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The reply of the Eritrean government to ACHPR's landmark ruling on Eritrea: A critical appraisal*

Summary

This article assesses the official and most recent stance of the Eritrean government on the illegal detention of eleven prominent Eritrean political personalities who remain behind bars since September 2001. The objective is to evaluate the unlawful detention pursuant to relevant Eritrean laws, namely: the 1993 "Interim Constitution" of Eritrea; the transitional codes of Eritrea which include the Penal, Criminal Procedure, Civil and Civil Procedure Codes; and other laws that amended and supplemented some of the above acts. The article critically examines the grounds which have led to the detention of the victims and analyses the legality of such reasons according to operational Eritrean laws. The contribution will also assess the prolonged duration of detention (detention without trial) and the justifications of the government for such a prolonged detention. It is submitted that the grounds of detention and the justifications for the prolonged detention, as corroborated by the Eritrean government, are ill-founded and have no legal basis. The assessment is based on the latest official account given by the Eritrean government about the detention of the officials. This account was given in a letter sent to the African Commission on Human and People's Rights upon the Commission's landmark ruling against Eritrea in November 2003.

Opsomming

Die antwoord van die Eritrese regering op ACHPR se keerpuntbeslissing oor Eritrea: 'n Kritiese benadering*

Hierdie artikel evalueer die amptelike en mees onlangse stand van die Eritrese regering oor die onwettige aanhouding van elf vooraanstaande Eritrese politieke persoonlikhede wat sedert September 2001 agter tralies gehou word. Die doel is om die onwettige aanhouding ingevolge relevante Eritrese wette te evalueer, te wete Eritrea se Tussentydse Grondwet van 1993; die oorgangswette van Eritrea wat insluit die Strafreg-, Strafprosedereg, Burgerlike en Burgerlike Proseswet; asook ander wette wat sommige van die wette hierbo wysig en aanvul. Die artikel ondersoek krities die gronde wat gelei het tot die aanhouding van die slagoffers en analiseer die wettigheid van sodanige redes volgens operasionele Eritrese wette. Die bydrae sal ook die verlengde duur van aanhouding (aanhouding

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sonder verhoor) en die regverdigings van die regering vir sodanige verlengde aanhouding, evalueer. Daar word betoog dat die gronde vir aanhouding en die regverdigings vir die verlengde aanhouding, soos bevestig deur die Eritrese regering, ongegrond is met geen regsbasis nie. Die evaluering word gebaseer op die nuutste amptelike weegawe oor die aanhouding van die amptenare, gegee deur die Eritrese regering. Hierdie verklaring is gegee aan die hand van 'n brief gestuur aan die Afrika-kommissie oor Mense- en Volkeregte (ACHPR) met die Kommissie se keerpunt-beslissing teen Eritrea in November 2003.

1. Introduction

The “poly-ethnic, poly-national state”¹ of Eritrea emerged as an independent entity in 1991. The country won its independence from Ethiopia under the dominant leadership of the Eritrean Peoples’ Liberation Front (EPLF). Soon after liberation, the EPLF established itself as a provisional government until such time when the country would draft its constitution and conduct free and fair elections. In 1993, a UN-monitored national referendum took place in which the Eritrean people overwhelmingly voted for independence over unity with Ethiopia. As Connell has noted, “[t]his was the first and last national ballot independent Eritrea ever held.”²

During the 1993-1994 period, the EPLF proposed a four-year transition to democratic governance, established a commission entrusted with the drafting of a constitution³ and renamed itself the Peoples’ Front for Democracy and Justice (PFDJ).⁴ The constitutional commission finalised its task in 1997 by formulating the first ever “democratic”⁵ constitution which was soon ratified by the Eritrean government as the supreme law of the land. Until then, the country was experiencing a relatively peaceful political transition.

However, the 1997 Constitution remained ineffective even after it was ratified by the government. In 1998, Eritrea and Ethiopia entered into a new war known as “a border conflict.” The war lasted until 2000. In 2002, a boundary commission rendered a final and binding decision on the border conflict. However, due to Ethiopia’s refusal to accept the decision of the boundary commission, the border is yet to be demarcated. Since the outbreak of the recent war, the Eritrean government has used the conflict as a pretext not to implement the constitution that was drafted and ratified with full support from the government. Using the same excuse, the government postponed previously scheduled general elections⁶

1 Medhanie 1986: 6.

2 Connell: 2005a: 233.

3 Article 4(6) of Proclamation No. 37/1993 (Proclamation to Provide for the Establishment, Powers and Functions of the Government of Eritrea, hereinafter “the Interim Constitution of Eritrea”). See also Proclamation No. 55/1994, Proclamation to Provide for the Establishment of the Constitutional Commission of Eritrea.

4 The National Charter of the PFDJ, as adopted by the Third Congress of the EPLF/PFDJ, 10-16 February 1994.

5 For some, the 1997 Eritrean Constitution is a legitimate establishment which came out of a legitimate process. For others, it is an illegitimate pact which came out of an illegitimate process. For further details, see the discussion in section 9 below.

6 According to article 3(2) of the Interim Constitution, the first democratic election was scheduled for 1997. Due to reluctance of the ruling party, it was not conducted

and consequently the long awaited political transition to democracy was frustrated. A combination of the reluctance of the government to facilitate democratic transition and the consequences of the recent war has precipitated economic, social and political crises, including severe disagreement among senior government officials. Connell described it as “a behind-the-scenes power struggle.”⁷ The major cause of such a disagreement was “the president’s conduct of the war, his hard-line approach to peace negotiations, and his resistance to democratization.”⁸

It was only in mid 2001 that the disagreement spilled into public arena. This happened when a group of fifteen senior government officials, who came to be known as the Group of 15 (the G-15) or the reformers, publicized their widely acclaimed “open letter.”⁹ The reformers called for a peaceful political transition to democracy via the implementation of the 1997 Eritrean Constitution and the conduct of free and fair elections. The group included former liberation movement leaders, ministers, members of the Eritrean National Assembly, and the Central and Executive Councils of the ruling party, the PFDJ.

2. An overview of the reform movement¹⁰

The open letter of the reformers was authored after persistent but unjustified refusal on the part of the state president, Isaias Afwerki, to convene government and party deliberative organs for purposes of critical assessment. Such a call had been made by the reformers, albeit clandestinely, immediately after the last round of war between Eritrea and Ethiopia. By that time, senior government officials were bitterly divided on how the nation should be governed, in general, and the inefficient performance of the government during the 1998-2000 border conflict with Ethiopia, in particular. The reformers intended to rectify the situation by way of critical deliberation and evaluation at all national deliberative organs, namely: the National Assembly, the Cabinet of Ministers and the ruling party’s Central and Executive Councils. The president of the country, who chairs all of these government and party deliberative organs, adamantly refused to call any special or regular meetings as demanded by the reformers. The regular sessions of the deliberative organs were by far more delayed at the time of the call. As a last resort, the reformers publicised their “open letter” in May 2001.¹¹

accordingly. In September 2000, the government committed itself to conduct general elections in December 2001. With the emergence of the reform movement and the sad developments after that, the election has been postponed indefinitely.

7 Connell 2005a: 234.

8 Connell 2005a: 234.

9 G-15 2001.

10 For a detailed account of the reform movement, see Awate Foundation: 2002 and Connell: 2005b.

11 The Central Council of the PFDJ and the National Assembly last convened in August and September 2000, respectively, thirteen to fourteen months before the arrest of the reformers. According to article 4(3) and article 5(5) of the Interim Constitution, the regular sessions of the National Assembly and the Cabinet of Ministers must be convened at every six months and every six weeks, respectively. According to article 5(A)(5) and article 6(A)(4) of the Transitional Constitution of the PFDJ, the Central and Executive Councils of the PFDJ are required to convene

The open letter was addressed to all ruling party members and criticised the government, particularly the president, for acting in an “illegal and unconstitutional” manner. In their letter, the reformers called upon “all PFDJ members and [the] Eritrean people in general to express their opinion through legal and democratic means and to give their support to the goals and principles they consider just.”¹² On 18 and 19 September 2001, the government responded by detaining eleven¹³ of the fifteen officials who were inside Eritrea at that time and accused all of the reformers “of crimes against the nation’s security and sovereignty.”¹⁴ Three¹⁵ of the fifteen senior officials managed to avoid imprisonment as they were outside of Eritrea at the time. Everything that followed after this sad event has utterly tarnished the relatively radiant image of Eritrea, a country once labelled one of the most promising in Africa. In continuation of its rigorous repression, the government

shut down the private press and arrested many of its leading editors and reporters. In the years since, there have been numerous, less publicized arrests — elders who sought to mediate on behalf of the detainees, more journalists, mid-level officials, merchants, businessmen, young people resisting conscription, and church leaders and parishioners associated with minority Christian denominations, among others. Some were held for short periods and discharged. Others — like the G-15 and the journalists — have been held indefinitely with no charges leveled and no visitors allowed.¹⁶

3. The plight of the reformers before the Commission

Ever since the arrest of the reformers, the Eritrean government has barely given a detailed official account on the matter.¹⁷ On 9 April 2002, Dr. Liesbeth Zegveld, an international lawyer with a Netherlands based firm — Böhler

at every six months and every month, respectively. The Fourteenth Session of the National Assembly was convened in February 2002, eighteen months after the Thirteenth Session and six months after the arrest of the reformers.

