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Human rights situations that require the Council's attention

Detailed findings of the commission of inquiry on human rights in Eritrea^{}**

* Reproduced as received.

** The information contained in the present document should be read in conjunction with the report of the commission of inquiry on human rights in Eritrea (A/HRC/32/47).

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Acronyms

ACHPR	African Charter on Human and Peoples' Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
EEBC	Eritrea-Ethiopia Boundary Commission
ELF	Eritrean Liberation Front
EPLF	Eritrean People's Liberation Forces (then Front)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
OHCHR	Office of the United Nations High Commissioner for Human Rights
PFDJ	People's Front for Democracy and Justice
SCSL	Special Court for Sierra Leone
SGBV	sexual and gender-based violence
UNHCR	Office of the United Nations High Commissioner for Refugees
UN-Women	United Nations Entity for Gender Equality and the Empowerment of Women
WYDC	Warsai Yikealo Development Campaign

I. Introduction

A. Mandate

1. The Commission of Inquiry on human rights in Eritrea was initially established for a period of one year by the Human Rights Council pursuant to its resolution 26/24. In that resolution, the Council mandated the Commission to investigate all alleged violations of human rights in Eritrea, as outlined in the reports of the Special Rapporteur. The Commission decided to focus the temporal scope of the investigation from 1991, when Eritrean entities took effective control of Eritrean territory.

2. On 26 September 2014, the President of the Human Rights Council appointed Mike Smith as chair of the Commission and Victor Dankwa as a Commissioner. Pursuant to Council resolution 26/24, the Special Rapporteur on the situation of human rights in Eritrea, Sheila B. Keetharuth, was also named a member of the Commission. The Commissioners serve in a non-remunerated, independent and expert capacity.

3. The Commission presented its report to the Human Rights Council (A/HRC/29/42) at its twenty-ninth session.¹ The Council subsequently adopted, without a vote, resolution 29/18, in which it extended the mandate of the Commission for one year, in order to investigate systematic, widespread and gross violations of human rights in Eritrea with a view to ensuring full accountability, including where these violations may amount to crimes against humanity.

B. Cooperation with the Commission

4. The Human Rights Council, in its resolution 29/18, reiterated its call upon the Government of Eritrea to cooperate fully with the Commission of Inquiry. Like during the first mandate of the Commission, the Government failed to respond to the Commission's repeated requests for access. The Permanent and Deputy Permanent Representatives of the Permanent Mission of Eritrea to the United Nations did, however, accept to meet the members of the Commission in New York. The Deputy Permanent Representative also forwarded new national legislation and media articles on Eritrea to the Commission. The Head of the Commission secretariat was also able to meet with Presidential Adviser and Head of Political Affairs of the People's Front for Democracy and Justice (PFDJ), Yemane Gebreab, in Geneva during the thirty-first session of the Council session, in March 2016.

5. Given its limited ability to meet directly with Eritrean officials, the Commission has relied, where relevant, on information issued by the Government.

C. Methodology

6. The investigations, analysis and conclusions of the Commission were guided by the human rights treaties ratified by Eritrea and customary international law.

7. The Commission followed the methods of work described in its first report, including with regard to the protection of witnesses, investigative methods, its legal and factual findings, the historical background of Eritrea, the State's economic and political context and its legal framework.

¹ See also A/HRC/29/CRP.1.

8. The Commission considers the scope of its new mandate and competence as follows:

- Competence *ratione personae*: the Commission has only investigated alleged violations that are imputable to Eritrean authorities. This means violations directly committed by public officials of Eritrea; or committed at their instigation or with their consent or acquiescence; or where the relevant authorities have abstained from preventing, investigating and/or prosecuting those responsible for violations of fundamental rights.
- Competence *ratione loci*: the geographic scope of the investigation is the full territory of Eritrea, including the border zones and Eritrean maritime zones.
- Competence *ratione temporis*: the temporal scope of the investigation covers the period from May 1991 until the present day.
- Competence *ratione materiae*: the Commission has investigated systematic, widespread and gross violations of human rights in Eritrea with a view to ensuring full accountability, including where these violations may amount to crimes against humanity.

9. In its work, the Commission has been at all times guided by the principles of independence, impartiality, objectivity, transparency, integrity, and the principle of “do no harm”.

10. The protection of witnesses and victims’ continued to be a central concern for the Commission. Almost all victims and witnesses who spoke with the Commission feared reprisals by Eritrean authorities, either against themselves or their family members in Eritrea. The Commission has worked to ensure the protection of victims, witnesses and other sources of information at all stages of its work and in the future, in accordance with standard policies of the Office of the High Commissioner for Human Rights (OHCHR).

11. As the Commission’s ability to physically protect witnesses is limited, it remains the primary responsibility of the governments in which witnesses reside to protect those who have cooperated with the Commission.

12. All information gathered by the Commission in the course of its investigations is confidential, unless witnesses have specified otherwise. The Commission took all necessary measures and precautions to protect the confidentiality of information and the identity of the individuals who provided information to the Commission and/or supported its work. For protection purposes, the names of victims, witnesses and sources are not mentioned in the report, nor are any other details that might reveal identities.

13. At the conclusion of the Commission’s work, all the information will be moved on to the official United Nations archive system, where contents will be classified as “unclassified”, “confidential” or “strictly confidential.” All victim and witness interviews will be classified as “strictly confidential.” Unless a witness has provided explicit and informed consent to share his/her information, it will not be shared, including with any other entity, including with other sections of OHCHR; United Nations human rights mechanisms; international judicial mechanisms such as the International Criminal Court (ICC); national judicial mechanisms; and member states.

14. During its two terms, the Commission has relied primarily on information provided by victims and witnesses in confidential interviews. Consistent with the practice of United Nations commissions of inquiry and other fact-finding bodies without access to the territory where the alleged violations occurred, the Commission visited neighbouring and other countries to conduct interviews with those who have experienced or witnessed human rights violations in Eritrea. Where necessary, it also conducted interviews via audio or video communication. Interviews were conducted in Australia, Canada, Djibouti, Ethiopia, France, Germany, Italy, the Netherlands, Norway, Sweden, Switzerland, the United

Kingdom, and the United States of America. The Commission also spoke with experts, diplomatic staff of third countries currently working in Eritrea and foreign journalists who recently visited Eritrea.

15. In both reporting cycles, the Commission issued calls for submissions. In this reporting cycle the Commission received close to 45,000 submissions.

16. As the Government of Eritrea has not formally cooperated with the Commission, the Commission has relied wherever possible on statements by the Government of Eritrea as reported on its official website or in the public domain. It has relied extensively on a December 2015 document which is the Government of Eritrea's official response to a 2011 report by the United Nations High Commission for Refugees (UNHCR) on the human rights situation in Eritrea entitled "UNHCR Eligibility Guidelines: Factual Findings or Recycled Defamation,"² as well as the government's official response to the Commission's first report entitled "Commission of Inquiry Report: Devoid of Credibility and Substance."³ The first document was sent to the Commission by the Permanent Mission of Eritrea to the United Nations in New York, and both are available on the Government website, Shabait. Eritrean officials outside the country in a position to relay official views provided a copy of Eritrea's new penal code.

17. As set out in paragraph 15 of Human Rights Council resolution 26/24, the Commission engaged with a number of United Nations entities to obtain relevant information and support to conduct its investigations. Of the 19 UN entities contacted, six responded, including two substantive replies.

18. The Commission appreciates the support received from OHCHR, the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), and UNHCR. All three organizations fully respected the independence and integrity of the Commission.

Gender integration in the work of the Commission

19. The Commission integrated a gender perspective and analysis into its work. It decided to devote specific attention to sexual and gender-based violence (SGBV), including violence against women and girls, and to assess the gender dimension and impact of other violations. In this context, the services of a gender advisor/SGBV expert-investigator were made available to the Commission by UN-Women. The SGBV expert provided advice, training, and guidance to the Commission.

20. In addition to the challenges already mentioned in its first report,⁴ the Commission faced further obstacles to the investigation of sexual and gender-based violence, in particular sexual violence suffered by women and girls, as well as by men and boys.

Sexual violence suffered by women and girls

21. Collecting evidence on cases of sexual violence suffered by women and girls in Eritrea proved difficult due to cultural, social, and religious beliefs associated with marriage and sexuality. Victims' reluctance to disclose information stems from the trauma and general shame they feel as well as the stigma which attaches to them if the harm they have suffered is known.⁵ Indeed, many women mentioned the cultural emphasis on their

² 17 December 2015. Available at: <http://www.shabait.com/news/local-news/20954-unhcr-eligibility-guidelines-factual-findings-or-recycled-defamation>

³ 19 June 2015. Available at: <http://www.shabait.com/news/local-news/20031-commission-of-inquiry-report-devoid-of-credibility-and-substance>

⁴ A/HRC/29/CRP.1, paras. 45-51.

⁵ See also A/HRC/29/CRP.1, paras. 50, 1331.

virginity, chastity or monogamy as one of the reasons to fear speaking about sexual violence. As a woman's virginity and chastity are highly regarded in much of Eritrea, many victims of rapes are unable to marry and therefore prefer to remain silent.⁶ On top of the trauma, "[t]he honour system causes additional shame".⁷ As a result, in some instances, women and girls who were raped committed suicide.⁸ The Commission also heard evidence that, within some ethnic or religious groups, if a woman is raped, she is rejected by her community.⁹ Finally, women and girls suffer even more stigma if they have a child from the rape.¹⁰ For all these reasons, rape is an underreported crime in Eritrea and most of the victims of such acts live in a culture of silence.¹¹

Strategies to overcome such challenges

22. In order to identify and contact survivors and eyewitnesses of sexual and gender-based violence willing to provide evidence, the Commission established contact with various intermediaries, including female intermediaries. The Commission stressed its desire to speak with women and girls in order to highlight their experiences in its report. In particular, the Commission contacted female activists, women's associations, networks, and groups, as well as care providers working with Eritrean women and male and female survivors of sexual violence. The Commission also stressed to male representatives of some groups, such as refugees and ethnic minorities, its willingness to interview women and girls of their groups to ensure that their voices are equally represented.

23. When conducting interviews with survivors of sexual and gender-based violence, efforts were made to identify male and female interpreters with experience in interpreting for survivors of sexual and gender-based violence and/or victims of trauma. A glossary of terms relating to sexual violence in English and Tigrinya was also made available to interpreters.

24. The Commission gathered information not only from primary sources such as survivors and eyewitnesses, but also from second-hand sources. These included representatives of women's associations/networks working directly with Eritrean women, as well as expert witnesses such as medical and psycho-social service providers working directly with Eritrean male and female survivors of sexual violence.

25. Prior to as well as during interviews, the Commission duly took into account cultural and gender considerations and ensured that its security arrangements were age and gender-sensitive and that specific protection and confidentiality measures for survivors of sexual and gender-based violence were implemented. In particular, the Commission endeavoured to enable a supportive, confidential and safe environment in which women and girls, as well as survivors and witnesses of sexual violence, felt sufficiently secure and comfortable to come forward and report such violations and crimes. In line with the overall standard procedures on witness protection, locations of interviews were carefully chosen to respect the security and confidentiality concerns of the interviewees and age and gender-sensitive investigative methods were used during interviews. The Commission demonstrated flexibility in scheduling interviews with survivors of sexual and gender-based violence and made sure that those interviews did not conflict with counselling and/or medical appointments. Before initiating interviews, the Commission also endeavoured to identify options for referring survivors of sexual and gender-based violence for assistance and

⁶ See, e.g., TBA065, TCDP041, TSH050, TSH088, TSS202. See also A/HRC/29/CRP.1, para. 1331.

⁷ See, e.g., TSH088.

⁸ See, e.g., TAA216, TBA224, TSH075.

⁹ See, e.g., TMM212, TSH081.

¹⁰ See, e.g., TBA062, TMM209, TSH095.

¹¹ See, e.g., TAM003, TBA202, TCDP022, TNR002, TSH043, TSH081, TSH104.

support. When necessary, the Commission ensured that a support person be available during breaks and immediately after the interview. Prior, during, and after interviews with women and girls, the Commission highlighted the importance of their participation in its work, thereby contributing to the empowerment of survivors of sexual and gender-based violence through participation in the documenting/justice process. The Commission wishes to acknowledge the courage and strength of the Eritrean survivors who spoke in detail of the rapes they suffered.

26. The Commission endeavoured to collect gender-sensitive information and disaggregated data broken down by sex and age and, where possible, on the basis of other parameters relevant for identification of potential discriminatory practices, such as ethnicity, religion, etc. However, with respect to statistics, gender-disaggregated data remains scarce.

Obstacles in collecting evidence on cases of sexual violence suffered by men and boys

27. During its investigation, the Commission gathered evidence about sexual violence committed against men in detention, including instances where men were either forced by a unit leader to have sex with other male detainees or were raped directly by him.¹² When trying to collect further evidence on rape perpetrated against men and boys, the Commission faced particular difficulties in collecting first-hand accounts, although expert witnesses working with survivors of such violence confirmed the existence of sexual violence against men in Eritrea.¹³

28. The Commission is of the view that the Eritrean patriarchal society, as well as assumptions about “normal” gendered behaviour within a simple male-female binary, contributes to such violence being under-reported and under-acknowledged, thereby preventing survivors of such violence from benefiting from much needed assistance and from accessing justice.¹⁴ In the words of one psychotherapist working with survivors of sexual violence, “[i]t is really hard for women to talk about rape. They always tell you that they have not told anyone and that they are embarrassed. They fear that they will be discriminated [against]. So, [...] men would be even more stigmatised than women, because in the society it is generally more accepted for a woman to be assaulted than for a man to be assaulted. [...]. This is [...] one of the reasons why men do not report sexual violence.”¹⁵

29. Further, discomfort with discussing issues of sexuality in general in Eritrean society, and homosexual behaviour in particular,¹⁶ prevents any contemplation of the perpetration of sexual violence against men within the Eritrean society. In this context, the Commission notes the stigmatisation created by the domestic legislation of Eritrea, which is in breach of international human rights law.¹⁷ The definition of rape in the Transitional Penal Code of

¹² See, e.g., TBA054. See also TAA210, TMM208, TSS202.

¹³ See, e.g., TMM204.

¹⁴ See also TBA203 (“[M]ale rape is almost unreported. Generally it is a taboo.”), TBA204 (“Homosexuality is a big taboo in Eritrea.”).

¹⁵ TMM209.

¹⁶ See, e.g., TAA210, TBA203, TBA204, TFM030, TSH043, S048. See also TSS210; U.S. Department of State, *Eritrea 2014 Human Rights Report*, p. 22 (“In general society stigmatized discussion of LGBT issues”), available at: <http://www.state.gov/documents/organization/236568.pdf>.

¹⁷ A/HRC/29/23, Discrimination and violence against individuals based on their sexual orientation and gender identity, 4 May 2015, paras. 41, 43 (“States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination”), 45; E/C.12/GC/22, General Comment No. 22 (2016) on the Right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social

Eritrea is gender-exclusive and limits the definition of the offence of rape to women.¹⁸ Moreover, both the new Penal Code of Eritrea of 15 May 2015 and the Transitional Penal Code of Eritrea criminalise consensual same-sex acts and impose a penalty of a term of imprisonment for such conduct.¹⁹ In addition, while non-consensual same-sex act was/is also criminalised, the Commission notes that it is not criminalised as rape but as an “aggravated unnatural carnal offence” under the Transitional Penal Code of Eritrea and as an “aggravated homosexual conduct” under the new Penal Code of Eritrea.²⁰ In light of the above, the Commission is of the view that the risk and fear to be labelled as homosexual with all the stigma, discrimination, exclusion and/or the possible prosecution and detention which that labelling entails further contributed to discouraging male survivors of sexual violence to report such incidents.²¹

30. Despite its efforts and the strategies put into place to overcome the difficulties in investigating sexual violence suffered by men and boys, the Commission is of the view that its inquiry may have only partially captured the extent and details of such violence.

D. Standard of proof

31. The Commission recalls that it has no law enforcement powers and is not a judicial body. It has nevertheless adopted a rigorous approach to the analysis of the information it has collected. It has assessed the credibility and reliability of each witness’s evidence on the basis of the information available to it. In addition, where individual incidents could not be corroborated, it has reviewed whether the allegations described are consistent with other similar allegations. Where the report describes patterns of conduct, these are based on numerous credible sources with direct information, which is supplemented with expert evidence, hearsay evidence, and/or open source information.

32. For this report, the Commission has maintained the “reasonable grounds to believe” standard of proof adopted for its first report. This means that when assessing all the information gathered the Commission concludes it is reasonable to believe that an act, event, human rights violation and/or crime has occurred. This standard has been adopted by other commissions of inquiry, and is also the standard used by the ICC to review evidence prior to the issuance of an arrest warrant.²²

33. Given the large number of acts and omissions constituting human rights violations and/or international crimes during this period, the large number of individuals affected, the 25-year scope of the Commission’s mandate and Eritrea’s denial of access to its territory, the Commission has been unable to corroborate each act or incident reported. Where the Commission was unable to corroborate or independently verify information about patterns

and Cultural Rights), 4 March 2016, para. 23. See also A/HRC/31/57, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 January 2016, para. 15.

¹⁸ See Transitional Penal Code of Eritrea, Article 589.

¹⁹ See Transitional Penal Code of Eritrea, Article 600; Penal Code of the State of Eritrea of 15 May 2015, Article 310(1). The Commission notes that any offence committed on a date before the entry into force of the new Penal Code of Eritrea of 15 May 2015 shall be prosecuted according to the law in force at the time of the offence, i.e. according to the Transitional Penal Code. See Penal Code of the State of Eritrea of 15 May 2015, Article 4(1).

²⁰ See Transitional Penal Code of Eritrea, Article 601(2); Penal Code of the State of Eritrea of 15 May 2015, Article 310(2)(d).

²¹ See, e.g., TBA204, TSH033, TSH043.

²² Rome Statute of the International Criminal Court, Article 58.

of alleged human rights violations, such information has not been included in the present report.

E. Applicable regional and international law

34. Eritrea is a State party to the International Covenant on Civil and Political Rights (ICCPR)²³, the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁴, the African Charter on Human and Peoples' Rights (ACHPR)²⁵, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)²⁶, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)²⁷, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²⁸, the Convention on the Rights of the Child (CRC), including its two Optional Protocols of 2000²⁹, the African Charter on the Rights and Welfare of the Child³⁰ and the Forced Labour Convention, 1930 (No. 29)³¹ of the International Labour Organization, along with its Abolition of Forced Labour Convention, 1957 (No.105)³².

35. With respect to the ICCPR, Eritrea has never sent a notification of derogation to the Secretary-General pursuant to Article 4 of the Convention permitting certain derogations in times of public emergency.

36. Although Eritrea is not a party to the Rome Statute of the International Criminal Court, many provisions of the Rome Statute reflect international customary law binding on Eritrea.

II. Written submissions

A. Introduction

37. On 9 November 2015, the Commission invited interested individuals, groups and organisations to submit information and/or documentation on systematic, widespread and gross violations of human rights in Eritrea, including where these violations may amount to crimes against humanity perpetrated in Eritrea since 1991, as well as on developments in the human rights situation since April 2015. The submission deadline was 15 January 2016.

38. In response, the Commission received 44,267 submissions from 39 countries. Of these, 30,517 arrived by mail and 13,750 by email. The submissions were mostly in Tigrinya and English but a sizeable number were in Arabic and German as well. The vast majority of the letters came from Germany, Saudi Arabia, Sudan, Switzerland, the United Kingdom and the United States of America. There were only eight submissions from

²³ Ratified in 2002.

²⁴ Ratified in 2001.

²⁵ Ratified in 1999.

²⁶ Ratified in 2014.

²⁷ Ratified in 2001.

²⁸ Ratified in 1995.

²⁹ Ratified in 1994, 2005.

³⁰ Ratified in 2000.

³¹ Ratified in 2000.

³² Ratified in 2000.

Eritrea, three from associations and five from individuals. The bulk of these submissions were critical of the Commission's first report and conclusions.

39. Given the large number of submissions, the Commission adopted a methodology to ensure that a statistically representative sample of 500 individuals from 16 countries who had sent letters and emails would be contacted. Those contacted were provided with an opportunity to share any further information they might have.

40. The submissions were categorised by country of origin. A random number generator was used to select samples from each country proportional to the total number of submissions received from that country. A sample size of 5 percent – or about 2250 letters – was deemed sufficient given that a review of the submissions revealed a fair amount of duplication in content. The lack of significant variance in the vast majority of the issues highlighted in the submissions meant that it was reasonable to expect that a greater sample size would not enhance the accuracy of the results.

41. The Commission contacted by phone each of the individuals chosen by the random sampling. The individuals were interviewed to verify the authenticity of the submission; to establish whether they had lived in Eritrea and, if so, when they left the country; to determine whether they had read the Commission's first report, their motivation for writing, and any information or views they wished to share. Some of the individuals who expressed a desire to be interviewed in further detail by the Commission were contacted again and interviews were conducted by phone or in person.

B. Substance of the submissions

42. Given the large number of group letters and petitions and the similar contents of the submissions, the Commission has concluded that the campaign critical of its first report was well-organised. That it was organised, however, does not mean that the submissions were involuntary. While the Commission is satisfied that a significant number of the letters were essentially voluntary, next to none of those contacted had actually read the report, and many had been provided with sensationalised information about the Commission's findings.

43. The Commission found that the most fervent critics of its findings were Eritreans who had left the country before or immediately after 1991, as well as their relatives. A substantial number of correspondents said they had written primarily to voice their opposition to United Nations sanctions. Thus, as will be discussed in greater detail below, these submissions were largely based on either an erroneous understanding, or deliberate misinformation, about the United Nations sanctions regime. There appeared to be significant misinformation on other issues as well; for example, one correspondent stated that he had written to counter the Commission's finding that "women were being raped on every Eritrean street corner".

44. The position of others contacted was more complex. For example, many of the Eritreans in one country who were contacted by the Commission said they were illiterate and had received assistance from the Eritrean Embassy in formulating letters to the Commission. When their letters were read back to them, some agreed with some parts of the letters sent in their names but not others. For instance, one said that he agreed with a section of a letter in his name saying that there was no discrimination against women in Eritrea but did not agree with another section stating there were no problems associated with national service.

45. Among the submissions, there were some letters that had been submitted involuntarily, namely, either because the author had been coerced or the letter had been

submitted without the knowledge of the signatory. In one country, a significant number of contributors stated that they had not appended their names to a petition and that their signatures had therefore been forged. Of greatest concern were those witnesses in States where Eritreans tend to be guest workers rather than refugees or dual nationals, who informed the Commission that Eritrean officials had made it known that Eritreans who did not write to the Commission supporting the Government would not have their passports renewed. Without a valid passport, Eritrean workers would not have their visas renewed.

Common themes

46. In reviewing the correspondence, the Commission was able to identify a number of common themes. The main elements can be summarised as follows:

(a) The Commission of Inquiry has never visited Eritrea, and is only interviewing Eritreans in Ethiopia and Djibouti, enemies of Eritrea. As such, its conclusions are biased and unreliable;

(b) Economic sanctions imposed by the United Nations are unjustified, sabotage the Eritrean economy, and have a damaging humanitarian impact;

(c) There is no rape in Eritrea;

(d) The Commission has failed to ensure implementation of the decision of the Eritrea-Ethiopia Boundary Commission (EEBC);

(e) Eritrean military conscription is justified by the continuous threat from Ethiopia and the failure of the international community to implement the findings of the EEBC;

(f) There is no discrimination against women; women participated in the struggle for independence, and hold 30 percent of high-level positions;

(g) Christians and Muslims live in harmony in Eritrea and there are no religious tensions;

(h) There is no shoot-to-kill policy at Eritrean borders;

(i) Contrary to the situation in other countries, education and health care are free in Eritrea, and Eritrea has made significant progress with respect to Millennium Development Goals; and

(j) Eritreans are leaving the country for economic reasons not because they are victims of human rights abuses.

47. The Commission will address these issues in turn.

(a) Commission's access to Eritrea

48. The Commission recalls that it has repeatedly sought permission from the Government of Eritrea to visit the country. The Government of Eritrea has failed to respond despite calls by the Human Rights Council to cooperate with the Commission of Inquiry.³³ The Commission was nonetheless able to interview Eritreans in 13 countries with significant Eritrean populations.

³³ A/HRC/RES/26/24 (14 July 2014), para. 9; A/HRC/RES/29/18 (22 July 2015), para. 12.

(b) United Nations sanctions

49. In 2009, well before the creation of the Commission, the United Nations Somalia and Eritrea Sanctions Committee imposed an arms embargo on Eritrea. It has imposed no economic sanctions on Eritrea, and no ban on the trade of Eritrean commodities.

(c) Rape

50. Correspondents were especially adamant in asserting that there is no rape in Eritrea and that sexual violence is intolerable in Eritrean culture. The Commission recalls that, based on substantial evidence, it found that rape and other forms of sexual violence occurred, inter alia, not only in the context of the military/national service and in detention, but also in the private sphere by military officers.³⁴ The Commission found that “there [was] a complete denial by the State of the extent of violence against women within its borders,”³⁵ which contributed to silencing Eritrean women and hindering their ability to seek recourse to justice. It concluded that Eritrea failed in its due diligence obligation to protect, prevent, punish, and remedy acts of sexual violence committed against women. This failure further contributed to creating an environment of impunity in which such violations lead to further acts of violence against women.³⁶ Thus, the Commission is of the view that the submissions do not undermine its conclusions with respect to sexual violence in Eritrea.³⁷

(d) Eritrea-Ethiopia Boundary Commission ruling

51. On 13 April 2002, the EEBC announced its ruling regarding the conflicting claims over territory between Eritrea and Ethiopia. Among other decisions, it awarded the disputed village of Badme (with approximately 1500 inhabitants) to Eritrea. The Commission recalls that in its first report it concluded that “the international community and the United Nations bear an ongoing responsibility for...the non-implementation...of the ruling on the demarcation of the border between Ethiopia and Eritrea” but added that the Government of Eritrea has often relied on this problem to justify repressive practices.³⁸ In its recommendations, the Commission continues to urge implementation of the EEBC decision.³⁹

(e) Eritrea’s military/national service

52. The Commission recalls that programmes of military/national service *per se* do not constitute human rights violations. As will be discussed in greater detail below,⁴⁰ it is the fact that the programmes are implemented in Eritrea in a manner inconsistent with international standards that is of concern to the Commission. The Commission further observes that in their letters, next to none of the authors referred to their own military/national service, the conditions of their military/ national service or the length of their service.

(f) Discrimination against women

53. The Commission is aware of the role women played in Eritrea’s independence struggle. Its first report highlighted in detail that “a women’s movement for gender equality

³⁴ A/HRC/29/CRP.1, paras. 706-707, 1046, 1074-1076, 1123, 1310-1333, 1376-1382, 1390. See also *ibid.*, paras. 708-709.

³⁵ A/HRC/29/CRP.1, para. 716.

³⁶ A/HRC/29/CRP.1, para. 723.

³⁷ A/HRC/29/CRP.1, para. 716.

³⁸ A/HRC/29/CRP.1, para. 1524.

³⁹ See, para. 363.

⁴⁰ See, paras. 202-234.

emerged and was subsumed into the national struggle” and “[w]omen’s involvement in the liberation [f]ronts (the ELF and the EPLF) began the transformation of gender relations in Eritrea.”⁴¹ Similarly, the Commission noted in its first report that “[p]roclamation No. 86/1996 reserved 30 per cent of the seats [of the regional assemblies] for women” and stressed that this was “welcomed by CEDAW in its 2006 concluding comments”.⁴² It further noted that 30 percent of high level positions are reserved to women and that 30 percent of the community courts’ judges elected in 2008 were women.⁴³ Thus, the thousands of submissions the Commission received on this common theme support the findings of its first report on these issues.

54. That being said, the Commission found that discrimination against women exists in various areas of Eritrean society⁴⁴ and that some of the legal reforms which appear gender-neutral, such as the new land tenure system, indirectly discriminate against women in practice.⁴⁵ As expressed by CEDAW in 2015, temporary special measures to ensure that women are represented in legislative and judicial bodies seem to “benefit only women sharing the views of the political party in power”.⁴⁶ The Commission further found that discrimination against women intersects with a number of other human rights violations in Eritrea, placing women in a position of vulnerability.⁴⁷ The general assertion that there is no discrimination against Eritrean women and girls is also contradicted by the recent findings of UN human rights treaty bodies.⁴⁸

(g) Religious harmony

55. The Commission does not dispute the general contention that there is religious harmony between Muslims and Christians in Eritrea. It is instead primarily concerned about the Government’s campaign of persecution against non-authorized religious denominations, and its strict control over all religious expression.

(h) Shoot-to-kill policy

56. The Commission received credible evidence that a shoot-to-kill policy was issued and that it has not been rescinded. The writers denying the existence of a shoot-to-kill policy did not explain the basis on which they concluded that such a policy does not exist. Very few, for example, said that they had passed through a border without interference or without the assistance of smugglers. The Commission is aware that the policy has been implemented in a less rigorous manner in recent years.

(i) Health, education, and Millennium Development Goals

57. The Commission observes that a number of international organisations, including UN agencies, have recorded advances in the protection of the rights to health and

⁴¹ A/HRC/29/CRP.1, para. 230. See also *ibid.*, paras. 228-230, 231-237.

⁴² A/HRC/29/CRP.1, para. 264, referring to CEDAW/C/ERI/CO/3, para. 5.

⁴³ A/HRC/29/CRP.1, paras. 252, 317, fn. 338.

⁴⁴ A/HRC/29/CRP.1, paras. 241-253, 368, 395-399, 703-721, 723, 921-922, 937-941, 953-957, 967, 1046, 1074-1076, 1123, 1148-1155, 1170, 1201-1205, 1256, 1310-1333, 1376-1382, 1390, 1521.

⁴⁵ A/HRC/29/CRP.1, paras. 1148-1152, 1170.

⁴⁶ CEDAW/C/ERI/CO/5, Concluding observations on the fourth and fifth periodic reports of Eritrea, 12 March 2015, para. 24. See also *ibid.*, para. 16.

⁴⁷ For example, the generally harsh conditions and the risk of sexual violence which is known to occur within the national service cause many girls, often at the behest of their families, to avoid national service through marriage and motherhood, which often goes hand and hand with withdrawal from education at an early stage. See A/HRC/29/CRP.1, paras. 1201-1205.

⁴⁸ See, e.g., CEDAW/C/ERI/CO/5, Concluding observations on the fourth and fifth periodic reports of Eritrea, 12 March 2015, paras. 6-43; CRC/C/ERI/CO/4, Concluding observations on the fourth periodic report of Eritrea, 8 June 2015, paras. 24-25, 36, 38-43, 51-52, 59-60.

education. The Commission notes that the indicators of progress are provided by the Government of Eritrea itself, and that Eritrea does not have the type of independent institutions that would permit verification of data provided by the Government nor does it permit verification by external institutions.

(j) Eritreans leave for economic reasons

58. The submissions on this issue were generally of a vague nature with respect to the reasons why the writers themselves had left the country. The Commission does not dispute that Eritrea is among the poorest countries in the world. Nevertheless, given the Commission's findings on the human rights situation in its first report and this report, as well as the fact that there is no similar exodus from other economically deprived states that are not in a state of armed conflict, the Commission concludes that economic reasons alone cannot be the driving force behind the large scale flight from the country.

