

ARTICLE 19

# Eritrea: A Nation Silenced

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June 2013

Country Report

# Executive Summary

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In this report, ARTICLE 19 assesses the situation for media freedom and the right to freedom of expression and information in Eritrea. The report demonstrates the lack of adequate legal protections for the right to freedom of expression at the domestic level, and explores the realities for journalists whose attempts to navigate repressive laws and practices have ended them in prison or killed.

No private media has existed in Eritrea since the last eight private newspapers were forced to close in 2001, when at least eighteen journalists and eleven former government officials were detained incommunicado without charge or trial. Of these detainees, eight are confirmed as having died in custody. Other reports include those of radio and television stations being forced closed and their broadcasters and journalists imprisoned, the whereabouts of many still unknown. The few remaining 'media' are state owned and far from independent, essentially serving as a mouthpiece for the Ministry of Information. Alternative sources of information are limited given the extremely low levels of internet penetration in the country. Opportunities for the re-establishment of an independent media in the country are therefore largely non-existent, and continued impunity for human rights violations against journalists provide little hope of this situation changing.

Eritrea's legal framework sustains impunity for these human rights violations. Domestic legislation has essentially engineered an environment where Afewerki's regime is insulated from criticism and has the discretionary means to crush any hint of dissent, often by relying on the perpetual state of emergency in the country. The failure of Afewerki's regime to implement the 1995 constitution flies in the face of binding commitments made at the international and regional level to the right to freedom of expression and information. The Press Proclamation, the Transitional Penal Code for Eritrea, and the Proclamation to Determine the Administration of Non-governmental Organizations grant the authorities numerous mechanisms to punish dissent with extensive custodial sentences and fines.

In September 2012 the UN Human Rights Council appointed Beedwantee Keetharuth as Special Rapporteur on the situation of human rights in Eritrea. The Special Rapporteur is mandated to independently review the situation of human rights in Eritrea, as well as take on the investigation of a number of individual complaints against the Eritrean government. Almost one year after the mandate was created, this report makes the continuing case for the need for unequivocal support for the mandate until drastic improvements are seen to the freedom of expression on the ground in Eritrea.

This report makes a series of recommendations to Eritrea to release journalists and other opposition activists; reform its domestic legal framework to implement the commitments it has made at the international level to promote and respect the right to freedom of expression and information, and to unconditionally invite the Special Rapporteur to officially visit the country and to provide unhindered support to such a country visit.

# Recommendations

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## **Africa Union and United Nations**

- The Africa Union and United Nations mechanisms should put pressure on the Government of Eritrea to cooperate with the UN Special Rapporteur;
- All UN member states should support the renewal of the mandate of the UN Special Rapporteur on the human rights situation in Eritrea;
- The African Union should encourage countries in the Horn of Africa region, including Eritrea, to become a member state of the African Peer Review Mechanism.

## **Government of Eritrea**

### ***International and regional human rights mechanisms***

- Unconditionally and officially invite and provide unhindered support to the Special Rapporteur;
- Extend a standing invitation to all UN Special Rapporteurs to visit and independently review the human rights situation in Ethiopia, including to the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression; the Special Rapporteur on the Situation of Human Rights Defenders; the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, and the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association;
- Submit its long overdue initial report to the UN Human Rights Committee under Article 40 (1) of the ICCPR;
- Ratify the Optional Protocol to the ICCPR to enable the individual complaint mechanism to the UN Human Rights Committee;
- Ensure that all international and regional human rights treaties they have ratified are translated into the official languages of the country and are accessible to the public and understood by the judiciary;
- Extend a standing invitation to the African Commission's Special Rapporteur on Freedom of Expression and Access to Information to visit and conduct an independent review of Eritrea's human rights record;
- Comply with the recommendations of the African Commission's Resolution 169 "on repealing criminal defamation laws in Africa";
- Comply with the recommendations of the African Commission's Resolution 178 "on the safety of journalists and media practitioners in Africa";
- Ratify the African Youth Charter; the African Charter on Democracy, Elections and Governance, and the African Charter on Values of Public Service and Administration;
- Comply with the judgments in *Communication No. 250 Liesbeth Zegveld and Mussie Ephrem/Eritrea* and *Communication No. 275 Article 19/Eritrea*;
- Comply with the recommendations made during the last UPR at the UN Human Rights Council;

### ***The Constitution***

- The legal status of the 1997 Constitution should be clarified;
- International human rights treaties ratified by Eritrea should be incorporated to the constitutional order;

- The right of access to information should be guaranteed to all people and not limited to citizens;
- Limitations on the right to freedom of expression and information should be provided for by law, be necessary in a democratic society, and be proportionate;
- The right to freedom of expression and information cannot be restricted on the basis of protecting the country's economic well-being;

#### ***Press Proclamation No.90/1996***

- The Press Proclamation should be repealed entirely, since it is fundamentally flawed from a freedom of expression and information perspective. It should be replaced by a system of effective self-regulation;
- State-ownership of the press should be prohibited, and the independence of the media guaranteed;
- The printed press should not be subjected to any licensing or registration requirements. If any such regimes are retained, they must be administered by a body independent of government;
- Any restriction premised on the content of the expression in issue should comply with the three part test of Article 19 (3) of the ICCPR;
- If statutory regulation for the press is retained, it should not be enforced through the criminal law. Any criminal offences must be compatible with the right to freedom of expression and information, be of general application to all people, and be contained in the Penal Code rather than the Press Proclamation;
- If statutory regulation for the press is retained, it should reflect the principle that the right to freedom of expression and information applies irrespective of boundaries. Restrictions on the financing of the media from abroad, and the circulation of foreign publications, should be lifted;

#### ***Crimes against freedom of expression***

- The offences of criminal defamation and insult should be abolished. In particular, the law should not provide heightened protections for the reputations of public officials, nor protect the reputational interests of public institutions, or national emblems or symbols;
- Articles 259, 260, and 261 should be redrafted to strike the appropriate balance between the right to freedom of expression and the protection of national security. Freedom of expression should only be restricted in circumstances where there was intent to incite imminent violence, where it is likely that such violence would be incited, and where there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence;
- The Criminal Code should be amended to include crimes against freedom of expression;

#### ***Proclamation to Determine the Administration of Non-governmental Organizations***

- The Proclamation to Determine the Administration of Non-governmental Organisations should be amended to lift the restriction in Article 7 on the operation of organisations seeking to promote and protect human rights.

## About ARTICLE 19

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Established in 1987, ARTICLE 19 defends the right to freedom of expression and information. Taking our name from Article 19 of the Universal Declaration on Human Rights, we fight for all hostages of censorship, defend dissenting voices that have been muzzled, and campaign against laws and practices that silence. ARTICLE 19 has its regional office for Eastern Africa based in Nairobi.

For more information about the work of ARTICLE 19 in Eastern Africa, please contact Henry Maina, Director of ARTICLE 19 Kenya and Eastern Africa at [henry@article19.org](mailto:henry@article19.org).

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# Introduction

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In this report, ARTICLE 19 assesses the situation for media freedom and the right to freedom of expression and information in Eritrea. The report demonstrates the lack of adequate legal protections for the right to freedom of expression at the domestic level, and explores the realities for journalists whose attempts to navigate repressive laws and practices have ended them in prison or killed.

Established in 1987, ARTICLE 19 defends the right to freedom of expression and information. Taking our name from Article 19 of the Universal Declaration on Human Rights, we fight for all hostages of censorship, defend dissenting voices that have been muzzled, and campaign against laws and practices that silence. ARTICLE 19 has been working on freedom of expression issues in Eritrea for a number of years, including taking a case against Eritrea to the African Commission on Human and Peoples' Rights. ARTICLE 19 has its regional office for Eastern Africa based in Nairobi.

Eritrea frequently tops lists as one of the 'most censored' countries in the world, and President Isaias Afewerki is routinely characterised as a ruthless and repressive autocrat. This report finds that Eritrea's reputation in this respect is well deserved.

No private media has existed in Eritrea since the last eight private newspapers were forced to close in 2001, when at least eighteen journalists and eleven former government officials were detained incommunicado without charge or trial. Of these detainees, eight are confirmed as having died in custody. Remaining 'media' are state owned and far from independent, essentially serving as a mouthpiece for the Ministry of Information. Alternative sources of information are limited given the lack of internet penetration in the country. Opportunities for the re-establishment of an independent media in the country are therefore largely non-existent, and continued impunity for human rights violations against journalists provide little hope of this situation changing.

Eritrea's legal framework sustains impunity for these human rights violations. Domestic legislation has essentially engineered an environment where Afewerki's regime is insulated from criticism and has the discretionary means to crush any hint of dissent, often through reliance on the perpetual state of emergency in the country. The failure of Afewerki's regime to implement the 1995 constitution flies in the face of binding commitments made at the international and regional level to the right to freedom of expression and information. The Press Proclamation, the Transitional Penal Code for Eritrea, and the Proclamation to Determine the Administration of Non-governmental Organizations grant the authorities numerous and alternate mechanisms to punish dissent with extensive custodial sentences and fines.

In September 2012 the UN Human Rights Council appointed Beedwantee Keetharuth as Special Rapporteur on the situation of human rights in Eritrea. Her mandate is due to be renewed during the 23<sup>rd</sup> Session of the UN Human Rights Council; hence it is therefore timely to review the current obstacles that exist to the promotion and protection of the right to freedom of expression and information in the country.

## Political and historical context

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Eritrea declared independence and received international recognition in 1993, and has since been ruled by a transitional government. A perpetual state of emergency, national security concerns and the protection of territorial integrity have been deployed to silence dissent. Significant legal, political and institutional reforms are required to ensure appropriate protections for freedom of expression and information.

### Governance

The Eritrean government formally recognises only one political party - the People's Front for Democracy and Justice (PDFJ) - which is led by President Isaiah Afewerki. The PDFJ is largely made up of former Eritrean People's Liberation Front members, a military group that opposed the Ethiopian annexation of Eritrea. The PDFJ were the dominant domestic power following the UN sanctioned referendum on independence that saw Eritrea become a *de jure* independent state in 1993.