12 G-15 2001.

13 Their names are Astier Feshatsion, Beraki Ghebreselassie, Berhane Ghebregzabiher, Estifanos Seyoum, Germano Nati, Haile Woldetensae, Hamid Himid, Mahmud Ahmed Sheriffo, Ogbe Abraha, Petros Solomon, and Saleh Kekya.

14 Ministry of Foreign Affairs of the State of Eritrea: Letter to the Chairman of the African Commission on Human and People’s Rights (22 March 2004), para 1 (hereinafter “the Letter”).

15 The three officials who escaped prison are Adhanom Gebremariam, Haile Menkerios and Mesfin Hagos. Two of them, Adhanom Gebremariam and Mesfin Hagos, became leading opposition figures in exile. One of the fifteen reformers, Mohammed Berhan Belata, recanted shortly before the summary arrest and was, therefore, spared jail.

16 Connell 2005a: 234.

17 See, however, the Resolutions of the Fourteenth Session of the Eritrean National Assembly (as adopted on 29 January-2 February 2002) which blamed the reformers of nine interrelated but non-corroborated accusations. See also the latest view of senior PFDJ officials on human rights issues as discussed in the official magazine of the ruling party, *Hedri* 2006: 11-25.

Franken Koppe De Feijter, and Mr. Mussie Ephrem, an Eritrean living in Sweden (“the Complainants”), lodged a complaint at the African Commission on Human and People’s Rights (“the Commission”) on behalf of the detainees.¹⁸ The Complainants alleged that the Eritrean government, in violation of Eritrean laws and certain provisions of the African Charter on Human and People’s Rights (“the African Charter”) has arbitrarily detained the officials for speaking their minds and openly criticising government policies. The Complainants further claimed that

should the detainees be tried, the trial should be held in accordance with international human rights standards and without recourse to the death penalty ... and such a trial should not be before the [Eritrean] Special Court, which ... fails to meet international standards of fair trial.¹⁹

4. The stance of the government before the Commission

In the normal course of things, the Eritrean government should have appropriately responded to the communication of the Complainants as submitted to the Commission, but it did not do so. The government opted to challenge the admissibility of the communication on the ground of non-exhaustion of internal remedies. However, after the Commission declared the communication admissible, the government failed to present comprehensive submissions on the merits “at its own peril.”²⁰ Only in an oral submission and a *note verbale* did the government briefly substantiate the reasons for the detention. The Commission was “left with no alternative but to proceed and deliver a decision on the merits based on the submissions of the Complainants.”²¹ Accordingly, the government was found in violation of certain provisions of the African Charter and was urged to immediately release the detainees. Furthermore, the Commission recommended the government to compensate the victims.²²

18 See *Liesbeth Zegveld and Mussie Ephrem v The Government of Eritrea* (African Commission on Human and People’s Rights, Communication 250/2002). The African Commission delivered its judgement at its 34th Ordinary Session held from 6 to 20 November 2003 in Banjul, The Gambia. The case was reported in the Seventeenth Annual Activity Report of the African Commission on Human and People’s Rights 2003-2004: 116-125, as adopted by the Third Ordinary Session of the Assembly of Heads of State and Government of the African Union. Unfortunately, the Complainants’ communication did not include the plight of other citizens, for example journalists of the free press, who are also languishing behind bars for several years. The initiative deserves, however, utmost appreciation. See the reasons provided by Ephrem and Kesete 2004: 27 as to why the communication had to aim only at the plight of the eleven officials.

19 *Mussie Ephrem v Government of Eritrea*, para 7.

20 *Mussie Ephrem v Government of Eritrea*, para 46.

21 *Mussie Ephrem v Government of Eritrea*, paras 46-47. In its *note verbale* submission, the Eritrean government claimed that the eleven persons had been detained in conformity with the criminal code of the country and admitted that the detainees had not been brought before any court of law at the time.

22 See also the latest resolution of the Commission on Eritrea as adopted at its 38th Ordinary Session held in Banjul, The Gambia, from 21 November to 5 December 2005 in which the Commission reiterated its decision under Communication No.

However, after the publication²³ of the Commission's ruling, the Eritrean government, by way of an official letter²⁴ addressed to the Commission, attempted to substantiate the grounds of the detention and the prolonged duration. Evidently, this could not affect by any means the ruling of the Commission which by that time was already finalised. As the Letter came out after the Commission rendered its decision on the merits of the case, the grounds of the detention and the justifications for the prolonged duration, as described in the Letter, were not sufficiently addressed by the Commission. Therefore, the focus of this article is not the ruling of the Commission *per se*; rather, it examines the reply of the Eritrean government to the ruling. The Letter deserves critical appraisal and appropriate attention for it represents the most recent and official stance of the government on the fate of the detainees.

5. The Letter of the Eritrean government

The substance of the Eritrean government's Letter focuses on two major points. Firstly, it elaborates on the reasons as to why the eleven government officials have been detained (*the grounds of detention*); secondly, it gives some reasons as to why the detainees were not brought to a court of law in due time (*the prolonged duration of detention*). The validity of the *grounds* and the *delay*, as corroborated by the Letter, need to be assessed pursuant to the most relevant Eritrean laws, namely: the Interim Constitution, the transitional Penal, Criminal Procedure, Civil and Civil Procedure Codes of Eritrea and other laws that amended and supplemented some of the above acts.

6. The grounds of detention

The government claimed that the officials were detained for: (a) conspiring and attempting to overthrow the legal government of the country; (b) colluding with hostile foreign powers with a view to compromising the sovereignty of the country; and (c) undermining Eritrean national security and endangering Eritrean society and the general welfare of its people.²⁵

The Eritrean government has also implicated one of the Complainants, Mr. Mussie Ephrem, for having conspiring to "overthrow the Government as an active member of a small affiliated group that worked, and is still working, as the foreign wing of those who plotted against the State of Eritrea."²⁶ These

250/2002. Accordingly, the Commission called "on the Government of Eritrea to immediately free the former cabinet ministers, government officials, members of Parliament, journalists, media practitioners and other individuals who have been arrested and detained without trial for many years." The resolution appears in the Nineteenth Activity Report of the Commission. However, the publication of the resolution was withheld by a decision of the Sixth Ordinary Session of the Assembly of Heads of State and Government held in Khartoum on 23-24 January 2006.

23 Afol News 10 March 2004.

24 Letter, para 1.

25 Letter, para 1.

26 *Mussie Ephrem v Government of Eritrea*, para 2.

are the usual allegations the government has made ever since the detention of the reformers, but none of these allegations has been adequately substantiated before the Commission or any other judicial body to date.²⁷ There exists no credible evidence to support the allegations of the government.

An analysis of the government's reasons for detention has to take into account critical issues such as: How did the detainees conspire to overthrow the government? What mechanisms did they employ for that "conspiracy"? How does a call for a peaceful political transition constitute a criminal act? How did the detainees endanger the safety of the people and the country or try to undermine the national security? What constitutes an act amounting to a crime in the first place?

Thus far, different writers and observers have tried to answer the above questions in different ways. Several reports have also been compiled by credible institutions on the situation of human rights violations in Eritrea, among which the most debated ones are: the detention of the eleven political figures; the arrest of the journalists of the free press and numerous other individuals; the persecution of minority religious groups and several other adversities. Most of such accounts examine the situation from an international human rights perspective. They fall short of critical evaluation based on relevant Eritrean laws. It is the purpose of this article to rectify such apparent limitations. Besides, the Eritrean legal literature is one characterised by perceptible lack of academic and professional discourse, most importantly on constitutional and human rights issues. As asserted by French,²⁸ the legal development in Eritrea is in its infancy and as such this contribution intends to stimulate scholarly debate.

7. The grounds in the light of relevant Eritrean laws²⁹

7.1 The grounds and the Penal Code of Eritrea

The main contention of the Eritrean government is that the detainees were arrested for committing serious crimes punishable under Penal Code articles

27 See, for example, "PFDJ Secretary highlights defeatist stand of a few Central Council members (2001)," an interview of the PFDJ Secretary, Mr. Al-Amin Mohammed Seid, with *Haddas Eritrea*. The interview was given shortly before the arrest of the reformers and is translated into English at Shabait.com, the official website of the ruling party. Another top official of the PFDJ has referred to the reform movement as "a politics of disillusionment" and "an uncritical acceptance of universalized European ideologies." See Yohannes 2001.