C. Conclusion on submissions

59. The Commission notes that most writers stated that they visited Eritrea only occasionally. Many stressed the general sense of calm and order in Asmara. It is important to note, however, that the types of gross human rights violations in Eritrea documented by the Commission in its first report are not committed on the streets of Asmara, but rather behind the walls of detention facilities and in military training camps. Torture and rape are not normally perpetrated in the open; the Commission nonetheless gathered a large amount of corroborated evidence and observed the physical and emotional scars of such violence in people who have fled the country. The façade of calm and normality that is apparent to the occasional visitor to the country, and others confined to sections of the capital, belies the consistent patterns of serious human rights violations. After careful review, the Commission concludes that the submissions do not undermine the findings described in its first report.

III. Recent developments with respect to human rights in Eritrea

A. Post-independence political and economic context⁴⁹

60. In the years immediately following the independence of Eritrea, there was a period of relative political openness. A transitional national assembly, including some members who were elected, was formed. A constitution was drafted following wide-ranging consultation, and ratified by parliament. There were a number of independent civil society groups, including independent media. These nascent democratic institutions, however, were all extinguished following the 1998-2000 war with Ethiopia, and the human rights situation in the country has therefore substantially deteriorated in the new millennium. The PFDJ remains the only political party. President Isaias Afwerki⁵⁰ has been in power since 1991, and there have never been national presidential elections. The transitional national assembly has not met since 2002.⁵¹

⁴⁹ For a more complete discussion of Eritrea's historical and political context see A/HRC/29/CPR.1, paras. 62-336.

⁵⁰ Eritrea uses both the Tigrinya and Arabic alphabets. As these do not translate directly into the Latin alphabet, the spelling of the names of individuals, locations and programmes in Latin may vary considerably from one source to another.

⁵¹ TBA208.

61. The Government of Eritrea puts the country's total population at 3.6 million. Others estimate that the population is between six and seven million.⁵²

62. Military/national service, *hagerawi agelglot* in Tigrinya, is regulated by the National Service Proclamation No. 82/1995 requiring that nationals between the age of 18 and 40 years participate in an 18-month active national service programme. The programme comprises six months of military training followed by 12 months of active military service and/or development work. In 2002, the Warsai Yikealo Development Campaign (WYDC) expanded the military/national service programme. Although the Commission has seen no written document or law relating to the WYDC, it would appear that the consistent extension of the duration of military/national service beyond the 18 months provided for in the 1995 decree on national service began no later than in 2002. In addition, since the programme has come into existence, conscripts have been required to perform various forms of civilian service ranging from agricultural work to work in government ministries. In this report, the term military/national service is used to describe conscription regardless of the nature of the specific tasks assigned to the conscript.

63. Eritrea is one of the least developed countries in the world, and most of the country's economic enterprises are state controlled.⁵³ However, the country's economic fortunes may be improving. State revenues are expected to rise substantially as a result of increased mining and the Government's leasing of a port in Assab to Gulf States engaged in military operations in Yemen. As Eritrea does not publish a budget, it remains to be seen whether this substantial new income will be used to enhance implementation of social, economic and cultural rights in the country.

B. Recent notable developments

64. There have been several notable developments in Eritrea since the publication of the Commission's report in June 2015. In February 2016, at the request of the Government, a delegation of the Office of the United Nations High Commissioner for Human Rights (OHCHR) undertook a working-level technical assessment visit to Eritrea. In March 2016, the Government of Eritrea released four Djiboutian prisoners of war. In addition, a delegation of the Office for the Coordination of Humanitarian Affairs visited Eritrea. The President of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea has also been invited.

65. During its mission, OHCHR had the opportunity to visit community courts and interact with officials and judges. OHCHR was also able to visit a number of local community projects, as well as Sembel Prison and Rehabilitation Centre in Asmara. It noted that the visit was short and not in circumstances that allowed for a full human rights or technical assessment. A workshop on implementation of the recommendations from the Universal Periodic Review and other human rights mechanisms was organized in collaboration with the United Nations Country Team and Eritrean partners.

66. In December 2015, the European Union announced €200 million in new long term support to promote poverty reduction, governance and socio-economic development in

⁵² The available figures vary considerably from 6.7 million for 2013 by the World Bank, available at <http://data.worldbank.org/country/eritrea> to 3.2 million for 2010, see population count by the Ministry of Local Government and NSO in Eritrea Population Health Survey 2010, National Statistics Office.

⁵³ See for example, Bertelsmann Stiftung Transformation Index 2016, Eritrea Country Report, Sections 6-7,11.

Eritrea. The assistance will also support implementation of recommendations of the Universal Periodic Review.⁵⁴

67. A number of foreign journalists have also been invited into the country. The Commission notes that Eritreans have some access to international news, satellite television and the internet, particularly in Asmara.⁵⁵

68. Large numbers of Eritreans have continued to flee the country. According to Eurostat figures, 47,025 Eritreans applied for asylum in Europe in 2015, up slightly from the 2014 figure, more than double the 2013 figure and nearly four times the 2012 figure.⁵⁶ Of the new arrivals last year, 13,925 were women. Eritreans accounted for 24.7 percent of all Mediterranean arrivals by sea to Italy – the largest number from a single country of origin.⁵⁷

69. There were also 35,845 new arrivals from Eritrea in Ethiopia in 2015, including 1,711 from the Afar community. Women accounted for 12,421 or about one-third of this figure. The figure is down slightly from the previous year, but remains significantly higher than the number from 2013, which was 24,402. Another 12,370 Eritreans arrived in Sudan last year, and 216 in Djibouti in 2015.⁵⁸ Many more are believed to have crossed the border without registering, but there are no precise numbers available.

70. As of June 2015 UNHCR figures, the global total number of refugees and asylum seekers from Eritrea stood at 444,091⁵⁹, about 12 percent of the population of the country.⁶⁰ Of these, more than 155,000 are believed to be in Ethiopia.

71. In the United Nations Development Programme 2015 Human Development report, Eritrea is ranked 186th out of 188 countries.⁶¹ The Mo Ibrahim Index of African Governance for 2015 ranked Eritrea 50th out of 54 countries, and ranked it 53rd out of 54 in the separate categories of Rule of Law and Human Rights.⁶² Eritrea ranked 128 out of 129 on the Bertelsmann Foundation's 2016 Transformation Index⁶³, and 189th out of 189 in the World Bank's 2015 and 2016 Doing Business reports.⁶⁴ In its 2016 Press Freedom Report, Reporters without borders ranked Eritrea last among 180 countries for nine consecutive years.⁶⁵ The Committee to Protect Journalists ranked it as the most censored country in the world.⁶⁶ Finally, Eritrea ranked 166 out of 167 in the Information and Communication Technology development index compiled by the International Telecommunication Union.⁶⁷

⁵⁴ See http://europa.eu/rapid/press-release_IP-15-6298_en.htm.

⁵⁵ A/HRC/29/CRP.1, paras. 561, 563.

⁵⁶ Eurostat: <http://appsso.eurostat.ec.europa.eu/nui/show.do>, last accessed 16 March 2016

⁵⁷ UNHCR Monthly Arrivals by Nationality to Greece, Italy and Spain, Jan 2015 to Jan 2016 .

⁵⁸ UNHCR figures.

⁵⁹ UNHCR Mid-Year Trends 2015. UNHCR will put out new figures on World Refugee Day which is 20 June.

⁶⁰ According to Eritrean Government figures, the current population of Eritrea is 3.6 million.

⁶¹ Available at: http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf

⁶² Available at: www.moibrahimfoundation.org/iiag/

⁶³ Available at: <http://www.bti-project.org/en/home/>

⁶⁴ Available at: <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Full-Report.pdf>

⁶⁵ Available at: <http://rsf.org/en/ranking#>

⁶⁶ Available at: <https://cpj.org/2015/04/10-most-censored-countries.php>

⁶⁷ Available at: <http://www.itu.int/en/ITU-D/Statistics/Pages/default.aspx>

C. Current human rights concerns

72. The Commission has not reviewed each and every human rights violation reported to it, but rather has aimed to apprise the Human Rights Council of developments, or lack thereof, with regard to patterns of the gravest violations.

73. The Commission prioritised gathering information about the current human rights situation in the country by interviewing those who recently fled Eritrea. The testimonies revealed that the serious human rights violations documented in its first report persist. Eritreans continue to be subjected to indefinite national service, arbitrary detention, torture, enforced disappearances, reprisals for the alleged conduct of family members, discrimination on religious and ethnic grounds, sexual and gender-based violence, and killings. In addition, many of those subjected to enforced disappearances in the past, including Muslim teachers, political prisoners, and journalists, remain unaccounted for.

74. All the witnesses and other evidence cited in subsections 1-10 of this section of the report on current human rights concerns detailed violations that took place between 1 January 2014 and the date issuance of this report.

1. Right to participate in public affairs

75. In 1993, Eritreans participated in a referendum on independence. In the same period, seventy five representatives were elected to a constituent assembly. No national elections have taken place since that time, and no presidential elections have ever taken place. Local or regional elections have not been held since 2003-2004. President Isaias Afwerki has regularly expressed his disdain for what he refers to as “western-style” democracy. In a 2008 interview with Al Jazeera, for example, the President stated that “Eritrea will wait three or four decades, maybe more, before it holds elections. Who knows?” The Eritrean delegation to the 2014 Working Group on the Universal Periodic Review stated that national elections would not be held until “the threats to national security and sovereignty had been eliminated”.⁶⁸ The Commission has received no indication of plans to hold national elections. Thus, Eritrea remains in violation of Article 25 of the ICCPR and Article 13 of the ACHPR.

2. Constitution and the rule of law⁶⁹

76. In 1997, the Eritrean National Assembly adopted a Constitution. Government pronouncements regarding the status of this document have been inconsistent with occasional statements that the Constitution has entered into force.⁷⁰ Notwithstanding the official discrepancies on the status of the Constitution, it is widely accepted, including by the Commission that the 1997 Constitution has never been in force. In a May 2014

⁶⁸ A/HRC/26/13, para. 8.

⁶⁹ The Commission relies on the following definition of the rule of law: “[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” From the Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies* (S/2004/616), 23 August 2004, para. 6.

⁷⁰ See for example, Article 5 of the May 2015 Code of Criminal Procedure which states: “All persons involved in the investigation and prosecution of crime shall follow the Constitution of Eritrea and the provisions of this Code shall be interpreted in accordance with the Constitution of Eritrea.”

Independence Day speech, President Isaias Afwerki announced the drafting of a new constitution. In February 2016, Presidential Adviser Yemane Gebreab informed the Commission that a committee had been established to consider drafting a new constitution. Neither the Commission nor witnesses to the Commission have received any further detail about this process.

77. In response to the Commission's conclusions regarding the rule of law in its first report, the Government of Eritrea stated that:

"Eritrea is governed by the rule of law. The Government has enacted and implemented 176 Proclamations and more than 120 Legal Notices since independence... The recent revision of the Transitional codes and the enacting of new Civil and Penal Codes that are in consonance with universally accepted standards and norms is another attestation of the Government's continuous commitment to strengthen the rule of law. The enforcement of the rule of law is in fact vividly reflected in the social cohesion and harmony, peace and stability, dignified life, enjoyment of fundamental rights, and active and responsible participation of citizens that prevail in the country... Furthermore, Eritrea has signed and ratified numerous International Conventions and Instruments. These have been incorporated in its domestic laws and are diligently observed. The claim that there is no rule of law is thus grossly at variance with the prevailing reality and only peddled for political ends."⁷¹

78. As will be discussed in further detail below, experts and other witnesses, including former state officials, have confirmed that subordinate legislation issued by decree is still implemented in a wholly arbitrary manner, and that existing judicial mechanisms are neither independent nor impartial.⁷² The Commission will further consider below the new legislation referred to by the government.⁷³

79. As the executive branch has absorbed the legislative branch and critical judicial functions, there can be no meaningful resolution of disputes between individual Eritreans and their government or its agents. Although low level community courts exist, most Eritreans interviewed immediately dismissed any suggestion that they could file a complaint for a rights violation. There was a palpable resignation among people towards the endemic injustices in Eritrea, as well as a fear of re-victimisation. In the absence of a constitution, an independent judiciary, a national assembly, and other democratic institutions, the Commission has found no progress in establishing the rule of law.

3. Military/national service programmes

80. In its first report, the Commission documented a number of grave human rights violations in the State's military/national service programmes, including its prolonged and indefinite duration, abusive conditions and the use of conscripts as forced labour.⁷⁴ Indefinite military/national service is frequently cited by Eritreans as the prime reason for leaving Eritrea.

81. In April 2015, Presidential Adviser Yemane Gebreab publicly announced that Eritrea would limit its military and national service programmes to the 18 months provided

⁷¹ Commission of Inquiry Report: Devoid of credibility and substance. Available at: <http://www.shabait.com/news/local-news/20031-commission-of-inquiry-report-devoid-of-credibility-and-substance>, para. 12.

⁷² See paras. 85, 95, 106, 112, 119, 136, 145, 152, 156, 164, 170.

⁷³ See paras. 168-177.

⁷⁴ A/HRC/29/42, paras. 57-65; A/HRC/29/CRP.1, paras. 1172-1506.

for in the 1995 decree.⁷⁵ It would appear that the Government has been making similar commitments to visiting delegations of third countries.⁷⁶ However, in a statement issued by the Ministry of Foreign Affairs on 19 June 2015, the Government asserted that:

“As far as the extended nature of national service in Eritrea, the Commission yet again ignores the fact that by law national service is only required for eighteen months. However, due to Ethiopia’s refusal to abide by a final and binding ruling and the international community’s continued indifference to this deliberate flaunting of international law by Ethiopia, the Government of Eritrea had been left with no other choice but to rely on its population to defend its independence and sovereignty.”⁷⁷

82. Six months later, the Ministry of Information confirmed this, stating that:

“In normal times, the National Service is limited to 18 months by law... This normative configuration is affected today due to Ethiopia’s continued occupation of sovereign Eritrean territories and its pronounced plans of destabilization against the country. Eritrea has been forced to prolong the duration of the National Service from its statutory 18 months to defend its sovereignty and territorial integrity... Eritrea has no option but to take necessary measures of self-defence that are proportionate to the threat it faces... This is the reason why National Service – limited by law to 18 months – remains prolonged. This is why National Service members are recalled into a ‘reserve army’ that was put into law merely as a residual and contingent option”.⁷⁸

83. And again in February 2016, Information Minister Yemane Ghebremeskel established that there were no plans to limit military/national service programmes, stating that: “demobilization is predicated on removal of the main threat... You are talking about prolongation of national service in response to...continued belligerence by Ethiopia.”⁷⁹

84. The Commission has received reliable information indicating that the Office of the President has instructed Eritrean officials meeting with foreign delegations to make the following assertions regarding Eritrea’s military/national service programmes should the issue arise: i) the programme is a national service programme, and conscripts are only required to work in civil service positions; ii) there are no military courts or prisons; and iii) there is an amnesty for draft evaders.⁸⁰ The Commission has received no evidence supporting these Government assertions. In addition, it would appear that a member of the

⁷⁵ Bruno Kreisky Forum for International Dialogue on the topic of Eritrea’s political situation and its policy in the Horn of Africa, 8 April 2015.

⁷⁶ See for example, United Kingdom, Home Office, Country Information and Guidance, National (Incl. Military) Service, September 2015, paras. 9.3.3 and 9.3.4; European Asylum Support Office, Country of Origin Information Report, Eritrea Country Focus, May 2015, Section 3.7; Report by the Swiss State Secretariat for Migration following a mission to Eritrea in January 2015, Section 2.1. According to this report, when asked whether the government would put assertions regarding its plans to limit military service in writing, Eritrean officials responded that there was no need, as those affected would be aware of changes.

⁷⁷ Commission of Inquiry report: Devoid of Credibility and Substance, issued by the Ministry of Foreign Affairs, 19 June 2015, para. 20. Available at: <http://www.shabait.com/news/local-news/20031-commission-of-inquiry-report-devoid-of-credibility-and-substance>.

⁷⁸ Eritrea-Ministry of Information, UNHCR Eligibility Guidelines: Factual Findings or recycled Defamation, 17 December 2015 Report, paras. 2 and 5.

⁷⁹ Reuters. “Eritrea won’t shorten national service despite migration fears.” 25 February 2016, citing interview with Information Minister Yemane Ghebremeskel the previous week. See also, France 24, A Visa for Eritrea the African North Korea, aired on 13 May 2016, in which the Information Minister reiterated this position about military/national service stating: “Why do you ask us to take solutions that threaten our existence...”.

⁸⁰ TBA229.

national security agency is present during all meetings with foreign delegations, often in the guise of a note-taker, tasked with reporting any deviation from these talking points.

85. The Commission has repeatedly emphasised that compulsory military/national service is not, in and of itself, a human rights violation. What distinguishes the military/national service programme in Eritrea from those in other States is (a) its open-ended and arbitrary duration, which routinely exceeds the 18 months provided for in a decree issued in 1995, frequently by more than a decade;⁸¹ (b) the use of conscripts as forced labour in a wide range of economic activities, including private enterprises;⁸² and (c) the rape and torture perpetrated in military camps, and other conditions that are often inhumane.⁸³ Witnesses who recently left Eritrea told the Commission that these problems persist.⁸⁴

86. On the issue of duration of military/national service, a witness who was conscripted in 2003 and remained in national service until he fled Eritrea in 2015 stated that:

“...the national service is still for an indefinite period; in fact when I joined the national service I was never informed as to when I was going to be released from service. The Government has not announced that it will reduce the service period to 18 months; it is still indefinite and we are all very aware of this.”⁸⁵

87. Moreover, the 2012 creation of a civilian militia programme named Hizbawi Serawit, or the “People’s Army”, has further expanded the scope of military/national service obligations. A number of witnesses said that Eritreans well into their 60s and 70s are required to participate in this additional programme.⁸⁶ Summarising the link between Eritrea’s military/national service programme, its reserve army and the People’s Army, one witness stated, “the line between militia and army is blurred”.⁸⁷ According to an expert on Eritrea, those discharged from national service remain in the People’s Army or militia or “reserve army” after their discharge, and must be available at any time the Government chooses to call them. Thus, most cannot qualify for Eritrean exit visas, and those who opt to leave without such a visa remain liable for the crime of “desertion.”⁸⁸

88. Witnesses described on-going forced labour in trades ranging from construction and agricultural to the civil service and the judiciary.⁸⁹ The Government has said of these non-military activities that “the majority of National Service members are routinely assigned to civilian functions in the Civil Service or other public sectors”.⁹⁰ This assertion is inconsistent with the evidence provided to the Commission indicating that much conscript labour is unrelated to the civil service. Illustrative of the circumstances of the substantial

⁸¹ First report, para. 57, A/HRC/29/CRP.1, paras. 1245-1255.

⁸² See for example, France24, *A Visa for Eritrea the African North Korea*, aired on 13 May 2016, in which a production manager for the Italian company Piccini states that in its joint venture construction project with Eritrea, 70 percent of the 150 Eritrean workers on the project are military/national service conscripts. See also, A/HRC/29/42, paras. 63-65; A/HRC/29/CRP.1, para. 1404-1425.

⁸³ A/HRC/29/42, paras. 58-60; A/HRC/29/CRP.1, paras.1287-1323.

⁸⁴ TSS212, TSS213, TAA218, TBA217, TBA215, TMM212, TSS212, TRS207, TBA223, MM203, TAA222.

⁸⁵ TSS212.

⁸⁶ TBA215, TBA217, TRS208, TBA091, TBA229, S149.

⁸⁷ TBA217.

⁸⁸ TBA208.

⁸⁹ TAA223, TBA232, TSS225, TSS223, TSS218, TBA226.

⁹⁰ Eritrea-Ministry of Information, UNHCR Eligibility Guidelines: Factual Findings or recycled Defamation, 17 December 2015 Report, para. 2.

number of witnesses who described forced manual labour, generally outside of Asmara,⁹¹ during the reporting period, is the statement provided by a witness:

“Air Force planes are outdated and there is no proper maintenance. So, the Air Force has shifted to plantation activities. For example, there was a piece of land near the airport... [The Chief of the Air Force] took that land for plantations. [He] would bring almost three quarters of Air Force conscripts to work on the plantations, and the equipment used on the plantation comes from the Air Force and Ministry of Agriculture. It was very hot on the plantations. [Conscripts] were not paid any money for this work. They were told it is part of our duties. If they refused to work there, they would be sent to the [nearby detention facility].”⁹²

89. Of Eritrea’s parastatal companies, a witness knowledgeable about Eritrean economic issues explained that:

“managers are all ‘ex-fighters;’⁹³ all of them. In other key positions, you also have ex fighters. The staff are conscripts. Most of them are paid 500 Nakfa by the company, although they are under the Ministry of Defence. There are no labourers except for conscripts. If a company employs someone who is not a conscript, it is penalised.”⁹⁴

90. As noted above, the Commission has heard evidence that some conscripts, particularly more educated ones, are assigned to work as non-manual labour in government ministries, schools, hospitals, and in the judiciary. The working conditions for this set of conscripts, particularly for those working in Asmara, appear to be more favourable. However, even these conscripts have no freedom of choice. Of the five years he spent in the civil service until he was arrested in 2014 for criticising the government and then fleeing, a witness explained:

“They sent me to work as a clerk in a construction company [owned by the PFDJ] even though they knew that I had studied surveying. Even if you graduate with a degree in physics, if the history department has no teacher, they send you there.”⁹⁵

91. Numerous witnesses described very difficult living, sanitary and health conditions as well as inadequate food and water associated with military training and service. With regard to discipline, a witness who underwent military training at Sawa in 2014 explained:

“If [a conscript] makes a mistake, he is punished. It is hard. Everyone was punished. The leaders are very backwards...they only do what they are told to do, and it is difficult to speak with them. A kid was tied, punished with sticks, it was difficult to watch. The unit or sub-unit leader decides who gets punished. If he does not like you he can call you and punish you, he does not need to ask anyone for permission...”⁹⁶

92. Another said that “in 2014, there was military training. I was sick and even had papers certifying that I was sick. But they didn’t believe me and I was [detained] for six months without due process.”⁹⁷

93. About reports that the Government would limit military/national service to 18 months, an Eritrean expert explained, “economically they can’t. The labour market cannot

⁹¹ TBA206, TAA203, TSS218, TBA232, TBA230, TSS225, TBA226, TAA218, TBA215, TMM212, TBA223, TAA222.

⁹² TAA222.

⁹³ The term ‘ex-fighters’ refers to veterans of the Eritrean war for independence.

⁹⁴ TBA206.

⁹⁵ TRS202.

⁹⁶ TBA215.

⁹⁷ TRS207.

absorb released conscripts. It would be dangerous for the Government and could be a liability for society. [Even using conscript labour], most of these companies are not making a profit. Unless there is a complete overhaul nothing will work.”⁹⁸ In a podcast, a journalist with expertise on the Horn of Africa provided a similar interpretation. She concluded that military/national service is “a form of crowd control...There is an element of keeping youngsters under control, keeping them obedient.”⁹⁹ Indeed, Presidential Advisor Yemane Gebreab himself has stated that: “the challenge for us is to be able to find jobs, skills, training, and business opportunities for [conscripts] when they are released,”¹⁰⁰ suggesting that prolonged military/national service is not, or is no longer, motivated primarily by national security concerns.

94. The stipends paid to national service conscripts remained very low during the reporting period. In a February 2016 television interview, President Isaias Afwerki stated that pay increases had “started in mid-2015.”¹⁰¹ The general context of the discussion suggested that the President was referring to public service employees, and it was therefore unclear whether this included military or national service conscript labour. A number of witnesses said they had heard of plans to increase stipend payments to military/national service conscripts, and others had heard of individuals who had received such increases, but none had personally received an increase and some expressed fears about arbitrary implementation of any new stipend scheme. While any increase in stipends to conscripts would be welcome, any such increases would not remedy the most troubling aspects of Eritrea’s military/national service programmes which is their arbitrary, extended, and involuntary nature, as well as the forced labour and abusive conditions.

95. The Commission concludes that Eritrea’s military/national service programmes violate Article 565 of Eritrea’s Transitional Penal Code which criminalises enslavement. They also violate Article 8 of the ICCPR, Article 5 of the ACPHR, and the Slavery Convention of 1926. Aspects of the programmes also violate Articles 9, 10, 12, 17 and 22 of the ICCPR, Articles 8, 12, 15 and 18 of the ACHPR, and the 1930 and 1957 conventions on forced labour. As will be discussed in greater detail below, the Commission has concluded that programmes also constitute the crime against humanity of enslavement.¹⁰²

4. Arbitrary detention, enforced disappearance and torture

96. In its first report, the Commission reported extensively on arbitrary detention, enforced disappearance, torture, and other cruel, inhuman or degrading treatment in Eritrean detention centres, military and civilian, official and unofficial.¹⁰³ On the subject of the administration of justice, the Government of Eritrea has stressed that these human rights violations would be:

“...grave crimes resulting in severe punishment under the domestic penal law and as reflected in international conventions to which Eritrea is a party. The Transitional Penal Code criminalizes arrest, confinement, detention or otherwise restraining the freedom of any person, without lawful order. Tortures, ill-treatment of or unlawful killing of a detainee, are among the grave crimes dealt with by the Penal Code. The

⁹⁸ TBA206.

⁹⁹ Interview with Michela Wrong. War College Podcast. 18 March 2016.

¹⁰⁰ Bruno Kreisky Forum for International Dialogue on the topic of Eritrea’s political situation and its policy in the Horn of Africa. 8 April 2015.

¹⁰¹ Available at: <http://www.shabait.com/categoryblog/21132-in-order-to-effectively-implement-our-priority-programmes-for-2016-and-the-period-beyond-that-we-need-to-properly-gauge-the-resources-accumulated-so-far-and-those-that-will-be-garnered-this-year-president-isaias>.

¹⁰² See, paras.191-235.

¹⁰³ A/HRC/29/42, paras. 41-44, 54-55; A/HRC/29/CRP.1, paras. 724-838, 865-936, 958-1099.

administration of justice falls under an independent judiciary comprising of hierarchical courts and Public Prosecution institution headed by an Attorney General which are clearly spelt out in Proclamation No.1/1991. The Constitution endorsed in 1997 not only protects these basic human rights of the citizens but also provides judicial and administrative remedies in case of any violation.... legal and administrative measures...takes into account the rights of the guilty citizen and whenever there is discrepancy or any degree of violations appears, both judicial and administrative remedies are made.”¹⁰⁴

97. Notwithstanding the Government’s position, during the reporting period the Commission interviewed a significant number of Eritreans who fled the country in the past two years and reported that these violations continue. Almost all arrested were detained in violation of fundamental rules of international law. Apart from those accused of minor common crimes or misdemeanours, most were detained without any form of judicial proceeding whatsoever. In the vast majority of cases, families of those detained received no official information about the fate of their loved ones. Finally, many of those detained who were eventually able to speak with the Commission either because they had been released or because they had escaped, described various forms of torture inflicted on them to obtain information, to punish for alleged wrongs, or to create a general climate of fear.

98. On May 22 2016, Sudan collectively expelled 313 Eritreans back to Eritrea. Another 129 were similarly sent back from Sudan several days earlier. According to UNHCR, the prior to the forcible returns, the Eritreans had been tried and convicted in Sudanese courts of “illegal entry” into Sudan.¹⁰⁵ According to corroborated reports by unrelated witnesses, in the days prior to the expulsions, Eritrean authorities visited Eritreans in a Sudanese prison to register the identities of those to be returned. The witnesses also reported that upon arrival in Eritrea, the returnees were arrested and detained. They further indicated that those who were in the national service, prior to leaving the country, were detained at Adi Abeito prison on the outskirts of Asmara, and that those who had not yet undergone military training are currently detained elsewhere, including in Tessenei and Hashferay, apparently awaiting transfer to military training centres. Some family members in Eritrea were able to obtain information about detained individuals through informal means, and not because they were officially notified about the detentions or permitted to visit the detainees.¹⁰⁶

99. One witness, who left Eritrea in 2015, spoke of a number of arbitrary detentions and disappearances of family members over the years. In 1999, the witness’s father was arrested and “disappeared”. He has never been heard from again. Of his father’s disappearance he said, “there is no law, we could not do anything. You cannot ask about someone who has disappeared, you risk being arrested yourself. I don’t think anyone ever asked about his whereabouts.” Sixteen years later, the witness left Eritrea after other relatives were subjected to arbitrary detention and enforced disappearance in his town, stating:

“They arrested six people in 2015. Two were my relatives. The other four were their co-workers. They were told they were being arrested because they went to [foreign country X] without permission. I overheard this when they were arrested. I don’t know where they were taken to. There is no further information about them.”¹⁰⁷

¹⁰⁴ Eritrea-Ministry of Information, UNHCR Eligibility Guidelines: Factual Findings or recycled Defamation, 17 December 2015, para. 9.

¹⁰⁵ UNHCR Press Release, 2 June 2016, UNHCR Concerned by expulsions from Sudan.

¹⁰⁶ TBA236, TBA237, TBA238.

¹⁰⁷ TBA220.

100. Other evidence illustrative of arbitrary detention and enforced disappearance in Eritrea was provided by a witness who left the country in September 2015. Her husband was arrested outside their home in 2009 but the witness said she only left Eritrea after giving up hope that she would ever obtain information about his condition or whereabouts:

“Nobody knows why he was arrested. I thought maybe his military leave permission paper had expired so I went to the local prison. I heard [informally from prison guards] that he was imprisoned. For years, I was going once a week. I took food and some clothes. They never told me how he was doing. After [...] years, when they refused to receive items like food and clothes, we knew that he was no longer there. I haven’t seen my husband in seven years and don’t know if he is alive or not. I searched for him, but the authorities finally told me just don’t bother coming back, there’s no point. Be a mother to your children instead.”¹⁰⁸

101. With respect to deprivations of the right to liberty, the Government has invoked its right to punish the crime of desertion stating that “we see no reason why desertion should not be considered a crime punishable, severely or otherwise, by the laws of any country, Eritrea one of them, that maintains an army”. The Government adds that any such allegations are heard by Eritrean military courts “which are still operational in Eritrea and continue to hear and decide on cases”.¹⁰⁹ The Commission does not object to the penalisation of the crime of desertion per se. However, of those witnesses who believed that they had been detained for attempting to evade military/national service, all said that they had been detained and punished without any warrant of arrest or judicial proceeding. Moreover, all of those who admitted having sought to desert the military said that they had done so after years of involuntary conscription beyond the 18 months provided for in the law and the denial of repeated demobilisation requests. In short, Eritrea’s penal provisions on desertion are of little relevance.

102. On the issue of torture, Information Minister Yemane Ghebremeskel stated in February 2016 that “torture is not allowed. That does not mean it may not happen here and there...Sometimes you will meet people who have fled here and they will have some marks. It can happen in some units...But one has to draw a difference: It is not systematic, it’s not officially sanctioned, it’s not in the law.”¹¹⁰ This assertion too is inconsistent with the Commission’s findings that the use of torture by Eritrean officials has been, and remains, both extensive and methodical in civilian and military detention centres.

