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# Establishment and Power of Federal Democratic Republic of Ethiopia Military criminal justice institutions

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ESTALISHMENT AND POWER OF FEDERAL DEMOCRATIC RUPUBLIC OF MILITARY CRIMINAL JUSTICE INSTITUTION

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# CHAPTER 1

## 1. Definition of Military criminal justice

Military justices are a structure of punitive measure designed to faster order morale and discipline with in the military[1]. In relation to this definition military law is the branch of public law governing military discipline and other rules regarding service in the armed force it is exercised both in peace time and in war is recognized by civil courts and includes rules for broader than for the punishment of offenders. Military justices law is large but not exclusively, statuary in character, and prescribe the rights of and imposes duties and obligation up on the several classes of persons computing military establishment creates military tribunals and also defines military offence and imposing of an adequate penalties endeavors to prevent their occurrence.[2]

### 1.1 The historical background of military criminal justices institutions in Ethiopia.

As far as military criminal justices concerned the modern criminal justices intuition in Ethiopia were started from the era of the emperor Haile Selassie. Even though at the time of emperor there is a modern criminal justice institution in our country however, the writer could not take in to account the military criminal justices before the era of Haile Selassie by the fact that was not sophisticated and not indicated in this paper. Therefore, I will attempt to categorize the Ethiopian military criminal justices institution here under as historical back ground namely 1930 of Ethiopian penal code, army proclamation of 1944, the Ethiopian penal code of 1957, the military justice system of the provisional military administrative council, the People Democratic Republic of Ethiopia (PDRE), the PDRE military court proclamation 1987, military criminal justice during transitional period and Federal Democratic Republic of Ethiopia.

## 1.2 1930 of Ethiopian penal code

The 1930 of the Ethiopian penal code recognized and promulgated the military law discipline and (justices).

The code had introduced the military discipline and justice in a better way than before in Ethiopia. In this code some military offence were provided with their corresponding punishments clearly. The 1930 penal code provide that demoralization of troops is punishable with imprisonment from 10-20 years.[3] other provisions also declared that faller to perform the military duties in a given camping specially by military leaders which was punishable up to death penality.[4]

The code promulgate the defense of superior order by the subordinate for an offence which was made in performing the order from the superior.[5] And art 147 stated that, even though the order was improper, that is to mean even if the order were illegal one if the person receiving the order honestly thought that it was necessary and proper for him to obey his superior, there shall be no punishment against such person.[6] From the above 1930 Ethiopian penal code provisions, one can arrive at a conclusion that, the Proclamation had promulgate military law (offences) which have a better protection to individual it servants than the previous law did in such way that it had introduce a new concept in the military the law of superior subordinate relationship. What I understand is that, the 1930 penal code Authorized superior to order their subordinal in the boundary of law and subordinate were not obliged to obey for the interest of their superiors unless prescribed in law.

The code had not corporate military offence against honesty, crimes against possession of injured and killed members, crimes against safely, morale and power of defense force. In the time of 1930 there is no separation of military criminal justice institution like investigation

and military prosecution regular investigation and public prosecutor performed it.

## 1.3 The army proclamation of 1944

The 1944 of army proclamation included a lot of military justices systems and better than 1930 penal code of Ethiopia. In this period the administration and training of Ethiopian army was very influenced by British (united Kingdom) army regulation because Ethiopian army was administered and trained by British officers and British army regulation.[7] This army proclamation did not change until 1987 PDRE military criminal justices establishment.

- The army proclamation of 1944 had provided for military misconducts and criminal offences and their corresponding punishments. The proclamation had corporate military offences like shame full abandons and delivery up any garrison place, post or guard and using any means to commit these offences by any army member, commanding officer or other person, assisting the enemy with any form of assistance and other similar military offences prescribed in this proclamation.[8] Moreover, offences like muting and insubordination, desertion, absence with out leave, darkness, preparing false documents and other miscellaneous military offences where subject to court martial. Offences like treasons, homicide, robbery, rape etc were non military offences when they committed by military members were submitted to ordinary courts.[9] Violating the military offences for military personals who were liable on conviction by a court-martial imprisonment not exceeding twenty years and reduction to a lower grade (rank) fine, stoppage, reprimand or service reprimand or to any combination to the above mentioned penalties.[10] The proclamation had granted the commanding officer an extensive

power to arrest, (put in custody); to investigate, (order to investigate) established court of enquiry and martial court member as well as defense counsel.[11] The court martial were under immediate command and control of such commanding officers were authorized to confirm or disconfirm the decision passed by court martial.[12] This implies that the court martial of 1944 army proclamation did not give independence for military courts because it was controlled, confirm or disconfirm the decision passed by military court. The members of armed member who sentenced by court martial have no the right of appeal to ordinary courts, because the courts of appeal in a military justice system was the emperor Haile Selassie himself as the commander in chief of the army. The court martial judges were composed of three to five commissioned officer which have not less than 3 years in service.[13] The court had jurisdiction over the person and offence which were under military criminal justice system and empowered to pass punishment of death penalty.

- This proclamation did not make specification of punishment. In other words it did not correspond as to which punishment is due to what military misconduct (offenses).

## 1.4 The Ethiopian penal code of 1957

- The 1957 of Ethiopian penal code amended some provisions of 1944 army proclamation by cooperating military offences and their corresponding punishments in better way. The military offences were prescribed in this code from Art 296-330 as well as military misconducts from Art 747-748 of penal code.[14] This code promulgate some changes which were in 1944 Army proclamation exclude the non military crimes from the jurisdiction of courts crimes like treason, homicide, robbery and rape were shifted to

ordinary jurisdiction of courts.[15] The difference between the army percolation of 1944 and the Ethiopian penal code of 1957 is that, the army proclamation of 1944 had provided separate and independent substantive and procedural laws, from the substantive and procedural laws that govern and regulate the ordinary criminal justice system. In other words this proclamation had no established any link between military criminal justice system and the regular criminal justice system both in legal and organizational aspects.

The penal code of Ethiopia of 1957, however, had amended the army proclamation of 1944 in such way that it had included the military offences to be its parts, i.e. Article 296 up to 331 of the code with certain amendments that were enacted separately in the army proclamation of 1944 and it had taken off the non military crimes from the jurisdiction of the court-martial and made them to fall with in the jurisdiction of the ordinary courts that were included as military offences in the army proclamation of 1944 the crimes were treason, homicide, robbery and rape. On the other side, the Ethiopian criminal procedure code of 1961 dictates the provisions, that articles shall be applicable to all persons equally. Hence, these provisions had enabled the regular procedural law to govern the military criminal justice system although it was affected partially due to the promulgation of the courts-martial procedural rules of 1972. In other words, although the courts-martial had their own separate rules since 1972, Art 29 of the revised constitution of 1955 had dictated these provisions not to deviate from the lines of the criminal procedure code of 1961, which has been applicable in the regular courts.

- The Army proclamation of 1944 was not changed up to the time of establishment of the military criminal justice system of people

democratic republic of Ethiopia (PDRE) of 1987 and it was the source for military law for about thirteen years.

## 1.5 The people Democratic Republic of Ethiopia (FDRE) Supreme Court proclamation 1987

The PDRE constitution was the main source of PDRE military criminal justice system of the country.[16] Investigation in the Military was carried out by the regular police and empowered with out any limitation military criminal investigation were not established and not empower by law to investigation military crimes. By Proclamation No 11/1987 the military public prosecutor was under the guidance of regular public presence for and military courts were under the guidance of PDRE Supreme Court from this concept the writer of this paper conclude that the military prosecutor was not independence because it was under the guidance of regular public prosecutor and investigation in the military had been carries out by the regular police with out any limitation.