28 French 1999: 430.

29 Most of the laws operational in Eritrea are inherited from Ethiopia with relevant amendments incorporated by Proclamations No. 1, 2, 3, 4, 5, 6, 7 and 8 of 15 September 1991. All such laws are known as Eritrean transitional codes. The amendments to the transitional codes of Eritrea and other laws promulgated after independence appear only in Tigrigna, one of the "official languages" in Eritrea. The provisions of the amending laws and acts cited elsewhere in this paper are author's *verbatim* translation.

259 (Attacks on the Independence of the State), 260 (Impairment of the Defensive Power of the State) and 261 (High Treason).³⁰

Under article 23 of the Penal Code of Eritrea,³¹ an act constitutes an offence, if and only if three main elements are fulfilled. Primarily, there must be a commission or omission of a given act — *the material ingredient of a crime*. This means somebody must do (commission) or fail to do (omission) something. Somebody must do so intentionally or negligently — *the moral or mental ingredient of a crime*. The commission or omission must be something which is prohibited by law — *the legal ingredient of a crime*. It is only after these three elements are fulfilled that an individual can be accused of a given crime — be it theft, treason, insult, contravention of a regulation, etc. With any one of the three main elements of a crime missing from a given circumstance, and a court of law not finding an offence proved and deserving of punishment, one cannot be accused of a crime at all. In such cases, the commission or omission is not a crime punishable under the law, but a non-criminal act that may be dealt with by other methods.

The above principle is a well-recognised tenet of criminal law that is incorporated in many progressive criminal codes of the world. If the government alleges that articles 259, 260 and 261 of the Penal Code are violated, it must substantiate its allegations in terms of the three requisite elements set by article 23. In plain language, this means that the government shoulders the burden of proof to make a *prima facie* showing of each fact necessary to establish the commission of a criminal act.

A call for a peaceful political transition or expressing one's views by peaceful and legal means are not actions defined as criminal acts, even when the country is in time of war.³² In this respect, regard must be had to the open letter the reformers have authored before their detention, the introduction of which reads as follows:

This letter is a call for correction, a call for peaceful and democratic dialogue, a call for strengthening and consolidation, a call for unity, a call for the rule of law and for justice, through peaceful and legal ways and means.³³

30 Letter, para 1.

31 The article provides as follows:

Offences:

- (1) A criminal offence is an act or omission which is prohibited by law.
- (2) The criminal offence is only completed when all its legal, material and moral ingredients are present.
- (3) A criminal offence is punishable where the court has found the offence proved and deserving of punishment.

For a thorough discussion on the general part of the Eritrean criminal law (articles 1-84), see generally Graven: 1965.

32 The principal contention of the government is that the reformers should not have made the call at a time when the country was in war with neighbouring Ethiopia. However, the contention falls short of sound legal basis.

33 G-15 2001.

The initiative was a reform movement well recognised as such by several credible writers and researchers. One such writer, who extensively wrote on Eritrean pre- and post-independence politics, is Connell. He asserted that:³⁴

How hard then to say: Enough! This movement [the PFDJ] is no longer, what it was, nor what I hoped it would become, and it is taking down too many others — along with the dream — to stay silent.

Connell's claim has been reinforced by Dorman,³⁵ who strengthened her assertion by referring to an article written by Plaut.³⁶ Dorman opined:

The reform movement which emerged in 2000 and 2001, criticised the failure to implement the ratified [C]onstitution, and called for much-delayed meetings of both the party deliberative structures, and the national legislature.

The above and other comparable findings³⁷ appropriately justified the noble cause of the reformers for which reason they have been jailed. This happened merely because the Eritrean government was not ready to stand the test of accountability for what went wrong in the country, especially after the 1998-2000 war with Ethiopia.

Clearly, what the detainees have done is far from the ambits of a crime as it falls short of the three main elements of a criminal act — *the material, mental and legal ingredients of a crime*. What follows is the principle laid down in article 2(1) of the Penal Code which proclaimed:

Principle of Legality:

Criminal law specifies the various offences which are liable to punishment and the penalties and measures applicable to offenders.

The court may not treat as a breach of the law and punish any act or omission which is not prohibited by law. It may not impose penalties or measures other than those prescribed by law.

The court may not create offences by analogy.

This is one of the most pertinent principles of criminal law. Accordingly, no one can be punished for an act which was not a crime during its commission. Neither should a person be subjected to a punishment under a law which was not operational during the commission of the crime. Such a protection shields

34 Connell 2003.

35 Dorman 2003: 12.

36 Plaut 2002: 120. Plaut (an eminent BBC reporter), on his part, argued that "recent political developments have dispelled hopes that Eritrea is an emergent democracy, and reinforced fears that it is becoming precisely what it sought to avoid — the shame of becoming yet another African dictatorship." On the sad account of African dictatorships and their alarming records of human rights violations, see also generally Abdullahi 1993.

37 See for example, Amnesty International 2006; United States Bureau of Democracy, Human Rights, and Labour 2006 and Human Rights Watch 2003.

suspects not to be punished by a law which imposes more severe punishment than the laws which were in force during the commission of a given crime.³⁸

An imperative of the rights protected under the Penal Code is the right to equality. The amended article 4 of the Penal Code states that criminal law is applicable equally to all persons alike without any kind of discrimination.³⁹ Sadly, this article does not explicitly proscribe “political view” as a prohibited ground of discrimination. As a result, it may be argued that the state is at liberty to discriminate on the ground of political view or dissent as is widely referred to.⁴⁰

However, the Interim Constitution obliges the state in broader terms to promote fundamental rights and freedoms until the establishment of a democratic constitutional order.⁴¹ Similarly, one of the national objectives of the ruling party, as demonstrated by its two major documents (the National Charter and Transitional Constitution),⁴² is the establishment of a constitutional order that respects human rights and allows for the rule of law to prevail. The National Charter of the PFDJ has made it clear that it is a stated objective of the ruling party to establish a political democracy that guarantees the rights of citizens “by law and practice.” The promotion of fundamental rights and freedoms as guaranteed by the above foundations would be impracticable without a protection accorded to discrimination on the grounds of political view. This is the society the Interim Constitution aspired to build, and the Transitional Constitution and the National Charter of the PFDJ envisioned to nurture.

In the present case, the government has infringed upon the detainees’ fundamental rights, by labelling them criminals, arresting them illegally, and

38 See also the principle of non-retrospective effect of criminal law as provided by article 5 of the Penal Code. This point must be studied against the backdrop of certain reports on the plans of the government to squash the matter by bringing the detainees to a newly formed quasi-military tribunal with uncontested powers. It has been also alleged that the government is coercing the detainees to admit the allegations in exchange for their liberty. This is contrary to the right to remain silent.

39 See the first paragraph of article 4 of the Penal Code, as amended by Proclamation No. 4/1991. It provides:

Equality before the Law

Criminal law applies to all alike without discrimination as regards persons, social conditions, race, sex or religion.

40 The amending law states only personal, social, racial, sexual and religious grounds not to be taken as a basis for discriminating against persons. The failure to include “political ground” in the list of non-discriminatory grounds might be taken as an implication of the ambiguity of the ruling party’s commitment to political tolerance. Although it claims to have a tolerant political background traced back to its Second Congress in 1987, such a commitment has never been put into practice in Eritrea until now, fifteen years after the country’s independence and nineteen years after the Second Congress.

41 Para 5 of the Preamble of the Interim Constitution.

42 See the National Charter of the PFDJ: 8 and 17; and article 4 of the Transitional Constitution of the PFDJ.

denying them access to criminal justice merely on account of their “political view.” This is the kind of violation that article 4 of the Penal Code, read in with Paragraph 5 of the Preamble of the Interim Constitution, seeks to prevent.

7.2 The grounds and the Criminal Procedure Code of Eritrea

The Eritrean Criminal Procedure Code, also called “mini constitution,” is the most salient of all laws when it comes to the protection of individual freedom and rights. Article 1 of the Code, as amended by Proclamation No. 5/1991, reads as follows:⁴³

Purpose:

The purpose of Criminal Procedure Code is to:

- uphold the principle that any accused person is *presumed innocent until proven guilty beyond reasonable doubt* by a corroboration of proof [Emphasis added]
- deliver fair and speedy investigation and trial
- guarantee proper usage of the law
- protect innocent citizens from unnecessary criminal investigation or trial
- punish criminals and
- inform citizens so that they can respect the law and fight against crime.

The most important aspect of the above provision is the presumption of innocence which emanates from the principles of natural justice. Accordingly, the detainees are “presumed innocent” until a court of law can prove “beyond reasonable doubt” that they are guilty of certain crimes. Criminal responsibility can only be corroborated by proof which must pass the test “beyond reasonable doubt” unlike, for example, civil liability that can be weighed by the principle of “preponderance of evidence.”

