www.erilaw.org

Stakeholder Report Submitted to the 32nd Session of the Working Group on the Universal Periodic Review (UPR) of the UN Human Rights Council

(Third UPR Cycle of Eritrea)

Submitted By
Eritrean Law Society (ELS)
12 July 2018

Contact Details:
3137 Linden Street, Oakland, CA 94608
United States of America
(Non-Profit Registration No. 0694693-3)
Tel: +1 786 603 3564
Email: eri.law.society@gmail.com
Website: www.erilaw.org

Table of Contents

1. Introduction

[1] This report spotlights critical shortcomings in the implementation of justice-sector-related recommendations, emanating from the Second Universal Periodic Review (UPR) of Eritrea. It also addresses other shortcomings related to the pervasive crisis of constitutionalism and lack of democratic accountability in the country, in particular the conspicuous absence of a working constitution and a functioning parliament. The main focus is on the problem of judicial devitalisation in Eritrea. The report emphasises that the judiciary is the most important of the three conventional state institutions when it comes to the protection of fundamental rights and freedoms, as well as restraining capricious government authority. The report is submitted by the Eritrean Law Society (ELS or the Society), which is the only professional association of Eritrean lawyers, currently based in exile due to the extremely closed political situation in Eritrea. The Society strives, among other things, for the establishment of a rule of law abiding politico-legal system in Eritrea.

2. Methodology

[2] Since its formal establishment in 2008, ELS to the UPR of Eritrea, in different other occasions the Society has produced several civil society reports that were submitted to various treaty monitoring bodies of the UN and the African Union (AU), such as: the UN CEDAW Committee, the UN CRC Committee, the African Commission on Human and Peoples Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child, to mention some examples. The Society has also submitted voluminous amount of information to two fact-finding missions established by the UN Human Rights Council, namely: the UN Special Rapporteur on the situation of human rights in Eritrea, and the UN Commission of Inquiry (COI) on human rights in Eritrea. As part of all these processes, ELS has accumulated voluminous amount information, mostly in the form of interviews with victims of human rights abuses and relatives of victims, making also the basis for much of the content in this report. Part of this report is also based on information obtained from some ELS members (former senior judges and prosecutors) who have fled the country recently under extremely difficult circumstances. In the interest of protecting the safety of interlocutors, this report will not make disclose of names.

3. Context of Eritrea's current UPR process

[3] The current UPR of Eritrea is taking place under extremely worrying circumstances, which involve an on-going situation of crimes against humanity in the country. This is according to the second and most important report of the COI, from June 2016, in which it is stated: there are reasonable grounds to believe that crimes against humanity have been committed in Eritrea since 1991.[1] To our knowledge, next to North Korea, Eritrea is the only country in the world, whose government is officially accused of perpetrating crimes against humanity in a political situation not involving active armed hostilities, or civil war, or a situation of generalised political disturbance. The catalogue of crimes against humanity documented by the second COI report include the following abhorrent violations that have been committed with alleged knowledge or acquiescence of high-ranking government officials: *enslavement*, *imprisonment*, *enforced disappearance*, *torture*, *other inhumane acts*, *persecution*, *rape and murder*.[2] Crimes against humanity are among "the most serious crimes

of concern to the international community as a whole," making one of the four major categories of core international crimes prohibited by Article 5 of the Rome Statute of the International Criminal Court (ICC). They are also one of the three major categories of atrocity crimes, envisaged under the Article 4(h) of the Constitutive Act of the AU, necessitating possible intervention on the part of the major political organs of the AU.

4. The problem of judicial devitalisation

[4] Since formal independence in 1993, Eritrea never had an independent judiciary that can meaningfully defend and protect the enjoyment of fundamental right and freedoms, as well restrain capricious government authority. Attacks by the executive branch against the independence and impartiality of the judicial branch have taken different forms and shapes. The crisis reached a very critical level in August 2001, at which time the then President of the High Court of Eritrea, Judge Teame Beyene, was disgracefully dismissed from his judicial office by the Minister of Justice. The Minister dismissed Judge Beyene at the behest of the Eritrean State President, in response to a public comment made by Judge Beyene – related to troubling trends of executive interference on the independence of the judiciary. At the time of his dismissal, Judge Beyene's position was the equivalent a Chief Justice in other jurisdictions with Supreme Courts. When this happened, several founding members of ELS were in Eritrea, witnessing the unwarranted attack against the judiciary.