## 1.6 The P.D.R.E Military Courts proclamation of 1987

The proclamation had established permanent military courts which were known as the military courts under the guidance of the military division in the supreme court.[17] In Both level of military courts the judge were three in number and superior in rank to the accused necessary.[18] The judges in both of military courts were appointed for 5 years terms by the president of the republic, among the candidates proposed by ministry of national defense requiring officer rank, having legal knowledge, good conduct, having political rights to elect or to be elected. The proclamation established 3 level of courts which are the primarily military court, the military high court and military division in the supreme courts having jurisdiction the offences which specifies in proclamation.[19]

This proclamation contains certain regulations concerning disciplinary matters in relation to the characters and efficiency of the judges of the military courts. Accordingly it specified that any judge of a military high court would be held liable for breach of duty or violations of the rules of the professional and disciplinary charges would be brought against the judges of the military high court would be heard by the judicial disciplinary committee of the supreme court. Disciplinary cases involving the judges of the military primary court could be decided in accordance with the directives issued by the ministry of National Defenses up on the proposal of the president of the military high court.[20]

## 1.7 Military criminal justices system in Ethiopia during transitional period.

During transitional period, by the fact that the military regime was fail down, they were no regular military court. The only temporally army organization was the fighter of EPRDF (Ethiopian Peoples Revolutionary Democratic Front), which were authorized to carry out the mission and carry out military tasks by the guideline of internal rule of the party. Because of the soldiers (troops) were the member of the party and continues for 5 years till proclamation No 27/96 established the according to L/Colonel Yosef Abu the judge of military court in the interview. It was the officials (leaders) of the party who were empowered to administer the ministry of defense were conducting the military justice system.

Evaluation (Gimgama) was the main instrument of fact-findings although its legality and reliability is arguable.[21] By the opinion of the writer the PDRE Effective laws that governed the pervious military criminal justice system were neither replaced expressly or tacitly nor had been used by the EPRDF Forces and these laws were tacitly

suspended or disused until proclamation No. 27/96 established the current military criminal justice institutions. The establishment and power of military criminal justice come up by the virtue of defense proclamation No 27/96 with its two-amendment proclamation No 123/1998 and 343/2003. The FDRE constitution recognized the establishment of the national defense force to protect the sovereign of the country and free of partisanship to any political organization.

The FDRE constitution also empowered the civilian as ministry of defense under its provision clearly. From the constitutional provision some one come to conclude that this organ empower its power from constitution as well as from the defense proclamation.[22] On the other hand According to provisions of the FDRE defense proclamation No 27/1996 military commanders have authorized to direct and administered military units at any level of national defense.[23] Art 13(1) (b) of the proclamation No 343/2003 authorized the commander in chief of the armed force to appoint judges of appellate military court and pursuant Art 35(2) of the proclamation No 27/1996 empowered the commander in chief confirm death penalty passed by the military courts. In other word death penalty could not take place with out the confirmation of commander in chief of armed force because prime minister is the commander- in- chief of armed force as per Art 74(1) of the FDRE constitution. But According to FDRE constitution the president of the Federal Democratic Republic of Ethiopia have the right to grant pardon in accordance with conditions and procedures established by law.[24]

The pardon granting is clearly given to head of state by FDRE constitution but the defense proclamation No 27/96 Art 35/2/ also enjoys this power to prime minister. This confliction of military courts decision with commander is seems unique and the ordinary court last decision regarding death penalty also referred to head state, therefore,

by the writer opinion, the death penalty which referred to commander –in- chief for executed or not; the death penalty is not sound. The council of commanders in defense force has the power of appointing judges who sets in the primary military court in accordance with defense proclamation. There are other common powers seemingly given for all commanders that affect the administration of the military criminal justices system. For this inconsistency of military court power and commander power, the other good example is that, the case of lutenant Lema Ayele who sentenced 4 months by applate military court again sentenced 3 months by military commander on the same issue by the fact that, the defense military regulation 01/1999 empowered to punish of some one who commit disciplinary offences. Therefore one can punish two wise by military courts as well as military commanders.[25]

Therefore, there is a clear confliction of the criminal code of 1997 military offences from Art 284-322 crimes like breach of liability service, abuse of military authority, breach of military duty, crimes against Guard duty or instructions, crimes against Honesty, crimes against the safety, morale or power of the defense forces, common provisions like crimes committed by civilians prisoners of war with military regulation No. 01/1999 because the offence, which stated in criminal code of 1997 is stated again in the regulation.[26] There is no a clear demarcation between military court and commanders as to power that is why the military commanders some times involved in the case of military court.

# CHPTER 2

## 2. The F.D.R.E military justice department

The current military justice department of the FDRE defense force was created by the letter, which was written in 1998 by general chief of staff that contain the mandate responsibilities and tasks of the department. As colonel Askale Berhane the head of defense military justice department in the interview made stated that, the military justice department playing a role in insuring justice and maintaining order and disciplines in the armed force[1].

After the establishment of military justice department in 1998 up to 2000 Ethiopian calendar, its establishment was limited only to be in FDRE Defense center. In other words its existence or establishment is only at the level of defense force and there is no establishment of this branch organ (department) at lower level of the organization, later on from the beginning of 2000 E.C. its scope of existence was extended up to corps.

As it has been stated in the latter that established it this department is under the guidance of the policy and human resource department sector, which is headed by a civilian minister of state answerable to the ministry of national defense. The task of the military justice department in addition to stated above, it is guiding and controlling the whole aspects of military criminal justice system including up grading the potential knowledge and conduct of the personals (lawyers/ which engaged in military investigation and military public prosecution.

However, the FDRE defense military justice department not established by proclamation likes military courts and other departments. By the fact of this its binding nature is very less and it is bounded only for recommendation of the commanders if a military crime is committed. In

other words this organization (military justice department) do not inciate the investigation and prosecution where the crime is committed or omitted with out consent of commander because the power to inciate or to order for investigation of a crime is given for military commanders by FDRE defense force proclamation. A commander have the power to direct and administer the whole tasks of unit or establishment in the military, it seems arguable to conclude that, the power of ordering for caring out intensive and impartial investigation referring to an appropriate military court and assigning a public prosecutor for a case is given for commanders not for military justice department[2]. Therefore the defense proclamation denies giving or empowered some power to this department regarding military crime for investigation and for prosecution with out affect the power of military commanders.

## 2.1 The Military Criminal Investigation Sub-Department

The police investigation shall be take place, whenever the police know or suspect that an offence has been committed, they shall proceed to investigate in accordance with provision of chapter 2 of criminal procedure in regular courts[3]. The criminal investigations also recognized by FDRE constitution Provisions by stating that, up on request, courts allow the necessary investigation allow the secretary investigation by taking in to account the rights of the suspect or accused person[4].

In regard to this department its establishment have sub-department in each command and in Air force organization in similar way with the central establishment. Additionally the military criminal investigation department has been extended organizationally up to the division and regiment.

As it is stated under Art. 5(1)(2) and (3) of defense proclamation No 123/98, the primary function of the military criminal investigation is

to ascertain the alleged facts and reports the findings to the body or person that assigned it carry out such task. This specific provision promulgate that, intensive and impartial investigation shall be carried out prior to bringing a case before military court and a case for investigation may be referred to a soldier or a team of soldiers or to the police as necessary[5].

The assigning body or person of the military criminal investigation is not stipulated specifically. Moreover this law or proclamation does not establish the military investigation sub department, but the task of investigator. From this actualization, there is an assumption that the law impliedly recognized the creation of such department because the task of investigation required by this law would not be successful intensive and imperial if it is not directed and controlled by military criminal investigation department. In accordance of the above mentioned Art, this sub department is obliged and responsible to ascertain and consider the evidences on all sides of each issue thoroughly and impartially, to respect the suspect constitutional and legal rights, to accomplish his or her investigation in accordance with criminal procedural code as much as possible, and finally to report the findings and recommendations i.e. to the appropriate and concerned body that is to the body or person that assigned it to carry out such work or to military justice department or to military public prosecutor sub-department.

The phrase "team of soldiers" and the word soldier stated in the defense proclamation concerning investigators, the contextually mean that any member of defense force[6].

Art 38(1) and (2) of proclamation No 27/1996 authorized the commander in chief of armed force and the ministry of the national defense to issue detailed directives on the respective power of the

ministry and general chief of staff and necessary directive for the implementation of the proclamation Art 24(3) of the same proclamation empowers the general chief of staff to organized national defense force structure[7]. The House of peoples Representative shall have the power of legislation in all matters assigned by this institution to federal jurisdiction and determined the organization national defense. Thus the institution under discussion is establishments of such constitutional based.

Despite the existence of such legal foundation for the military justice department along with its sub departments like investigation department. Still there are considerable deficiencies of law and organizational system concerning military investigation sub-department.