Other fundamental rights safeguarded under article 1 are the right to a fair and speedy investigation and trial, and ultimately the right to be protected from unnecessary criminal investigation or trial, all of which have been blatantly breached by the government. These rights are reinforced by article 19 of the Criminal Procedure Code. This provision obliges the authorities to bring persons under their detention to a court of law within forty-eight hours. At the same time, the detainees have also the right to seek a writ of *habeas corpus* if the authorities do not bring them to a court of law within forty-eight hours.

In its submission before the Commission, the government claimed that the Complainants did not approach the High Court of Eritrea for a writ of *habeas*

43 This provision was borrowed from the Criminal Procedure Code of the Eritrean People’s Liberation Front (EPLF), the predecessor to PFDJ. The new article 1 of the Criminal Procedure Code uses the phrase “proper usage of the law” instead of “due process of law,” as is the case in most other legal systems.

corpus;⁴⁴ hence, they should not hold the position that such a right was denied by the government. This contention is, however, ill founded. The fact that the Complainants did not approach the High Court does not absolve the government from its obligation to bring the detainees to a court of law *proprio iure*. It is not necessary for an application of a writ of *habeas corpus* to be presented to the High Court as a matter of priority. Even without such an application, the government is duty bound to bring the detainees to a court of law within forty-eight hours after their detention. It is only when the government fails to do so that an application for a writ of *habeas corpus* can be made to the High Court pursuant to article 29 of the Criminal Procedure Code and article 179 of the Civil Procedure Code.⁴⁵

Since their detention, the reformers are kept at an undisclosed location. By reason of the *incommunicado* detention, the government has violated the right of the detainees "to occasionally get in touch with close relatives; receive and send letters; buy, borrow and read newspapers and books."⁴⁶ These provisions are meant, among other things, to protect the individual from any kind of conduct which amounts to *cruel, inhuman or degrading treatment or punishment*. The fact of denying the detainees occasional access to their families and relatives certainly amounts to cruel, inhuman and degrading punishment.⁴⁷

The physical and psychological harm the detainees have sustained due to the *incommunicado* detention is noticeably agonizing. This is beyond doubt a conduct contrary to human dignity which is a major component of human rights and fundamental freedoms. Although none of the operational laws in Eritrea explicitly uses the terminology "human dignity," one can plausibly infer from the relevant provisions of the Interim Constitution⁴⁸ and the ruling party's foundational documents that human dignity is a major component of a society founded on respect to human rights and fundamental freedoms as envisaged by the above documents. Such a society can only become viable when it recognises the fundamental right to human dignity.⁴⁹

44 *Mussie Ephrem v Government of Eritrea*, para 31. The allegation was discredited by the Complainants who asserted that approaching the High Court of Eritrea for a writ of *habeas corpus* was practically impossible. Some anonymous lawyers in Eritrea were not willing to approach the High Court of Eritrea for fear of reprisal. In light of the retaliatory character of the government, the fear is a well-founded factor. This is true especially after August 2001 when the President of the High Court of Eritrea, Judge Teame Beyene, was summarily dismissed due to his critical assessment of the interference of the executive branch into the independence of the judiciary. See Beyene 2001.

45 It sounds unusual for matters of jurisdiction on *habeas corpus* to be defined by the Civil Procedure Code. As such matters are related to criminal justice, they must have been provided by the Criminal Procedure Code of Eritrea.

46 Article 42 of the EPLF Criminal Procedure Code as incorporated in the amended article 62 of the Eritrean Criminal Procedure Code.

47 On the inhuman and degrading aspect of the *incommunicado* detention, see the opinion of the Commission, *Mussie Ephrem v Government of Eritrea*, para 55.

48 Para 5 of the Preamble of the Interim Constitution.

49 A political party which emphatically committed itself to develop "the decisive role of the human factor" can only do so by respecting the fundamental right to human dignity. See the National Charter of the PFDJ: 10-11.

What is more, the government did not obtain a warrant of arrest at the time of detention, as required by article 49 of the Criminal Procedure Code.⁵⁰ There are, however, certain conditions under which a warrant of arrest may not be needed. These are situations which involve the commission of serious crimes or flagrant offences.⁵¹ The government may claim that what the detainees have done is one of the serious crimes which do not require a warrant of arrest and it did arrest the detainees accordingly. Nonetheless, article 49 of the Criminal Procedure Code does not entirely override other requirements set by other provisions of the same Code. A person who is detained without a warrant of arrest still enjoys the right to be brought before a court of law within forty-eight hours of the arrest. This is the general principle provided by article 29 and the amendment to article 59⁵² of the Criminal Procedure Code.

Once a detainee is brought before a court, such court, according to relevant circumstances, may grant the authorities a permission to detain the person for such other additional time but no longer than fourteen days. This additional time is called, under article 59, a remand. It denotes the additional time of detention courts may duly allow so that arresting officers can investigate into the case of a suspect, collect the relevant evidence for the alleged crime, and prepare their case for setting of a motion by the prosecution. The timeframe of a remand is subject to the discretion of courts. If a given court believes that the investigation can be conducted in less than fourteen days, such a court can order the release of the suspect before fourteen days. Still, if the court believes that the investigating officer can conduct the investigation without detaining the suspect, the court can make such an order.

However, the total amount of days courts can grant in the form of remand should not exceed twenty eight days. After that, the investigating officer is obliged to release the suspect (most of the time on bail) and the court is, by law, not authorised to prolong the remand beyond that. This is one of the noble safeguards of individual freedom, newly added to the old article 59 of the Criminal Procedure Code, by the amending act of 1991.

50 The relevant part of this article provides that: "Save as is otherwise expressly provided, no person may be arrested unless a warrant is issued and no person may be detained in custody except on an order by the court."

51 See in general articles 19, 20, 49, 50 and 51 of the Criminal Procedure Code.

52 This article provides:

Detention:

(1) The court before which the arrested person is brought (article 29) shall decide whether such person be kept in custody or be released on bail.

(2) Where the police investigation is not completed the investigating police officer may apply for a remand for a sufficient time to enable the investigation to be completed.

(3) A remand may be granted in writing. No remand shall be granted for more than fourteen days on each occasion.

The amendment to sub-article 3 provided that the total amount of days for a remand should not extend twenty-eight days.

No court of law in the Eritrean judicial system knows where the detainees are kept since September 2001. By law, Eritrean courts have the power “to visit at any time prisons and places where prisoners are kept and to ascertain that prisoners are detained pursuant to the law.”⁵³ Eritrean courts are given identical powers by article 8(1) of Proclamation No. 1/1991.⁵⁴

In the present case, one may contend that it was within the jurisdiction of the Sub-regional Court of Gindae to visit the detainees at the place of detention, Embatkala School of Management Sciences, where they were allegedly kept.⁵⁵ However, with the government not disclosing the exact place of detention, no court can fulfil this statutory obligation. Such was the situation in the case of other detainees, for instance, the journalists who were moved from the First Police Station of Asmara to an unknown location after they embarked on a hunger strike. However, even if the place of detention was known to the Eritrean courts, with the bellicose inclination of the government, no one would dare to question whether the prisoners are detained pursuant to the law.

Other provisions of the Criminal Procedure Code violated by the government include the right to be informed of the grounds of arrest and the right to remain silent as protected in article 27,⁵⁶ and the right to counsel as guaranteed in

53 Article 4 of the Criminal Procedure Code.

54 This is a proclamation which provided for the establishment of the transitional institutions of administration of justice in Eritrea. Need less to say, the provisions of article 8(1) of this proclamation have remarkable similarity with the amendments to article 4 of the Criminal Procedure Code.

55 This is according to the submission of the Complainants. One can infer from the phrase “in some management building between the capital Asmara and the port of Massawa” that the place of detention is possibly the School of Management Sciences in Embatkala. See *Mussie Ephrem v Government of Eritrea*, para 3. Recently, unconfirmed reports have claimed that the reformers with other prisoners have been taken to a newly-built prison called Ira-Iro since 2003. The reports have also indicated that nine of the prisoners at Ira-Iro prison have died of various illnesses, psychological pressure or suicide. See Awate Foundation 2006 in which the English translation of the original Tigrigna report appears. The Tigrigna report is available at <http://www.aigaforum.com/Situation-report-on-eritrea.pdf>. In this regard, the Paris-based advocacy group, Reporters Without Borders said that: “Reporters Without Borders knows the sources for the information in the report, although it will not identify them for security reasons, and believes them to be credible and serious ... All of the Eritreans consulted by Reporters Without Borders said the information contained in the report was ‘entirely plausible’ at the very least, even if it could not currently be verified.” See Reporters Without Borders 2006. See also the press release of the Eritrean People’s Movement (EPM) of 19 October 2006, available at <http://www.meihabar.org>.

