>

What is clear from the Ethiopian military justice system is that, the law has set the criteria of minor offence to underline the boundary between criminal and disciplinary proceedings. To this end, certain offences correspondingly may fall under the power of the Commanders to see the offences through disciplinary proceedings and within the jurisdiction of the military courts to try the offences through criminal proceedings. Furthermore, there is no provision in the law that

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<sup>125</sup>See *Lauko v Slovakia* (1998)33 EHRR 994, para.57.

<sup>126</sup> Beatson J, *The Human Rights Act and Criminal Justice and Regulatory Process*, (University of Cambridge Center for Public Law,1999) at 147.

<sup>127</sup> Sepulveda (n 2) at 522

<sup>128</sup> See article 38(1)(a) of Defence Force Proclamation No.1100/2019.

<sup>129</sup> Ibid. Article 38(1)(c).

<sup>130</sup> Ibid. Article 38(1)(b).

<sup>131</sup> Ibid. Articles 17 and 72(1).

<sup>132</sup> Ibid. Article 17.

deals in what condition a particular offence has been supposed as to minor offences. Thus, it seems that it is the power of the Commanders to classify such offences. However, this muteness of the law may lead to arbitrary classifications of offences. Therefore, in order to ensure the right to independent tribunal in Ethiopia military courts, it is important to amend the law in order to set forth clear criteria for determination of minor offences. Until such amendments the Commanders are expected not to evade the application of the right to independent tribunal through arbitrarily placing of the proceeding as disciplinary.

### **3.1.3.2. Determination of Rights and Obligations in a Suit at Law**

Concerning to the notion of determination of rights and obligations in a suit of law in the context of article 14 of the ICCPR, the HRC has clarified that ‘The determination of rights and obligations in a suit at law is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.’<sup>133</sup>

With respect to matters which falls under the notion of suit at law in the context of international human rights instruments the Committee has stated that

The concept of a ‘suit at law’ in the context of article 14 of ICCPR encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of the civil servants for other than disciplinary reasons, the determination of social security benefits or the pension right of soldiers, or procedures regarding the use of public land or the taking of private property. In addition, (c) it also may cover other procedures which, however, must be assessed on a case by case basis in light of the nature of the right in question.<sup>134</sup>

Therefore, for the purpose of application of the international standards of independence tribunal, the notion of determination of rights and obligations in a suit at law only constitutes courts proceedings in accordance of private and administrative laws, and not criminal proceedings. With respect to disciplinary proceedings, the Committee has further emphasized that

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<sup>133</sup> HRC General Comment 32, para 16.

<sup>134</sup> Ibid.

There is no determination of rights and obligations in a suit at law where the persons concerned are confronted with measures taken against them in their capacity as persons subordinated to a high degree of administrative control, such as disciplinary measures not amounting to penal sanctions being taken against a civil servant, a member of the armed forces, or a prisoner.<sup>135</sup>

Determination of persons' rights and obligations in suit at law, therefore, neither involves criminal nor disciplinary proceedings. Hence, military courts by their nature rarely deal with the notion of determination of rights and obligations in a suit at law.

### **3.1.3.3. The Element of Tribunal**

Concerning of the meaning of tribunal under article 14 of ICCPR, the HRC has outlined it as to 'A body, regardless of its denomination, that is established by law, is independent from executive and legislative branches of the government or enjoys specific case judicial independence in deciding legal matters in proceedings that are judicial in nature.'<sup>136</sup> Likewise, others also defines it as to 'A body whose function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner.'<sup>137</sup> According to Nowak, a mere designation of a body as to a court by domestic law is not sufficient so long as the standards of independence of tribunal would not be satisfied, and under certain circumstances, on the other hand, administrative authorities that are largely independent and free of directives may satisfy the concept of tribunal pursuant to article 14(1) of ICCPR.<sup>138</sup>

In general, the concept of tribunal constitutes both criminal and civil courts existing in every domestic judicial system. While it is not necessarily to be understood as signifying a court of law of the classic kind integrated with the standards of judicial machinery of the country.<sup>139</sup> This

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<sup>135</sup> Ibid. Paragraph 17

<sup>136</sup> Ibid. Paragraph 18

<sup>137</sup> Stavros S., *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff Publisher, 2003) at 124. See also Amnesty International, *Fair Trials Manual* (n 142)

<sup>138</sup> Nowak (n 140) at 319.

<sup>139</sup> In *Campbell and Fells V United Kingdom*, Judgement of 28 June 1984, Application No.7819/77 and 7878/77, para.76, the European Court of Human Rights held that 'Nobody disputed that the Board of Visitors, which was appointed by the Home Secretary for each prison in England and Wales and had adjudicatory and supervisory functions, in particular, the power to inquire into the charges of disciplinary offences, to control the conditions of premises, the administration of prison and the treatment of inmates, also to examine complaints from the prisoners, was not a court of classic kind integrated in the judicial system of the United Kingdom, however, the court, taking into account its character and functions, found that it was a 'tribunal established by law' for the purpose of the Convention.'



means that, due to the fact that the judicial systems of States significantly varies across the globe, it is not possible to set a single criteria for how a given judiciary shall be operate. Therefore, it is submitted that States are in position to create a body which is named neither called a court nor tribunal, while possessing the powers similar to the courts and satisfy the minimum standards of fair trial principle.

To this end, whatever its name is, the important thing is that the functions and characteristics of that body. As it has been stated by the HRC in its General Comment No.32, para.18, ‘...any criminal conviction by a body not constituting a tribunal is incompatible with article 14(1) of the ICCPR.’ Accordingly, if a body is well-established by law with adjudicatory power and satisfy the minimum standards of independence tribunal, for the purpose of article 14(1) of ICCPR, it is considered as to tribunal and the proceedings conducted by it may not supposed as to be incompatible with the international human rights law so long as such tribunal satisfies the international standards of independence tribunal.

#### **3.1.3.4. The Element of Established by Law**

In order to comply with the international standards of independence tribunal, it is also further required that cases should be heard by tribunal established by law.<sup>140</sup> Any tribunal hearing the case must have been established by law. In order to satisfy this requirement, a tribunal may have been established by the constitution or by other legislation adopted by the law making authority.<sup>141</sup> This requirement is seen as a guarantee against the ‘special or *ad hoc*’ creation of tribunal to try specific cases.<sup>142</sup>

Accordingly, for the purpose of article 14(1) of the ICCPR, States Parties have the obligation to ensure that trials are not conducted by special tribunals which do not use duly established procedures and displace the jurisdiction of ordinary courts, or by tribunals set up to decide a particular individual case.<sup>143</sup> Therefore, the accused has a right to be tried by competent and regularly constituted court using established legal procedures. Coming to Ethiopia, the law

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<sup>140</sup> HRC General Comment No.32, paragraph 15.

<sup>141</sup> Amnesty International, *Fair Trials Manual*, (2<sup>nd</sup>ed. 2014) at 108.

Available at: <[www.amnesty.org/ailib/intcam/fairtrial/indxftm-b.htm#12-4](http://www.amnesty.org/ailib/intcam/fairtrial/indxftm-b.htm#12-4)> (accessed in April, 2019).

<sup>142</sup> Ibid. at 109.

<sup>143</sup> See Principle 5 of the Basic Principles on the Independence of the Judiciary. See also *Apitz Barbera et al v Venezuela*, Inter-American Court (2008) paragraph 50.

imposes obligation upon military courts to apply the Criminal Procedure Code in disposing the case.<sup>144</sup>

### **3.1.4. The Importance of Safeguarding the Right to Independent Tribunal**

Preserving the right to independence tribunal creates an institutional guarantee and is a prerequisite for the protection of right to a fair trial. In this regard, the ECtHR has held in one of its cases ‘A court whose lack of an independence has been established cannot in any circumstances guarantee a fair trial.’<sup>145</sup> Therefore, a basic institutional framework that enables the enjoyment of the right to a fair trial is that the proceedings in any criminal cases should be undertaken by independence tribunals established by law.

Beyond safeguarding the rights of accused in criminal proceedings, ensuring independence of tribunal is important in order to secure proper administration of justice and for the effective protection of other rights safeguarded in the Covenant that serves the interests of the public at large.<sup>146</sup> In this respect, in a number of cases the ECtHR held that ‘The right to a fair trial holds a paramount place in democratic society that it cannot be sacrificed to expediency.’<sup>147</sup> Therefore, in criminal cases beyond protecting the rights and interests of the defendant, ensuring independence of tribunal has paramount importance for a democratic society through protecting the trust of the whole society in proper administration of justice.

### **3.1.5. The Status of the Right to Independent Tribunal**

The right to fair trial including the right independence tribunal is not an absolute right.<sup>148</sup> However, the HRC maintained that in order to safeguard absolute protection for rights explicitly recognized as non-derogable under Article 4, paragraph 2, of the ICCPR, they must be secured

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<sup>144</sup> See article 43(1) of Proclamation No.1100/2019

<sup>145</sup> See *Hunki Gunes v Turkey*, Application No.28490/95, judgement of 19 June 2003, para.84

<sup>146</sup> The significance of guaranteeing the right to trial by independence and impartial tribunal under article 14 of the ICCPR is especially preserve the institutional guarantee for the proper administration of justice and a prerequisite for the protection of every other rights enshrined in the Covenant.

<sup>147</sup> See *Kostovski v The Netherlands*, Judgement of 20 November 1989, Application No.11454/85, para.44; *De Cubber v Belgium*, Judgement of 26 October 1984, Application No.9186/80, para.26; *Piersack v Belgium*, Judgement of 1 October 1982, Application No.8692/79, para.30, the Court established that while the independence and impartiality of tribunal is questioned by a party involved in the court proceedings ‘what is at stake is the confidence which the court in democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.’

<sup>148</sup> Neither of the ICCPR nor the ACHPR stipulates that a fair trial right is non-derogable right in time of public emergency.

by procedural guarantees, including, often judicial guarantees. In this regard, the Committee has emphasised that

The Provision of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Thus, for instance, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14 and 15.<sup>149</sup>

The other justifications given by the Committee for such interpretation was that certain elements of the right to a fair trial are guaranteed under international humanitarian law during armed conflicts, thus no derogation from these elements can be justified in other state of emergency.<sup>150</sup> In light of this assertion, through taking into account of the relevant norms of Four Geneva Conventions,<sup>151</sup> it can be argued that the independence and impartiality of tribunals obviously is one of those elements of fair trial rights no derogation from which is enshrined in the Committee General Comment No.29.

Furthermore, Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR stipulates that despite the right to a fair trial is not an absolute right and it can be restricted because of exigencies of an emergency situation, some fundamental rights cannot be restricted even in this situation. One of such element of the right to fair trial is that any person charged with an offence shall be entitled a fair trial by independent and impartial tribunal established by law. Respecting those fundamental rights is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation.<sup>152</sup>

Although the ICCPR stipulates that the right to independence tribunal is not absolute right, by taking into account of the above interpretations of international human rights mechanisms and

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<sup>149</sup> Human Rights Committee, General Comment No.29, State of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para.15. Available at <[www1.umn.edu/humanrts/gencomm/hrc29.html](http://www1.umn.edu/humanrts/gencomm/hrc29.html)> (accessed in April, 2019). The Committee also asserted that ‘The principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. Ibid. para. 16.

<sup>150</sup> Ibid.

<sup>151</sup> Common Article 3, Article 84.

<sup>152</sup> United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR, Annex, UN Doc. E/CN.4/1984/4 (1984).

soft laws, it can be concluded that the right to independence tribunal established by law does not belong to the list of rights that can be restricted because of the emergency of situation.

### **3.1.7. Summary**

In order to maintain the effectiveness and combat readiness of the army, one may appreciate the establishment of a separate military court with stricter rules and procedures. Likewise, it is however important to consider that ensuring justice through independent, impartial and competent military tribunal also essential not only it is incumbent upon States to comply with its human rights commitments but it is indispensable to bring accountability in the armed forces. Hence, a delicate balance needs to be kept between these two competing interests. In the subsequent chapter, the study will assess the compliance of Ethiopian military justice system with that of the international standards of the right independent, impartial and competent tribunal.

## Chapter 4

### **4.1. The Right to Trial by an Independent Tribunal: Appraisal of the Ethiopian Military Courts in Light of International Human Rights Law**

#### **4.1.1. Introduction**

As it was pointed out in the previous chapters of this study, an independent military courts are vital for the protection and realization of human rights as well as to create necessary conditions for accountability in the armed forces. The principle of independence presupposes the freedom of the military courts and judges particularly from the interference and influence of the executive and military chain of command. However, this does not mean that military courts and judges are entitled to act in arbitrary manner. And it does not also mean that they shall not have any interaction with the executive and the military authority. The argument in this chapter, therefore, would be in the view that all the participation of, not only those organs of the government mentioned hitherto but others in different activities of the military courts, in principle, would not undermine the independence of the military courts. Due to this fact the appraisal in this chapter will be in accordance with the benchmarks described in the chapter three of this study.

Therefore, this chapter is devoted to provide a critical analysis of whether the Ethiopian military courts comply with the international standards of independent tribunal. To do so, different national and international relevant laws as well as the jurisprudence of international human rights organs and the experiences of some other countries will be examined. Specific issues such as the compatibility of the country legal and institutional framework on the independence of military courts with that of the international standards of independence tribunal will be appraised. In so doing, the data collected from the key-informants such as judges, prosecutors and the defense counsel serving the Ethiopian military justice system have been used to show how the country military courts are operated independently.

#### **4.1.2. Military Courts and the Obligation of Ethiopia Under International Human Rights Law**

No one can convincingly refute the roles of Ethiopian military courts in the administration of criminal justice, particularly their roles in the administration of crimes committed by members of the army. Despite of this fact, however, so far as the Ethiopian military courts are organized as

part and parcel of the Ministry of Defence Forces, there could be numerous questions that would be raised on them from different point of views. Among others, the likely question appeared here is that, do the Ethiopian military courts are bound to ensure the standards of independence of tribunal enshrined in the international human rights law and FDRE Constitution as well?