[5] Over the last sixteen years, the Eritrean judiciary has suffered from a great deal of unwarranted attacks emanating from the Office of the State President. Attacks also come from the Minister of Justice, under whose direct authority the judicial branch operates, and from other arms of the executive branch, including the army and the secret police. Like ordinary citizens, judges and other members of the legal profession, including public prosecutors and lawyers in practice, are not immune from abhorrent forms of abuses, such as the widespread practice of enforced disappearance and/or arbitrary without detention – the boundary between the two examples of abuses being murky in most cases. Rights groups, estimate that there are more than 10, 000 victims of detention without trial and enforce disappearance in Eritrea.[3]

[6] As part of the overall crisis of human rights in the country, there are several instances known to ELS, which involve instances of detention without trial, including deaths as a result of abuses in the hands of agents of the national security, suffered by members of the legal profession. The judiciary suffers from an acute problem of outright reversal of judgements rendered by ordinary courts; such reversals take place most of the time by army commanders and other influential politicians. Further details containing names of victims and places of abuses are available any time on a confidential basis.

[7] Complicating matters, there is no independent association of the legal profession. The plight of our own association (ELS), which is based in exile due to the extremely repressive political situation in Eritrea, is a case in point. Initial efforts aimed at establishing ELS inside Eritrea were frustrated by the secret police, leading to the formation of ELS in exile. The very fact of our existence in exile tells volumes about the level of repression suffered by the legal profession in general. Based on this very difficult experience, ELS likens its predicament with that of an orphaned child. Like a child abandoned by its own parents, ELS is also forsaken, abused and persecuted by its imagined parent – the politico-legal system in Eritrea

[8] Legal education is also severely under-developed. With the dismantlement of the only national university in 2003 (Asmara University), under the guise of "decentralisation of higher education," the School of Law at the national university sustained huge setbacks that have severely curtailed its capacity to cultivate competent lawyers. Moreover, there is one major entity of the Eritrean judicial system, which comes as a hideous blot in the post-independence judicial history of the country. This is the Special Court of the country. Established by Proclamation No. 85/1996 with the seemingly noble objective of fighting corruption and embezzlement of public funds, the Special Court ended up becoming one of the most harmful tools of the Eritrean State President against his political opponents.

[9] Flouting well-known principles of justice, and conceived as an omnipotent judicial entity, the Special Court enjoys absolute powers. The Court is accountable only to the State President. It renders judgements without due regard to some universally recognised principles of criminal justice: such as, the right to appeal and the right to legal counsel. The law that established the Special Court flagrantly violates the very basic principle of legality. The Special Courts has no known laws to refer to. It is empowered to use any method to pursue "justice" with any limits. The Special Court has far-fetching powers, including the power to undo previous judgements given by ordinary courts. This is the most common way by which the Special Court encroaches into the domains of ordinary courts in disregard of well-known legal presumptions, such as the principle of *res judicata*. Only on this account, the mayhem caused by the Special Court is beyond imagination.

[10] In general terms, Eritrean ordinary courts are relegated to adjudicating on trivial civil and criminal matters that do not involve substantive human rights issues, such as the issue of *habeas corpus* in the case of political prisoners or other actions aimed at challenging capricious government authority. As a matter of well-known practice, cases that are generally considered by the Eritrean government as "politically inexpedient" are never brought to the attention of ordinary courts. If they come, Eritrean judges do not have the requisite independence to deal with them. On this particular issue, there is a landmark court ruling from Canada, known as *Araya v. Nevsun Resources Ltd.* 2016 BCSC 1856. The ruling dealt with the specific issue of: whether a lawsuit against a Canadian corporation (Nevsun), accused of complicity in the commission of grave human rights violations, should be heard by Canadian courts, under the assumption that the political situation in Eritrea does not allow the national courts to do so? In answering the question to the affirmative, the Supreme Court of British Columbia ruled as follows:

> "… there is evidence on the record … that corroborates the plaintiffs' expressed fears that they cannot return to Eritrea and obtain a fair trial against Nevsun in that forum. This evidence also corroborates … that the plaintiffs would not receive a fair trial in Eritrea and that any judge hearing the case and who ruled in their favour would place his or her career and personal safety in jeopardy."[4]

[11] The plaintiffs in the court case are former national service conscripts from Eritrea who were allegedly abused in a mining industry co-owned by the Canadian corporation, Nevsun. They claimed that they are unable to return to Eritrea due to well-founded fear of reprisal. In November 2107, the ruling of the Supreme Court of British Columbia from 2016 was confirmed by the Court of Appeal for British Columbia in: *Araya v. Nevsun Resources Ltd*., 2017 BCCA 401.

5. Concluding remarks and recommendations

[12] From the above, it is clear that there is an urgent need for Eritrea to make a quick return to a politico-legal system anchored on respect for the rule of law and democratic accountability. However, this would not be possible without addressing two critical shortcomings, which are very much related to the problem of judicial devitalisation in Eritrea: the lack of a working constitution and a functioning parliament. To our knowledge, Eritrean is the only country in the world in not having any form of a constitution (written or unwritten) and a functioning parliament regardless of the democratic or non-democratic nature of such a constitution or a parliament. Indeed, seen from this angle, Eritrea's predicament is very unique when compared to several other experiences around the world.