56 The relevant parts of this article are:

Interrogation:

(1) Any person ... arrested ... shall ... be asked to answer the accusation or complaint made against him.

(2) He shall not be compelled to answer and shall be informed that he has the right not to answer and that any statement he may make may be used in evidence.

article 61⁵⁷ which entitles the detainees to have an advice supported by a legal representative. As from the day of their detention, the detainees never had the chance to obtain a lawyer of their choice. Moreover, the right of the detainees to have access to a public trial as provided by the amendment to article 94 of the Criminal Procedure Code is another pertinent right manifestly violated by the government.⁵⁸

Mention must also be made of other fundamental rights and freedoms of the detainees guaranteed by the Eritrean Civil Code and infringed by the government. The first of such rights is protected by the amended article 8(1) which provides: "Every natural person shall enjoy the rights of personality and fundamental freedoms as ascertained by the national programme and constitution of the EPLF."⁵⁹ The right to liberty and privacy (restriction on freedom and searches) are guaranteed by article 11, while the right to freedom of thought is guaranteed by article 14. All such rights have been continually violated by the government ever since the detention of the reformers.⁶⁰

Finally, a parallel comparison can be drawn between the statutory protection provided by the relevant Eritrean laws and the African Charter to the rights of the reformers. The following groups of rights violated by the government concurrently enjoy statutory and Charter protection: equality under the law, the right to liberty and to the security of the person, the right to fair trial which includes presumption of innocence and other incidental rights as well as the right to freedom of conscience, expression and other freedoms.

...

Compare the fundamental freedom safeguarded by sub-article (2) with the concerns discussed in the accompanying text of note 38 above.

57 The article provided:

Detained Persons Right to Consul Advocate:

Any person detained on arrest or on remand shall be permitted forthwith to call and interview his advocate and shall, if he so requests, be provided with the means to write.

The amendment to this article has obliged the state to hire a lawyer for detainees who cannot afford to do so by themselves.

58 The amendment to article 94 was also borrowed from the Criminal Procedure Code of the EPLF. The amendment stipulated that trials must be conducted in an open and public place.

59 The national programme of the EPLF referred to in this article, was adopted as the National Charter of the PFDJ in 1994. Guaranteed protection to fundamental freedoms and rights is a major component discussed in the Charter.

60 All of such rights are universally recognised and protected by other international human rights instruments to which Eritrea owes obligations, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. See also article 4 of the Transitional Constitution of the PFDJ which guarantees freedom of thought and expression.

8. The prolonged duration of detention

There are two reasons put forward by the government in defence of the claim that the detainees have been jailed for a longer period of time than what is required by relevant Eritrean laws.⁶¹

8.1 Mandate of the National Assembly

Principally, the government claims that the matter of the detainees has been properly handled and that the matter has not lacked timely consideration. In this regard, the government has said:

The Eritrean government did not throw away or stash the matter indefinitely. The National Assembly at its Fourteenth Session, held from January 29 to February 2, 2002, discussed the report concerning the nature of the criminal acts committed by these people.⁶²

...

The National Assembly deplored the grave acts perpetrated by the detainees, who were government ministers, high officials and senior military officers, for the serious crimes they committed against the nation and its people. The National Assembly noted that because of their own choice and by virtue of these acts, they have abdicated from the National Assembly. The National Assembly mandated the government to handle the matter appropriately and bring it to its logical conclusion.⁶³

The indication that the matter of the eleven political prisoners is receiving proper attention by the National Assembly lacks any legal or moral ground for several reasons. In the first place, the government's claim that the detainees are "criminals" renders the above contention inherently unacceptable as it deprives the National Assembly of any valid mandate or jurisdiction to adjudicate on the fate of the detainees, which are allegedly depicted as criminals. The adjudication of a criminal act by a legislative branch of government is contrary to the well established principle of the separation of powers and most importantly to the powers and functions of the Eritrean National Assembly as defined by the Interim Constitution.

The applicable legal provisions which define the powers and functions of the three government organs — the legislative, the executive and the judiciary — are articles 4, 5, 6 and 7 of the Interim Constitution (Proclamation No. 37/1993). This proclamation, albeit concise and full of shortcomings, can be

61 The government put forward two contradicting arguments to justify the prolonged duration of the detention. On the one hand, it claimed that the National Assembly is attending to the matter and as such the matter has not been stashed away. By saying this, the government is arguing that there was no delay in the handling of the matter. On the other hand, the government claimed that the prolonged detention was mainly a problem associated with the inefficiency of the Eritrean judicial system. By saying this, the government is admitting that there was a prolonged detention.

62 Letter, para 3.

63 Letter, para 3.

plausibly referred to as the Interim Constitution of Eritrea. The act was promulgated as a proclamation and not as a constitution. However, in the absence of a more detailed and enforceable constitution, current legal and academic exposition can only refer to the provisions of this act, the nature and content of which bear several similarities with other interim constitutions. This act briefly defines the powers and functions of the principal organs of the transitional government and outlines the general guiding principles of the transitional period.

According to this law, the National Assembly is defined as the highest legal authority in Eritrea with a mandate to facilitate transition to democratic governance by, among other things, election of the president; promulgation of laws, formulation of internal and external policies and ensuring the implementation thereof; approving [the national] budget, development policies and reports submitted by the Cabinet of Ministers and so on.⁶⁴ These are some of the major tasks of the National Assembly and these tasks do not include the mandate to adjudicate on matters which are of a judicial nature.

The Cabinet of Ministers, chaired by the president, is the country's executive branch. Most of all, it implements the policies, resolutions and laws of the government and is accountable to the National Assembly.⁶⁵ Unlike in most other legal systems, however, the president is also the Chair of the National Assembly, a situation which has undermined the cardinal principle of the separation of powers, a litmus test for an accountable, transparent and democratic government. The anomaly has enabled the president to avail himself of excessively concentrated political power.⁶⁶

The Interim Constitution defines the judiciary as a system of courts which shall defend legally recognised rights and interests of the government, associations and individuals. The law also promulgates that the judiciary shall function according to the law and shall be free from the legislative and the executive branches of government.⁶⁷ In Eritrea, judicial power is vested in the High Court of Eritrea and such other lower courts as established by Proclamation No. 1/1991. The independence of the judiciary is also guaranteed by article 8(1) of the same proclamation which states that: "In rendering judgments and orders, courts should rely only on promulgated national laws." Article 4 of Proclamation No. 3/1991⁶⁸ and article 4(3) of Proclamation No. 5/1991⁶⁹ have also similarly guaranteed the independence of the judiciary.

64 Article 4(5)(a) – (i) of the Interim Constitution.

65 Article 5(4)(a) – (j) of the Interim Constitution.

66 See Article 4(3) of the Interim Constitution. The president also chairs the two major organs of the PFDJ, the Central and Executive Councils, as provided by article 7 of the Transitional Constitution of the PFDJ. This is one of the major causes of post-independence dictatorship as expounded in the discussion paper of the Eritrean Movement for Democracy and Human Rights (EMDHR) 2006; See also the educational manual of EMDHR, *Bidho antsar atehasasbana* (Challenging our perceptions) 2006: 6-21.

67 Article 7 of the Interim Constitution.

68 The provision reads: "Judges must be free from any pressure and should administer justice only in accordance with the law."

69 The provision reads: "Judges must perform their duties with full independence and shall not be guided by any authority except the law."

According to article 3 of Proclamation No. 1/1991,⁷⁰ adjudication of [civil and criminal matters] is a mandate whose sole jurisdiction falls on the judicial branch of government. Accordingly, only courts are duly authorised to exercise judicial power, which includes, *inter alia*, the trial of alleged criminal acts. This is a universal principle common to all legal systems. Support to this cardinal principle is to be found in article 40(e) of the Criminal Procedure Code which states that: "Unless otherwise expressly provided by law ... no person accused of any crime shall be tried by anybody other than the courts empowered under the Criminal Procedure Code."

No legislative or other branch of the government has the power to decide on matters which are allegedly criminal by their nature or purely adjudicatory. None of the operational laws in Eritrea has mandated the National Assembly to assume the tasks and responsibilities of the judicial branch and this appropriately applies to the current debate of the eleven political prisoners. Nor does the National Assembly have any power to mandate the executive branch of government to accomplish certain tasks, which, under the normal course of things, have to be performed by the judicial branch of government.

However, as would the approach of several other countries, the resolution adopted by the National Assembly in its Fourteenth Session might be analogised to one that came out as a result of inquest by a parliamentary *ad hoc* committee or a commission of inquiry that investigated into the matter of the detainees. However, it goes without saying that the findings of any parliamentary *ad hoc* committee or a commission of inquiry must always meet the minimum requirements of fundamental freedom enshrined in relevant Eritrean laws. The resolution adopted by the National Assembly has severely violated the fundamental rights of the detainees. By no means does the resolution amount to "a logical conclusion of the matter" or "appropriate handling of the issue."

