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Commentary

The Human Rights Situation and Rule of Law in Eritrea¹

Sunday 18 September 2016 represents the 15th anniversary of the arrest of a group of senior leaders of the Eritrean People’s Liberation Front (EPLF) and its successor, the People’s Front for Democracy and Justice (PFDJ), cabinet ministers, members of parliament, high ranking army officers and independent journalists. The day marked *Eritrea’s Black September*, as characterised in my book, *Eritrea at a Crossroads: A Narrative of Triumph, Betrayal and Hope* (2014).

Having detained them on trumped up accusations, the government has, to date, neither formally charged nor brought these prominent political prisoners before a court of law. It continues to hold them in solitary confinement and deny them normal visitation rights by family, friends or human rights monitors. Furthermore, the government has provided no information regarding their whereabouts or the state of their physical and mental health.

The question of whether such indefinite detention under solitary confinement, without charge or trial, constitutes a crime against humanity can now be addressed in light of the recent findings of the UN Commission of Inquiry (COI) on the Human Rights Situation in Eritrea. The purpose of this commentary, however, is not to present an exhaustive discussion of this broad topic but rather to make some observations regarding the general situation of human rights and the need for democratic governance in Eritrea. In this context, it will also highlight the role of Eritreans in the Diaspora, in general, and in Canada, in particular.

It must be underscored at the outset that the struggle for human rights in Eritrea is an integral part of the overall struggle for democracy and rule of law. These essential elements are indelibly linked. Experience shows that respect for human rights, rule of law and democratic principles is incompatible with dictatorship. Indeed, there exists an organic link between human rights, rule of law and democratic governance.

Justice Tom Bingham (2010), an eminent British jurist, defines rule of Law as “*a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly*

¹ This commentary is based on Ambassador Andebrhan Welde Giorgis’ speech at the University of Winnipeg, Canada, on 25 September 2016 at the invitation of Eritrean-Canadians Human Rights Group of Manitoba to commemorate the 15th anniversary of the arrest of a group of senior Government and Front leaders (www.eri-platform.org).

promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”

Under the rule of law, all people and institutions are subject to and accountable to law that is fairly applied and equally enforced. In a political system that adheres to the supremacy of the rule of law, the law is paramount over the acts of the government and the people. In a dictatorial form of government like Eritrea's, where the rule of man prevails, governance and the rules of conduct are set and altered at the discretion of a single person, or a select group of persons.

It is worth looking at the state of rule of law in Eritrea in terms of existing domestic, regional and international instruments.

At the domestic level, Eritrea has (1) a ratified Constitution that enshrines basic rights and fundamental freedoms and (2) Civil and Penal Codes and Associated Procedures. At the international and regional levels, Eritrea is state party to several international and regional conventions, such as, (1) the International Covenant on Civil and Political Rights [2002]; (2) the African Charter on Human and Peoples' Rights [1999]; (3) the Convention on the Abolition of Forced Labour [2000]; and (4) the Convention against Torture [2014].

The problem is that these legal instruments exist only on paper. They are not put to effect. The ratified Constitution has been shelved since ratification in 1997. The Civil and Penal Codes and Associated Procedures are not duly applied. The international instruments are ignored. There exists no mechanism of domestic accountability, regional censure or international enforcement.

It is in the context of such a constitutional and legal vacuum that the UN Commission of Inquiry (COI) [*Report of the Commission of Inquiry on Human Rights in Eritrea, A/HRC/32/47, 9 May 2016*] has concluded that it *has reasonable grounds to believe that Eritrean officials have committed gross, widespread and systematic violations of human rights that amount to crimes against humanity*. Its list of alleged crimes includes 'enslavement, imprisonment, enforced disappearances, torture, persecution, rape, murder and other inhumane acts' since 1991'.

Noting that Eritrea, without substantial legal and institutional reform, cannot provide accountability for these crimes and violations, the COI recommends that the United Nations Security Council (UNSC) refer the situation to the Prosecutor of the International Criminal Court (ICC) for consideration, that the African Union (AU) conduct an investigation and establish an accountability mechanism, and that UN Member States exercise their obligation to prosecute or extradite individuals suspected of such crimes present in their territory.

It is important to note that the COI has not said that *crimes have been committed* but only that it *has reasonable grounds to believe that crimes have been committed*. Moreover, there is a problematic with its timeframe that includes the entire first decade of Eritrea's statehood, which seems to unduly malign the very legitimacy of the Eritrean State, as opposed to the praxis of the Eritrean Government.

