



Human Rights Law Clinic Papers 2017

ERITREA COUNTRY PROFILE ON THE PREVENTION AND PERPETRATION OF TORTURE AND ACCESS TO REDRESS AND ACCOUNTABILITY

To: Ann Hannah, Freedom from Torture

Submitted by: Selam Biru

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Introduction

This memorandum appraises the international legal and political context of Eritrea to identify international advocacy opportunities for holding to account the commission of acts of torture in the country.

The aim of this memorandum is first to describe the human rights situation in Eritrea and the State structure in the country which affect the prevention, perpetration, access to redress and accountability for acts of torture. Secondly, the memorandum explores the measures taken by Eritrea in implementing recommendations concerning the prevention and combating of torture by regional and/or international mechanisms. Lastly, it aims to identify opportunities and challenges for advocacy in relation to the prevention and combating of acts of torture in the country. The methodology used in the memorandum is a desk-based research, involving examining reports (national and international reports including reports from human rights monitoring mechanisms, academia, governmental and non-governmental organizations, media and any other related reports), legal documents, books, case law and other Internet sources.

The memorandum is organized in four parts. The first introduces the memorandum and the second provides the background information including the geopolitical context and human rights situation in the country. The third part is devoted to discussing the prevention and perpetration of torture and access to redress and accountability. To address the topic, the State structure in the country, the implementation of human rights obligations, measures taken to prevent and redress and the gaps in implementation are explored. Finally, the fourth part concludes findings of the study and makes some recommendations.

The Convention against Torture (CAT, or the Convention) under its Article 1 sets out an internationally agreed definition of acts that constitute torture. The memorandum applies this definition and its scope is limited to acts of torture, excluding other forms of cruel, inhuman or degrading treatment or punishment.

Background

Geopolitical context

Eritrea is located along the Red Sea and shares border with Djibouti, Ethiopia, and Sudan.¹ 1990 marked a change in the history of Eritrea, as it brought the independence of Eritrea from the rule of Ethiopia.² The political and human rights situation in the country after its independence did not improve, however.³ The geopolitical situation of Eritrea is not different from other countries within the Horn of Africa, which is characterized by political unrest and insecurity. Eritrea has continually been involved in war and conflict with neighbouring countries including Yemen, Sudan, Djibouti and Ethiopia.⁴ The Government of Eritrea usually raises this hostile relationship with neighbouring countries, and the threat of occupation, as a justification for derogations from and restrictions of human rights guaranteed under international instruments to which it is party.⁵

Human rights situation

Many Eritreans engage in a very dangerous route of migration through the Mediterranean Sea to escape human rights violations and the hopeless situation in their country, making

¹ Tronvoll Kjetil, *The lasting struggle for freedom in Eritrea: human rights and political development, 1991-2009*. (Oslo Centre for Peace and Human Rights, 2009), 8.

² Ogbazghi, Petros, 'Personal rule in Africa: the case of Eritrea', (2011) 12(2) *African Studies Quarterly* 21, 25.

³ Ibid.

⁴ Kjetil, op cit, 8.

⁵ National UPR Report submitted in accordance with paragraph 5 of the Annex to Human Rights Council resolution 16/21, UN Doc A/HRC/WG.6/18/ERI/1 (2014), para 84.

Eritrea the top asylum-generating country.⁶ The common forms of human rights violations committed by the Eritrean Government include forced labour, arbitrary arrests, degrading treatment in detention, enforced disappearances and torture.⁷

After independence, the Eritrean Constitutional Commission drafted the Constitution, which was enacted in 1997, but has never been enforced.⁸ Even before the implementation of the existing draft Constitution, the Eritrean Government announced a promise for the introduction of a new Constitution.⁹ Consequently, Eritreans are unable to claim their Constitutional rights and courts face challenges to guide their decisions with the absence of an applicable Constitution.