The resolution deplored the detainees as criminals and suspended their membership from the National Assembly. Such a resolution took place in the absence of the detainees. It transgressed one of the fundamental rights of the detainees, the right to be heard. The mandate given by the National Assembly to the government is also equally abhorrent as it transgressed fundamental rights of the detainees. It is commonly understood that any action that abrogates the fundamental rights and freedoms of citizens is unacceptable irrespective of the fact that such an action was done either by the legislative, the executive, or the judicial branch of government. This must be seen in line with paragraphs five and six of the Preamble of the Interim Constitution which envisaged a transitional government committed to the promotion of human rights and fundamental freedoms and the establishment of democratic governance and institutions accountable to the people. Prior to this, the government has also committed itself to similar promises as promulgated in article 1(1) of Proclamation No. 1/1991.⁷¹

70 Primarily this article defines the powers and functions of the Minister of Justice. In so doing, it has explicitly restricted the Minister (and by analogy other government organs as well) not to interfere into the judicial power of the courts.

71 See also the National Charter of the PFDJ.

The legitimacy of the National Assembly must also be examined. According to the Preamble and article 3(2) the Interim Constitution, the government of Eritrea and all its current structures (mainly the legislative and executive branches) are transitional by nature and temporary by tenure. The government was established for a maximum period of four years within a period beginning in 1993 and ending in 1997. Since 1997, the government has unilaterally extended scheduled national elections without the blessing of the Eritrean people and this has enabled the government to stay in power uncontested contrary to its own promises manifested in the Interim Constitution and other documents.⁷²

This is contrary to the underlying assumption of the concept of legitimacy and representative democracy that government is established by and on behalf of the governed. In purely legal terms, the Eritrean general public is no longer legitimately represented by the current National Assembly. By the time the reformers were arrested, the National Assembly ought to have been replaced by a democratically elected representative body. The resolution is, therefore, inherently unlawful not only because it was done in transgression of fundamental rights of the detainees but also it was adopted by an illegitimate parliament which unilaterally imposed itself on the Eritrean public.

8.2 A situation of war and limitations of the judicial system

The second major argument put forward by the government to justify the prolonged detention focuses on the war situation in Eritrea and the limitations of the Eritrean judicial system. In elaborating the delay, the government claimed:

The delay in bringing the detained persons even as a matter of routine procedure has been taken as a serious violation of their rights by the Commission. However, delay exists in other places and taking the war situation in Eritrea such a decision is unwarranted because the Commission did not take into account the practical and technical problems that the Eritrean justice system faced. For example, the Commission was appraised that until the end of 2003, there was only one criminal bench within the High Court of Eritrea, which is the proper jurisdiction for the acts perpetrated against the country and government.

8.2.1 A situation of war

It is true that Eritrea and Ethiopia were engaged in a full fledged war in the period 1998-2000. In principle, a situation of war or aggression is one which requires the promulgation of a state of emergency. However, there are no clearly defined statutory or institutional mechanisms which allow for the promulgation of a state of emergency in Eritrea. The only situation where fundamental rights can be limited is envisaged in the amended article 9(2) of the Eritrean Civil Code according to which a given right might be limited on the grounds of "valid social reasons." Nevertheless, the limitation of fundamental rights under the

72 See also G-15 2001 and the National Charter of the PFDJ.

current situation is not one that can be justified as a limitation based on a "valid social reason."⁷³

It is common practice in most democratic legal systems that a state of emergency can be declared only when there is a real and imminent threat to the life of the nation or the public at large. It is also an accepted state practice that a state of emergency limiting fundamental rights and freedoms requires special procedures and mechanisms before it is promulgated. In most cases, a state of emergency is declared by a duly elected representative body or a legislative branch of government. At any rate, a state of emergency does not nullify certain category of fundamental rights and freedoms such as the right to life, the right to liberty, the right to human dignity and the right to fair trial, to mention a few. In most countries, such rights are absolute and cannot be limited even under a state of emergency.⁷⁴

In reality, the Eritrean National Assembly is a rubber stamp of the executive branch which simply solemnises the decisions of the president without appropriate consultation and investigation. Formally, the Eritrean National Assembly never proclaimed a state of emergency in Eritrea especially after the detention of the eleven political prisoners. Even during the war, almost all situations have been handled by presidential decrees and orders unchallenged by the nominal parliament and not by formal declaration of a state of emergency. The most important aspect, however, is that there has never been a situation of war in Eritrea during and after the arrest of the detainees.

The border conflict between Eritrea and Ethiopia came to an official end on 18 June 2000 when the two countries signed the Agreement on Cessation of Hostilities between Ethiopia and Eritrea.⁷⁵ By signing this agreement, the two countries officially committed themselves to cease hostilities and ever since the ratification of this agreement there has never been any war between the two countries. There are tensions, however, which do not amount to a situation of war, not least because of Ethiopia's refusal to accept the final and binding verdict of the Eritrea Ethiopia Boundary Commission whose implementation was expected in 2003.

The agreement on cessation of hostilities paved the way to the comprehensive peace accord, called the Algiers Peace Agreement, which was signed by the two countries on 12 December 2000. Prior to that, on 31 June 2000, the UN Security Council, by Resolution 1312 (2000), established the United Nations Mission in Ethiopia and Eritrea (UNMEE). One of the major responsibilities of UNMEE is to put into operation the mechanism for verifying the cessation of hostilities.⁷⁶ To

73 The previous version of article 9(2) used the term "legitimate interest" instead of a "valid social reason." It is not clear why "valid social reason," a more restrictive language, was used by the amending law in preference to a "legitimate interest" which is less restrictive.

74 See for example, section 37 of the 1996 Constitution of South Africa.

75 UNMEE 2006b. See also Voice of America 2006.

76 The area in which the peacekeepers are deployed is known as the Temporary Security Zone (TSZ). The TSZ creates a gap of 25 kilo meters between the armed forces of the two countries. None of them are allowed to encroach into the TSZ and this has effectively ensured the cessation of hostilities after the last round of

ensure this, the entire border between the two countries has been thoroughly supervised by UNMEE's peacekeeping forces that are physically stationed in the border of the two countries and kept apart the armed forces of the two countries.⁷⁷ The reformers were arrested 15 months after the ratification of the agreement on the cessation of hostilities. Legally and factually speaking, there existed no situation of war in Eritrea after the ratification of the agreement on the cessation of hostilities. For this reason, the government's claim that there is a situation of war that precludes the trial of the detainees in due time has no valid grounds.

8.2.2 Limitations of the judicial system

To begin with, inefficiency of the judicial system is not a sound justification to detain innocent citizens *ad infinitum* with their fundamental rights violated manifestly. It is undeniable that judicial underdevelopment is one of the major challenges of post-independence Eritrea. However, the primary reason for such underdevelopment is the government's incessant interference with the independence of the judiciary and lack of genuine political willingness to strengthen judicial independence.

A strong, independent and watchful judicial branch is one of the major pillars of democratic dispensation and good governance. However, in a situation of autocratic rule, an ideal judicial branch with guaranteed independence and integrity is contrary to the political culture of despotism and as such it becomes the first target of attacks by the executive. Seen as a likely threat to the government's hegemonic political agenda, the Eritrean judiciary has been crippled by the ruling party since the early years of independence.

In principle, the Eritrean judiciary is independent but practically the system has been subject to persistent attacks from the president of the state.⁷⁸ Apart from belittling the whole system through various mediums of communication, the president of the state has undermined the independence of the Eritrean judicial system by establishing the notorious Special Court of the country.⁷⁹

war between the two countries in May 2000. The total number of UN peacekeepers deployed in the mission is 4,200. This includes 200 military observers as well as political, military, public information, mine action and administrative components. The mission comprises three infantry battalions and the necessary support units backed by planes and helicopters, as well as ground forces and armoured personnel carriers. A latest press release of UNMEE has described the military situation in the TSZ as stable, albeit tense. See UNMEE 2006a.

77 However, due to the excessive delay in border demarcation, Eritrea has repeatedly blamed the international community which allegedly failed to have done enough to compel Ethiopia to accept the decision of the boundary commission. As a result, since 2005, the Eritrean government has severely restricted the movement of the UN peacekeeping mission within Eritrean boundaries. Moreover, the Eritrean government expelled all of the North American and European staff members of UNMEE. In October 2006, some 1500 Eritrean government troops entered the TSZ triggering serious concerns at the UN Security Council. See *CNN* 2006.

78 See Beyene 2001 and notes 66-67 above and the accompanying texts.

79 See also the classic examples given by Beyene 2001. The president of the state has notoriously harassed courts, lawyers and law students several times by his irresponsible words uttered during interviews and public addresses.

