

At the national level, there are few women in high level positions despite the 30 per cent quota. Low levels of representation are also seen in diplomatic and senior government positions. Efforts have been made to include women in the political and public spheres; however, this has been difficult because of the failure to hold elections.

253. The NUEW remained the only organization for women in post-liberation Eritrea. The mission of the NUEW is “to ensure that all Eritrean women confidently stand for their rights and equally participate in the political, economic, social, and cultural spheres of the country and share the benefits”.²³¹ Although the NUEW planned to become an independent civil society organization, it remains in the PFDJ, and only women affiliated with the PDFJ are members. The organization’s lack of independence and insufficient human and financial resources negatively impact upon its ability to operate effectively.²³²

V. The institutional and domestic legal frameworks

A. Political and security frameworks

254. The structure and operation of the Eritrean state reflects decisions by President Afwerki and the wider political and international context. The failure to put into place the Constitution adopted by the Constituent Assembly in 1997,²³³ has left Eritrea with institutions that were supposed to be transitional (many institutions exist in name only). During the past 15 years, the political system has progressively become more centralised and controlled by the President. The military and security apparatus remains very opaque but, again, is tightly controlled by the President.

1. Structure of the State

(a) From the Provisional Government of Eritrea to the Government of the State of Eritrea

255. In May 1991, during the last phase of the armed struggle, which culminated in the liberation of Asmara, the Executive Committee of the EPLF set up the Provisional Government of Eritrea (PGE). Isaias Afwerki, who had been the secretary general of the EPLF since 1987, became the head of the PGE. In May 1992, the Central Committee of the EPLF, created in the 1970s to manage the Front’s day-to-day operations, was transformed into the “legislative body” of the PGE. The first measure taken by this new body was to adopt Proclamation No. 23/1992, which formalised the structure of the PGE.

256. Proclamation No. 23/1992 stated that “until the Eritrean people decides its rights to self-determination through a plebiscite and until a constitutional government is established ... the EPLF, in this transitional period, has the responsibility to proclaim and establish a transitional government so as to take its fight for Eritrean independence to its final destination.”²³⁴ Article 3 of the Proclamation confirmed the legislative status of the Central Committee of the EPLF. Article 4 established an Advisory Council to serve as the executive wing of the Government. The Advisory Council was composed of 28 members including the heads of the 12 departments of the EPLF, the provincial administrators, the

²³¹ As stated on the NUEW website (<http://www.nuew.org/>).

²³² CEDAW/C/ERI/CO/5, para. 24.

²³³ Simon M Weldehaimanot, *The status and fate of the Eritrean Constitution* (African Human Rights Law Journal, 2008 1), pp. 108-137.

²³⁴ Translated by GlobaLex: <http://www.nyulawglobal.org/globalex/Eritrea.htm>.

military zone commanders and the navy. Article 6 of the Proclamation provided for the establishment of the Eritrean judicial system.²³⁵

257. On 19 May 1993, the PGE adopted Proclamation No. 37/1993, which amended Proclamation No. 23/1992²³⁶ and set the basis for a transitional government for a four-year period “until a constitution is adopted”.²³⁷ Proclamation No. 37/1993 created a three-branch government. A unicameral Parliament was established with a National Assembly (*Hagerawi Baito*) composed of 150 members comprising the whole Central Committee of the EPLF and 75 elected representatives.²³⁸ The legislative powers of the National Assembly included the elaboration of domestic and foreign policies, the ratification of international treaties and conventions, and the approval of the establishment of ministries and other government agencies.²³⁹ The National Assembly was also empowered to adopt proclamations but Proclamation No. 37/1993 did not specify the procedure for the enactment of legislation.²⁴⁰ The Judiciary remained independent from the other branches of the Government.

258. The National Assembly also had the authority to elect the President, who in turn served as its chair.²⁴¹ On 21 May 1993, Isaias Afwerki was confirmed in that position. On 7 June 1993, through endorsement by the National Assembly, the Advisory Committee of the PGE became the Executive Branch of the Government, or State Council. The President, supported by the Office of the President²⁴² set up since 1992, headed the Council of Ministers. The Proclamation stated that his tasks included presenting legislative proposals and the national budget to the National Assembly. He was also given the power to appoint ministers, regional administrators, ambassadors, justices of the Supreme Court and judges, among others.²⁴³

(b) Building of a constitutional state and administrative division of the country

259. In February 1994, at its Third Congress, the EPLF reorganised itself into a political party – the People’s Front for Democracy and Justice (PFDJ). It reconfirmed Isaias Afwerki as its secretary general and adopted a new structure with a 19-member²⁴⁴ Executive Council and a 75-member²⁴⁵ Central Council which succeeded the EPLF Political Bureau and Central Committee. The members of the new Central Council continued to sit in the National Assembly. During the same congress, the PFDJ adopted a National Charter aimed at guiding the party and the Government’s policies and actions. The Charter called for the creation of a body to draft a constitution. Proclamation 55/1994, adopted on 15 March 1994, provided for the establishment of a constitutional commission tasked to organise a

²³⁵ See *infra*.

²³⁶ Proclamation No. 37/1993 was itself afterwards amended by Proclamation No. 52/1994.

²³⁷ Article 3 (2) of Proclamation No. 37/1993.

²³⁸ This composition is provided by Proclamation No. 52/1994.

²³⁹ Article 4 (3) of Proclamation No. 37/1993.

²⁴⁰ *Ibid.*

²⁴¹ Article 4 of Proclamation No. 37/1993.

²⁴² There is no publicly available information on the structure of the Office of the President, except that Mr. Gebre Meskel’s official title had been “Director of the Office of the President” until he was appointed Minister of Information in March 2015.

²⁴³ Article 5 of Proclamation No. 37/1993.

²⁴⁴ Out of which 12 are reportedly still in office, two in exile, one in prison, and three have died.

²⁴⁵ Out of which 30 are reportedly still in office, six “frozen”, six in exile, seven arrested, and 18 have died.

national debate and public awareness on constitutional principles and practices, draft a constitution, and submit it to the National Assembly for approval.²⁴⁶

260. During its Third Congress the PFDJ also called for a new administrative division of the country. In April 1996, Proclamation No. 86/1996 was adopted.²⁴⁷ It abolished the historical nine provinces of Eritrea and established six administrative regions or *zobas*, instead. These regions, which still exist, are: Southern Red Sea; Northern Red Sea; Anseba; Gash-Barka; Southern; and Central (which includes the capital Asmara). Regions are further sub-divided into sub-regions, or sub-zones (*nus-zobas*), themselves divided into administrative areas and/or villages (*kebab/adi*), which constitute the smallest administrative units in Eritrea.²⁴⁸

261. This new organization entailed a change in the system of local administration and governance. After the liberation of Eritrea, the EPLF had formalised a customary system based on elected assemblies (*baitos*). Local elections were organised between 1992 and 1993 to appoint people's representatives to the local assemblies created at each of the four levels of administration, namely the village (*adi*), the district (*woreda*), the sub-province (*nus-awraja*), and the province (*awraja*). In that system, members of local assemblies were accountable to the constituencies that had elected them. The EPLF, however, maintained control over the administration. At the level of the sub-provinces, the EPLF appointed administrators to guide and assist members of local assemblies in their decision-making. Similarly, assemblies in the nine provinces were composed in part by members designated by the EPLF, while the executive branch of provincial administrations were staffed by EPLF appointed cadres and administrators.

262. The new system introduced in 1996, besides reducing the number of regions to six, removed one level of administration – the districts – and elected assemblies at the level of the sub-regions and villages. Proclamation No. 86/1996 reinforced the control of the central government and the PFDJ over each administrative level. It established a direct line of command from the President all the way down to villages, through the Ministry of Local Government. Since then, administrators at each level have been appointed by the President or the Minister of Local Government. They report and are accountable for the conduct of their office to their immediate superior, ending with regional administrators who are accountable to the Minister of Local Government.²⁴⁹ Proclamation No. 86/1996 did not abolish local democracy. At the level of villages, a customary council called *megaba'aya* which replaced *baitos*. *Megaba'ayas* comprise all village inhabitants who are above the age of 18.²⁵⁰ *Megaba'ayas* are expected to meet every two or three months under the chairmanship of village administrators.²⁵¹ They are mandated to discuss programmes to be carried out in the village/area, make comments and recommendations and approve programmes requiring their participation.²⁵² They also hear and comment on performance

²⁴⁶ Art 4 of Proclamation No. 55/1994.

²⁴⁷ Proclamation for the establishment of Regional Administrations, published in the Gazette on 15 April 1996.

²⁴⁸ The exact number of sub-regions, areas and villages is difficult to know. According to an interview given by the Vice-Minister for Local Government, published on 17 February 1996 in Eritrea Profile, the weekly newspaper of the Ministry of Information, Eritrea is divided into six regions, 54 sub-regions and 2,000 villages/areas.