The human rights situation in Eritrea resulted in action being taken by the United Nations Human Rights Council, which established the Commission of Inquiry to investigate all alleged violations of human rights in Eritrea.¹⁰ The Commission collected witnesses' interviews residing in third countries, and written submissions, as it was denied entry to visit by the Government.¹¹ It released two reports in 2015 and 2016.¹² In the second and final report, the Commission of Inquiry on Eritrea confirmed the engagement of the Eritrean Government in systematic, widespread and gross human rights violations.¹³

Prevention and perpetration of torture and access to redress and accountability

State structures

The Eritrean draft Constitution outlines three branches of government as the legislative, judiciary and executive.¹⁴ The Constitution devotes a separate chapter to fundamental rights and freedoms,¹⁵ while imposing an obligation on branches of government for their promotion and protection.

Executive branch of government

The power distribution in Eritrea indicates an excessive power concentration in the hands of one person. The President of Eritrea is the central person in the executive and with a direct control over other branches of government. The President, Isaias Afewerki, is vested with a range of powers including head of government, head of State, chairperson of the national parliament and commander in chief of the army.¹⁶ He personally appoints cabinet ministers, regional administrators, national and regional court judges, the auditor general, the governor of the national bank, new ambassadors, top military commanders and many mid-level

⁶ Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea, UN Doc A/HRC/29/CRP.1 (2015), para 154.

⁷ Human Rights Watch, 'World Report Eritrea' (2016), at URL <https://www.hrw.org/world-report/2016/country-chapters/eritrea> (accessed 20 March 2016).

⁸ Luwam Dirar and Kibrom Tesfagabir, 'Introduction to Eritrean Legal System and Research' (2015), at URL <http://www.nyulawglobal.org/globalex/Eritrea1.html> (accessed 22 March 2017).

⁹ Sudan Tribune, 'Eritrean leader pledges to draft new constitution' (2014), at URL <http://www.sudantribune.com/spip.php?article51115> (accessed 22 March 2017).

¹⁰ Human Right Council resolution 26/24 (2014), 'Situation of human rights in Eritrea'.

¹¹ Report of the commission of inquiry on human rights in Eritrea, UN DOC A/HRC/29/42 (2016), summary

¹² United Nations Human Rights Office of the High Commissioner, 'Commission on human rights in Eritrea', at URL <http://www.ohchr.org/EN/HRBodies/HRC/ColEritrea/Pages/2016ReportColEritrea.aspx> (accessed 20 March 2017).

¹³ Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea, UN Doc A/HRC/29/CRP.1 (2015), summary.

¹⁴ Chapters IV-VI.

¹⁵ Chapter III.

¹⁶ Petros, op cit.

officials.¹⁷ Thus, the President is technically empowered to have a unitary power over the executive, legislative and judicial branches.

Legislative branch of government

The Eritrean legislative branch of government is represented by the national assembly parliament, which is formed by elected representatives.¹⁸ The draft Constitution entrusts the legislative branch with a supreme representative and legislative power.¹⁹ However, there is no legislation that regulates law-making procedures in Eritrea. The Eritrean parliament has not convened since 2002, which means that important laws and policies adopted by the Government, including those severely affecting individual rights and freedoms, have not been enacted by the legislature.²⁰

Judicial branch of government

Eritrea's judiciary constitutes three types of courts including civil, military and special courts.²¹ The special court in Eritrea was established in 1996 and has jurisdiction over cases that involve government officials accused of corruption, misuse of public funds and other major offenses.²² Senior military officers with no formal legal training are appointed directly by the President to constitute the court.²³ The judges base their decisions on 'conscience' and are not bound by the Code of Criminal Procedure or the Penal Code.²⁴ Furthermore, the special court is allowed to subject defendants to double jeopardy because it is empowered by the Attorney General to rehear civilian court cases and high court decisions.²⁵

Judicial independence is lacking in Eritrea's judiciary as the President appoints, reassigns and dismisses judges.²⁶ An example is the removal of the chief judge of the High Court, Teame Beyene, from his post after complaining of executive interference in judicial proceedings and calling for the dismantling of the special courts in July 2001.²⁷ This is against the Constitutional requirement of independence, which obliges the appointment and dismissal of judges to be based on the recommendations of an independent judicial service commission.²⁸

While national courts are expected to apply treaties ratified by the State, Eritrean courts do not do so because international law is not directly invoked before the courts in Eritrea. For laws to be applied by Eritrean courts, they are required to be published in the Eritrean Gazette. However, under international law, no State may invoke its national constitution or laws to avoid the implementation of international obligations.²⁹

¹⁷ Kelly Sanja, Christopher Walker, and Jake Dizard, (eds) *Countries at the crossroads: a survey of democratic governance* (Rowman & Littlefield, 2008), 8.