The class structure advocated by the ruling party divides Eritrean society into two classes: the *Tegadelti*<sup>1</sup> and the *Hafash*.<sup>2</sup> The *Tegadelti* claims that, because of their contribution and participation in the armed struggle with Ethiopia, they deserve more reward than the rest of the Eritrean population. Hence, *Tegadelti* in post-independent Eritrea receive a higher salary scale as compared to *Hafash*.<sup>3</sup>

In addition, the *Tegadelti* dominate politics and government. 50 per cent of national assembly seats are reserved for *Tegadelti*, although they represent only 95,000 of the population.<sup>4</sup> Likewise, the executive branches of the government, specifically most of the cabinet of ministers are, if not all, members of *Tegadelti*. With regard to judiciary, with the exception of Special Court, members of both class structures operate all the other courts.<sup>5</sup>

The government is autocratic and power is mostly centralised. Within the government there is an almost total denial of any involvement or responsibility for violations of the right to freedom of expression.

### Regional instability

The lead up to independence in 1993 was long and violent and the subsequent twenty years have also been characterised by bloodshed. Destabilising wars and border disputes with Yemen, Djibouti and Ethiopia have wracked the country almost constantly during its existence. Afewerki's government has often been the aggressor in these conflicts, and continuing tension with its neighbouring countries ensures that peace in the region remains

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<sup>1</sup> *Tegadelti* literally means 'fighters'. It denotes army members of EPLF who fought for liberation of the country.

<sup>2</sup> *Hafash* means the civilian public both those who live inside and outside Eritrea.

<sup>3</sup> Berhane Hagos, *Eritrea's 20th Anniversary Comprehensive Report Card*, 2011; available at <http://bit.ly/11dmejD>.

<sup>4</sup> Article 4(3) of Proclamation 37/1993 reserves 50 per cent seats of the National Assembly for *Tegadelti*.

<sup>5</sup> *Ibid.*, the section on special court shows that the judges are military officers elected by the president.



unstable. Many Eritreans have taken flight, with more than 50,000 Eritrean refugees residing in just three camps in the Tigray region of Ethiopia alone.

The PDFJ has been accused of supporting the Al-Qaeda backed militant group al-Shabaab.<sup>6</sup> Based in Somalia, al-Shabaab has claimed responsibility for numerous horrific acts of terrorism throughout East Africa. Following the renewed vigour of the African Union Mission in Somalia (AMISOM) intervention in 2011, al-Shabaab have suffered a string of defeats in Somalia, most notably in relinquishing control over the capital, Mogadishu. The closeness of the PDFJ to al-Shabaab is disputed.

The government often exploits regional insecurity to further their projection of the country as being under-siege. President Afewerki made claims in 2012 that his main concern for the country is “protecting national security” from “external aggressors” - a process which seeks to combat not only the interventions of Ethiopia but of the media and human rights advocates.<sup>7</sup>

### **Attempted coup**

On 21 January 2013 there were reports that a group of 100 soldiers attempted a coup in Eritrea. According to reports, the soldiers stormed the Ministry of Information and took over the state-run television service and forced the station’s director, Asmelash Abrah, to read out a brief statement calling for the implementation of the 1997 constitution and release of political prisoners.<sup>8</sup> The State broadcaster, Eritrean TV, then went off air for sometime before it started broadcasting again. According to the Crisis Group, “the government reportedly negotiated with the soldiers, and subsequently the ministry’s employees were released. The mutinous soldiers left the building and returned to their barracks outside the capital.”<sup>9</sup>

### **UN sanctions**

UN backed sanctions have been imposed on Eritrea since 2009 when the Security Council passed resolution 1907 following reports that “Eritrea had provided support to armed groups undermining peace and reconciliation in Somalia,” particularly noting the links to al-Shabaab.<sup>10</sup> The sanctions were further reinforced with the adoption of Security Council resolution 2023 in 2011 which was passed following calls from other East African governments, imploring that the Security Council “act decisively to stop the Asmara government from further destabilizing the region”.<sup>11</sup> Calls by the Eritrean Government for the UN Security Council to lift sanctions in October 2012 were rejected.

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<sup>6</sup> UN Monitoring Group on Somalia and Eritrea, Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 (2010), 2011; available at: <http://bit.ly/pZ9X70>.

<sup>7</sup> Voice of America, Eritrea President Denies Stifling Freedom of Speech, 2012; available at: <http://blogs.voanews.com/breaking-news/2012/05/18/eritrea-president-denies-stifling-freedom-of-speech/>

<sup>8</sup> Martin Plaut, Seething discontent in the Horn of Africa: Eritrea’s strange ‘coup’, New Statesman, 23 January 2013; What really happened at Asmara’s ministry of (dis)information?, RSF, 24 January 2013;

<sup>9</sup> “Eritrea: Scenarios for Future Transition,” Africa Report N°200, 28 March 2013, <http://bit.ly/11C9x3j>.

<sup>10</sup> UN, Security Council Imposes Sanctions on Eritrea over Its Role in Somalia, Refusal to Withdraw Troops Following Conflict with Djibouti, 2009; available at: <http://www.un.org/News/Press/docs/2009/sc9833.doc.htm>.

<sup>11</sup>VOA, *UN Security Council Approves New Eritrea Sanctions*, 2011. Available at: <http://bit.ly/u98bFg>.

## The media environment

Eritrea's record on media freedom is recognized as being very poor<sup>12</sup> and it has been recently bestowed the titled "most censored country in the world".<sup>13</sup>

Eritrea is the only country in Africa with no privately owned press, television broadcasters or radio stations, having banned the entire private press for "endangering national security" in 2001. The following privately owned newspapers were closed: *Meqaleh*, *Setit*, *Tsigenay*, *Zemen*, *Wintana*, *Admas*, *Keste Debona*, and *Mana*. At least 18 journalists<sup>14</sup> and 11 former government officials<sup>15</sup> (part of a collective known as "the group of 15") were arrested as part of this crackdown, ostensibly on national security grounds.

It was reported in August 2012 that eight of the journalists detained in 2001 have since died in detention. These are: Dawit Habtemichael; Mattewos Habteab; Temesgen Gebreyesus; Yosef Mohamed Ali; Medhaine Haile; Sahle Tsegazab; Said Abdul Kadir, and Fessahye Yohannes.<sup>16</sup>

Amnesty International has reported that Dawit Isaak, one of the journalists detained in the 2001 clampdown, remains in detention and is in poor mental and physical health.<sup>17</sup> Dawit Isaak's lawyers have since referred his case to the Africa Commission on Human and Peoples Rights (ACHPR). Seyoum Tsehaye, Amanuel Asrat, and Temesgen Gebreyesus are reported to still be alive.<sup>18</sup>

Paulos Kidane, also a journalist in Eritrea, was reportedly killed in 2007 while attempting to leave the country on foot. The circumstances surrounding his demise are unknown.<sup>19</sup>

In February 2009 the authorities shut down Radio Bana, and 38 of the journalists working there were arrested and detained. One of the journalists, Yirgalem Fisseha Mebrahtu, was reportedly placed in solitary confinement in Mai Swra Prison in May 2009. She has not been given a date for release nor is it clear what she has been charged with.<sup>20</sup> Mebrahtu was "released on bond" - with relatives acting as guarantors- in early 2012 after being held for 10

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<sup>12</sup> Eritrea has been ranked at the bottom of the Reporters Without Borders Press Freedom Index for the last five years RSF, *World Press Freedom Index 2011-2012*, 2012; available at: <http://bit.ly/16rQplo>.

<sup>13</sup> CPJ, 10 Most Censored Countries, 2012; available at: <http://bit.ly/lrIXOn>.

<sup>14</sup> Zemenfes Haile; Ghebrehiwet Keleta; Selamynghes Beyene; Binyam Haile; Yosef Mohamed Ali; Seyoum Tsehaye; Temesgen Gebreyesus; Mattewos Habteab; Dawit Habtemichael; Medhaine Haile; Fessahye Yohannes; Said Abdul Kadir; Amanuel Asrat; Dawit Isaac; Hamid Mohammed Said; Saleh Aljezeeri; Simret Seyoum; Sahle Tsegazab.

<sup>15</sup> The names of the eleven former government officials are: Former Foreign Minister Petros Solomon; Ogbe Abraha; Haile Woldetensae; Former Vice President Mahmud Ahmed Sheriffo; Berhane Ghebre Eghzabiher; Astier Feshation; Saleh Kekya; Hamid Himid; Estifanos Seyoum; Germano Nati, and Beraki Ghebre Selassie.

<sup>16</sup> Reporters Without Borders, "Three journalists held since 2001 die in Eiraeiro Prison Camp", 30 August 2012; available at: [http://en.rsf.org/eritrea-three-journalists-held-since-2001-30-08-2012\\_43298.html](http://en.rsf.org/eritrea-three-journalists-held-since-2001-30-08-2012_43298.html)

<sup>17</sup> Amnesty International, *Amnesty International Annual Report 2011 - Eritrea*, 13 May 2011, available at <http://bit.ly/119qddA>.

<sup>18</sup> *Ibid*, note 14.

<sup>19</sup> Committee to Protect Journalists, *Journalists Killed, Eritrea, Paulos Kidane*, 2007; available at: <http://bit.ly/12QQQ8F>.

<sup>20</sup> RSF, *Yirgalem Fisseha Mebrahtu*, 2009; available at: <http://bit.ly/1aDce4d>.

months.<sup>21</sup> It is reported that Bereket Misghina, Wedi Misghina, Basilios Zemo, Wedi Zemo remain in custody.