²⁴⁹ Article 20 (3) of Proclamation No. 86/1996.

²⁵⁰ Art. 3 of Proclamation No. 86/1996.

²⁵¹ Ibid.

²⁵² Ibid.

reports presented by the village administrators and pass on to regional administrations their objections and reservations.²⁵³

263. The only remaining local assemblies are the regional ones, called *baito zobas*. However, Proclamation No. 86/1996 does not grant them any power of initiative. Article 13 (1) of the Proclamation states that *baito zobas* are to prepare regional development programmes relating to economic and social services, pass resolutions, and issue directives “in harmony with central government policies, proclamations and regulations.” Regional assemblies do not have fiscal authority but are mandated to collect local revenues. They may recommend solutions based on people’s wishes but they have to abide by national priorities defined by the Government. In this regard, regional administrators may decide not to implement recommendations taken by *baito zobas* until the Minister of Local Government decides on them, when they think that policies and regulations of the Government are violated. In order to avoid resorting to such a measure, regional administrators attend all meetings of the *baito zobas* where Proclamation No. 86/1996 entitles them to make recommendations and advise on matters related to the Government’s policies, regulations, and programmes.²⁵⁴

264. Elections of designate members of the regional assemblies were held between January and March 1997. Proclamation No. 86/1996 reserved 30 per cent of the seats for women, a provision welcomed by CEDAW in its 2006 concluding comments.²⁵⁵ The 399 newly elected representatives, along with the 150 members of the National Assembly and representatives from the diaspora, formed the Constituent Assembly that on 23 May 1997 adopted the Constitution drafted by the Constitutional Commission.

(c) Structure of the State as outlined in the 1997 Constitution

265. The proposed constitution sought to ensure a separation of powers between the legislature, the executive, and the Judiciary.²⁵⁶ The political system stipulated in the Constitution mixed characteristics of parliamentary and presidential systems. The unicameral National Assembly, composed of representatives elected by Eritrean citizens of 18 years of age or more, was to elect “from among its members, by an absolute majority vote of all its members, the President.” Once a year, the President was to deliver a speech on the state of the country to the legislature. The President, though appointing ministers and heading the Cabinet,²⁵⁷ is not responsible to the National Assembly. Nevertheless, the National Assembly can impeach the President under certain conditions.²⁵⁸ For their part, ministers are collectively accountable to the National Assembly for the work of their departments. Both the President and the National Assembly are elected for five years. The President cannot serve more than two terms.

266. Article 32 of the Constitution lists the powers and duties of the National Assembly. They include the enactment of laws and the passing of resolutions; overseeing of execution of the legislation; approval of the national budget and the imposition of taxes; ratification of international agreements by law; and approval of states of peace, war or national emergency. The President initiates legislation. He or she is entitled to “present legislative

²⁵³ Ibid.

²⁵⁴ Articles 13 (6), 14 (4) and 20 of Proclamation No. 86/1996.

²⁵⁵ CEDAW/C/ERI/CO/3.

²⁵⁶ See *infra*.

²⁵⁷ Articles 30 (1) and 31 (2), 32 (8), 42 (1) and 46 (1) and (2) of the 1997 Constitution.

²⁵⁸ Article 42 (14) and Articles 32 (9) and 41 (6) provide three reasons for impeachment: (i) violation of the Constitution or grave violation of the law; (ii) conducting himself in a manner which brings the authority or honour of the office of the President into ridicule, contempt and disrepute; and (iii) being incapable of performing the functions of his office by reason of physical or mental incapacity.

proposals and the national budget to the National Assembly.” The President is also the one who signs and publishes the laws approved by the legislature, and ensures their execution. Besides ministers, the President appoints, with the approval of the National Assembly, a number of officials, including justices to the Supreme Court and judges of the lower courts. As the Commander-in-Chief of the Defence Forces, he or she also appoints high ranking members of the Armed and Security Forces. The Cabinet assists the President in directing, supervising and coordinating the affairs of the Government; preparing the national budget; drafting laws to be presented to the National Assembly; and preparing government policies and plans.²⁵⁹

(d) Current Government of Eritrea

267. The Constitution adopted by the Constituent Assembly did not provide transitional provisions to ensure the entry into force of the new system. President Afwerki and government officials decided that the text would not come into effect before elections for a new National Assembly were conducted.²⁶⁰ The outbreak of the border conflict with Ethiopia delayed the elections originally scheduled to take place in 1998. After the war, elections were re-scheduled for December 2001. A committee, headed by the then Minister of Local Government Mahmoud Ahmed Sherifo, prepared a draft Proclamation “on the Formation of Political Parties and Organizations.” President Afwerki rejected it after the text was leaked to the media in January 2001.²⁶¹ National elections were again postponed due to the political crackdown that occurred the same year. In February 2002, the National Assembly prepared a draft electoral law²⁶² that provided for a majority rule system. However, it is not known whether the draft electoral law has entered into force. President Afwerki appointed a five-person electoral commission with responsibility to prepare and organise national elections, yet elections never took place and the Constitution has never been implemented.²⁶³

268. Given the failure to adopt the Constitution, it appears that the Government of Eritrea is still regulated by Proclamation No. 37/1993, although the system set up by that decree was to be transitory. Over the years, the role of the Executive has become predominant. The National Assembly, which apparently is still in place,²⁶⁴ has not convened since February 2002. The Judiciary is closely controlled by the President, who for example appoints the judges of the Special Court. Created in 1996 to deal with cases of theft, corruption, illegal foreign currency exchange and embezzlement, its jurisdiction has superseded other courts.²⁶⁵ According to witnesses and officials who have defected, most of the decisions are taken by the President and his entourage, often without consulting concerned ministers.²⁶⁶

269. Regional and local administrations were brought under President Afwerki’s control after Mr. Sherifo was ousted from his post of Minister of Local Government and arrested with other members of the G-15 in September 2001. Elections to new regional assemblies

²⁵⁹ Articles 42 (15), 42 (4), (5), (7), (8), (9) and (11) and 39 (1) of the 1997 Constitution.

²⁶⁰ Simon M Weldehaimanot, *The status and fate of the Eritrean Constitution*, African Human Rights Law Journal, (2008) 1., pp. 108-137.

²⁶¹ Dan Connell and Tom Killion, *Historical Dictionary of Eritrea*, 2nd ed. (The Carecrow Press, Inc, 2011), p. 196.

²⁶² Available on: <http://www.parliament.am/>.

²⁶³ According to information collected by the Commission, the electoral commission officially ceased to function in autumn 2014.

²⁶⁴ For example, in April 2010, members of the National Assembly met with their German counterparts to discuss the situation in Eritrea and the region (<http://www.shabait.com/>).

²⁶⁵ See *infra*.

²⁶⁶ See Annex II.

have taken place twice since 1997²⁶⁷ and the assemblies have held regular meetings. However, they remain tightly controlled by regional administrators appointed by the President.

(e) The role of the People's Front for Democracy and Justice (PFDJ)

270. Since its creation in February 1994, the PFDJ has remained the only political organization allowed in Eritrea.²⁶⁸ The PFDJ followed EPLF strategies and maintained its strong presence throughout the country. Its organs were organised in parallel to central government, through a number of departments that replicated ministerial²⁶⁹ and local government structures, through offices headed by secretaries at regional, sub-regional, and village level. Candidates seeking central and local posts usually come out the PFDJ or are endorsed by it. In this way the party aims to control local administrations and citizens.

271. The line between party and Government is blurred at the highest level as the President maintains his role as secretary general of PFDJ. Apart from the daily management of the Party, he also presides over the PFDJ Executive Council and its Central Council, whose members also sit in the National Assembly.²⁷⁰

272. From 1994, through the border war with Ethiopia and then particularly since the events of 2001, the significance of the PFDJ has consistently shrunk – to the point that some observers now consider it to have become an empty shell. In 2001, the G-15 group noted how the Executive Council, expected to hold meetings on a monthly basis, had only met 11 times between 1994 and 2001. They also criticised the indefinite postponement of the PFDJ Fourth Congress, first scheduled for 1996 and then rescheduled to five years later, in March 2001; and the role played by the Central Office of the Front and its secretary general, who according to them exceeded their mandate by unduly interfering in the affairs of Government. After their purge from the party, arrest and disappearance the decision to reduce democratic spaces of discussion, even within the PFDJ, became clear. The Party has not held a congress since then.