¹⁸ Article 31(2).

¹⁹ Article 31(1).

²⁰ European Parliament, Resolution on European Parliament resolution on the situation in Eritrea, 2 March 2016, (2016/2568(RSP)), para AC.

²¹ Kjetil, op cit, 11.

²² Sanja, Walker and Dizard, op cit.

²³ European Parliament resolution, op cit, para AH.

²⁴ Kjetil, op cit, 40.

²⁵ US Department of State, Bureau of Democracy, Human Rights, and Labor, 'Eritrea – Country Report on Human Rights Practices 2007', at URL <<https://www.state.gov/j/drl/rls/hrrpt/2008/af/119000.htm>> (accessed 20 March 2017).

²⁶ Kjetil, op cit.

²⁷ Tronvoll, Kjetil, and Daniel Rezene, *The African Garrison State: Human Rights & Political Development in Eritrea* (Boydell & Brewer Ltd, 2014), 51.

²⁸ Articles 52 and 53.

²⁹ Vienna Convention on the Law of Treaties, Article 27. See also Conor Foley, 'Combating Torture a Manual for Judges and Prosecutors', at URL 'www.essex.ac.uk/combatingtorturehandbook/manual/' (accessed 18 March 2017).

²⁹ Kjetil, op cit.

The Government structure in Eritrea shows the absence of separation of powers and of checks and balances. Power is concentrated without limitation in the hands of the President, which affects the separation of powers among branches of government.

Implementation of human rights obligations concerning the prevention and combating of torture and recommendations of human rights monitoring bodies

States parties to the Convention are required to domesticate the international obligations under the Convention into their national legal systems. For the Convention to have an effect, the rights provided under the Convention must be given a practical application. Even though Eritrea has committed to international obligations, the human rights credential of the Government reveals a series of violations of the rights guaranteed under the instruments to which it is party.³⁰ While some of the national laws have anti-torture provisions, the State structure and other reasons to be mentioned do not provide a comprehensive and effective anti-torture framework.

Implementation of international human rights obligations by Eritrea

International human rights treaty bodies monitor the implementation of human rights obligations in different ways, including by examining the periodic reports submitted by States parties. Reporting encourages implementation and compliance with treaty obligations. After ratification of or accession to a treaty, States parties are required to submit periodic reports on measures taken to implement.

CAT requires States parties to submit to the Committee against Torture (the Committee) an initial report within one year of ratification or accession and subsequent periodic reports at least every four years.³¹ The Committee considers reports submitted by States parties regarding their implementation of the provisions of the Convention and, after examining these reports and other information provided by State delegations and other stakeholders, issues Concluding Observations.³² The State of Eritrea acceded to CAT on 25 September 2014³³ and the initial report was therefore due on 25 October 2015.³⁴ However, up to the date of writing this memorandum, Eritrea has not submitted its initial report.³⁵

The procedure under Article 20 of CAT allows the Committee to initiate an investigation when it considers there to be 'well-founded indications that torture is being systematically practiced in the territory of a State Party'.³⁶ However, at the time of accession Eritrea lodged a reservation to Article 20, which means that Eritrea does not recognize the competence of the CAT Committee to initiate such investigations.³⁷

³⁰ Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea, UN Doc A/HRC/29/CRP.1 (2015), chapter IV

³¹ Article 19(1).

³² United Nations High Commissioner for Human Rights, Monitoring the prevention of torture and other cruel, inhuman or degrading treatment or punishment, at URL <<http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx>> (accessed 21 March 2017).