This court, established in violation of several cardinal principles, has the power to try suspects without respect to fundamental rights, such as the right to counsel and appeal. Purportedly established to combat corruption,⁸⁰ the Eritrean Special Court is one of the manifest interventions of the executive branch into the independence of the judiciary.

In 1991, the judiciary began its function with limited independence and severely restricted human and capital resources. In the early years, there were a small number of judges, seventy in number, as described by Judge Beyene.⁸¹ This was less than half of the number of judges required for a full fledged judiciary. However, before and after the detention of the eleven political prisoners, the number of qualified judges and prosecutors has increased considerably.

Starting from 1998 until the time when the Commission rendered its judgement (November 2003), the University of Asmara graduated an estimated average number of twenty five lawyers (with LLB degree) every year. This is without taking into account other professionals trained through short- and long-term courses. Several of the graduates of Asmara University have successfully completed postgraduate studies in various specialisations adding more to the severely lacking judicial system of the country. For a country with a population of 3.5 to 4 million people this number is not small and it was a major boost to the institutional capacity of the judicial system. Truly, the system needs more human and capital resources than is already acquired in order to serve justice efficiently. Nevertheless, in terms of human power, the Eritrean judiciary was more equipped in 2001 and after than it was in previous years.

The increasing number of fresh graduates and professionals was expected to make a significant contribution to the Eritrean judicial system. The disappointing aspect, however, is that a considerable number of university graduates who pursue postgraduate studies abroad are not willing to return to Eritrea. For instance, the majority of the first and second batch law graduates, most of whom were judges and prosecutors, refused to return to Eritrea mainly because of the deteriorating political crisis⁸² and some of them on a well-founded fear of

80 See Proclamation No. 85/1996. Initially, the Special Court was established to combat corruption, embezzlement and theft but in practice it serves as an instrument of intimidation to political dissent. The judges of the court are military commanders personally appointed by the state president. The establishment of the Special Court is contrary to what has been adopted by the Preamble to Proclamation No. 4/1991 (the amendment to the Penal Code of Eritrea).

81 Beyene 2001.

82 Most of them left the country for postgraduate studies starting from 1999. They have remained in exile ever since. These include: Abdunadir Abdella, Abraham Gebreyesus, Amanuel Tesfayesus, Amha Habtemariam, Aklil Habtetsion, Alexander Gebrekristos, Biniam Gorgorios, Daniel Ketema, Daniel Missgina, Daniel R Mekonnen, Dawit Araya (alias Wedi Sheikh), Dawit Gedle, Dehab Afewerki, Degol Kesete, Fitsum Kidane, Fortuna Adam, Gezae Hagos, Kibrom Isaak, Leake Tsegay, Michael Girmay, Michael Yohannes, Milkias Mihreteab, Paulos Gezae, Ribqa Weldu, Samuel Bizen, Teodos Hebtayohannes, Senay Welday, Wesenseghed Hagos, Yosief Alazar and Yonas Debesay. Majority of them are LL.M holders. Two prominent members of the Eritrean judicial system namely, Medhanie Haile and Sahle Tsegazeab, remain in jail since 2001. However, latest reports have claimed that both of them have died at the infamous Ira-Iro prison. See note 55 above.

persecution.⁸³ All such problems are necessitated by the brutality of the regime in power. It is, therefore, illogical for the government to portray the “inefficiency of the judicial branch” as a factor that necessitates prolonged detention.

By the time the reformers were arrested and shortly after that, the High Court of Eritrea was fairly sufficiently staffed with qualified judges ranging from LLB to LLM holders.⁸⁴ In terms of manpower, the High Court of Eritrea was the most staffed court of all hierarchies of courts in the country. However, there are claims that the drafting of judges, court administrators, prosecutors and lawyers into the army during the 1998-2000 Eritro-Ethiopia border conflict had severely affected the Eritrean judicial system. This is true only until Eritrea and Ethiopia signed the Agreement on Cessation of Hostilities between Ethiopia and Eritrea on 18 June 2000 after which time many judges and prosecutors who served in the frontlines returned to their posts. The detainees were arrested after such cheering developments of revival in the judicial system of Eritrea.

As such, the inefficiency of the Eritrean judicial system is not a grave factor that can impede the government from bringing the detainees to a court of law in due time. The factual problem lies not in the inefficiency of the High Court of Eritrea, rather in two other major factors. Firstly, unwillingness of the regime to bring the detainees to an impartial court of law is the principal reason for the prolonged detention; and secondly, the vulnerability (not the inefficiency) of the judiciary is another major obstacle.

A situation which has clearly demonstrated the vulnerability of the Eritrean judiciary is the summary dismissal of the President of the High Court of the Eritrea (the highest court in the country), Judge Teame Beyene, in 2001. Judge Beyene was arbitrarily dismissed from his post after he firmly criticised the

83 Some of the exiles have formed human rights advocacy organisations such as the Eritrean Movement for Democracy and Human Rights (EMDHR – www.emdhr.org), which has firmly exposed the human rights violations of the Eritrean government since its inception in 2003 in South Africa. The founders and members of EMDHR have been threatened to deportation as a result of misleading information conveyed to the South African Department of Home Affairs by the Eritrean Embassy in South Africa. See for example, the order of the High Court of South Africa, Transvaal Division, in *Yoel Alem v The Minister of Home Affairs and Others* (Case No 2597/2004, unreported).

84 The following highly qualified judges and professionals, with LLM degrees, joined the Eritrean judicial system during and after the arrest of the eleven reformers: Abraham Desta, Abraham Mellakh, Adiam Welday, Ataklti Habtemariam, Habteab Yemane, Menkerios Beraki (the Acting President of the High Court after the arbitrary dismissal of Judge Beyene), Mulubrehan Berhe, Sium Tekle, Yirgalem Weldegeberiel, and Yonas Zekarias. Fitsum Tesfatsion and Zerisenai Debretsion, senior lecturers at the University of Asmara, are also potential members of the Eritrean judicial system. The High Court was already well-equipped with other senior judges and professionals such as Judges Teame Beyene (until his arbitrary dismissal) Daniel Semere, Dawit Habtu, Idris Awelkier, Jaefer Osman, Kegnazmach Hamid (last name unknown), Yosief (alias Brezhnev, last name unknown), Yosuf Haj Jamie, Ghenet (last name unknown), Belaynesh (last name unknown) and many more. Many senior and junior graduates of the University of Asmara are also serving in the Eritrean judicial system in different levels.

unjustifiable interference of the executive branch into the domains of the judiciary.⁸⁵ This was the biggest and worst blow to the independence of the judiciary and currently the Eritrean judiciary barely exists.

Moreover, there are reports from Eritrea that army generals, who since 2001 took full control of all aspects of life in the country, can unilaterally amend or dismiss decisions of ordinary courts involving "sensitive" matters. To mention a concrete example, the President of the Zoba Maekel Provincial Court, Judge Mussie Sahlezgi, was forced into exile in 2004 after a judgement of his bench was abhorrently dismissed by the infamous army general Gherezgher "Wuch" Andemariam. Similarly, in mid-2006, the newly appointed President of the Zoba Maekel Provincial Court, Judge Andemeskel Kifle, has been summarily dismissed by the government for unknown reasons.⁸⁶

If follows that the inefficiency of the Eritrean judicial system, as portrayed by the government, is not the main reason for the prolonged detention. In actual terms, the delay is attributable to the unwillingness of the government to solve the matter democratically and judiciously and as such the argument of the government as stated in the Letter is manifestly unfounded. Regard must be had also to the conclusion reached by the Commission in determining the obligation of the Eritrean government to bring the detainees to a court of law in due time. The Commission asserted that:

The State has a ... statutory requirement to provide an accessible, effective and possible remedy whereby alleged victims can seek recognition and restoration of their rights before resorting to the international system for protection of human rights. Such procedures should not be mere formalities that, rather than enable the realisation of those rights, to the contrary, dilute with time any possibility of success with respect to their assertion, recognition or exercise.⁸⁷

9. The role of the 1997 Eritrean Constitution

A discussion of the grounds of detention and the prolonged duration in the light of the 1997 Eritrean Constitution has not been found helpful for the following reasons. First and foremost, the 1997 Eritrean Constitution, although ratified and recognised by the government, has never been put into force for a couple of reasons which are beyond the scope of this article.⁸⁸ Secondly, controversies

85 Beyene 2001.

86 These and other pieces of information have been lately confided to the author by credible sources from Eritrea whose names are withheld for fear of reprisal.

87 *Mussie Ephrem v Government of Eritrea*, para 47.