The ICCPR and other human rights instruments do not expressly prohibit the establishment of military courts, instead they require that such courts to be independent tribunal. In this regard, the HRC has clearly emphasized that ‘The provision of article 14 of ICCPR, apply to all courts and tribunals within the scope that article whether ordinary or specialized, civilian or military.’<sup>153</sup> Thus, the right to independent tribunal enshrined in article 14 of the ICCPR, is an absolute right and apply to all courts including military courts.<sup>154</sup>

Furthermore, Principle 2 of the UN Principles on Military Justice<sup>155</sup> also underlines that military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial. Specifically, Principle 13 states, inter alia, that ‘...the Organisation and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial.’<sup>156</sup> Therefore, irrespective of the State legal tradition and judicial system, Ethiopia has the obligation to ensure that its military courts are protect and uphold the accused right to trial by independent tribunal,<sup>157</sup> and any conviction by military courts which are not independent amount the State non-compliance of its obligation under article 14(1) of ICCPR.

#### **4.1.3. The Constitutional Status of Ethiopian Military Courts**

With regard to the constitutional guarantee of independence of military courts, the FDRE Constitution enshrined the independence of judiciary in general.<sup>158</sup> However, still there is a stipulation in the constitution that implicates judicial powers may be exercised by institutions other than regular courts. For that, the FDRE Constitution under article 78(4) provides ‘Special or *ad hoc* courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures

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<sup>153</sup> HRC General Comments No.32, paragraph 22; Principles 1,2,3, and 15 of the UN Principles on Military Justice.

<sup>154</sup> HRC General Comments No.32, paragraph 19.

<sup>155</sup> These principles have been positively cited in the case law of the European Court of Human Rights. *See*, for example, *Ergin V. Turkey*, Application No.47533/99, Judgement of 4 May 2006.

<sup>156</sup> *See* the UN Principles on Military Justice (2006)

<sup>157</sup> General Comment No.32, paragraph 18

<sup>158</sup> *See* Article 78 of the Constitution

shall not be established'. As per this provision, the constitution prohibits the establishment of two types of courts. These are; *first*, special or *ad hoc* courts or institutions which takes judicial powers away from the regular courts, and *second*, special or *ad hoc* courts or institutions legally empowered to exercise judicial powers and which do not follow legally prescribed procedures.

With respect to the first prohibition, it is clear that the constitution primarily confers judicial powers to the federal and state levels regular courts, not for special or *ad hoc* courts or other institutions.<sup>159</sup>As a result, the judicial powers principally vested to the regular courts<sup>160</sup>and to this end they are expected to adjudicate all types of cases which fall under their competence. In this respect, the federal courts of Ethiopia vested with the jurisdiction over criminal matters as per Article 4 of proclamation No 25/1996. However, special or *ad hoc* courts or institutions with judicial powers<sup>161</sup>may be established to entertain legal matters within their specific jurisdiction.<sup>162</sup>

According to the second prohibition, establishing special or *ad hoc* courts or institutions which do have judicial powers but do not follow legally prescribed procedures are unconstitutional. However, the counter reading of it reveals that such special or *ad hoc* courts or institutions may be established provided that they do follows legally prescribed procedures. The purpose of this prohibition would seems to ensure that trials are not conducted by institutions which do not observe due process of law<sup>163</sup>enshrined under the constitution and international human rights materials in which Ethiopia is bound to comply.<sup>164</sup>Hence, according to this provision, establishing special or *ad hoc* courts or institutions with specific jurisdiction would be constitutional provided that they do follow due process of law. Therefore, observance of due process of law established by the constitution as well as international human rights instruments is indispensable constitutional criteria for special or *ad hoc* courts or institutions with judicial powers to be considered as to legitimate institutions.

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<sup>159</sup> Ibid. Article 79(1)

<sup>160</sup> Ibid.

<sup>161</sup> For instance, military courts

<sup>162</sup> See Article 37(1) of the FDRE Constitution

<sup>163</sup> Due process of law has also include the right to fair and public trial before independent tribunal. *See Sepulveda* (n 2) at 478

<sup>164</sup> See Articles 9(4) & 13(2) of the FDRE Constitution

Coming up to the case of military courts, in Ethiopia, military courts are operated distinctly with specific jurisdiction to assume military criminal cases over offences enumerated from article 285 to 322 of the Criminal Code,<sup>165</sup> therefore they hold the status of institutions with judicial powers. To this end, the establishment of military courts with specific jurisdiction on military matters shall not be considered as unconstitutional and as a result of this, they are bound to ensure the due process rights of the accused, including the right to trial by independent tribunal, guaranteed by universal as well as regional human rights instruments to which Ethiopia is a party, and the relevant provisions of the FDRE Constitution and Criminal Procedure code<sup>166</sup> as well. Therefore, the Ethiopian military courts are constitutionally bound to ensure the accused right of trial by independent tribunal.

#### **4.1.4. Appraisal of the Independency of Ethiopian Military Courts and Judges from Military Hierarchy and Executive**

With respect to the institutional independence of the military courts, the FDRE Constitution, at the first hand, explicitly separates the powers of the executive, legislative and judiciary branches of the government and also clearly declares the independence of the judiciary.<sup>167</sup> It further asserts that all courts at any level shall be free from any interference or influence of governmental or non-governmental institution, official or from any other source.<sup>168</sup> Likewise, it also safeguards the personal independence of judges by stipulating that in discharging of their judicial responsibilities all judges shall hold full independence and be directed solely by the law.<sup>169</sup> More specifically, the Defence Forces Proclamation No.1100/2019 provides that ‘Military courts and judges shall carry out their duties independent of any influence from any governmental body or official, non-governmental or private organizations, or any other person.’<sup>170</sup>

On the other hand, when we see the international standards, the UN Special Rapporteur on the independence of judges and lawyers underlined that ‘The principle of a separation of powers

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<sup>165</sup> This includes any offences committed by a member of the defense forces on combat duty, offense committed by prisoners of war and civilians deployed abroad with members of the defense force on a combat duty. Even if regular courts assumes jurisdiction over all criminal cases, the explicit mention of provision of the criminal code makes it fall under military courts. *See* Article 38 of Proclamation No 1100/2019.

<sup>166</sup> In the military criminal proceedings, courts are required to follow the Criminal Procedure Code of Ethiopia. *See* Article 43 of Proclamation No 1100/2019 provided the application the criminal procedure code.

<sup>167</sup> This can be simply identified by reading Articles 50(2&7) &78(1) of the FDRE Constitution

<sup>168</sup> *Ibid.* Article 79(2)

<sup>169</sup> *Ibid.* Article 79(3)

<sup>170</sup> *See* Article 47 of the Proclamation No.1100/2019



requires that military courts be institutionally separated from the executive and legislative branches so as to avoid any interference, including by the military, in the administration of justice.<sup>171</sup> In addition, the Draft Principles Governing the Administration of Justice Through Military Tribunals states that ‘Military tribunals should have a status guaranteeing their independence and impartiality, in particular in respect of military hierarchy.’<sup>172</sup> Likewise, the European Court of Human Rights<sup>173</sup> also has emphasized that military courts cannot be considered independent in such cases that they are part of the hierarchy of the army.

By taking all these into account, as far as the question of independence of military courts and judges is concerned, the Ethiopian law is generally requiring that both military courts and judges should enjoy a status which ensures their independence from the military hierarchy, the executive or from any other governmental or non-governmental body or authority. In other words, military courts as institutions must have exclusive power to dispose of cases before them. Similarly, the judges as individuals shall be free to decide matters before them on the basis of facts and law without any interference, pressure or improper influence from any branch of the government or elsewhere. Therefore, in exercising of their judicial functions, military courts as well as judges must be free from inappropriate or unwarranted interference or influence of governmental or non-governmental body or persons.

However, this does not mean that, military courts and judges should not have any form of interactions with executive and military authorities. This is because, due to numerous reasons military courts and judges cannot entirely avoid their interactions with their commanders and other organs of the government. To this end, when this researcher articulates that military courts and judges shall be independent, it does not necessarily mean that they must be totally detached from the executive and military authorities. The existence of formal and appropriate interactions with executive and military authorities may not be at all times threat their independence.

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<sup>171</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, UN. Doc. A/68/285 (2013), para. 38.

<sup>172</sup> See Principle 10 of the Draft Principles Governing the Administration of Justice through Military Tribunals, UN. Doc. E/CN.4/2006/58 (2006). The Commentary to this principle, further states that ‘The statutory independence vis-à-vis the military hierarchy be strictly protected, avoiding any direct or indirect subordination, whether in the organization and operation of the system of justice itself or in terms of career development for military judges.

<sup>173</sup> *Findlay v. the United Kingdoms*, Application No.22107/03, Judgements of 25 February 1997, paras 75-80. The Court concluded that ‘... the fact that, among other things, members of the court martial board were subordinate to the convening officer and under his command meant that there had been a violation of the applicant right to an independent and impartial tribunal.’

Although as I have mentioned hitherto, the Ethiopian laws stipulates the independence of military courts and judges. However, a mere existence of such legal provisions could not be supposed as adequate safeguarding to ensure genuine independence of military courts and judges. This is because, formal guarantee often viewed as to initial step, not as an end by itself. This means that, in addition of guaranteeing by law, the independence of military courts required to be revealed in the day to day activities of that courts. To ensure all these in practice, all organs of the government and officials and also non-governmental organizations and persons have to respect the independence of the military courts as well as judges. Therefore, to safeguard the independence of military courts, there should not be inappropriate interference or influence by governmental or non-governmental body or official in the judicial activities of the military courts.

In Ethiopian military courts, this fact has been strengthened by the key-informants participated in this study. Table 1 below shows that the military authorities and the executive do not directly interfere in the day to day activities of military courts and judges. Accordingly, among the key informants participated in this study as military judges, prosecutors and members of military defense counsel, 94 percent or 16 out of 17 respondents agreed that neither of the executive nor military chain of command have interfered in the decision-making processes of the court and only one respondent disagreed with this response.

Questions Posed	Responses from Key Informants											
	Military Judges				Military Prosecutors				Military Defense Counsel			
	Yes		No		Yes		No		Yes		No	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Does the military chain of command or the Ministry of Defence Forces has interfere in the court-decision making process	0	0%	7	100%	1	16.6%	5	83.3%	0	0%	4	100%

Table 1. The Roles of Ministry of Defence Forces and Military Chain of Command

Source: Computed from collected data as primary sources

Notwithstanding of these facts, determining the issue of whether the military courts and judges of Ethiopia are genuinely free from any interference or influence especially from the Ministry of Defence Forces and the military chain of command requires the presence of additional concrete indications.<sup>174</sup> This means that, to safeguard the genuine independence of military courts and judges, the non-existence of interference by the executive and military authority would be essential component, but not sufficient indicator. This is because, as far as the military courts are often composed of military officers, respecting the order of their superior's commander is a basic rule. Thus, military judges are serving officers<sup>175</sup> they are subject to the same military discipline rules and to this end they would have indebted to act in accordance with the orders given by their superior authority.<sup>176</sup> Therefore, so long as the principle of military chain of command has been operated in the military courts, it is predictable that military judges would not sense independence, and therefore this could undermine the principle of independent tribunal guaranteed by international instruments and the constitution as well.

On the other hand, to counter this contention one may infer the legal principle that all soldiers including military judges are expected only to obey manifestly legal orders.<sup>177</sup> Accordingly, so far as military judges aware of the illegality of the order, they have to discard such order. Therefore, since the laws have explicitly declared the independence of military courts as well as the judges, any command by military authority or the executive that threat the independence of that courts or judges would clearly constitute illegal order and can therefore legally be disobeyed.

Despite of this fact, however, the perceived independence of military courts could be threatened because the executive and the military authority still have the power to appoint the judges that would accepts their order, whereas remove those who challenges them. Furthermore, the intervention of executive and military commander quiet persistent when we critically examining some of the powers vested to them by the law.<sup>178</sup> Thus, the law provides an opportunity for the

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<sup>174</sup> These concrete indicators will be analyzed subsequently.

<sup>175</sup> See article 44(1) of Proclamation No.1100/2019

<sup>176</sup> See *Incal v Turkey*, (1998)29, EHRR 449 at 1571-2567 as cited in *Morris v the United Kingdom*, (2002)34 ECHR para.65.

<sup>177</sup> For further discussions, see CR Snyman, *Criminal Law* (5<sup>th</sup> ed. 2008)138-140.

<sup>178</sup> Proclamation No.1100/2019

chief executive and military commanders to determine some of the administrative aspects of the military courts. For instance, the law gives power for the Chief of the General Staff to deploy military judges at any time to non-judicial functions<sup>179</sup> and similarly the Commander-in-Chief of the Armed Forces also vested with the power to determine the judge who sits to hear the case where the accused soldier has a higher military rank than that of the presiding judge.<sup>180</sup> These are administrative matters that directly relate to the exercise of judicial functions by military courts.

Therefore, as far as the issue of independence is concerned, it requires that military courts and judges must enjoy a status which guarantee their independence from military chain of command and the executive with respect to matters that directly related to their judicial functions. However, due to the fact that military judges are under the command of the executive and military chain of command, this would make the system incompatible with the international standards safeguarding the independence of judiciary.

#### **4.1.5. Financial Independence of Military Courts**

Financial autonomy is also another important standard in order for ensuring the genuine independence of judiciary, in general, and independence of military courts, in particular. The financial independence, constitutes the participation of the courts starting from preparation to the implementation of budget. In this respect, the international human rights law requires the judiciary to have active roles in the discussion over the proposal as well as to control and oversight the budget.<sup>181</sup> Accordingly, to ensure the financial independence, it is important that the military courts are not financed on the basis of discretionary decisions of the executive or military authorities, but in stable way on the basis of objective and transparent criteria.