103. A witness who escaped from prison in 2015 told the Commission that he had been detained because he had asked his commanding officer to release him from national service:

“...since there [was] no war... I also [complained] that we were only working for the benefit of the big bosses. I asked this question during a meeting in March 2014 and all my colleagues clapped their hands but it annoyed the General. Immediately after the meeting, I was arrested and sent to prison. In the prison, I was placed in shackles and detained in a cell alone for 8 months. I was repeatedly beaten and tortured. Each time two people held me down and two others beat me with stakes and rubbers. They submerged my head in a deep container with dirty water. They beat me on my testicles many times. I fainted each time they did this. I have no testicles now, they

¹⁰⁸ TRS215.

¹⁰⁹ Eritrea-Ministry of Information, UNHCR Eligibility Guidelines: Factual Findings or recycled Defamation, 17 December 2015, para. 9.

¹¹⁰ As quoted in Wall Street Journal, “Thousands flee isolated Eritrea to escape life of conscription and poverty”, 2 February 2016.

disappeared. I am impotent and am not able to bear children. Before the incident I had one daughter and that is all I will ever have.”¹¹¹

104. Another witness explained that when he was in detention in 2014, he and others detained would “put vaseline and lemon on the wounds of those tortured” but added that “if [prison officials] see you helping others, you’ll suffer the same fate. We had to hide [to help fellow prisoners]...I was not normal when I left the detention centre.”¹¹²

105. Recent evidence confirms that Eritrea’s widespread use of arbitrary arrest,¹¹³ enforced disappearance,¹¹⁴ and torture,¹¹⁵ continues despite the Transitional Penal Code provisions prohibiting such violations. On the issue of legal safeguards, a witness noted that pursuant to military rules, an officer who abused his authority to obtain sexual favours could be subject to a range of penalties but added that “punishment for this crime is never applied”.¹¹⁶ As noted above, the Government has asserted that remedies are available for such violations, but the Commission has received no evidence indicating that any legal safeguards or available remedies are effective in practice.

106. Article 416 and 557 of the Eritrean Transitional Penal Code prohibit “unlawful arrest or detention and illegal restraint”. Use of improper methods, which would include torture, is criminalized under Article 417 of the same code. Article 19 of Eritrea’s Transitional Criminal Procedure Code also provides for the right of habeas corpus. Arbitrary detention and torture constitute violations of Articles 7, 9, 10 and 14 of the ICCPR, and Articles 3, 5 and 6 of the ACHPR, as well as the intent of the CAT. Enforced Disappearance is a violation of the General Assembly’s Declaration on the Protection of All Persons from Enforced Disappearances, as well as the International Convention for the Protection of All Persons from Enforced Disappearance. As will be discussed in more detail below,¹¹⁷ although Eritrea has not ratified the latter document, the Commission considers that its provisions reflect international customary law binding on Eritrea. Also discussed in more detail below, the Commission has concluded that that these violations constitute the crimes against humanity of imprisonment, arbitrary detention and torture.¹¹⁸

5. Reprisals against third parties

107. In its first report, the Commission described reprisals against family members, friends and associates for the alleged conduct of a third person. Forms of reprisals include arrest, detention, imposition of fines, elimination of coupons to buy staples in state-run stores, harassment, eviction and property confiscation.¹¹⁹ Those targeted included persons close to government critics, both within Eritrea and outside the country; Eritreans alleged to have evaded or deserted military/national service; Eritreans who left the country; Eritreans who escaped from prison; and members of non-recognised religious denominations.

¹¹¹ TSS210.

¹¹² TRS202.

¹¹³ TMM203, TSS216, TSS217, TSS219, TSS222, TBA201, TBA205, TAA206, TAA210, TBA209, TMM203, TBA213, TBA211, TAA218, TRS213, TRS216, TMM202, TMM205, TMM207, TMM208, TMM210, TMM211, TBA220, TBA226, TRS214, TRS212, TSS206, TSS208, TSS209, TSS210, TSS211, TSS213, TRS202, TBA236, TBA237, TBA238.

¹¹⁴ TRS215, TSS222, TRS209, TBA203, TBA204, TBA205, TAA206, TAA218, TRS215, TRS216, TMM202, TBA213, TBA220, TRS207, TBA236, TBA237, TBA238.

¹¹⁵ TMM203, TSS210, TSS203, TSS214, TSS218, TSS220, TSS222, TSS223, TBA201, TAA210, TAA214, TBA209, TRS213, TMM205, TMM211, TRS214, TSS213, TRS201, TRS202.

¹¹⁶ TRS208.

¹¹⁷ See paras. 249- 252.

¹¹⁸ See paras. 236-270.

¹¹⁹ A/HRC/29/CRP.1, paras. 746-760.

108. The Government of Eritrea has said of allegations that it punishes individuals on the basis of guilt-by-association:

“These claims are false... In the first place, Eritrea’s laws unequivocally reject the notion of collective punishment. The laws do not recognize or allow collective culpability, or accountability by proxy, for crimes committed by a family member. The laws uphold the legal principle of personal punishment for an offence committed by an individual... Complicity or being an accessory to crime is clearly another matter. In this regard, there are provisions in the general laws and in the Proclamation on National Service for culpability of persons who wilfully assist a person to commit an offense, including evasion or desertion from the national service.”¹²⁰

109. Nonetheless, the Commission has heard ample evidence that punishment of third parties for alleged wrongful conduct of a family member or associate continues.¹²¹ A witness who fled from Eritrea in June 2015 after 20 years as a military conscript told the Commission that after his escape:

“...they called my sister and put her in prison. Since she was the one responsible for me, she had to pay the 200,000 Nakfa. The family helped to pay the 200,000. After they paid, she was released. After my sister was released, my brother was accused of helping me escape and was imprisoned. They took his car. He’s still in prison and has been there for over seven months. Even though my sister paid the 200,000, they still imprisoned my brother.”¹²²

110. Another witness told the Commission that after the witness left Eritrea in mid-2015, both a sibling and grandparent were arrested and detained.¹²³ An official who recently left Eritrea told the Commission that he had been detained for two months in mid-2014 for refusing to implement instructions involving reprisals.¹²⁴

111. With respect to the Government’s contention that any reprisal against a third person would be pursuant to legal proceedings on charges of aiding and abetting the alleged wrongdoer, the Commission has found no evidence to support this. On the contrary, witnesses told the Commission that there had been no judicial proceedings relating to their punishment.

112. The Commission observes that reprisals against third persons violate Articles 40, 48, 57 and 554 of Eritrea’s Transitional Penal Code. It further concludes that punishment of third parties constitutes a violation of Articles 14 and 15 of the ICCPR, and Articles 3 and 7 of the ACHPR. In certain cases, punishment also violates Articles 7 and 9 of the ICCPR and Article 6 of the ACHPR. As will be discussed in more detail below, the Commission has also concluded that some of the forms of reprisal constitute Other Inhuman Acts, a crime against humanity.¹²⁵

6. Discrimination on religious or ethnic grounds

113. In its first report, the Commission found that the Government controls freedom of religion tightly. Only four religious denominations are recognised: Eritrean Orthodox, Roman Catholicism, Lutheran Evangelical, and Sunni Islam. Religious practice by

¹²⁰ Eritrea-Ministry of Information. UNHCR Eligibility Guidelines: Factual Findings or Recycled Defamation, 17 December 2015, para. 14.

¹²¹ TRS215, TRS216, TMM202, TSS208, TSS212, TSS214, TBA201, TRS215, TMM210, TRS214.

¹²² TRS207.

¹²³ TAA220.

¹²⁴ TMM210.

¹²⁵ See paras.271-281.

members of non-authorised religious groups is prohibited and subject to repression.¹²⁶ Following a 2002 decree requiring registration of all religions seeking authorisation to practice, a number of smaller religious groups attempted to register.¹²⁷ To date, they have not received authorisation.¹²⁸

114. The Government of Eritrea has responded to allegations of religious discrimination as follows:

“Eritrea is a secular state. Religious freedom is indeed guaranteed by law. Eritrea has also a rich history of religious tolerance, co-existence and harmony in a turbulent region that is often wracked by acute religious polarization and strife... Even within the confines of secularism, the government of Eritrea has obligations to ensure that centuries-old religious tolerance and harmony is not perturbed by externally-induced new trends of Islamic or Christian fundamentalism that corrode the social fabric. The Government thus introduced administrative regulations in 2002 that basically request new faiths to declare their sources of funding. Most of the miniscule new faiths did not want to comply with the regulations because they have external funding.”¹²⁹

115. With respect to Jehovah’s Witnesses in particular the Government has stated that “Jehovah’s Witnesses had long forfeited their legal status when they refused to recognize the ‘temporal government’ after liberation and the referendum process”.¹³⁰

116. A number of witnesses told the Commission that members of non-authorised religious groups continue to suffer acute discrimination.¹³¹ A witness told the Commission:

“I left Eritrea on 20 January 2016 because I was not able to practice my religion freely and I was detained many times for being a member of [a non-recognised religion]. I was detained the last time on 9 March 2014. We were 58 people, including women and children, worshipping together when the military police stormed the premises and arrested us all. They took us to [the local] police prison. They beat us very badly and many of us sustained injuries. When we arrived at this prison we met 50 other Protestants from [a banned church] detained for practicing their faith [...] On 29 March 2014, 11 of us refused to renounce our faith, so were transferred to an underground prison. On 27 April 2014, five persons agreed to renounce their faith and were released after signing documents saying that they were now members of the Eritrean Orthodox Church. On 5 May 2015, we were transferred to a military prison [...] In all, we were 108 religious prisoners in this prison. I was beaten once there because I refused to renounce my religion. On 12 November 2015, while working in the garden, I managed to escape. Persecution on religious ground has not improved and people are still being arrested for worshipping. I know that many of those arrested have died in their respective prisons due to torture and pneumonia, for which some have been forbidden proper medical treatment. Protestants detained are only released after denouncing their faith and promising to worship in the Eritrean Orthodox Church.”¹³²

¹²⁶ A/HRC/29/42, paras. 35-37; A/HCR/29/CRP.1, paras. 631-676.

¹²⁷ A/HCR/29/CRP.1, paras. 645-646.

¹²⁸ A/HCR/29/CRP.1, para. 646.

¹²⁹ Eritrea-Ministry of Information, UNHCR Eligibility Guidelines: Factual Findings or recycled Defamation, 17 December 2015, para.18.

¹³⁰ Eritrea-Ministry of Information, UNHCR Eligibility Guidelines: Factual Findings or recycled Defamation, 17 December 2015, para.12.

¹³¹ TSS207, TSS208, TSS217, TSS221, TSS222.

¹³² TSS208.

117. Government control of authorised religious groups also persists. The Government of Eritrea continues to detain under house arrest Orthodox Patriarch Abune Antonio, who was arrested over ten years ago for calling for the release of political prisoners and failing to excommunicate church members opposed to the Government.¹³³ The Commission was also able to corroborate reports that over ten Orthodox priests were detained in April 2016 for protesting his continued detention and expressing concern about Government plans to appoint a new Patriarch following the death of Abune Dioskoros who was appointed by the Government following the detention of Patriarch Abune Antonio.¹³⁴

118. The Commission also received reports of forcible evictions of members of the Afar ethnic group, and arbitrary arrests of members of the Kunama ethnic group, in late 2015 and 2016, which require further investigation.

119. The Commission recognises that there is a considerable degree of religious harmony among those religious denominations authorised in Eritrea. Nonetheless, Eritrea's persistent discrimination against persons belonging to unrecognised religious groups constitute violations of Article 486 of Eritrea's Transitional Penal Code, Articles 2, 18 and 26 of the ICCPR, and Articles 2 and 8 of the ACHPR. It may also violate articles of the ICERD. As will be discussed in more detail below, the Commission has concluded that many of the acts of discrimination constitute the crime against humanity of persecution.¹³⁵

7. Sexual and gender-based violence

120. Sexual and gender-based violence persists in Eritrea. The Commission collected evidence that some cases of rape committed by men against women in local communities had been adjudicated by courts and that the perpetrators had been sentenced to terms of imprisonment.¹³⁶ However, rapes committed in military training centres, in the army, and in detention by military officials, trainers, as well as detention officials and guards continue to be committed with impunity.¹³⁷ The Commission also collected evidence about recent cases of domestic servitude imposed on some young women in the national service or in the army.¹³⁸ Similarly, evidence collected recently confirm that rape in the society, including by soldiers, continue to be committed without fear of prosecution.¹³⁹

121. Furthermore, women and girls who try to flee the country are at increased risk of sexual and gender-based violence. The Commission heard evidence about recent cases of women and girls being raped in Eritrea when trying to leave the country, including a 14 year-old girl who was raped by soldiers and became pregnant.¹⁴⁰ Although women are aware of the possibility to be raped when trying to flee the country, many still prefer to leave Eritrea. One witness explained that:

“Before our attempted [flight in June 2015], fearing what could happen on our journey, [two female relatives] had a contraceptive injection [...] to prevent unwanted

¹³³ <http://www.uscirf.gov/news-room/press-releases/uscirf-release-eritrean-orthodox-patriarch-abune-antonios>. Some witnesses believed that he is under house arrest.

¹³⁴ TAA224.

¹³⁵ See paras. 282-296.

¹³⁶ See, e.g., TMS205.

¹³⁷ See, e.g., TAA222, TBA217, TBA229, TMM204, TMM207, TMM208, TMM209, TMS201, TRS202, TSS220.

¹³⁸ See, e.g., TAA222, TMM204, TMM212.

¹³⁹ See, e.g., TBA217, TMM204, TMM209, TMM212, TMM213.

¹⁴⁰ See, e.g., TAA207, TMM207, TMM209, TMM212, TMM213.

pregnancy. Because you hear about rapes, this is why they had this injection. Women trying to flee often have this injection, because we know what can happen.”¹⁴¹

122. Moreover, in some instances, women and girls who tried to flee the country and were arrested by soldiers guarding the border were forced to strip naked, or nearly naked, and submitted to acts of sexual violence, which in some cases amounted to rape, as described by one witness who tried to flee in April 2015:

“What was really sad...we were men, women and children...they obliged everyone to take off all their clothes so they could search them. [...] All the guards were men. They searched the women and were touching them. The women couldn’t say no. They felt bad and we felt bad but could do nothing. They searched everywhere, even the genitals, with their hands. They even laughed about it. Even put their fingers inside the women’s genitals and the little girls’ genitals – 5-year-old girl, a 9-year-old girl. The girls cried.”¹⁴²

123. In nearly all the cases documented by the Commission, the rape led to physical and/or mental suffering and pain – including post-traumatic stress disorder – and, in some instances, to unwanted pregnancy or transmission of sexually-transmitted diseases, such as HIV. This resulted not only in the violation to be free from torture and from cruel, inhuman or degrading treatment or punishment but also to the right to sexual and reproductive health.¹⁴³

124. Victims of rape infected by HIV suffered additional human rights violations. For example, a young girl who was only 10 year-old when raped by a soldier described to the Commission the discrimination and stigmatisation she faced at school, outside school, and while in detention because of her illness.¹⁴⁴

125. Recent evidence collected by the Commission show that detention continues to have a discriminatory effect on women. The special needs of pregnant and nursing mothers and women with children in detention continue not to be met; in some recent instances leading to miscarriage or an infant becoming seriously ill.¹⁴⁵

126. The Commission collected evidence which confirms that harmful practices, such as forcible marriage of underage girls, including for reasons relating to poverty, persist in Eritrea, even though the legal minimum age for marriage is 18 years.¹⁴⁶ Discrimination against women also continues to intersect with a number of other human rights violations. Girls continue to be pulled out of school and/or forced into a marriage arranged by their family in order for them to avoid the harsh conditions and the possibility of sexual abuse committed in the military training camp in Sawa.¹⁴⁷ Female and child relatives of men who have been subjected to an enforced disappearance are often victims of various forms of discrimination. For example, the wives of such men often lose their job and encounter difficulties in getting car insurance or in renting a house. Their children also face discrimination at school, in some cases to such an extent that they drop their studies.¹⁴⁸

¹⁴¹ TMM207.

¹⁴² TRS207. See also, *e.g.*, TMM207.

¹⁴³ See, *e.g.*, TAA207, TMM204, TMM208. See also E/C.12/GC/22, General Comment No. 22 (2016) on the Right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 4 March 2016.

¹⁴⁴ See, *e.g.*, TMM211.

¹⁴⁵ See, *e.g.*, TMM207, TMM209, TRS216.

¹⁴⁶ See, *e.g.*, TMM209.

¹⁴⁷ See, *e.g.*, TRS206, TRS209, TRS215. See also A/HRC/29/CRP.1, paras. 1201-1204.

¹⁴⁸ See, *e.g.*, TBA211, TBA215, TMM202, TRS203.

127. Finally, sexual violence against men continues to be committed in detention. The Commission collected evidence about recent cases of prison guards beating men on – and/or applying electric shock to – their sexual organs, in some instances with the intent of ensuring that these men will no longer be able to reproduce.¹⁴⁹ It also documented the case of a 14 year-old boy who was raped in detention by co-detainees and subsequently beaten by detention officials to provide the names of the perpetrators.¹⁵⁰

128. The Commission is of the view that the above-mentioned acts of sexual and gender-based violence are in violation of many of Eritrea’s human rights obligations, including Articles 2, 7, 8, 9, 10, 16, 17, 23, and 26 of the ICCPR, Articles 2, 3, 4, 5, 6, 16, 17, 18, and 19 of the ACHPR, Articles 2, 4, 11, 13, 14, and 16 of the CAT, Articles 2, 5, 10, and 12 of the CEDAW, Articles 2, 3, 24, and 28 of the CRC, as well as Articles 21 and 30 of the African Charter on the Rights and Welfare of the Child.

8. Right to life

129. In its first report, the Commission detailed violations of the right to life in Eritrea.¹⁵¹

130. The Government of Eritrea has stated that allegations of extrajudicial killings and a shoot-to-kill policy are “unfounded.” It concedes that there may have been executions for the crimes of desertion or absence without leave from the military, and notes that these crimes are set out in Articles 300 and 301 of Eritrea’s Transitional Penal Code, and that Eritrean courts exist to address this crime.¹⁵²

131. The Commission has found that the Government of Eritrea violates the right to life by committing extrajudicial killings, and by subjecting Eritrean citizens to abysmal conditions of detention and military/national service in which death is a foreseeable consequence.¹⁵³

132. An example of extrajudicial killing reportedly took place on 3 April 2016, as military/national service conscripts were being transported through the city centre of Asmara. When several conscripts tried to jump from the trucks, soldiers reportedly fired into the crowd, killing and injuring a considerable but unconfirmed number of conscripts and bystanders.¹⁵⁴

133. The Commission obtained reliable evidence that a shoot-to-kill policy at Eritrean borders targeting Eritreans attempting to flee the country still exists, but that it is not implemented as rigorously as it was in the past.¹⁵⁵ The information that the policy still exists was corroborated by a witness who told the Commission that he had been sent to

¹⁴⁹ See, e.g., TAA210, TMM204, TMM205, TMM209, TMM212, TMM213, TSS210.

¹⁵⁰ TAA210.

¹⁵¹ A/HRC/29/42, paras. 45-47 and A/HRC/29/CRP.1, paras. 1103-1131.

¹⁵² Eritrea-Ministry of Information, UNHCR Eligibility Guidelines: Factual Findings or recycled Defamation, 17 December 2015, para. 9.

¹⁵³ A/HRC/29/CRP.1, paras. 1103-1127.

¹⁵⁴ See for example, BBC, Eritrean Army Conscripts ‘killed in Asmara Escape Bid,’ 6 April 2016. Available at: <http://www.bbc.com/news/world-africa-35977605>. See also, tweets by Yemane Gebremeskel, Minister of Information, on 8 April 2016: 1) “Two National Service members died last Sunday in Asmara from injuries received when they jumped & fell from military trucks transporting them”; 2) “11 other were also injured I the same act & have been hospitalized. Police stabilized z situation by firing few warning shots into z air”; 3) Eritrea’s arch-enemies and hired guns have now gone into their usual frantic-mode to conjure up and recycle despicable lies of a sad incident.”

¹⁵⁵ TAA218, TBA234, TSS211, TBA229, TBA223. See also A/HRC/29/41, Report of the Special Rapporteur on the situation of human rights in Eritrea, para. 48.

military training in June 2015. Three months later he was sent to patrol the border with Ethiopia:

“In September 2015, the battalion commander told me if anyone attempts to cross the border to Ethiopia just shoot at them. He told us to shoot people down if we see them crossing. I couldn’t ask about this order because I would have been killed or jailed; I had to implement it. If you don’t implement it you won’t be seen again. I know 3 soldiers who spent 20 years in service. They told me I had to implement the order.”¹⁵⁶

134. Witnesses also told the Commission about border killings in 2014, including one in which reportedly forty persons were killed.¹⁵⁷ In response to allegations of border killings, the Government has suggested that those seeking to flee Eritrea are military deserters and that, as elsewhere, it is Eritrea’s prerogative to punish this crime aggressively.¹⁵⁸ The Commission observes that Eritrea’s transition penal code does not impose the death penalty for “desertion” or “absence without leave from military service”.¹⁵⁹ On the contrary, the maximum sentence for these crimes is five years imprisonment. More importantly, witnesses arrested at the border or shot at said they had not been subject to any form of judicial proceeding meaning that any punishment for desertion is imposed extra-judicially.

135. According to witnesses, deaths associated with torture, and abject conditions of detention and military service, persist.¹⁶⁰ A witness who was detained without trial in 2013 for attempting to leave Eritrea, described the deaths he witnessed in a centre for minors during the two years following his arrest:

“It is very cold. This place is hell. Many children are malnourished. They have scabies and other skin diseases. They give them so little food. Lentil soup is just water, two scoops for 20 people. You can’t eat it. Some kids had been there for 2 years, some less. The kids are malnourished, with diarrhea. There is only one nurse, who can only distribute two pills per person. 11 kids died while I was there. They had diarrhea, there were no fluids, so they died. I had a friend; he was 17 when he died while I was there. My friend went to see the first aid person, but he had no antibiotics. Those who died were buried. I had to dig the graves myself for two kids.”¹⁶¹

136. In conclusion, although the Commission has received evidence of large-scale extrajudicial killings by Eritrean authorities in the past, it is not aware of recent such incidents. However, the Government remains responsible for border killings, other sporadic extrajudicial killings, and the deaths associated with the poor conditions of military/national service and in detention centres.¹⁶² These deaths violate Articles 521 and 537 of the Eritrean Transitional Penal Code. The Government of Eritrea also continues to violate Articles 6 and 14 of the ICCPR and Articles 4 and 7 of the ACHPR. As will be discussed below, the Commission has concluded that these violations constitute the crime against humanity of murder.¹⁶³

¹⁵⁶ TSS211.

¹⁵⁷ TNR010, TNR084, TAM051.

¹⁵⁸ Eritrea-Ministry of Information, UNHCR Eligibility Guidelines: Factual Findings or recycled Defamation, 17 December 2015, para. 9.

¹⁵⁹ See Articles 300 and 301.

¹⁶⁰ TSS213, TRS212, TBA209, TBA217, TBA204, TMM202, TSS209, TRS215.

¹⁶¹ TBA209.

¹⁶² TBA209, TBA217, TMM202, TBA204, TBA206, TSS211, TSS213, TSS214, TSS222, TSS209, TBA202, TRS215, TMM212, TRS202, TRS207.

¹⁶³ See paras. 313-324.

9. Freedoms of expression, assembly and association

137. In its first report, the Commission reported extensively on violations of freedom of expression, assembly and association.¹⁶⁴

138. The Government of Eritrea has asserted that “it is well known that expressing one’s political opinion or belief is not a crime in Eritrea for any citizen... [Allegations that journalists have been detained are] completely false and misleading.”¹⁶⁵ With respect to the high profile detention of the G-15 in 2001, considered by many, including the Commission, to have been government critics, the Government added that:

“The 11 senior government officials, and few others that belonged to the same ring, were detained for conspiring and attempting to overthrow the legal government of the country in times of war and for colluding with hostile foreign powers with a view to compromising the sovereignty of the nation... Not a single Eritrean has been detained in the past twenty four years since independence for expressing his/her opinion or performing their duties or for criticizing the Government. Breach of national security and sovereignty is of course another matter.”¹⁶⁶

139. The Commission observes that while the Government refers to the applicable Eritrean law on the crimes of treason and attacks against the state, it makes no mention of any trials or convictions relating to the detention of the G-15 or journalists.

140. The increase in the number of foreign journalists granted access to Eritrea during the reporting period is a positive development, but witnesses said that in Eritrea, government-controlled media remains the only kind of local media.¹⁶⁷ A former journalist who left Eritrea in 2015 explained that:

“...since the media is Government-owned, you clearly are not supposed to cover anti-government issues. If interviewees say something anti-governmental, you listen but do not use it in your broadcast. A lot of items you didn’t broadcast. At first the bosses told me not to use such material, and then there’s self-censorship.”¹⁶⁸

141. The Government of Eritrea has stated that allegations of interference with freedom of association “are preposterous and can only be peddled by someone who has no clue of Eritrean society or by a person/entity engaged in rabid disinformation... Freedom of association and assembly is respected by law and deeds.” The Government concedes that “formation of political parties has been deferred pending the enactment of relevant laws” and adds that “this has never been a hindrance to the formation of professional and civil society associations”. It then refers to the existence of professional associations, labour unions, and Eritrean laws protecting worker rights.¹⁶⁹

142. With respect to trade unions, the Commission recalls that in its first report it concluded that those relatively independent unions that did exist in the 1990s were all forced to close by the Government, and that the same was true of other independent non-

¹⁶⁴ A/HRC/29/42, paras. 31-34; A/HRC/29/CRP.1, paras. 443-617.

¹⁶⁵ Eritrea-Ministry of Information. UNHCR Eligibility Guidelines: Factual Findings or Recycled Defamation, 17 December 2015, para. 15.

¹⁶⁶ Eritrea-Ministry of Information. UNHCR Eligibility Guidelines: Factual Findings or Recycled Defamation, 17 December 2015, para. 15.

¹⁶⁷ In the documentary *France 24, Visa for Eritrea Africa’s North Korea*, 13 May 2016, a journalist interviewed stated “there is no independent media but there is independent news.”

¹⁶⁸ TRS205.

¹⁶⁹ Eritrea Ministry of Information, “UNHCR Eligibility Guidelines. Factual Findings or Recycled Defamation”, 17 December 2015, para. 17.

governmental organisations.¹⁷⁰ Today, there exist trade unions, a National Union of Eritrean Women and a National Union of Eritrean Youth and Students, but these organizations are controlled by the Government and the PFDJ.

143. A witness stated the following about freedom of speech and assembly in Eritrea:

“In January 2015, the Government asked people to leave their houses within three days; many people left but some had nowhere to go since the government did not allocate land or houses for them. After the three day deadline the military arrived in the area with yellow bulldozers and started to break the houses down. I participated in a peaceful protest in my town against the government because they were destroying houses in my neighbourhood. About one thousand people participated in the protest. 30 people refused to leave their homes and were arrested and detained in military prisons. The military shot and killed one person during the demonstration and four were wounded. [Following local resistance, the military retreated and returned with reinforcements]. The soldiers entered the town at night and conducted house to house searches. They were looking for those who initiated the demonstration. About 300 houses were destroyed and more than 15 percent of the town population was affected.”¹⁷¹

144. Restrictions on freedom of speech are not limited to just those physically in Eritrea. A witness in Ethiopia told the Commission that after he had participated in a demonstration in Addis Ababa in late June 2015 in support of the Commission’s first report, his mother was arrested in Eritrea.¹⁷²

145. In conclusion, the Commission’s evidence indicates that there has been no material improvement in the enjoyment of the rights to freedom of expression, assembly and association. The systematic repression of these rights appears to be firmly entrenched. Interference with civil or political rights is punishable under Article 568 of Eritrea’s Transitional Penal Code. The Government of Eritrea also continues to violate Articles 18, 21 and 22 of the ICCPR, and Articles 9, 10 and 11 of the ACHPR.

10. Nakfa (currency) exchange programme

146. A significant number of witnesses raised concerns about a recent Eritrean currency exchange programme.¹⁷³ On 4 November 2015, the Government of Eritrea published a decree on the exchange of old Nakfa currency notes for new ones.¹⁷⁴ The Government announced that the conversion programme would take place between 18 November and 30 December 2015, that the conversions would only take place at local banks through bank deposits, and that cash deposits exceeding 20,000 Nakfa¹⁷⁵ could only take place on ten specific dates.¹⁷⁶ The Decree explicitly states that “one old Nakfa currency note equals one new Nakfa currency note”.¹⁷⁷

147. The Commission accepts that the Eritrean programme may have legitimate goals, such as a desire to promote reliance on modern banking, to combat money laundering

¹⁷⁰ A/HRC/29/CRP.1, paras. 601-617.

¹⁷¹ TSS214.

¹⁷² TAA215.

¹⁷³ TRS214, TRS206, TBA215, TRS202, TRS 204, TRS205, TAA207, TAA221, TBA208, TBA227.

¹⁷⁴ Legal Notice No. 124/2015 (Decree).

¹⁷⁵ On 11 May 2016, 20,000 Nakfa was the equivalent of approximately 1900 USD (www.xe.com) or 1230 USD (www.google.com/finance/converter), at the official rate. However, the official rate may be misleading. See also *infra*, fn. 295.

¹⁷⁶ Shabait.com. 6 November 2015.

¹⁷⁷ Decree, Article 3(2).

and/or to eliminate the currency black market.¹⁷⁸ However, witnesses have described issues relating to the implementation of the programme that raise concerns about rights to property,¹⁷⁹ legal certainty, and the presumption of innocence.

148. One concern expressed was the very short period during which the Nakfa exchange took place. The overall redemption period set out in the decree was six weeks. Individuals were permitted to deposit an unlimited amount of old Nakfa during a period of only two weeks, and then no more than 20,000 Nakfa during an additional four weeks.¹⁸⁰ Moreover, the Decree states that individuals and entities “may redeem currency solely in one bank and solely once”.¹⁸¹ An expert on Eritrea told the Commission that individuals abroad had lost large holdings of Nakfa because they had not been able to return to Eritrea during the redemption period.¹⁸² In an interview on Eritrean television, the Eritrean Bank Governor stated that Eritreans living abroad had no legitimate reason to hold Nakfa, and therefore that those who did had “no other option” but to return to Eritrea to exchange their old bills during the redemption period.¹⁸³

149. The Decree requires that the exchange take place at a bank and states that a maximum of 20,000 Nakfa can be exchanged in cash. Greater sums must be deposited into new or existing bank accounts and “during redemption [individuals] shall not be allowed to withdraw more than twenty thousand in new Nakfa currency notes”.¹⁸⁴

150. A number of witnesses told the Commission that in fact they had not been permitted to withdraw 20,000 Nakfa. One witness stated that while he had deposited 800,000 old Nakfa, he had only been able to withdraw 2,500 new Nakfa once and that he had not been able to withdraw any money since.¹⁸⁵ Another said that her mother had deposited approximately 350,000 Nakfa but had only been able to withdraw 10,000 Nakfa she had deposited the sum.¹⁸⁶ Others said that they had only been permitted to withdraw 5,000 Nakfa.¹⁸⁷ When one of these witnesses asked about the small sum he was able to withdraw, the reply was that “we haven’t printed the new money, so we have no money to give you”.¹⁸⁸ Witnesses were not told by bank officials if, or when, they might have full access to their deposits. A witness with knowledge of Eritrean financial issues told the Commission that he believed that the Government had launched the programme because

¹⁷⁸ In an interview on Eritrean television in November 2015, Mr. Kibreab Woldemariam, the Governor of Eritrea’s Central Bank said that the purpose of the programme was to introduce modern banking technologies and limit cash transactions.