³³ United Nations High Commissioner for Human Rights, Ratification status for Eritrea at URL http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=57&Lang=EN (accessed 21 March 2017).

³⁴ United Nations High Commissioner for Human Rights, Ratification status of Eritrea, at URL <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=ERI&Lang=EN> (accessed 21 March 2017).

³⁵ United Nations High Commissioner for Human Rights, Reporting status for Eritrea, at URL <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=ERI&Lang=EN> (accessed 21 March 2017).

³⁶ Article 20(1).

³⁷ United Nations Treaty Collection, CAT, at URL <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#EndDec> (accessed 21 March 2017).

Along with the Committee against Torture, there are other mechanisms developed by the UN Commission on Human Rights that can examine allegations of torture, irrespective of wherever the act occurs in the world. Special Rapporteurs, Representatives, Independent Experts or Working Groups are examples of such country-specific mechanisms.³⁸ The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment sent a request for a country visit to Eritrea in 2005, but Eritrea rejected the request.³⁹ In 2012, the UN Special Rapporteur on the situation of human rights in Eritrea was appointed by the UN Human Rights Council to investigate human rights violations perpetrated by the Eritrean Government, following recourse by victims to the Council's complaint procedure.⁴⁰ The Government of Eritrea has not cooperated with these Special Procedures to permit them unrestricted access to visit the country, to give due consideration to the recommendations contained in their reports or to provide them with the information necessary for the fulfilment of their mandates.⁴¹

Eritrea has participated in two cycles of the Universal Periodic Review, in 2009 and 2014.⁴² The national reports presented by Eritrea mainly focused on children's rights, female genital mutilation and the Millennium Development Goals.⁴³ The reports did not deeply cover the measures taken by the State regarding torture.⁴⁴ Under the first cycle of the UPR, members of the Human Rights Council recommended that Eritrea ratify CAT and grant the requests for a visit by the UN Special Rapporteur on torture.⁴⁵ Eritrea accepted the first recommendation but rejected the latter stating that requests by Special Procedures are granted on a case by case basis.⁴⁶ The other recommendation was for Eritrea to take measures for the prevention and investigation of torture and the prosecution of perpetrators.⁴⁷ The Government rejected this recommendation and stated no person is tortured in the country and the Government works for the prosecution of anyone responsible for torture.⁴⁸ According to the Human Rights Watch, Eritrea has implemented none of the Council's major UPR recommendations: the protections against torture and arbitrary arrest are consistently violated.⁴⁹

Under the 2014 UPR, members of the Human Rights Council made similar recommendations, including for ratification of CAT, for the acceptance of visit requests by the UN Special Rapporteur and for a measure to end the widespread use of torture.⁵⁰ The Government accepted the former recommendation and the latter were rejected.⁵¹ The Government did not take any measure to implement the recommendations under the first cycle and the 2014 UPR represented no advance.⁵²

³⁸ Foley, op cit.

³⁹ UN General Assembly resolution 63/175 (2008).

⁴⁰ Kjetil and Rezene, op cit, 18.

⁴¹ Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea, UN Doc A/HRC/29/CRP.1 (2015), para 12

⁴² Kjetil, and Rezene, (n.28) 41

⁴³ Human Rights Council 29th session (n.7) Para 179

⁴⁴ Ibid.

⁴⁵ Report of the Working Group on the Universal Periodic Review, UN Doc A/HRC/13/2 (2010), para 79(1).

⁴⁶ Views on conclusions and/or Recommendations, voluntary commitments and replies presented by the State under review, UN DOC A/HRC/13/2/Add.1, para 15

⁴⁷ Report of the Working Group on the Universal Periodic Review, UN Doc A/HRC/13/2 (2010), para 79(85).

⁴⁸ Views on conclusions and/or Recommendations, voluntary commitments and replies presented by the State under review, UN DOC A/HRC/13/2/Add.1, para 26

⁴⁹ Human Rights Watch, 'Eritrea: Submission to the Universal Periodic Review' (2010) at URL <https://www.hrw.org/news/2013/06/20/eritrea-submission-universal-periodic-review> (accessed 30 April 2017).