In Ethiopia, the constitution has explicitly stipulated certain procedures for the financial independence of regular courts. Accordingly, it provides that ‘The Federal Supreme Court shall

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<sup>179</sup> As per article 44(7) of Proclamation No.1100/2019, the Chief of the General Staff has a power to remove military judges from office even during tenure whenever such military judges are needed for another assignment.

<sup>180</sup> In the determination of the sitting judges at military courts, article 45(6-7) of Proclamation No.1100/2019 requires that among the judges sitting in the primary military court at least the military rank of the presiding judge shall be a higher or equivalent rank with that of the accused soldier. In case where the military rank of the accused soldier is higher than that of the presiding judge, the Commander-in-Chief of the Armed Forces has the power to assign the presiding judge.

<sup>181</sup> See Principle 7 of the UN Basic Principles on the Independence of Judiciary; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section A, Principle 4(v); European Committee of Ministers (CoM) Recommendation (2010)12, para. 40; see also Report of the Special Rapporteur on the independence of judges and lawyers, UN. Doc. A/HRC/11/41 (2009), para. 39.

draw up and submit to the House of Peoples Representatives for approval of the budget of the Federal Courts, and upon approval, administer the budget.’<sup>182</sup> At the regional level, the respective State Councils have the power to determine their own State Courts budget.<sup>183</sup> However, we cannot find similar provision for military courts. The unique structure of military courts frequently makes challenging to decide by whom the budget of military courts has been determined. Albeit the likely interpretation thereto is that as far as military courts are structured as part and parcel of the Ministry of Defence Forces, their budget would be included in the annual budgets of the Ministry. To this end, the question as to whether this kind of arrangement could undermine the independence of courts is the issue that would require inquiry. In this regard, however, the international human rights instruments maintain that whatever the approach is, to ensure the independence of the courts, their participation in the budgetary processes shall be safeguarded.<sup>184</sup>

Furthermore, when looking to the experiences of other countries, we cannot find a single model. For instance, in countries where military courts are organized as part of the military institutions, their budget often included in the annual budgets of the defense forces.<sup>185</sup> On the other hand, in countries where the military courts are organized as part of civilian judiciary, the budget of military courts commonly included in the general budgets of the ordinary judiciary.<sup>186</sup> For instance, in the United Kingdom, according to Court Martial Act 1956, the salaries and allowances of judges of courts martial are determined by the Lord Chancellor<sup>187</sup> with the

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<sup>182</sup> See article 79(6) of the FDRE Constitution.

<sup>183</sup> Ibid. Article 79(7)

<sup>184</sup> See Report of the Special Rapporteur on the independence of judges and lawyers, UN. Doc. A/HRC/11/41 (2009), para. 39; likewise, a number of regional standards also provide that the judiciary should be consulted regarding the preparation of its budget, for instance, see article 4 (v) of Principles and Guidelines of the right to fair trial and legal assistance in Africa; Council of European Committee of Ministers (CoM) Recommendation (2010)12, para.40. The involvement of the court in the budgetary process determined by its roles in the process of preparation of the budget; adoption of the budget; management of the budget; and evaluation or audit of the budget allocated to court. Here, the position of the court is stronger, the more often it has the lead in these phases.

<sup>185</sup> Vashakmadze (n 23) at 15.

<sup>186</sup> Ibid.

<sup>187</sup> It is a senior functionary in Great Britain, responsible for the efficient functioning and independence of the courts martial.

approval of Treasury.<sup>188</sup> Likewise, in Canada, according to National Defence Act 1985, the remuneration of military judges is regularly reviewed by a Compensation Committee.<sup>189</sup>

While in Ethiopia, so long as the military courts are not organized under the responsibilities of the Federal Supreme Court, their budget never have been arranged in accordance with the provisions of the constitution cited hitherto. The Defense Forces Proclamation<sup>190</sup> has also indicated nothing procedures. To this end, the military courts of Ethiopia are not legally entitled with the power to have participate in the proposal of the budget, to control and implement their own budget, instead it is the Ministry of Defence Forces that has a power to do so. Therefore, it is up to the Ministry of Defence Forces to ensure the participation of military courts in the budgetary process. As a result, so far as the budget of military courts has been arranged as part of the annual budgets Ministry, care must always be taken to ensure that neither the Ministry nor the military hierarchy are able to exert any pressure on the military courts when setting such budget.

Once the issue of who determines the budget of Ethiopian military courts has been addressed, the next issues would be determining the existence of objective criteria in deciding such budget as well as its adequacy.<sup>191</sup> In this respect, the Ethiopian law articulates nothing about in what criterion the budget of the military courts would be fixed. While, the UN Special Rapporteur on the independence of judges and lawyers has recommended that ‘A fixed percentage of GDP should be established [...] be progressively increased.’<sup>192</sup> When we considering to the experiences of other countries, in most of cases, the numbers of military courts and judges as well as the territorial organization of that courts influences the budget.<sup>193</sup> However, the non-existence of legally prescribed procedures in deciding the budget could enable the executive to decide it arbitrarily that consequently jeopardizes the institutional independence of the Ethiopian military courts.

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<sup>188</sup> Aifheli Tshivhase, ‘Financial Security of Military Judges in South Africa’ [2017]45 South Africa Journal of Military Studies 2, at 95.

<sup>189</sup> Ibid.

<sup>190</sup> Proclamation No.1100/2019

<sup>191</sup> Principle 7 of the UN Basic Principles on the Independence of Judiciary and Procedure 5 of the UN Procedures for the Effective Implementation of the Basic Principles on the Independence of Judiciary states ‘The need for adequate resources for the functioning of the Judicial system, including providing the courts with necessary equipment and offering the judges appropriate remuneration and compensation.’

<sup>192</sup> Report of the Special rapporteur on the Independence of Judges and lawyers, Addendum, Mission to Maldives, UN. Doc. A/HRC/4/ 25/ Add.2(2007), para 77.

<sup>193</sup> Vashakmadze (n 22) at 15.

Furthermore, the existence of objective criteria in determining the budget of the courts also closely linked with the adequacy of the budget.<sup>194</sup> This is because the existence of objective criteria in determining the financial aspect of the courts by its effect may justify the accuracy of the system. If the budget system of a country is accurate, the adequacy will follow. However, in practice, adequate budget is often lacking for the military courts, both in terms of institutional resources and also with regard to salaries of military judges.<sup>195</sup> While it is generally accepted that proper funding is an important ingredient for the operation of an effective and independence of military courts.<sup>196</sup> In this regard, the Special Rapporteur emphasized that ‘The reduction of the judiciary budget significantly hamper the administration of justice.’<sup>197</sup> Therefore, the budget allocated to military courts to be adequate, it is recommended that the overall funding of the courts should have to cover the main issues related to the judicial functions of the courts and also should create social guarantee for judges.<sup>198</sup>

#### **4.1.6. Financial Security and Performance Evaluation of Military Judges**

Financial security requires that the military judges must enjoy sufficient financial security that ensures their salaries and other financial benefits are not subject to arbitrary interference by military authority and the executive. The international human rights standards require that the salaries and other financial benefits of judges must be adequately secured by law.<sup>199</sup> Therefore, to safeguard the independence of military courts and protection of military judges, the state is required to provide adequate financial resources through prescribing objective criteria in the law. To this end, the financial arrangement by executive is not suitable for military courts and judges, because it ignores the independence of judiciary and the status of military judges as judicial officers and also it is inconsistent with international standards for the Independence of Judiciary.

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<sup>194</sup> The uniqueness of military courts here again also makes challenging to determine what constitute adequate budget for military courts as institution.

<sup>195</sup> Criminal Justice Assessment Toolkit, *Access to Justice: The Independence, Impartiality and Integrity of Judiciary* (United Nations Office of Drugs and Crime, 2006) at 10.

<sup>196</sup> *Ibid.*

<sup>197</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN. Doc. A/HRC/11/41 (2009), para. 41.

<sup>198</sup> See Principle 7 of UN Basic Principles of the Independence of Judiciary; Report of the Special Rapporteur on the independence of judges and lawyers, UN. Doc. A/HRC/11/41 (2009), para. 39. The sufficiency of budgets of the military courts could be measured by distinguishing the key activities that must receive adequate budgets. These are; for handling case load; for engaging experts, translators, where necessary and when fees are paid by the court; for keeping the knowledge and skills of judges and staff up to date; and for facilitating judges and other personnel in matters of information technology(IT) systems, buildings, etc. See also Vashakmadze (n 23) at 15.

<sup>199</sup> See principle 11 of the UN Basic Principles on the Independence of Judiciary; Article 4(m) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.



However, in Ethiopia, there is no provision in the Defence Forces Proclamation No.1100/2019 and other relevant legislations that prescribe the salaries and other financial benefits of military judges. Instead, as the information acquired from Colonel Meshesha,<sup>200</sup> since military judges are serving officers of Ethiopian National Defence Forces, they are not paid or compensated above their usual salaries. Like any other military officers, the salaries of military judges are determined by considering their status and rank in military.

Therefore, the issue of promotion becomes pertinent to determine the issues of salaries and other financial benefits of military judges.<sup>201</sup> In Ethiopian military justice system, performance of military judges is largely determined based on the evaluation reports made by Judicial Disciplinary Committee as stipulated in article 47(5) of the Proclamation No.1100/2019. In practice, however, till the collection of this data, the Committee has not been yet established by the Chief of the General Staff.<sup>202</sup> While whatever performance of evaluation has been made by whomever, the promotion solely be made by commanding officers and then the increment in salaries and other financial benefits will be determined by considering such promotion. Due to this fact, the respective commanding officers have continued evaluating the performance of Ethiopian military judges. However, this practice undermines the independence of military judges. In this respect, Justice Lamer correctly asserted that ‘An officer’s performance evaluation could potentially reflect his superior’s satisfaction or dissatisfaction with his conduct at a court martial.’<sup>203</sup> He also emphasized that by granting or denying a salaries increase or other financial benefits on the basis of performance evaluation, the executive could effectively reward or punish military judges for their performance as members of military courts.<sup>204</sup>

Thus, the failure of Ethiopian law to formally and expressly ruling out promotion based on performance evaluation of military judges is a big shortcoming in terms of guaranteeing financial security of those judges. This is particularly because, as military judges they are entrusted to the duty of adjudicating over cases that already considered by commanders. Hence, if they are often rule in favour of the accused soldiers, they are likely to disappoint their commanders and as a

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<sup>200</sup> He is the presiding judge in Primary Military Court.

<sup>201</sup> According article 20(1) of Proclamation No.1100/2019, one of the major consideration for promotion of soldiers and then to increase salaries and other financial benefits is having excellent in performance.

<sup>202</sup> Despite the fact that establishment of the Committee has at first time launched by Defence Forces Proclamation 809/2013 before five years but till now the Committee has not been established.

<sup>203</sup> See *R v. Genereux*, Judgement of Supreme Court of Canada, p.306.

<sup>204</sup> *Ibid*.

result they would not get good evaluation for promotional purposes. In that way, that the military authority and the executive are in position to arbitrarily affect the salaries and other financial benefits of military judges.

On the other hand, there may be an argument that civilian judges are also subject to the same pressures. This is only true when examined from superficial perspective. A failure to satisfy the executive may indeed prohibit a civilian judge from promotion, but the salaries and other financial benefits of the regular courts judges are such that can hardly be compared with that of military judges, whose promotion and salaries as well as other financial benefits determined by the decision of their military authority alone. Therefore, if the commander can manipulate the military justice system by sanctioning or adversely affecting a military judges career because the commander disagrees with the judge's decision in a particular case, it will have a chilling effect on judicial independence and undermine confidence in the system. Therefore, the military judges of Ethiopia do not have financial security and hence cannot be said to be independent.

#### **4.1.7. Organizational Autonomy**

The existence of independent Judicial Administration Council also envisages the institutional freedom of military courts. Here, , the organizational autonomy of the courts justifies their actual independence from the executive and legislative branches of the government. The international and regional standards hold that a judicial council should be established independent of the executive and legislative branches of the government. This means that the executive, whether represented by the Ministry of Defence Forces, or any other figure within the Ministry or other executive bodies, whether or not they are political appointees or military personnel, should not have significant control over the council nor have overriding role in its functioning.

Accordingly, the organ that has the power to discipline or remove a judge should be independent and objective in imposing sanctions. Such organ should be composed of representatives of the military courts and regular courts.<sup>205</sup> In this respect, the Council of Europe's Committee of Ministers have recommended that, in order to safeguard the independence, the authority taking the decision on the selection and careers of judges should be independent of the government, the rules should ensure that the significant proportion of the council must be judges who are selected

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<sup>205</sup> Vashakmadze (n 22) at 39

by their peers,<sup>206</sup>and it should decides on its procedural rules.<sup>207</sup>Therefore, to ensure actual independence of the military courts, the law of Ethiopia have to provide the procedures for the selection of members of the council that is fair, inclusive, transparent and administratively independent. Furthermore, the council to undertake its activities independently, it should need to have a budget separated from the Ministry of Defence Forces.

In Ethiopia, the FDRE Constitution under articles 79 and 81 provide about the competence of the Judicial Administration Council at both the federal and states levels of regular courts. At the federal level, the Judicial Administration Council has the power to administer the disciplinary rules of the federal courts judges. It has the power to remove the federal court judge upon approval of the Federal House of People Representatives due to violation of disciplinary rules, inefficiency, gross incompetence, or where the judge can no longer carryout his judicial responsibilities because of illness.<sup>208</sup>It has also the power to select, enforce the professional code of conducts and decide on the transfer of the judge federal court.<sup>209</sup>

With respect to military courts of Ethiopia, article 47 of the Defence Forces Proclamation No.1100/2019, provides about the establishment of the Judicial Disciplinary Committee with the power to monitor and follow up the discipline, performance, accountability and independence of the military courts and judges. In order to discharge its responsibilities, the Committee has the power to draw up its own directive.<sup>210</sup> It has also the power to receive complaint of disciplinary offence against the military judge and investigate the alleged offence<sup>211</sup>while it has no the power

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<sup>206</sup> At least half of the members should be judges selected by their peers. *See* Council of European's Committee Recommendation (2010)12, para.27. The UN Special Rapporteur on the Independence of Judges and Lawyers has also stated that the judicial council should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable. *See* Report of the Special Rapporteur on the independence of judges and lawyers, UN. Doc. A/HRC/26/32, (2014), para.126

<sup>207</sup> Council of European's Committee Recommendation No. R (94)12, principle 1.2.C

<sup>208</sup>*See* article 79(4) (a-c) of the FDRE Constitution.