By the fact that the legal defectiveness, the military criminal investigation sub-department does not have the power to carry out investigation on its own motion although it has knowledge of commission of crimes, the law that establish this institution (department) do not make either cross reference to the criminal procedure code or provide other alternative as to how investigation conducted. The proclamation of defense No27/96 and its amendment do not determine the connection with each commands and Air force the like institutions with the ordinary or regular ones as well. Furthermore, the requirements and qualifications required from the personal who engaged (work) which is assigned in criminal investigation sub-department are not completely stated in the laws.

The defense proclamation, regulations and other directives do not say nothing whether or not this institution (investigation sub-department) is needed to be permanent code of conduct and ethics for their personnel practically for most of their functions they seem

appendages of the chain of the military commanding system and need reconsideration in legislation and organization. For instance the federal democratic republic of Ethiopia police commission which has similar function with the defense military criminal investigation sub-department is established by separate and independent proclamation as well as authorized and be governed by such manner of regulations and directives by indicating the merit of the personnel's (investigation officer), the qualifications of them, their code of conduct etc[8].

However, the aforementioned defects of defense proclamation could not affect the legal basis of the existing military criminal justice system institution because the establishment of this department takes place impliedly by defense proclamation[9]. But there is obviously inadequate of legislation, which leaves room that may erode the legal basis of the military criminal investigation sub-department. There fore the writer believes that, it is important and reconsiders the laws that specifies and deals with the military criminal investigation sub-department.

## 2.2 The Military Prosecution Sub-Department

The military prosecution sub-department empowered its legal personality form FDRE defense proclamation provides that, up on accomplishment of an investigation a military case shall be referred to an appropriate and a public prosecutor will be assigned to follow-up such a case[10].

The assigning power for such task is inherently granted to the commander and such commanders logically are only able to assign military personnel members. From this point of view then, it can be argued that this provision recognizes impliedly the creation of this sub-department in such way that establishes the prosecuting task and assigning of a person who follows it up and turn these wordings

imply that in order such a task to be performed efficiently, rapidly and to be effective it should be guided by a well organized and responsible body and naturally it is a military public prosecutor sub-department which is expected to bear such a responsibility.

Normally the primary function of public prosecutor up on receiving report from police investigation in accordance with the criminal procedure code the department (a prosecutor) could be prosecute military offences which are investigated adequately and contain sufficient and conclusive evidences that enables to win the cases which may fall under the jurisdiction of the court[11]. The public persecutor other than military public prosecutor is obviously known and well defined by federal proclamation[12]. But proclamations No 123/1998 Art 5(3) have defect and UN clear.

This is to mean that although it says, "a public prosecutor is assigned to follow up such a case," it does not give clear and precise meaning or it does not make a clear weather or not such a public prosecutor will be assigned from the members of the armed force. In regard to this issue to clarify practical experience from interview made to Lieutenant Samuel Kebede the current military persecutor department head, the military public prosecutor has been appointed by appropriate commander that is by letter and still there is no case which prosecutor by civilian public prosecutor before military courts. In other words, the articles i.e. Art5 (3) of defense proclamation No 123/1998 does not answer the question weather or not it is possible to assign a civilian prosecutor to follow up a case which falls with in the jurisdiction of the military courts[13]. Nevertheless such defect of the law, it will be reasonable and logical to the writer that the intention of the defense amendment proclamation No 123/1998 seems to mean that such public prosecutor will be assigned or appoint from among the member of defense (armed) force[14].

My argument can be strongly believed and argued in accordance with Art-5(3) of defense amendment proclamation No 123/1998 which stated that, the assigning or appointing power of a public prosecutor granted to the military commanders, hence, the military commanders as a matter of law have no power to assigning appointing a civilian public prosecutor except the commander in chief of the armed force in his official capacity as prime minister[15].

This fact implies and leads to the conclusion that it is only possible for the military commanders, perhaps saving the commander in chief of the armed forces. to assign or appoint a public prosecutor from among the members of the armed forces. Based on this argument therefore, it would be legitimate to accept that the law presumes the existence of public prosecutor from the outset of its enactment. As a result, it also would be right and safe to conclude that the law presumes the establishment of an institution that carries out the functions of persecution in the military. Because if the task of prosecution which is presumed to be carried out by the military personnel, it is then logical to expect the establishment of an institution that carries out such task. Otherwise, it will be difficult and sometimes impossible to the military public prosecutors to perform their task of prosecution efficiently and effectively. From this point of view, therefore, it would be logical and acceptable to believe that the existence and establishment of the current military public prosecution sub-department has acquired its legal existence from this law impliedly, although it is afar fetched legal basis.

The other defect of defense proclamation regarding military public prosecutor establishment is that, the laws do not establish, authorized and give any way of regulations or delegate any responsible body to represent this department in an express and adequate way of legislation.

For instance the responsible body or commander to organize all of the military organization and department is not specifically stated and authorized in defense proclamation.

In addition the power, responsibility, ability, etc of the military criminal public prosecutor sub-department is not provided in the laws as normally it is done for the establishment of the corresponding institutions in the ordinary justice system that is Federal public prosecutor. For instance the federal prosecutor administration council regulation provided that about qualification for appointment of prosecutor, procedure for employment of prosecutors, supporting documents of candidates selection and appointment of attorneys, accountability of prosecutors, Oath, Nullity of Employment and appointment probation permanent assignment, termination of service, obligation of prosecutors like loyalty, personal conduct, obedience, prosecutor relation with the public, secrecy, borrowing money, gift, conflict of duty and private interest, working for other government offices or private institution etc are the facts which public prosecutor should be fulfilled under federal prosecutor administration council of ministers regulation.[16] This regulation explains each point regarding the federal public prosecutor one by one in addition to attorney's proclamation which stated above.

By the fact that of the defense proclamations legal defectiveness the military public prosecutor does not have the power to initiate or order an investigation or give the necessary orders and instructions to the military police investigation and insure that the military police investigators carry out their duties in accordant with the criminal procedure code[17].

The defense proclamation No 27/1996, and proclamation No 123/1998 which establish this investigation (military public

prosecutor sub-department) do not make either cross reference to the criminal procedure code or provide other alternative as to how prosecution would be conduct but practically the current military prosecution sub-department members (prosecutors) follow the criminal procedure code according to Lieutenant Samuel Kebede stated in the interviewed.

The defense proclamations also do not determined and specified the requirements and qualifications required from the personnel who work of assigned in military criminal prosecutor on sub-department as prosecutor and this institution is not completely stated in laws. Even though the law is silent in relation to qualification practically the member of military prosecutors have certified diploma up to LLB in law with additional law training from several federal institution annually as colonel Kidu Alemu the FDRE Air force Head of military justice department stated in the interview made[18].

The law do say nothing weather or not this department is needed to be permanent and it has no code of conduct and ethics for its personnel practically for most of their function it seems appendages of the chain of the military commanding system and need reconsideration in legislation and organization. However, the aforementioned defects of law do not affect grossly the legal bases of the existing criminal justice institutions. This is to mean that, there is clear and strong legal ground for the establishment of this organ (department) impliedly by defense proclamation.[19]

## 2.3 The military Defense counsel Sub-Department

According to the provisions of the FDRE constitution, accused persons have the right to be represented by the legal counsel of their choice, if they do not have sufficient means to pay for it and miscarriage of justice would result to be provided with legal

representation at state expense.[20] Further more the FDRE defense proclamation also promulgate that, the accused person who may be subject to the jurisdiction of the military courts are with the right to have their own defense council at their own expense and if they unable to provide defense counsel, the state shall provide with a defense counsel at its own expense to such persons charged with offences punishable with imprisonment of not less than five years.[21] This sub-department obtain its legal personalities from the above mentioned laws that is from FDRE constitution and defense proclamation. The primary function of this sub-department is to defend and give legal advices for the accused members of the defense force in order they should not be convicted and punished for military offences they have not committed or violated. In addition the sub-department also responsible to follow up weather or not the constitutionally granted fundamental rights and the due process of law given to the accused person are properly protected and respected.