A few days following the arrests of the Radio Bana's Journalists, the following people were arrested: Isaac Abraham, a journalist on public *Eri TV*; Girmay Abraham, a journalist on radio *Dimtsi Hafash* (The Voice of the Masses state radio); Mulubrhan Habtegebriel, a journalist, writer and translator; Meles Negusse, a young writer and poet; Tsegay (Temere'o) Peot; Zemenfes Haile, a writer; Petros Teferi (wedi Qeshi) both a writer and poet; Tesfagirgios Habte; Negassi Habtemariam, a veteran journalist at the state media; Mohammed Ali Dafla, a journalist from Radio Bana; Mohammed Said Osman, a journalist and head of Tigre branch in Radio Bana and well known poet among the Tigre people. It is not known where they are being held.<sup>22</sup>

In February 2011, radio journalists Nebiel Edris, Ahmed Usman and Mohamed Osman were arrested. Tesfalidet "Topo" Mebrahtu, who used to report sports on state-owned radio *Dimtsi Hafash* and state-owned *Eri-TV*, was also arrested at the end of March 2011.<sup>23</sup>

The foreign media has also been constantly harassed and their transmission blocked. On 5 February 2013, *Al-Jazeera TV network* was blocked for 11 days because of allegedly carrying reports about demonstrations by Eritrean exiles outside Eritrean diplomatic missions in opposition to the government and in support of soldiers who had allegedly stormed the Ministry on information on 21 January 2013 in what was believed to have been an attempted coup.<sup>24</sup> On 4 September 2012, Radio Erena<sup>25</sup> a Paris-based satellite radio station that broadcasts to Eritreans in Eritrea and to the Eritrean Diaspora was a "victim of sabotage" that prevented it from being carried by the Arabsat radio and TV satellite service for three weeks. It had been previously been jammed on 14 August but was restored on 2 September. Radio Erena's website had also been the target of a cyber-attack on 28 August.<sup>26</sup>

The public media thus operates as an extension of the civil service with 'journalists' essentially acting as agents for government propaganda. The situation has been consistently dire for over a decade now and there seems to be little sign of improvement.

## Technology and Infrastructure

Eritrea lacks the infrastructure that would allow a more robust media to operate. It has an extremely small telephone network and one of the least internet hosts of any country in the world. The combined mobile and fixed line telephone reach is around 5%. As a result, usage statistics for all phones and the internet are also among the lowest globally; only 6.2% of the population use the Internet.<sup>27</sup> In 2011, Eritrea planned to introduce mobile Internet

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<sup>21</sup> RSF, Three journalists held since 2001 die in Eiraeiro prison camp, 30 August 2012, <http://bit.ly/PtKQM9>.

<sup>22</sup> This information was provided by contacts of ARTICLE 19 in Eritrea.

<sup>23</sup> RSF, *op.cit.*

<sup>24</sup> "Al Jazeera transmission restored," 18 February 2013; available at <http://bit.ly/1514cvN>.

<sup>25</sup> *Radio Erena* was launched by Reporters Without Borders in 2009 with the primary chief aim of providing an independent news service to Eritreans.

<sup>26</sup> Complaint filed in Paris about jamming of Radio Erena, 8 November 2012, available at <http://bit.ly/RKfdAp>.

<sup>27</sup> International Telecommunications Union, 2011 statistics.

capability, but these plans were abandoned, apparently because the government was fearful of the effect of the Arab Spring uprisings. The well-documented rise in broadband connectivity and access to smart phones that has seen an explosion of new media in Africa - particularly in Kenya, Egypt, South Africa and Nigeria - has not reached Eritrea.

# International standards on the right to freedom of expression and information

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The right to freedom of expression and information is crucial not only in its own regard but is fundamental to the functioning of democracy. Rapid developments to information communication technologies have significantly enhanced the way in which billions of people around the world seek, receive, and impart information. More so than ever, the right to freedom of expression and information is essential to the promotion and protection of all civil, political, social and economic rights in society.

Eritrea is bound to protect the right to freedom of expression and information as a matter of international law, including through numerous commitments it has made at the regional level. This section outlines those obligations, providing the basis for the legal analysis of domestic legislation that follows.

## Universal Declaration on Human Rights

Article 19 of the Universal Declaration of Human Rights (“the UDHR”)<sup>28</sup> guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a UN General Assembly Resolution, is not directly binding on states. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.<sup>29</sup>

## International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“the ICCPR”) elaborates upon and gives legal force to many of the rights articulated in the UDHR. Eritrea acceded to the ICCPR on 22 January 2002<sup>30</sup> and is legally bound to respect and ensure the right to freedom of expression as contained in Article 19 of the ICCPR.<sup>31</sup>

1. Everyone shall have the right to freedom of opinion
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

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<sup>28</sup> UN General Assembly Resolution 217A(III), adopted 10 December 1948

<sup>29</sup> *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit)

<sup>30</sup> See UN Treaty Collection, available at: <http://bit.ly/Zge7BJ>.

<sup>31</sup> Articles 2(1)(b), 14(1) and 16, The Vienna Convention on the Law of Treaties 1969.

In General Comment No. 34, the UN Human Rights Committee (“the HR Committee”), the treaty monitoring body for the ICCPR, emphasised that Article 19 protects the right to express and receive information of any form, including political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It even includes expression that may be deemed offensive.<sup>32</sup>

While the right to freedom of expression is a fundamental right, it is not guaranteed in absolute terms. Article 19(3) of the ICCPR permits the right to be restricted in the following respects:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are prescribed by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order, or of public health or morals.

Restrictions on the right to freedom of expression must be strictly and narrowly tailored and may not put in jeopardy the right itself. Determining whether a restriction is narrowly tailored is often articulated as a three-part test. It is required that restrictions are i) prescribed by law, ii) pursue a legitimate aim; and iii) that they conform to the strict tests of necessity and proportionality.<sup>33</sup>

States party to the ICCPR are obliged by Article 40(1) to submit, within one year of ratification, an initial report to the UN Human Rights Committee on the measures they have taken to give effect to the rights contained in the ICCPR. Eritrea was therefore obliged to submit its initial report on 22 April 2003 but failed to do so. The report is still outstanding.<sup>34</sup>

Eritrea is not a signatory to the Optional Protocol to the ICCPR, and therefore the UN Human Rights Committee does not have the competence to receive individual complaints regarding Ethiopia’s compliance with its treaty obligations.<sup>35</sup> In December 2009 the Ethiopia government indicated that it would examine the merits of signing the Optional Protocol.<sup>36</sup>

The United Nations Human Rights Council adopted by consensus a resolution on the human rights situation in Eritrea at the 20<sup>th</sup> session in 2012.<sup>37</sup> The resolution is notable because it was advanced by Djibouti, Nigeria, and Somalia. The resolution “strongly condemns”:

The severe restrictions on freedom of opinion and expression, freedom of information, freedom of thought, conscience and religion, and freedom of peaceful assembly and

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<sup>32</sup>HR Committee, General Comment No. 34, CCPR/C/GC/34, at Para 11.

<sup>33</sup>*Velichkin v. Belarus*, Communication No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (2005).

<sup>34</sup> See <http://www.ccrpcentre.org/en/overdue-reports>

<sup>35</sup>*Ibid*, note 22.

<sup>36</sup> Human Rights Council, Report of the Working Group on the Universal Periodic Review, Ethiopia, 4 January 2010, A/HRC/13/17; available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/101/47/PDF/G1010147.pdf?OpenElement>

<sup>37</sup> Resolution on the situation of human rights in Eritrea, A/HRC/20/L.19/Rev.1, 5 July 2012; available at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session20/Pages/ResDecStat.aspx>

association, including the detention of journalists, human rights defenders, political actors, religious leaders and practitioners in Eritrea.

The resolution's recommendations include that the government of Eritrea must: account for and release all political prisoners, including the "G-11"; allow human rights and humanitarian organizations to operate in Eritrea without fear or intimidation; respect everyone's right to freedom of expression and freedom of thought, conscience and religion or belief, and freedom of peaceful assembly and association, and to implement the 1997 Constitution.

Significantly, the resolution also appoints a Special Rapporteur on the situation of human rights in Eritrea for a period of one year. On 28 September 2012 the HRC appointed Beedwantee Keetharuth as Special Rapporteur on the situation of human rights in Eritrea. The Special Rapporteur is due to report at the 23<sup>rd</sup> Session next year. Eritrea has rejected the legitimacy of the Special Rapporteur.<sup>38</sup>

In Resolution 21/1, the HRC decided to discontinue reviewing the human rights situation in Eritrea under the confidential complaints procedure.<sup>39</sup> The resolution noted the inadequate and incomplete information provided orally to the HRC during the confidential complaints procedure. The complaints include allegations of arbitrary arrest and detention, torture, and restrictions on the rights to freedom of expression, peaceful assembly and of thought, conscience and religion. The Special Rapporteur will now publicly investigate the substance of the individual complaints ahead of reporting at the 23<sup>rd</sup> Session.

### **Special Rapporteur on the human rights situation in Eritrea**

Beedwantee Keetharuth was appointed as the Special Rapporteur on the human rights situation in Eritrea during the 21<sup>st</sup> Session of the UN Human Rights Council in September 2012. She was appointed after the adoption by consensus of resolution A/HRC/RES/20/19 at the 20<sup>th</sup> session of the HRC that was submitted by Somalia, Nigeria and Djibouti and supported by a number of African and other states that raised concerns over the human rights situation in Eritrea.<sup>40</sup>

Ms. Keetharuth said after her appointment:

I hope that the Eritrean Government would consider the mandate of the Special Rapporteur as an opportunity to start a fresh and constructive dialogue on human rights issues that have been raised by the international community and other stakeholders.<sup>41</sup>

She also noted that the primary concern of the Special Rapporteur is to provide an objective, fair and impartial picture of human rights in Eritrea.

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<sup>38</sup> Council adopts five texts, appoints Members of Advisory Committee, Commission of Inquiry on Syria, Special Rapporteurs, UNHRC, 28 September 2012; see General Comments by Observer States: <http://bit.ly/18xLEN1>.