⁵⁰ Report of the Working Group on the Universal Periodic Review, UN DOC A/HRC/26/13 (2014), para 122(3,77 and 140)

⁵¹ Views on conclusions and/or Recommendations, voluntary commitments and replies presented by the State under review, UN DOC A/HRC/26/13/Add.1, para 1

⁵² Foreign & Commonwealth Office, 'Eritrea- Country of Concern' (2014) at URL <https://www.gov.uk/government/publications/eritrea-country-of-concern/eritrea-country-of-concern-latest-update-30-june-2014> (accessed 30 April 2017).

Regional human rights implementation

Article 5 of the African Charter on Human and People's Rights enshrines the prohibition of torture, cruel, inhuman or degrading treatment or punishment. The African Commission on Human and People's Rights, the body responsible for monitoring implementation of the Charter,⁵³ has repeatedly raised the issues of human rights in Eritrea.

The Commission has made decisions in two cases, in 2003 and in 2007.⁵⁴ In the first case, *Zegveld and another v Eritrea*, the Commission requested the immediate release of 11 individuals who were arrested incommunicado since 2001.⁵⁵ Similarly, in 2007, the Commission gave a decision in the case of *Article 19 v Eritrea* that involved 18 journalists who were detained without trial, with the African Commission deciding that the Government had violated the freedom from torture, freedom of expression and rights of liberty of the journalists.⁵⁶ The Commission also adopted a resolution in 2005 condemning human rights violations in Eritrea.⁵⁷ In the Resolution, the Commission required the Eritrean Government to implement the decision in the case of *Zegveld and Another v Eritrea*.⁵⁸ However, the State of Eritrea has not done anything to give effect to and implement the decisions and the resolution of the Commission.⁵⁹

Furthermore, as a party to the African Union Charter, Eritrea is obliged to receive fact-finding missions from the African Commission on Human and Peoples' Rights when it is investigating accusations and claims of human rights violations in the country.⁶⁰ Eritrea has never invited the Special Rapporteur of the African Commission and has repeatedly barred the Commission access to the country.⁶¹ Eritrea did not recognize the competence of the African Court on Human and People's Rights to examine individual communications.⁶²

Article 4(h) of the Constitutive Act of the African Union also provides the right of the Union to intervene in a Member State. The Union's right to intervene in a Member State is pursuant to the decision of the Assembly in respect of grave circumstances such as war crimes, genocide and crimes against humanity. The Commission of Inquiry has reported the widespread and systematic commission of crimes against humanity and the framework of humanitarian intervention under the Union is a potential platform to end the human rights violations in the country.⁶³

Domestic implementation

International or regional human rights obligations require the change of domestic laws or their modification accordingly.⁶⁴ After ratifying CAT in 2014, Eritrea published a new Penal Code in May 2015. The Penal Code includes provisions setting out a definition of the crime torture and its punishment.

The Penal Code under Article 108 lists what constitutes crimes against humanity, with torture listed as one of them. Torture is defined as "the intentional infliction of severe pain or suffering, whether physical or mental upon a person in the custody or under the control of

⁵³ Under Article 30 of the Charter.

⁵⁴ Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea, UN Doc A/HRC/29/CRP.1 (2015), para 197

⁵⁵ *Zegveld and Another v Eritrea*, African Commission on Human and People's Rights Case 250/02 2003.

⁵⁶ *Article 19 v. Eritrea*, African Commission on Human and People's Rights Case 275/03 2007.

⁵⁷ African Commission on Human and Peoples' Rights Resolution 91/38 (2005).

⁵⁸ Ibid.

⁵⁹ Kjttil, op cit.

⁶⁰ Ibid, 36.

⁶¹ Ibid.