On its part, the Eritrean Government has denied any wrongdoing and faulted the COI's Report as politically motivated. Moreover, the Eritrean Diaspora is divided between support for and opposition to the COI's findings. Furthermore, the Diaspora opposition is also divided, fragmented and polarised, thereby generating considerable internal negative energy. How can the political opposition in the Diaspora overcome its divisions, stem its polarisation and coalesce under a minimum programme based on a shared vision in the service of an orderly democratic transition in Eritrea?

To begin with, there is an imperative need to recognise and be able to distinguish the difference between the State of Eritrea (**ግዢ ኤርትራ**), the People of Eritrea (**ህዝቢ ኤርትራ**), and the Government of Eritrea (**መንግስቲ ኤርትራ**). The State of Eritrea is the homeland of all Eritreans, embracing the people, the country, the territory, and the government. The people are the entire citizenry in all its ethnic, linguistic, cultural, religious and regional diversity. The Government is the regime in power under the auspices of the PFDJ.

The People and the Country are permanent and will endure; an independent sovereign Eritrean State and the Eritrean people are here to stay. However, the present government of Eritrea is transient; it shall come to pass, sooner or later. Of course, better sooner than later, from the point of view of the interests of democracy, rule of law and human rights in Eritrea. And it is entirely up to the Eritrean people at home and in the Diaspora, to shorten or extend its tenure. It is in their hands to accelerate the end of the dictatorship and usher in a new democratic dispensation.

What does this mean in practice? It means that patriotic pro-democracy Eritreans should: (1) defend the sovereignty, territorial integrity and national security of the State of Eritrea; (2) promote the interest, unity and wellbeing of the Eritrean people; and (3) expose, isolate and weaken the tyrannical regime.

Once people recognise the distinction between the State, the People and the Government, they can see that the COI does not accuse the State or the People of Eritrea. Nor does it accuse the entire Government of Eritrea. It only accuses some officials in the government of committing crimes against the people and, by implication, the State. Still, the Report upholds the legal principles of *due process* and the *presumption of innocence until proven guilty*. This is precisely why the COI has recommended taking legal measures to ascertain the alleged crimes, establish accountability for the perpetrators and ensure justice for the victims.

Furthermore, the Report of the COI points to two possible avenues to pursue justice: (1) a democratic Eritrea embodying substantial legal and institutional reform capable of administering justice, providing accountability for proven crimes and violations, and fair closure for the victims of ascertained crimes. (2) United Nations Security Council (UNSC) Referral to the International Criminal Court (ICC), which is mandated to prosecute crimes of genocide, crimes against humanity and war crimes. Both paths to the administration of justice would require sustained hard work and substantial financial outlays, with neither path guaranteed success *a priori*.

The divergent national interests of the major powers, especially the Permanent Members of the UNSC, the Permanent Five (P5), and the prevailing geopolitics of the strategic but volatile region of the Horn of Africa, the Red Sea Basin and the South Arabian Peninsula, would make the required unanimous decision on a referral resolution difficult, if not impossible.

In addition, the politicisation of the workings of the ICC has undermined its overall credibility. Moreover, its track record of selective prosecution, special focus on African suspects², failure to apply similar criteria to similar cases, and consequent loss of confidence by the AU and most of its Member States, would render the external route to justice problematic, if not untenable, in the continental context. Furthermore, prosecution under ICC jurisprudence would require the cooperation of the Eritrean government, which is highly unlikely. At the same time, the national route to justice necessitates Eritrea's transition to a constitutional system of governance based on democratic principles, rule of law and respect for human rights. It would also require the establishment of an independent judiciary with the requisite competence.

In the final analysis, pro-democracy Eritreans must make a strategic choice. They must decide whether they wish to pursue retributive and punitive justice or transformative and restorative justice; whether they wish to take revenge or seek reconciliation; whether they wish to relive the old dark past or move on to a new bright future. Eritreans at home and in the Diaspora need to engage in an inclusive national conversation at all levels to make a strategic choice on how to proceed and what to do for when the time comes. There is a case to opt for an Eritrean owned and Eritrean driven strategic choice that empowers the people to become masters of their own destiny, ensures justice for the aggrieved and best serves the cause of national reconciliation, progress and prosperity of the Eritrean people.

Against this backdrop, it would be useful to look at certain basic facts and try to find common ground to build the basis for pro-democracy Eritreans, inside the country and in the Diaspora, to work together to accelerate the end of tyranny and the advent of a new democratic dispensation in the country. In this context and at this juncture, it would be illustrative to make brief comments regarding three of the alleged crimes, namely, enslavement, imprisonment and torture.