There are certain provisions which limit the right to defense of accused person where such accused will unable to provide defense counsel under the defense proclamation which says, " the state shall provide a defense counsel only if the offence such person charged with a punishable with imprisonment of not less than 5 years and is unable to retain council.[22] This provision clearly contradict with the FDRE constitution Art 20(5) because as indicated the term of this provision above, the court should ascertain that the accused has not economical means to provide defense counsel by his own or the court should be convinced that miscarriage of justice would result if the accused is not represented by a defense counsel. In spite of this constitutional provisions, the power to determine as to the fulfillment of the aforementioned factors and based on this determination whether or not such accused person would be represented by a

defense counsel at the expense of state is granted to the court that has jurisdiction to try such a casa. From this argument the writer argue that the FDRE defense proclamation enacted by the parliament and promulgate is clearly against the FDRE Constitution and it seriously affect the right of the accused military personnel. [23]

The defense military counsel now on duty Captain Hagos W/Tensa'e states in the interview made that, the professional lawyers whose that is counseling accused military persons are not sufficient in number and the majority of the militaries counsels limits to diploma level in law from this clarification there is a shortage of knowledge.[24] The other problem in practical situation is that, some times military commanders being as accusers, have not good attitude to wards the military defense counsels based on the myth that defense counsels are the caves of criminals. As a result few of them become reluctant to cooperate with, and to facilitate and present all necessary evidences that the helpful for the accused.

The other defect of defense proclamation which establish defense counsel is that, it do not make either cross reference to requirement and qualifications required from the personnel's who assigned in this sub-department at all. Event though the defense proclamation denies the requirement fulfilled by defense counsel as lawyer practically they follows the criminal procedures as much as possible before military courts and it is similar with public prosecutor in terms of qualification and establishment in FDRE defense force.

# CHAPTER 3

## 3. The FDRE military court administration and the military courts power and establishment.

### 3.1 The FDRE military courts administration department.

This department has established in recent years, which have about three years of age. The main function and task of this department is to coordinate and to administer the overall functions and aspects of both military courts i.e the primary military court and the appellate military court and the military defense counsel sub department as stated by Colonel Addisu G/yesus, the head of this department in the interview made with him .As Colonel Addisu G/yesus clarified in the interview that, the department is fully empowered its establishment by the letter written by the head of the policy and human resource development sector to request and administrator the budget of primary and appellate military courts as well as military counsel department to control, evaluate and take corrective measures based on the performance efficiency and disciplinary conducts of the judges in both military courts and of the military defense counsel sub department.[1]

The military justice department along with its sub department which stated in chapter two and the military court administration department together are founded for their creation on the laws that grant to commanders the power to organized, to issue directives and to direct all the military establishment although it is a far fetched and implied source of power. The defense proclamation authorized the commander –in –chief of the armed forces and the ministers of national defense issue detail directives on the respective powers of the ministers and General chief of staff and necessary directives for the

implementation of the proclamation.[2] The same proclamation article states that, the General chief of staff empower to organize and to determine the size and shape of national defense forces in line with the strategy and decision of the federal government[3]. The military court administration department empowered its legal personality or legal foundation on a similar basis of law with the proclamation that grants the above mentioned power to the commanders is also a legislation passed by a component body i.e the parliament which is authorized to promulgate such laws by the virtue of FDRE Constitution which reads as follows: -

The house of people's democratic republic of Ethiopia shall have the power of legislation in all matters assigned by this Constitution to federal jurisdiction and determine the organization of the national defense[4]. So the military court administration department established constitutional basis. Despite the existence of such legal foundations for the military court administration department still there is considerable deficiencies of law and organizational system concerning this department. The reason that I agreed there is a defect of laws is that, the law do not establish, authorized and give any way of regulations or delegate any responsible body to present the military court administration in an express and adequate way of legislation .By other words the law do not express in a clear way that, the responsible body or military commander to organize this department. In addition to this non-clarification of law to establish this department, its power and qualification could not be identified in law simply it established impliedly. The federal judges administration council which have similar function with the military courts administration department has established by separate and independent proclamation as well as authorized and be governed by such manner of regulation and directives.

However, the aforementioned defects of law do not affect grossly the legal basis of the existing military court administration department. This is to mean that the existence and establishment of this department get its legal personality impliedly from the above mentioned defense proclamation[5]. But there is a clear inadequacy of legislation, which leaves room that may erode the legal basis of the department. Therefore, the writer believes that, it is very necessary and important to re consider the law, which deals with the military court administration department.

## 3.2 Legal basis of the FDRE military courts.

The FDRE constitution states about the legality of the courts that," Every one has the rights to bring a justifiable matter to and to obtain a decision or judgment by, a court of law or any other competent body with judicial powers.[6] The other constitutional provision declared that 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 shall not be established.[7] The important and useful wording, which mentioned above in the provisions of FDRE constitution are…. Any other competent body with judicial power and ….the phrase that says…institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedure. The former similar phrase i.e. other competent body with and institutions legally empowered to exercise judicial power are included to denote institutions with judicial power are not established by the constitution like the ordinary courts but assumed to be established by the parliament and they are under the guidance of the executive body. The second phrase that says …which do not follow legally prescribed procedure on and a contrary reading is to mean that such legally

established courts and which follow the legally prescribed procedure are constitutionally acceptable. In short courts that fulfilled the above mentioned requirements are assumed to be established by the parliament as the foregoing constitutional provisions intend to provide for the society with speedy and expertise supported justice and one of which in the military community. Such constitutional envisaged courts may include the administrative tribunal, the labour dispute board, the military courts etc. the parliament therefore, has established the military courts based on this constitutional intention on the authority that has been granted to it by the same constitution i.e to determine the organization of the national defense force.

The ministry of national defense being one subject of the federal jurisdiction, the parliament is with full constitutional power to enact laws that govern the armed force and one of them is the law, which is useful to regulate the military courts. The parliament hence promulgated the defense proclamation and its amendments in accordance of constitutional provision.[8] To bring the national defense in to a position, which enables them to stand on the ground of efficiency, readiness and effectiveness in performing the mission they tasked is also grant to the house of people's representative by FDRE constitutional.[9] In order the national defense force to be efficient, ready and effective in performing their operations and tasks; the member and the units there should be built in an iron discipline.

It should therefore be recognized that military courts are one of the main bodies which play a good role in maintaining military discipline and ensuring justice by dealing and correcting the members of the armed force. With out the creation of the military courts the organization of the defense force, which would be determined by the parliament, is not complete. Constitutionality of the military court the FDRE-military courts establishment are clearly courts of law by the fact

that they are empower their personality and legal existence from FDRE constitution and Defense proclamation which states above and by the fact that, they are not special courts because they are not designed for particular purpose which is unusual and at the same time they are not ad hoc courts because the military courts could not established to see a particular cases rather they adjudicate permanently the case of military criminals in their jurisdiction and also the judges of the two level of military courts established independently court as well they could not in an activity other than court duty.

In addition to above-mentioned reason, the constitutionality of military courts insures the defense proclamation by stating that, the military court shall apply the criminal procedure code when they adjudicate the case. This means the military courts should be refers and follow the criminal procedure when they adjudicate their cases. Even though the military courts establishment have a legal ground, it should have not been assumed indirectly rather ought to be established expressly by the constitution like the ordinary courts because they exercise judicial powers over the gravest offences, which in effect entail harsh punishment including death penalties against the members of the defense force.