<sup>209</sup> *Ibid.* Article 81(2 & 6). According to the Amended Federal Judicial Administration Council Establishment Proclamation No.684/2010, (Federal Negarit Gazeta No.41 24th July, 2010), the Council shall have its own budget, secretariat and head of secretariat as well as necessary staff. Among others, it has the power to issue and implement the professional code of conduct, performance appraisal criteria, to deliver decision on the placement and transfer of judges, salary, allowances, medical benefits and promotion of judges. With respect to its composition, it has twelve members represent the judiciary, legislative and executive branches of the government, and the lawyers, law academic, as well as the public. This composition has its own shortcoming in ensuring the independence of the council and the judges also do not have the right to participate in election of the members of the council which among others eventually hamper the independence of the council as well as the judges, but appraising of this council is beyond the scope of this study.

<sup>210</sup>*See* Article 47(6) of Proclamation No.1100/2019.

<sup>211</sup> *Ibid.* Article 47(4).

to take action.<sup>212</sup> This means that, the Committee has the responsibility to submit the result of its investigation to the Council of Defence Commanders where the alleged disciplinary offence was committed by the judge of Primary Military Court<sup>213</sup> and to the Commander-in-Chief of the Armed Forces if such investigation is against the judge of Appellate Military Court for final decision.<sup>214</sup> Hence, this provision points out not only the nominal powers of the Judicial Disciplinary Committee, it further proves the power to appoint and remove the military judges in Ethiopia remained at the hand of the executive alone which seriously undermines the independence of the military courts as institution and military judges as individuals.

With respect to the composition of the Committee, as per the Proclamation No.1100/2019, it has five members, in which two of them are judges from the military courts; two judges from regular courts and the remain one from commanders.<sup>215</sup> While the problem is by whom they are appointed. It has been already discussed that, to ensure the independence of the Committee, its members shall be appointed by the judges themselves. However, in Ethiopia, it is the chief of executive or the Commander-in-Chief of the Armed Force who has the power to appoint the members upon the recommendation of the Ministry of Defence Forces.<sup>216</sup> Furthermore, the presence of the commander in the Committee may could have also a chilling effect on its ability to act independently. Thus, although judges both from military and regular courts, technically have majority, but may not effectively influence or exercise majority power because of their unequal political presence.

In practice, as Table 2 presented below indicates, although the establishment of Judicial Disciplinary Committee was stipulated in the former Defence Force Proclamation No.809/2013 and again maintained by Proclamation No.1100/2019, 88 percent or 15 out of 17 respondents have proved that till the date, the Committee has not been established. According to Colonel Mersha, it is the Commander-in-Chief of the Armed Forces and the Ministry of Defense Forces that knows the reasons why the Committee still has not been established.

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<sup>212</sup> Because its power limited purely investigate the actuality of the alleged offence and then submit the result to the organ having the power to appoint the military judges.

<sup>213</sup> This is because as per article 44(2) of the proclamation the judges of Primary Military Courts appointed by the Council of Defence Commanders upon the recommendation of the Chief of the General Staff. The Council of Defence Commanders composed of the Chief of the General Staff, the commanders of the corps, Commander in Chief of Air Forces and the head of the principal staffs. See article 27(1) of the Proclamation No.1100/2019.

<sup>214</sup> Ibid. Article 47(4).

<sup>215</sup> Ibid.

<sup>216</sup> Ibid. Article 47(3).

With respect to the competency of the Committee in the process of selection and appointments of judges, 94 percent or 16 out of 17 respondents have thought that even if the Committee has been established, it will have no role in the process of selection and appointments of military judges. Likewise, with regard to its power on the disciplinary offences of military judges, 88 percent or 15 out of 17 respondents have believed that the Committee will have no substantial power in deciding on the issue. Further, regard to the independence of the Committee especially from the military authority and Ministry of Defence Force, 70.5 percent or 12 out of 17 respondents have believed that it will be neither of under the influence of the military chain of command nor Ministry of Defence Forces.

However, despite of the responses made by the key-informants for the questions posed especially regarding to the independence of the Committee, this researcher would not agree with that responses because so far as Committee still has not been established no one can convincingly assure its independence. Due to this fact, when we evaluate their responses as reasonable person particularly on the independence of the Committee from the intervention and influence of the executive or military chain of command would not be convincing. Furthermore, the mere fact that the members of the Committee are judges selected from military and civil courts could not assure the independence of that Committee. In addition to it, it is important to establish a Committee to which its members are elected in fair, inclusive and participatory manner by the judges themselves and to have a power to administer its own staff as well as budget.

Questions Posed	Responses from Key Informants											
	Military Judges				Military Prosecutors				Military Defense Counsel			
	Yes		No		Yes		No		Yes		No	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Is there Judicial Administration Council or equivalent body that administer the affairs of the military courts?	0	0%	7	100%	1	16.6%	5	83.3%	1	25%	3	75%
Do you believe that the Judicial Administration Council or equivalent body has actively participate in the processes of selection and appointment of military judges?	1	14.2%	6	85.7%	0	0%	6	100%	0	0%	4	100%
Do you believe that the judicial Administration Council or equivalent body has substantial power to decide on the military judges disciplinary misconduct?	3	42.8%	4	57.1%	1	16.6%	5	83.3%	1	25%	3	75%

Table 2. The establishment, functions and independence of the Judicial Administration Council/equivalent body

Source: Computed from collected data as primary sources.

#### **4.1.8. Appointment Procedures**

In order to guarantee the independence of military courts, the legislation should define the rules of selection and appointments of military judges. The selection and appointments must be based on the integrity and qualifications of person. In addition to this, it is also important to ensure the mechanism for appointments of judges does not exclusively depends on the chain of command and executive branch of the government and therefore establishing an independent body who makes decisions on the appointments based on formal criteria defined by law is essential.<sup>217</sup> Coming to Ethiopian military justice system, in order to hold the position of judgeship, the law requires that the prospective judges must be the members of the army on the basis of active-duty officers and have to have legal skills as well as to have attained the rank of ‘officer’ in the military.<sup>218</sup> To appraise the issue whether the selection and appointments procedures of Ethiopian military judges comply the international standards of independence of judiciary, it is important to assess each elements of the provision. The followings are the criteria for selection and appointments of military judges mentioned in the law.<sup>219</sup>

##### **4.1.8.1. Being Active-Duty Officer’s**

A person to be a judge in military courts of Ethiopia, the first criteria is, such person must be a serving officer. This means that, the person should be currently active member of the armed forces. So, with this assertion, those members who are retired or dismissed from the armed forces for any reason are not eligible for appointments as a judge for Ethiopian military courts. However, the requirement of appointing active-duty officers would normally jeopardize the independence of the courts. This is because, it is inconsistent with the required independence of the military courts from the influences of the executive as well as military chain of command.<sup>220</sup> This is due to the fact that, appointing active-duty military personnel to the post of judgeship creates an institutional link between the military courts and that of the military chain of command as well as the executive. This means that, especially in countries in which there is no clear separation between the military courts and military chain of command, active-duty

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<sup>217</sup> Vashakmadze (n 22) at 41.

<sup>218</sup> See Article 44(1) of Proclamation No.1100/2019.

<sup>219</sup> Ibid.

<sup>220</sup> Thus, where active-duty officers are seen as parts of the Ministry of Defence Forces or executive by virtue of their employments, this in fact create a reasonable concern regarding the independence of the military courts.

personnel could not able to guarantee the independence of the courts.<sup>221</sup> In this respect, the Inter-American Court of Human Rights held that:

The organic structure and composition of military tribunals in Chile implies that they are made up of active-duty military members who are hierarchically subordinate to higher-ranked officers through the chain of command, that their designation does not depends on their professional skill and qualifications to exercise judicial functions, that they do not have sufficient guarantee that they will not be removed and that they have not received legal education required to sit as judges. All these implies that the said courts lack independence and impartial.<sup>222</sup>

Thus, as long as the military judges are first and foremost the members of the defense forces, they would have the obligation to observe the order of their commander otherwise they would be subject to disciplinary action taken by the concerned military authority or the commander that could endangers their independence. In other words, this means that as far as the military judges are active-duty officers, it is difficult to see how these judges could have been perceived as to independent when their position depends upon being members of the forces, obliged to the chain of command and required to meet their individual service requirements. In order to solve this problem to some extent, it may be preferable if retired military personnel or civilian with a required knowledge of military operations have been appointed. Therefore, an effective guarantee in this respect is to appoint judges who are at the very minimum removed from the sphere of command influence or who are not subject to military discipline.<sup>223</sup>

#### **4.1.8.2. Attaining the Rank of Officer**

In order to hold the position of judgeship in Ethiopian military courts, the second criteria is attaining a rank of ‘officer’.<sup>224</sup> Due to the definition of the term ‘officer’ in the proclamation,<sup>225</sup> members of the armed forces who have a rank bellow Second Lieutenant are excluded from appointments even if they are law graduate. So, to be appointed as a judge in the military court of Ethiopia, the prospective judges are required to attain a rank of at least Second Lieutenant.

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<sup>221</sup> Vashakmadze (n 22) at 39.

<sup>222</sup> *Palamara Iribarne v. Chile*, Judgement of 22 November 2005, Series C No.135.

<sup>223</sup> Vashakmadze (n 22) at 39.

<sup>224</sup> Article 44(1) of the Proclamation No.1100/2019.

<sup>225</sup> *Ibid.* Article 2(6) stated that officer includes ‘All members of the defense forces having a rank of Second Lieutenant to General.’



### 4.1.8.3. Having Legal Skills

Having legal skill is the third requisite to hold the position of judgeship in Ethiopia military courts.<sup>226</sup> In its definition clause, the law does not stipulate the meaning for the term legal skill. While, according to Waters, the term legal skill ‘Encompass all the academic and practical legal skills.’<sup>227</sup> This means that, legal skill could be acquired through legal education or training and through long term experiences. However, as mentioned hitherto, the Defence Forces Proclamation of Ethiopia did not stipulate the minimum required level of legal education and experiences to hold the position of judgeship in the military courts, and such obscure of the law could provide opportunity for the executive to select judges arbitrarily.

At international level, different international human rights instruments requires that the method for the selection and appointment must safeguard against judicial appointments for improper motives and ensure that only individuals of integrity and ability with appropriate training are appointed.<sup>228</sup> Thus, the method of appointments of military judges is important to ensure that appropriate persons are selected for the post of military judiciary. Accordingly, the principle that judges should be selected and appointed on ‘merit’<sup>229</sup>is central to many international declarations and statements on the judiciary.<sup>230</sup>

On the other hand, when we looking to the practices of countries, the modalities for selection and appointments of military judges vary from country-to-country. In several countries, military

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<sup>226</sup> Ibid.

<sup>227</sup> Ben Waters, ‘Legal Skills’ [2015]49 Learning Research Review, at 419. Available at <[www.tandfonline.com/doi/pdf](http://www.tandfonline.com/doi/pdf)> (accessed on July12,2019).

<sup>228</sup> In this respect, principle 10 of the UN Basic Principles on the Independence of Judiciary requires that ‘a person selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law and any method of judicial selection shall safeguard against appointment for improper motives.’ Principle 13 of the UN Draft Principles of Administration of Justice Through Military Tribunals also states, inter alia, that ‘...the persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications.’ Section A (4) (i) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also states, inter alia, that ‘The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability.’

<sup>229</sup> With regard to the definition of merit in this context, some simply state it is the basis on which judges are selected and appointed, while others go some ways towards defining the qualities that constitute merit. For instance, the Committee of the Council of Europe, in its Recommendation for Member States on Judges: Independence, Efficiency and Responsibilities, provides the definition by requiring that ‘Appointments should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.’<sup>229</sup> Likewise, article 4(k) of the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa states that ‘No persons shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfill their functions.’

<sup>230</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Para.44.

courts are composed of solely active or retired members of the armed forces who have appropriate training in law or law related qualifications.<sup>231</sup> In some cases, military judges are not required to have undergone any legal training and appointed by executive branch of the government. In other countries, military courts are made up of professional judges, who are civilian judges and have military experience and knowledge of the operations of armed forces and appointed by judicial council or the ordinary courts.<sup>232</sup>

However, in Ethiopia, the Defence Forces Proclamation<sup>233</sup> does not specifically stipulate to what extent the prospective judges should be required to have legal skills. But, in general, before taking any post of service, every member of the defense forces shall receive training in diverse skills, as necessary by considering their individual disposition and competence.<sup>234</sup> To this end, whenever someone assigned to the position of judgeship in the military courts of Ethiopia, he may take the required training and education to carry out the assignment effectively.<sup>235</sup> However, the problem still here is that there are no legally pre-determined criteria in terms of education and experience to hold the position of judgeship in a way that satisfy the required qualifications, skills and capacity to adjudicate cases by applying the law and avoid appointment of military judges for improper motives.