<sup>39</sup> Resolution on the human rights situation in Eritrea, adopted 27 September 2012, A/HRC/RES/21/1

<sup>40</sup> Human Rights Council appoints Special Rapporteur on Eritrea, extends mandates on Côte d'Ivoire and Somalia, 5 July 2012 <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12327&LangID=E>

<sup>41</sup> New UN Special Rapporteur on Eritrea urges Government to cooperate, 21 December 2012, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12905&LangID=E>.

However, Eritrea has refused to cooperate with the Special Rapporteur and has denied her an official invitation to visit the country despite her repeated requests. This has forced Ms Keetharuth to rely on exiled Eritreans in neighbouring countries to collect information about the human rights situation in Eritrea. In this regard, she carried out official visits to Ethiopia and Djibouti from 30 April to 9 May 2013 to collect information directly from Eritrean refugees on the human rights situation in their country.

Ms. Keetharuth is due to present her first report to the UN Human Rights Council on 4 June 2013 during the 23<sup>rd</sup> session of the HRC and her mandate is expected to be renewed during the same session.

### **African Union human rights instruments**

Eritrea acceded to the African Charter on Human and Peoples' Rights (the African Charter)<sup>42</sup> on 14 January 1999. The African Charter guarantees the right to freedom of expression at Article 9 in the following terms:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

The African Commission on Human and Peoples' Rights ("the Commission") elaborated upon Article 9 of the African Charter in October 2002, adopting the Declaration of Principles on Freedom of Expression in Africa ("the African Declaration").<sup>43</sup> At Article 1 it provides that:

1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

Principle IV to the African Declaration elaborates on the right of access to information:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
  - everyone has the right to access information held by public bodies;
  - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
  - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
  - public bodies shall be required, even in the absence of a request, actively to publish

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<sup>42</sup> Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

<sup>43</sup> Adopted at the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002; available at: <http://www1.umn.edu/humanrts/achpr/expressionfreedomdec.html>



- important information of significant public interest;
  - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and secrecy laws shall be amended as necessary to comply with freedom of information principles.
3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

The importance of the right to freedom of expression and information to the realisation of all civil, political, social, economic, and cultural rights in Africa is signified by its integration to numerous African Union treaties. However, of these Eritrea has only ratified the African Union Convention on Preventing and Combating Corruption.<sup>44</sup> The right is also protected by the following instruments that have not been ratified by Eritrea: the African Youth Charter;<sup>45</sup> the African Charter on Democracy, Elections and Governance,<sup>46</sup> and the African Charter on Values of Public Service and Administration.<sup>47</sup>

The African Commission has issued a number of Resolutions pertinent to the protection and the promotion of freedom of expression in Eritrea. These include Resolution 169 on repealing criminal defamation laws in Africa,<sup>48</sup> and Resolution 178 on the safety of journalists and media practitioners in Africa.<sup>49</sup>

### Decisions of the African Commission on Human and Peoples' Rights

In *Communication No. 275 Article 19/Eritrea* the Commission found that the incommunicado detention without trial of at least eighteen journalists and eleven former government officials in Eritrea, in addition to a wholesale ban on the operation of the private press, constituted a violation of the right to freedom of expression as contained in Article 9 of the Charter and several other convention rights. The Commission made the following important points in their decision:

- **Exhaustion of local remedies:** it is not compulsory to exhaust local remedies under Article 56 of the Charter where such remedies are not available, effective and sufficient in the Member State.<sup>50</sup> Eritrea had ample notice of the violation of the Charter but

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<sup>44</sup>The AU Convention on Preventing and Combating Corruption, 11 July 2003; available at: [http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf).

<sup>45</sup> The African Youth Charter, in its preamble and at Articles 4, 10, 11, 15, 16, 20 and 28; available at: [http://www.au.int/en/sites/default/files/AFRICAN\\_YOUTH\\_CHARTER.pdf](http://www.au.int/en/sites/default/files/AFRICAN_YOUTH_CHARTER.pdf).

<sup>46</sup> The African Charter on Democracy, Elections and Governance: its preamble and at Article 19 (2); available at: <http://www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf>.

<sup>47</sup> The African Charter on Values of Public Service and Administration, at Article 6; available at: <http://www.au.int/en/content/african-charter-values-and-principles-public-service-and-administration>.

<sup>48</sup> Resolution on repealing criminal defamation laws in Africa, ACHPR/Res 169 2010; available at: <http://www.achpr.org/sessions/48th/resolutions/169/>

<sup>49</sup> ACHPR/Res.178 (XI IX) 2011: Resolution on the safety of journalists and media practitioners in Africa; available at: [http://old.achpr.org/english/resolutions/Resolution178\\_en.htm](http://old.achpr.org/english/resolutions/Resolution178_en.htm)

<sup>50</sup> *Communication No. 275 Article 19/Eritrea*, African Commission on Human and Peoples' Rights, at Para 73.

nevertheless failed to charge the detained journalists or allow them access to a lawyer, and it was therefore precluded from relying upon the exhaustion requirement.<sup>51</sup>

- **Derogations:** The Charter does not permit derogations from the rights it guarantees in any circumstances; therefore Eritrea cannot rely on “the backdrop of war”<sup>52</sup> or the level of development in the country to justify the suspension of certain human rights protections, including minimum standards regarding fair trial or due process conditions.<sup>53</sup>
- **Violation of the right to freedom of expression:**
  - “Any law enacted by the Eritrean Government which permits a wholesale ban on the press and the imprisonment of those whose views contradict those of the Government’s in contrary to both the spirit and the purpose of Article 9... the imprisonment of journalists ‘deprives not only the journalists of their rights to freely express and disseminate their opinions, but also the public, of the right to information.’”<sup>54</sup>
  - “[B]anning the entire press on the grounds that it constitutes a threat to the incumbent government is a violation of the right to freedom of expression ... A free press is one of the tenets of a democratic society, and a valuable check on potential excesses by government.”<sup>55</sup>
- **The prohibition on arbitrary arrests or detention:** the detention of journalists without charge or trial in itself constituted a violation of the guarantee in Article 6 of the Charter that “no-one shall be arbitrarily arrested or detained”.<sup>56</sup>
- **The right to a fair trial:** five years of detention without trial, compounded by the fact that it was incommunicado, constituted a violation of Article 7 of the Charter, which guarantees at subparagraph (1)(d) “the right to be tried within a reasonable time by an impartial court or tribunal.”<sup>57</sup>
- **Right to be free from torture, inhuman or degrading punishment or treatment:** the detention of the journalists and politicians incommunicado, without allowing them access to legal counsel or their families, violated the guarantee in Article 5 of the Charter that all individuals have the right to be free from torture, inhuman or degrading punishment or treatment.
- **The right to respect for family life:** incommunicado detention violates the right to respect for a family life of both the detained individual and their family members.<sup>58</sup>

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<sup>51</sup> *Ibid*, at Para 75.

<sup>52</sup> *Ibid*, para 87.

<sup>53</sup> *Ibid*, para 80.

<sup>54</sup> *Ibid*, para 104-105.

<sup>55</sup> *Ibid*, para 106.

<sup>56</sup> *Ibid*, para 94.

<sup>57</sup> *Ibid*, para 96.

<sup>58</sup> *Ibid*, para 102.

The Commission concluded their decision by quoting the UN Human Rights Committee in the case of *Mukong*:

The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights.<sup>59</sup>

The Commission urged the government of Eritrea to:

- 1) Release or to bring to a speedy and fair trial the eighteen journalists detained since September 2001, and to lift the ban on the press;
- 2) Grant detainees immediate access to their families and legal representatives; and
- 3) Take appropriate measures to ensure the payment of compensation to the detainees.

ARTICLE 19 notes that none of the Commission's recommendations have been adopted. When President Afeworki was asked about the imprisoned journalists by *Al-Jazeera* in May 2008, he replied: "There were never any. There aren't any. You have been misinformed."<sup>60</sup>

*Communication No. 250 Liesbeth Zegveld and Mussie Ephrem/Eritrea* concerned a complaint regarding the detention of the eleven former government officials, mentioned above. The government of Eritrea explained that the eleven persons had been detained for "conspiring to overthrow the legal government of the country in violation of relevant OAU resolutions, colluding with hostile foreign powers with a view to compromising the sovereignty of the country undermining Eritrean national security and endangering Eritrean society and the general welfare of its people."<sup>61</sup>

In this Communication the Commission also affirmed that the right to freedom of expression cannot be derogated from on the basis of an emergency or "special circumstance".<sup>62</sup> That the eleven former government officials were detained incommunicado and have not been charged or tried left no doubt in the Commission finding a violation of the right to freedom of expression as contained in Article 9 of the Charter. Violations of the right to liberty (Article 6) and recourse to a fair trial (Article 7) were also found.

### International human rights peer review mechanisms

The UN Human Rights Council's Universal Periodic Review mechanism ("UPR") reviews the human rights record of every UN member state every four years. The UPR is a state-driven cooperative process in which member states make representations on their own human rights records, and receive recommendations from other states.

Eritrea became a member state of the United Nations on the 28th May 1993. The review of Eritrea occurred at the sixth session on 30 November 2009.<sup>63</sup> In response to a number of

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<sup>59</sup> *Womah Mukong v. Cameroon*, Communication No. 458/1991, UN Doc.CCPR/C/51/D/458/1991 (1994), para 9.7

<sup>60</sup> RSF, 2012 *Predators of Press Freedom: Eritrea - Issaias Afeworki, President*, 4 May 2012.

<sup>61</sup> *Communication No. 275 Article 19/Eritrea*, African Commission on Human and Peoples' Rights, para 47.

<sup>62</sup> *Ibid.*, para 60.