## 3.3 Structure of the F.D.R.E military courts.

Structural level of the FDRE defense courts can be identified in terms of number of military courts per the number of military units or establishments. For instance according to FDRE constitution the federal courts established in three level i.e Federal Supreme Court, Federal high court, and Federal first instance courts.[10]

As indicated above, the FDRE constitution established the Federal courts clearly but when we come to defense (military) courts the defense proclamation does not provide any level of establishment for

both military courts rather the proclamation only establishes the types of military courts that is the primary military court and the appellate military court.[11] Both levels of military courts have situated their office in Addis Ababa .The primary and appellate military courts carry out their respective function across the whole military units and establishments of the nation in the form of circuit sessions /chilots/most of the time based on the center area of the commands and sometimes at center area of the divisions where circumstances demand imperatively to do so. According to the defense proclamation and the intension of the legislature, military courts may not necessary be established by restricting their level of establishment to be in a fence of certain military unit or establishment rigidly. As a whole the need of law enforcing in the military the measurement is in the magnitude. So that the law leave gap without determining the establishment level of military courts and because the structure of the FDRE defense force may be minimize and maximize depending on the condition and prediction of war.[12]

From this conclusion and the intension of the parliament it is possible to accept art 11 of the proclamation No 343/2003 which implies the possibility of establishment of the military court regardless the nature and level of the military formation as such provided that the law enforcing deeds demand so. When there is convincing reasons which calls for the establishment of number of military courts, say the primary military court may be established for any military unit or formation at any level regardless its location but it should be reasonable in the eyes of law enforcing necessities. Even though the defense proclamation establish two types of military courts as to level of courts practically there is a problems, which affect the need of justice in the FDRE defense for instance cases in the command and Air force to wait for a long period of time until the session or chilots from both

military courts to come to the places where they are found. Because of the distance and in different settlement of the military units, delay of justice occurs which results in affecting the right to speedy trial of the suspect and some times because of mobilization of the army, evidence of parties may destroyed, disappeared and by the fact length of time to proceed the case. The other difficulty regarding establishment of two level of defense military courts, Where the circuit session /chilots/ move to proceed a cases or to adjudicate cases in different places, the judges want to try the cases quickly with out adequate and sufficient evidences because there is no good facility to such bench like office, bad weather condition.

Therefore the judges are not willing to wait until the necessary and relevant evidence would be collected and organized by the litigant parties. By the fact that the structural level of primary military court is limited and established at the level of defense i.e in Addis Ababa, the non availability of the military courts in the command and in Air force in reasonable time denies the right of speedy trial, right of defense, right to be released on bail in time. The dalliance of the circuit session /chilot/is also affect when the defense force member is ones arrested and sent to prison no body can order the release of such person except the judge when he or she is charged with a criminal offences.

## 3.4 **The FDRE military courts hierarchy**

The word hierarchy is mean to that considered as forming a chain of power, forming an ascending series of ranks or degrees of power an authority with the corrective subjection, each to the one next above.[13] Having in mind the above word meaning, the military court hierarchy explained by the provision of the defense proclamation which declared about the military court hierarchy specified that, there are two types of military criminal courts i.e. the primary court that has only original

jurisdiction over any case which falls with in its jurisdiction according to the laws that grant their jurisdiction and the appellate military court which has only an appellate jurisdiction over any case that has been rendered on a decision by a primary military court being in its judicial competence.[14] The appellate military court could not have original jurisdiction over any offence of military case rather it have only jurisdiction to hear on appeal cases in which a decision passed by primary military court has the power to confirm, vary or reverse such judgment according to the criminal procedure code.[15] In this case an appellate military court have jurisdiction to hear on appeal, cases in which a sentence of imprisonment exceeding two years has been passed.[16]

The hierarchical superiority and status of the appellate military court is only revealed by the appeal jurisdiction over the judgment of the primary military court. Even if the defense proclamation No 27/1996 Art 31 (1) and (2) states about the power of appellate military court, this law could not involve all powers of this court which Indicate in criminals procedure code art 194 (2) referring a case to additional evidence to the court of first instance, art 195 (1) dismissal of a case where there is no sufficient ground for interference. Even though the defense proclamation is silent about these two concepts practically the defense appellate court adjudicate in accordance of the criminal procedure code and applying the relevance provision.

Apart from this jurisdictional hierarchy, both courts have equivalent power in all aspects of their respective function with regard to their administration both level of courts are accountable and parallel to the military courts administration department as Colonel Adissu G/Yesus explained in the interview that was made with him.[17] Non of the military courts superior or subordinate each other but the federal Supreme Court has a hierarchal authority over both primary and an

appellate courts when by an appeal referred to it in cassation hearing and where the final judgment passed by both military courts contain fundamental error of law by the virtue of defense proclamation.[18] From the above defense proclamation, which clarifies that, the federal Supreme Court shall have the power to hold a cessation hearing where a final judgment by a primary and an appellate military court contains fundamental error of law. From this provision it is possible to argue that, the law allows an appeal from primary military court to federal Supreme Court if there is fundamental error of law (s) in the given judgment and the other issue is that the appellate military court has no power to hold cassation hearing on judgment of the primary court although it contains fundamental error of law as indicated in the above discussed defense proclamation.

### 3.4.1 **Independence and Impartiality of the military courts**.

For the purpose of this sub topic the word independence is to mean that, the state or condition of being free from dependence, subjection, or control or not subject to the government control or dictation of any exterior power and the word impartiality is to mean that, favoring neither, disinterested, all alike, unbiased fair and just. So the F.D.R.E defense military courts are obliged to consider the above mention terms when they perform their duty according to FDRE constitution and other substantive and procedural laws. By the fact that the defense proclamation clearly declared that, the judges who sit in both military courts are free from any interference of or inference of day governmental body[19]. According to this defense provision, any governmental body including the ministry of National defense, component establishment and any military commander or including general chief of staff (prime minister) should not interfere or influence directly or indirectly as to how to dispose and decision rendered by

military courts. By the virtue of different provisions of defense proclamation every military command at any level has been authorized to play decisive and significance roles to perform the military duties and obligations as well as to administer the military criminal justice institutions in such way that by ordering investigation when crime committed or committed and refers to public military prosecutor and to military courts, by organizing and monitoring the function of the military criminal justice institutions that conduct the military criminal justice system including the F.D.R.E defense courts. In addition the military commanders have the power to assign investigators, public prosecutor and defense counsels and appoint military judges. Move over they have decisive powers on the promotions; transformations evaluations etc of personals who engaged in military criminal institutions including military courts. Hence, the power to decide the organization, composition, administration and accountability of the military courts in addition to the above-mentioned power are granted to the military commanders. This wide discretion endangers the intended independence of judges, which stated in defense proclamation No 343/2003 Art 16. Because the military commander may abuse by using this wide discretion easily to interfere and influence the trial of the military courts to arrive at a particular decision that they wish which may invade the independence and impartiality of the military courts. For instance military commanders may seek explanation or justification for the decisions of the military courts and witnesses may be intimidated and discouraged from testifying by the commanders abusing their extensive powers. In addition to above Explanation problem, the defense proclamations does not provide the institutional freedom of the military courts rather it talks only about the individual freedom of judges which reads as " judges

shall be free from any interference of any government body [20]. This way of legislation seems denay the institutional Existence and impartiality of the military courts. For this reason the freedom of the individual judges is simply theoretical with out institutional independence and impartiality of the military courts.

However, some of the current military court judges argued that as if they have relative freedom and independency while, others are disagreed this opinion by saying that, the independence of the military judges always depends on the willingness of each commander who has a power on those judges. If the commander wishes he can do what he needs. In practice no judge dares to Explain this problem by supporting with real cases. The reason behind is that the fear of military subordination and the individual judges will get their rights and privileges for instance promotion of Rank, Scholars for higher education etc through chancel of the higher military commander like other military members.

### 3.4.2 **The criteria to be appointed as a judges in the Existing military courts and removal from their post**.

The requirement to be appointed as adjudge in the FDRE primary military court is that, when some one should be fulfill the requirements set forth according to defense Proclamation which read as follows, " Any officer on active duty and having legal skills may sit in the primary military court. However, unless the defendant agrees other wise, no member of his home-unit may sit there in [21].

In this provision the phrase ' Any officer' directly exclude civilian, non-officer armed members and private soldiers from appointment as adjudge.

The word " on Active duty" saying in the above provision show that, the officer can be elected for the primary military court where he/she should not be retired or dismissed from military member rather he/she could be on active duty. The other criteria to be adjudge in primary military courts that, the standard of the legal skills to be possessed by the officers but not those standards of the formal education of law. Indeed as the minutes of the debates held by the parliament can explain this issue indicates that, the intention of the parliament is that all officers would pass through formal cadet military training at least for three years and would acquire basic knowledge of law which enables them to be elected for military judge [22]. In other words the defense proclamation does not required the officers to be a lawyers who acquired formal law education on basic legal skills suffice for judge ship appointment for the officer.

Practically there is no adequate number of officers who possess the required legal knowledge which enables them to be appointed as judges in the primary military courts by the fact that there is no officer who passed through the formal cadet training according to the Explanations and interview made with Colonel Kidu Alem the current military appellate court judge [23].