(f) Drafting of a new constitution

273. In May 2014, in his speech at Independence Day, President Afwerki announced the drafting of a new constitution. He confirmed that decision in an interview granted to Eritrean TV on 31 December 2014, during which he said that a new constitution was being drafted by a committee of experts. Asked about the rationale of drafting a new text while the 1997 Constitution was still awaiting implementation, President Afwerki replied: “After 15 years of government, we, the People of Eritrea, have learned a lot. We needed to use that knowledge to create a more suitable constitution. We do not do this to please any foreign influence or request. We do this intending to leave a document to the coming generations of Eritreans, a document that will help better shape their lives.”²⁷¹ The drafting of a new

²⁶⁷ Notably in 2002 and 2004.

²⁶⁸ Decision reconfirmed by the National Assembly during its last meeting in February 2002.

²⁶⁹ There is no official list of the PFDJ Departments. The functions of the Directors of these Departments seem to be those of special advisors but at least in some instances they have reportedly become similar to those of *de facto* ministers. For instance, Mr. Yemane Gebreab, in addition to being Director of the PFDJ Political Affairs Department, is known to undertake the functions of a minister of foreign affairs. Similarly, Mr. Hagos Gebrehiwet, Director of the PFDJ Economic Affairs Department, is known to operate as *de facto* Minister of Economy of Eritrea, a post which does not exist in the Government organization chart.

²⁷⁰ Proclamation No. 37/1993.

²⁷¹ Translated by the Commission of Inquiry, from public records of the President interview available at <http://eastafro.com/>.

constitution was confirmed by the Eritrean delegations to the Committee on the Elimination of Discrimination against Women and to the 28th session of the Human Rights Council, held in February and March 2015 respectively. Nevertheless, no details on the composition of the committee or on the status of its work have been given.

2. Security sector

(a) Historical overview

274. The existence of a security apparatus in Eritrea can be traced to the struggle for independence. During that period, the EPLF set up two entities dealing with security matters. The first one – *Halewa Sewra* (lit. the “Guardians of the Revolution”) – was in charge of internal security and the second – *Seban Keleten*, alias “72” – of military intelligence. Until 1987, *Halewa Sewra* was headed by Mr. Ali Said Abdella, with Mr. Musa Naib as his Deputy. During the same period, Mr. Petros Solomon, who was later to be arrested as a member of the G-15, headed *Seban Keleten*.²⁷²

275. After the Second Congress of the EPLF in 1987, *Halewa Sewra* was renamed the “Vigilance Department” and put under the leadership of Mr. Naib. The Vigilance Department held normal police functions in EPLF-controlled parts of Eritrea. Following the liberation of the country in 1991, the police functions of the Vigilance Department were transferred to the newly set up Eritrean Police Force (EPF), headed by Brigadier General Musa Raba, with Colonel Simon Gebredengel as his Deputy. For its part, *Seban Keleten* was transformed into a Military Intelligence and Security Department, with Mr. Kiflu as its head. In 1993, the Military Intelligence and Security Department was criticised for not foreseeing the veterans’ protest that took place just days before the declaration of independence.²⁷³ The Department was consequently split into two entities which exist to this day. The first is the National Security Office headed since its creation by Major General Abraha Kassa; it reports directly to the President. The National Security Office inherited the archives of *Halewa Sewra* and *Seban Keleten*. Its size and functions have expanded following the border conflict with Ethiopia and it has created a pervasive system of state control. The second entity is Military Intelligence, headed by Brigadier General Tekesteberhan Gebrehiwot. Military Intelligence reports to the Chief of Staff of the Eritrean Defence Forces, the Minister of Interior, and ultimately to the President.

276. In 2001, following public unrest, President Afwerki created a security committee which was involved in suppressing dissent.²⁷⁴ Mr. Kiflu was put in charge of this Committee. Since then, it is unclear whether the Committee has disappeared or whether it has been replaced by other ad hoc entities, such as the “Supra-Committee” which was reportedly in charge of suppressing events following the January 2013 incident at Forto.²⁷⁵ At the end of 2013, during President Afwerki’s absence from Eritrea for medical reasons, the media reported the existence of a “national security team” in charge of the country. Since no further information is available from public sources, it is impossible to know the composition and function of this team.

²⁷² As military intelligence, *Seban Keleten* had reportedly been in charge of dealing with dissenters within the armed forces and competing military organizations like the ELF.

²⁷³ See Chapter III, C, Post-independence.

²⁷⁴ Ibid.

²⁷⁵ See *supra*.

(b) The current security apparatus

277. Eritrean Police Forces (EPF) are responsible for maintaining internal security, and the Eritrean Defence Force (EDF) is responsible for external security.²⁷⁶ In practice, however, the President resorts to national security officers, armed forces, reserves, released soldiers and the newly created People's Army for the domestic security to carry out domestic and external security activities.²⁷⁷

(i) The National Security Office

278. The National Security Office is under the Office of the President. There is no official information on the structure or functioning of this entity, except that it has always been headed by Major General Abraha Kassa. However, according to testimonies collected by the Commission, the National Security Office allegedly operates through a group of Special Forces also known as "Unit 72" or the "Middle Office." The head of the Special Forces is not known. Used in arresting high-ranking officials or high-profile figures, their members usually hide their faces. However, in January 2013, Special Forces, reportedly headed by Brigadier General Hadish Efreem, led the assault against the mutineers who had taken over control of Eritrean TV.²⁷⁸

279. Since an assassination attempt against him in 2007, while he was allegedly investigating a corruption ring, Brigadier General Gebredengel seems to have gained a direct reporting line to the President, thus by-passing Major General Kassa, who is his superior. The "Middle Office" apparently oversees the whole network of undercover security officers that is spread throughout the country. The Asmara Office covers the capital city through a network of sub-offices, not officially identified and anonymously located in various neighbourhoods, and sometimes in public places such as bars or hotels. Each sub-office is organised in three sections: one in charge of intelligence activities, one in charge of arrests and one responsible for the interrogation of those who have been arrested. Testimonies collected by the Commission indicate that each section may comprise over a hundred officers. Outside Asmara, offices are located in each of the five military zones.²⁷⁹ These offices can have branches in the localities under their surveillance. Moreover, the National Security Office has been reported to have under-cover agents in local administrations and immigration offices throughout the country.

(ii) The Eritrean Police Force

280. There is very little public information available about the Eritrean Police Force (EPF), except that its head, Colonel Beraki Mehary Tsegai, allegedly reports to Brigadier General Gebredengel who has been presented as "Commander of National Police and Security Forces."²⁸⁰ According to Interpol, the EPF mission is to: (i) enforce and uphold the law; (ii) prevent, detect and investigate crime; and (iii) control traffic.²⁸¹ From information

²⁷⁶ On the Eritrean Police Force, public information is available for example on the Interpol site at <http://www.interpol.int/>.

²⁷⁷ See *infra*.

²⁷⁸ See: "Issayas staggers a little", Africa Confidential, 15 February 2013 (<http://www.africa-confidential.com/>). The United Nations Monitoring Group on Somalia and Eritrea reported that Brigadier General Hadish Ephrem is "a key member of President Afwerki's informal military intelligence network and had previously been arrested and deported from Kenya after fleeing from Somalia in 2007 following the defeat of the Islamic Courts Union." (S/2013/440).

²⁷⁹ See Chapter III, B, Historical Background - the struggle for independence.

²⁸⁰ See : "INTERPOL Chief discusses regional security needs during Eritrea visit" (<http://www.interpol.int/>).

²⁸¹ <http://www.interpol.int/>.

collected by the Commission, it would appear that in reality police functions are also conducted by other security entities, ranging from the EDF to the People's Army. There is no official information on the strength of the EPF contingent or about how it is organised.

(iii) *The Eritrean Defence Forces*

281. As is the case with the entire security sector, there is very little public information available about the Eritrean Defence Forces (EDF). Major General Philipos Woldeyohannes reportedly heads the EDF, as their Chief of Staff. He also seems to act as *de facto* Minister of Defence since Major General Sebhat Ephrem, who had held that position since 1995, was appointed Minister of Energy and Mines in June 2014. Major General Woldeyohannes reports directly to President Afwerki.

282. The EDF is composed of the Eritrean Air Force headed by Major General Teklai Habteselassie who is also EDF Chief of training; the Navy, commanded by Major General Humed Mohamed Karekare; and the Eritrean Army, which was headed by Major General Ahmed Umer Kakay until he died on 16 February 2015.²⁸² The Eritrean Army constitutes the main component of the EDF. It is reportedly composed of four corps and of one commando division and one mechanised brigade, with their commanders reporting to the Chief of Staff.²⁸³ Each Corps (*kflä särawit*) reportedly contains 20 infantry brigades (*brgedä*). Following the traditional structure of defence forces worldwide, there should be an additional entity – the Division – between Brigade and Corps levels. However, there is no information available on the current number of divisions in the Eritrean Army.