<sup>63</sup> Further details of the 6th session of the UPR process are available at: <http://bit.ly/11qKXfQ>.

recommendations made in relation to the right to freedom of expression, the Eritrean government responded:

There is no state of emergency in Eritrea and the human rights of the Eritrean people are fully respected. Eritrea respects the right to information and freedom of expression and opinion. No one in Eritrea is detained for expressing his/her views. Eritrean citizens have access to the entire spectrum of the media, including the internet, the print and other electronic media. As for the issue of freedom of the press, the Government will continue to work on developing press laws and regulations consistent with the values, traditions, cultural practices and national interest of Eritrea.<sup>64</sup>

The African Peer Review Mechanism (“the APRM”) was initiated in 2002 and brought under the auspices of the African Union in 2003. Eritrea is not a party. The APRM is a voluntary association that provides a platform for experience sharing and reinforcement of best practices in the thematic areas of democracy and political governance, economic governance, corporate governance and socio-economic development. The APRM presents an excellent opportunity for Eritrea to share its experiences, and to learn best practices from other African nations on the thematic areas of concern.

### **Recommendations:**

- The Africa Union and United Nations mechanisms should put pressure on the Government of Eritrea to cooperate with the UN Special Rapporteur as required by HRC resolution A/HRC/RES/20/19.
- The Government of Eritrea should unconditionally and officially invite and provide unhindered support to the Special Rapporteur.
- All UN member states should support the renewal of the mandate of the UN Special Rapporteur on the human rights situation in Eritrea.
- Eritrea must submit its initial report to the UN Human Rights Committee under Article 40 (1) of the ICCPR.
- Eritrea must ratify the Optional Protocol to the ICCPR to enable the individual complaint mechanism to the UN Human Rights Committee.
- Eritrea must ensure that all international and regional human rights treaties they have ratified are translated into the official languages of the country and are accessible to the public and understood by the judiciary.
- Eritrea should extend a standing invitation to all UN Special Rapporteurs to visit and independently review the human rights situation in Ethiopia, including to the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression; the Special Rapporteur on the Situation of Human Rights Defenders; the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, and the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association.
- Eritrea must extend a standing invitation to the African Commission’s Special Rapporteur on Freedom of Expression and Access to Information to visit and conduct an independent review of Eritrea’s human rights record.
- Eritrea must comply with the recommendations of the African Commission’s Resolution 169 “on repealing criminal defamation laws in Africa”.

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<sup>64</sup>Addendum to the Report of the Working Group on the Universal Periodic Review, Eritrea, 10 March 2010, A/HRC/13/2/Add.1, at Para 31. Available at: [http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A\\_HRC\\_13\\_2\\_Add.1\\_Eritrea\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A_HRC_13_2_Add.1_Eritrea_E.pdf)

- Eritrea must comply with the recommendations of the African Commission’s Resolution 178 “on the safety of journalists and media practitioners in Africa.”
- Eritrea must ratify the African Youth Charter, the African Charter on Democracy, Elections and Governance, and the African Charter on Values of Public Service and Administration.
- Eritrea must comply with the judgments in *Communication No. 250 Liesbeth Zegveld and Mussie Ephrem/Eritrea* and *Communication No. 275 Article 19/Eritrea*.
- Eritrea must comply with the recommendations made during its last UPR at the UN Human Rights Council.
- The African Union should encourage countries in the Horn of Africa region, including Eritrea, to become a member state of the African Peer Review Mechanism.

# Domestic legal framework

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This section provides an overview of domestic legal protections for the right to freedom of expression and information in Eritrea and the extent to which the constitution, criminal and counter-terrorism laws, and regulatory frameworks for the media, telecommunications and civil society are compatible with international standards on the right to freedom of expression and information.

## The Constitution

### *Transitional Government*

The Eritrean People's Liberation Front (EPLF) gained de facto control over Eritrea in 1991, issuing Proclamation 23/1992 the following year, which recognised the historical obligation of the EPLF to establish a transitional government awaiting the formation of a constitutional government.

In a UN-facilitated referendum in 1993, the vote of the Eritrean population overwhelmingly supported the move towards independence. The transitional government issued Proclamation 37/1993, establishing the structure of the transitional government; it guarantees public participation in the National Assembly and also restricts the duration of the transitional government to four years.<sup>65</sup> Despite this limitation, the transitional government remains in power almost twenty years later, retaining the structure established by Proclamation 37/1993.

### *The Constitution*

In March 1994 the Transitional Government of Eritrea established the Constitution Commission under Proclamation 55/1994, which provided for public participation in the drafting process for the new Constitution. This process concluded on 23 May 1997 with the ratification of the constitution by the National Assembly.<sup>66</sup>

The legal status of the 1997 constitution is uncertain. At its last UPR in November 2009, Eritrea made this response to the recommendation that it implement the 1997 constitution:

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 have yet to be constituted. National elections will be held once the threat to national security and the country's sovereignty is irrevocably removed.<sup>67</sup>

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<sup>65</sup>Proclamation 37/1993, at Article 3(2).

<sup>66</sup>Constitution of Eritrea, 23 May 1997, available at: <http://www.unhcr.org/refworld/docid/3dd8aa904.html>

<sup>67</sup> Addendum to the Report of the Working Group on the Universal Periodic Review, Eritrea, 10 March 2010, A/HRC/13/2/Add.1, at Para 11; available at: [http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A\\_HRC\\_13\\_2\\_Add.1\\_Eritrea\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A_HRC_13_2_Add.1_Eritrea_E.pdf)

It is not clear how the constitution can both be the “supreme law of the land” and not yet implemented; the constitution’s legal status therefore remains uncertain.

No provision in the Constitution or the preamble references the status of international human rights treaties ratified by Eritrea as a matter of domestic law. It would strengthen the Constitution to incorporate these treaties into the Constitutional order.

Numerous aspects of the Constitution are relevant to the protection and promotion of human rights, in particular the enumeration of a Bill of Rights in Chapter III.

Article 7 of the Constitution guarantees a state based on democratic principles, the following being particularly supportive of the right to freedom of expression and information:

- 1) It is a fundamental principle of the State of Eritrea to guarantee its citizens broad and active participation in all political, economic, social and cultural life of the country.  
...
- 5) The conduct of the affairs of government and all organisations and institutions shall be accountable and transparent.  
...
- 7) The State shall create conditions necessary for developing a democratic political culture, defined by free and critical thinking, tolerance and national consensus.

Article 19 of the Constitution specifically guarantees the right to freedom of expression and information in the following terms:

- 2) Every person shall have the freedom of speech and expression, including freedom of the press and other media;
- 3) Every citizen shall have the right of access to information.

It is positive that the right to freedom of speech and expression is guaranteed to all people, and that it specifically references the right to freedom of the press and other media.

Article 19 (3) of the Constitution does not conform to international standards, since it only guarantees the right of access to information to citizens and not all people.

The right to freedom of expression and information are subject to qualification in Article 26 of the Constitution. Limitations may be placed on the right “only insofar 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 rights and freedoms of others. Limitations on the right to freedom of expression must be (a) consistent with principles of democracy and justice; (b) be of general application and not negate the essential content of the right or freedom in question; and (c) specify the ascertainable extent of the limitation and the identity the article of the constitution which authorises that act.

Article 26 of the Constitution is formulated in broader terms than the qualification in Article 19 (3) of the ICCPR, and should be narrowed. The threshold at which the right to freedom of expression and information may be restricted is too low, as it is only required that a relevant interest be engaged; the elements of legality, necessity and proportionality are lacking.

The list of interests permitting restrictions on the right to freedom of expression and information in Article 26 of the Constitution is too broad. For example, international standards

do not permit the right to be restricted for the protection of the “economic well-being of the country”.

Article 27 allows the right to freedom of expression and information (although not the right to freedom of opinion) to be derogated from when a “state of emergency” is declared by a two-thirds majority of a parliamentary assembly vote. The government of Eritrea confirmed during its last UPR that there is currently no state of emergency in Eritrea, and that the right to freedom of expression and opinion are respected.<sup>68</sup> However, the African Charter does not permit derogations from the right to freedom of expression in any circumstance, including during emergencies.

### **Recommendations**

- The legal status of the 1997 Constitution should be clarified.
- International human rights treaties ratified by Eritrea should be incorporated to the constitutional order.
- The right of access to information should be guaranteed to all people and not limited to citizens.
- Limitations on the right to freedom of expression and information should be provided for by law, be necessary in a democratic society, and be proportionate.
- The right to freedom of expression and information cannot be restricted on the basis of protecting the country’s economic well-being.

### **Press Proclamation No.90/1996**

The Press Proclamation No. 90/1996 regulates professional journalism and the operation of the mass media in Eritrea; it entered into force on 10 June 1996.<sup>69</sup>

ARTICLE 19 notes that most countries have now moved away from press laws, preferring to regulate the printed press through laws of general application. Laws specifically targeting the press tend to be used by governments as an instrument to excessively restrict the right to freedom of expression and information, and are not the most effective ways of achieving legitimate regulatory objectives.

General Comment No. 34 emphasises the importance of a “free, uncensored and unhindered press” to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. The HR Committee stresses that “the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential” and “implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.” The public also has a corresponding right to receive media output.<sup>70</sup> States are bound to guarantee media plurality and the independence of the media, including editorial freedom.<sup>71</sup> The State should not have a monopoly over the media and must take measures to prevent undue media dominance in

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<sup>68</sup> Addendum to the Report of the Working Group on the UPR, Eritrea, 10 March 2010, A/HRC/13/2/Add.1, para 31, available at: [http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A\\_HRC\\_13\\_2\\_Add.1\\_Eritrea\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A_HRC_13_2_Add.1_Eritrea_E.pdf)

<sup>69</sup> Press Proclamation No. 90/1996, available at: <http://www.unhcr.org/refworld/docid/48512e992.html>

<sup>70</sup> HR Committee, General Comment No.34, para 13.

<sup>71</sup> *Ibid*, para 14 and 16.



the private sector.<sup>72</sup> Guarantees for media plurality are also contained in Article III of the African Declaration, including the obligation to ensure access to the media and other means of communication for vulnerable and marginalised groups.

General Comment No. 34 makes it clear that the penalisation of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.<sup>73</sup>

### ***Freedom of the press***

Part II of the Press Proclamation, titled “freedom, objectives and functions of the press” guarantees the freedom of the press at Article 4(1)(a), and also prohibits censorship in Article 4(1)(b). Despite these assurances, a number of provisions in the Proclamation directly undermine media freedom.