The defense proclamation also dictates about the removal of judges in military courts which reeds as follows:- judges in the military courts shall be removed from their posts when it is proven that they are in efficient to perform there tasks because of illness and commit disciplinary offences [24]. In other words this Article tells us that lawyer who is weak and inefficient in performing his/her professional task and commits disciplinary offences shall not be appointed as judge in the military courts from the outsets of appointment or recommendation.

Further more, the law is silent about the presiding judge a session. In the military flow post of judge ship there is two distinctive rank i.e the military rank and the professional rank. For Example in a session let as say there are three judges, one is master holder in law but captain in Rank, the second one is a diploma certificate holder in law but Major in military rank with 15 years service. In this session, which judge is going to be a presiding judge? The law does not say nothing and answer this issue. Even though the law is silent, practically the leading Rank is the military Rank what ever his/her profession in relation to formal education. But in effect military rank has nothing or little to do with the knowledge to interpret and render proper justice and logically the person who learned much is more knowledgeable than that learned little in the same field of profession.

### 3.4.3 **The criteria to be appointed as a judges who sit in the appellate military court**.

By the virtue of defense proclamation, in the appellate court there shall sit one civilian judge and two officers to be appointed by the commander in chief of the armed forces up on recommendation of the minister[25]. As indicated above the defense proclamation does not enumerates the qualification to be fulfilled as requirement to be appointed as judge in the appellate military court Except the fact that they are required to hold on officer tank. The intention of this law was to include higher officers even who have not legal skills and retired higher officers when circumstance of the case required doing so.

And also it does not mean that the higher officers who have sufficient legal profession would not be appointed as judges in the appellate military court [26]. Although this intention of the law, it is un clear for the person who are expected to implement it and it

should be re-enacted in the way of the intention behind the law with regard to the personal character and integrity requirements of the officers that are going to be appointed as adjudges in the appellate military court and it is based on similar reasons with the requirements for the judges in the primary military court because there is no reason to have different requirements for this judges with respect their appointment.

The advantage of higher officer and highly qualified professionals for the judge ship post in the appellate military court is in order to have better combination of skills i.e. the military needs skills and pure legal skills. The same reason is also true for the civilian judge. In this court, it should be noted that the presiding fudge is the civilians' fudge and he/she comes from the Federal Supreme Court.

The practice is more or less similar with the legal requirements and the higher officers are appointed as a Judge in the current military appellate court. As colonel Adsu G/Yesus stated in the interview made with him is that, the current military appellate court established according to the defense proclamation empowered, there are two civilian judges from the federal supreme court, two colonels with first degree in law and one Brigadier General off higher officers with no legal skills as well all of the assigned officers are engaged on active military servile [27]. The term & the service is 5 years and the ground of removal from their post is also similar to primary military court.

### 3.4.4. Judges in the FDRE primary military court

Pursuant to the FDRE defense proclamation, the council of commanders up on recommendation appoints the judges who sit in the primary military court by the general chief staff [28]. And

another defense proclamation provision stated that, the number of adjudges sitting in the primary military court is dictated to be fire where the case of an accused person whose offence is punishable by a prison-term of over two years respectively. Although the guiding Principle concerning the number of Judges who try a case with an offence punishable by a prison term of more than two years dictated to be five there in an exception to this rule in the defense proclamation which says that the number of the Judges that is required to be five in number may under Circumstances of non availability be reduced in to three[29]. Here the phrase number of Judges should be understood that the number of Judges should be understood that the number of the judges who sit in one session ( chilot) to try a particular case brought before the primary military court.

How ever, the practice Concerning the required number of judges in the Primary military court is exercised in a reverse way to the dictation of the law as colonel Addisu Gebreyesus the head of the department for administration of the military courts stated that in application the exception becomes the principle and vice versa[30]. The reason as he said is that, it is difficult to find officers who have legal skills in the required number at the right place and time and this event in turn entails justice delay. In other words it is impossible to found five lawyer on trained military judges for a case in a session. So this legislation seems unrealistic in the situations in the military forces in the present day and entails delay in justice with out legal and practical justification. Moreover, there is no any reason that convinces us that justice in the military courts will be properly rendered if the number of judges would be promoted to five rather than to be three in number. Rather it is wastage of manpower and unnecessary cost of resource.

### 3.4.5. Judges in the FDRE appellate military court

The 1996 and 2003 defuse proclamation provided that, in the appellate military court there shall sit one civilian Judge and two military officers who shall be appointed by the commander in chief of the Armed force up on the Recommendation by the defense minister. [31] Like the judges in the primary court, the judges in the appellate military court are also recommended and appointed by the military leaders i.e by the minister and commander in chief of the Armed forces respectively.

Unlike the number required for the judges in the primary military courts the required Number for the judges in the Appellate military court is always three. The reason for the difference in number between the judge in primary military court and the appellate military court may be that the law presumes that the judges in the appellate military court are more knowledgeable than the judge in the primary court in many aspects in understanding the law. It should be noted that the civilian judge who sits in appellate military court is not a newly appointed already for the federal Supreme Court in accordance of the F.D.R.E constitution[32]. According to the F.D.R.E Appellate military court judge colonel kidu Alemu stated in the interview made with him, the civilian judge is a presiding judge because he/she is considered as a superior for all military judges including the officers with Brigadier General of the military ranks for the reason that he/she appointed by the highest authority in the country i.e. the F.D.R.E parliament from this point of view, the civilian judge is selected from among many judges of the / Federal supreme court/ by the minister and Commander in chief of the armed force to serve in the military appellate court as we have seen this, the power of selection and appointment of judges who sits in both military courts is fully in

the hands military commander clear at different levels i.e the commander in chief of the armed force, the counsel of commanders and the General chief of staff.

Even though the law empowers the military Commander to recommend and appoint this two level of military courts, the writer does not find this way of reasoning is adequate to empower fully the aforementioned military commanders to select and appoint Judges. The power of appointment of judges would not bring any problem if it had been granted to the parliament in the same way as the appointment of Judges in the Federal ordinary courts in accordance with the FDRE constitution. [33] The reason is that the parliament should control the defense force not only by legislation but also by appointment of judges. Moreover, it is a matter of criminal justice, which affects the life, liberty of the members of defense force.

In practice, it does not limit the power of the commanders to have hands on monitoring the judges because the commanders select and nominate them and then administer and control their functions and rights in all aspects.

### 3.4.6. Jurisdiction of FDRE Military Courts

Military jurisdiction is the power to exercise military authority over certain categories of persons under, basically, four situations.[34] The first situations is the system of military justice for the government and regulation of the armed forces and civilians who have, with out being members, some connection or association with organized military unit.

Functional relation to the mission of the armed forces is the common factor which gives rise rational unity to this head of jurisdiction this situation is called military law.[35]

The second situation concerns with measures of military control in time of war or other public emergencies with in domestic territory, which would have been UN lawful under normal conditions. This is called martial law, and is exercised by a government temporarily governing the civilian population with out authority of written law, as necessity may require.[36]

The third situation concerns with the supreme authority exercised by belligerent forces or rebels treated as belligerents, acting as a military government, in territory occupied in war time in displacement of and substitution for the previously existing government of that territory. Military necessity in the conduct of operation as well as international law requires that military government be instituted and the fourth situation arises when a punitive action be taken against violators of the law of war and is concerned with the law of war .[37]

In all of these areas therefore, the military independently of civilian control may exercise some degree of jurisdiction, conferred by domestic legislation or international law or a combination of the law.[38]

In this Chapter, however we shall confine ourselves to the first situations- Military justice or military criminal jurisdictions, which is the power that exists in properly convened military court for the trial and punishment of military offences. It must be noted that military justice is the application of military laws to persons subject there to and accused of the commission offences of military nature.

It must also be noted that the subsequent discussions emphasize on the primary military courts. Because, the appellate military courts are not vested with original or first instance jurisdiction. They hear cases only when appealed against decisions rendered by the primary courts. In other terms, the appellate military courts where a case comes before them on appeal could also exercise all jurisdictions exercisable by the primary military courts.

## 3.5. Jurisdiction over person

There is three classes of persons enumerated by the defense force proclamation № 27/1996.[39] these are: -

a) All members or the defense force;
b) Civilians;
c) Prisoners of war;

Since such broad classification does not tell us how and under what circumstance should these person become under the military courts jurisdiction, it is imperative to address each class separately so that we will have a clear understanding as to the extent of power military courts are vested with.