¹⁷⁹ Although the Right to Property does not exist in the ICCPR, the right does exist in Article 14 of the ACHPR, Article 21 of the American Convention on Human Rights, and Article 1 of Protocol 1 of the European Convention on Human Rights. The jurisprudence of the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR) has established the rights to property is not absolute and but that deprivation must be based on reasons of public utility or social interest, and that any legislation that regulates deprivation of the right to property must be “clear, specific, and foreseeable.” See for example, *Salvador Chiriboga v. Ecuador*, 6 May 2008 at the IACHR, paras. 61 and 64, and *Beyeler v. Italy*, 5 January 2000 at the ECHR, para. 109.

¹⁸⁰ Decree, Article 5.

¹⁸¹ Decree, Article 3(2).

¹⁸² TBA208.

¹⁸³ November 2015 interview with Mr. Kibreab Woldemariam, Governor of Eritrea’s Central Bank.

¹⁸⁴ Decree, Article 4(3)(4).

¹⁸⁵ TRS214.

¹⁸⁶ TRS206.

¹⁸⁷ TBA215, TAA207, TRS202.

¹⁸⁸ TRS202.

Eritrean banks needed cash. As a result, he did not believe that depositors would ever recover the full sums they had deposited.¹⁸⁹

151. The Decree states that foreigners and foreign entities wishing to exchange only Nakfa “may only be allowed to do so after the legitimacy of the mode of obtaining the old nakfa...has been verified”.¹⁹⁰ It was an expert’s understanding that the government would also seek justification from account holders for any deposits over 20,000 Nakfa.¹⁹¹ The Commission is of the view that forcing individuals to prove that they did not obtain the money illicitly shifts the burden of proof from the state to the depositor. In addition, as the law is otherwise silent on this aspect of the exchange programme, it is not clear which person or body would review documentation regarding the acquisition of larger sums of old Nakfa or whether a depositor would have any recourse in the event of an adverse finding.

152. On the evidence available, the Commission is able to determine that the exchange programme is not being implemented in accordance with Legal Notice No. 124/2015, the law governing the programme. However, it would be premature to conclude that depositors will never have access to the full sums deposited, and therefore that the exchange programme has been in fact an expropriation exercise. The Commission concludes that the problem requires additional consideration and monitoring with a view to assessing the impact of the programme on property, as well as social and economic rights.

11. Financial transparency and corruption

153. In resolution 2023 (2011), the Security Council called on Eritrea “to show transparency in its public finances...”.¹⁹² In 2015, the United Nations Monitoring Group on Somalia and Eritrea reported that:

“...the Government continues not to disclose its budget appropriations and the country’s budget is not publicly available. In general, financial transparency also leads to financial accountability, which requires Governments to justify raising public resources and revenue and to explain how they are used. The standard practice by institutions and Governments alike to build and maintain budgets in order to demonstrate compliance with laws and communicate effectiveness is a practice not currently followed in Eritrea...”¹⁹³

154. According to a reliable source, official budgets exist but have no bearing whatsoever on actual Government income and expenditures. With respect to sources of Government income, the source added “that is a mystery. Money is deposited at the National Bank. The Ministry of Finance does not know where the money comes from. Only the President knows.”¹⁹⁴ This evidence is corroborated by the evidence of other witnesses with knowledge of Eritrean financial affairs who said that only the President and three members of his inner circle, alone and with no oversight, run state finances.¹⁹⁵ One important and undisputed source of revenue is proceeds from mining operations owned jointly by the Eritrean state and a transnational corporation. In its 2015 report, the Monitoring Group on Somalia and Eritrea observed that “the Government continues to maintain a complete lack

¹⁸⁹ TBA206, TBA204.

¹⁹⁰ Decree, Article 3(5).

¹⁹¹ TBA227.

¹⁹² Para. 12.

¹⁹³ S/2015/802, 19 October 2015, para. 69.

¹⁹⁴ TBA206.

¹⁹⁵ TSS204, TBA056, TBA206. See also, Bertelsmann Stiftung Transformation Index 2016, Eritrea Country Report, Sections 7, 15.

of transparency with regard to mining revenue” and that this impeded the ability of the group to assess Eritrea’s compliance with Security Council resolution 1907 (2009).¹⁹⁶

155. In the absence of public financial information and statistics, it is difficult for the Commission to assess any progress in the areas of economic and social rights reported by the Government. In particular, it cannot evaluate the claim made by the Government in a note verbale to the Monitoring Group on Somalia and Eritrea that the “country needs and uses every single penny from its revenue for the eradication of poverty”.¹⁹⁷ Indeed, the Commission has received evidence indicating the opposite. For example, witnesses told the Commission that a bank account with 40 million USD in mining revenue had been opened in Qatar in the name of the Director of the PFDJ Economic Affairs department.¹⁹⁸ Other information suggests that there may be private accounts belonging to the president or members of his inner circle in the United Arab Emirates, Iran, Cyprus, and /or China.¹⁹⁹ More generally, the Commission concludes that the Government’s disregard for financial transparency mirrors its indifference to the rule of law and transparency in other areas.

156. Although the Commission has little information on overall government finance, numerous witnesses indicated that petty corruption, bribery, trading in influence, illicit enrichment and abuse of authority, is endemic in Eritrea despite provisions in the Transitional Penal Code criminalising these acts.²⁰⁰

157. The Human Rights Council, in resolution 7/11, recognised “the detrimental impact of widespread corruption on human rights, both through the weakening of institutions...as well as through the impairment of the ability of Governments to fulfil their human rights obligations...” and that “effective anti-corruption measures and the protection of human rights are mutually reinforcing...”.²⁰¹ The foreword to the United Nations Convention against Corruption states that “corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights...and allows organized crime, terrorism and other threats to human security to flourish.”²⁰² The South African Constitutional Court has held that

¹⁹⁶ S/2015/802, summary. See also paras. 93-103.

¹⁹⁷ S/2015/802, para. 103.

¹⁹⁸ TBA206, TSS204. The Somalia Eritrea Monitoring Group has also reported that there exists other accounts in this individual’s name in countries with non-transparent financial industries. See for example, S/2014/727, paras. 94, 96-98..

¹⁹⁹ TSS204, TBA 206. See also, Reports of Monitoring Group on Somalia and Eritrea, S/2014/727, paras. 94, 96-98, S/2011/433, para. 377; and Bertelsmann Stiftung Transformation Index 2016, Eritrea Country Report, Section 6.

²⁰⁰ See for example, Articles, 81, 303-304, 414.

²⁰¹ A/HRC/7/11. The role of good governance in the promotion and protection of human rights, 27 March 2008. See also, preamble to African Union Convention on Preventing and Combatting Corruption, which states: “Concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples; Acknowledging that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent...”.

²⁰² See also, preamble to African Union Convention on Preventing and Combatting Corruption, which states: “Concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples; Acknowledging that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent...” See also, Corruption and its impact on the full enjoyment of human rights, in particular, economic, social and cultural rights, E/CN.4/Sub.2/2004/23, 7 July 2004, para. 57: “...corruption, whether systemic, endemic or petty, violates citizens’ enjoyment of all the rights contained in all the

“corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms.”²⁰³

158. In a January 2016 interview on Eritrean television, President Isaias Afwerki stated that:

“Corruption constitutes... a major national security threat to any country and people. Corruption destroys a country, corrodes its social cohesion, widens the economic gap between the haves and have-nots to implant toxic polarization of society, squanders the resources and opportunity of the nation, and jeopardizes the rights of citizens. As such, it poses a major danger to any country... One cannot talk about nation-building or respect for the rights of citizens in a situation where corruption is tolerated and institutionalized... To conclude, our stance of ‘zero tolerance to corruption’ is not surprising.”²⁰⁴

159. The President’s words regarding Eritrea’s intolerance for corruption is at odds with the Commission’s evidence. A witness told the Commission that “no one is ever imprisoned for corruption... Officials are encouraged to be corrupt so that they cannot criticize the government.”²⁰⁵ Other witnesses described the dramatic impact of corruption on human rights in Eritrea. For example, witnesses consistently linked corruption to exemption or early release from military service.²⁰⁶ As one witness who left Eritrea in 2015 explained:

“Release from national service is mostly by corruption. If you have lots of money, you bribe them and they release you. In every ministry there is corruption. It is not always easy to know to whom you should give the money but it is usually the directors. Also, if you have [well-placed] relatives who know you well, they may help you.”²⁰⁷

160. Another described the phenomena more succinctly stating that “there are people with money and people without money. Those with money can bribe their way out.”²⁰⁸ An expert said that conscripts working in civil service positions could often bribe their supervisors to turn a blind eye to extended absences that would allow them to participate in

international instruments...”; Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, A/HRC/28/73, 5 January 2015.

²⁰³ *South African Association of Personal Injury Lawyers v. Health and Others*, 28 November 2000, para. 4. See also, South African Constitutional Court, *Hugh Glenister v. President of the Republic of South Africa and others*, 17 March 2011, para. 177: “The Constitution enshrines the rights of all people in South Africa. These rights are specifically enumerated in the Bill of Rights... [The Constitution] casts an especial duty upon the state... [to] ‘respect, protect, promote and fulfil the rights in the Bill of Rights.’ *It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy.*” [Emphasis added].

²⁰⁴ Interview 23 January 2016. Transcript available on shabait.com.

²⁰⁵ TBA201. Corroborated by, TBA206, TBA229, TBA234, TNR008, and, Bertelsmann Stiftung Transformation Index 2016, Eritrea Country Report, Sections 2 and 15.

²⁰⁶ For example, TBA068, TCDP074, TBA201, TBA015, TRS208, TBA206, TBA217, TSS206, TRS203, TNR052, and Bertelsmann Stiftung Transformation Index 2016, Eritrea Country Report, Section 3.

²⁰⁷ TRS203.

²⁰⁸ TBA217.

income generating activities.²⁰⁹ Yet another explained that conscripts living away from their families bribed their commanders in order to obtain permission for home leave.²¹⁰

161. Of conditions in military service, a witness with extensive knowledge of the Eritrean military, said:

“Children of the wealthy get better treatment. Whenever there is spare time, they get called to the Commander’s house. We all know who the ‘special’ ones are. There are well-known wealthy people, it’s widely known. If you punish [such a child] someone might ask you why you punished him. The divisional commander tells the brigade commander to tell him if one of the trainees is special.”²¹¹

162. According to other witnesses, Eritrean officials also routinely accepted bribes to release individuals from detention.²¹² A witness explained that he was arrested for having asked to speak to a Colonel about the fate of his brother who was missing. The witness spent one month in an underground prison but was released after his parents paid bribes to high ranking officials. According to the witness:

“I was innocent. I was released from prison with no charges and without being taken to a court. I was arrested without any reason. If I hadn’t had relatives in high places and people we could bribe I would probably still be in the prison or might have been able to leave prison only after signing a confession to crimes I never committed. Alternatively, I might be a prisoner for life.”²¹³

163. A former security official who left Eritrea in 2015 said of those he was charged with arresting: “if the prisoner is connected or comes from a rich family he is sometimes released, but poor people are left to die in prison”.²¹⁴

164. Other witnesses said they bribed officials to obtain unofficial information about the location of detained family members.²¹⁵ Some indicated that they had bribed border officials to turn a blind eye to the passage of Eritreans out of the country.²¹⁶ Witnesses, with knowledge, described widespread bribery and abuse of authority in the judiciary. Problems in the judiciary are compounded by pervasive executive interference in judicial matters, and the fact that many judges receive only national service stipends as compensation for their work.²¹⁷ A number of witnesses also spoke of unlawful or arbitrary forcible evictions and housing demolitions for the purpose of transferring housing or land to influential individuals.²¹⁸ Recent but uncorroborated information received by the Commission indicates that demolitions and evictions are on-going.²¹⁹ Finally, the costs associated with avoiding reprisals for the alleged wrongs of a family member appear to vary dramatically, a further indication of corrupt practices.²²⁰

²⁰⁹ TBA234.

²¹⁰ TBA201.

²¹¹ TRS208.

²¹² TNR018, S143r, TAM065, TAM071, TAM072, TBA024, TBA217, TAA218, TAA220, TBA061, S033, TBA230, TBA234, TCDP074.

²¹³ S103.

²¹⁴ TAA218.

²¹⁵ A/HRC/29/CRP.1, para.736.

²¹⁶ TFM039, TBA219, TSS206, TBA224.

²¹⁷ Daniel R. Mekonnen, TBA229, S033, S119, TSH012, S098, S110, S092, S012, TCDP018.

²¹⁸ TAM017, TAM031, TLA030, TAM070, TBA093.

²¹⁹ TCDP013, TAM017, TAM031, TLA030.

²²⁰ Witnesses cited costs of avoiding imprisonment ranging from 50,000 Nakfa to 2,000, 000 Nakfa, as well as confiscation of property, including homes, suggesting that the assessment of “fines” may depend on the wealth of the family.

165. With respect to other acts of abuse of authority violating, inter alia, Articles 304 and 414 of Eritrea's Transitional Penal Code, a witness with knowledge of the military training programmes said that he knew of commanders who told women: "we will demobilise you if you have sex with us."²²¹ Another witness said of the sexual exploitation of female military conscripts that "battalion commanders consider these things as their right".²²²

166. Witnesses also described the use of forced conscript labour to benefit individuals or semi-private enterprises,²²³ a form of illicit enrichment. According to one witness, "the Generals receive salaries, but also receive income from agriculture [and other commodities] that is not accounted for. Production costs are low because they use free conscript labour. This income is not disclosed to the Ministry of Defence. The President knows about this but does not interfere."²²⁴ An expert on Eritrea observed that high-level state officials often turned a blind eye to such corruption by local commanders in order to blackmail them later if necessary.²²⁵

167. The Commission is of the view that forms of corruption described have a direct impact on citizens' enjoyment of their rights, and further undermines what rule of law exists in the country. Notwithstanding President Isaias Afwerki's public commitment to combat corruption, the Commission is concerned that the Government of Eritrea does not have the political will to establish the type of independent judicial and other institutions required to combat corruption in an effective manner, as is also true with respect to other types of accountability mechanisms.

12. New legislation

168. There is conflicting information about the status of four pieces of legislation issued in May 2015: a Penal Code, a Civil Code, a Civil Procedure Code and a Criminal Procedure Code. Only the Penal Code includes a provision regarding its entry into force. Article 3 states that it comes into force when it is published in the Official Gazette. The Civil Code is not available on line. The other three codes are available in English only on the internet, but it is not clear that they have been published in the Official Gazette.

169. Moreover, witnesses told the Commission that Eritrean judges had not received copies of the new codes and continued to apply the older, transitional legislation.²²⁶ A legal decree issued on 4 November 2015, six months after the date on the new legislation, states that violation of the new decree is punishable under the "Transitional Penal Code" which is the previous penal code.²²⁷ The Government's December 2015 response to 2011 UNHCR guidelines also refers to the transitional penal code rather than the May 2015 penal code.²²⁸ The Eritrean Permanent Mission to the United Nations in New York transmitted the new penal code to the Commission but did not confirm that it is in force despite requests to do so.

²²¹ TRS208.

²²² TBA224.

²²³ TBA069, TAA222, TBA234, TBA101, TNR079, TAA206, TAA203, TBA232, TBA230, TSS225, TBA226, TBA206, TAM019, TBA086, TNR041, TNR030, TAM029, S077dd, S077bb, S114q, S116 (non-exhaustive list).

²²⁴ TBA206.

²²⁵ TBA234. Also, TNR008.

²²⁶ TBA227, TBA2229.

²²⁷ Legal Notice No. 124/2015, Legal Tender Nakfa Currency Notes Regulations, para. 6.

²²⁸ UNHCR Eligibility Guidelines: Factual Findings or Recycled Defamation?, 17 December 2015, paras. 7, 9, 15.

170. While the Commission welcomes the new codes if they are in force or coming into force, it recalls that Eritrea's Constitution is not in force and that there are no other legal document setting out law-making procedures. It further recalls that it has concluded that there is no rule of law, as defined by the UN's Secretary-General,²²⁹ in Eritrea. Without any meaningful reform, the Commission remains concerned about the political will of the Government of Eritrea to ensure the rational and effective implementation of any law, old or new.

171. As the Commission has not been able to ascertain the legal status of the 2015 codes, it does not propose to undertake a full analysis of the new legislation here. It will nevertheless comment on those provisions relevant to the issues addressed in this report.

172. The Commission welcomes Part II, Book 1 of the 2015 Penal Code entitled "Offences against International Law", prohibiting genocide, crimes against humanity and war crimes. While the transitional penal code mentioned the words "crimes against humanity", it only set out the elements of the crime of genocide. In the 2015 Penal Code, the general elements of crimes against humanity, as well as the definitions of the individual crimes, are virtually identical to those in the Rome Statute of the International Criminal Court. The Commission also welcomes Article 60 on "the presumption against imprisonment",²³⁰ and Article 73(g) ensuring that "prisoners are allowed regular visits from family members and friends".

173. The Commission notes Article 7(7) of the 2015 Penal Code on "principles of legality"²³¹, and Article 73 on "conditions of imprisonment",²³² but observes that a similar provision exists in the Transitional Penal Code²³³ but has been regularly breached.

174. In justifying the arrests of government critics, Eritrean officials have referred to critics as traitors and spies.²³⁴ Although the Commission is unaware of any judicial proceedings for related crimes, the Commission nonetheless observes that the definitions of these crimes in the 2015 Penal Code are scarcely more precise than those in the Transitional Penal Code. For example, the crime of treason as set out in Article 112(1)(a), would include the communication to a foreign person of documents or decisions "not required to be divulged to protect the interests of Eritrea."²³⁵ An individual could also be liable for treason, pursuant to Article 112(1)(b), for "misleading" or "enticing" into "dispiritedness persons... engaged in the defence of Eritrea". Pursuant to Article 114(1)(a), liability for espionage could attach where an individual makes available to a foreign organization information that "he knows should be kept secret" and which may be "prejudicial to the interests of Eritrea".

²²⁹ See fn. 69.

²³⁰ A Court sentencing an offender should not deprive the offender of liberty, where less restrictive sanctions are allowed and are appropriate in the circumstances.

²³¹ Article 7(7): "No person accused of any offence punishable by criminal law shall be tried by any person or institution other than Courts constituted by law and no person convicted of committing an offence shall suffer any punishment other than those described in this Code."

²³² "(1) Terms of imprisonment shall be served in facilities established by the State of Eritrea and under such conditions as provided by law. (2) The Courts shall supervise the conditions of the prisons and the treatment of prisoners to ensure that: (a) prisoners are treated humanely and afforded opportunities for rehabilitation and development...."

²³³ Article 2.

²³⁴ See for example, Eritrea-Ministry of Information. UNHCR Eligibility Guidelines: Factual Findings or Recycled Defamation, 17 December 2015, para. 15. See also, TCDP034, TRDV004, TLA023, TAM074, S077o, TBA220, TCDP028, TAA202. TAM002, TNR046, TNR003, TAA206, S033.

²³⁵ According to witnesses, this document was drafted in English, and thus this vague language is deliberate.

175. Given the numerous issues relating to military service set out by the Commission in its first report (and below), the Commission is troubled by Articles 119 and 120 in the 2015 Penal Code criminalising “interference with the military service.” This provision existed in the Transitional Penal Code and the Commission recognises that it is within a state’s prerogative to penalise a failure to carry out a legal obligation. However, the position is more ambiguous in Eritrea given that the Government itself consistently violates international standards relating to its military/national service programmes.²³⁶

176. Article 428 of the Transitional Penal Code referred to “infraction of rules concerning compulsory registration” but this provision clearly applied only to the failure to register births, deaths, and property transactions. Article 156 of the 2015 Penal Code criminalises the “failure to register” without providing any additional detail. The Commission is concerned that this provision may serve to codify the persecution of members of religions that have not been permitted to register rather than merely those who failed to register a birth.

177. The Commission welcomes the significant number of provisions in the 2015 Criminal Procedure Code (2015 Procedure Code) consistent with international human rights standards but observes that a number of critical provisions were already contained in the Transitional Criminal Procedure Code,²³⁷ and that these provisions were honoured more in the breach than in observance.²³⁸ The new procedure code also includes a number of peculiarities. For instance, Article 5 imposes a “duty to follow [the] constitution.” The Commission recalls that President Isaias Afwerki himself has conceded that the Constitution is not in force. Similarly, the new code includes numerous references to the “Supreme Court”.²³⁹ While the unimplemented 1997 Constitution anticipated the creation of a Supreme Court, to date, no such court exists, and the existing final appellate court does not appear to have the same jurisdiction. Finally, the Commission notes with concern Article 32(5) of the 2015 procedure code permitting the arrest of “deserter[s] from the armed forces” without a warrant, even when the crime is not committed in *flagrante delicto*.

IV. Crimes against humanity

A. Introduction

178. On 2 July 2015, the Human Rights Council requested that the Commission investigate systematic, widespread and gross violations of human rights in Eritrea, including “where these violations may amount to crimes against humanity.”²⁴⁰

²³⁶ See paras. 80-95, 191-239.

²³⁷ According to witnesses, the Transitional Criminal Procedure Code is a little modified version of the Ethiopian Criminal Procedure Code of 1961. Proclamation 185 of 1961.

²³⁸ For example, both codes include provisions requiring that detainees be brought before a judge within 48 hours of their arrest: Transitional Criminal Procedure Code, Article 29(1); May 2015 Procedure Code, Article 60(1). Both also require the attendance of the accused at his/her trial: Transitional Criminal Procedure Code, Article 127; May 2015 Procedure Code, Article 105. And both prohibit arrests without a warrant except in cases of *flagrante delicto*: Transitional Criminal Procedure Code, Articles 49 and 50; May 2015 Procedure Code, Article 29.

²³⁹ See 2015 Criminal Procedure Code, Articles 12, 21, 118-121, 123-126, 128, 157, 176,-177, 179, 182, 196.

²⁴⁰ A/HRC/Res/29/18, para. 10.

179. While there is debate about whether the Rome Statute of the International Criminal Court (Rome Statute)²⁴¹ reflects customary international criminal law in all its aspects, for the purposes of this report where the Commission is of the view that the Rome Statute definitions reflect customary law it will rely on them. Where the Rome Statute is silent or incomplete or where the Commission is uncertain the Rome Statute reflects customary international law, the Commission will supplement its discussion by reviewing relevant jurisprudence and other reliable sources of international criminal law.

B. The general requirements²⁴²

180. Article 7 of the Rome Statute defines crimes against humanity as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

181. It is settled law that an attack against the civilian population need not take place within the context of an armed conflict, nor must it be a military attack.²⁴³ The question nonetheless arises: what constitutes an attack against the civilian population during peacetime? The answer is provided by the Rome Statute which defines an “attack” against a

²⁴¹ Rome Statute of the International Criminal Court. Entry into force, 1 July 2002. See also Elements of Crimes of the ICC.

²⁴² Also known as the “*Chapeau Elements*.”

²⁴³ See Article 3 of the statute of the International Criminal Tribunal for Rwanda (ICTR) eliminating the nexus between crimes against humanity and armed conflicts that exists in the ICTY Statute. See also, Article 7 (1) of the Rome statute, Article 2 of the statute of the Special Court for Sierra Leone, Article 5 of the Law on the Establishment of the Extraordinary Chambers [of the Courts of Cambodia]; as well as, *Prosecutor v. Kunarac*, IT-96-23&IT-96-23/1A, 12 June 20002, (*Kunarac AC Judgement*), para. 86, and for more detailed analysis, see *Prosecutor v. Tadic*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (*Tadic Interlocutory Decision on Jurisdiction*), paras. 140-141.

civilian population, as “a course of conduct involving the multiple commission of acts referred to [above] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.²⁴⁴ In other words, the term refers to “a campaign or operation carried out against the civilian population”.²⁴⁵ Thus, the commission of acts constituting international crimes against civilians may be evidence of an attack against the civilian population, provided the crimes are not random or isolated.²⁴⁶

182. Prior to the adoption of the Rome Statute, the element of “state or organizational policy” was not explicit in definitions of crimes against humanity. However, it is the Commission’s view that it has always been an implicit element as it is difficult to conceive of international individual criminal liability for crimes that were random rather than organised. The state policy need not be explicitly articulated but may be inferred.²⁴⁷ Indeed, while it is understood that “the State [must] actively promote or encourage such an attack against a civilian population... Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack...”²⁴⁸

183. The “widespread” or “systematic” elements of the attack against civilians are to be read as alternatives, or disjunctive. The term “widespread” requires that the attack be committed on a large scale and directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed on personal initiative and directed against a single victim.²⁴⁹ In contrast to the large-scale character of “widespread”, the term “systematic”, refers to the “organised nature of the acts of violence and the improbability of their random occurrence”.²⁵⁰ This alternative, too, is intended to exclude a “situation in

²⁴⁴ Rome Statute, Article 7(2)(a).

²⁴⁵ Situation in the Republic of Kenya: Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, (Kenya authorization decision), para. 80.

²⁴⁶ For example, *Prosecutor v. Dusko Tadic*, IT-94-1-T, Opinion and Judgement, 7 May 1997 (*Tadic* TC Judgement), para. 648. See also, Kenya Authorization decision, para. 94.

²⁴⁷ See for example, *Tadic* Trial Chamber Judgement, para. 653: “...the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts... *Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur.* Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not. Although some doubt the necessity of such a policy the evidence in this case clearly establishes the existence of a policy.”

²⁴⁸ Element of Crimes of the ICC, Article 7(3) including footnote 6.

²⁴⁹ International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996 (ILC Draft Code), Article 18, commentary para. 4. Kenya Authorization decision, para. 95: “...insofar as the ‘widespread’ element is concerned, this has long been defined as encompassing ‘the large scale nature of the attack which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.’ ...The assessment is neither exclusively quantitative nor geographical...a widespread attack may be the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”

²⁵⁰ Kenya Authorization decision, 31 March 2010, para. 96. *Prosecutor v. Blaskic*, IT-95-14-A, Judgement, 29 July 2004, para. 101: “Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.” Commentary, paras. 3 and 5 relating to Article 18 of ILC Draft Code: Systematic requires that “the act was instigated or directed by a government...The thrust is to exclude a random act which was not committed as part of a broader plan or policy.”

which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan”.²⁵¹ “Importantly, only the attack, and not the alleged individual acts, must be ‘widespread’ or ‘systematic’.”²⁵² However, the acts must be linked to the attack.

184. Finally, there is no statute of limitations with respect to crimes against humanity.²⁵³

C. Crimes against humanity in Eritrea

1. The general requirements as they apply in Eritrea

Widespread or systematic attack against a civilian population

185. In its first report, the Commission observed that the Government of Eritrea and the PFDJ have adopted “totalitarian practices aimed at perpetuating their power”.²⁵⁴ In support of this conclusion, the Commission set out the Government’s systematic violation of the right of its citizens to take part in the conduct of public affairs, and the absence of the rule of law.

186. Also central to the Eritrean leadership’s campaign to perpetuate its hold on power has been its wholesale disregard for the right to liberty and security of Eritrean citizens. Specifically, and as will be discussed in further detail below, Eritrean officials have committed the acts of enslavement, imprisonment, enforced disappearance, torture, reprisals as other inhumane acts, persecution, rape and murder.

187. Enslavement has been committed on an on-going, large-scale and methodical basis since no later than 2002.²⁵⁵ Imprisonment, enforced disappearance, torture, reprisals as other inhumane acts, and persecution have been committed on an on-going large-scale and methodical manner since 1991.²⁵⁶ Rape has been committed since 1991, and murder has been committed in a methodical manner since 1991.

188. Because State officials have relied so extensively on the commission of the crimes to establish, consolidate and maintain total control over the Eritrean population, the Commission has determined that they have engaged in a widespread and systematic attack against the civilian population of Eritrea since May 1991 which remains ongoing.

Can military conscripts be victims of an attack on the civilian population?

189. As many of the victims have been, and remain, military conscripts, the Commission now turns to the question of whether military conscripts may be considered members of the civilian population for purposes of crimes against humanity.

²⁵¹ ILC Draft Code, commentary para. 5 on Article 18. See also, *Kunarac* AC Judgement, para. 100: A crime would be regarded as an “isolated act” when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.

²⁵² Kenya Authorization Decision, para. 94 citing, inter alia, ICTY, *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Judgement, 17 December 2004, para. 94; and ICTY, *Prosecutor v. Deronjic*, IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 para. 109.

²⁵³ United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

²⁵⁴ A/HRC/29/42, paras. 24-25.

²⁵⁵ Apart from 10-12 June 2008 when Eritrea was involved in armed clashes with Djibouti.

²⁵⁶ Eritrea formally declared independence on 24 May 1993. However, Ethiopia surrendered Asmara on 24 May 1991, and the Commission is of the view that the Eritrean Government had effective control over all Eritrean territory since the Ethiopian surrender.

190. The Government has regularly referred to the situation in the country as one of “no war, no peace” although this term has no legal significance. The Commission is of the view that with the exception of the periods from May 1998-June 2000 and 10-12 June 2008, Eritrea has not been engaged in an armed conflict as defined in international law.²⁵⁷ Thus, those aspects of international humanitarian law – also known as the laws of war – which distinguish between combatants, combatants *hors de combat* and civilians, do not apply. The Commission recalls that the purpose of these distinctions in international humanitarian law is to distinguish between individuals of an “inoffensive character” and those taking part in hostilities.²⁵⁸ Given the nature of military service programmes in Eritrea, the Commission concludes that apart from the period between May 1998 and June 2000 and 10-12 June 2008, Eritrean military conscripts had, and have, an “inoffensive character”. As such, they may be victims of an attack on the civilian population. With respect to the May 1998-June 2000 and 10-12 June 2008 periods, those conscripts who were victims of acts or crimes at a time they were *hors de combat*, as defined in international humanitarian law, were also victims of the attack on a civilian population.²⁵⁹

2. Enslavement

The law

a. Enslavement

191. Article 7(2)(c) of the Rome Statute defines enslavement as the exercise of any or all of the powers attaching to the right of ownership over a person... The Elements of Crimes, adopted by the Assembly of States Parties to the Rome Statute of the ICC in September 2002, expand the definition of enslavement: “The perpetrator exercised any or all of the powers attaching to the right of ownership...or by imposing on them a similar deprivation of liberty.”²⁶⁰ At first glance, the definition may appear to restrict the crime to traditional

²⁵⁷ With respect to international armed conflict, Common Article 2 of the 1949 Geneva Conventions state that the conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them...” The *Tadic* Interlocutory Decision on Jurisdiction, para.70, defined armed conflict as follows: “...whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached...” Ethiopia and Eritrea signed a peace agreement on 12 December 2000. Although the Commission is aware of no formal peace treaty between Eritrea and Djibouti, there were no hostilities involving Eritrean armed forces between the two states after 12 June 2008. (That said, international humanitarian law applying to unreleased prisoners of war would apply after this date.) The Eritrea-Ethiopia Claims Commission - Partial Award: Jus Ad Bellum - Ethiopia's Claims 1-8, 19 December 2005, para. 11, concluded that: “Localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of [Chapter VII of the UN] Charter.”