On the other hand, when we see the minimum required qualifications to hold the position of judgeship in the regular federal courts, among others, the prospective judges are required to have at least first degree in law(LLB) with good results from recognized university<sup>236</sup> and taking of pre-candidacy training.<sup>237</sup> The divergence in these two judicial systems can be mentioned to show how far the military justice system of Ethiopia threatened discretely. However, this may not be without reasons. The possible reasons may close to the truncated perception of the government about the military justice system. Unlike that of the regular courts, it may also due to the shortage of military officers who have attained the required minimum level education and

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<sup>231</sup> National legislations of a number of countries usually states that military judges should possess the same legal education and training required of civilian judges. *See* Report of the Special Rapporteur on the independence of judges and lawyers, Gabriel Knaut, UN Doc. A/68/285 (2013).

<sup>232</sup> *Ibid.* para.27.

<sup>233</sup> *See* Proclamation No.1100/2019

<sup>234</sup> *Ibid.* Article 7

<sup>235</sup> *Ibid.*

<sup>236</sup> *See* article 11(1)(c) of Proclamation No.684/2010

<sup>237</sup> *Ibid.* Article 11(1)(f).

experiences.<sup>238</sup> But whatever the reason may be, in order to form independent and competent military judiciary it is important to appoint competent judges on the basis of merit.

To ensure independent military judiciary, therefore, military judges should need to have appropriate training, knowledge and expertise in military criminal justice.<sup>239</sup> They should not be appointed for improper motives and should be properly qualified.<sup>240</sup> For this reason, to comply with the standards of international human rights law, the recommended system of appointments of military judges should solely depends on merit.<sup>241</sup> To realize this, it is important to amend the proclamation in order to specify the required extent of education and experience to hold the position of judgeship in military courts.

#### **4.1.9. The Independence of the Body that Appoints Military Judges**

Once the issue about qualifications is determined, the next issue would be determining of the body that appoints military judges. Yet, the selection and appointments of judges should be in the hands of an independent body is one of the important international standard to safeguard the independence of military courts. In this regard, the UN Special Rapporteur on the independence of judges and lawyers underlines that ‘The composition of the body that select and appoints judges matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges.’<sup>242</sup> The Rapporteur further has underlined the potential danger where a body that appoints judges is effectively under political control by

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<sup>238</sup> As the information I have gained from military judges those participated in the study, almost all of them have Law Degree (LLB). However, this may not ease the perceived problems because unless the law prescribed explicit criteria, there is no guarantee for that incompetent officers would not have been appointed.

<sup>239</sup> Vashakmadze (n 22) at 41.

<sup>240</sup> The selection and appointment of military judges should be based on objective criteria, particularly ability, integrity and experience and any method for selection of military judges should safeguard against judicial appointment for improper motives.

<sup>241</sup> This reasoning is affirmed by the African Commission Principles which require states to 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. The ACHPR held that, in *Media Rights Agenda v. Nigeria*, the selection of persons serving military tribunals, with little or no knowledge of law as members of the special military tribunal that tried *Malaolu* was in contravention of Principle 10 of the UN Basic Principles on the Independence of the Judiciary. See African Commission on Human and Peoples Rights, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Comm. No. 224/98 (2000), para 60. Likewise, the ECtHR, in *Incal v Turkey*,<sup>241</sup> also identified that the status of the military judges who were required by law to undergo the same professional (legal) training as their civilian counterparts provided certain guarantees of independence and impartiality to the national security court in question. See *Incal v Turkey*, Judgement of 9 June 1998, EHRR para 67. See also Naluwairo (n 26) at 454.

<sup>242</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, UN Doc. A/HRC/11/41 (2009), para.28.

asserting that ‘...if the body is composed primarily of political representatives there is always a risk that these independent bodies might become merely formal or legally rubber-stamping organs behind which the government exerts its influence indirectly.’<sup>243</sup> As a result, the Rapporteur recommends the establishment of an independent body, both to guard against the actual risk of political influence and to strengthen the legitimacy of the courts by reinforcing the public confidence on the system.<sup>244</sup>

When we see the practices of other countries, there are many hybrids in the approach to selection and appointments of military judges. In countries where the military justice is form part of the judiciary, the judges of military courts are appointed according to the general appointments procedures of the judiciary; the Head of State or the Ministry of Justice has the authority to appoint them.<sup>245</sup> Thus, in a number of countries in Eastern and Central Europe, civilian authorities appoints military judges in the same way that judges for civilian courts are appointed.<sup>246</sup> In other countries in which military justice form part of the armed forces, the Ministry of Defence will be responsible for selection and appointments of judges.<sup>247</sup>

In Ethiopia, when looking to the FDRE Constitution, in general requires the involvement of the executive, legislative and judiciary branches of the government in the overall process of selection and appointments of judges serving regular courts.<sup>248</sup> However, this general appointments procedures of the judiciary would not applicable to military courts. Thus, in so far as the Ethiopian military courts are part of the Ministry Defence Forces, the selection and appointments method of military judges have been continued with different approach. According to the

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<sup>243</sup> Ibid. Para.28.

<sup>244</sup> Ibid. See Paras 24-26. Additionally, in order to safeguard the courts from political interference, the Rapporteur further recommends that it is preferable that such body should composed of a majority of judges.

<sup>245</sup> Vashakmadze (n 22) at 42.

<sup>246</sup> Ibid. For instance, in Bulgaria, the same appointments requirements apply for military and civilian judges. The Supreme Judicial Council is responsible for appointing military judges.

<sup>247</sup> Ibid. For instance, in some European countries of the Soviet Union and the United States of America, the judges of military courts are still selected and appointed by the executive.

<sup>248</sup> According to article 81 of the Constitution, the president and vice-president of the Federal Supreme Court are appointed by the House of People Representatives upon the recommendation of the Prime Minister. At the states level, the practice is similar regarding the recommendation of the president and vice-president of the regional State Supreme Courts. However, with respect to the judges serving federal courts, the Federal Judicial Administration Council has the power to select the candidates and appointment has been done by the House of People Representatives upon submission of the Prime Minister. Likewise, judges serving regional state courts have appointed by State Councils upon the recommendation by State Judicial Administration Councils.

Defense Forces Proclamation,<sup>249</sup> the selection and appointments of military judges are depends on the level of the military courts to which the prospective judge would be appointed. Accordingly, the judges serving Primary Military Courts have been appointed by the Council of Defense Commanders<sup>250</sup> upon the recommendation of the Chief of the General Staff,<sup>251</sup> and judges serving Appellate Military Court are also appointed by Commander-in-Chief of the Armed Forces upon the recommendation of the Defence Minister who would have interests over the outcomes.<sup>252</sup> Due to this fact, any reasonable person could notice that the appointments of military judges by these bodies would possibly undermines the independence of judges.<sup>253</sup> The remarkable thing in the law is also that the it does not give this power even to the Judicial Disciplinary Committee of military courts.<sup>254</sup>

Hence, we can understand that the judges of military courts of Ethiopia are not selected and appointed by independent body, instead it is the executive branch of the government and the military authority, that may have an interest in the outcomes, have the power to select and appoint them. To this end, as long as this power remained at the hand of the executive branch of the government, no one could confidently contend that the selection and appointments would be conducted in the way that would assure the genuine independence of the judges. Furthermore, such method would also jeopardize the principle of ‘separation of powers’ which is indispensable to safeguard the independence of the military courts. This means that the selection and appointments process of military judges would have been tainted, or appeared to be tainted, with the arbitrariness of the executive, the independence of the judges as well as the courts

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<sup>249</sup> Proclamation No.1100/2019

<sup>250</sup> Ibid. According to article 24, a Council of Defence Commanders is a collection of high senior rank within the structure of Ministry of Defence Forces.

<sup>251</sup> Ibid. Article 44(2).

<sup>252</sup> Ibid. Article 44(3).

<sup>253</sup> The international jurisprudence confirms that the appointments of military judges by executive branch undermine the required independence, the Inter-American court of Human Rights, in *Castillo Petruzzi v. Peru*, Judgement of 30 May 1999, Series C No.52, held that ‘The fact that members of the Supreme Court of the Military Justice were appointed by the Minister of the Pertinent sector was enough to call the independence of the military judges into serious question.’ Furthermore, a number of the UN Special Rapporteurs expressed concern that the United States Military Commission operating in Guantanamo Bay were not sufficiently independent of the executive. Among other things, the United States Department of Defence and ultimately the President had the authority over the body responsible for appointing the judges, who could be removed by the appointing body. UN Mechanisms Joint Report on detainees of Guantanamo Bay, UN Doc. E/CN. 4/2006/120 (2006) paras. 30-33; see Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN. 4/2005/60 (2005) paras. 17-19; see also HRC Concluding Observations: Jordan, UN Doc. CCPR/JOR/CO/4 (2010) para.12.

<sup>254</sup> Article 47(2-5) Proclamation No.1100/2019. To which the majority of its members will be judges selected from military and civilian courts.

eventually threatened. Therefore, to guarantee genuine independence of military courts and judges as well as in order to comply with the international standards of independence judiciary, it is important to establish an independent body that is composed of its majority judges selected by their peers, in the place of the Council of Commanders and that of the chief-executive.

In practice, regarding of whether the appointment of military judges is based only on qualifications and ethics, the responses of the key-informants which indicated in Table 3 below shows that, 94 percent or 16 out of 17 respondents have believed that only the qualifications and ethics of judges are taken into account and on other hand the political and other attitude of the prospective judges would not have been taken into consideration. But, 6 percent or 1 out of 17 respondents has not agreed with such responses and replied that both qualification and political attitude of the prospective judges have been taken into consideration.

With regard to the issue as to the existence of pre-determined procedure for selection and appointments of judges that carried out by independent body, 94 percent or 16 out of 17 respondents have thought that strict evaluation and assessment about the qualifications and ethics of the prospective military judges have been carefully conducted before appointments. Only 6 percent or 1 out of 17 respondents have believed that such assessment and evaluation have never been undertaken. With regard to the organ that undertake such process, 88 percent or 15 out of 17 respondents have believed that such assessment and evaluation have been carried out by military courts.

Furthermore, with respect to appointments of military judges without having the required qualifications, 88 percent or 15 out of 17 respondents have thought that no such kinds of appointments were happened in military courts while 11.7 percent or 2 out of 17 respondents have thought that there are judges appointed by the executive without satisfying the required qualifications. This implies that, even though judges of Ethiopian military courts are selected and appointed by executive branch of the government, according to the majority respondents, the appointments have been carried out on the basis of the qualifications and ethics of the prospective judges.

Questions Posed	Responses from Key Informants											
	Military Judges				Military Prosecutors				Military Defense Counsel			
	Yes		No		Yes		No		Yes		No	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1. Before appointing persons as military judges, strict evaluation and assessment about their qualifications and ethics have been carried out?	7	100%	-	-	6	100%	-	-	3	75%	1	25%
2. If your answer for question No.2 is 'Yes,' who perform such assessment?												
a. Ministry of Defence Forces	-	-	-	-	1	16.6%	-	-	-	-	-	-
b. Superior Commanders	-	-	-	-	-	-	-	-	1	25%	-	-
c. Judicial Administration Council or Judicial Disciplinary Committee	-	-	-	-	-	-	-	-	-	-	-	-
d. Military Courts	7	100%	-	-	5	83%	-	-	3	75%	-	-
3. In selection of military judges, more emphasis has been given for:												
a. Their qualifications and ethics	7	100%	-	-	6	100%	-	-	3	75%	-	-
b. Their political attitude	-	-	-	-	-	-	-	-	-	-	-	-
c. Both	-	-	-	-	-	-	-	-	1	25%	-	-
4. Among the judges in military courts, do you believe that there are judges appointed without consideration of their educational background and experience?	1	14.2%	6	85.7%	-	-	6	100%	1	25%	3	75%

Table 3. The selection and appointment of military judges

Source: Computed from collected data as primary sources

#### **4.1.9.1. Appointment of Civilian as to Judges of Military Courts**

Furthermore, in Ethiopia, civilian judges serving regular courts may also be appointed as judges of military courts.<sup>255</sup> However, the law says nothing about in what criteria and by whom they are appointed. By implication, such appointments may be carried out by the executive alone, acting on its sole discretion. However, the participation of civilian judges in the military courts would be supposed as a good improvement in the military justice system, still this alone does not be sufficient to compensate for the lack of independence, either real or perceived, of a tribunal in which military judges are members.<sup>256</sup>

In this respect, the European Court of Human Rights has more than once determined that the presence of civilian judges in military courts is not enough for a genuine guarantee of independence for the military courts. For instance, in *Ibrahim v Turkey*, the Court concluded that

...while the presence of civilian judges was permissible under the European Convention, the fact that those civilian judges were appointed by their hierarchical superiors and subject to military discipline led to the violation of the right to trial by independent and impartial tribunal.<sup>257</sup>

Furthermore, in another case the court concluded that

...while the participation of civilian judges as ordinary members of a court martial did somewhat contribute to its independence, they did not have enough influence over the proceedings as a whole, including over the military members of the court martial, to comply with the requirements of independence and impartial tribunal.<sup>258</sup>

Therefore, the presence of civilian judges in both primary and appellate military courts of Ethiopia even has some undeniable contribution to ensure the independence of tribunal through reducing the influence of military chain of command, but it does not alone sufficient to warrant the genuine independence of the military courts.

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<sup>255</sup> See article 44(1) of Proclamation No.1100/2019.

<sup>256</sup> Ibid. According to article 44(1) and (3), civilian to be appointed as judges for primary military courts, they are required to be judges in a regular court. Furthermore, one civilian also may be appointed as presiding judge for Appellate Military Court.

<sup>257</sup> Application No.10987/10, Judgment of 3 July 2012, Para. 19.

<sup>258</sup> *Martin v. the United Kingdoms*, Application No.40426/98, Judgment of 24 October 2006, Para. 51.