All members of the armed force by the largest class of person subject to the military court are that which is composed of persons who are members of the defense forces. A person becomes member of the defense forces after taking military oath up on completion of his training and before going to service.[40]

These classes of persons include all members, but it can also be subdivided into two groups. The first group comprises of member of the defense forces specified under art 26 (1) of the proclamation No 26/96 and the second group are these who belongs to member of the forces specified in sub- art 2 of the same article These sub - articles are read:-

Art 26 military court shall have jurisdiction over:-

1. Person accused of military offence enumerated in the penal code ( Articles 296- 331, inclusive)
2. Without prejudice to sub - Articles (1) of this Article, any offence committed by a member of the defense forces on active service (emphasis added).

The offences enumerated in the penal code to which reference is made by the proclamation are such a military nature, which can be committed by a member of the defense forces irrespective of whether he/she was on active service or at his/ leisure time. That is, with out having regard to his being on - post- or off- post. His/ her member ship in the defense forces is sufficient.

All of the offences enumerated under the repealed penal code of 1957 art 296 - 331 or under the amendment FDRE criminal code of 2004 art 284 -337 are purely military nature. Mere violation of either of those offences makes very member of the defense forces amenable to military courts. In short, when a member of the defense forces, whether on active duty or not, violates any of the provisions cited, then he/she will be tried by military courts. These persons constitute the first group. The second groups of persons are those who may commit any offence while on active service as envisaged in the above-cited sub - art 2.

As general principle civilians are subjects of ordinary courts nonetheless, there are two situations /Circumstances under which civilians could be tried by military courts.

The first situation is when a civilian accused of committees any of the military offences enumerated in art 296-331, of repealed penal code of 1957 or art 284 -337 2004 criminal code inclusive. [41] Most of these offences are of a military nature and member of the armed forces could normally, commit them. On the other hand, there are provisions,

though military in nature, which can be violated by civilians resulting in criminal prosecution under military courts.

]

To make it more clear, art 284(1) of 2004 criminal code for instance, states " whose ever with intent to evade recruitment or military service which is legally bound to perform, fails to obey an enlistment or mobilization order duly served by personal summons, by placard or by public announcement. What we can understand from this provision is that it is only civilians who may fail to obey an enlistment or mobilization order and it is also likely for civilians to evade recruitment or military service. In addition, Art 26(1) of the defense forces proclamation states "persons accused of ..." it did not limit itself to member of the defense forces only as it did in sub- 2 of the same article. Thus, the phrase "persons accused " could be interpreted to include civilians too.

The second situation under which civilian may be brought for trial by military courts is relatively more clear than the first situation. It is clear in a sense that the proclamation, under its art 26(3) has made it clear that by specifying the civilians subject to military courts stating "Civilians deployed with members of the defense forces on combat duty abroad". The phrase "on combat duty abroad" indicated the involvement of troops of any formation in an active theatre of operation out side the territory of Ethiopia.. Then, those civilians' people who may be deployed with the troops in such an active theatre of operation are quite likely to violate any law and hence they will be brought before military courts for trial.

The other jurisdiction of military courts over person is prisoners of war. The defense force proclamation has made prisoners of war in the custody of the armed forces subject to military courts. In fact, jurisdiction over such persons was coffered by treaties or conventions

to which a state is a party.[42] in as much as Ethiopia is a party to the Geneva Convention and their protocols, which deal with prisoners of war, it could be said, there fore, recital of such jurisdiction in the proclamation is merely a declaration of international law. The scope and limitation of such jurisdiction are to be determined from the provision of the treaties or conventions as interpreted under international law.[43]

### 3.5.1. Jurisdiction As to place

As was said that military courts should be established where justifying circumstances demands to their level of organization is also dependent up on such circumstances that is to mean, when necessity justifies the establishment of a military court at any level of military formation then it can be done so. It thus logically, follows that military courts are competent to they persons and or offences under their jurisdiction with out local or territorial limits.

Beside to the jurisdiction military courts have all over the country, they can also exercise the same over member of the defense forces deployed abroad and civilians deployed with them. That is to say, when member of the army commits an offence abroad and or by civilians deployed with them, then military courts are empowered to try it. There fore the jurisdiction of the court is not limited to certain place with in or outside the territory of Ethiopia.

### 3.5.2. Jurisdiction over offence and punishment

Ethiopian military offences are those specified in Art 296- 331 of repealed penal code of 1957 to which reference is made by the defense forces proclamation, and the violations of rules, directives, regulations and standing orders issued by the appropriate military authorities.

The, appropriate authorities and their respective powers. Duties and rights are defined in Articles 23, 24 and 38 of the proclamation No 27/96.

Military offences have two categories. the first is that specified in art 25 of the proclamation which in turn is divided in to two groups the first being those specified in Articles 296- 331 of the repealed penal code or 284 - 337 of FDRE Criminal code and the other is that which may be committed by members of the defense force on active service, offences committed by civilians deployed with member of the defense force on the combat duty abroad and offences committed by prisoners of war.

The second category, referred to as military disciplinary offences, are those envisaged under Art 792-795 of FDRE Criminal code of petty offence.

# CONCLUSTION

In the history of Ethiopian military criminal justices the Penal code of 1930 of Ethiopia is the first code regarding military justice system. The code had established relatively a developed system of the military justice than the eras of prior to it. The code had made a distinction between military offence and non-military offences and it had able to place the military justice system in the path of the laws, that govern the regular justice system and it developed superior subordinate relationship. In fact, our separate and modern military justice system has been established by the variety of the Army proclamation of 1944.

This proclamation had contained a lot of provisions that deal with matters pertaining to the military justice system and it was influences by the British tradition because as that time the Ethiopian Army administrations as well as training were in the hands and control of the British officers and army regulations. The Army proclamation of 1944 also stipulated with military disciplinary misconducts and military offences were also prescribed with their corresponding punishments. It also provided the composition of military judges, the procedure and requirements for assuming judgeship office. According to this proclamation, the commanding officer were authorized to order arrest, to put is to arrest or custody to investigate or to order investigation, to control all the result of adjudications including the power to review the military court decisions.

Despite the occurrence of successive changes on the proclamation, it has gone unchanged considerably up to the time of establishment & the P.D.R.E. military justice system. One of the miner changes that were made on this proclamation was the promulgation of the 1957 penal code that had shifted the crimes like rape, murder and robbery from the jurisdiction of courts martial to the jurisdiction of the regular courts.

The next step of military justice system to the aforementioned was that the P.D.R.E. military justice system that has been established by proclamations No 10/1987, No 9, 1987 and No 11,1987 based on the promulgation of the Art 63 (3) of the P.D.R.E constitution.

All the military justice system-enforcing bodies in this period had direct relation ship with and were under the guidance of their respective bodies in the regular law in forcing institutions. The three levels of the military course were made to be under direct guidance of the Supreme Court. These proclamations had established three-leveled permanent military high court and the military division in the Supreme Court, which is the next highest level of such courts system. In terms of requirement for appointment and qualification, the proclamation had contained judge ship office and the president of the republic and national Shengo appointed such judges and such judges required officers rank, should be active with high morale and with high professional caliber and were governed by the laws that had regulated the regular justice system personnel. Investigation and prospective tasks in the military justice system have been concluded and governed in accordance with the laws that regulate the ordinary investigation and prosecution system and this institutions were guided and controlled by the regular justice
System institutions. The P.D.R.E. military justice system institutions were abolished at the period of the E.P.R.D.F. has come in the power.

- After E.P.R.D.F (Ethiopian people Revolutionary and Democratic front) came to power, the fighting forces that were tasked to defend the century by the transitional government for almost about 5 years.

- By the fact that fighting forces were the members of E.P.R.D.F. they were ruled by the party's internal rule. After the abolishment & the P.D.R.E. system, the existing military criminal justice institution made by the virtue of the F.D.R.E Defense forces proclamations № 27/96 and its two

successive amendments. According to these proclamations and other relevant laws, the existing military criminal institutions like military courts, military investigation and prosecutions as well as military counseling department established directly and impliedly by the defense proclamation and by FDRE constitution.