283. The EDF was built out of the fighting forces of the EPLF, which were organised around small units called *mäsri* composed of three lines/rows of five to ten soldiers each. Three *mäsri* form a *ganta*, equivalent to a platoon, with a strength of about 30 to 45 fighters. Three *ganta* form a *haile* (meaning power), equivalent to a company, often equipped with heavy weapons and numbering about 100 fighters. Three *haile* form a battalion, or *boìoloni*, and three battalions a brigade. Three brigades supposedly form a division, with three divisions then forming a corps.²⁸⁴

284. Eritrean defence forces are deployed throughout Eritrea, and the country is divided into five military operation zones or command zones, created out of the fighting zones defined in 1965 by the Supreme Council of the ELF and maintained by the EPLF.²⁸⁵ The operation zones are: Gash-Barka (Zone 1); West (Zone 2); South (Zone 3); East (Zone 4); and Centre, including Asmara (Zone 5). Each of them is headed by a general. Again, there is almost no information on how operation zones are staffed and structured.²⁸⁶ They seem to

²⁸² Some Eritrean media reported that Major General Ahmed Umer Kakay had been under house arrest since the January 2013 Forto incident.

²⁸³ According to the Defence and Foreign Affairs Handbook (2006), published by the International Strategic Studies Association.

²⁸⁴ The online *International Encyclopaedia of Uniform Insignia Around the World* lists several ranks in the Eritrean Army, including Major General, Brigadier General, Colonel, Lieutenant Colonel, Major, Captain, Lieutenant 1st Class, Lieutenant 2nd Class, Master Sergeant, Staff Sergeant, Sergeant, Corporal and Private 1st Class.

²⁸⁵ See Chapter III, B, The struggle for independence.

²⁸⁶ In 2013, Major General Haile Samuel “China” was reportedly heading Zone 1 and Brigadier General Teklai “Manjus” Zone 2. It seems that they have been removed from their duties in 2014. Major General Umar Hassan “Teweel” commanded Zone 3 before being arrested in 2013, following the Forto incident. He reportedly died in prison in May 2014. Major General Gerezgiher Andemariam “Wuchu”, who died in April 2014, used to head Zone 4. Major General Philipos Woldeyohannes commanded Zone 5 before being appointed as Chief of Staff of the EDF.

integrate all three elements of military power.²⁸⁷ Reports indicate that operation zone commanders have gained power since the border conflict with Ethiopia, to the extent that they supersede civil administrators in many regions. It has also been reported that President Afwerki routinely shifts zone commanders around, apparently to encourage rivalries between them, distribute profits, and prevent them from building up too close a rapport with the units under their command. Similarly, deputy commanders are reportedly carefully selected for their loyalty to the President, who maintains control over zonal commanders through them.

285. The strength of the EDF is difficult to evaluate. Most of their manpower is provided by Eritreans between 18 and 40 years of age who are conscripted into military service.²⁸⁸ According to public sources, the Eritrean army has between 250,000 and 300,000 troops.²⁸⁹ Recent reports, however, indicate that the actual number of troops is lower, with some units operating half-strength. This is allegedly due to the number of potential or actual conscripts fleeing the country.

(iv) *The People's Army*

286. The "People's Army" (*Hizbawi Serawit*) was created in 2012. The People's Army is composed of citizens released from the national service and conscripts assigned to civil assignments as part of their open-ended national service. People's Army's units are organised by profession (e.g. teachers' militia, artists' militia, etc.) or by geographic area or neighbourhood. They are assigned tasks that range from guarding public sites, looking for evaders of the national service to undertaking development projects. Units meet regularly, i.e. one day per week or one week per month. The members of the People's Army are supposed to keep their current jobs but they have to undertake military training prior to starting their function and are given a Kalashnikov with ammunition.²⁹⁰ It seems that short military practices or training are held regularly, in some cases every two weeks. The United Nations Monitoring Group on Somalia and Eritrea reported that in 2013 the People's Army was headed by Brigadier General Teklai "Manjus".²⁹¹ Interviews by the Commission, however, indicate that Brigadier General Teklai "Manjus" was allegedly relieved of his duties in 2014 and that the People's Army has since come under the command of the EDF Chief of Staff.²⁹²

B. The domestic legal framework²⁹³

287. The domestic legal framework in Eritrea was structured to follow a classic hierarchy of norms. The Constitution is officially the supreme text establishing the structure of the government, delimiting the powers of the various institutions, defining the procedure to

²⁸⁷ Defence and Foreign Affairs Handbook (2006).

²⁸⁸ See Chapter VI, C, 1, National service.

²⁸⁹ 2015 CIA World Factbook.

²⁹⁰ The United Nations Monitoring Group on Somalia and Eritrea reported in 2013 (S/2013/40) that, "throughout 2012, President Afwerki ordered village-based government administrators to draw assault rifles, principally AK-47s, from official military weapon stores and to initiate their widespread distribution to the civilian population."

²⁹¹ S/2013/40.

²⁹² See Chapter VI, C, 2, Forced labour.

²⁹³ This chapter does not intend to provide a comprehensive review of the Eritrean current domestic legal framework, which is impossible to do because of the lack of information available about existing domestic legislations. Information gathered in the course of the investigation enabled the Commission to confirm the data presented in this chapter.

enact laws and ensuring the protection of fundamental rights of individuals. Under the hierarchy, below the Constitution come the Transitional Codes adopted in 1991 and Proclamations enacted after 1991, which constitute the law of the country. Eritrea is a dualist State in which international treaties that have been ratified by the Government are not automatically included in the domestic legal framework. The Government of Eritrea is, therefore, responsible for giving effect to the international treaties, including the core human rights conventions, by integrating them in its domestic legal framework. Laws come into force by legal notices and regulations enacted by Ministers and the administration.²⁹⁴

1. The non-implemented 1997 Constitution and its Bill of Rights

288. The content of the Constitution is generally consistent with international standards related to rule of law, separation of powers, democratic society and fundamental rights and freedoms. In its preamble, it recognises and protects the “rights of citizens, human dignity, equality, balanced development and the satisfaction of the material and spiritual needs of citizens”. The Constitution is supposed to be the basis for the protection of the rights, freedoms and dignity of citizens and of just administration, as well as the supreme law of the country and the source of all laws of the State.²⁹⁵

289. A bill of rights is included in Chapter III of the Constitution, entitled “Fundamental rights, freedoms and duties”. Most of the core human rights are directly provided for thereunder:

- Equality under the law of all persons and non-discrimination on any ground (Article 14)
- Right to life and liberty (Article 15)
- Right to human dignity (Article 16), which includes the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, interdiction of slavery, servitude or forced labour.
- Right to liberty and security (Article 17) – not to be arbitrarily arrested or detained, right to due process and fair trial, presumption of innocence. This constitutional provision contains detailed legal safeguards in the context of the arrest and detention of persons, which are globally consistent with international standards: the right of every person arrested or detained to be informed of the grounds for his/her arrest or detention and of the inherent rights in a language that he/she understands; the right to be brought before a court of law within 48 hours of his/her arrest; the right to submit a writ of *habeas corpus* to a court of law;²⁹⁶ the right to a fair, speedy and public hearing by a court of law; the right to the presumption of innocence; the right to appeal and not to be tried twice for the same offence.
- Right to privacy (Article 18)
- Freedom of conscience, religion, expression of opinion, movement, assembly and organization, freedom to choose one’s profession as well as the right to

²⁹⁴ Due to lack of information on legal notices and regulations, no further details on these texts can be provided.

²⁹⁵ Articles 2.1 and 2.3 of the Constitution.