²⁵⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Commentary of 1987, Definition of civilians and civilian population, para. 1909. See also, *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Judgement, 12 September 2006, para. 513: “...the Chamber must consider the specific situation of the victim at the moment the crimes were committed, rather than his status,” citing the *Bagilishema* Trial Judgement (at the ICTR), para. 79, and the *Blaskic* Trial Judgement (at the ICTY) para. 214.

²⁵⁹ *Prosecutor v. Mrksic*, IT-95-13/1-A, Judgement, 5 May 2009, paras. 29, 33.

²⁶⁰ Emphasis added. A footnote further clarifies that “It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956...”

forms of “chattel” slavery, or commercial transactions involving persons, but Chambers at four international criminal tribunals have interpreted it more expansively and without dissent.²⁶¹

192. After the adoption of the Rome Statute, the *Kunarac* trial chamber at the International Criminal Tribunal for the former Yugoslavia (ICTY) conducted a thorough review of the interpretation of the definition of enslavement.²⁶² It concluded that the element of “powers attaching to the right of ownership” should not be construed to limit the crime to chattel slavery. On the contrary, other indicia of ownership and control might include:

“...the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship... The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement...”²⁶³

193. The Appeals Chamber of the ICTY upheld the verdict, approving the Trial Chamber’s discussion and confirming that the traditional concept of slavery has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. It also considered the destruction of the juridical personality of victims as evidence of enslavement, and found that contemporary forms of slavery constituted a crime against humanity under customary international law at the time the crimes were committed in the early 1990s.²⁶⁴ This jurisprudence was later cited approvingly by an ICC Trial Chamber in the *Katanga* case. In that case, the Chamber held that “the notion of servitude relates first and foremost to the impossibility of the victim’s changing his or her condition”.²⁶⁵

194. No discussion of the crime of enslavement or slavery in international law would be complete without reference to the following passage from a judgment by a post-World War II tribunal in *United States of America v. Oswald Pohl* (1947):

²⁶¹ At the International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v Kunarac*, IT-96-23-T& IT-96-23/1-T, Judgement, 22 February 2001 (*Kunarac* TC Judgement), paras. 518-543; and *Prosecutor v. Kunarac*, IT-96-23& IT-96-23/1-A, Judgement, 12 June 2002 (*Kunarac* AC Judgement), paras. 116-124. At the Special Court for Sierra Leone (SCSL), *Prosecutor v. Taylor*, SCSL-03-01-A-1389, Judgement, 26 September 2013, paras. 446-448 (citing the *Kunarac* judgements approvingly). At the International Criminal Court, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgement pursuant to Article 74 of the Statute, 7 March 2014 (*Katanga* TC Judgement), para. 976. At the Extraordinary Chambers in the Courts of Cambodia, *Prosecutor v. Kaing*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, paras. 117-162 (*Kaing* Appeal Judgement).

²⁶² *Kunarac* TC Judgement, paras. 518-543.

²⁶³ *Kunarac* TC Judgement, para. 542.

²⁶⁴ *Kunarac*, AC Judgement, 12 June 2002, para. 117. Full discussion of the crime of Enslavement, paras. 116-124. In the *Kaing* Appeal Judgement, the ECCC later found that the broader interpretation of the crime already existed at the time of the Khmer Rouge regime.

²⁶⁵ *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgement rendu en application de l’article 74 du Statut (*Katanga* TC Judgement), para. 976.

“Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery...would still remain... Involuntary servitude, even if tempered by humane treatment, is still slavery.”²⁶⁶

b. Sexual slavery as a form of enslavement

195. The Commission notes that Article 7(1)(g) of the Rome Statute criminalises “sexual slavery” as a separate crime against humanity. According to the Elements of Crimes of the ICC, the two non-contextual elements of Article 7(1)(g) of the Rome Statute are as follows: (i) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; and (ii) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. When compared with the definition of enslavement as a crime against humanity under Article 7(1)(c) of the Rome Statute, the crime of sexual slavery under Article 7(1)(g) of the Rome Statute adds a requirement, namely factual proof of at least one act of a sexual nature.

196. While enslavement has been criminalised as a distinct crime against humanity under customary international law for decades,²⁶⁷ it has not been established that sexual slavery as a distinct crime against humanity existed from the beginning of the 1990s under customary international law.

197. In this regard, it is worth noting that the Slavery Convention of 1926 “does not delineate any *sine qua non*, or specific task or purpose for which one is a slave.”²⁶⁸ The tasks that a slave may be required to perform, or the conditions in which a slave may be held, are only factors indicative of enslavement but are not elements constitutive of the crime of enslavement under customary international law.²⁶⁹ The ICTY Appeals Chamber has confirmed that, under the definition of enslavement as a crime against humanity under customary international law, “control of sexuality” is a possible indicator to be taken into consideration in determining whether a person is enslaved.²⁷⁰ The Special Rapporteur of the former Sub-Commission on Prevention of Discrimination and Protection of Minorities concluded that “sexual slavery is slavery” and that “[t]he term ‘sexual’ is used...as an adjective to describe a form of slavery, not to denote a separate crime.”²⁷¹ In other words,

²⁶⁶ Cited in *Kunarac* TC Judgement, para. 525.

²⁶⁷ See *supra*, para. 193.

²⁶⁸ See Patricia Viseur Sellers, “Wartime Female Slavery: Enslavement?”, in 44 *Cornell International Law Journal* (2011) 115-143, at 123. See also *amicus curiae* brief submitted by 16 international experts in the treatment of sexual violence under international criminal law: *Prosecutor v. Hissène Habré*, Extraordinary African Chambers, Rape and Other Forms of Sexual Violence as Crimes Against Humanity, War Crimes, and Torture Under Customary International Law: *Amicus Curiae* Brief of the Human Rights Center at the University of California, Berkeley, School of Law, and International Experts on Sexual Violence Under International Criminal Law, 8 December 2015, Annex A, para. 107.

²⁶⁹ *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, paras. 542-543.

²⁷⁰ *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 543; *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002, para. 119.

²⁷¹ *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, U.N. Doc.

under customary international law, sexual slavery is a sub-set of enslavement as a crime against humanity. Accordingly, the Commission has dealt with acts of sexual slavery under the crime against humanity of enslavement in order to fully respect the principle of legality.

198. Furthermore, the Commission is of the view that the reality of Eritrean women and girls enslaved as described below is better encapsulated under the crime against humanity of enslavement. Narrowing down female enslavement to its sexual manifestation under the crime of sexual slavery while playing down the non-sexual acts of ownership is legally unsatisfactory and ignores the full spectrum of the violations suffered by women and girls as an interrelated whole set of conduct integral to female enslavement.²⁷² In addition, “[s]uch legal splintering results in inadequate judicial redress. The reality of female slaves’ sexual abuse is torn from the reality of their non-sexual burdens”.²⁷³ Another benefit in this approach is that it avoids labelling and, therefore, stigmatising victims of such offences as “sex slaves”.²⁷⁴ Finally, incorporating acts of sexual slavery under the crime against humanity of enslavement allows describing and assessing the gender dimension and impact of this gender-neutral crime.²⁷⁵ For all these reasons, the Commission has dealt with acts of sexual slavery under the crime against humanity of enslavement.²⁷⁶

The facts

a. Military/national service

199. In its first report, the Commission documented numerous human rights violations relating to Eritrea’s military/national service programmes.²⁷⁷

200. In 1995, the Government of Eritrea issued a decree instituting compulsory national service for a period of 18 months.²⁷⁸ In 2002, the Government launched the *Warsai Yikealo Development Campaign* (WYDC) deploying military conscripts to the civil service, national administration and state owned companies, in addition to military units. The WYDC also extended the 18 month period of military service indefinitely, although there is evidence that compulsory military service beyond 18 months existed prior to 2002.²⁷⁹

201. In 2012, the Government created a new programme which it called *Hizbawi Serawit* or the People’s Army or militia.²⁸⁰ Witnesses in this reporting period confirmed earlier reports indicating that members of the population are forcibly recruited, armed, provided with additional military training, and ordered to report for duty. Eritreans drafted into this service are assigned unpaid law enforcement and other civilian duties, such as agricultural

E/CN/Sub.2/1998/13, 22 June 1998, para. 30. See also Christopher K. Hall, Joseph Powderly, Niamh Hayes, “Article 7: Crime against Humanity”, in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck/Hart/Nomos, 2016 (3rd edition), p. 212, mn. 61, fn. 404.

²⁷² See also Patricia Viseur Sellers, “Wartime Female Slavery: Enslavement?”, in 44 *Cornell International Law Journal* (2011) 115-143, at 138-139. Cf. also Valerie Oosterveld, “The Special Court for Sierra Leone, Child Soldiers, and Forced Marriage: Providing Clarity or Confusion?”, in 45 *Canadian Yearbook of International Law* (2007) 131-172, at 155.

²⁷³ See also Patricia Viseur Sellers, “Wartime Female Slavery: Enslavement?”, in 44 *Cornell International Law Journal* (2011) 115-143, at 138-139.

²⁷⁴ See *supra*, para. 21. See also Patricia Viseur Sellers, “Wartime Female Slavery: Enslavement?”, in 44 *Cornell International Law Journal* (2011) 115-143, at 142.

²⁷⁵ This is in line with the Commission’s methodology. See *supra*, para. 19.

²⁷⁶ See *infra*, paras. 224-233, 235.

²⁷⁷ A/HRC/29/42, paras. 57-62, and A/HRC/29/CRP.1, paras. 1172-1506.

²⁷⁸ Proclamation No. 82/1995. Proclamation on National Service.

²⁷⁹ A/HRC/29/CRP.1, paras. 1449-1468.

²⁸⁰ A/HRC/29/CRP.1, paras. 1449-1464.

work, and security and border guard duties. The Commission received numerous corroborated reports that Eritreans in their sixties and seventies have been forced to participate in the People's Army, as well as persons who had been released from military/national service on health grounds. Further, all witnesses said that all members of the People's Army are provided with arms, some with training, others without.²⁸¹ The Commission is aware of no law or decree regulating this programme, and has been unable to find a government justification, direct or indirect, for the programme.

202. Here, the Commission again wishes to stress that compulsory military or national service is, in and of itself, neither a human rights violation nor a crime against humanity, provided it is regulated, uniform, and proportionate to the needs of the state. Furthermore, many of the purposes of the national service programme as set out in the 1995 decree on national service are unobjectionable, such as the aim of "foster[ing] national unity" or "develop[ing] professional capacity and physical fitness."²⁸² What distinguish Eritrea's national service programmes from those in other states are the apparent underlying purposes of the programmes and the manner in which the programmes are implemented.

203. The Government of Eritrea has on many occasions stated that prolonged military/national service is necessitated by external threats to the country, and in particular, Ethiopia's occupation of the town of Badme (a village of approximately 1,500 inhabitants), as well as the sanctions imposed by the United Nations.²⁸³ While the ongoing Ethiopian occupation of the village of Eritrean territory is illegal,²⁸⁴ the Commission considers that neither the issue of Badme nor the arms embargo on Eritrea justify the open-ended and arbitrary nature of Eritrea's military/national service programmes, nor do they explain the use of conscripts to carry out non-military work, including for private enterprises. The Commission finds more persuasive the opinions of experts and others who believe that the programmes are instead a source of cheap labour and a form of population control.

204. In further determining whether the military/national service programmes constitute the crime of enslavement, the Commission has considered a number of factors.

i. The uncertain legal basis

205. While Eritrea's 1995 decree on military/national service is widely available, the Commission is aware of no law or decree regulating the WYDC extending military/national service, although many witnesses spoke of the programme. Equally, the Commission has found no legal basis for the People's Army or militia.

ii. Arbitrary and indefinite duration

206. Numerous witnesses told the Commission that the duration of military/national service is arbitrary and often of punishing length, routinely well beyond the 18 months provided for in the 1995 decree, and frequently for periods exceeding well over a decade.²⁸⁵ Emblematic is a witness heard by the Commission who said he had served 18 years as an involuntary conscript before fleeing to Ethiopia in 2015. He had had "terrible experiences" in the 1998-2000 war with Ethiopia, and later in his military service was imprisoned for over a year and tortured. He ultimately decided to flee the military/national service and

²⁸¹ TSS215, TBA234, TBA232, TBA229, TRS204, TBA215, TBA217, TBA211, TBA208, TAM071.

²⁸² National Service Proclamation No. 82/1995, 23 October 1995, Article 5.

²⁸³ See for example, A/HRC/26/13, para. 33.

²⁸⁴ Eritrea-Ethiopia Boundary Commission, Decision regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 13 April 2002, and Determinations of 7 November 2002, Determination para. 3.

²⁸⁵ See for example, A/HCR/29/CRP.1, paras. 1251-1255.

Eritrea because he was unable to spend time with his wife and four children or support them.²⁸⁶

iii. Involuntary nature

207. In its first report, the Commission noted that it had documented requests for release from military/national service which were systematically denied without any explanation or indication of the remaining duration of service. It added that there exists no mechanism for appealing such denials.²⁸⁷

iv. Forced labour

208. With respect to other apparent purposes of Eritrea's military/national service programmes, the Commission notes that Article 5 of the 1995 decree establishes that one of the objectives of military service is "to develop and enforce the economy of the nation by investing in development work...". In a 2008 interview with Al Jazeera, President Isaias Afwerki reinforced this goal of military/national service stating that "we have been in a state of war for the last ten years. We have been forced to mobilize the majority of the young... And we're using that resource to put in place a solid foundation for the economy of our country." On this point, the Commission recalls that the 1957 Convention on the Abolition of Forced Labour, ratified by Eritrea, explicitly prohibits the use of compulsory labour for "purposes of economic development."²⁸⁸

209. In its first report, the Commission documented the extensive use of forced conscript labour for the benefit of the Government, as well as senior officials. Conscript labour has been used in construction projects, ranging from roads to schools, clinics and office buildings, and in support of private enterprises;²⁸⁹ in agriculture; in the civil service, to staff government ministries as well as work as teachers and nurses; and in the judiciary as judges. The use of conscript labour in, inter alia, construction and agriculture has benefitted not only the state but private individuals, and private and state-controlled enterprises.²⁹⁰ The testimony of a witness who was conscripted from 1998 until he escaped in 2014 concisely encapsulates this problem:

"After the [Ethiopian-Eritrean] war, I was not released although I asked for it many times. They said the war could start again at any time, you have to be on stand-by. I was sent to do agricultural work in Tsorona. The fields belong to my unit leader."²⁹¹

210. As noted above, the Commission has heard evidence that some conscripts are assigned to work as non-manual labour in government ministries, schools, hospitals, and in

²⁸⁶ TMM203.

²⁸⁷ A/HRC/29/CRP.1, paras. 1252-1253.

²⁸⁸ Article 1(b).

²⁸⁹ See for example, France24, A Visa for Eritrea the African North Korea, aired on 13 May 2016, in which a production manager for the Italian company Piccini states that in its joint venture construction project with Eritrea, 70 percent of the 150 Eritrean workers on the project are military/national service conscripts. See also, A/HRC/29/CRP.1, paras. 1409-1414.

²⁹⁰ A/HRC/29/CRP.1, paras. 1399-1479. Because the Government has implied that conscripts are generally used in the civil service, the Commission notes that witnesses who spoke of the use of forced non-civil service manual labour include: TNR046, TCDP052, TAM013, TAA223, TBA232, TSS225, TSS223, TSS218, TBA226, TAM019, TAM024, TAM026, TNR037, TNR041, TNR043, TAM045, TBA086, TNR055, TBA081, TBA071, TSH064, TNR041, TNR067, TNR079, TLA026, TLA028, TBA101, TBA206, TAA203, TBA230, TSS225, TRS204, TAA206. Other individual accounts were provided in S037, S140, S077dd, S077bb, S114q, S116

²⁹¹ TBA081.

the judiciary, but that even these conscripts have no freedom of choice.²⁹² For example, one witness told the Commission:

“In 2013, they decided I would be a teacher for the Ministry of Education. They don’t care what you want, they organise you as they want...they will never consider a meeting. They just organize you, give you some papers – you receive a letter telling you where you have to go. Nobody asks you where you want to go. I had no specific training as a teacher.”²⁹³

211. The conditions associated with manual forced labour appeared to be far worse than forced labour associated with civil service positions. Speaking of his work as a conscript on a plantation in the mid-2000s, a witness said:

“Conditions [on the plantation] were harsh. The workers did not receive sufficient food. There were many diseases because of the poor nutrition and poor sanitation. Labourers were flogged and subjected to especially hard labour if they misbehaved, refused to work or disobeyed orders. Medical treatment is very basic and insufficient. Movement is severely restricted and commanders prevent conscripts from going anywhere even when they are sick. Workers are rarely allowed to go on leave. They are compelled to stay and work long hours.”²⁹⁴

212. Most former conscripts said they had been paid approximately 450 Nakfa²⁹⁵ per month. All said this sum was insufficient given local prices. It is also well below the standard wage for workers even in similarly economically disadvantaged countries. Most importantly, this sum does not change the involuntary nature of the servitude.

v. Restrictions of movement

213. As discussed above,²⁹⁶ Eritreans are very rarely ever released entirely from military/national service. Those who remain conscripts or members of the “Peoples’ Army” or “reserve army” are ineligible for the exit visas, which would allow Eritreans to leave their country legally. In addition, conscripts within military service have their movement within Eritrea heavily proscribed. On military service, a former conscript explained that “people cannot move as they want, they are just like prisoners”.²⁹⁷

vi. Inhumane conditions

214. With respect to the conditions of military/national service, a witness who was conscripted from 2004 until he escaped in 2015 explained his experience in the principal military training camp stating: “When I first got to Sawa, I hoped I would get educated there. When I first put my feet there, I saw that the military trainers terrorise [conscripts], kick you, hit you. I believe it exists not to train the youth in the military, but just to terrorise

²⁹² See para. 90.

²⁹³ TRS203.

²⁹⁴ TSS225. Similar information about conditions on plantations in this area was provided by Witness TAA222, who continued working there until 2014.

²⁹⁵ On 11 May 2016, 450 Nakfa was the equivalent of approximately 43 USD (www.xe.com) or 28 USD (www.google.com/finance/converter), at the official rate. However, numerous witnesses explained that the black market rate for 450 Nakfa was closer to 10 USD. It is the Commission’s understanding that an Eritrean would not be able to go to a local bank and obtain 43 USD for 450 Nakfa. Thus, the official exchange rate may be misleading. See also *infra*, fn. 175.

²⁹⁶ See para. 87.

²⁹⁷ TNR058.

the youth and transfer a message of terror to them.”²⁹⁸ A former military trainer confirmed that “the PFDJ’s policy is that if you don’t terrorise the trainees, they won’t obey.”²⁹⁹

215. About his time at the Wi’a military training centre in 2006, another witness said:

“Many people fell sick. Many people got diarrhoea, skin diseases, many people fainted due to the heat. There was little medical support. At night, we could check on each other to make sure no one died. There was a shortage of air. We slept outside. Even at night it was very hot. People got very sick. Some died of diarrhoea. Some just collapsed, because they always beat us. I don’t remember how many people died.”³⁰⁰

216. Numerous former conscripts complained about the lack of food and appropriate accommodation, as well as inadequate sanitary and health facilities, and difficult environmental conditions.³⁰¹

vii. Torture and killing

217. The Commission has noted that conscripts may be detained for a number of reasons including: alleged desertion, unauthorised movement or absence, insubordination or asking “inappropriate” questions. Once released from a detention facility, conscripts are sent back to their military unit where they are often subjected to additional punishment.³⁰² Describing conditions in the military training camp at Sawa, a former military trainer and administrator, who fled military service in 2012, explained:

“The trainers are very harsh. We were told if you don’t apply pressure, they won’t do what you say. We were not trained on how to treat people. They just instruct you to punish using ‘military punishments’. In one incident a trainer named [...] tied up two people and left them in a tent. He tied them so tightly that we heard them screaming. Later, one was dead and the other’s hands were crippled... If [the trainer does not] apply pressure to the trainees, [he] could end up in prison.”³⁰³

218. Although extrajudicial killings associated with military/national service are not as widespread as incidents of torture, the Commission nevertheless recalls that it has documented instances of killings during military round-ups,³⁰⁴ and that the Government has justified border killings as punishment for the crime of desertion.³⁰⁵ The Commission has also documented deaths resulting from the often inhumane conditions of military/national service training.³⁰⁶

²⁹⁸ TRS201.

²⁹⁹ TRS208.

³⁰⁰ TBA210.

³⁰¹ A/HRC/29/CRP.1, paras. 1289-1291, 1301, 1354-1375. The Commission recalls that Eritrea is required to respect human rights standards relating to right to adequate food, pursuant to Article 11 of the ICESCR; the right to adequate housing, pursuant to Article 11 of the ICESCR; the right to the highest attainable standard of health and access to health care, pursuant to Article 12 of the ICESCR and Article 16 of the ACHPR; the right to marry and found a family, pursuant to Article 23(2) of the ICCPR; and the right to the enjoyment of just and favourable conditions of work pursuant to Article 7(d) of the ICESCR.

³⁰² A/HRC/29/CRP.1, para. 1072.

³⁰³ TRS208.

³⁰⁴ A/HRC/29/CRP.1, para. 1107.

³⁰⁵ Eritrea-Ministry of Information, UNHCR Eligibility Guidelines: Factual Findings or recycled Defamation, 17 December 2015, para. 9.

³⁰⁶ See for example, paras. 132, 316-318, 322 of this report.

viii. Coercive measures to deter desertion

219. The Commission accepts in principle that it is a state's prerogative to punish acts of "desertion" or "absence (from military service) without leave." However, witnesses asserted that allegations of such acts were penalised without any form of administrative or legal proceeding. Moreover, most of those who attempted to escape, said they had done so after years of service beyond the 18 months provided for by the 1995 decree. Finally, witnesses described punishment that was not only arbitrary but cruel. One witness, for example, described a February 2013 incident in which the military opened fire on a group who were attempting to flee, killing nine. The next morning "they gathered us in one corner to watch...while they took the bodies away by car. We do not know where they took them."³⁰⁷

ix. Prohibition of religious observance

220. In its first report, the Commission noted that religious observance is severely restricted during national service. Upon arrival at training centres, new conscripts are required to indicate their faith, have religious material confiscated and are informed that it is prohibited to practice their religion. Those who are caught praying or reading religious material are punished.³⁰⁸

x. Impact on family life

221. Most conscripts are deployed far from their homes. The Commission has documented cases of conscripts whose home leave requests were repeatedly denied. In some cases, conscripts were unable to visit their families for up to ten years.³⁰⁹ A number of witnesses corroborated the information provided by one who stated that during her national service training "if something happens in the family, for example, if a relative dies, they do not tell us. I remember many students who only found out when they returned home that the father or another family member had died."³¹⁰

222. With respect to marriage, a witness explained that he had not married during his thirteen years as a conscript because "effectively I would be living separately from my wife."³¹¹ Another stated that "if you are a soldier, you are watched all the time. Families arrange the marriage, because the men are in the military and cannot choose a wife. They have no opportunity to meet someone. The family has to assist with organising and funding the wedding ceremony. A soldier needs permission to get married to attend his own wedding ceremony."³¹² Yet another witness, who had been a conscript for over seventeen years, before he escaped in 2012, explained that while a conscript:

"I was married and had three children. They only sent us home once a year for 15 days. You are working seven days a week. When you went home for 15 days, if you stayed for one extra day, they would just take you to prison."³¹³

xi. Preliminary conclusion

223. Like the victims of the crime of enslavement in Germany during the Second World War, in Cambodia during the Khmer Rouge regime, and in the former Yugoslavia and Sierra Leone in the 1990s, the victims of the military/national service schemes in Eritrea are

³⁰⁷ TNR052.

³⁰⁸ A/HRC/29/CRP.1, para. 1287; TBA068, TCDP074, TBA219.

³⁰⁹ A/HRC/29/CRP.1, paras. 1365, 1371; TBA210, TBA226.

³¹⁰ TNR058.

³¹¹ TAM031.

³¹² TBA095.

³¹³ TRS208.

not bought and sold on an open market. Rather, the powers attaching to the right of ownership in Eritrea are revealed by (a) the uncertain legal basis for the national service programmes; (b) the arbitrary and open-ended duration of conscription, routinely for years beyond the 18 months provided for by the decree of 1995; (c) the involuntary nature of service beyond the 18 months provided for by law; (d) the use of forced labour, including domestic servitude, to benefit private, PFDJ-controlled and State-owned interests; (e) the limitations on freedom of movement; (f) the inhumane conditions, and the use of torture and sexual violence; (g) the extreme coercive measures to deter escape; (h) punishment for alleged attempts to desert military service, without an administrative or judicial proceeding; (i) the limitations on all forms of religious observance; and (j) the catastrophic impact of lengthy conscription and conditions on freedom of religion, choice, association and family life.

b. Domestic servitude

224. In addition to the treatment and punishment that all conscripts face, Eritrean women – and sometimes girls – are at risk of a further form of enslavement which is domestic servitude in military training camps, as well as to a lesser extent in the army. Although the military/national service is intended, *inter alia*, to put men and women on an equal footing, just as they were during the liberation struggle,³¹⁴ many young women in military training camps as well as in the army are discriminated against on the basis of their gender and sex and used as slaves.³¹⁵

225. The Commission has heard how some young women are placed in servile positions to military leaders and trainers in Sawa, Wi'a, and in other military training camps. These women were compelled to perform non-military activities such as cooking, cleaning, doing laundry, preparing and serving coffee, and performing other domestic duties. Some were also forced to provide sexual services constituting rape.³¹⁶

226. A former female trainee in Sawa, who described the situation of these young women stated that “[t]hey are their personal slave.”³¹⁷ Another female military trainee reported a typical day to her friend: “Dreadful life starts in the morning: I prepare his breakfast, wash his clothes, prepare lunch, prepare coffee ceremony, prepare dinner, and then prepare to be ‘his wife’. I have had this life for the last six years.”³¹⁸ A male soldier in Sawa also provided the following explanation:

“We watched sexual abuses. Systematically, they forced girls to obey their instructions; to have a relationship with them. If she doesn’t obey, they find any kind of military punishment. It is commonly the [d]ivision leaders, the highest ranks who would do that. All people would go back to their [d]ivision at the end of the day. The leaders select girls personally. After six months, he would change her, take a newly

³¹⁴ A/HRC/29/CRP.1, para. 1175. See also *ibid.*, paras. 228-237.

³¹⁵ A/HRC/29/CRP.1, para. 1312.

³¹⁶ A/HRC/29/CRP.1, para. 1378. See also *ibid.*, paras. 1312-1323, 1377, 1380. See also, *e.g.*, TAA215, TAA222, TAM003, TAM018, TBA001, TBA002, TBA005, TBA012, TBA029, TBA091, TBA222, TCDP004, TCDP005, TCDP007, TCDP022, TCDP068, TCDP071, TFM003, TFM004, TMM204, TMM216, TNR001, TNR009, TNR045, TNR084, TRS201, TRS208, TSH017, TSH018, TSH022, TSH024, TSH030, TSH031, TSH075, TSH079, TSH081, TSH086, TSH088, TSH095, TSS205, TSS224, S047, S077k, S148. For instances of rape, see also *infra*, paras. 301-307, 312.

³¹⁷ TNR009. See also, *e.g.*, TAA222 (“[...] was under [the General’s] ownership”), TBA005 (“[The major brigadier] made us his slaves”), TBA224 (“Battalion leaders considered these things [– i.e. sexual and gender-based violence –] as their right. Everyone under a commander was considered as his slave.”), TCDP005 (“They treat you as a slave”).

³¹⁸ See TFM004.

arrived. The 11th grade students...have to pass their last year's exam in Sawa. They take them. Once a woman is assigned to a General, they stay there [to] do office work, chores, etc. 'there is no rule, no law.' Sometimes when the girls see the car of the General approaching they hide. What if they become pregnant? [...] When it happens, they make abortion traditionally. The girl doesn't even want to let the colonel know. One of my best friends was a 'personnel' of the Colonel. He told me that the nick name used to get a girl is 'goat'. Sometimes when newcomers arrive they asked assistants to bring new ones."³¹⁹

227. The Commission is of the view that, in addition to the tasks the women are forced to perform, the exercise of powers attaching to the right of ownership over these young women is further illustrated by four factors.

228. The first factor which reveals the exercise of powers attaching to the right of ownership is the way young women victims of this crime are selected and allocated to military officers. Officers in military training camps select the young women they want and have them allocated to their service or training team, placing them under their control.³²⁰ As with all conscripts, these young women are unable to refuse their allocation.³²¹ A former male soldier explained: "When women come...in[to] the military training [in the first 6 months], officers go and look at them. They choose the ones they find attractive and make note of their name. When they [have] finished their military training the officers ensure the ones they have selected are allocated to them. This is common knowledge. The officers even talk about it as their right."³²²

229. In some other cases, officials in military training camps instruct their assistants to bring a particular woman to their quarters. Military personnel in subordinate positions are tasked with collecting the young woman from her quarters and delivering her to their superior.³²³ These methods, as well as the fact that military officials "talk about it as their right", show that military officials treat the victims as if they owned them.

230. The second factor is that the non-sexual and sexual acts of powers attaching to the right of ownership exercised over these women take place within an overall environment of control, intimidation, and coercion. Indeed, military officials exploit the military hierarchy and structure, which requires that subordinates obey and perform the orders given by their superiors, in order to exercise their powers attaching to the right of ownership over these young women.³²⁴ Moreover, young women are subjected to physical and mental punishment or at least fear such punishment if they do not submit to orders to serve military officials.³²⁵ These forms of physical and/or mental coercion are further indicia of this form of enslavement.³²⁶

³¹⁹ See TCDP004.

³²⁰ A/HRC/29/CRP.1, paras. 1316, 1377. See also, *e.g.*, TAA215, TCDP004, TCDP005, TCDP022, TNR009, TRS208, TSH017, TSH075.

³²¹ A/HRC/29/CRP.1, para. 1377. See also, *e.g.*, TCDP004, TCDP005, TSH017, TSH075.

³²² See TSH017.

³²³ A/HRC/29/CRP.1, para. 1317. See also, *e.g.*, TAM018, TCDP004, TCDP068, TNR001.

³²⁴ A/HRC/29/CRP.1, para. 1319.

³²⁵ A/HRC/29/CRP.1, paras. 1321, 1380. See also, *e.g.*, TBA221, TBA222, TCDP004, TCDP005, TCDP022, TCDP068, TNR002, TNR045, TRS201, TSH017, TSH022, TSH024, TSH030, TSH031, TSH107, TSS205, S077k.

³²⁶ *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 543; *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002, para. 119. See also *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 976.

231. The third factor which reveals the exercise of powers attaching to the right of ownership is the control of these young women's movements. In addition to the control of movement exercised over all the conscripts in the military/national service or in the army, some of these women are victims of an additional deprivation of liberty, being sometimes even locked up:

“One day, ...a female soldier...from my unit was...assigned to General [...] to prepare food and do cleaning; it was also made clear to her that she [was] supposed to please [the General] in bed whenever he wanted. [...] She provided this service to [the General] for many years. [Three years after it started], she got pregnant [from] him and gave birth to a baby girl... She told me that she did not do this voluntarily but [because] she was afraid. She said she was not allowed to leave the house and sometimes she was locked up.”³²⁷

232. The fourth factor is that, in some cases, military officers also exercise control over the sexuality of these women, sexually abusing or raping them.³²⁸ In some instances, these women are also submitted to forced abortion.³²⁹

233. The Commission is of the view that the non-contextual element of enslavement as a crime against humanity is therefore met. Finally, the Commission finds that, given the context in which these acts of enslavement are committed, i.e. during the military/national service and/or in military training centres or camps, they are part of the widespread or systematic attack committed against the Eritrean civilian population.