Enslavement

Open-ended active national service has been the scourge of Eritrea's youth. Implemented in clear violation of the terms of the 1995 Proclamation, it denies the conscripts the right to normal family upbringing, the opportunity to proper education and the prospect to develop their potential. Furthermore, it ruins the national and household economies, subverts the development of the country and poses a threat to its long-term national security. Endless national service has squandered the productive

² In the six cases that are ongoing or about to begin, the ICC has charged only Africans, which explains why African states are threatening withdrawal from the ICC.

energy and stolen the future of Eritrea's youth. Undertaken without proper planning and due compensation, indefinite national service represents modern day servitude tantamount to enslavement. In the considered opinion of the UN Commission of Inquiry of the Human Rights Situation in Eritrea, this constitutes a crime against humanity.

Imprisonment

The political prisoners and detained journalists were arrested without due process. Arbitrary arrests and indefinite detentions happen by word of mouth without any written or signed orders. For the members of the defunct Transitional Eritrean National Assembly, the arrests represented a clear violation of the principle of parliamentary immunity. Arrest without due process and detention without trial constitute gross abuses of human rights.

Beyond baseless allegations of treachery and sedition, the political detainees have not been formally charged or brought to trial before a court of law. Once detained, they have not been heard of or heard from. They are held incommunicado in solitary confinement. There is no official information on their whereabouts and the state of their physical or mental health. They have no visitation rights from family or international human rights monitors, such as the International Committee of the Red Cross (ICRC). It is unlawful to lock up people, let them waste away and forget about them! In the considered opinion of the UN Commission of Inquiry of the Human Rights Situation in Eritrea, this constitutes a crime against humanity.

Torture

The UN Commission of Inquiry Report compiles horrific stories of torture perpetrated on political detainees and ordinary prisoners from victims themselves first hand. Indefinite detention, incommunicado and solitary confinement represent denial of the fundamental right to life, liberty and the pursuit of happiness. They rank among the cruellest forms of torture and represent a grave violation of human rights. In the considered opinion of the UN Commission of Inquiry of the Human Rights Situation in Eritrea, this constitutes a crime against humanity. It is quite horrifying to imagine oneself in such a situation even for a brief moment!

Evidently, Eritrea has become unliveable for its people! It has been repeatedly and amply ascertained that gross, widespread and systematic violations of human rights, aggravated by economic hardship, drive Eritrean youth to flee their country in droves at great risk to their lives. Some use human traffickers; others march on foot. Many die from sunstroke in the perilous Sahara trek to North Africa; drown in the Red Sea or the Mediterranean Sea in transit to the Arabian Peninsula or Europe; or perish from organ harvest in the Sinai. Remember the Lampedusa tragedy!

Quite clearly, Eritreans fleeing the country are political refugees. Otherwise, most Eritreans love their country and prefer to stay home. They are pushed primarily by harsh political repression and utter despair rather than pulled by the prospects of a better life elsewhere. Destination countries like Canada have thus an obligation to

welcome, host and provide them with protection under international humanitarian law, pending positive changes in the human rights situation in Eritrea.

The Regional Geopolitical Situation

The highly strategic region of the Horn of Africa (HoA) and the Red Sea Basin is in turmoil. Most of the countries in the HoA, whether the HoA proper [Djibouti, Eritrea, Ethiopia and Somalia] or the Greater Horn of Africa (GHoA) [Djibouti, Eritrea, Ethiopia, Somalia, Kenya, South Sudan, Sudan and Uganda], and the adjacent South Arabian Peninsula, find themselves in varying degrees of a deep crisis. It must be underscored that this volatile region, beset by worsening intrastate strife, chronic interstate conflict and bloody sectarian wars, exerts a powerful negative impact on the peace, security and stability of Eritrea and the wellbeing of the Eritrean people.

Role of the Eritrean Diaspora

Eritreans in the Diaspora, including in Canada, should lobby their host governments to, *inter alia*:

- Call for the immediate and unconditional release of all political detainees, jailed journalists and prisoners of conscience;
- Persuade the Eritrean government to institute rule of law and put into effect the international and regional conventions to which Eritrea is a state party and guarantee universal human rights to its people;
- Demand transparency and accountability of multinational companies investing and operating in Eritrea's mining sector, in particular, regarding
 - Environmental policy,
 - Employment practice, and
 - Revenue distribution and financial transactions with the Eritrean government; and
- Lobby them to exert pressure on the Eritrean government to:
 - Manage national service in line with the 1995 Proclamation;
 - Effect the immediate and unconditional release of all political detainees, jailed journalists, prisoners of conscience and detained ordinary citizens; and
 - Cease arbitrary arrests, torture, extrajudicial killings and enforced disappearances.

Finally, and most crucially, Eritreans at home and in the diaspora should actively participate in the national effort to generate an orderly Eritrean owned and home grown transition to democratic governance and contribute to the construction of a constitutional, progressive and prosperous Eritrean State.