²⁹⁶ “A writ of *habeas corpus* is used to bring a prisoner or other detainee (e.g. institutionalized mental patient) before the court to determine if the person’s imprisonment or detention is lawful”, definition from the Legal Information Institute of the Cornell Law School.

leave and return to Eritrea and to be provided with a passport and other travel documents (Article 19)

- Right to take part in public affairs, i.e. to vote and be a candidate to an elective office (Article 20)
- Economic, social and cultural rights, including access to health, education, cultural and other social services, as well as the right to participate freely in any economic activity (Article 21)
- Right to family life, right to marry and found a family freely (Article 22)
- Right to property, right to acquire and dispose of property. However, “all land and all natural resources below and above the surface of the territory of Eritrea belong to the State. The interests that citizens shall have in land shall be determined by law” (Article 23)
- Right to redress, to seek remedy in a competent court for any infringement of the rights enshrined in the Constitution (Article 28)

290. The Constitution states that fundamental rights and freedoms may only be limited in so far as it is in the “interests of national security, public safety or the economic well-being of the country, health or morals, for the prevention of public disorder or crime or for the protection of the rights and freedoms of others”. It also states that the principle of equality under the law, the right to life and liberty, the right to human dignity (and not to be subjected to torture, ill-treatment or slavery and forced labour), the right not to be tried or convicted for a criminal offence that did not exist at that time, the right to submit a writ for *habeas corpus*, the right to appeal and to be tried twice for the same crime, the presumption of innocence, the freedom of thought, conscience and religion, cannot be limited.²⁹⁷

291. In addition, Chapter VI of the Constitution is dedicated to the administration of justice and provides for the implementation of rule of law in the country.²⁹⁸ Judicial power is to be vested in a Supreme Court and in lower courts that should be established by law. All courts should be independent and impartial.²⁹⁹

292. The Constitution, as ratified by the Constituent Assembly, did not contain a specific clause dealing with its entry into force or any transitional provisions. Implementation measures were required for its entry into force but since nothing was done by the Constituent Assembly or by the Provisional Government of Eritrea, the Constitution was never implemented.³⁰⁰ The President claimed that the war against Ethiopia that started in May 1998 and lasted until 2000 prevented the implementation of the Constitution.³⁰¹ At the end of the border dispute and under internal and international pressure, the Government of Eritrea agreed to a timeframe for the implementation of the Constitution and started to take preparatory steps.³⁰² However, following the crackdown in 2001 “the term ‘constitution’ itself became prohibited and citizens did not dare mention it in public. Effectively, the

²⁹⁷ Article 26 of the Constitution.

²⁹⁸ Articles 48 to 54 of the Constitution.

²⁹⁹ Article 48 of the Constitution.

³⁰⁰ See Bereket Habte Selassie, *Constitution Making in Eritrea – a Process-Driven approach*, Chapter 3, in *Endowment of the United States Institute for Peace*.

³⁰¹ Simon M Weldehaimanot, *The status and fate of the Eritrean Constitution* (African Human Rights Law Journal, 2008 1, pp. 108-137), p. 122.

³⁰² See *supra*.

[Government of Eritrea] eliminated the Constitution not only from its priorities but even from its propaganda.”³⁰³

293. In this context, the status of the Constitution is remains unknown and the Government has not shown a consistent or coherent position in this regard. Sometimes, the Government has stated that the Constitution had never been implemented because its population was not considered ready for a full democratic system. On other occasions, the Government has indicated that some of the provisions of the Constitution had actually been implemented and that full implementation would happen in due time. In contradiction to both positions, the Government has also stated that the Constitution was fully in force and was implemented. For example, during its first Universal Periodic Review in 2009, the Government stated that “the Constitution is the supreme law of the land and the Government is implementing it, including the holding of democratic elections at the local, sub-regional and regional levels. However, some institutions provided for in the Constitution are yet to be established. National elections will be held once the threat to national security and the country’s sovereignty is irrevocably removed.”³⁰⁴ During its second Universal Periodic Review in 2014, the Government reiterated that “all the provisions enshrined in the Constitution, with the exception of those dealing with national elections – for the obvious reason of the “no-war-no-peace situation” – were strictly implemented and adhered to”.³⁰⁵ Similarly, constitutional provisions were heavily referenced in two individual communications submitted by the Government to the African Commission on Human and Peoples’ Rights³⁰⁶ and in its consolidated second and third reports presented under the Convention on the Rights of the Child.³⁰⁷

294. *De facto*, the Constitution that should be the supreme law of the country and in which are enshrined the fundamental rights, has not come into force nor has it been implemented. The existing national legal framework is not satisfactory to guarantee basic human rights. Some laws and practices are not consistent with international standards and contradict the rights enshrined in the Constitution.³⁰⁸

2. The law: Transitional Codes and Proclamations³⁰⁹

295. On 11 May 2015, the Government of Eritrea promulgated the new Eritrean Penal Code, Procedural Penal Code, Civil Code and Procedural Civil Code. They replace the Transitional Codes, which were until that date the backbone of the legal framework of Eritrea since its independence, as provided by “Proclamation No. 1/1991 on the Transitional Institutions of the Administration of Justice.” This text was the first legislation enacted by the Provisional Government of Eritrea. It is also called the “Law Reform Proclamation” as it provided that the penal, civil and related procedural codes enacted at the end of the 1950s in Ethiopia would be the basis of the transitional legal framework of the new State of Eritrea.³¹⁰ This Proclamation repealed all discriminatory clauses and included

³⁰³ Simon M Weldehaimanot, *The status and fate of the Eritrean Constitution* (African Human Rights Law Journal, 2008, 1, pp. 108-137), pp. 122-123.

³⁰⁴ A/HRC/13/2/Add.1, par. 11.

³⁰⁵ A/HRC/26/13, par. 92.

³⁰⁶ For further details, see Chapter IV on the current context to human rights violations in Eritrea.

³⁰⁷ Simon M Weldehaimanot, *The status and fate of the Eritrean Constitution* (African Human Rights Law Journal, 2008, 1, pp. 108-137), p. 123.

³⁰⁸ See *supra*.

³⁰⁹ The Commission had to rely on unofficial translations of national legislation that are publicly available and, therefore, is not responsible for possible inaccuracies of these translations.

³¹⁰ “The Ethiopian codes were grounded in the civil law tradition, excepted for the codes of civil and criminal procedures, which were prepared by Anglo-Saxon lawyers and, therefore, based on the

protective legal measures, in particular with regard to discrimination against women and to marriage.³¹¹

296. Subsequent Proclamations (No. 2 to No. 7) amended the Ethiopian codes to constitute the Transitional Code of the new State of Eritrea. These Transitional Codes were pieces of legislation that were meant to regulate the passage from the Ethiopian legal framework to the new Eritrean legal framework, which was initiated in 1997. In 1997 the Ministry of Justice started a comprehensive law reform project aimed at drafting new legal codes that would constitute a comprehensive framework reflecting Eritrean realities and that would be consistent with the Constitution. The Eritrean authorities repeated on several occasions, including during the Universal Periodic Reviews and reviews by the Committee on the Elimination of all forms of Discriminations Against Women, the Committee on the Rights of the Child and the International Labour Organizations, that the definitive Eritrean codes were about to be finalised and adopted. For example, during its first Universal Periodic Review in 2009, the representative of Eritrea stated that its Government was “now at the final stage of drafting civil, penal, commercial codes and a civil procedure and criminal procedure codes with the collaboration of UNDP”.³¹² The civil, penal, civil procedure and criminal procedure codes were finally promulgated by the Government of Eritrea on 11 May 2015. The Commission welcomes the promulgation of these Codes. Because of its coincidence with the end of its own investigation, the Commission is not in a position to review the content of these Codes and express an opinion about their compatibility with the human rights treaties ratified by Eritrea. The Commission is not able to determine to which extent the various Proclamations may be amended or superseded by the new Codes. Thus, the information on the national legal framework presented in this report only refers to the laws that were in force during the period covered by the investigation. As such, this information, which does not reflect the brand new legal framework of Eritrea, remains nevertheless relevant.

297. The Transitional Codes were:

- The Transitional Civil Code based on the Ethiopian Civil Code of 1960 as amended by Proclamation No. 2/1991.³¹³
- The Transitional Code of Civil Procedure, based on the Ethiopian Code of Civil Procedure of 1965 as amended by Proclamation No. 3/1991.³¹⁴
- The Transitional Penal Code, based on the Ethiopian Penal Code of 1957 as amended by Proclamation No. 4/1991.³¹⁵
- The Transitional Code of Penal Procedure, based on the Ethiopian Code of Penal Procedure of 1957 as amended by Proclamation No. 5/1991.³¹⁶
- The Transitional Commercial Code, based on the Ethiopian Commercial Code of 1960 amended by Proclamation No. 6/1991.³¹⁷

common law system”, in Teame Beyene, *The Eritrean Judiciary: Struggling for Independence* (Eritrean Law Society Occasional Papers, No. 7, December 2010), p. 3.

³¹¹ CRC/C/41/Add.12 p. 9 and CEDAW/C/ERI/1-2, p. 7. – No copy of the text could be obtained.

³¹² A/HRC/WG.6/6/ERI/I, para. 13.

³¹³ Transitional Civil Code of Eritrea, Vol. 1/1991, Call No. Law Ethiopia 3 Civil Code 1960.

³¹⁴ Transitional Code of Civil Procedure of Eritrea, Vol. 1/1991, Call No. Law Ethiopia 3 Civil Procedure 1965.

³¹⁵ Transitional Penal Law of Eritrea, Vol. 1/1991, Call No. Law Ethiopia 3 Criminal 1957.

³¹⁶ Transitional Code of Penal Procedure of Eritrea, Vol. 1/1991, Call No. Law Ethiopia 3 Crime Procedure 1961.

³¹⁷ Transitional Commercial Code of Eritrea, Vol. 1/1991, Call No. Law Ethiopia 3 comm 1960.