Conclusion

234. The Commission concludes that there are reasonable grounds to believe that within the context of military and national service programmes, Eritrean officials exercise powers attaching to the right of ownership over Eritrean citizens. It further determines that despite the justifications for a military/national service programme advanced in 1995, the military/national service programmes today serve primarily to boost the economic development of the nation, profit state-endorsed enterprises, and maintain control over the Eritrean population in a manner inconsistent with international law. Thus there are reasonable grounds to believe that Eritrean officials have committed the crime of enslavement, a crime against humanity, in a persistent, widespread and systematic manner since no later than 2002. Despite reports that the Government would limit military/national service to 18 months, witnesses stated that conscripts of the 28th round, which began after these reports, had not been released after 18 months of service.³³⁰ As noted above, Government officials have confirmed that there are no plans to limit this service, and that witnesses have confirmed that related abuses persist.³³¹

235. The Commission is also of the view that there are reasonable grounds to believe that enslavement as a crime against humanity has been committed in Eritrea against some young women in military training camps, as well as to a lesser extent in the army, where young women are forced into domestic servitude and, in some cases, also raped.

³²⁷ See TSS224.

³²⁸ See *infra*, paras. 301-307, 312.

³²⁹ See, e.g., TMM202. See also *infra*, para. 267.

³³⁰ TSS212, TSS213, TAA218, TBA217, TBA215, TMM212, TSS212.

³³¹ See paras. 81-95.

3. Imprisonment or other severe deprivation of physical liberty

The law

236. The international prohibition against “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law” is reflected in Article 7(1)(e) of the Rome Statute. General Comment 35 on Article 9 of the ICCPR emphasises that “liberty and security of person are precious for their own sake, and also because the deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights.”³³² This is true both for “arbitrary detention” as a human rights violation and “imprisonment” as an international crime. The Commission stresses that the right to liberty is not absolute and that individuals may be arrested in certain circumstances and conditions.³³³ It further observes that not every detention violating an aspect of a fundamental rule of international law would constitute a crime against humanity.³³⁴

237. It is the view of the Commission that the fundamental rules of international law relevant to the crime of imprisonment include, at a minimum, the rights set out in Articles 9 and 14-16 of the ICCPR, Articles 6-7 of the ACHPR, and Articles 20, 22, 23, 55, 59 (sub clauses 1-4), and 60 of the Rome Statute.

238. In this report, the Commission focuses primarily on the inordinate number of detentions carried out absent any form of legal authorisation or proceeding.

The facts

239. In its first report, the Commission found that the vast majority of witnesses said that they had been arrested and detained arbitrarily, many repeatedly, or had had friends or relatives who had been detained, for periods ranging from months to years.³³⁵

240. Arbitrary detention in Eritrea is not reserved for government critics. Indeed, in its first report the Commission concluded that Eritreans are arrested “for reasons that are arbitrary to such an extent that no one can possibly identify the law that might have been broken.”³³⁶ When referring to detained individuals, Eritrean officials regularly invoke treason and espionage. Treasonous behaviour would thus appear to include: conscientious objection to military service; practice of an unauthorised religion; asking to be released from military/national service; attempting to evade military service; trying to leave the country; seeking information about the detention of a loved one; offending a high ranking government or PFDJ official; or, having a friend or family member accused of a perceived wrong.³³⁷ With respect to actual political dissent, the Government appears to have successfully stifled all forms of opposition, and those who spoke out in the past have generally disappeared, fled or been otherwise silenced.

241. Witnesses also described other reasons for detention more difficult to categorise. For example, an orphan was arrested and detained for three months in 2000 for asking that social benefits in the event of his death be provided to a sibling rather than his parents;³³⁸ a

³³² General Comment 35 on Article 9 of the ICCPR, para. 2.

³³³ General Comment 35, para. 10.

³³⁴ See e.g., *Prosecutor v. Ntagerura*, ICTR-99-46-T, 25 February 2004, para. 702: “imprisonment as a crime against humanity refers to arbitrary or otherwise unlawful detention or deprivation of liberty. It is not every minor infringement of liberty that forms the material element of imprisonment as a crime against humanity...” See also General Comment 32 on ICCPR Article 14, para. 26.

³³⁵ A/HRC/29/42, para. 41. See also A/HRC/29/CRP.1, paras. 684, 726.

³³⁶ A/HRC/29/42, para. 41.

³³⁷ For more detailed information on the latter, see paras.273-281.

³³⁸ TAM003.

witness who was detained in 2011 for asking his supervisor at a construction site why military conscript labourers had not been provided with safety equipment;³³⁹ the wife of a high-ranking member of the PFDJ remains in detention fourteen years after seeking a divorce from her husband;³⁴⁰ a tribal leader was detained in the past five years for asking why the Government was cutting down trees in his region;³⁴¹ an entertainer was detained in 2013 for posting a photo on the internet showing the Eritrean and Ethiopian flags side by side;³⁴² and a man was detained in 2013 because a family member was involved in a property dispute involving a high-ranking general.³⁴³ Finally, many were detained for no discernible reason. A witness who was arrested in September 2001 and detained for thirteen years explained:

“I did not know why I had been arrested... After six months I was asked if I was okay, and I said I wanted to know why I had been imprisoned... In 2014, I was called to the office of Colonel [...]. He asked me if I knew what I had done wrong to [warrant] imprisonment for all these years. I said no. I was asked to write an apology and sign it. At first I refused. The Colonel offered to write the apology, and I later signed it although I did not know what I was signing as I became blind in prison in 2011... I later learned [informally] that I had been imprisoned because, in 2001 I was overheard in a bar telling friends that the G-15 were helpless and shouldn't have been arrested.”³⁴⁴

242. The vast majority of witnesses said they were arrested and detained without due process. They were not arrested on the basis of a warrant. They were not informed of the reasons for their detentions. They were never charged or advised of procedural rights. They were never provided with legal assistance or an opportunity to contact their families. And, once in detention, they were never brought before judicial authorities or advised of the anticipated length of detention.³⁴⁵ This evidence was corroborated by other witnesses who were former security officials and described their role in imprisoning Eritrean citizens,³⁴⁶ as well as a former judge who was arrested for attempting to flee Eritrea because he felt that he could not perform his judicial duties in good conscience.³⁴⁷ According to the latter:

“I was neither tried nor convicted, and I still have no idea how they decide which prison terms to impose. Except during interrogations, I never met any prison officials except for guards, and was never made aware of my rights... After I was released, my appointment as a judge was revoked [without a proceeding].”³⁴⁸

243. In a 2009 televised interview, a Swedish journalist asked President Isaias Afwerki whether a Swedish-Eritrean journalist detained and “disappeared” in 2001 would be tried or released. After asserting that he did not know what crime the journalist had committed but alleging that he was a CIA agent, the President replied that “we don't release. We don't take to trial. We have our own ways to deal with him and others like him. We have our own ways of dealing with that.”³⁴⁹ Asked in a 2016 interview where the G-15 were detained and

³³⁹ TSH001.

³⁴⁰ TAA220.

³⁴¹ TAM050.

³⁴² TBA091.

³⁴³ S092.

³⁴⁴ TAA225.

³⁴⁵ A/HRC/29/42, paras. 41, 48.

³⁴⁶ A/HRC/29/CRP.1, paras. 729-730.

³⁴⁷ S033.

³⁴⁸ S033.

³⁴⁹ President Isaias Afwerki interview with Donald Bostrom. Televised on Sweden's TV4, 29 May 2009 referring to journalist Dawit Isaak.

whether they were still alive, Presidential Advisor Yemane Gebreab responded that “we have decided to handle the issue of the 15... as a national issue. We have decided to go at it in a very different way...”³⁵⁰ The Commission has received no information suggesting that the Government’s position has changed.

244. Courts do exist in Eritrea, and some observers have noted that community courts appear to adjudicate minor local disputes. This is consistent with the evidence of an expert who told the Commission that “the function of ordinary courts is now strictly limited to adjudication of insignificant matters that have no tangible role in protecting citizens from gross human rights violations.”³⁵¹ The Commission recalls that in its first report it found with respect to criminal proceedings that “violations of the right to fair trial and due process of law are particularly blatant. Criminal proceedings disregard the most basic, universally recognised principles in the administration of justice... The judiciary is not in a position to protect the fundamental rights of Eritrean citizens...” This conclusion was based on evidence provided by both victims and former judges.³⁵²

245. Eritrea’s Special Court is a source of particular concern. The Court was established by Proclamation No. 85/1996 in 1996, with jurisdiction over cases of theft, corruption, illegal foreign currency exchange and embezzlement. The Court has also invoked jurisdiction over a number of political cases presented as cases of terrorism or treason. In its first report, the Commission observed of the Court:

“The procedure before the Special Court clearly disregards the most basic safeguards related to due process, including those explicitly provided for under the Transitional Codes. Judges are senior military officers without legal training, directly appointed by the President and directly accountable to him... One judge acts as Prosecutor. There is no right to have a legal representative or to present one’s defence. Trials are not public and there is no public record of the proceedings. Decisions are not published. The Special Court [may] re-open cases that have already been decided by other courts...The decisions, which are final and binding since there is no right of appeal, are reportedly not taken on the basis of the domestic laws in force in Eritrea or established jurisprudence but on the basis of the judges’ opinions.”³⁵³

246. On this basis, the Commission concludes that even those detainees convicted pursuant to judicial proceedings have been deprived of their liberty in violation of fundamental rules of international law.

247. Finally, with respect to the impact of the crime, the Commission recalls that men and women experience detention in unique ways. While conditions of detention in Eritrea may not be discriminatory as such, the special needs of women are not taken into account in a system primarily design for men. For example, the Commission found that women’s particular sanitation and hygiene needs are not being met, causing unnecessary humiliation for female detainees. It also documented that the special needs of pregnant and nursing mothers and women with children were not met, in some instances leading to miscarriage or infant mortality. This results in detention having a discriminatory effect on women.³⁵⁴ Moreover, while women are generally kept in different cells than men, they are almost

³⁵⁰ See, France 24, A Visa for Eritrea the African North Korea, aired on 13 May 2016.

³⁵¹ TBA 229. Corroborated by Daniel R. Mekonnen, TBA227, TSH012. TBA229, S033, S119, TSH012, S110, S092, S012, TCDP018. See also A/HRC/29/CRP.1, paras. 332-336.

³⁵² A/HRC/29/42, paras. 38-40. See also, A/HRC/29/CRP.1, paras. 680-702.

³⁵³ A/HRC/29/CRP.1, paras. 328-329.

³⁵⁴ A/HRC/29/CRP.1, paras. 921, 953-957. See also, *e.g.*, TMM214, TRS216.

always under the responsibility of male guards and prison officers, a situation which put them at increased risk of sexual and gender-based violence.³⁵⁵

Conclusion

248. The arrests and detentions described by witnesses have not been random or isolated. They have not been committed by individuals in their private capacity pursuing personal agendas. On the contrary, the evidence demonstrates that arrests and detentions in violation of fundamental rules of international law, have been and remain, central to an Eritrean leadership policy designed not only to discourage dissent but to suppress independent or critical thought, and instil fear in the population. This in order to maintain control over the Eritrean population in a manner inconsistent with international law. Thus, the Commission concludes there are reasonable grounds to believe that Eritrean officials have committed the crime of imprisonment, a crime against humanity, in a large-scale and methodical manner since May 1991. As noted above, Eritrean officials continue the crime of imprisonment.³⁵⁶

4. Enforced disappearances

The law

249. Article 7(2)(i) of the Rome Statute defines the crime of enforced disappearance of persons as the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State..., followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.³⁵⁷

250. As this crime did not appear in the statutes of earlier international criminal tribunals, the Commission will discuss whether the drafters of the Rome Statute created a new crime or simply codified for the first time an existing crime in customary international law. If the former, the legal principle of *nullum crimen sine lege*³⁵⁸ would apply, meaning that no individual could be held accountable for the commission of this crime prior to 2002 when the Rome Statute entered into force.

251. The first known international criminal conviction was of Field Marshall Wilhelm Keitel by the International Military Tribunal at Nuremberg in 1946³⁵⁹, for, inter alia, issuing the Night and Fog Decree encouraging enforced disappearances.³⁶⁰ Lawyers who drafted

³⁵⁵ A/HRC/29/CRP.1, para. 967. See also *infra*, paras. 267, 308-311.

³⁵⁶ See paras. 97-101, 105.

³⁵⁷ The Commission notes that the definition contained in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance is slightly different. It defines the crime as: "...the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law." Article 24(1) of the Convention further states that: "[f]or the purposes of this Convention, 'victim' means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance."

³⁵⁸ No crime without pre-existing penal law.

³⁵⁹ Judgment of the International Military Tribunal for the Trial of German Major War Criminals Nuremberg, 30th September and 1st October, 1946.

³⁶⁰ Night and Fog Decree (*Nacht und Nebel Erlass*), 7 December 1941. To further implementation of the decree, Field Marshall Wilhelm Keitel issued the following directive: "Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminals do not know the fate of the criminal...The prisoners are, in future, to be transported

and implemented the decree were also convicted in a later case, *US v. Alstoetter*. In that case, the Court stressed that the purpose of the decree and enforced disappearances was to produce “efficient and enduring intimidation” by creating constant fear and anxiety among the families, friends, and relatives.³⁶¹ The Commission observes that the post-World War II tribunals did not specify whether the Night and Fog Decree constituted a war crime or a crime against humanity, and that the perpetrators were found liable for both. Yet, it is clear that while those detained may or may not have been involved in resistance movements, the purpose of withholding information about their fates was to intimidate civilian populations, both at home and abroad. Indeed, Keitel explicitly stated that enforced disappearances would intimidate family members and communities as effectively as capital punishment of those detained but without the bother of judicial proceedings.³⁶² Thus, the Commission is of the view that had the tribunals developed their legal analysis in more detail they would have found that enforced disappearance constituted both a crime against humanity and a war crime.

252. In 1983, the General Assembly of the Organisation of American States adopted a resolution declaring that “the practice of forced disappearance...constitutes a crime against humanity.”³⁶³ The United Nations General Assembly made a similar declaration in 1992.³⁶⁴ In 1996, the Inter-American Convention on the Forced Disappearance of Persons, which established that “the systematic practice of forced disappearances...constitutes a crime against humanity” entered into force. The International Law Commission included the forced disappearances of persons as a crime against humanity in its 1996 Draft Code. On the basis of the above developments, the Commission concludes that enforced disappearance constituted a crime against humanity under international customary law well before the Rome Statute entered into force in 2002, and that this was already the case in 1991. Whether the purpose of enforced disappearance is to remove the individual detained from “the protection of the law for a prolonged period of time” as set out in the Rome Statute, or to create “constant fear and anxiety among the families, friends, and relatives” as set out by the Post-World War II tribunals, need not be determined here as the Commission has found that enforced disappearances in Eritrea serve both purposes.

The facts

253. As set out in the Commission’s first report, Eritrean citizens have “disappeared” into the web of Eritrea’s official and unofficial detention centres, since May 1991.³⁶⁵ Indeed, almost all witnesses reported that those detained were subject to enforced disappearance. Particularly high profile cases of enforced disappearance include: former fighters of the Eritrean Liberation Front, a former rival to the EPLF, detained in 1992; Jehovah’s Witnesses detained in 1994; Muslim teachers in Keren detained in 1994; members of the Afar ethnic group, detained in 1998-1999; the G-15 political critics and journalists detained in 2001; scores of Muslims detained for protesting the appointment of a Mufti in 2007;

to Germany secretly, and further treatment of the offenders will take place here; these measures will have a deterrent effect because: A. The prisoners will vanish without a trace. B. No information may be given as to their whereabouts or their fate.” Nuremberg Judgement, 1 October 1946.

³⁶¹ *US v. Alstoetter* (Justice Trial), Judgement, US Military Tribunal, Nuremberg, 4 December 1947. Opinion and Judgement, Crimes under the Night and Fog Decree. Lawyers involved in drafting and implementing the decree were convicted of both war crimes and crimes against humanity in this case.

³⁶² See Night and Fog decree above.

³⁶³ Resolution 666. See Annual Report of the Inter-American Commission on Human Rights.

³⁶⁴ Preamble of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance. GA Res. 47/133 (1992).

³⁶⁵ A/HRC/29/42, paras. 43-44; A/HRC/29/CRP.1, paras. 774-791.

Djiboutian prisoners of war detained in 2008,³⁶⁶ and those alleged to have participated in the attempted takeover of the Ministry of Information building at Forto, detained in 2013.

254. Many witnesses described the steps that they had taken to obtain information about the fate of their loved ones: they sought information from their immediate local authorities, as well as their personal contacts; they contacted area medical facilities; they knocked on the gates of each known detention centre in their region; some even contacted senior Government officials. And they did so despite the risk to themselves. Witnesses said that friends and family of the disappeared were never able to obtain information officially. That some were able to obtain information unofficially, for example, by bribing a prison guard or from released fellow detainees, does not relieve the Government's obligation to provide official notification.

255. A witness informed the Commission that his father and brother-in-law were arrested in 2004 because they were Jehovah's witnesses. He learned unofficially that his father had been detained at a prison in Asmara and learned of his father's death there in the same manner, stating that "his corpse was not returned to us; we only got to know when we visited the prison to deliver food for him when the prison guard informed us that he has died and buried. They informed us that he died from a disease, nothing else." Of his brother-in-law's detention, the witness who left Eritrea in 2015, added:

"My brother in-law was detained by the police along with my father, but he disappeared from that prison and we don't know where they took him. We looked for him everywhere and asked the Government about his whereabouts but no one answered. His fate is unknown, I don't know if he is alive or not. There is no information about his whereabouts."³⁶⁷

256. While the majority of the cases of enforced disappearances documented by the Commission concern men, Eritrean women are also victims of this crime for the same reasons as men – including real or perceived opposition or threat to the Government – or because of their relationships with real or perceived political opponents, particularly as spouse.³⁶⁸ Given the situation of extreme vulnerability these women are put in because of their removal from the protection of the law, some of these women have been known to suffer of other forms of gender-based violence, including being disproportionately at risk of sexual violence. These women are sometimes detained in isolation for months or years, which lead to further human rights violations.³⁶⁹

257. In addition, female relatives of men who disappeared also suffer from the consequences of such crimes, as they are left behind to pick up the pieces after a disappearance. The victimisation of family members is also greater when men who forcibly disappeared were the breadwinners and heads of household. In these cases, the family structure is disrupted and, due to prevailing gender inequalities, Eritrean women are not only discriminated against, but often negatively affected economically and socially, leading

³⁶⁶ That some Djiboutian prisoners of war have now been released does not change their status as victims of the crime of enforced disappearance, as there was no official information about their whereabouts during the period between June 2008 and March 2016.

³⁶⁷ TSS217.

³⁶⁸ See, e.g., TBA201, TBA215, TMM201. See also A/HRC/29/CRP.1, para. 786.

³⁶⁹ See, e.g., TBA201, TBA215, TMM201, TRS206. See also A/HRC/WGEID/98/2, General comment on women affected by enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012), 14 February 2013, paras. 7-8.

to further human rights violations.³⁷⁰ These women and their children are often left in a vulnerable position, children being sometimes forced to drop school because of the way they are treated in repercussion of the disappearance of their father, and family members of the men who disappeared are often placed under tight control and followed by agents from the national security.³⁷¹

Conclusion

258. The Commission has previously concluded that the Government of Eritrea has imprisoned large numbers of Eritrean citizens in violation of fundamental rules of international law since 1991. In most cases, the Government refused to provide information on the fate or whereabouts of those detained. In doing so, Eritrean officials intended to deprive victims of the protection of the law for a prolonged period of time and create fear among the loved ones of detainees. This, as part of a government policy to maintain control over the Eritrean population in a manner contrary to international law. The Commission thus concludes that there are reasonable grounds to believe that Eritrean officials have committed the crime of Enforced Disappearance, a crime against humanity, in a large-scale and methodical manner since May 1991. As noted above, Eritrean officials continue to commit the crime of enforced disappearance.³⁷²

5. Torture

The law

259. Article 7(2)(e) of the Rome Statute defines torture as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused...

The facts

260. The purpose of the infliction of suffering is not an element of the crime of torture. The Commission nevertheless notes that it has found that the infliction of physical and mental suffering is, and has been, used in Eritrean detention centres to extract information, to inflict punishment, and to create a generalised atmosphere of fear, and by the military to punish and to instil discipline. Nearly all of those who eventually emerged from Eritrea's numerous detention centres and were interviewed by the Commission said they had been tortured.³⁷³ These facts, together with the impunity for acts of torture, demonstrate that torture is a government policy rather than random acts committed by individuals of their own accord.

261. A number of former security officers told the Commission about their participation in the torture of detainees. A former interrogator, who fled Eritrea in 2006, explained that "Your job is to torture and abuse [prisoners] when interrogating them. Some are hung up. It was the first time I heard such screams and I almost vomited."³⁷⁴

262. Witnesses said that torture was used to punish not only alleged perpetrators, but also as a form of collective punishment or reprisal for the alleged wrongs of others. For

³⁷⁰ See, e.g., TBA211, TBA215, TMM202, TRS202, TRS203, TRS215, TSH032, TSH055, TSH073. See also A/HRC/WGEID/98/2, General comment on women affected by enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012), 14 February 2013, para. 12.

³⁷¹ See, e.g., TBA211, TBA215, TMM202, TNR003, TNR010, TRS203, TSH032, S025.

³⁷² See paras. 97-100, 105.

³⁷³ See for example, First report, paras. 54-55, A/HRC/29/CRP.1, paras. 1006-1007.

³⁷⁴ TCDP071.

example, one spoke of an attempted prison break in about 2001 “seven people tried to break out [...] We heard gunshots and the following morning we heard that people had been shot. The following night they rounded us up and beat us up because we did not inform the guards about the attempted escape. [...] We were warned that if we again do not tell them about people fleeing, it would be on us.”³⁷⁵

263. With respect to the techniques used, another former interrogator detailed:

“Torture includes beating with whips, plastic tubes and electric sticks, standing [outside] on a very hot sunny day at noon, tying the hands and feet like the figure of eight, tying the hands and feet backwards, tying to trees, forcing the head down into a container with very cold water, beating the soles of the feet and the palms. In addition, the interrogator is allowed to use whatever fantasy comes to his mind...”³⁷⁶

264. In its first report, the Commission described and illustrated particular torture techniques known as “Helicopter”, “Otto”, “Jesus Christ Crucifixion”, “Almaz”, “Torch”, “Ferro”, and “Gomma”. It also noted the use of electric shocks, mock drowning, mock burials and executions, various forms of sexual torture, and extensive exposure to the scorching sun.³⁷⁷ The Commission’s evidence confirms that these forms of abuse have been intentionally inflicted by Eritrean officials to cause severe pain or suffering, physical and/or mental, to citizens under their control.

265. On the subject of impunity for torture, a witness detained in 2011 stated that:

“the military rules do not allow torture. However, there is no way to complain. To whom should you complain? You cannot oppose the authorities. The prison is isolated. There is no one there, so they can do whatever they want to do. There is a saying in prison: If you scream, only the sea will hear you.”³⁷⁸

266. The Commission notes that, while some methods of torture are used against both men and women, other forms of torture committed against the Eritrean civilian population are gender-specific or disproportionately affect women. As mentioned in greater detail below, rape - including as a form of torture - is predominantly inflicted on women.³⁷⁹ In addition to the physical injuries and other possible consequences such as loss of reproductive abilities, unwanted pregnancy and/or transmission of sexually-transmitted disease such as HIV,³⁸⁰ “the mental pain and suffering inflicted on victims of rape and other forms of sexual violence is often long-lasting due, inter alia, to subsequent stigmatisation and isolation”³⁸¹ as described by several victims of such practice, as well as by

³⁷⁵ TAM075.

³⁷⁶ TCDP036.

³⁷⁷ A/HRC/29/CRP.1, paras. 1022-1047.

³⁷⁸ TBA068.

³⁷⁹ See *infra*, para. 311. The Commission recalls that rape can be constitutive of torture as a crime against humanity. See, e.g., *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 2 September 1998, paras. 596-598; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, paras. 495-496; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, paras. 163, 171; *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, para. 207.

³⁸⁰ A/HRC/29/CRP.1, paras. 1330-1333, 1381-1382. See also *infra*, para. 305 and references cited therein.

³⁸¹ A/HRC/31/57, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 January 2016, para. 51. See also A/HRC/7/3, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 15 January 2008, para. 36.

psychological and medical experts working with Eritrean survivors of such methods of torture.³⁸²

267. Moreover, the Commission collected evidence of the following instances of gender-specific forms of torture committed against women: (a) preventing a lactating mother in detention from breastfeeding or otherwise relieving the build-up of milk in her breasts, thereby causing her immense physical pain; (b) beating pregnant women in military training camps or in the army to induce abortion; (c) forcing a mother to watch her baby being thrown from one person to another like a ball while being interrogated on the whereabouts of her husband who had fled Eritrea; and (d) refusing to provide women in detention with necessary sanitary pads as a form of punishment and humiliation, thereby creating severe mental suffering.³⁸³

268. As mentioned above, the majority of cases of enforced disappearances documented by the Commission concern men.³⁸⁴ Thus, female and child relatives of men who disappeared are also predominantly, but not exclusively, victims of a specific form of torture. Indeed, the Commission heard evidence from such family members whose severe mental pain or suffering is nearly impossible to convey.³⁸⁵ As previously found, “the uncertainty about the fate of their loved-ones is a source of continued anguish and anxiety”,³⁸⁶ which results from the refusal to acknowledge the deprivation of freedom or to give information about the whereabouts of these persons. Not knowing whether the disappeared is still alive, and if so in what state of health and under which conditions, cause a level of mental distress and suffering so severe which, in numerous cases documented by the Commission, rises to the level of torture as a crime against humanity under customary international law.³⁸⁷

³⁸² See, e.g., TMM204, TMM209, TMM212, TMM213. See also *supra*, paras. 21, 24 and references cited therein.

³⁸³ See, e.g., TAA220, TAM074 (“Since I was I was menstruating so much, all the prisoners who had an undershirt, they cut it for me to use it to stop the bleeding. They were not able to help me. They just said this was part of the punishment. When all our under clothes were all cut and finished, the old woman in detention with us had a cloth which she gave me and we cut it. We used it as a pad.”), TBA001 (“Due to the stress and the beatings, the women had their periods, and lots of blood, but they were not allowed any sanitary pad. [...] There was no place to wash, they were very smelly due to the blood [...]. We could not take it anymore, some of us tried to help them. [...] We prepared some sheets of tissues to help them and put a can of water in the toilet so that they could wash and use the sheets as sanitary pads. We also got oil for them [...] to disinfect their wounds. They washed but not too much, so that they would not appear too clean and left their hair dirty, to hide that we were helping them.”), TBA212, TBA221, TMM202, TMM209, TSH015, TSH026, TSH079, S035, S143g. See also A/HRC/29/CRP.1, para. 1076.

³⁸⁴ See *supra*, para. 256.

³⁸⁵ See, e.g., TBA211, TBA215, TCDP078-082, TMM202, TNR003, TNR010, TRS203, S012, S015 (“that is killing me day by day”), S023, S045.

³⁸⁶ A/HRC/29/CRP.1, para. 789. See also *ibid.*, para. 791.

³⁸⁷ Christopher K. Hall and Carsten Stahn, “Article 7: Crime against Humanity”, in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck/Hart/Nomos, 2016 (3rd edition), p. 270, mn. 132, fn. 807 and references cited therein; Working Group on Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearances, para. 4 (“the enforced disappearance causes ‘anguish and sorrow’ [...] to the family, a suffering that reaches the threshold of torture”). See also A/RES/47/133, Declaration on the Protection of All Persons from Enforced Disappearance, 18 December 1992, Article 1(2) (“Any act of enforced disappearance [...] inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, [...] the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.”). Cf. *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T,

269. Finally, the Commission also documented instances of sexual torture committed against men, including beating and applying electric shocks to the sexual and reproductive organs of detainees, tying up a five-litre jerry can or a one-kilo weight to their penis, and in one instance burning the genitals of a detainee with a cigarette lighter.³⁸⁸ In some instances, this was done intentionally to ensure that the men will no longer be able to reproduce. In the words of an Eritrean man who was detained and tortured for trying to flee the country:

“For 6 months, I was tortured every other day, while the other day I was left in a cell with 40 other detainees. A lot of them were also tortured. [...] During the torture, all of them said that they do not want someone like me to have children, as children of persons like me are not welcomed. They said that they will make sure that I cannot reproduce. [...] My left testicle is seriously harmed from the torture and I cannot produce sperm. They used the device applying electricity against my genitals as well as against the palms of my hands and under my feet. [...] I have liquid in my testicles. I cannot reproduce. [...] In Eritrea, they do not want educated men to reproduce; they want to break the heredity. This is why they torture men like they did with me. This is what they said to me when they tortured me.”³⁸⁹

Conclusion

270. The Commission concludes that the use of torture has been an integral part of the Eritrean leadership’s repression of the civilian population. It therefore finds there are reasonable grounds to believe that Eritrean officials have committed the crime of torture, against persons under their control, a crime against humanity, in a large-scale and methodical manner since May 1991. As noted above, the widespread use of torture persists.³⁹⁰

6. Other inhumane acts

The Law

271. Article 7(1)(k) of the Rome Statute sets out, as a separate crime against humanity, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

272. Article 7 of the ACHPR, which states that “punishment is personal and can be imposed only on the offender”, reflects a fundamental principle of all domestic penal systems and customary international law.³⁹¹

Judgement, 17 January 2005, para. 653. For the definition of torture as a crime against humanity under customary international law, see, e.g., *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002, paras. 142-156.

³⁸⁸ See, e.g., TCDP049, TCDP051, TCDP069, TMM204, TMM205, TMM209, TMM212, TMM213, TRS214, TSH026, TSH035, TSS210, TSS217.

³⁸⁹ TMM205.

³⁹⁰ See paras. 97, 102-105.

³⁹¹ See for example, Article 75(4)(b), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), and Article 6(2)(b), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II): “no one shall be convicted of an offence except on the basis of individual penal responsibility.” See also, ICRC Commentary on Article 6(2)(b) of Protocol II: “This sub-paragraph lays down the fundamental principle of individual responsibility; a corollary of this principle is that there can be no collective penal responsibility for acts committed by one or several members of a group. *This principle is contained in every national legislation* (emphasis added). It is already expressed in Article 33 of the fourth [Geneva] Convention, where it is more elegantly worded as follows: ‘No protected person may be punished for an offence

The facts

273. In its first report, the Commission described the ubiquitous practice of punishing Eritreans on the basis of “guilt by association”.³⁹² Numerous victims and witnesses spoke of the punishment of relatives and others associated with (a) government critics, both within Eritrea and outside the country; (b) Eritreans who evaded or deserted military/national service; (c) Eritreans who left the country, (d) Eritreans who escaped from prison; and (e) members of non-authorized religious denominations.