⁶² Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea, UN Doc A/HRC/29/CRP.1 (2015), para 194

⁶³ Article 4(h)

⁶⁴ Andrew Byrnes and Catherine Renshaw, 'Within the states', in Daniel Moeckli, S Shah, S Sivakumaran and Harris, *International Human Rights Law* (Oxford University Press, 2nd ed, 2013), 460.

the accused; except that torture shall not include pain or suffering reasonably arising only from inherent in or incidental to the proper execution of lawful procedures".⁶⁵ The definition adopted some elements of the definition provided for under CAT. However, the Penal Code excluded the requirement of the specific purpose for the commission of torture as an element of its definition. According to Article 1 of CAT, an act is regarded as torture if it is committed for a purpose of obtaining information or confession from the victim or third person, as a punishment for an act of a victim or third person or as an intimidation or coercion of the victim or a third person or as a discrimination. Additionally, the definition does not clarify who commits torture. CAT requires the inflictor to have a public official position and excludes acts of a private person. Article 149 of the Penal Code, on the other hand, criminalizes a public official who commits an international breach of the duties of his office by using physical or mental torture during the arrest, custody, supervision escort or interrogation of a person. This provision, read with Article 108 of the Code can clarify the ambiguity on the specific purpose requirement and the 'who' requirement. Torture is also prohibited under the draft Constitution of Eritrea. Article 16(2) of the Constitution grants people's freedom from torture or cruel, inhuman or degrading treatment or punishment.

Beyond legalizing the prohibition of torture, States are required to have effective legislative, administrative, judicial or other measures to implement the obligations under CAT.⁶⁶ Eritrea has not adopted specific legislation or other necessary measures to facilitate such implementation. The other crucial requirement for implementation of international human rights obligations is shaping domestic practices in line with obligations under the Convention. The Convention obliges States parties to inform and educate law enforcement officials, public officials and other persons who may be involved in the custody, interrogation or treatment of any individuals subjected to any form of arrest, detention or imprisonment.⁶⁷ However, reports show that torture is widespread in Eritrea especially in police stations, civil and military prisons and in secret and unofficial detention facilities.⁶⁸ The Commission of Inquiry on human rights in Eritrea identified different methods by which officers; police, interrogators and prison guards inflict torture against detainees to obtain self-incriminating statements, extracting confessions and information and intimidating, punishing and suppressing detainees.⁶⁹ The methods used to inflict torture include tying up, beating, electric shock, death threat, sexual torture and rape.⁷⁰

From the above discussion, it is possible to grasp Eritrea's failure to undertake the domestic implementation of its international obligations under CAT. The Eritrean Government in its Universal Periodic Report (UPR) in 2014 justified the border war with Ethiopia and territorial occupation of the country as a reason for its non-compliance.⁷¹ Eritrea opts to blame external forces for failing to implement its human rights obligations, yet the border war with Ethiopia took place between the years 1998 to 2000.⁷² Fourteen years later, the Eritrean Government raises the war as a reason for its non-compliance and the non-implementation of its draft Constitution.

Respect for due process and the protection from arbitrary arrest

States are obliged to prevent, investigate, prosecute and punish human rights violations committed by public officials and provide effective remedies and reparation to victims, and

⁶⁵ Article 108(2) (1).

⁶⁶ Article 2(1).

⁶⁷ Article 10.

⁶⁸ Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea, UN Doc A/HRC/29/CRP.1 (2015), para 838

⁶⁹ Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea, UN Doc A/HRC/29/CRP.1 (2015), para 282

⁷⁰ Ibid.

⁷¹ National UPR Report submitted in accordance with paragraph 5 of the Annex to Human Rights Council resolution 16/21, UN Doc A/HRC/WG.6/18/ERI/1 (2014), para 84.

⁷² Kjttil (n.2) 35

following the due process of law⁷³. Nevertheless, the situation in Eritrea reveals a prevalent impunity for abuse.⁷⁴ According to the US Department of State report, there were no known internal or external mechanisms to investigate security force abuse or other public officials.⁷⁵ Several detainees are held without charge or due process.⁷⁶ Moreover, the Human Rights Council's Commission of Inquiry in its 2015 report affirms the state of impunity, and states that there is no evidence of a perpetrator of torture having been held responsible and punished for acts of torture.⁷⁷

Individuals are protected from arbitrary detention under the International Covenant on Civil and Political Rights, to which Eritrea is a party.