## **4.1.10. Security of Tenure and Irremovability of Military Judges**

### **4.1.10.1. Term of Service and Reappointment**

Security of tenure means that a military judge is appointed for a fixed period of time or until retirement and cannot be removed from office without proper cause.<sup>259</sup> Tenure is necessary to give military judges the independence needed to decide issues and cases without fear of professional retribution by the commander or executive. International human rights mechanisms and standards have clarified that the tenure of judges until a mandatory retirement age or expiry of their term of office is a requirement for safeguarding independence of judiciary.<sup>260</sup> The tenure of military judges shall also be adequately secured by law.<sup>261</sup> Coming up with the Ethiopian constitution, Article 79(4) of the FDRE Constitution in general specifies the retirement age of a judge as mandatory term of service.<sup>262</sup> More specifically, the Federal Judicial Administration Council Establishment Proclamation stipulates sixty years for retirement age of federal courts judges.<sup>263</sup>

Despite of these two legal provisions, when we examining the military justice system of Ethiopian, the law stipulates fixed period of time. Accordingly, the term of service for military judges is five years.<sup>264</sup> Two points are emphasized here, *first*, the issue of whether a fixed period of service stipulated by the law is complying of the international standards of independence of tribunal has been the one which is indispensable to determine whether or not adequate tenure is safeguarded for Ethiopian military judges. Unlike that of the civilian judges, in Ethiopia, it is clear that the constitutional guarantee of tenure until retirement age has not been maintained for military judges. However, there is no clear reason why the defense forces proclamation hesitated to maintain identical security of tenure with that of the constitution. This means that, if the

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<sup>259</sup> Tshivhase (n 188) at 116.

<sup>260</sup> See HRC General Comments No.32, para. 19; Principle 11 of the UN Basic Principles on the Independence of Judiciary and article 4(L) of the Principles and Guidelines of the Right of Fair Trial and Legal Assistance in Africa.

<sup>261</sup> Ibid.

<sup>262</sup> It provides that no judge shall be removed from his duties before he reaches the retirement age determined by law. The rationale behind of this guarantee is to provide the judges to accomplish their task without fear of termination.

<sup>263</sup> See Article 12(1)(B) of Proclamation No.684/2010.

<sup>264</sup> Article 44(4) of the Proclamation No.1100/2019 states that the term of office of both primary and appellate military courts judges shall be five years.

Proclamation were adopted the retirement age approach, the term of service of military judges would be at least seven years from the date of their recruitment.<sup>265</sup> What is more, as far as military judges are officers who are attained at least the rank of Second Lieutenant, it is not clear why the drafters of the Proclamation have hesitated to maintain the retirement age of 48 years of age or at least even the 10 years subsequent to their appointments as judges, just like any other officers in the military.<sup>266</sup>

However, this does not necessarily mean that it is the retirement age of service only that secures the independence of military judges. This because, sometimes prescribing the term of service of military judges till the age of retirement may not be desirable. In this regard, Justice Lamer pointed out that ‘...officers who serves as military judges being members of the military establishment may not wish to be cut off from promotional opportunities within that career system.’<sup>267</sup> However, the principle of independence of judiciary has been guaranteed not to safeguard the interest of the judges alone but it is directed at securing the rights and interests of the public as well. To this end, it is indispensable to understand the issue of tenure beyond the personal aspiration of the judges. Yet, in Ethiopia, unless otherwise there is a good working environment and safety for military judges that associated with genuine independence, appointing them till the age of retirement may not be desirable. To conclude, even though the defense forces proclamation has not embraced the constitutional approach of retirement age, fixing specific period alone does not in principle violates the independence of judges.

*Second*, the issue of whether or not the five-years term of service safeguards the independence of military judges is also indispensable. Determining the compliance of the domestic law on its length of term of service with that of international standard is the one which is highly subjective. Furthermore, except of few soft law mentioned below, there is no single binding international law and jurisprudence that clearly states the acceptable length of term of service. However, the HRC in its Concluding Observations on Armenia, underlined that ‘...the election of judges by popular vote for a fixed maximum of six years does not ensure their independence and

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<sup>265</sup> According to Article 10(1) of Proclamation No.1100/2019, the mandatory retirement age for all members of the defense forces is seven years’ term of service.

<sup>266</sup> Ibid. As per article 10(4, a), any member of the defense forces shall serve at least 10 years subsequent to becoming an officer, provided, however, such service may not be extended beyond 48 years for members those with the rank of ranging from Second Lieutenant to Captain.

<sup>267</sup> See *R v. Genereux* (1992)1 S.C.R.259, p.320.

impartiality.<sup>268</sup> Furthermore, the UN Special Rapporteur on the independence of judges and lawyers has also contended that ‘...a term of five years is too short for security of tenure of judges.’<sup>269</sup> When we seeing to the practice of other country, a similar five years’ tenure has been guaranteed by the Canadian military justice system.<sup>270</sup> Nevertheless, since 2003, various recommendations have been made to that the period of appointment should be extended.<sup>271</sup>

However, a mere appointment for the term of five years does not make the military law of Ethiopia incompatible with that of the international standards of independence of tribunal. There are factors associated with the lengthy of service that would make the law incompatible. Therefore, in determining the adequacy of five years’ term of service, the issue would be whether or not the term of service to five years would have contribution for the judge’s to lose their professional confidence or not? This is because, the legal profession itself requires the judges to have job security that could not be interrupted arbitrarily.<sup>272</sup> Here, it is presumed that the judges would lose their job security if they are appointed for short period of time. This means that, if judges are appointed for short period of time, their confidence could be easily eroded for the reason that they do not know where they will go upon the expiry of the five years’ term of service. It is only the commander or the competent authority who knows and decides the destination of the judge. This may also indicate that judgeship in the military courts of Ethiopia is not as such considered as a profession, rather simply an assignment for limited term of service at temporary basis. For this reason, the five years’ tenure provided in the defense forces proclamation of Ethiopia is not sufficient to safeguard the tenure security of military judges. Therefore, it is essential that the tenure of military judges would be extended for a relatively long period of time or at least that of the ten years’ retirement age after appointments.

The other important point in this respect is whether after expiry of the fixed term stipulated by the law is there the possibility of reappointment or not in Ethiopia military justice system? However, the Ethiopian law articulates nothing on this issue. While from the reading of the

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<sup>268</sup> 19 November, 1998CCPR/C/79/Add.100, para 8.

<sup>269</sup> UN Doc. E/CN. 4/2000/61/Add.1, para.169(c)

<sup>270</sup> Laurie Hawn, ‘Strengthening Military Justice in the Defence of Canada Act’ [2010] Canadian Bar Association, at 3.

<sup>271</sup> Ibid.

<sup>272</sup> This means that, in order to safeguard the independence of military judges, tenure whether until the age of retirement or for a fixed term must secure against interference by the executive or commander or any other body in a discretionary or in arbitrarily manner.

Defence Forces Proclamation one can infer that the non-inclusion of explicit provision about the possibility of reappointment and also the term ‘shall’<sup>273</sup> in the provision designates the appointments of military judges for the term of no more than five years is mandatory. Thus, there is no legal ground for reappointment in Ethiopia. The prohibition of reappointment could also be assumed as a good improvement in guaranteeing the independence of military courts. This is because, there is a plausible perception on the fact that where there has been a possibility of reappointment, the decision of military judges will be prejudiced due to their aspiration of future reappointment.<sup>274</sup> Therefore, it is submitted that in order to safeguard genuine independence of military judges, the prohibition of reappointment by the law is important to avoid the opportunities of the judges indebtedness to the appointing organ or the executive for a further term.

#### **4.1.10.2. Irremovability of Military Judges**

Moreover, security of tenure also requires that military judges should only be removed on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the law.<sup>275</sup> This because, security of tenure of judges could be affected by the ease or otherwise with which military judges can be removed from office. The international human rights laws protect judges from political or otherwise improperly motivated attempts to remove judges.<sup>276</sup> The UN Special Rapporteur on the independence of judges and lawyers makes clear that tenure must be guaranteed through irremovability for the period of time the judge has been appointed, by stating that ‘Irremovability of judges is one of the main pillars guaranteeing the independence of judiciary.’<sup>277</sup> Thus, protecting military judges against arbitrary removal is critical to the concept of judicial independence.

In Ethiopia, concerning to judges serving regular courts, Article 79(4) the FDRE Constitution and article 12 of the Amended Federal Judicial Administration Council Establishment Proclamation No.684/2010 provides the grounds for removal and by whom they may be

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<sup>273</sup> Article 44(5) of Proclamation No.1100/2019 states that ‘Term of office of judges of the Primary Military Court as well as Appellate Military Court shall be five years.’

<sup>274</sup> Victor Hansen, ‘The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences’ [2013]21, Michigan State International Law Review 2, at 366.

<sup>275</sup> See HRC General Comments No.32, para.20.

<sup>276</sup> See principle 18 of the UN Basic Principles on the Independence of Judiciary; Article 4(n) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.

<sup>277</sup> See Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para.57.

removed.<sup>278</sup> Despite of these provisions, concerning to military judges, the grounds for removal and the body by whom they may be removed are provided under article 44(5-7) of the Proclamation No.1100/2019. According to this provision, a military judge may be removed from office for reasons of incapacity or found guilty of either disciplinary or criminal misconduct. However, unlike the case of judges serving regular courts, for military judges the Defence Forces Proclamation No.1100/2019 does not provide gross incompetence or inefficiency as a ground for removal.

Furthermore, the military judge may be removed from office by the order of the Chief of the General Staff at any time whenever such judge is needed for another assignment upon notification to the concerned judge.<sup>279</sup> Due to this provision, nothing stops the Chief of the General Staff from removing military judges from office and assigning them to other non-judicial functions. In this regard, the international standards recommended that the transfer decision must be decided by judicial authorities, and the consent of the judge in question be sought.<sup>280</sup> Further, the UN Special Rapporteur on the independence of judges and lawyers also asserted that ‘The assignment of judges to particular court, locations, and their transfer to others, should equally be determined by objectives criteria.’<sup>281</sup> However, when examining the above provision in line of the international standards we do not found objective criteria in Ethiopia law for removal of judges from office other than that of he has been required for another post. The decision for removal would also be made not by the court or other independent body instead it is by the Chief of the General Staff who has interest in the outcome of a particular case. Due to this fact, any reasonable person could perceive that this provision could be used arbitrarily to remove “unwanted” military judges from their judicial functions. This can adversely affect the independence of military judges.

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<sup>278</sup> A judge serving federal courts may only be removed by Judicial Administration Council upon approval of the House of People Representatives where he is found to be incapacitated, grossly incompetent or guilt for violation of disciplinary rules.

<sup>279</sup> See article 44(7) of the Proclamation No.1100/2019

<sup>280</sup> See Singhvi Declaration, para.15. This Declaration formed the basis of the UN Basic Principles on the Independence of Judiciary and formally recommended to States by the Commission on Human Rights in Resolution 1989/32, UN doc. C/CN. 4/RES/1989/32 states that the assignment of the judge to a post ‘shall be carried out by the judiciary or by a Superior Council of the judiciary where such bodies exist.’

<sup>281</sup> See Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/67/305 (2012), para.53.

Therefore, to safeguard the independence of military courts as well as judges having an independent organ is important. Establishing an independent body may have also an important role to play in legitimate the removal of military judges.<sup>282</sup> This is because, such body should act as a buffer between the military courts and the executive to limit the executive influence on the courts.<sup>283</sup> While the Ethiopian law conveys this power to the Council of Defence Commanders and the Commander-in-Chief of the Armed Forces which are part of the executive and may often have interest in the outcomes.<sup>284</sup> Thus, the Ethiopian law place military judges under the control of the executive and military hierarchy, and also made a link between the military courts and the executive that would jeopardizes the independence of that courts.

However, in order to comply the international standards of independence tribunal limiting the executive ability of removing military judge alone may not be sufficient. Here, the international human rights standards require the domestic law to have prescribe the procedures for removal of judges<sup>285</sup>and the proceedings on it to be processed promptly, expeditiously and fairly.<sup>286</sup> Accordingly, judges facing disciplinary or removal proceedings shall be entitled guarantees of fair hearing including the right to be represented by legal representatives of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.<sup>287</sup> Unfortunately, we cannot found this guarantee in Ethiopian military law.

Furthermore, the judges of Ethiopian military courts do not have a separate and independent professional code of conduct that list the type of professional misconducts and govern their day to day activities and still they are governed by the general military disciplinary regulation that eventually undermines their professional independence.<sup>288</sup> Additionally, till the collection of this

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<sup>282</sup> Ibid. para.39

<sup>283</sup> Ibid.

<sup>284</sup> Article 44(6) of the Proclamation No.1100/2019 provides that ‘Judges shall be removed from office by the organ which appointed them.’ And as per article 47(4) of the same proclamation, the power of the Judicial Disciplinary Committee of military courts limited purely to investigate and submitting its report to the appointing organ. As per article 44(2-3), the judges of Primary Military Court shall be appointed by the Council of Defence Commanders upon recommendation by the Chief of the General Staff and judges of Appellate Military Court shall be appointed by the Commander-in-Chief of the Armed Forces upon recommendation by the Minister of Ministry of Defence Forces.

<sup>285</sup> See Principles 17 -19 of UN Basic Principles on the Independence of Judiciary; Article 4(q-r) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.

<sup>286</sup> Ibid.

<sup>287</sup> Ibid.

<sup>288</sup> According to the information collected from the military judges participated in this study as key informants there is no separate and independent code of conducts for military judges. For further information, see Table 5

data, there is no also an independent judicial authority that have the power to investigate and make final decision on the issue of professional misconducts of military judges.<sup>289</sup> Thus, as indicated in the Table 4 below, 82 percent or 14 out of 17 respondents affirmed that there is no clear and separate professional code of conduct that govern and list the type of disciplinary misconducts of military judges. Likewise, the same percentage of respondents answered the nonappearance of an independent body for the investigation and decision-making on the disciplinary misconducts of military judges. Moreover, 94 percent or 16 out of 17 respondents do not believe that the body who sees the disciplinary misconducts of military judges has sufficient power to secure the professional independence of military judges. Similarly, all respondents are confirmed that within military justice system, there is no legally established appeal procedures against a decision and sanction on disciplinary misconducts for military judges.