- The Transitional Maritime Code, based on the Ethiopian Maritime Code of 1960 amended by Proclamation No. 7/1991.³¹⁸

298. By general practice, the Transitional Penal Code (TPC) and the Transitional Code of Penal Procedure (TCPP) provided the fundamental legal safeguards for individuals during judicial proceedings. The Transitional Civil Code (TCC) and the Transitional Procedural Civil Code (TPCC) also contained provisions to guarantee some fundamental rights and freedoms.³¹⁹

299. Moreover, about 180 Proclamations have been adopted since independence. It should be noted that since there is no legislation that regulates law-making procedures,³²⁰ codes, decrees and domestic legislation is prepared and adopted in the absence of a clear, transparent, consultative and inclusive process. Nobody really knows the procedure leading to the enactment of legislation or the author of a specific decree.³²¹ The majority of Proclamations have been enacted by the President, the Government of Eritrea and residually, before it became obsolete, by the National Assembly. In addition, some important policies decided by the Government are not embodied in law but are just “announced” through Government media or through messages passed on by local administrations and implemented in practice, with all the ambiguities that such a procedure gives rise to. The most striking example of this is the “*Warsai Yikealo* development campaign”, announced and implemented by the Government which lacked a formal legal basis.

300. As per Proclamation No. 9/1991, Proclamations should enter into force on the date of their publication in the Gazette of Eritrean Laws. However, the Commission could not find evidence that all Proclamations were published. It is not clear how the Gazette is distributed and/or made available to the public.³²²

301. Between 1991 and 1998 more than 100 proclamations were enacted. Most of them dealt with the structure of the Government and aimed at establishing a political system based on the principles of democracy and the rule of law that would be in accordance with the Constitution that was being prepared. The Proclamations related to the economic field have a liberal approach. This is also the period during which the Constitution was being prepared and ratified and Proclamations reforming the land tenure system, adopting the transitional codes, establishing the national service and regulating the Press and activities of churches and religious institutions were adopted. The drafting of the Eritrean penal, civil and procedural codes started in 1997.

302. Between 1999 and 2000 the law-making process was fairly limited, with less than five proclamations enacted. This was certainly due to the war with Ethiopia.

303. From 2001 to 2009, about 50 proclamations were enacted. They provide for State welfare and State intervention in the economy (establishment of State enterprises, control of the foreign currency, regulation of import permits, regulation of private contracts, including those related to construction and lease). It is also the period during which Proclamations

³¹⁸ Transitional Civil Code of Eritrea, Vol. 1/1991.

³¹⁹ The texts of the Eritrean Transitional Codes could not be obtained, only the text of the Ethiopian codes. As the exact scope of revision of the original Ethiopian Codes made by the various Proclamations remains uncertain, this part only covers the provisions of the Transitional Codes which have been confirmed or taken directly from Government’s submissions to human rights mechanisms.

³²⁰ Luwam Dirar and Kibrom Testafagir, *Introduction to Eritrean legal system and research*, available at <http://www.nyulawglobal.org/globalex/Eritrea1.htm>.

³²¹ Simon M Weldehaimanot and Daniel Mekonnen, *The nebulous law-making process in Eritrea* (Journal of African Law 2000 53 (2) pp. 171-193), pp. 181-182.

³²² The titles of Proclamations the Commission has been able to identify are provided in Annex III.

regulating the formation and activities of political parties and NGOs were adopted in the wake of the crackdown on perceived critics and opponents to the regime. These Proclamations aimed at curtailing fundamental freedoms and/or tightening the control of the Government on the activities of persons and institutions in Eritrea, and they contain provisions that are not compatible with human rights principles and international legal standards.³²³

304. Between 2010 and 2013, the law-making process was relatively slow, with less than 15 proclamations enacted. Most were issued between 2012 and 2013 and aimed at deregulating some aspects of the economy and transforming state enterprises into share companies open to international investors.

3. Other sources of law

305. The Government recognises that some personal matters related to Muslim communities are regulated by Sharia law. Additionally, various communities in Eritrea had been historically governed by various customary laws and practices, often dating back to several centuries. Certain of these customary practices remain in force.

(a) Sharia law

306. Sharia law regulates the personal status of Muslims and is enforced through separate Sharia chambers in the civil court system. Indeed, Proclamation No. 2/1991, which established the Transitional Civil Code of Eritrea, provided that provisions on marriage and succession contained in the Code do not apply to marriages concluded according to Sharia Law.³²⁴

307. Some customary codes also include Sharia law provisions, which may be used as the basis of the negotiated settlement of disputes in community courts.

(b) Customary laws

308. Since Eritrea is a heterogeneous nation composed of nine ethnic groups, each with its indigenous language, traditional values and customary laws, a certain flexibility in recognising some customary practices has always existed.³²⁵ During Ethiopia's rule, the 1960 Civil Code repealed all customary laws, except where explicitly provided otherwise (Article 3347 of the Civil Code). Article 3347 was not amended in the Transitional Civil Code of Eritrea and thus, customary laws are not officially included in the current legal framework of Eritrea. However, in practice the Government has recognised a role for customary laws as a basis for the negotiated settlements of disputes within community courts.³²⁶

³²³ These specific legal provisions are further detailed in the relevant chapters of this report dedicated to the findings of the investigation since they are helpful to understand the functioning of the system and put the findings in the specific Eritrean context.

³²⁴ "The Sharia law exercises its own divorce, inheritance and property management regulations, separate from the civil code. Once a woman is married under Sharia law, she is obliged to go by Sharia provisions in case of divorce, child custody and alimony, succession where it differs from the provisions given in the civil code." CEDAW/C/ERI/1-2, p. 55.

³²⁵ Customary laws are community-based and usually well integrated and respected by members of the community, in particular because such customary system is based on the principle of reciprocity of duties among the members of the community. In addition, it strives to find solutions through peaceful mechanisms to resolve disputes, and negotiation and persuasion are the most important elements.

³²⁶ See *infra*.

309. There are no less than 21 customary laws in Eritrea.³²⁷ A given customary law applies to a tribe or group of tribes (an ethnic group), usually with the same religion. All the groups regulated by the same customary law have a common ancestor or live in the same part of one of the nine historical regions.³²⁸ Many customary laws were codified during the colonial period,³²⁹ but the codification procedure has continued through time. They usually address only a limited number of legal issues related to commercial, civil matters such as land property marriage, inheritance or criminal matters, including homicide. In addition, some specialised traditional institutions are charged to specifically settle cases of homicides to avoid blood feuds between clans, families and communities.³³⁰

310. The Eritrean domestic legal framework is problematic because the Constitution has never been implemented and the Transitional Codes inherited from the Ethiopians were outdated and did not provide a comprehensive protection of human rights and fundamental safeguards, in particular with regard to the administration of justice. Also the procedure for drafting and enacting a proclamation is not transparent and is contrary to the procedure set out in the 1997 Constitution as well as of the principle of separation of powers.

C. The judicial system

311. The existing jurisdictions have been established and amended through Proclamations. Chapter VI of the 1997 Constitution describes the judicial system and the administration of justice that is supposed to exist in Eritrea. It includes the establishment of a Supreme Court as the court of last resort and the only institution with jurisdiction to interpret the Constitution and review the constitutionality of any law enacted or any action taken by the Government. It is supposed to be the sole jurisdiction to try a President who has been impeached by the National Assembly. However, since the Constitution has never been implemented, the Supreme Court has not been established.

1. Types of jurisdictions

312. There are various types of courts existing and functioning to a greater or lesser degree in Eritrea. Most of them are integrated in a formal and regular system, whether civilian or military, but there are some with special jurisdiction.

(a) Regular civilian jurisdictions

313. The civilian judicial system is composed of four courts: community courts, regional (*zoba*) courts, high courts, and the Bench of the High Court of Asmara. In Eritrea “there is no case reporter and one has to get official permission to access court judgements”.³³¹ Therefore, in general, there is no publicly accessible information available on the functioning of the courts, the number of cases on the dockets of the courts, the number of decisions given on average every year, the type of cases, sanctions imposed, etc. A possible exception is community courts, the development of which has been supported by the international community.

³²⁷ A list of the main customary laws is attached in Annex IV.

³²⁸ Superseded by the six new administrative regions in 1996.

³²⁹ See: NUEW, *An Assessment of Legal issues affecting women's lives in Eritrea*, March 2001 and CEDAW/C/ERI/1-2, para. 54.

³³⁰ See Muluberhan Berhe Hagos, *Customary versus modern laws of Eritrea on gender equality*, (Atlas Graphic Printers, Asmara, February 2014) p. 343.

³³¹ See Luwam Dirar and Kibrom Testafagir, *Introduction to Eritrean legal system and research*, available at <http://www.nyulawglobal.org/>.