- Even though the military investigation, prosecution and counseling departments could not established clearly as organization by defense proclamation rather indirectly established, the primary military court and appellate military courts has been established clearly by proclamation but both institutions personals like judges, investigators and prosecutors could not indicated their qualification and code of conduct.

- Even if the F.D.R.E. proclamations stated that, the military judges should be free from the intervention of duty commanders and other authorities, this proclamation again empowered the commander's military courts and judges are entirely under control of the chain of command, which is similar to the 1944 of Army proclamation.

# RECOMMENDATIONS

- From the main parts of the research paper, which explained in three chapters about the Ethiopian military criminal justice institution establishment, power, the law and practice as well, practical problems have been identified and discussed. The writer hopes that, the readers are able to have certain observations on the aspects of the existing military criminal justice system from the main parts of the paper. There fore, since the main objective of this thesis could be forward certain recommendations that may have significant role in reconsideration and in resolving the legal and practice problems which face and affect the efficiency, effectiveness and proper administration of the military criminal justice system, the following appropriate recommendations and suggestion are submitted.

- Even though the FDRE constitution Art, 51(6) and 55(1) and (7) empower the federal Government and the House of peoples' representatives to establish, administer, to make laws and to determine the organization of the defense force, these provisions do not grant and express power to the federal Government and the parliament to establish and administer a separate military criminal justice system, like that of the judicial function and power is granted to the regular judiciary system by the constitution clearly and expressly. The legal source, establishment and power of the defense military criminal justice system in Ethiopia have not been made to have direct and express constitutional foundation and full of defects in content rather its foundation is based on indirectly by FDRE Constitution. So that, the constitution should give an express authorization to the parliament that enable it to establish and organized a separate military criminal justice system including adjudication and to determine by whom and how should it be

administered and to what extent power of the higher military commanders up to law level. In other words, the constitution should make clear weather or not the parliament has the power of establishing, a separate military criminal justice system from the ordinary justice system, especially, the power of establishing military courts should be given in express words, in particular with matters concerning the extent of limitation and the manner of the conducting of such power should be made clear word by word.

- Regarding the establishment of the existing military criminal justice system enforcing institutions such as the military justice department, and its sub departments like military investigation, military prosecutor and the administrative department for the military courts, they should each be established by separate proclamation promulgated by competent authority in Order to have a clear legal existence and to be empowered adequately and also these departments should be established by indication their qualification, code of conduct as well as their extent of power so that to be able to play their meaningful roles in the proper administration of the military criminal justice system. For instance as indicated before in chapter one, the power of the military commanders in conducting of the whole system of the military criminal justice should be determined and provided in the laws that govern this system being in the line with the General objectives of the regular criminal justice system. This is to mean that the military Justice department, the military public prosecutor sub department and the administrative department for the military courts should be established by proper proclamations to have firm legal basis rather than indirect establishment.

  The power of military commanders regarding to investigation, prosecution and adjudication should be limited only to the extent that requesting and monitoring weather or not such task are being

conducted properly and laying charges based on reports of crimes to that effect.

- A death penalty passed by the military courts could not executed unless other wise confirmed by the commander in chief according to Art 35(2) of the 1996 defense proclamation. This power should be given to the president of the state according to the FDRE constitution, which indicated in chapter one. The other comment that the defense proclamation will be considered is that, the military member could not punish two wise by the same offence. If some one sentenced or accused before military court, the commanders could not interfere or should not take any measure that already accused person be cause no one could not subject to penalize two wise in same offence to avoid double jeopardy.

- The military criminal investigation, the military prosecution, the military defense counsel sub department should clearly be empowered and organized in a relative independence and to be free of influences that may come from the military commanders and should be authorized and obliged by plain words of law to have the powers and to be governed by the substantive and procedural laws that regulate and govern the regular (ordinary) criminal Justice system.

- In other words, the above mentioned sub-departments of the military justice department should not expect orders from their respective military commanders to conduct their respective tasks in accordance with the pertinent laws and to do so, they should have a manner of organization that emancipates them from subtle pressure and intimidation of their respective military commanders.

- The writer recommended that, except the military defense counsel sub department the aforementioned sub departments should be

accountable to the General chief of staff directly under the guidance and direction of the military justice department to maintain the military justice and order accordingly.

- With regard to the military defense council sub-department, it should have connection with and be a member of the defense lawyers' Association and other similar institutions and all the members in this sub department requirements as it is mandatory factor for the civilians defense lawyers and they have to be licensed and should be abided and governed by the code of conducts that regulate the civilian defense counsel with necessary modifications which appropriate with military duty. The defense proclamation should be indicate clearly weather civilian defense council involve in this activity or not and the accountability of this department. The writers suggest this sub department could be accountable to military administration department in a clear manner through appropriate law.

- In connection with the defense council, it should be given attention for the accused military members to have canceling with out any limitation. Because most of the members of the armed force have no enough access and financial capacity to collect evidence and to afford such costs. There fore, any accused member of the armed force should be provided with a defense counsel at expense of state and should be allowed and given conducive environment to collect, to organize and study his/her evidence starting from outsets of the time when she/he informed with a charges laid down against him/her or when such charge is handled over to him or to her.

- The department for administration of the military courts has no unequivocal and express legal existence and the power that is presumed to be assumed by it were not clearly spelled out in any law.

So that, it should be re-established by a competent body that is authorized to establish such situations and such law should contain the powers the miner as to how such power should be exercised and the limitations of such powers in a clear legislation. And also should be determined the relationship it may have with the Federal council of courts administration and should be made clear combination of the individuals of this office. The law could also determine the accountability of this office and personals.

- The writer provides as recommendation if this department (Administration of military) courts is to be accountable to the Federal administration council of judges in order to have wide freedom and would be free from the possible influence of military commanders so as to achieve the goal of the military criminal justice system by ensuring and guarantying the independence of the military courts, If the first choice could not be acceptable, the next better advisable in the seans that this department could be made accountable to the commander in-chief of Armed force.

- In relation to military courts both level of court are in better legal basis for their existence and power than the other a fore mentioned institutions do for the fact that they are established and empowered by a proclamation passed by the parliament although it is with an umber of deficiencies and doubts. Despite the existence of the establishing proclamation for the military courts, it does not determine their accountability of the military courts; the writer provides the comment, which should be re-consideration, this subject matter.

- The first choice is that, the military courts should be organized under the direct guidance of the Federal supreme court, in such way that the primary military court should be organized under the direction of

the Appellate military court. And appellate military court should be accountable to the Federal Supreme Court as one division with out change of the composition of the judges in both military courts. If the first idea is not accepted, one military bench in every level of the Federal courts and the composition of judges in such courts should be one presiding civilian judge and two military officers in each military bench of all levels of the Federal courts and all their functions should be directed and controlled by the president of each level of the Federal court in which they belong to and by the whole system of the regular courts.

- With regard to the power of appointment of judges who may sit in both military courts, regardless of their accountability, they should be nominated by the commander in chief of armed force along with the minister and General Chief of staff and should be appointed by the House of peoples' Representatives, the requirements that may enable an officer to appointed as a judge is sound by the opinion of the writer the professional aspect, the service status and legal skills provided in the law for the judgeship will be promulgated in the defense proclamation in both primary and appellate military courts clearly like that of ordinary judicial system jugs court nomination.

- After having been appointed, the military judges should be subject to the regulations and code of conduct in relation to their performing capacity and discipline and also removed in accordance with the laws that govern the functioning system of the judges in the regular courts of the country and more consideration should be given to professional qualification.

- Interims of establishment the primary military court should be established up to the level of commands so that they would be quickly

accessible to the members of the Armed forces and for speedy trial and fair justice enforcement.

- The military courts should have jurisdiction over the following offences and persons in addition to the existing ones. An offence. Which may be committed by the military members while he/she is on active duty, Over an offences committed or omitted by a members of armed force against another member of the same force, particularly which affects the unity and discipline of armed force,
- Over any civilian who has committed any offences deployed with members of defense force on combat duty with in the country regardless the type of the combat that the offender has engaged.
- The appellate military court should have first instance court jurisdiction on certain complicated and heavy offence and should be able to be petitioned to appeal to the Federal Supreme Court.

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