88 This issue is too complicated and needs special assessment and appropriate discussion in a separate paper. For someone who is not well informed about the political intricacies in Eritrea, it may seem paradoxical to claim at the same time that the 1997 Eritrean Constitution is ratified and recognised by the government but remained ineffective since its ratification. This is the harshest side of the current political reality in Eritrea and equally one of the major causes of the political quagmire in the country. It is hard to believe that a government that strongly backed the

about the 1997 Constitution are widespread among major Eritrean political forces, especially those who consider the ruling party as a historical enemy. The main contention lies on the legitimacy of the 1997 Constitution itself.

For some, the Constitution is an illegitimate pact which came into being as a result of an orchestrated strategy of domination and exclusion the ruling party has tactfully practiced for many years. The body which drafted the Constitution, the Constitutional Commission of Eritrea, as well as the body which has ratified the Constitution, the Constituent Assembly of Eritrea, were not democratically elected by the people, but appointed by the ruling party according to the latter's political priorities.⁸⁹ Although the process was accompanied by "a popular participation" of the Eritrean people inside and outside of the country, the issue of legitimacy of the Constitution remains a focal point of contention among major Eritrean political forces and academics.

As far as the matter of the eleven detainees is concerned, the significance of the 1997 Eritrean Constitution is very little in practical terms. Therefore, any discussion devoted to the Constitution in relation to the plight of the detainees would be misplaced in this article. Of particular relevance for purposes of this article is the position of the government on the 1997 Constitution, as reflected in the Letter. The Letter of the government made no mention of the Constitution at all. The government never relied on the 1997 Constitution to justify its actions. Reliance of the government was basically on the Penal Code of Eritrea and the resolution adopted by its parliament. As such, it would be better to focus on what the government raises as defences and hold it to its own words accordingly. It is appropriate, however, to note that much of the arguments put forward in defence of the reformers would have changed favourably if the Constitution was in force. The 1997 Constitution accords protection to almost all of the fundamental rights discussed in this article. Yet, most of the operational laws discussed in this paper are more than enough to defend the rights of the reformers and other prisoners unlawfully detained for several years.

drafting and ratification of such a constitution would refuse to support its implementation, but such has happened in Eritrea. Everything was done by the government — appointment of experts to draft the constitution and ratification of the constitution and at last refusal to implement the constitution. This issue calls for an appropriate assessment of the whole process of constitution making in Eritrea which is beyond the ambits of the current discussion. For comparable views, however, see generally Eritrean People's Liberation Front — Revolutionary Council (ELF-RC) 2006; Hagos 2006; Habteselassie 2006; Habteselassie 2003; Habteselassie 1999; Medhanie 2004; Medhanie 2002.

89 The fact that the Constitutional Commission of Eritrea was not democratically elected is less controversial. There are claims that the Constituent Assembly, which ratified the Constitution, was democratically elected as the majority of its members were elected from the public via the 1997 elections of regional assemblies. This argument remains controversial. Besides, any claim that the 1997 elections of regional assemblies were free and fair is far from objectivity and truth. In contrast, see Hagos 2006.

10. Remedies

It is well established that the Eritrean government has violated a range of statutory rights by detaining the reformers and not bringing them to a court of law in due time. The next question is the issue of possible remedies. The immediate effect of violation of fundamental rights is that aggrieved persons are legally and rationally entitled to seek remedy for the damage they have sustained as a result of the violation. Recognition of such a fundamental right can be deduced from article 7(2) of the Interim Constitution which obliges the judiciary "to safeguard legally recognised rights of individuals." Support to this can also be inferred from the discussion on the set of fundamental rights expounded in the previous sections.

The first step an impartial Eritrean court might have taken in this case is to order the government to release the detainees immediately and bring them to a court of law. Thereafter, the government can be ordered to appropriately compensate the victims for the damage they have sustained as a result of the illegal and prolonged detention which has been imposed on them for five years.⁹⁰ The same is true for other victims of human rights violations who are closed behind bars for several years. The conclusion that could have been reached by an independent and impartial Eritrean court is more or less the same with that drawn by the Commission.

Apart from the above possibilities, the authorities who have detained the eleven political prisoners unlawfully may also face criminal prosecution based on applicable Eritrean laws. Pursuant to article 557 (Illegal Restraint) of the Penal Code of Eritrea, an unlawful detention is a criminal act punishable by law. If the offence is committed by a public servant, as is the case in the matter of the eleven political prisoners, the offence becomes graver. In such kind of situations, the provisions of article 416 (Unlawful Arrest or Detention) of the Penal Code shall apply. Accordingly:

Any public servant who arrests or detains another except in accordance with the law, or who disregards the forms and safeguards prescribed by law, is punishable with rigorous imprisonment not exceeding five years, and fine.

The punishment that can be imposed pursuant to article 416 of the Penal Code is "without prejudice to the imposition of punitive administrative measures" and the claim of damages.⁹¹ Similarly, a public servant who unlawfully restricts the freedom of movement of others is punishable under the provisions of article 568 of the Penal Code. However, it is unlikely that any sort of action can be taken against government authorities. The Eritrean government will not set free and compensate the detainees unless forced to do so by extraordinary circumstances.

90 Compare this with the operative part of the Commission's ruling, *Mussie Ephrem v Government of Eritrea*, para 70. For some aspects of redress and monetary compensation under Eritrean laws, see the following provisions of the Civil Code: articles 2028, 2090, 2105 and 2108; and article 100 of the Penal Code.

91 Article 411 of the Penal Code. See also Article 412 (Abuse of Power) of the same Code.

As far as the Commission's ruling is concerned, there appears an apparent shortcoming common to all regional and international judicial bodies. The major limitation of such judicial bodies is the inability to enforce their decisions. Ordinarily, decisions of national courts are enforced by executors, police and prison authorities specially assigned to such tasks. International and regional judicial bodies lack the necessary machinery by which their judgements could be enforced.

The most sensible way of implementing international decisions is through the collective effort of the international community. This can be carried out, *inter alia*, by isolating the specific government against which a judgement is rendered. Economic sanctions and severance of diplomatic relations are other alternative mechanisms of enforcement. The expulsion of Eritrea by the United States government from the African Growth and Opportunity Act (AGOA), although not directly linked with the Commission's decision, is a pertinent example in this regard. The Eritrean government was expelled from the AGOA in 2004 due to deterioration of human rights, lack of progress towards the rule of law and political pluralism in Eritrea.⁹² This is a commendable example that must be followed by other democratic dispensations in order to tackle the alarming record of human rights violations in Eritrea and equally to give effect to the landmark ruling of the Commission.

11. Conclusion

The detention of the eleven senior government officials is a blatant violation of several statutory provisions which safeguard individual rights and freedoms in Eritrea. A peaceful call for a democratic transition and constructive criticism on the conduct of government by no means constitutes a crime against the national safety and security of Eritrea. By detaining the reformers, the government has manifestly violated their fundamental rights, including: right to be presumed innocent; the right to a writ of *habeas corpus*; the right not to be held in custody without a court order; the right to counsel; the right to fair, speedy and public trial; and their right to be visited by family members.

In its short life as an independent state, Eritrea is going through the most difficult time. The nation is incurring severe wounds the healing of which is too costly for the present and next generations. After defeating a previous dictatorship imposed on them by Ethiopia's unlawful occupation, Eritreans are now struggling to free themselves from despotism from within Eritrea. Several

92 *The East African Standard* 1 April 2004. The United States has also included Eritrea in the list of Countries of Particular Concern (CPC), a category of countries whose human rights records are alarming. Regard must be had also to the condemnation of the Eritrean government by the Working Group on Arbitrary Detention of the UN Commission on Human Rights. The Working Group concluded that the political prisoners were arrested for having expressed their political view and therefore requested the Eritrean government to bring the situation into conformity with the standards and principles set forth in the Universal Declaration of Human Rights. For further details, see *Mahmoud Sherifo et al v Eritrea*, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2003/8/Add.1, 54 (2002).

writers have been proposing possible solutions for such a stalemate, the best of which is a peaceful and negotiated transition accompanied by a comprehensive scheme of national reconciliation. With the ruling elite frustrating all possibilities, the prospect of a peaceful and negotiated transition seems too slim and the future looks dark and grim.

By and large, there is nothing for Eritrea as exigent as the issue of the alarming records of human rights violations which include, mainly but not only, the fate of people massacred extra-judicially or disappeared without a trace, the plight of political prisoners and religious minorities languishing behind bars for several years. Eritrea and its people are competent enough to attend to such demanding national concerns. The only obstacle is the abnormal absence of political commitment on the part of the ruling party. All alternative solutions on the predicament of the eleven detainees and other victims of human rights violations are dependent on the willingness of the government submitting itself to a peaceful political transition. Without the regime accepting such a precondition, whatever proposed solutions to the troubles of the country may not be fruitful. Experience has proven that the government in power is not willing to accomplish the above tasks as long as it is not forced to do so by a formidable resistance which is severely lacking in the Eritrean opposition camp. It will definitely take some time for the situation in Eritrea to change favourably.

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