(i) *Community courts*

314. Community courts, established in 2003 by Proclamation No. 132/2003,³³² are courts of first instance. Currently, there are 368 community courts.³³³

315. Community Courts have jurisdiction over disputes arising from the “daily lives of the communities” and that are “not complicated”. Thus, the matters falling under their jurisdiction include civil disputes involving movable property not exceeding 50,000 Nakfa and immovable property not exceeding 100,000 Nakfa;³³⁴ land related rights under Proclamation No. 58/1994, such as the rights to fence the land, the right to mark the perimeter of a plot, right to require the cutting of branches and roots when they invade someone else’s land, right to protect an allotted plot of land. They also hear minor criminal cases, such as intimidation, minor damage to property caused by herds or flocks, disturbing the possession of others without use of force, petty assault and minor acts of violence as well as slight offences against honour (simple insult or defamation).³³⁵

316. Community courts should try to find a negotiated settlement between the parties to the dispute, taking into account customary law and practices. If no solution is reached, the court makes a binding judgment based on national law. In this case, the losing party may appeal the judgment to the regional court. About two-third of the disputes are resolved through negotiated settlement.³³⁶ During proceedings parties are not represented by lawyers as the judges most of the time act as negotiators and conciliators between the parties to the dispute. In criminal matters, the maximum sanction that may be imposed by community courts is a fine of 300 Nakfa,³³⁷ which may be substituted by a 15-day imprisonment fine.

317. Community courts are composed of three judges, who are elected for two years by the community and may be re-elected – the number of mandates allowed, though, is unknown. Judges must be at least 25 years old, have completed their national service obligations and not have been previously convicted of theft, embezzlement, corruption or perjury. Judges hold hearings on average three times per week. In practice, most of the judges are above 45 years old and usually one of them is a woman.³³⁸ Some judges are not

³³² In 2003, community courts replaced both the village courts created in 1992 (Proclamation No. 25/1992) and the sub-regional courts that had been established in 1996 (Proclamation No. 86/1996 on the regional administration) and had taken over the competencies of the village courts, deemed ineffective. Their judges, who were appointed by the Government from the village elders, were often illiterate and were not taking into account customary law and practices of the community in arriving at their decisions. At the same time, they did not have a sufficient legal background to base their judgments on the national law (See: Ensuring Access to Justice through community courts in Eritrea, in Tradition justice: practitioners perspectives, Senai W, Andemariam, Working Paper Series Vol.3, International Development Law Organization, 2011, Chapter 6, page 116).

³³³ Initially, 683 community courts were established but it quickly appeared that this number was excessive.

³³⁴ 3,319 USD and 6,638 USD respectively.

³³⁵ Relevant articles of the Transitional Penal Code (TPC): art. 55, 649 (2), 650 (1) and 798.

³³⁶ Senai W, Andemariam, *Ensuring access to Justice through community courts in Eritrea*, (Tradition justice: practitioners perspectives, Working Paper Series Vol.3, International Development Law Organization, 2011), pp. 113-129.

³³⁷ Approximately 20. USD.

³³⁸ This is not an obligation under Proclamation No. 132/2003 but it is an expectation that is actually realised in practice. 30 per cent of judges elected in 2008 were women (See Senai W. Andemariam, *Ensuring Access to Justice through community courts in Eritrea*, (Tradition justice: practitioners perspectives, Working Paper Series Vol. 3, International Development Law Organization, 2011), p. 121.

literate (the Ministry of Justice attaches college students to the courts of such judges to assist them). Additionally, all judges undergo legal training on domestic law.

318. Community courts, established throughout the country, are usually seen as successful and as having facilitated access to justice for people living in rural and remote communities who had to travel long distances to get to the nearest court. On average, more than 20,000 cases are brought to community courts every year. Reports indicate that the number of pending cases is relatively low but no precise data is available on the average duration of a procedure.³³⁹ Similarly, there is no information available on the rate of appeals made against judgments given by community court judges, nor about the rate of reversal of these judgments by regional courts. However, it seems that some communities (such as the Afar) do not resort to community courts and prefer their traditional modes of dispute resolution.³⁴⁰

319. The development of community courts has been supported by the international community, in particular the European Union and UNDP.³⁴¹ In May 2007, the Government of Eritrea carried out a review of community courts and studied the possibility of: extending their jurisdiction to include more civil and criminal matters that were under the jurisdiction of regional courts (including divorce, custody of children, succession and guardianship); extending the term of judges to four years; and a proposal that at least one of the three judges sitting at a court should be literate.³⁴² In terms of their effective functioning, however, it should be noted that former Eritrean judges are of the view that the establishment and development of community courts were seen as a means for the Government to increase its control and weaken the judicial system. This is evidenced by the fact that community court judges are under the direct control of the Ministry of Justice and the local administration, and that untrained community judges have created legal chaos when trying to resort to positive national law.³⁴³

(ii) *Regional (zoba) courts*

320. The regional courts - or *zoba* courts - constitute the second degree of jurisdiction. There are 36 *zoba* courts. They are courts of first instance for civil cases involving moveable property above 50,000 Nakfa in value, and immoveable property above 100,000 Nakfa in value³⁴⁴ and for suits that cannot be expressed in monetary terms. They also hear criminal cases and appeals from community and Labour courts.³⁴⁵ In first instance proceedings, there is a single judge bench system, while three judges' panels are required for appeal proceedings.

321. According to information provided by the Government, separate chambers have been recently established to try children and a probation service has been created to counsel

³³⁹ Ibid, p. 124.

³⁴⁰ Ibid, p. 119.

³⁴¹ The European Union provided € 9.7 million to support the community courts as part of the overall financial assistance of € 122 million agreed in the Country Strategy Paper and National Indicative Programme for 2009-2013.

³⁴² A draft law was prepared but it could not be confirmed whether the draft law was promulgated and entered into force and when, as well as whether the term of office of judges was extended to four years.

³⁴³ Submission S033 to the Commission.

³⁴⁴ See *supra* for exchange rate in USD.

³⁴⁵ See *infra*.

convicted children.³⁴⁶ However, no additional information is available on the functioning of these chambers or about the laws they apply.

(iii) *High Court*

322. The High Court constitutes the third degree of jurisdiction. There are five High Courts: one in Asmara, two in the Debub region, one in the Anseba region and one in the Gash-Barka region. They serve as the appeal courts for the Zoba courts located in their region. The High Court in Asmara is also the appeal court for decisions by the Labour Relations Board.³⁴⁷

323. They have first degree jurisdiction on major criminal cases (murder, rape and other serious crimes) and jurisdiction for cases dealing with the formation, dissolution and liquidation of corporate bodies, enforcement of foreign judgements and arbitral awards and the expropriation of property.³⁴⁸ It is presided over by a panel of three judges and there are separate benches for civil, commercial and criminal cases. There is also a separate bench for matters regulated by Sharia law. The President of the High Court is considered to be the Chief Justice of Eritrea.³⁴⁹

(iv) *The Bench Court of Final Appeal within the High Court of Asmara*

324. The Bench Court of Final Appeal within the High Court of Asmara is the court of last resort. It is constituted by a panel of five judges. It was supposed to be replaced by the Supreme Court, but it continues to exist and to perform as the Court of last resort in the country. However, it does not have jurisdiction over the interpretation of the Constitution.

(b) Military Courts

325. According to Proclamation No. 4/1991, Eritrean military courts have exclusive jurisdiction to prosecute military personnel for criminal matters and authors of crimes perpetrated against members of the military as well as material jurisdiction over offences listed in articles 296-353 of the Transitional Penal Code of Eritrea. Such offences include the refusal to perform military service, self-maiming to avoid military service, evasion and desertion, absence without leave, abuse of authority, threats or violence against lower ranking officers or soldiers, provision of incomplete or inaccurate official statements, drunkenness on active duty, breach of discipline, insults, threats of or assault of superior officers, insubordination, mutiny, misuse or waste of material, failure to report danger or to take essential security measures, cowardice, sabotage, unauthorized wearing of military uniforms, decoration or insignias and disclosure of military secrets.

326. There are two levels of jurisdiction: lower military courts and higher military courts. However, there is no right of appeal against a decision of the lower court to the higher court since they have different material jurisdiction based on the seriousness of the alleged offence. According to Proclamation No. 25/1992, lower military courts have jurisdiction over offences that are punishable with simple imprisonment from three days to ten years.

³⁴⁶ See Report by Eritrea, UPR, 1st cycle review, A/HRC/WG//ERI/.

³⁴⁷ See *infra*.

³⁴⁸ First degree jurisdiction refers to the fact that a court is the first instance to be seized on a case; material jurisdiction refers to a court having the mandate to deal with a specific kind of cases (e.g. expropriation of property).