Article 4(1)(c) of the Press Proclamation allows blanket derogations to be made from the right to freedom of expression and information. The government is afforded emergency powers to act without parliamentary approval to rescind the Press Proclamation where the country or part of it is “faced with a danger” threatening public order, security and general peace caused by war, public rebellion or public disorder or by a natural disaster. This provision directly contravenes the African Charter, which does not allow blanket derogations on the right to freedom of expression and information, even in times of emergency. A perpetual ‘state of emergency’ in Eritrea is consistently used to justify strict controls on the press, the detention of journalists, and to excuse the lack of a reform agenda.

Article 4(1)(d) of the Press Proclamation provides that radio and television broadcasting shall remain the reserve of the state, with ownership of the press and “all equipment of expression” being reserved to Eritrean citizens (reiterated in Article 6). It is contrary to international standards on freedom of expression for the ownership and operation of radio and television to be monopolized by the State,<sup>74</sup> or to restrict ownership of the press or its equipment on the basis of nationality. The right to freedom of expression and information should be guaranteed to all people within the State’s jurisdiction, irrespective of nationality, and regardless of frontiers.

### ***Objectives and functioning of the press***

Article 4(2) of the Press Proclamation lists the objectives of the press, demonstrating clearly that the press is regarded as an arm of the state rather than as an independent watchdog. This is demonstrated in sub-paragraph (e), which requires the press to work “to realize national objectives” and to “develop public control” and “constructive criticism” by

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<sup>72</sup> *Ibid*, para 40.

<sup>73</sup> *Ibid*, para 41.

<sup>74</sup> HR Committee, General Comment No. 34, CCPR/C/GC/34, at para 40: “[B]ecause of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression. The State should not have monopoly control over the media and should promote plurality of the media.”

“affirmatively contributing to the clarification of ideas helpful to the organs of government in rendering solutions”. At sub-paragraph (d) the media is expected to enrich and deepen the “national tradition” and “work for national unity”.

Article 4(2) makes clear that media freedom is only guaranteed to the extent that the government believes it is furthering and not undermining government objectives. Framing the objectives of the press in this manner provides the government with the rationale for restricting the right to freedom of expression and information according to its own whims. The government has no legitimate interest in prescribing the functions of the press in this manner. If the Press Proclamation is to be retained, it should emphasised that any government intervention with the conduct of the media should be premised on the rationale of furthering the right to freedom of expression and information and promoting the principles of media independence and pluralism. All “objectives and functions” of the press should otherwise be removed.

### ***State-owned press***

Article 4 (3) on the “division of the press” provides that the press will be divided between the “press owned by the state” and the “private press owned by political associations, legal persons and individuals.”

ARTICLE 19 maintains that it is not legitimate for the state to obtain any ownership interest in media entities, particularly in the printed press, as it directly conflicts with the state’s obligation to promote media independence and plurality. While the state may promote these interests through indirect funding or subsidies that promote media pluralism, the independence of those media from the state must in all circumstances be protected.

### ***Definition of journalist***

The definition of “journalist”, contained in Article 3 of the Press Proclamation, limits the meaning of the term to individuals who gain their main source of income from journalism and who are registered with the relevant government ministry. Three problems can be identified with this definition.

Firstly, by adopting a narrow definition of “journalist”, the limited protections that are contained in the Press Proclamation are restricted to a narrow subset of people, all of whom should have the right to freedom of expression and information guaranteed. Distinguishing journalists from non-journalists on the basis of income is not a rational basis for denying legal protections to individuals that are otherwise professionally or regularly engaged in the collection and dissemination of information to the public through the mass media. Given the economic difficulties facing journalists and the media sector in Eritrea, it is unlikely that many individuals will meet the definition of journalist on this basis.

ARTICLE 19 recommends that the term ‘journalist’ be defined in the broadest possible terms, to include citizen journalists and others involved in broader media activities. It would be adequate to describe a journalist as “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.”

Secondly, requiring journalists to register with the Ministry of Information violates international standards on the right to freedom of expression and information. Even where such licensing or accreditation schemes purport to promote press standards or to protect journalists themselves, they are often abused as a political tool to limit which persons are able to freely express themselves through the media. Abolishing licensing and accreditation requirements ensures that a greater number of individuals are free to join the profession and a greater range of viewpoints will be heard.<sup>75</sup> A number of countries have adopted this position. For example, in August 1997, the High Court of Zambia invalidated an attempt to establish a statutory body to regulate journalists, stating that any effort to license journalists would breach the right to freedom of expression, regardless of the form that effort took.<sup>76</sup>

A third issue is the use of criminal penalties to police the narrow definition of “journalist” and enforce the registration requirement. Article 15(1) of the Press Proclamation makes it an offence to present oneself as a journalist when one is not registered as such. Custodial sentences of six months to one year are available, or a fine of between \$1000 and \$2000. These penalties would therefore apply to any individual who is either not registered as a journalist but engages in journalistic activity, or to any registered journalist who does not gain their main source of income from journalism. This reinforces the government’s control over the media sector, and would potentially deter individuals from entering the profession.

### ***The rights and duties of journalists***

Part III of the Press Proclamation defines the rights and duties of journalists. Article 5(1) includes the right of journalists to obtain news and information from any official or unofficial source, guarantees for the security of journalists, protections against being compelled to disclose journalistic sources, and the right to establish an association of journalists.

The right to protect the identity of sources is particularly important, as the ability of journalists to guarantee the anonymity of their sources is essential for the functioning of the press. Article 11 of the Press Proclamation could be further improved by granting protection to individuals who release information on wrongdoing, also known as whistleblower protection. This would provide an important information safety valve, ensuring that key information on wrongdoing reaches the public and wrongdoing is addressed rather than secrecy engendering such wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement.

Article 5(2) of the Press Proclamation details the duties of the journalist. A number of these duties simply specify that the generally applicable criminal law also applies to journalists - they are bound to respect “the laws of Eritrea” and to not “blackmail the judiciary”. The specific incorporation to the Press Proclamation of laws of general application is not necessary and does not serve a legitimate purpose. This equally applies to the specification of other standards of conscience that may be desired of people generally but are very ambiguous and are not therefore legally enforceable - such as the duty to abide by “the rule of law, professional ethics, and his [sic] conscience”. These duties appear to target journalists with a

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<sup>75</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A. No. 5, available online in English at [http://www.corteidh.or.cr/serieapdf\\_ing/seriea\\_05\\_ing.pdf](http://www.corteidh.or.cr/serieapdf_ing/seriea_05_ing.pdf).

<sup>76</sup> *Kasoma v. Attorney General*, 22 August 1997, 95/HP/29/59.

warning that their conduct is being especially scrutinised, and is likely to have a chilling effect on the exercise of the right to freedom of expression and information.

Several duties contained in Article 5(2) of the Press Proclamation have no basis in international law, including the obligation not to “distort information” or “disseminate unverified information”, or the overly inclusive obligation to not infringe upon broad and undefined concepts, including: “supreme national interests” “division” and “dissension”. ARTICLE 19 emphasises that it is illegitimate for the state to suppress any expression on the basis of its content other than in the narrow circumstances permitted by Article 19 (3) of the ICCPR. We recall that in General Comment No. 34 the HR Committee emphasised that it is a violation of Article 19 of the ICCPR to use national security, official secrets or sedition laws to prosecute journalists for disseminating information of genuine public interest.<sup>77</sup>

### ***Licensing of the Press***

The Press Proclamation prohibits the publication of newspapers without permission from the government at Article 7(2). The government is given full discretion to deny permission to those requesting it and is not required to give reasons in Article 7(3), although a right of appeal to the courts is available. Article 7(9) provides a long list of individuals who are not permitted to own or run a newspaper.

ARTICLE 19 believes that formal registration requirements for the print media create an unnecessary obstacle for individuals seeking to publish periodicals. Such requirements serve no compelling state purpose. The UN, OAS and OSCE special mandates on freedom of expression have declared that

[I]mposing special registration requirements on the print media is unnecessary and may be abused and should be avoided.<sup>78</sup>

The HR Committee has similarly held that it is a violation of Article 19 of the ICCPR to impose registration requirements on small-scale publications with small print-runs.<sup>79</sup>

Where registration requirements on the printed press are imposed, international standards require that at a minimum the following conditions be respected: the authorities should have no discretion to refuse registration once the requisite information has been provided; registration should not impose substantive conditions on the press; and the registration system should be administered by bodies which are independent of government. A government ministry must not hold the licensing decision-making authority, and they should not be free to exercise discretion in the awarding of licenses. If the Press Proclamation is to be retained, these safeguards should be inserted to the licensing scheme.

Lastly, it is of particular concern to ARTICLE 19 that Article 15 (2) of the Press Proclamation imposes severe criminal penalties on individuals who do not comply with the licensing requirement. An individual may be fined anywhere between US\$3000 and US\$5000, in addition to having copies of the publication confiscated and be prohibited from being issued

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<sup>77</sup> HR Committee, General Comment No. 34, CCPR/C/GC/34, at Para 30.

<sup>78</sup> Adopted 18 December 2003, available at <http://bit.ly/18A1cPn>.

<sup>79</sup> *Laptsevitch v. Belarus*, 20 March 2000, Communication No. 780/1997, paras 8.1 - 8.5.

with a license for one year. Reprinting an unauthorised publication carries the same penalties in Article 15 (3). The imposition of criminal liability in these circumstances clearly violates international standards on freedom of expression and information, particularly since the licensing regime in its current formulation is incompatible with these standards. Article 15 (2) of the Press Proclamation should be repealed immediately.

#### ***Restrictions on foreign publications***

Article 8 of the Press Proclamation prohibits the import or export, lease, sale, reproduction, display or distribution of artistic goods such as films, cinema, tape cassettes or videocassette without a permit from the ministry and license. Article 9 similarly prohibits the printing of any press product in Eritrea without a permit. Article 9 further provides that foreign correspondents for newspapers based outside of Eritrea require a permit from the Ministry of Information, which may be refused at their discretion. The power is reserved to the Minister of Information to create further conditions on the entry and work of foreign national journalists.