The Constitution also prohibits arbitrary arrest and detention, but arbitrary arrest and detention remains widespread in the country, including incommunicado detention.

Investigation and prosecution of crimes of torture

National criminal courts are the institutions primarily responsible for the investigation and prosecution of crimes of torture. However, as discussed, the executive branch of the government controls the courts in Eritrea. The lack of independence of the judiciary contributes to the widespread impunity in Eritrea. Despite Eritrea's binding international commitments to undertake investigations when acts of torture have been alleged, no record of investigation or prosecution is available.⁷⁸

When national courts are unable or unwilling to prosecute some crimes of torture, the International Criminal Court (ICC) is another potential platform to bring perpetrators to justice. The Rome Statute establishing the ICC regards crimes of torture as crimes against humanity.⁷⁹ However, Eritrea has not ratified or acceded to the Rome Statute.⁸⁰ That said, the Security Council has the jurisdiction to refer a case to the ICC, following which the Court could exercise jurisdiction.⁸¹ The Commission of Inquiry on Eritrea recommended that the Security Council refer the case to the ICC for the investigation and trial of individuals for genocide, war crimes and crimes against humanity.⁸² Following the Commission's recommendation, a draft resolution was initiated by Somalia and Djibouti requesting the Human Rights Council to seek the General Assembly to submit the report to the Security Council for appropriate action to hold those responsible for human rights violations accountable in Eritrea.⁸³ However, the Human Rights Council adopted a watered-down resolution, which allowed Eritrea to escape censure by the UN Security Council.⁸⁴ The resolution adopted decided to transmit all reports of the Commission of Inquiry to all relevant

⁷³ See also African Charter on Human and People's Right, Article 7, and International Covenant on Civil and Political Rights, Article 14.

⁷⁴ US Department of State, Bureau of Democracy, Human Rights, and Labor, 'Eritrea – Country Report on Human Rights Practices, 2014, at URL <https://www.state.gov/j/drl/rls/hrrpt/2014/humanrightsreport/index.htm#wrapper> (accessed 20 March 2017).

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea, UN Doc A/HRC/29/CRP.1 (2015), para 282

⁷⁸ See also Article 12 of the Convention Against Torture, which requires State authorities to start an investigation when there is a reasonable ground to believe that an act of torture has been committed.

⁷⁹ Article 7(1).

⁸⁰ International Criminal Court, 'the States Parties to the Rome Statute', at URL https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed 29 March 2017).

⁸¹ Article 13(b).

⁸² Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea, UN Doc A/HRC/29/CRP.1 (2015), para 132

⁸³ Draft Resolution on the situation of human rights in Eritrea, (UN DOC) A/HRC/32/L.5/Rev.1(2016) para 17.

⁸⁴ Reuters, 'Eritrea escapes UN Security Council referral over human rights' (2016), at URL <http://news.trust.org/item/20160701161311-xilwq/> (accessed 1 May 2017).

bodies of the United Nations, including the General Assembly and the Secretary-General for appropriate action.⁸⁵

Measures taken for the prevention of torture

Domestically, Eritrea's implementation of its international obligations shows gaps. Eritrea continues to be uncooperative with international and regional human right mechanisms. The Constitution, which incorporates these human rights and freedoms, has never entered into force since its enactment in 2001.

However, the Government has taken some measures for the implementation of its obligations. In 2007 and 2014, Eritrea participated in UPR process which showed the government's engagement with the international community. The ratification of CAT and the publication of new Penal Code can be taken as positive measures taken in the prevention of torture.

Measures taken for the provision of access to redress for victims of torture

Article 28 of the draft Eritrean Constitution grants individuals the right to redress. Any aggrieved person is entitled to petition a competent court seeking redress for violation of a fundamental right or freedom. The provision also obliges courts to accept victims' claims and grant an appropriate decision to redress wrongs. The same provision of the Convention also grants individuals the right to complain about acts of torture and ill-treatment, to have their complaints investigated and to be offered protection against consequent intimidation or ill-treatment.