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<sup>289</sup> Ibid.

Questions Posed	Responses from Key Informants											
	Military Judges				Military Prosecutors				Military Defense Counsel			
	Yes		No		Yes		No		Yes		No	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Is there clear and separate professional code of conduct that list the type of disciplinary misconducts of military judges?	0	0%	7	100%	1	16.6%	5	83.3%	2	50%	2	50%
Is there a separate and independent authority for the investigation and decision-making of disciplinary misconducts of military judges?	0	0%	7	100%	1	16.6%	5	83.3%	2	50%	2	50%
Do you believe that the authority sees the disciplinary misconducts of military judges has sufficient power to do so in practice?	0	0%	7	100%	1	16.6%	5	83.3%	1	25%	3	75%
Are there legally established procedures for military judges to appeal against a final decision or sanction of disciplinary misconducts?	0	0%	7	100%	0	0%	6	100%	0	0%	4	100%

Table 4. Military Judges Disciplinary Actions System

Source: Computed from collected data as primary sources



#### 4.1.11. Immunity of Military Judges

The last but not the least indispensable indicator for independence of military judges is protecting them from fear of action for their judicial acts or omission by means of immunity. To ensure genuine independence, the military judges shall be independent from influence, including for instance, threat of suit for judicial acts or omissions. The international human rights standards requires that the judges shall not be liable in civil or criminal proceedings for improper acts or omission in the exercise of their judicial activities.<sup>290</sup> There should be an appropriate level of judicial immunity for actions taken within the scope of judges official duties.<sup>291</sup> Accordingly, the immunity of judges from suit is one of the aspects to safeguard independence of judiciary from other sources of influence including, but not limited to, the executive.

When we examining the Ethiopian judges' legal immunity in general, Article 2138 (C) of the Civil Code provides immunity by stating that 'No actions for liability may be brought as the result of an act connected with their functions against [...] a judge of the Ethiopian courts.' Accordingly, action for civil liability may not brought against a judge as a result of an act connected with his/her judicial functions. However, except that of procedural immunity provided in the Regulations of some Regional States, such as South Nation Nationality and Peoples Regional Government, Benishangul-Gumuz and Harari, there is no criminal immunity for judges in Ethiopia.<sup>292</sup> By virtue of procedural immunity, a judge could not be arrested or charged without the Judicial Administration Council assent, except in case of flagrant offence. This immunity would contribute to giving judges confidence to make independent decisions based only on the law. Unfortunately, the Defence Forces Proclamation of Ethiopia stipulates nothing about the immunity of military judges. This would undermine the independence of military judges.

When we looking up on the practices of other States, most countries protects judges from civil liability by providing immunity for action taken in their judicial capacity.<sup>293</sup> However, in most

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<sup>290</sup> Article 4(n) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa

<sup>291</sup> National Judicial Institute for the Canadian International Development Agency, (n 185) at 9

<sup>292</sup> While without listing the subject for criminal immunity and by referring other independent laws, Article 39(1c) of the Criminal Procedure Code of Ethiopia empowers the public prosecutor to close the police investigation file where the suspected person cannot be prosecuted under any special law.

<sup>293</sup> For instance, the law of France provides vicarious State liability with the possibility of judicial reimbursement

countries with well-established democracies, there is no criminal immunity for judges, except of procedural or otherwise.<sup>294</sup> Yet, Sweden provides neither civil nor criminal immunity for judges.

#### **4.1.12. Summary**

Independence of judiciary entails the freedom of courts and judges from interference by the executive or legislative in the exercise of judicial functions. As far as the issue of independence of military courts and judges is concerned, it requires that military courts as institution and military judges as individuals should formally and practically safeguarded from improper and unwarranted interference and influence by the military hierarchy and the executive with respect to matters that relate directly to their judicial business.

However, as it has been pointed out in this chapter, since the executive and the military hierarchy have an extensive power to intervene and influence the functions military courts, and the military courts are also particularly composed of active-military officers with the command structure of the armed forces, these have been created lack of independence and impartiality that is required under international human rights law to which Ethiopia is a party. Here, it is also submitted that military commanders and executive do not lose any of their legitimate authorities when military courts and judges are assumed meaningful independence and are free to decide issues and cases without undue influence and interference by them. So, limiting the extensive powers of the commanders and executive has vital importance to safeguard the independence of military courts as well as judges. Consequently, in a nutshell, it follows from the foregoing analysis that Ethiopian military courts as institutions and military judges as individuals, as they stand today falls short to comply with the requirements of independence of tribunal guaranteed by international human rights law to which Ethiopia is a party.

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<sup>294</sup> For instance, there is no criminal immunity for judges but a limited immunity is provided in India and South Africa.

## **Chapter Five**

### **Conclusion and Recommendations**

#### **5.1. Conclusion**

The major objective of this study is to appraise the compliance of Ethiopian military justice system with the right to trial by an independent tribunal in the view of forwarding recommendations that help the country to ensure its military justice system compliant with that of minimum standards of the right to trial by independent tribunal guaranteed by international human rights law to which Ethiopia is a party. Accordingly, to ensure genuine independence, it is important to make sure that both the law and practices safeguards the military courts and judges particularly from improper and unwarranted influence and interference of the executive and military authority in their day-to-day activities. Although the key informants participated in this study have thought that there was no chance for the executive and military authority to exert pressure on the activities of the military courts and judges, however, this does not mean that a country has sufficient legal safeguards to guarantee the independence and impartiality of military courts as well as judges against the occurrence of such influence and interference.

In this regard, the international human rights organs identified many forms of interference and influence that could be exerted by executive and military hierarchy against military justice system. There is evidence on the executive and military chain of command influence and interference over military justice system in many countries including those whose democratic credentials are highly rated. For instance, in United States, the executive and military hierarchy exert their power of appointing military judges to influence and interference in the military justice system. It is therefore important that in line with the international human rights obligations, Ethiopia to undertake essential reform in its military justice system to provide for effective measures to safeguard military courts as well as judges from unwarranted and improper influence and interference by executive and military chain of command.

#### **5.2. Recommendations**

To improve the compliance of Ethiopian military justice system with the minimum international standards of trial by independent tribunal, a number of recommendations have been provided.

The key recommendations include: in order to guarantee genuine independence of military judges and courts, the military judges have to remain outside the military chain of command when performing their judicial businesses and must not be subject to military disciplinary rules and authority in respect of matters that directly relate to the exercise of their judicial functions. Both the executive and the military authority do not lose any of their legitimate authority in defense forces when military courts as well as judges are outside of their control. So, giving meaningful independence for military courts and judges could not affect the aims of the defense forces quite as it warrants the rule of law and human rights in the armed forces.

Further, to ensure the genuine independence of military courts, the courts have to have financial autonomy. Influence through finance would undermine their independence. The financial independence of military courts has to be prescribed by specific law. Military courts are required to have, propose, implement and control their own budget. To this end, the law has to set forth requirements that safeguard their participation in the budgetary processes and that would enable them to administer their budget independently.

The selection and appointments of military judges have to be based on clear and objective criteria that are grounded on merit prescribed by the law and also relevant to the position and status of judges serving regular courts. Accordingly, it is recommended that the appointed persons should be those who satisfy the required integrity and qualifications and training in law as well as experience, but with sufficient knowledge of military operations. Similarly, the law has to set forth procedures for the selection of all judges. Further, it has to set forth clear criteria that must be taken into account in appointing civilian judges for military courts.

To restrict the extensive power given by the law to the executive and military authority over the military courts, the recommendations here include: revoking the power of the Council of Defence Commanders and the Commander-in-Chief of the Armed Forces of appointing and removing military judges and establishing an independent and competent body to select, appoint, transfer, remove and monitor military judges and ensure the military courts are under the supervision and administration of that body. The majority members of this body also shall be judges selected by their peers. Establishing this body with a separate budget administered independently and with the power to control and oversight over the budget of the military courts is also crucial to ensure genuine independence of military judiciary. The law also required to

prescribe clearly that all the decisions of such body, relating to the selection, appointment, transfer and removal of military judges subject to independent review.

Additionally, all judges of military courts have to benefit from security of tenure and irremovability. In this respect, the recommendations include: the term of service of military judges has to be guaranteed by the constitution for considerable period of times. Thus, just like any other officers appointed for other position in the military, the term of service of military judges should be at least ten years after appointments for the post of judgeship. For this reason, article 44(4) of the Defence Forces Proclamation No.1100/2019 has to be amended. Further, the law has to guarantee financial security of military judges, including adequate remuneration. The law has to set forth clear criteria for military judges career promotion that better reflect international standards by requiring the ability, integrity and experience of military judges.

Concerning to irremovability of military judges, in order to prevent arbitrary removal of military judges on the sole ground of assignment to another post by the Chief of the General Staff, it is important to amend article 44(7) of the Defence Forces Proclamation No.1100/2019 and to guarantee removability must only be on clear and objective criteria prescribed by prior law and such decision must be made exclusively by body which is independent. To this end, it is important to provide that all disciplinary, suspension and removal proceedings against military judges shall be in accordance with the established standards of code of conduct that list the type of disciplinary misconducts.

Additionally, the disciplinary procedures for addressing complaints against military judges for alleged breaches of the disciplinary misconducts set out in the law and affords judges the right to a fair hearing before an independent and impartial body and includes; the right to a prompt and fair determination of the complaint before an independent body, the right to consult and be represented by legal counsel and the right to substantive appeals against any disciplinary decision or sanction to a higher independent body. Finally, the law has to be amended to ensure that military judges enjoy personal immunity from civil and criminal suit for acts or omissions in the exercise of their judicial functions. Therefore, in order to comply with these minimum international human rights standards for trial by independent and impartial tribunal, Ethiopia has to require to reform its military justice system.

## **Bibliography**

### **A. Books, Journal, Articles and Working Papers**

AFriMAP and Open Society Initiative for South Africa, 'Discussion Paper, the Democratic Republic Congo Military Justice and Human Rights - An Urgent Need to Complete Reforms (2009).

Amnesty International, *Fair Trials Manual* (2<sup>nd</sup> ed. 2014).

Behan C, Don't Tag on Supermen's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members [2003]176, *Military Law Review*.

Berhe M, 'The Ethiopian Post-Transition Defense Review: Building a National Army from a Revolutionary Democratic Army [2016] *African Politics, African Peace*.

Bishop J, *Justice Under Fire: A Study of Military Law* (1974).

Brietzke P, 'Law, Development and the Ethiopian Revolution' [1979] *Oriental and African Studies of the University of London, Dissertation*.

Canadian Military Judges Compensation Committee, 'Report on the Compensation of Military Judges' (2008).

Cooke J, *Manual for Courts Martial: Evolving Military Justice* (Eugene Fidell and Dwight Sullivan(eds): 2002).

Criminal Justice Assessment Toolkit, *Access to Justice: The Independence, Impartiality and Integrity of Judiciary* (United Nations Office of Drugs and Crime: 2006).

Dahl A, *International trends in Military Justice* (2011).

Danilet C, 'Independence and Impartiality of Justice: International Standards' [2000] *International Bar Association*.

Edward S, 'Military Justice Without Military Control' [1973] *Maurer Faculty*.

ENCJ Report of 2013-2014, 'Independence and Accountability of the Judiciary' [2014].

Fisseha-Tsion M, 'Highlights of the Constitution of People Democratic Republic of Ethiopia (PDRE): A Critical Review of the Main Issues' [1988]14, *Review of Socialist Law*.

Gibson M, 'International Human Rights Law and the Administration of Justice Through Military Tribunals: Preserving Utility While Precluding Impunity'[Vol.4]1, *Journal of International Law and International Relations*.

Guzman F, 'Military jurisdiction and international law: Military courts and gross human rights violations' [Vol.1] *International Commission of Jurists Colombian Commission of Jurists*.

Hansen V, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences* (2013)21:2, *Michigan State International Law Review*.

Hawn L, *Strengthening Military Justice in the Defence Forces of Canada Act* (2010).

Hirschhom J, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights* (North Carolina Law Review: 1970)62

Hodson K, 'Military Justice: Abolish or Change' [1975] *Military Law Review*.

Kassa Y, 'Dealing with Justifiability: In Defense of Judicial Power of Ethiopia' [2015] *Mekelle University Law Journal*

Kelly F, *An Independent Judiciary: The Case of the Rule of Law* (International Center for Criminal Justice Reform and Criminal Justice Policy: 1997).

Lawyers Committee for Human Rights, *What Is a Fair Trial? A Basic Guide to Legal Standards and Practice*

Michel A, Voon T, *Defence of the Indefensible? Reassessing the Constitutional Validity of Military Services Tribunals in Australia*, (Eugene Fidell and Dwight H Sullivan(eds): 2002)

Naluwairo R, 'Military courts and human rights: A critical analysis of the compliance of Uganda's military justice with the right to an independent and impartial tribunal'[2012]12,*African Human Rights Law Journal*.

Nowak M, *United Nation Covenant on Civil and Political Rights: CCPR Commentary*, (2<sup>nd</sup> ed. 2005).

Osiel M, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (2002).

Paul J, 'Human Rights and the Structure of Security Forces in Constitutional Orders: The Case of Ethiopia' [1994] Wm. & Marry Bill Rts.J. at 235.

Phillip H, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, (Columbia Law Review, 2002).

Roan J, Buxton C, 'The American Military Justice System in the New Millennium'[2002]52,Air Force Review.

Rowe P, *The Impacts of Human Rights Law on Armed Forces* (Cambridge University Pres: 2006).

Schlueter D, 'The 20<sup>th</sup> Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s – A Legal System Looking for Specific'[1991]133,Military Law Review

Selassie B, 'Constitutional Development in Ethiopia'[1966]10,Journal of African Law

Sepulveda M, et al. *Universal and Regional Human Rights Protection: Cases and Commentaries* (University for Peace: 2004).