Articles 8 and 9 of the Press Proclamation violate the fundamental principle that the right to freedom of expression and information applies *regardless of frontiers*. These blanket measures serve no legitimate interest under Article 19(3) of the ICCPR, merely providing additional mechanisms to the Eritrean government to control the free flow of information into and out of the country. This violates Eritrea's obligation under international human rights law to protect and promote the right to freedom of expression and information.

It is of further concern to ARTICLE 19 that these illegitimate restrictions on the right to freedom of expression and information may be enforced through the criminal law. Article 15 (4) provides custodial penalties of between 6 months and 1 year for violating Article 9, or fines of US\$4000 to US\$6000. Violations of Article 8 may be punished with fines of between US\$3000 and US\$4000.

#### ***Provision of gratuitous copies***

Article 13 provides that any newspaper licensed to operate in Eritrea must provide two copies of the paper to the Ministry of Information, free of charge. This requirement is likely to have a significant chilling effect on the content of periodicals, particularly those that engage in critical commentary on politics or other contentious social issues. As a restriction on the right to freedom of expression, such a requirement cannot be justified under any of the bases provided in Article 19 (3) of the ICCPR.

#### ***Content based restrictions on freedom of expression***

In addition to the content-based restrictions imposed on journalists through Article 5 of the Press Proclamation, Part V of the law concerns further "matters not to be disseminated". ARTICLE 19 reiterates that any restriction imposed on the exercise of the right to freedom of expression must comply with the three-part test as articulated in Article 19 (3) of the ICCPR.

A number of interests listed in Part V of the Press Proclamation are not narrowly tailored to the pursuit of any of the legitimate aims listed in Article 19 (3) of the ICCPR. These include prohibitions on disseminating information on "any matter which vilifies or belittles humanitarian and religious beliefs"; "inaccurate information and news intentionally disseminated to influence economic conditions, create commotion and confusion and disturb general peace"; "shapes, pictures and maps of Eritrean territory"; "any document or secret information on the supreme interest of the nation and people"; information that "incites

religious and sub-national differences, promotes the spirit of division and dissension among the people, vilifies the Eritrean people's tradition of struggle" and so on.

International standards clearly require that any restriction on the right to freedom of expression must be narrowly tailored to the pursuit of a legitimate aim as enumerated in Article 19 (3) of the ICCPR. The interests listed in Part V of the Press Proclamation are not specifically and narrowly tailored to these aims, and as such present the government with an arsenal of measures with which to suppress any expression that does not conform with their vision of Eritrea. Part V of the Press Proclamation should be repealed in its entirety.

ARTICLE 19 is further concerned that criminal penalties may be used to enforce these content based restrictions through Article 15 of the Press Proclamation, at subsections (9) through (12). These provisions correlate violations of Part V of the Press Proclamation with their corresponding provisions in the Transitional Penal Code of Eritrea. The penalties available for these offences are discussed in greater depth below.

### ***Right of correction or reply***

Under Article 11, any person may request a newspaper to correct or require an editor to publish a reply to "incorrect news or information". Strangely, this right is not available if one submits their complaint in a language different from that used in the piece of journalism complained of, or if that complaint is "contrary to morality". Article 15 (7) provides that fines of US\$500 to US\$1000 will be available where any newspaper or publication disseminates "wrong news or information" regarding individuals or legal persons and refuses to accept a reply or make a correct. Liability under Article 15 (7) cannot be concurrent with liability for any offence against honour. The newspaper may also be suspended from operating until the reply or correction is published.

Imposing fines on the printed media or requiring the suspension of their activities for the failure to facilitate the right of reply is not a proportionate restriction on the right to freedom of expression. In most countries the facilitation of the right of reply is an expected condition in a system of self-regulation for the media. The self-interest of the media in being perceived as compliant with ethical journalism standards is incentive alone to ensure that the obligation is respected. Penalties for failure to facilitate the right of reply are therefore not a necessary restriction on freedom of expression where an effective system of self-regulation is in place. In this respect the African Commission on Human and Peoples' Rights has declared that "[e]ffective self-regulation is the best system for promoting high standards in the media."<sup>80</sup>

### ***Financing of the press***

Article 7 (8) of the Press Proclamation provides that all capital held by a newspaper will be "entirely Eritrean". Article 7 (9) further provides that any party permitted to publish a newspaper will provide annual accounts to the Ministry of Information.

Articles 15 (13) and (14) provide penalties for the unlawful acquisition of revenue in support of a newspaper, as per Article 7 (8) and (9). These provisions serve to prohibit foreign

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<sup>80</sup> Declaration of Principles on Freedom of Expression in Africa, *op.cit.*, Principle IX.

investment in the Ethiopian media, undermining the financial viability of an independent press in the country. ARTICLE 19 reiterates the the right to freedom of expression applies *regardless of frontiers* and attempts made to exclude “foreign influence” from the media, including financial support, therefore violates Eritrea’s obligations under international law.

### **Confusion of names**

Article 7 (11) of the Press Proclamation provides that any publication shall carry the printer’s name as well as the editor’s name. Article 15 (15) of the Press Proclamation provides that “where the owner of a newspaper uses the name of another newspaper or uses a name likely to bring about confusion of names, he shall be punishable pursuant to Article 673 of the Transitional Penal Code and liable under the Transitional Civil Code of Eritrea.”

This provision, and the corresponding penalties, serve no legitimate aim and are not necessary in a democratic society. The provision should therefore be repealed.

### **Recommendations:**

- The Press Proclamation should be repealed entirely, since it is fundamentally flawed from a freedom of expression and information perspective. It should be replaced by a system of effective self-regulation.
- State-ownership of the press should be prohibited, and the independence of the media guaranteed.
- The printed press should not be subjected to any licensing or registration requirements. If any such regimes are retained, they must be administered by a body independent of government.
- Any restriction premised on the content of the expression in issue should comply with the three-part test of Article 19 (3) of the ICCPR.
- If statutory regulation for the press is retained, it should not be enforced through the criminal law. Any criminal offences must be compatible with the right to freedom of expression and information, be of general application to all people, and be contained in the Penal Code rather than the Press Proclamation.
- If statutory regulation for the press is retained, it should reflect the principle that the right to freedom of expression and information applies irrespective of boundaries. Restrictions on the financing of the media from abroad, and the circulation of foreign publications, should be lifted.

### **The Transitional Penal Code of Eritrea**

At independence, the Transitional Government of Eritrea adopted the 1957 Penal Code of Ethiopia.<sup>81</sup> While this Penal Code has been repealed in Ethiopia, it continues to govern the criminal law in Eritrea under the name of the Transitional Penal Code of Eritrea (the TPCE). The following are the most relevant provisions to the right to freedom of expression.

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<sup>81</sup>*Penal Code of Ethiopia 1957*, Proclamation No. 158 of 1957, 23 July 1957, available at: <http://www.unhcr.org/refworld/docid/49216a0a2.html> [accessed 15 May 2012]

### ***Defamation and Calumny***

ARTICLE 19 has consistently advocated for the repeal of criminal defamation laws since they fail to strike the appropriate balance between the right to freedom of expression and the right to a reputation.

The HR Committee,<sup>82</sup> the four Special Mandates on freedom of expression,<sup>83</sup> and the African Commission,<sup>84</sup> have called upon states to decriminalise defamation. This reflects a global trend towards the decriminalisation of defamation.<sup>85</sup> In particular, the African Commission stated in Resolution 169 of 2010 that criminal defamation laws “constitute a serious interference with freedom of expression and impedes on the role of the media as a watchdog, preventing journalists and media practitioners to practice their profession without fear and in good faith”.<sup>86</sup> In a related case, the Ugandan Constitutional Court found that the criminal offence of seditious libel violates the right to freedom of expression.<sup>87</sup>

Where criminal defamation statutes continue to exist, the African Commission urges that they only be employed in the most serious of cases and never to forms of expression that cannot be verified (such as opinions); that the defence of truth and public interest both be available, and that imprisonment is never appropriate as a penalty.<sup>88</sup> Article 12 of the African Declaration advances four related principles on defamation:

- No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
- Public figures shall be required to tolerate a greater degree of criticism;
- Sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others;
- Privacy laws shall not inhibit the dissemination of information of public interest.

Defamation is a criminal offence in Eritrea. Title III of the TPCE, “offences against honour”, lists three such offences:

- “Defamation” (Article 580(1)) is defined as the communication by one party to a third imputing an act, fact or conduct to another which injures his or her reputation or honour. Article 581(2) provides for a defence of truth to this charge, in addition to a defence of acting in the public interest or with a “moral aim”. Article 582 provides that

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<sup>82</sup>Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2).

<sup>83</sup> Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 10 December 2002. For more information, see: [http://www.osce.org/documents/rfm/2004/10/14893\\_en.pdf](http://www.osce.org/documents/rfm/2004/10/14893_en.pdf)

<sup>84</sup> *Ibid*, note 35.

<sup>85</sup> Ghana, Togo, Mexico, the United Kingdom, Ireland, Sri Lanka, Georgia, and the Maldives have decriminalised defamation and the Central African Republic has removed imprisonment for criminal libel.

<sup>86</sup> *Ibid*, note 35.

<sup>87</sup> *Andrew Mujunimwenda and the Eastern African Media Institute v. Attorney General*, (Consolidated Constitutional Petitions No.12 of 2005 & No.3 of 2006) [2010] UGCC 5 (25 August 2010); available at: [http://www.ulii.org/cgi-bin/uganda\\_disp.pl?file=ug/cases/UGCC/2010/5.html&query=sedition](http://www.ulii.org/cgi-bin/uganda_disp.pl?file=ug/cases/UGCC/2010/5.html&query=sedition)

<sup>88</sup> *Ibid*, note 35.



the defence of truth is not available where the victim's right to a private life was undermined by that communication. The scope of the right to private life in this context is not explained.