However, reports which were discussed above show the crime of torture is poorly investigated and the perpetrators are hardly brought to justice.

Implementation gap

The memorandum has discussed and revealed the wide gap existing in implementation. Eritrea falls short of implementation of its international and regional human rights commitments.⁸⁶ The Government has not made any progress in implementing the enacted 1997 Constitution, nor the promised new Constitution in 2015.

The main challenge, which contributes for the non-compliance under international or regional level, the rule of law, continues to be arbitrary. The State structure undermines the protection of individuals' from torture, the investigation of the crime and the prosecution of perpetrators. Separation of powers between the branches of government is lacking. Other serious shortcomings including arbitrary detention, incommunicado detention and torture in detention.

Conclusion

The memorandum set out to identify the country's human rights situations, the State structure, and the available international and legal frameworks for advocacy in the prevention, perpetration, access to redress and accountability for acts of torture. The memorandum consulted available reports on the human right situation of Eritrea making its focus on torture. Mainly the reports of international monitoring mechanisms, government bodies, and NGOs are used.

Accordingly, the memorandum depicts the widespread violation of human rights in Eritrea. The human rights credential of the Government has deteriorated due to the absence of rule

⁸⁵ Human Rights Council resolution 32/14 (2016), 'situation of human rights in Eritrea' UN DOC A/HRC/RES/32/24 para 16.

⁸⁶ United Kingdom Foreign and Commonwealth Office, Human Rights and Democracy Report Eritrea, (12 March 2015), at URL <http://www.refworld.org/docid/551a52ff15.html> (accessed 27 February 2017).

of law. It is shown, that the rights protected under international instruments and national legal frameworks are progressively curtailed by the acts of the Government and individuals.

The implementation of international human rights instruments and the national legal framework, which grant citizens with the right to protection from torture, remained unimplemented. The Government announced the introduction of a new Constitution in 2015 whilst the existing ratified constitution was not enforced. The State structure is not established in a way it works independently. The executive, which is headed by the president, influence and control the other three branches of governments. Rule of law is replaced by the rule of men and spread in the country. The separation of power in Eritrea is blurred which resulted in the absence of check and balance.

The State structures that are central figures in playing a prominent role in the prevention of torture and in the protection of individuals from torture are not effective. Their inefficiency also affected the investigation of acts of torture, the prosecution of perpetrators and the redress of victims negatively. It is safe to conclude the absence of rule of law coupled with the other challenges mentioned above curtailed the proper function of the government bodies responsible for protecting individuals' from the crime of torture. In Eritrea, the act of torture is committed with impunity.

Recommendations

The wide implementation gap existing in the country demands a range of advocacy. The step taken by Eritrea in engaging with international community can be explored for further advocacy opportunities. At the UN level, advocacy might be pursued using the CAT reporting system. The alternative report that is presented by NGOs during a State party's report could be used to offer an alternative view of Eritrea's compliance by elaborating the real human rights situation in the country. Bringing specific issues to the attention of UN's country-specific monitoring mechanisms of Special Procedures or Commission of Inquiry is another opportunity. In general, lobbying for the recommendations below can be considered.

1. The Government of Eritrea should implement the enacted constitution or proceed with developing, enacting and implementing the promised new Constitution.
2. Executive interference with the legislative and judicial branches of government should be halted. Checks and balances and a robust separation of powers should be observed.
3. The Penal Code should be implemented by applying due process of law to protect individuals from torture and give effect to individuals' right to redress.
4. Eritrea should promote the establishment of national human rights and other civil organizations that work on the promotion of human rights.
5. International human right mechanisms should lobby Eritrea for the abolishment of the special court and its replacement by civil courts.
6. Lobbying the African Union, which under Article 4(h) of its Constitutive Act allows for humanitarian intervention based on the United Nations Commission of Inquiry conclusions on Eritrea concerning the commission of crimes against humanity.
7. Lobbying Eritrea to withdraw its reservation to Article 20 of CAT, accede to the Rome Statute and ratify the Optional Protocol to the Convention against Torture.