³⁴⁹ Menkerious Beraki was Chief Justice until 2013 but it could not be confirmed whether he still occupies this position.

Higher military courts have jurisdiction over offences that are punishable with rigorous³⁵⁰ imprisonment from one year to twenty-five years, life imprisonment, and capital punishment.³⁵¹ All judges are military officers; and no information is publicly available on how these judges are appointed or how they perform their tasks.

(c) **Courts with special jurisdictions**

327. Courts with special jurisdictions have been established in addition to the regular civilian and military jurisdictions.

(i) *The Special Court*

328. The Special Court was established in 1996 by Proclamation No. 85/1996, with the jurisdiction over cases of theft, corruption, illegal foreign currency exchange and embezzlement. Since then, their jurisdiction seems to have extended to general criminal cases, including cases of smuggling. It was reported that ten years after its creation, a special bench within the Special Court (*Nay Fluy Fluy*) was established to revise its decision, even if this is not formally an instance of appeal.³⁵² In practice, the Special Court also tries some political offences by opponents and critics of the regime, often presented as cases of terrorism or treason. It is reported that in less than one year, the Special Court had considered 1,331 cases of corruption, embezzlement and fraud. Three-hundred and sixty accused were acquitted, 237 were given a warning and 1,279 were sentenced to fines and imprisonment, the maximum sentence being 12 years.³⁵³

329. The Special Court is not part of the ordinary judicial system and it does not have any formal links with the High Court and the Chief Justice. It derives its powers from the Ministry of Defence rather than from the Ministry of Justice but it is the Attorney-General who decides which cases go to the Special Court.³⁵⁴ The procedure before the Special Court clearly disregards the most basic safeguards related to due process, including those explicitly provided for under the Transitional Codes. Judges are senior military officers without legal training, directly appointed by the President and directly accountable to him. Some judges such as the renowned singer Mr. Estifanos Abraham “Zemach” are appointed because of their popularity. One judge acts as Prosecutor. There is no right to have a legal representative or to present one’s defence. Trials are not public and there is no public record of the proceedings. Decisions are not published. The Special Court has the capacity to re-open cases that have already been decided by other courts. In fact the Special Court is empowered to use any method to pursue the truth. The decisions, which are final and binding since there is no right of appeal, are reportedly not taken on the basis of the domestic laws in force in Eritrea or established jurisprudence but on the basis of the judges’ opinions.

³⁵⁰ According to article 107 of the Transitional Penal Code, “Rigorous imprisonment is a sentence applicable only to offences of a very grave nature committed by offenders who are particularly dangerous to society. Besides providing for the punishment and for the rehabilitation the offender, this sentence is intended also to provide for a strict confinement of the offender and for special protection to society. (...) The sentence of rigorous imprisonment shall be served in such central prisons as are appointed for the purpose. The conditions of enforcement of rigorous imprisonment are more severe than those of simple imprisonment”. This Code was replaced by the new Penal code promulgated on 11 May 2015 by the Government.

³⁵¹ See Luwam Dirar and Kibrom Testafagir, *Introduction to Eritrean legal system and research*, available at <http://www.nyulawglobal.org/globalex/Eritrea1.htm>, para .4.4.

³⁵² Submission S033 to the Commission.

³⁵³ United States’ State Department Country Reports on Human Rights Practices 2001.

³⁵⁴ See *infra*.

(ii) Labour Relation Board and the Labour Court

330. The Labour Relation Board has exclusive jurisdiction over collective labour disputes and for the interpretation of the Labour Proclamation No. 118/2001. The Labour Court has exclusive jurisdiction over individual labour cases and is presided over by a panel of three judges.

(iii) Sharia Courts

331. Sharia courts have separate Sharia chambers established within Zoba Courts and in High Courts in the civil court system. They have limited jurisdiction on guardianship, succession, divorce and the partition of estates of Muslims.

2. The independence of the Judiciary

332. Article 48 of the Constitution provides that justice should be administered in an independent manner and should be free from interference from executive or legislative powers. The independence of the Judiciary is also provided for in different Proclamations regulating the structure of the Government.

333. In accordance with the principle of the separation of powers and to ensure the independence of the judiciary, the Constitution provides that a Judicial Commission should be established and be in charge of appointing judges.³⁵⁵ However, the Constitution is not in force and the Judicial Commission has never been established. Judges are appointed, reassigned and dismissed at the will of the President. There are different procedures to appoint judges but all are generally directly appointed by the Government or require its express approval after being proposed by the Ministry of Justice. The Attorney General's Office has the power to initiate public prosecutions, to make complaints in accordance with the law and to oversee the investigatory activities of the police and of law enforcement in prisons. Prosecutors are appointed the same way as judges, by the Government, and may be rotated to the function of judges and vice-versa. A few of judges were trained at the Law Faculty in Asmara; however most are military officers without legal training and/or they are conscripts assigned as judges during their national service whose "careers" are managed by the Ministry of Defence and the Ministry of Justice. In 2001, the Chief Justice, Mr. Teame Beyene, was dismissed from his position by the Government after he criticised the frequent interference of the executive in the judicial proceedings and called for the abolition of the Special Court, whose establishment and functioning he described as illegal and unconstitutional.³⁵⁶

3. The legal profession

334. Proclamation No. 88/1996 regulates legal practice, including professional responsibility and the management of disciplinary matters. There is no professional association of lawyers. Therefore, it is the Legal Committee of the Ministry of Justice, chaired by the Minister of Justice, which has the power to admit applicants to the bar.³⁵⁷ Virtually no licenses have been issued by this Committee for several years. Consequently, since many lawyers have left the country, the number of lawyers has sharply decreased.³⁵⁸

³⁵⁵ Article 53 of the Constitution.

³⁵⁶ See chapter III, C, Post-Independence, and chapter VI, B, 1, Administration of justice.

³⁵⁷ Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies" (2004).

³⁵⁸ There are reportedly very few lawyers in private practice in Eritrea.

335. Disciplinary matters are managed by the Disciplinary Committee of the Ministry of Justice.³⁵⁹ This arrangement may constitute a breach of the independence of the legal profession as it puts lawyers at risk of undue pressure from the Government.

336. There is no functioning and institutionalised system of public defence, not even for criminal matters. Nevertheless, according to national law a private lawyer should be assigned to represent the accused in cases before military courts, for trials of children and in the most serious criminal cases. In addition, following the closure of Asmara University in 2006, no legal education was available in Eritrea until the Legal College opened in 2010.

VI. Findings of the Commission

A. Controlled, Silenced and Isolated

1. Surveillance of the population in violation of the right to privacy

(a) Legal framework

337. The right to privacy guarantees the protection of all persons against arbitrary and unlawful interference with privacy, family, home or correspondence. It is enshrined in article 17 of the International Covenant on Civil and Political Rights. Under international human rights law, any interference with the right to privacy must be prescribed by law and comply with the principles of legality, necessity and proportionality.³⁶⁰

338. Accordingly, the Eritrean Government should guarantee that information gathered by State officials with regard to an individual's private life is limited to what is essential in the interests of society. In this regard, the surveillance of individuals and their communications by any measures should not arbitrarily or unlawfully interfere with an individual's privacy, family, home or correspondence. Such measures should be strictly regulated by law and restricted to what is necessary, for example for legitimate law enforcement or intelligence purposes. Mass surveillance programmes are consequently deemed to be arbitrary, even if they serve a legitimate aim, such as protecting national security, and are provided for by law.³⁶¹ Furthermore, the Government should ensure that the gathering and storage of personal information in electronic databases is regulated by law and that individuals are informed of the kind of information collected as well as of the intended purpose of establishing such databases.

339. The Commission notes that during the period under investigation, Eritrean law provided that the domicile of natural persons is inviolable and that no one may enter against their will, nor may a search be carried out therein except in the cases provided by law.³⁶² Due to a dearth of information on national laws, the Commission was unable to establish whether other provisions that protect the right to privacy and regulate the interferences and restrictions to the enjoyment of this right exist.

³⁵⁹ See Luwam Dirar and Kibrom Testafagir, *Introduction to Eritrean legal system and research*, para. 4.2, available at <http://www.nyulawglobal.org/globalex/Eritrea1.htm>.

³⁶⁰ Human Rights Committee, General Comment No. 16, para. 3 and 4 and General Comment No. 31, paragraph 6.

³⁶¹ Report of the High Commissioner on Human Rights on the right to privacy in the digital age, A/HRC/27/37, para. 25.

³⁶² Article 13 of the Transitional Criminal Code and 571 of the Transitional Penal Code – see CRC/C/41/Add.12, par. 132. The Commission notes that these Transitional Codes have been replaced by new Codes promulgated by the Eritrean Government on 11 May 2015.