[13] We assert that in spite of several empty promises made by the Eritrean government in numerous occasions, including in the form of "accepted/supported" or "noted" UPR recommendations, no concrete improvement has have been seen in the following selected examples of recommendations, drawn from the last UPR of Eritrea (as reflected in the these major documents of the UN: A/HRC/26/13 and A/HRC/26/13/Add.1). Some of the most neglected UPR recommendations and their respective paragraph numbers, including the countries that made the recommendations are are cited below verbatim (in order of importance to our report).

> 122.33. Fully implement the Constitution to ensure the administration of justice and the rule of law and also establish an independent human rights institution to oversee human rights issues (Republic of Korea).
>
> 122.151. Efforts aimed at improving the administration of justice system and the situation of persons deprived of their liberty (Ecuador).
>
> 122.135, 122.137, 122.163. Bring to an end inhumane detention conditions, release persons detained for exercising their freedom of expression, respect and ensure that all detainees are treated in accordance with international human rights standards (Germany, Norway and Sweden).
>
> 122.144, 122.146, 122.147, 122.148. Release or bring before a court all persons detained without a charge and to respect international standards in the treatment of detainees (Austria, Germany, Switzerland, Norway).

[14] With regard to the implementation of the 1997 Constitution, for example, it needs to be noted that in its voluntary commitments and replies (A/HRC/26/13/Add.1), submitted in June 2014, Eritrea indicated that it is drafting a new constitution. Nonetheless, nothing of a substance has been done about this process over the last four years. In fact, in December of the same year (2014), the Eritrean President said in a televised interview that the 1997 Constitution is a dead document and must be forgotten.[5] Four years since then no new constitution has been adopted in the country. The government has also taken not any single step in addressing the crucial recommendations cited above. In fact to the contrary, as noted by the second COI report of June 2016, the country is now said to be suffering from a persistent problem of crimes against humanity that required a more coordinate response from regional and international actors: the UN, the EU and the AU.

[15] In view of the persistent crisis of human rights in Eritrea, including that of crimes against humanity, the following are among the least that should be done by the Eritrean government

as a matter of utmost priority. We take this occasion to make a sober call on the UN Human Rights Council to ask the Eritrean government to come up with a clearly defined, Specific, Measurable, Achievable, Relevant and Time-bound (SMART) plan to resolve the crisis of human rights in the country, including devitalisation of the judicial branch. The demands can be put forward in the form of questions asked as follows. What is the most likely timeline of the government to:

- Implement 1997 Constitution, and/or adopt a new constitution in a democratic and participatory process;
- Reinstate the Eritrean National Assembly (the transitional parliament);
- Restore the independence and impartiality of the judiciary, including the establishment of an independent judicial service commission, and complete separation of the courts from the authority and influence of the Ministry of Justice;
- Release prisoners, in particular those detained on account of political views or religious tendencies;
- Take other symbolic measures that bolster transition to a full-fledged democratic order, such as concrete preparations for the conduct of free and fair general elections.

[16] We believe that taking measurable and time-bound steps in the problem areas identified above is the most important starting point in resolving the deep-seated crisis of human rights in Eritrea. Over the past many years, the government has persistently used the prolonged stalemate with neighbouring Ethiopia as an excuse to suppress fundamental rights and freedoms. The problem is officially resolved as of 9 July 2018, with the adoption of the Joint Declaration of Peace and Friendship between Eritrea and Ethiopia.[6] In light of this new development, there should not be any excuse left for the Eritrean government to remain reluctant in addressing meaningfully the problems identified in this report in a timely, concrete and responsible manner.

---

[1] *Second Report of the Commission of Inquiry on Human Rights in Eritrea*, A/HRC/32/47, 8 June 2016 [hereinafter "Second COIE Report Short Version"], Summary, at 1; see also paras. 59-95.
[2] Ibid.
[3] Amnesty International, *Eritrea: 20 Years of Independence but Still No Freedom*, Index: AFR 04/001/2013, p. 14.
[4] *Araya v. Nevsun Resources Ltd.* 2016 BCSC 1856, para. 284.
[5] Interview of President Isaias Afwerki with the Eritrean TV, 30 December 2014, copy available at https://www.youtube.com/watch?v=keehnnPFoDk.
[6] Joint Declaration of Peace and Friendship between Eritrea and Ethiopia, 9 July 2018, http://www.shabait.com/news/local-news/26639-joint-declaration-of-peace-and-friendship-between-eritrea-and-ethiopia.