Sherman E, *Conscience and Command*, (Finn (eds) 1971).

Sherrill R, *Military Justice is to Justice as Military Music is to Music* (1970).

Shetreet S, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges, in Judicial Independence the Contemporary Debate' [1985].

Snyman CR, *Criminal Law* (5<sup>th</sup> ed. 2008).

Spak M, 'Military Justice: The Oxymoron of the 1980s' [1984]

Stavros S. *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff Publisher: 2003).

Tshivhase A, 'Military Courts in Democratic South Africa: An Assessment of their Independence' [2006]6, The New Zealand Armed Forces Law Review

Tshivhase A, 'Financial Security of Military Judges in South Africa' [2017]45, South Africa Journal of Military Studies.



Vashakmadze M, 'Understanding Military Justice System, Guidebook' [2010] Geneva Center for the Democratic Control of Armed Forces

Vashakmadze M, *Understanding Military Justice: A Practice Note* (Geneva Center for the Democratic Control of Armed Forces (DCAF), 2018).

Vibhute K, 'The Judicial System of Ethiopia: From 'Empire' and 'Military Junta' to 'Federal Democratic Republic' [2013]7, Malawi Law Journal

Water B, *Legal Skills* (2015)49 Learning Research Review.

## **B. International and Regional Instruments and Documents**

African Charter on Human and Peoples 'Rights, adopted on 27 June 1981 at Nairobi, entered into force on 21 October 1986.

Basic Principles on the Independence of the Judiciary [adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, Milan 26 August - 6 September 1985, U.N.Doc. A/conf./121/22/Rev.1, I.B], G.A. Res. 40/146, 13 December 1985, 40 U.N. GAOR Supp. (No.53) 254, U.N. Doc A/40/1007.

Draft Principles Governing the Administration of Justice through Military Tribunals, U.N.Doc. E/CN.4/2006/58 at 4 (2006).

Draft Third Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at Guaranteeing under all Circumstances the Right to a Fair Trial and a Remedy, 3 June 1994, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1994/24.

European Convention on the Protection of Human Rights and Freedoms, adopted on 4 November 1950 at Rome, entered into force on 3 September 1953.

International Covenant on Civil and Political Rights, adopted 16 December 1966 at New York, entered into force on 23 March 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) 52, U.N.Doc. A/6316(1967).

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 at its 33<sup>rd</sup> Ordinary Session in

Niamey-Niger, May 2003, DOC/OS(XXX)247, reprinted in 12 Int'l Hum. Rts. Rep. 1180 (2005).

Report of the Special Rapporteur on the Independence of Judges and Lawyers, Addendum: Report on the Mission to Guatemala, U.N.doc. E/CN.4/2000/61/Add.1.

The Dakar Declaration on the Right to a Fair Trial in Africa, Adopted by the African Commission on Human and Peoples Rights at its 26<sup>th</sup> Ordinary Session in Kigali, Rwanda, November 1999.

UN Human Rights Committee, *General Comment No.13 (Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law – Article 14)*, adopted at the Twenty-first session of the Human Rights Committee, 13 April 1984.

UN Human Rights Committee, *General Comment No.24 (on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant)*, adopted at the Fifty-second Session of the Human Rights Committee, 4 November 1994, CCPR/C/21/Rev.1/Add.6. Available online at: <http://www.unhcr.org/refworld/docid/453883fc11.html>

UN Human Rights Committee, *General Comment No.29 (Article 4: Derogations during a State of Emergency)*, Adopted at the Seventy-second Session of the Human Rights Committee, 31 August 2001, CCPR/C/21/Rev.1/Add.11. Available online at: <http://www.unhcr.org/refworld/docid/453883fd1f.html>

UN Human Rights Committee, *General Comment No.32 (Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial)*, adopted at the Ninetieth Session of the Human Rights Committee, 23 August, 2007, CCPR/C/GC/32. Available online at: <http://www.unhcr.org/refworld/docid/478b2b2f2.html> .

UN Sub-Commission on the Promotion and Protection of Human Rights, *Administration of Justice, Rule of Law and Democracy: Issue of the Administration of Justice through Military Tribunals, Report submitted by the Special Rapporteur,*

*Emmanuel Decaux*, 2 June 2005. E/CN.4/Sub.2/2005/9. Available at the UNHCR Refworld website: <http://www.unhcr.org/refworld/docid/43f30ad30.html>

Universal Declaration of Human Rights, G.A.Res. 217A (III), 10 December 1948, 3 U.N. GAOR Supp. (No.11 A) 71, U.N. Doc. A/810, 7 (1948).

### **C. Ethiopian Legislations**

Penal Code of 1930.

Imperial Army Proclamation No 68/1944.

Revised Constitution of the 1955.

The Ethiopian Criminal Procedure Code Proclamation No.185/1961

The PDRE Constitution of 1987.

Proclamation to Establish Supreme Court of PDRE No.9/1987

The FDRE Constitution of 1995.

The FDRE Criminal Code of 2005

Proclamation on the Defence Forces of the Federal Democratic Republic of Ethiopia No. 809/2013.

Proclamation on the Defence Forces of the Federal Democratic Republic of Ethiopia No. 1100/2019.

### **C. CASE LAW**

*Amnesty International and Others v. Sudan*, African Commission on Human and Peoples Rights, Comm. No. 48/90, 50/91, 89/93 (1999).

*Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance*

*Project v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 218/98 (1998).

*Civil Liberties Organisation v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 129/94 (1995).

*Civil Liberties Organisation v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 151/96 (1999).

*Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, African Commission on Human and Peoples Rights, Comm. No. 224/98 (2000).

*R v. Genereux* [1992] 1 S.C.R 259.

*R v. Genereux* (1990), [1992] 5 C.M.A.R. 38.

*Cooper v. United Kingdom* [2003] EHRR 48843/99.

*Engel v. Netherlands* (1976) 1 EHRR 647.

*Findlay v. United Kingdom* (1997) 24 EHRR 221.

*Incal v. Turkey* (2000) 29 EHRR 449.

*Morris v. United Kingdom* [2002] ECHR 38784.

*Mundy Busyo et al v. Democratic Republic of Congo*, U.N. Doc. CCPR/C/78/D/933/2000 (2003).

*Madani v. Algeria*, U.N. Doc. CCPR/C/89/D/1172/2003 (2007).

## Annex I

### Check Lists for Document Review, Interview, and Questionnaire

1. The issues of organizational autonomy of the military courts
  - Formal guarantee
  - The extent of administering the human resource and financial aspects by the military courts themselves
2. The issues of personal independence of military judges
  - How the recruitment and selection of military judges processed?
  - How the military judge's disciplinary issues are governed?
  - How the issues of evaluation, promotion and transfer of military judges determined?
  - How the salaries and benefits of military judges determined?
3. The issues of composition, functions, and independence of Judicial Administration Council or equivalent body
  - The extent of the military chain of command and/or executive intervention and/or influence in the activities of the Judicial Administration Council/equivalent body
  - The extent of proportional representation in Judicial Administration Council/equivalent body
  - The extent of the responsibilities of the Judicial Administration Council/equivalent body

## Annex II

### Interview Questions

First of all, I would like to express my appreciation for your willingness and devotion to be interviewed for my study.

The purpose of this interview is to collect data for research paper titled *The Right to Trial by Independent Tribunal: Appraisal of Ethiopian Military Courts in Light of International Human Rights Law*.

This is an independent research being conducted for the partial fulfillment of the Master's Degree in Law (LL.M) by a prospective graduate student from Jima University.

This researcher would like to assure that the information provided would be used for research purpose only and all responses will be treated in confidentiality.

Thank you in advance to all these interview questions would appear.

### **I. Regarding management of Military Courts**

1. Do military courts have the power to make decisions regarding general management of the courts? If yes, how? If no, who made such decisions?
2. Do military courts independently administer and implement their own budgets without interference from Military authority or Ministry of Defence Forces or other executive branch of the government? If yes, how?

### **II. Regarding Organizational Autonomy of Military Courts**

1. Is the order, interest, or attitude of the military chain of command and/or the Ministry of Defence Forces taken into account in performing judicial functions of the court? If yes, how?
2. Are the courts human resources and finance administered without intervention of the military chain of command or executive? If yes, how?
3. Is independent Judicial Administration Council established in your court? If yes,
  - 3.1. Is the Council controls its own finance independently from military chain of command and/or executive? If yes, how?
  - 3.2. Is the Council controls its own activities independently from military chain of command and/or executive? If yes, how?
4. If the answer for question number "3" is "No", do military courts judges have decisive influence on court and judges' administration?

### **III. Regarding Personal Independence of Military Judges**

1. Do judges of military courts selected and appointed solely based on merit? If no, in what criteria they are selected and appointed? If yes, how?
2. Do military courts or Judicial Administration Council/equivalent body/ have the power to propose candidates for recruitment and/or selection as military judges? If no, which

authorities have this power? Do you believe that assigning this power to such authorities has influence on the personal independence of the judges? If yes, how?

3. Do military courts or Judicial Administration Council/equivalent body/ have the power to deliver decisions about the recruitment and/or selection of military judges? If no, who makes such decisions?
4. Do military courts or Judicial Administration Council have the power to propose the candidates for military court president? If no, which authorities have this power? Do you believe that assigning this power to such authorities has influence on the personal independence of the judges? If yes, how?
5. Do military courts or Judicial Administration Council have the power to evaluate and promote their own judges independently? If yes, how? If no, who makes such evaluation and promotion? Do you believe that such mechanism has influence on the personal independence of the judges?
6. Do military courts or Judicial Administration Council have the power to adopt and implement of ethical standards of military judges? If no, who adopt and implement such ethical standards?
7. Do military courts or Judicial Administration Council have the power to make decision on the salaries and other benefits of military judges?
8. Do military courts or Judicial Administration Council have the power to make decision on the contents and program of training for military judges? If no, who makes such decisions?
9. Outside the system of appeal, preliminary ruling, or precedent doctrine, can a higher ranked judge's change a decision of a lower ranked judge's? if yes, what kind of decision that a higher ranked judge's made too?
10. Can a military judge be transferred to another military court or location or post without his/her consent? If yes, which authorities have this power? For what reason? Is the judge guaranteed to transfer into equivalent post (in terms of a position, salary, etc.)? can a judge appeal on the transfer decision?

### **Annex III**

#### **Key Informant Questionnaire**

##### **Part I**

The purpose of this questionnaire is to collect data for research paper titled *The Right to Trial by Independent Tribunal: Appraisal of Ethiopian Military Courts in Light of International Human Rights Law*.

This is an independent research being conducted for the partial fulfillment of the Master's Degree in Law (LL.M) by a prospective graduate student from Jima University.

This researcher would like to assure that the information provided would be used for research purpose only and all responses will be treated in confidentiality.

Thank you in advance to all these interview questions would appear.

## **Part II**

### **Personal and Organizational Profile**

1. Age .....
2. Occupation
  - Judge  Primary Military Court  Appellate Military Court
  - prosecutor
  - Defence Counsel
  - Military Personnel
3. Level of Education
  - High School Graduate
  - Certificate
  - College Diploma
  - University Degree
4. Your Field of Specialization.....
5. Years of Experience.....
6. Your Rank in Military Chain of Command.....

## **Part II**

### **I. Recruitment and Selection of Military Judges:**



1. Recruitment and selection of judges are made by:

- a. Military Chain of Command
- b. Ministry of Defence Forces
- c. Judicial Administration Council/equivalent Body
- d. Military Courts

2. Before appointment as military judges, strict evaluation and assessment about their qualification and ethics is mandatory

Yes

No

2.1. If your answer for question number 2 is "Yes" is this done by:

- a. Ministry of Defence Forces or other executive
- b. Military Chain of Command
- c. The Judicial Administration Council/ Equivalent Body
- d. The Military Court

2.2. If it is done as above, in selection military judges more emphasis is given for their:

- a. Qualification and ethics
- b. Political attitude

2.3. In the processes of appointment and promotion of military judges more emphasis is given

to:

- a. Their education, experience, capability and ethics
- b. Political interest and attitude

2.4. Among the judges in the military courts, do you believe that there are judges who are appointed without consideration of their qualification, experience and ethics, due to patronage?

Yes  No

### **III. The Interference of Military Chain of Command and/or Executive in the Military Justice System**

Does the military chain of command and/or the executive interfere in the decision-making processes of the military court?      Yes       No

#### **IV. Disciplinary Action in Military Courts**

1. Is there a clear and separate professional code of conducts that list the type of disciplinary misconduct of military judges?      Yes       No

2. Is there a separate and independent body for the investigation and making of decisions on disciplinary misconducts of military judges?      Yes       No

3. Do you think the body sees the disciplinary misconducts of military judges has enough power to do so in practice?      Yes       No

4. Is there any procedure to appeal against disciplinary decision and sanction of military judges?      Yes       No

#### **V. Judicial Administration Council or Equivalent Body, its Composition, Functions, and Independence**

1. Is there Judicial Administration Council that administer the affairs of military courts?  
Yes       No

2. Do you believe that the Judicial Administration Council actively participate in the process of selection and appointment of military judges?      Yes       No

3. Do you believe that the Judicial Administration Council plays significant role on the improvement of military judges compensation such as salaries and other benefits?

Yes       No

4. Do you believe that the Judicial Administration Council has substantial power to decide on the military judge's disciplinary misconducts?

Yes       No

5. Do you believe that the military judicial system including the Judicial Administration Council is under the influence of military chain of command or executive?

Yes       No

## VI. Financial Independence

1. Do the military courts prepare their own budget and directly submit to the Federal House of People Representatives?      Yes       No
2. Do the military courts have any say in drafting their own budgets, independently administer and implement without interference of the Ministry of Defence Forces or other executive?  
Yes       No
3. Do military courts have the power to determine their own budgets?  
Yes       No