274. Many of these relatives and associates were harassed, fined, deprived of government issued coupons for purchase of staples, and/or had property confiscated. Others were fired or ‘frozen’ from their employment.³⁹³ The Commission considers that while these forms of reprisal violate human rights law they may not be of sufficient gravity to constitute inhumane acts, as a crime against humanity. Of greater concern are the numerous victims who were imprisoned, disappeared or killed because of the alleged wrongs of associates or family members.³⁹⁴ One witness told the Commission that his mother was arrested and detained in 2008 because he had refused to compose songs for the Government.³⁹⁵ Another witness told the Commission that “when my husband left the country [in 2009], they came home and arrested me and my daughter who was 1 year and 8 months old; they put us in prison, in solitary confinement, and I was beaten.”³⁹⁶ Yet another said that his father had been arrested and beaten to death after he left the country in 2013.³⁹⁷

275. A mother apprehended in 2013 while trying to cross the border with her children told the Commission that she was detained for six months with her five children, aged between 8 and 13. The witness stated that “there was not enough food in the prison and my children got sick because of the lack of air and food”.³⁹⁸ A witness who evaded military service in 2007 told the Commission that “I left Eritrea when I was 19 years old... When I left, they imprisoned my mother [...] for two years. When she fell sick, they released her.”³⁹⁹

276. Another witness who escaped Eritrea in 2014 after 13 years in detention said that while in prison he met an 87 year old woman who was detained because her son had fled the country. She was held for seven months and died a month after her release.⁴⁰⁰

277. A political activist in the diaspora spoke about his father’s detention:

he or she has not personally committed”. See also ICRC Commentary on Article 33(1) of Geneva Convention IV stating that the article “embodies in international law one of the general principles of domestic law, i.e. that penal liability is personal in character... This does not refer to punishments inflicted under penal law, i.e. sentences pronounced by a court after due process of law, but penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed.” J. Pictet (ed), Commentary; IV Geneva Convention, Relative to the Protection of Civilian Persons in Times of War, p. 225.

³⁹² A/HRC/29/42, para. 75. A/HRC/29/CRP.1, paras. 466, 747-749, 752, 1140. Submissions and witnesses on this issue this during the Commission’s first mandate included: TCDP005, TCDP006, TSH053, TCDP039, TAM026, TBA061, TSH082, S114a, S114b, S114c.

³⁹³ For a description of the term “freezing” in Eritrea, see A/HRC/29/CRP.1, paras. 357, 361-362, TMM202, TBA215.

³⁹⁴ A/HRC/29/42, para. 75; A/HRC/29/CRP.1, paras. 466, 747-749, 752, 1140; TCDP052, TAA220, TMS201, TMM210, TBA215, TSS220, TRS209.

³⁹⁵ TBA213.

³⁹⁶ TCDP059.

³⁹⁷ TAA217.

³⁹⁸ TBA090.

³⁹⁹ TNR075.

⁴⁰⁰ TAA225.

“My father...was imprisoned for 20 months... He was never taken to a court. We did not know why he was arrested and he was not told the reasons either. [...] He was arrested by intelligence people who asked him about my political activities. He was told to ask me to leave the political organisation that I was affiliated to.”⁴⁰¹

278. A significant number of witnesses said that more than one family member had been detained and “disappeared” for the alleged wrongs of one family member.⁴⁰²

279. Witnesses also explained that family members of those who have left Eritrea are required to pay a substantial fine,⁴⁰³ and that those unable to pay the fines are imprisoned. A witness responsible for collecting these fines until he left Eritrea in 2015 said that the vast majority of those he had been required to pursue could not pay the fine and were thus arrested and detained.⁴⁰⁴

Conclusion

280. With respect to forms of reprisal resulting in detention, enforced disappearance, physical injury or death, the Commission is of the view that they are of a character similar to other crimes set out in the Rome Statute, but that those crimes do not adequately capture the nature of the acts of reprisal described.

281. Thus, the Commission concludes that the forms of reprisal against third parties enumerated above, and in particular, imprisonment, enforced disappearance, and murder, cause great suffering, as well as serious injury to mental or physical health, both to the victim(s) of the reprisal and the individual alleged to have committed a wrong. It further determines that the reprisals are integral to the Eritrean leadership’s campaign to maintain its authority in a manner inconsistent with international law. Thus, the Commission concludes that there are reasonable grounds to believe that the Eritrean officials have committed other inhumane acts, a crime against humanity, in a large-scale and routine manner since May 1991. As noted above, Eritrean officials continue to commit these crimes.⁴⁰⁵

7. Persecution

The Law

282. Articles 7(1)(h) and (2)(g) of the Rome Statute define persecution as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively. They prohibit persecution on political, racial, national, ethnic, cultural, religious, or gender grounds.

283. Not every act of discrimination constitutes the crime of persecution. The persecution must be “in connection with” another international crime within the jurisdiction, for example, of the ICC,⁴⁰⁶ as well as linked to the attack on the civilian population.

The facts

284. In its first report, the Commission found that Muslim scholars and businessmen were subjected to arbitrary detention and disappearance throughout the 1990s, in part

⁴⁰¹ TAM053.

⁴⁰² TBA059, TRS207, TAA225, TCDP059, TCDP052, TBA090, TNR083, TBA056, TMS201.

⁴⁰³ The fines cited by witnesses ranged from 50,000 Nakfa to 2,000,000 Nakfa, suggesting that the “fines” assessed may depend on the wealth of the family.

⁴⁰⁴ TMM210.

⁴⁰⁵ See paras. 109-111.

⁴⁰⁶ Rome Statute, Article 7(1)(h).

because of alleged links to the Eritrean Liberation Front, the precursor of the PFDJ.⁴⁰⁷ In 2007 and 2008, close to a hundred Muslims, including scholars and clerics were arbitrarily detained and subject to enforced disappearance for resisting the government's appointment of the Sunni Mufti.⁴⁰⁸

285. Jehovah's Witnesses have been targeted throughout Eritrean history primarily because of their conscientious objection to military service. In 1994, President Isaias Afwerki announced the revocation of their citizenship, and Jehovah's Witnesses properties were confiscated. They have also been routinely subject to arbitrary detention and enforced disappearance since that time.⁴⁰⁹

286. The Commission has previously concluded that the Government of Eritrea perceives freedom of religion as a threat and for that reason has sought to control religious expression.⁴¹⁰ A 1995 decree on religious institutions emphasises that "religions and religious institutions must not undertake any political activities against the government [or comment] on any political issue." The decree additionally prohibits religious groups from initiating or offering social services, development programmes and charitable assistance.⁴¹¹

287. The Government of Eritrea recognises only four religious denominations, Eritrean Orthodox, Sunni Islam, Roman Catholicism and Evangelical Lutheranism.⁴¹² In 2002, the Government issued a decree requiring that all religious groups register or cease their religious activities.⁴¹³ Despite attempts to register by some groups, the Government has refused to authorise any other religious group. Thus, in effect, the 2002 decree banned the religious groups commonly known as "Pentes". "Pentes" include Pentecostals, Born Again Christians, Seventh-Day Adventists, Jehovah's Witnesses, other Protestants, Baha'is and Buddhists.⁴¹⁴

288. Following the 2002 ban, the Government stepped up its campaign of arbitrary detention and enforced disappearance of members and leaders of unauthorised religious groups that began well before the issuance of the decree.⁴¹⁵ The Commission found that "attacks were not random acts of religious persecution but were part of a diligently planned policy of the Government" which vilified un-authorised religious groups, regularly referring to their leaders and members as foreign state agents.⁴¹⁶

289. A member of the Full Gospel Church, who, from 2003, was detained for four years including two in solitary confinement, said that during his interrogation:

⁴⁰⁷ A/HRC/29/CRP.1, paras. 781-784. Also, TBA224.

⁴⁰⁸ A/HRC/29/CRP.1, para. 784.

⁴⁰⁹ A/HRC/29/42, para. 35; A/HRC/29/CRP.1, paras. 631-638, 876-878.

⁴¹⁰ A/HRC/29/42, para. 35.

⁴¹¹ Eritrea: Proclamation No. 73/1995 of 1995, Proclamation to legally standardize and articulate religious institutions and activities, Articles 2(2) and 6. Unofficial Translation.

⁴¹² First report, para. 35.

⁴¹³ According to the US State Department, International Religious Freedom Report (2014), Eritrea: The Office of Religious Affairs reviews the applications of religious groups seeking official recognition. Applications must include a description of the religious group's history in the country, an explanation of the uniqueness or benefit the group offers compared with other religious groups, names and personal information of the group's leaders, detailed information on assets, a description of the group's conformity to local culture, and a declaration of all foreign sources of funding.

⁴¹⁴ A/HRC/29/42, para. 639, US State Department, International Religious Freedom Report (2014), Eritrea.

⁴¹⁵ A/HRC/29/42, para. 37. A/HRC/29/CRP.1, paras. 639-642, 645, 649-657.

⁴¹⁶ A/HRC/29/CRP.1, paras. 640-642, 645, 649-657.

“...they asked me for the names of the members of the Church. They said I was an agent for the American and Ethiopian Governments. They said I was a spy. They said I would have to accept my guilt and give them full information regarding the contacts with Ethiopia and the United States, aims and objectives, funds and names of members. They said I would never see my kids and my wife [again] if I did not cooperate.”⁴¹⁷

290. Members of authorised religious groups are not exempt from Government interference. While members of officially recognised religious denominations have been allowed to congregate and worship in public, many witnesses believe they are under surveillance. According to one witness who fled Eritrea in 2015:

“In Eritrea, everybody practices in secret except for authorised religions. For these religions, the celebrations are organised in churches and are authorised, but the national security is checking what is said during the mass and other celebrations.”⁴¹⁸

291. For example, in 2014, the Government detained Lutheran priests for six months before their ordination.⁴¹⁹ The Commission has also heard evidence that the Government has been heavily involved in decision-making with respect to the leadership of Muslim and Orthodox religious denominations.⁴²⁰ While the targeting of members of authorised religious groups may not constitute the crime of persecution, it does further illustrate the degree to which the government fears all forms of independent religious expression.

292. Afar and Kunama are minority, pastoralist ethnic groups. The Afar inhabit an area which is split between Southern Eritrea, Eastern Ethiopia and Northern Djibouti. The Kunama live in an area covering Northern Eritrea and Northern Ethiopia. In its first report, the Commission noted that the border war with Ethiopia prompted the emergence of new opposition movements based on Ethiopian territory including the Red Sea Afar Democratic Organization and the Democratic Movement for the Liberation of the Eritrean Kunama which sought the independence of the Afar and Kunama minorities both in Ethiopia and in Eritrea.⁴²¹ This resulted in suspicions that all Kunama and Afar intended to betray Eritrea. Kunama were also suspected of collaboration with Ethiopia because unlike other ethnic groups, they did not flee their villages during the 1998 Ethiopian occupation of Kunama areas in Eritrea. As a result, the government of Eritrea engaged in a campaign of killings, arbitrary detentions and enforced disappearances targeting Afar and Kunama civilians, in particular during the period 1998-2001. Many rapes were also reported.⁴²² The Commission also received reliable but uncorroborated information about additional killings and disappearances of Kunama civilians in 2007.⁴²³

293. The Commission received a report about the arbitrary arrest and enforced disappearance of at least 52 Kunama civilians in late 2015, and separate information about the forcible eviction and, in some cases, forced relocation, of Afar civilians in 2015 and 2016. These reports require further investigation.

Conclusion

294. The Commission concludes that there are reasonable grounds to believe that Eritrean officials have and still continue to deprive Eritrean “Pentes”, and some Muslims, of

⁴¹⁷ TBA061.

⁴¹⁸ TLA016.

⁴¹⁹ A/HRC/29/CRP.1, para. 662.

⁴²⁰ A/HRC/29/CRP.1, paras. 184, 664, 666; TAA224.

⁴²¹ A/HRC/29/CRP.1, para. 146.

⁴²² A/HRC/29/CRP.1, paras. 453, 854, 1117-1124, 1156-1168, 1171.

⁴²³ A/HRC/29/CRP.1, paras. 1118-1120.

fundamental rights contrary to international law on religious grounds. Muslims were targeted, in particular in the 1990s, in 2007-2008, and after the Forto incident in 2013. Jehovah's Witnesses have been targeted since May 1991, and other non-authorised religious denominations since no later than 2002.

295. The Commission also has reasonable grounds to believe that Eritrean officials have intentionally and severely deprived Eritrean Kunama and Afar of fundamental rights contrary to international law on ethnic grounds. The Commission has corroborated evidence that the Afar and Kunama were targeted, at a minimum, in the period between 1998 and 2001. It has also received uncorroborated information that both ethnic groups were persecuted during other periods as well, and that such persecution persists.

296. Persecution on both religious and ethnic grounds has been an integral part of the Eritrean leadership's plan to maintain its authority in a manner contrary to international law. Thus, the Commission finds that Eritrean officials have committed the crime of persecution, a crime against humanity, in a large-scale and routine manner since May 1991. As discussed above, the Commission finds that, at a minimum, the persecution of members of non-authorised religious denominations persists.⁴²⁴

8. Rape

The law

297. Rape has been criminalised as a distinct crime against humanity under customary international law for decades.⁴²⁵ Article 7(1)(g) of the Rome Statute also criminalises rape as a separate crime against humanity.

298. The definition of rape as a crime against humanity under customary international law as identified by the *ad hoc* international criminal tribunals has evolved from a conceptual into a more mechanical definition, including first the concept of coercion before concentrating on the concept of consent.⁴²⁶ According to the Elements of Crimes of the

⁴²⁴ See paras. 114-116.

⁴²⁵ See, e.g., Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity), 20 December 1945, Article II(1)(a); *Trial of General Tomoyuki Yamashita*, United Nations War Crimes Commission, Law Report of Trials of War Criminals, Vol. IV, Case No. 21, United States Military Commission, Manila, 8 October-7 December 1945, p. 7; The International Crimes (Tribunals) Act, 20 July 1973, Article 3(2)(a). See also *amicus curiae* brief submitted by 16 international experts in the treatment of sexual violence under international criminal law: *Prosecutor v. Hissène Habré*, Extraordinary African Chambers, Rape and Other Forms of Sexual Violence as Crimes Against Humanity, War Crimes, and Torture Under Customary International Law: *Amicus Curiae* Brief of the Human Rights Center at the University of California, Berkeley, School of Law, and International Experts on Sexual Violence Under International Criminal Law, 8 December 2015, Annex A, paras. 62-68; Valerie Oosterveld and Patricia Viseur Sellers, "Issues of Sexual and Gender-Based Violence at the ECCC", in Simon M. Meisenberg and Ignaz Stegmüller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law*, T.M.C. Asser Press, 2016, pp. 339-341, 344.

⁴²⁶ See, e.g., *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 2 September 1998, paras. 598, 688 ("The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."); *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 185 ("the Trial Chamber finds that the following may be accepted as the objective elements of rape: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person."); *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 460 ("the *actus reus* of

ICC, the two non-contextual elements of rape as a crime against humanity under Article 7(1)(g) of the Rome Statute are: (a) “The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body”; and (b) “The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”.

299. The concept of “invasion” in this mechanical definition is gender-neutral as to the victim and the perpetrator.⁴²⁷ Footnote 16 of the Elements of Crimes of the ICC further specifies that “[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity”. However, outside of this specific situation, the Elements of Crimes of the ICC do not refer to the absence of consent on the part of the victim and, therefore, this does not have to be demonstrated.⁴²⁸

The facts

300. The Commission conducted interviews detailing incidents of rape against women, girls, and men.⁴²⁹ As explained in more detail below, the evidence collected indicates that instances of rape which can be legally qualified as a crime against humanity, given that they were committed as part of a widespread or systematic attack directed against the Eritrean civilian population, occurred in two distinct circumstances. The first is in military training centres and in the army, the second is in detention. A third occurrence concerns rape of women and girls from the Afar ethnic minority by military officers.⁴³⁰ However, given its limited resources, the Commission has not been able to investigate further these instances of rape and to establish whether these rapes were also committed as part of a widespread or systematic attack directed against the Eritrean civilian population. Accordingly, the Commission is of the view that its inquiry may have only partially captured the extent and details of rape as a crime against humanity.

a. Rape in military training centres and in the army

301. Women are at a disproportionate risk of discrimination and violence within the military/national service and in the army and are targeted for sexual abuse on account of their gender. As described above in the section on enslavement as a crime against

the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim”); *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002, paras. 128-130; *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-01-64-A, Judgement, 7 July 2006, paras. 151-157.

⁴²⁷ See also Elements of Crimes of the ICC, fn. 15.

⁴²⁸ See *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014, para. 965. See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 105.

⁴²⁹ With respect to men, for the reasons explained in more detail above, the Commission is of the view that its inquiry may have only partially captured the extent and details of rape against men. See *supra*, paras. 27-30.

⁴³⁰ See, e.g., TSH050, TSH053, TSH056, TSH072, TSH068.

humanity, many women in military training centres, as well as to a lesser extent in the army, are raped by military officials and trainers.⁴³¹

302. The extent of the rape in the military/national service is best described by a male military officer:

“Sexual violence and rape are very common in the national and military service especially against recruits; it also happens a lot when soldiers are conducting raids. [...] They take the young ladies there as wives and they have children by them and discard them. They do this to many recruits; when the women don’t agree they force them and threatened them sometimes [...] in the public; they are forced when they refuse to have sex with the commanders. It is not just the commanders but even common soldiers do that, but the commanders start this first; they select the women first. When new ones arrived they do the same thing to them. [...] I remember that one lady refused to have sex with the commander; after a while the commander got drunk and put the lady at gunpoint and raped her. There are many girls who were raped like this during training or when already in services. All these sexual violence crimes took place in Sawa military training centre [during a period of six years until I left the national service]. I can’t give you an estimate of the number of victims but they are many; they complained to other colleagues about the rape but not to the commanders. On several occasions the women raised the problems with the overall commander of the Sawa military training school [...]; all times the commander responded that please deal with this issues directly with the persons you have problem with. The reason for not addressing this problem against the perpetrators is very simple; because these commanders know each other so nothing happens when reported. They also reported the problem to [...] at the cadre school but he responded that people should take care so that these things should not backfire in the public. [...] At the time we received many cases and complaints [...]; you will imagine that if this bad things happened in the main training centre and nothing happen[s], what do you think is happening in the remote training camps? [...] I [am aware] of information from all training centres across the country [...]. Very bad things happened to these women; women get pregnant and bore children. They are told to return home and no one takes care of the children and the women. These women don’t have a future; some have ended up in the streets as prostitutes just to earn money to feed their children and themselves. Most of these women are released from the national service without paying them salary or anything.”⁴³²

303. The instances of rape in military training centres and in the army concern the penetration of the vagina of the victim by the penis of the perpetrator. In some cases, victims reported being raped only once,⁴³³ but the vast majority of the survivors reported being raped multiple times, including for a certain length of time.⁴³⁴ Some also reported being raped by one perpetrator for a certain length of time before then being raped by another perpetrator during another time period.

⁴³¹ See also, *e.g.*, TAA202, TAA208, TAA214, TAA215, TAA216, TAM003, TAM018, TBA001, TBA002, TBA012, TBA217, TBA221, TCDP004, TCDP005, TCDP007, TCDP022, TCDP068, TCDP071, TFM004, TMM202, TMM204, TMM209, TMM212, TMM213, TMM216, TNR045, TNR084, TRS201, TRS208, TRS215, TSH017, TSH018, TSH030, TSH079, TSH081, TSH095, TSS205, TSS224, S047, S148.

⁴³² TSS205.

⁴³³ See, *e.g.*, TMM214.

⁴³⁴ See, *e.g.*, TBA221.

304. For example, one young woman assigned to a specific military camp for six months described her ordeal:

“[A military officer] came every night [...]. I had no interest, no feeling for him. He would just come and rape me. He raped me and then went [...]. I always lost when I tried to oppose [him]. He would start to kick me, so I let him finish quickly and leave [...]. So later, I did not resist to avoid more problems. I had no sexual feelings, I was praying to God to take me in his hand, for that pain to stop, I wanted to die. I had no feeling for [that military officer], I hated him, during the intercourse, I had no vaginal secretion, it was scratching, it hurt.”⁴³⁵

305. Moreover, in most instances, the perpetrators did not use condoms, which in some cases led to unwanted pregnancies and/or transmission of sexually-transmitted diseases, such as HIV.⁴³⁶ Finally, in many occasions, rape resulted in physical and psychological impairment.⁴³⁷ In light of the above, the Commission is satisfied that the first element of rape as a crime against humanity is met given that these women were vaginally penetrated by the sexual organ of the perpetrator(s).

306. In addition, given that these instances of rape were committed in the military/national service or in the army, i.e. by taking advantage of an environment of control and coercion where military officials use the military hierarchy and structure according to which subordinates are forced to obey and perform the orders given by their superiors, and are – in many instances – often committed by force, threat of force, or coercion caused by fear of punishment, abuse of power, and/or psychological oppression, the Commission finds that the second element of rape as a crime against humanity is also met.⁴³⁸

307. Finally, the Commission finds that, given the context in which these acts of enslavement are committed, namely during the national service and/or in military training centres or camps, they are part of the widespread or systematic attack committed against the Eritrean civilian population.

b. Rape in detention

308. While the vast majority of cases of rape in detention concern the penetration of the vagina of the victim by the penis of the perpetrator,⁴³⁹ the Commission also documented other forms of rape, including: (a) objects, such as pens, being inserted in the anus of women;⁴⁴⁰ (b) metal rods being inserted in the vagina of a woman up to her womb;⁴⁴¹ (c) male detainees being raped by male perpetrators;⁴⁴² as well as (d) male detainees being forced to have sex with other male detainees.⁴⁴³ In some cases, victims reported being raped only once by one single perpetrator.⁴⁴⁴ In other instances, survivors provided evidence

⁴³⁵ TBA221.

⁴³⁶ A/HRC/29/CRP.1, paras. 1330, 1332, 1382. See also, *e.g.*, TAA215, TAM003, TBA012, TBA091, TBA212, TBA221, TCDP004, TCDP005, TCDP022, TCDP068, TMM214, TNR001, TNR009, TRS208, TSH018, TSH030, TSH075, TSH079, TSH081, TSH095, TSS205, TSS224, S047.

⁴³⁷ A/HRC/29/CRP.1, para. 1333.

⁴³⁸ See *supra*, para. 230.

⁴³⁹ See, *e.g.*, TAA220, TMM208, TSS220.

⁴⁴⁰ See TSH035, TCDP037. See also A/HRC/29/CRP.1, para. 1075.

⁴⁴¹ See TRS207.

⁴⁴² See TBA054. See also A/HRC/29/CRP.1, para. 1075.

⁴⁴³ See TBA054. See also A/HRC/29/CRP.1, para. 1075.

⁴⁴⁴ See, *e.g.*, TMM207.

about being raped multiple times or gang raped, including over extended period of time.⁴⁴⁵ For example, one woman detained in a police station reported that:

“[The chief of a particular police station] frequently called me out of [my] cell and raped me. I stayed there for [nearly] six months and nearly every day he raped me. He penetrated my vagina with his penis. There were two other men who did similar things to me. They ejaculated inside me. That was very painful. Even after I was released I was not sure I would survive. They would take turn. While one was raping me, the other would wait outside and come one after the other. [The chief of that particular police station] raped me every day. The two other came every few days, it depends. The names of the two other persons who raped me are [...]. They are also police officer[s] but [...] is the chief of that police station. When [he] came to rape me, if I would refuse, he would slap me and ask why I would refuse. I responded that I want to protect myself and do not want to have this kind of intercourse with anyone. He beat me and raped me. After he finished, he [threatened] me not to say anything. [He] told me that if I would report the rapes he would find me wherever I go and kill me. I asked [him] about my fault/wrongdoings. He told me to stay here and that I would learn about my problems. None of them use[d] condoms.”⁴⁴⁶

309. All of the above-mentioned cases of invasion meet the first element of rape as a crime against humanity, which is also satisfied when the perpetrator does not engage in the act of penetration himself/herself but causes or prompts someone else to be penetrated⁴⁴⁷ such as male detainees being forced to have sex with other male detainees.⁴⁴⁸

310. In addition, given that these instances of rape are committed in detention, i.e. by taking advantage of the coercive environment of detention centres, and are – in most cases – often committed by force or threat of force, the Commission is of the view that the second element of rape as a crime against humanity is also met.

311. Although the Commission does not consider that there is an official governmental policy promoting rape, the frequent incidences of rape in detention – often carried out as a form of torture to intimidate, punish, humiliate and/or instil additional fear among the population⁴⁴⁹ – committed by, or at the instigation of, detention officials form part of the overall widespread and systematic attack against the Eritrean civilian population. Moreover, like in the military/national service and in the army, cases of rape in detention are a direct and foreseeable consequence of the general environment of impunity and unchecked power that prison guards, military or police officers, and other detention officials enjoy.

⁴⁴⁵ See, e.g., TCDP037, TLA030, TMM208, TSH035. See also A/HRC/29/CRP.1, para. 1075.

⁴⁴⁶ See TMM208.

⁴⁴⁷ See *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014, para. 963.

⁴⁴⁸ *Prosecutor v. Ranko Češić*, Case No. IT-95-10/1-S, Sentencing Judgement, 11 March 2004, paras. 13-14, 33, 35-36 (where the accused plead guilty – and was convicted – of rape as a crime against humanity for forcing two brothers detained to perform fellatio on each other). Instances of rape where male detainees are forced to have sex with other male detainees would definitely qualify as rape as a crime against humanity under customary international law under the definition of rape identified in the *Akayesu* case given its wider ambit which would include rape between two victims. See *supra*, fn. 426. See also Valerie Oosterveld and Patricia Viseur Sellers, “Issues of Sexual and Gender-Based Violence at the ECCC”, in Simon M. Meisenberg and Ignaz Stegmüller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law*, T.M.C. Asser Press, 2016, pp. 336-338.

⁴⁴⁹ See *supra*, para. 266.

Conclusion

312. The Commission documented many instances of rape, repeated rape, and gang rape committed by military officials and trainers as well as by detention officials against a significant number of women and a few men. These rapes were committed by taking advantage of a coercive environment and, in many cases, by force or threat of force. Moreover, these rapes were part of the widespread and systematic attack committed against the Eritrean civilian population. In light of the above, the Commission is of the view that there are reasonable grounds to believe that rape, a crime against humanity, has been committed in Eritrea in military training centres and in the army, as well as in detention, since 1991.

9. Murder*The Law*

313. The international prohibition against murder is reflected in Article 7(1)(a) of the Rome Statute. The Elements of Crimes of the ICC states that murder is synonymous with “kill[ing] one or more persons,” and that the term killing is interchangeable with “causing death.”⁴⁵⁰ Article 30(2)(b) of the Rome Statute establishes that the requisite intent may be found, inter alia, where “...that person...is aware that [the consequence] will occur in the ordinary course of events”.

The facts

314. In its first report, the Commission documented a number of state-sponsored individual and mass extrajudicial executions since May 1991, including the killing of disabled war veterans in July 1994 at Nefasit, the killing of approximately 150 Muslims at Keshet in June 1997, the killing of conscripts at Adi Abeito prison camp in 2004, and a mass killing at Wi’a training camp in 2006.⁴⁵¹ In addition to the high-profile executions, witnesses described more routine individual state-sponsored killings. For example, one stated that:

“In 2004, a soldier who was sick with malaria went to the hospital but the doctor refused to give him medication and started beating him. The soldier was angry and shouted at him. Then, the doctor went to the leader of the Division...who told the doctor to kill the sick soldier. The doctor took his gun and shot him dead. After several months a member of the soldier’s family [arrived]. He was a colonel himself and told the leader of the Division “I know who killed [my family member]”. When peace comes you will be punished.”⁴⁵²

315. The Commission has also heard evidence about an official order to shoot-to-kill Eritreans attempting to flee the country at both land and maritime borders. The information about this policy has not always been consistent. A number of witnesses believed that the policy has been implemented in a haphazard manner depending on the particular regional commander or border guard. A few said that the policy was more rigorous with respect to those attempting to cross into Ethiopia than into other countries. A former border guard indicated that the policy has been unofficially relaxed in recent years and that border guards are now expected to shoot-to-wound rather than shoot-to-kill those seeking to leave, and that those wounded are then arrested and imprisoned. He and other witnesses confirmed

⁴⁵⁰ Elements of Crimes of the ICC, Article 7 (1)(a)(1) including footnote 7.

⁴⁵¹ First report, paras. 45-46, A/HRC/29/CRP.1, paras. 1106-1127, 1129-1131. See also, TBA224, TSS219.

⁴⁵² TCDP014.

that numerous persons were killed when the policy was first initiated.⁴⁵³ However, another former border guard said he had been ordered to shoot-to-kill as recently as 2015.⁴⁵⁴ The Commission also documented incidents of border killings in 2014, including one in which 40 persons were killed.⁴⁵⁵

316. The Commission has also documented extrajudicial killings that have taken place during military round-ups called Giffas.⁴⁵⁶

317. In addition, numerous witnesses described deaths resulting from torture and the inhuman conditions associated with detention centres and military service.⁴⁵⁷ For example, one witness stated of his time in military training in 2007-2008:

“Many people died in the [military detention] cell because it was too hot. We were appointed to bury the bodies. We just dug up holes in the field. [...] Many people died during our training round. Many fell sick, some were shot [for attempting to flee]. [...] there were no investigations into why so many people fell sick and died. No one came.”⁴⁵⁸

318. Another witness described the death of a friend during military training in 2007:

“The day after we arrived at Wi’a, we were made to trek about 15 kilometers to collect and bring firewood. On the way back, a young man named [...] was tired and sick and could not carry his load. Guards beat him to force him to continue trekking until he finally fell on the ground. The guard threatened that he would suffer for his tricks when he reached the camp. Four people carried [my friend] to the camp. On arrival at the camp, the guard tied him up using the ‘helicopter’ technique, and beat him severely saying that he tried to cheat. He left [my friend] tied up on the burning ground. Soon after [my friend] vomited blood through his mouth and nostrils and died on the spot.”⁴⁵⁹

319. With respect to the conditions of military training at Wi’a, a witness told the Commission that when he underwent training there in 2009, 526 conscripts died over a period of three months.⁴⁶⁰ While other witnesses said that the high number of deaths at Wi’a during that period eventually resulted in the temporary closure of the training centre, the cause of these deaths was never ascertained, and the victims were buried without funerals in unmarked graves.

320. Yet another witness described the death of her father-in-law in 2007 for asking about his son’s detention:

“The father of my husband tried to ask about [his son’s detention and the whereabouts of his son’s property]. [The high ranking government official] and his people were afraid he would bring problems, so they imprisoned my father-in-law too. After three

⁴⁵³ TMM216, TBA224, TBA20., TBA202, TBA204, TAA206, TAA207, TAA210, TMM204, TMM216,

⁴⁵⁴ TSS211.

⁴⁵⁵ TNR010, TNR084, TAM051.

⁴⁵⁶ A/HRC/29/CRP.1, para. 1107.

⁴⁵⁷ A/HRC/29/CRP.1, paras. 983-996, 1091-1092. TSS209, TSS221, TRS209, TAA210, TBA203, TBA208, TBA210, TBA212, TAA216, TAA218, TBA214, TMM210, TMM214, TSS213, TRS201, TRS207, TAA222, TBA216.

⁴⁵⁸ TBA210.

⁴⁵⁹ TCDP026.

⁴⁶⁰ TBA091.

months in detention, he became sick and died. Because of his age and high blood pressure he was unable to handle the hot temperatures. He was 75 years old.”⁴⁶¹

321. Another witness told the Commission that he had been arrested and detained from 2010 through 2012 in the political section of an Eritrean prison in a very small cell which held 13 inmates. The witness stated that “there was no ventilation system; it was called the ‘oven’. While I was in that prison more than 15 people passed away. Most died as result of the poor conditions in the facility.”⁴⁶²

322. Describing military training that took place on the Red Sea in 2013, one witness explained:

“They threw us in the sea. Most of the trainees didn’t know how to swim. We told the soldiers that most couldn’t swim, and that they must teach us first and then send us out to sea. The trainers said no. When someone was drowning, the soldiers said ‘just let them be, they are pretending so they can get out of doing this exercise.’ The first time we went out five people drowned [ten conscripts died in all over one month]. We wanted to gather to commemorate the people who died, but our trainers said this is nothing. If one man dies per day, then it’s a real tough course. No action was taken to bring to justice or punish those who did this”⁴⁶³

323. The Commission considers that such deaths demonstrate a callous indifference to human life on the part of Eritrean officials, that the deaths were a foreseeable consequence of the conditions the victims were subject to, and thus that Eritrean officials are also liable for these deaths.

Conclusion

324. The Commission concludes that murder has been in some instances, part of the government’s campaign to maintain its control in a manner inconsistent with international law, and in others, a foreseeable consequence of the campaign. As discussed above, the government remains responsible for a large number of Eritrean deaths.⁴⁶⁴ There are therefore reasonable grounds to believe that Eritrean officials have committed murder, a crime against humanity, in a methodical manner since May 1991. As noted above, the commission of this crime persists.⁴⁶⁵

V. Accountability

325. The Commission recalls that, in its resolution 29/18, the Human Rights Council extended the mandate of the Commission of Inquiry to investigate gross violations of human rights in Eritrea with a view to ensuring full accountability, including where these violations may amount to crimes against humanity.

A. Institutional accountability

326. Eritrea is an authoritarian State. Despite some attributes of a democratic State, including a 16-member cabinet, a judicial system and regional governors and assemblies, political power in Eritrea is concentrated in the hands of the President and of a small and

⁴⁶¹ TRS207.

⁴⁶² S006.

⁴⁶³ TRS212.

⁴⁶⁴ See paras. 131-136.

⁴⁶⁵ See para. 136.

amorphous circle of military and political loyalists. The President appears to maintain shadow structures of advisers who make policy decisions outside the formal governing structures. Government ministers, who are not in the President's inner circle, do not debate or create policy, but merely enforce executive will. The leading members of the ruling PFDJ party and the commanders of the security forces appear to report directly to the President, and each group has responsibilities parallel to those of appointed government officials. More generally, individual proximity to the President is a more reliable indicator of de facto influence and control than official title.

327. In assessing de facto power in Eritrea and its relationship to the gross human rights violations and crimes described in the present report, the Commission bears in mind that Eritrea is a highly militarized society, and that military and security personnel are disproportionately represented within the President's inner circle. Both the National Security Office and the military have a central role in affairs of State. The Commission has reasonable grounds to believe that the National Security Office is responsible for most cases of arbitrary arrest, enforced disappearance and torture in official and unofficial detention centres.

328. The military in Eritrea is responsible for the numerous abuses associated with the Government's military service programmes, including in training camps and military detention centres and at Eritrean borders. Military detention centres reportedly exist wherever there is a military encampment. Military commanders are also responsible for the use of conscripts as forced labour. It is the Commission's understanding that the commanders of the country's five military zones, all generals, hold considerably more power than civilian governors, given that they control economic assets and military prisons in their zones.

329. The distinction between the PFDJ and the Government is blurred at the highest levels, given also that the President is Secretary-General of the party. The PFDJ leadership reportedly controls parastatal enterprises in Eritrea, and thus benefits from the use of conscript labour in them.

330. The police appear to have less influence, although some witnesses described cases of illegal detention in police stations. That government ministers tend to have less de facto power than the military, national security and the President's inner circle does not preclude the possibility that individual ministers closely associated with the President could be liable for the acts described in the present report.

B. Individual accountability

331. Following a review of its evidence, the Commission is satisfied that there are reasonable grounds to believe that particular individuals, including officials at the highest levels of the State and the PFDJ, and commanding officers, bear responsibility for crimes against humanity and other gross human rights violations.

332. In order to assist future accountability mechanisms, the Commission compiled files on a number of individuals it has reasonable grounds to believe bear responsibility for the crimes it has documented. These files include the names of suspects, information about the potential suspect's position and a summary of evidence compiled by the Commission relating to the potential suspect. With regard to individual statements, the Commission did not include any information that could identify witnesses. In compiling the files, the Commission bore in mind that, under customary international law, there are various types of liability for the crimes described above. Liability may be attached not only to those who commit crimes directly but also to individuals who plan, order or instigate them. In addition, both civilian and military superiors may be liable for crimes committed by their

subordinates. Future accountability mechanisms may wish to consider whether a joint criminal enterprise existed during the period covered by the Commission in its reports, or any part of that period; for that reason, the Commission also took into consideration information on individuals who may have contributed to such an enterprise. Lastly, the Commission recalls that individuals who aid and abet the execution of a crime may themselves also be liable for the crime, and that providing such assistance may take a variety of forms.

333. The files and other relevant information are safeguarded in the Commission's confidential database. The Commission has requested that the United Nations High Commissioner for Human Rights grant access to information for purposes of accountability where confidentiality and protection concerns have been addressed.

334. In addition, the Commission compiled files on victims of enforced disappearances, which contain, *inter alia*, information on their whereabouts. The files will be handed over to the Working Group on Enforced or Involuntary Disappearances for further action where confidentiality and protection concerns have been addressed.

C. Accountability mechanisms

335. At the World Summit of Heads of State and Government in 2005, world leaders reaffirmed that each individual State has the primary responsibility for protecting its population from genocide, war crimes, ethnic cleansing and crimes against humanity.⁴⁶⁶

336. Similarly, the Rome Statute recognizes that the exercise of national jurisdiction is not only a right but also a duty of States. Given its findings with regard to the rule of law in Eritrea, however, the Commission is of the view that, without substantial institutional and legal reform, there is no genuine prospect of the domestic judicial system holding perpetrators to account in a fair and transparent manner. Far-reaching reform would enhance the viability of national accountability mechanisms.

337. Many States Members of the United Nations could exercise jurisdiction over Eritreans accused of crimes against humanity who are in their territories, in accordance with principles of universal or passive personality jurisdiction. Pursuing such prosecutions would be consistent with the principles set out in the preamble of the Rome Statute which, *inter alia*, recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

338. The Commission concludes that neither a hybrid tribunal nor a truth commission would be a viable option in the current circumstances. A regional mechanism could, however, be created.

339. Eritrea is not a State party to the International Criminal Court. The Court may therefore exercise jurisdiction only over the crimes committed in Eritrea if the State were to ratify the Rome Statute or if the Security Council were to refer the situation in Eritrea to the Court.

340. Lastly, acting under Chapter VII of the Charter of the United Nations, the Security Council could also impose targeted sanctions on individuals suspected of international crimes.

⁴⁶⁶ See General Assembly resolution 60/1.

VI. Conclusions and recommendations

A. Conclusions

341. The Commission finds that there are reasonable grounds to believe that crimes against humanity have been committed in Eritrea since 1991. Eritrean officials have engaged in a persistent, widespread and systematic attack against the country's civilian population since 1991. They have committed, and continue to commit, the crimes of enslavement, imprisonment, enforced disappearance, torture, other inhumane acts, persecution, rape and murder.

342. In the absence of a constitution, an independent judiciary or democratic institutions in Eritrea, the Commission has found no improvement in the rule of law. The Commission has heard of no plans to hold national elections. While the Commission was informed about the establishment of a committee to consider drafting a new constitution, it has received no further details.

343. The Commission finds that the gross human rights violations it documented in its previous report persist, including arbitrary detention, enforced disappearances, torture, killings, sexual and gender-based violence, discrimination on the basis of religion and ethnicity, and reprisals for the alleged conduct of family members. In addition, many of those subjected to enforced disappearance in the past remain unaccounted for.

344. While the Commission notes the State's increased engagement with the international community, there is no evidence of progress in the field of human rights. Human rights violations are cited as the main motivating factor for departure by the consistently large number of Eritreans fleeing the country, including by the rising number of unaccompanied minors.

345. Eritreans continue to be subjected to indefinite military/national service. The Government has recently confirmed that there are no plans to limit its duration to the statutory 18 months. Conscripts are drafted for an indefinite duration of service in often abusive conditions, and used as forced labour.

346. Political power and control are concentrated in the hands of the President and a small circle of military and political loyalists. The Commission has reasonable grounds to believe that the top levels of the National Security Office and the military are responsible for most cases of arbitrary arrest, enforced disappearance and torture. Military commanders are also responsible for abuses committed in the context of the Government's military service programmes and at Eritrean borders. The leadership of the party and the military also benefit from the use of military/national service conscripts as forced labour.

B. Recommendations

347. **The recommendations made by the Commission in its first report remain valid. The Commission highlights below those recommendations that are specifically relevant to its new mandate, and makes new ones.**

1. Government of Eritrea

(a) *General recommendations*

348. **The Commission of Inquiry recommends that the Government of Eritrea:**

(a) **Implement fully and without delay the Constitution of 1997; any amendments thereto should be made in a transparent and participatory manner, and take into account the State's international human rights obligations;**

(b) **Respect the obligations prescribed by the international human rights treaties to which Eritrea is a party, and ratify and implement other international human rights instruments, including the International Convention for the Protection of All Persons from Enforced Disappearance, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption.**

(b) *Governance and administration of justice*

349. **The Commission also recommends that the Government of Eritrea:**

(a) **Ensure the separation of powers among the legislature, the executive and the judiciary, and establish the rule of law;**

(b) **Adhere to the principles of the supremacy of law, equality before the law, accountability to the law and legal certainty, and procedural and legal transparency;**

(c) **Establish without delay an independent, impartial and transparent judiciary, and ensure access to justice for all;**

(d) **Ensure that court processes, including judgements, are transparent, open and accessible to the public, and transmitted to accused persons immediately;**

(e) **Bring into force the Penal Code, the Criminal Procedure Code, the Civil Code and the Civil Procedure Code of May 2015, and amend them to reflect all international human rights standards;**

(f) **Allow for the creation of political parties, and hold free, fair and transparent democratic elections at all levels;**

(g) **Establish an independent national human rights institution with a protection mandate, including to investigate human rights violations;**

(h) **Permit human rights defenders and independent civil society organizations, including gender-specific organizations, to operate without interference.**

(c) *Military/national service*

350. **The Commission further recommends that the Government of Eritrea:**

(a) **Discontinue indefinite military/national service by limiting it to 18 months for all current and future conscripts, as stipulated by the Proclamation on national service;**

(b) **Put an immediate end to torture and ill-treatment, sexual violence and the enslavement of conscripts;**

(c) **Provide conscripts with humane living conditions, including with regard to food, health care and shelter;**

(d) **Cease the practice of using conscripts, detainees and members of the militia and reserve army as forced labour;**

(e) Establish an independent complaint mechanism for conscripts to raise allegations of ill-treatment and to obtain redress;

(f) Ensure that military commanders responsible for human rights abuses are held accountable.

(d) *Arbitrary arrest, detention and enforced disappearances*

351. The Commission recommends that the Government of Eritrea:

(a) Put an end to the practice of arrests and detention carried out without legal basis, and release immediately and unconditionally all those unlawfully and arbitrarily detained;

(b) Provide information on the fate and whereabouts of all those deprived of physical liberty;

(c) Review all cases of detainees who have been convicted of an offence in judicial or similar proceedings but were not accorded the procedural rights guaranteed in the international instruments to which Eritrea is party;

(d) Provide immediately information on all prisoners of war, and release them as soon as possible;

(e) Allow access to detainees by legal representatives and family members;

(f) Close all secret places of detention;

(g) Improve the conditions of detention to bring them into line with international standards and, in particular, ensure access to medical treatment for all detainees;

(h) Ensure that solitary confinement remains an exceptional measure of limited duration;

(i) Allow independent monitoring of all places of detention with regard to both legality and conditions of detention;

(j) Immediately permit unhindered access by independent monitors, including the Office of the United Nations High Commissioner for Human Rights and other recognized organizations, to all places of detention, official and unofficial, to monitor the legality of detentions and the treatment of detainees and prison conditions, and allow them to conduct regular and unannounced visits, and act promptly on their recommendations.

(e) *Torture and other cruel, inhuman or degrading treatment or punishment*

352. The Commission also recommends that the Government of Eritrea put an immediate end to the use of torture and other forms of ill-treatment, establish adequate complaints mechanisms and ensure that prompt and effective investigations are conducted into all allegations of torture and ill-treatment with a view to bringing perpetrators to justice.

(f) *Discrimination on religious or ethnic grounds*

353. The Commission further recommends that the Government of Eritrea:

(a) Respect freedom of religion or belief;

(b) Put an end to the practice of arbitrary arrest and detention of individuals based on their religious beliefs, in particular followers of specific religious

groups, such as Jehovah's Witnesses, Pentecostals and other non-authorized religious groups, and release immediately and unconditionally all those unlawfully and arbitrarily detained;

(c) Ensure the protection of all minority ethnic groups in Eritrea, in particular the Kunama and the Afar.

(g) *Sexual and gender-based violence*

354. The Commission recommends that the Government of Eritrea:

(a) Adopt a comprehensive strategy to eliminate stereotypes and harmful practices that discriminate against women and girls, including forced marriage, and ensure that the minimum age of marriage, set at 18 years of age, is strictly enforced;

(b) Take measures to ensure de facto gender equality, and address all forms of violence and discrimination against women, including sexual and gender-based violence, particularly within State institutions, such as military camps and places of detention;

(c) During mandatory military training, prohibit the assignment of women and girls to officials' quarters for forced domestic servitude, and implement a zero-tolerance policy for sexual abuse in the army and in detention centres;

(d) Ensure that all forms of sexual violence are criminalized in national law, and take appropriate legislative and policy steps to establish complaint mechanisms and to ensure the prompt and adequate investigation, prosecution and accountability of perpetrators, including by strengthening the capacity of the criminal justice system;

(e) Adopt gender-sensitive procedures to avoid reprisals and stigmatization of survivors of sexual and gender-based violence by, inter alia, establishing special protection units and gender desks in police stations, and provide rehabilitation and support services, including safe houses, legal aid resources and health care;

(f) Ensure that national laws and policies comply with the State's international human rights obligations and are non-discriminatory by, inter alia, permitting prosecution of marital rape in all circumstances and abolishing legal provisions criminalizing consensual same-sex sexual activity.

(h) *Reprisals against third parties*

355. The Commission also recommends that the Government of Eritrea put an immediate end to the various forms of harassment and reprisals against relatives and associates of persons accused of wrongdoing.

(i) *Killings*

356. The commission further recommends that the Government of Eritrea put an end to extrajudicial killings, including of those fleeing the country.

(j) *Accountability*

357. The Commission recommends that the Government of Eritrea:

(a) Ensure accountability for past and persistent human rights violations and crimes, including enslavement, imprisonment, enforced disappearance, torture, and other inhumane acts, persecution, rape and murder, through the establishment of independent, impartial and gender-sensitive mechanisms, and provide victims with adequate redress, including the right to truth and reparations;

(b) **Ratify and implement the Rome Statute of the International Criminal Court;**

(c) **Cooperate with, and accept and implement the decisions of, any accountability mechanisms.**

2. Human Rights Council

358. **The Commission recommends that the Human Rights Council:**

(a) **Renew the mandate of the Special Rapporteur on the situation of human rights in Eritrea, and request the mandate holder to, inter alia, promote and report on the implementation of the present recommendations, and provide the mandate holder with the necessary additional human and financial resources;**

(b) **Bring to the attention of relevant special procedures, for appropriate action, the human rights violations and crimes identified by the Commission in its reports, including the situation of minorities, such the Kunama and the Afar;**

(c) **Keep the situation in Eritrea on its agenda, and invite the United Nations High Commissioner for Human Rights to report periodically on the situation of human rights;**

(d) **Transmit the present report to the General Assembly, the Secretary-General and the Security Council for follow-up on its recommendations;**

(e) **Support the establishment of a structure by the Office of the United Nations High Commissioner for Human Rights with a protection and promotion mandate, in particular to assist in ensuring accountability for human rights violations in Eritrea, especially where such violations amount to crimes against humanity.**

3. Office of the United Nations High Commissioner for Human Rights

359. **The Commission recommends that the Office of the High Commissioner report annually to the Human Rights Council and other appropriate United Nations organs on the situation of human rights in Eritrea, and assist the Government of Eritrea in the implementation of the recommendations made by the Commission, and those made at the sessions of the Working Group on the Universal Periodic Review and by the treaty bodies and special procedures.**

4. General Assembly

360. **The Commission recommends that the General Assembly put the human rights situation in Eritrea on its agenda.**

5. Security Council

361. **The Commission recommends that the Security Council:**

(a) **Determine that the situation of human rights in Eritrea poses a threat to international peace and security;**

(b) **Refer the situation in Eritrea to the Prosecutor of the International Criminal Court;**

(c) **Impose targeted sanctions, namely travel bans and asset freezes, on persons where there are reasonable grounds to believe that the said persons are responsible for crimes against humanity or other gross violations of human rights.**

6. African Union

362. The Commission recommends that the African Union establish an accountability mechanism, under the aegis of the African Union and supported by the international community, to investigate, prosecute and try individuals reasonably believed to have committed crimes against humanity.

7. Member States and international organizations

363. The Commission recommends that Member States and international organizations:

(a) **Keep Eritrea under close scrutiny until consistent and tangible progress with regard to the situation of human rights is evident, and ensure the centrality of human rights in all engagement with the State;**

(b) **Insist on the implementation of the decision made on 13 April 2002 by the Eritrea-Ethiopia Boundary Commission on the delimitation of the border;**

(c) **Keep Eritrea on the agenda of the International Labour Organization and continue to address the issue of forced labour;**

(d) **Assist Eritrea in addressing serious legislative and institutional weaknesses by strengthening its judiciary, establishing independent institutions and reforming its security sector through bilateral and multilateral development cooperation, in accordance with the human rights due diligence policy on United Nations support to non-United Nations security forces;**

(e) **Provide Eritrean nationals seeking protection with refugee status in accordance with the provisions of the international law governing asylum, and in particular the Convention relating to the Status of Refugees;**

(f) **Exercise jurisdiction over crimes against humanity when any alleged offender is present on the territory of a Member State or extradite him or her to another State in accordance with its international obligations;**

(g) **Increase attention and the resources allocated to the situation of human rights in Eritrea by strengthening engagement with the Government with the aim of implementing the present recommendations and those made during the sessions of the Working Group on the Universal Periodic Review and by other human rights mechanisms.**

8. Transnational corporations

364. The Commission recommends that transnational corporations operating or planning to operate in Eritrea conduct human rights impact assessments that specifically address the possibility that Eritrean contractors will rely on conscript labour, difficulties relating to freedom of association and expression in Eritrea, and the absence of financial transparency.

Annex I

Letter dated 7 December 2015 from the Commission of Inquiry addressed to the Permanent Representative of Eritrea to the United Nations

Dear Mr. Ambassador,

Thank you for your willingness to engage with me and my fellow Commissioners on 2 November 2015. I hope we can build on this first encounter and continue the discussion.

As stated during our meeting, I would be grateful for any documentation your Government may wish to share with the Commission about developments noted by you during your statement delivered during the interactive dialogue with the Commission at the Third Committee of the General Assembly on 29 October 2015.

Our Secretariat received with thanks the Penal Code and the Criminal Procedure Code, and is looking forward to also receiving the Civil Code and its procedural code in due course.

Furthermore, we are interested in documentation and information about the drafting of a new constitution, as well as the duration of the national service for current and future conscripts.

We would also welcome any additional updates and positive developments you might wish to highlight with regard to the human rights situation in Eritrea since the finalisation of our first report.

I take this opportunity to reiterate our continued desire to visit Eritrea as stated during our meeting and in previous correspondence, most recently in my letter of 28 September 2015 to H.E. Mr. Osman Saleh Mohammed, Minister of Foreign Affairs. I hope that the Government of Eritrea will invite the members of the Commission and its staff to visit Eritrea, in line with Human Rights Council resolution 29/18.

I look forward to hearing from you in due course. For any clarifications I can be contacted through the Office of the High Commissioner for Human Rights or via email (coieritrea@ohchr.org).

I remain,
Yours sincerely,



Mike Smith
Chair
Commission of Inquiry
on Human Rights in Eritrea

His Excellency
Mr. Girma Asmerom
Permanent Representative of Eritrea
Permanent Mission of Eritrea
New York

Annex II

Letter dated 24 February 2016 from the Commission of Inquiry addressed to the Minister for Foreign Affairs of Eritrea

Excellency,

I write to you in my capacity as the Chair of the United Nations Commission of Inquiry on Human Rights in Eritrea.

As requested by the Human Rights Council (HRC), the Commission will present a written report at the thirty-second session of the HRC in June 2016, and at the seventy-first session of the General Assembly in September 2016.

I wish to reiterate our continued desire to visit Eritrea as stated in previous correspondence, most recently my letter to you of 28 September 2015 and the letter of 7 December 2015 to H.E. Mr. Girma Asmerom, Permanent Representative of Eritrea to the United Nations in New York.

We would be most grateful if the Government of Eritrea would extend an invitation to members of the Commission and its staff to visit Eritrea, in line with Human Rights Council resolution 29/18. Such a visit could be organised at any time prior to the finalisation of our report for the thirty-second session of the HRC.

I look forward to hearing from you in due course. For any clarifications I can be contacted through the Secretariat of the Commission (coieritrea@ohchr.org).

Please accept, Excellency, the assurances of my highest consideration.



Mike Smith
Chair, Commission of Inquiry
on Human Rights in Eritrea

His Excellency
Mr. Osman Saleh Mohammed
Minister of Foreign Affairs of Eritrea
Asmara
Eritrea

Annex III

Letter dated 7 June 2016 transmitting an advance edited version of the report of the Commission of Inquiry to President Isaias Afwerki

Excellency,

In July 2015, in its resolution 29/18, the Human Rights Council decided to extend the mandate of the Commission of Inquiry on Human Rights in Eritrea “to investigate systematic, widespread and gross violations of human rights in Eritrea with a view to ensuring full accountability, including where these violations may amount to crimes against humanity”.

I would like to share with you an advance copy of the Commission’s report, which will be launched publicly on 8 June 2016, ahead of its consideration by the Human Rights Council at its 32nd session on 21 June 2016. The Commission has reasonable grounds to believe that crimes against humanity have been committed by State officials of Eritrea in the period from 1991 to the present, and specifically the crimes of enslavement, imprisonment, enforced disappearance, torture, other inhumane acts, persecution, rape and murder.

The Commission recalls that, in addition to direct perpetrators, both military commanders and civilian superiors may be held accountable for crimes against humanity where the commander and/or superior knew, or had reason to know, that subordinates were committing or about to commit crimes, and failed to take necessary and reasonable measures to prevent or repress their commission. Liability may also attach to those who plan, instigate, order, solicit, induce and/or aid and abet, the commission of crimes, as well as those who contribute to a joint criminal enterprise.

The Commission has also concluded that the Government of Eritrea is either unwilling or unable to ensure accountability for these crimes, and has therefore recommended that the Security Council and Member States adopt measures designed to promote accountability.

In the meantime, the Commission strongly believes that immediate measures must be taken to prevent the commission of future crimes. I therefore respectfully look to you to exercise your authority over State and PFDJ officials to stop on-going human rights violations and ensure accountability for crimes committed.

His Excellency
Mr. Isaias Afwerki
President of Eritrea
Asmara

The advance copy of the Commission's report is attached herewith.

The Commission urges the Government of Eritrea to consider the Commission's report, and take measures to implement the recommendations that it has addressed to the Government of Eritrea.

Please accept, Excellency, the assurances of my highest consideration.



Mike Smith
Chair
Commission of Inquiry
on Human Rights in Eritrea

Enclosure

Annex IV

Map indicating the location of places of detention in Eritrea identified by the Commission of Inquiry on Human Rights in Eritrea

A web based version of this map containing additional information is available at the Commission's webpage: <http://www.ohchr.org/CoIEritrea>

LOCATION OF PLACES OF DETENTION IN ERITREA IDENTIFIED BY THE COMMISSION OF INQUIRY ON HUMAN RIGHTS IN ERITREA

Analysis with WorldView-3 Data Acquired 24 September 2015 and 23 January 2016 and Landsat-8 Data Acquired 29 May 2016

This map illustrates the location of 77 places of detention in Eritrea. Green and blue dots indicate the location of each place. The Commission assumed that the list is not exhaustive and that there are additional places of detention. Data used in the production and military division have their own process. The Commission collected from multiple sources.

Production Date: 6/6/2016
Version: 1.0
Acquisition Number: CE20150120ER1

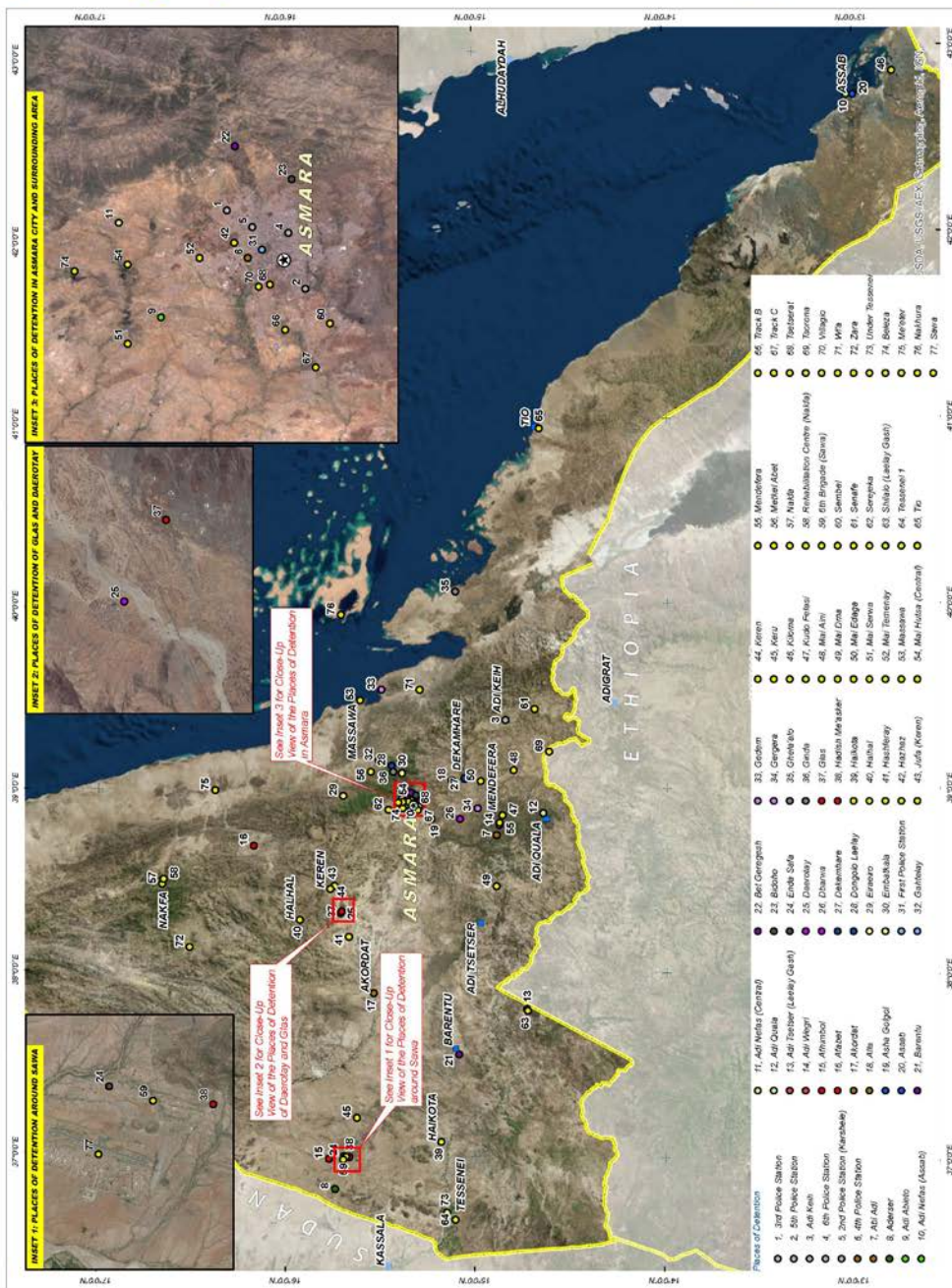


Source Data (1): WorldView-3 Imagery Data: 24 September 2015 and 23 January 2016
Resolution: 31 cm
Copyright: DigitalGlobe, Inc.
Source: US Department of State, Humint/Wiretap Information Unit, Navteq/License
Source Data (2): Landsat-8 Imagery Data: 29 May 2016
Resolution: 30 m
Copyright: NASA
Source: USGS

Other Data: USGS, UNCS, MASA, NGA
Analysis: UNHCR - UNOSAT
Production: UNHCR - UNOSAT
Analyst: UNHCR - UNOSAT
Coordinate System: WGS 1984 UTM Zone 37N
Projection: Transverse Mercator
Datum: WGS 1984
Units: Meter

The depiction and use of boundaries, geographic names and related data shown here are not warranted or guaranteed by UNOSAT. UNOSAT is a program of the United Nations Institute for Training and Research (UNITAR), providing satellite imagery and related geographic information, research and analysis to support development agencies and their implementing partners.

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- | Places of Detention | Places of Detention | Places of Detention | Places of Detention |
|----------------------------------|---------------------|---------------------|---------------------|
| 1. 3rd Police Station | 33. Gudim | 64. Trak B | 71. Sawa |
| 2. 5th Police Station | 34. Gergena | 65. Minckova | |
| 3. Adi Kueh | 35. Boboho | 66. Metel Abel | |
| 4. 6th Police Station | 36. Ghelebo | 67. Trak C | |
| 5. 2nd Police Station (Kerubale) | 37. Ghelebo | 68. Tolobari | |
| 6. 4th Police Station | 38. Ghelebo | 69. Tolobari | |
| 7. Adi Adi | 39. Ghelebo | 70. Tolobari | |
| 8. Adi Adi | 40. Ghelebo | 71. Wila | |
| 9. Adi Adi | 41. Ghelebo | 72. Wila | |
| 10. Adi Adis (Aush) | 42. Ghelebo | 73. Wila | |
| | 43. Ghelebo | 74. Wila | |
| | 44. Ghelebo | 75. Wila | |
| | 45. Ghelebo | 76. Wila | |
| | 46. Ghelebo | 77. Wila | |
| | 47. Ghelebo | | |
| | 48. Ghelebo | | |
| | 49. Ghelebo | | |
| | 50. Ghelebo | | |
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