- “Calumny” (Article 580(2)) is defined in the same terms as defamation, but the imputed act, fact or conduct must be false, and the defendant must have knowledge of its falsity. Neither the defence of truth or the public interest defences are available for this charge.
- “Insulting behaviour or outrage” (Article 583) concerns an individual who, directly addressing or referring to the victim, offends him in his honour. No defences are specified for this offence.

Article 579 provides that certain categories of communication will not be subject to prosecution. This includes “considered opinions and reasoned or well-founded criticism, couched in proper and moderate terms, concerning personal aptitudes or artistic, literary, scientific, professional or social activities, creations or productions”. It also applies to statements uttered or repeated by a public servant, advocate or attorney, expert or witness or journalist acting in good faith in the discharge of his duties - however it is unclear from the wording of the provision whether this would apply only in court proceedings or outside thereof.

It is also noted that members of the legislature, executive and judiciary are immune from prosecutions for offences listed under Title III of the TPCE insofar as the communication related to the proper discharge of their duty (Article 578).

#### ***Insult of government officials and objects***

Article 574(1) specifies that offences against honour can be committed by anyone irrespective of rank or social status or by a body corporate, public body or institution - and can be committed against individuals (whether alive, dead or missing), corporate bodies or institutions. However, Article 586 provides for aggravated sentences where offences against honour or reputation are committed against a public servant in the discharge of his duties. In addition to these general provisions on defamation, Article 256 specifically protects the “Emperor” or the constitutional authorities from injury. This essentially allows for sentences to be further aggravated where the offence is directed against the head of state or any of the arms of government.

International standards, including the African Declaration, require that public officials display a higher degree of tolerance toward criticism than other individuals. This ensures that individuals who have elected to serve the public in public office are subject to scrutiny, which is necessary for maximising the performance of public bodies. Thus, the more senior the post held or the more influential an individual, the more that person ought to tolerate scrutiny, including non-malicious accusations that may turn out to be false. The Criminal Code of Eritrea inverts this logic and provides the most specific protections for the most senior political actors.

Furthermore, it is often the case that individuals in the public eye have alternative means available to them to seek redress for untrue statements made against them. For these reasons, in August 2010 the Constitutional Court for Uganda found a law criminalizing sedition to be in violation of the guarantees of free speech and freedom of the press under Article 29 of the Ugandan Constitution. This law made it a crime to say or publish statements that promoted

hatred, contempt or disaffection for the Ugandan government, president or judiciary, with a conviction of a sentence of up to seven years imprisonment.<sup>89</sup>

ARTICLE 19 notes that even in the civil law public institutions do not have a right to a reputation and it is therefore illegitimate to criminalise expression on the basis that it interferes with such a right. The same applies to the offence created by Article 257 “insults to national emblems” and Article 258 the “unlawful use of national emblems”. Neither of these concepts have a reputational right or even “feelings” that can be protected by international human rights law. Such provisions must therefore be repealed.

### **Treason**

In September 2001, when at least 18 journalists were arrested and detained incommunicado by the government, the authorities claimed that the journalists were guilty of three offences under the TPCE. These were:

- “High Treason”, Article 261 of the TPCE essentially criminalises collusion with “an enemy” in various ambiguously framed ways.
- “Attacks on the independence of the state”, Article 259 of the TPCE criminalises any act which so much as “jeopardizes” the country’s independence or provokes an intervention or interference with the country’s affairs “calculated to endanger its independence”.
- “Impairment of the defence powers of the state”, Article 260 of the TPCE criminalises various acts of incitement interpreted, in rather subjective terms, as jeopardizing the defence powers of the State.

Broad provisions that purport to protect national security are often the most simple and effective instruments available to a government for silencing dissent and insulating itself from criticism. As noted, these provisions, often used in conjunction with references to Eritrea being in a state of emergency, are used to justify serious violations of the right to freedom of expression and information.

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (the Johannesburg Principles),<sup>90</sup> a set of international standards developed by ARTICLE 19 and international freedom of expression experts, are instructive on restrictions on freedom of expression that seek to protect national security.

At Principle 1.2, the Johannesburg Principles state that “[a]ny restriction on expression or information that a government seeks to justify on grounds of national security must have the

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<sup>89</sup> See: *Andrew Mujunimwenda and the Eastern African Media Institute vs. Attorney General*, (Consolidated Constitutional Petitions No.12 of 2005 & No.3 of 2006) [2010] UGCC 5 (25 August 2010); available at [http://www.ulii.org/cgi-bin/uganda\\_disp.pl?file=ug/cases/UGCC/2010/5.html&query=sedition](http://www.ulii.org/cgi-bin/uganda_disp.pl?file=ug/cases/UGCC/2010/5.html&query=sedition).

<sup>90</sup> The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, ARTICLE 19, London, November 1996. These Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and have been referred to by the United Nations Commission on Human Rights in each of their annual resolutions on freedom of expression since 1996; available at: <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>

genuine purpose and demonstrable effect of protecting a legitimate national security interest.”

A legitimate national security interest is defined in Principle 2 as a measure that is narrowly tailored to the protection of the “country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.” Principle 2 goes on to emphasise that any restriction on the right to freedom of expression “sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.”

Principle 6 of the Johannesburg Principles propose a three-part test for identifying expression that may legitimately be restricted to protect national security. First, it must be established that the expression was intended to incite imminent violence. Second, it is likely that such violence would be incited. Third, there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

The provisions of the Penal Code addressing national security concerns must therefore be carefully revised in order to reflect the Johannesburg Principles and ensure that they are not abused to protect the government from criticism.

### ***Crimes against freedom of expression***

The Criminal Code does not include a specific category of crimes against freedom of expression that would address the impunity for attacks against journalists, media workers, bloggers, human rights defenders and others targeted for exercising their right to freedom of expression. ARTICLE 19 – together with other international bodies - have advocated for creation of this category of crime in “vulnerable” countries, such as Ethiopia, on the ground that crimes against those exercising their freedom of expression undermine the right to know of all, and affect societies as a whole.

The UN has observed that “every journalist killed or neutralised by terror is an observer less of the human condition. Every attack distorts reality by creating a climate of fear and self-censorship.”<sup>91</sup> Various international and regional human rights bodies have made recommendations that states take measures to amend their domestic laws to take account of the particularly serious nature of crimes against freedom of expression. Mexico is the latest country to amend its constitution in line with these recommendations.<sup>92</sup>

The HR Committee has interpreted Article 19 of the ICCPR to impose a duty on states to protect journalists and other human rights defenders from threats of violence, intimidation and attacks. States must vigorously investigate such attacks in a timely fashion, and

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<sup>91</sup>The United Nations Plan of Action on the Safety of Journalists and the Issue of Impunity, endorsed by the UN Chief Executives Board on 13 April 2012; available at: <http://bit.ly/IZXhfg>.

<sup>92</sup> ARTICLE 19 Mexico: Constitution amended, federal authorities given powers to prosecute crimes against free expression, 14 June 2012; available at: <http://bit.ly/KE9KHi>.

prosecute perpetrators. Victims, or in the case of killings their representatives, must be granted appropriate forms of redress.<sup>93</sup>

Article 11 of the African Declaration makes clear that safeguarding the right to freedom of expression includes the duty to protect journalists from violence:

1. Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.
2. States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies.
3. In times of conflict, States shall respect the status of media practitioners as non-combatants.

In 2011, the African Commission adopted Resolution 178 “on the safety of journalists and media practitioners in Africa.”<sup>94</sup> The preamble notes that “freedom of expression, press freedom and access to information can only be enjoyed where journalists and media practitioners are free from intimidations, pressure and coercion.”

Article 12 to the UN General Assembly Declaration on Human Rights Defenders places similar obligations on states:

The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.<sup>95</sup>

In 2006 the UN Security Council adopted Resolution 1738 condemning intentional attacks against media professionals in situations of armed conflict and calling upon all parties to put an end to such practices. The Resolution affirms the civilian status of journalists under international humanitarian law, including journalists embedded with any armed forces.

In June 2012, Special Mandates on the right to freedom of expression representing the United Nations, the African Commission, the Organisation of American States, and the Organisation for Security and Cooperation in Europe issued a Joint Declaration on Crimes against Freedom of Expression.<sup>96</sup> In summary, the Joint Declaration calls on states to:

- Take measures to protect individuals from crimes against freedom of expression;

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<sup>93</sup> HR Committee, General Comment No. 34, para 23.

<sup>94</sup> *Ibid*, note 36.

<sup>95</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly resolution 53/144 of 9 December 1998; available at <http://www2.ohchr.org/english/law/freedom.htm>.

<sup>96</sup> Joint Declaration on Crimes against Freedom of Expression, available at: <http://www.article19.org/resources.php/resource/3348/en/joint-declaration-on-crimes-against-freedom-of-expression>.

- Conduct independent, speedy and effective investigations into crimes against freedom of expression;
- Where crimes against freedom of expression are committed, to provide adequate remedies to the victim.

Also in June 2012, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, both released reports focussed on the issue of impunity for violations of journalists' human rights.<sup>97</sup> Both reports recommend that States:

- Ensure the unequivocal legal and practical protection of journalists' freedom of expression;
- Ensure clear and effective safeguards to prevent physical threats against journalists and to ensure accountability;
- Conduct prompt and exhaustive investigations into violations of journalists' right to life, identifying and bringing to justice those responsible;
- Take special measures, such as establishing commissions of inquiry, to address patterns of killings of journalists;
- Promote the judiciary's, journalists' and civil society's awareness of relevant international human rights standards and demonstrate a willingness to work towards implementing those standards;
- Ensure that law enforcement officials and the armed forces receive training, as part of standard procedure, on the legitimate presence of journalists during non-armed and armed conflict and on their legal protection;
- Strengthen their systems for gathering information and data on killings and threats and analyse the trends and developments, in a gender sensitive way;
- Publicly condemn at the highest political level all forms and incidents of violence against journalists;
- Strengthen their cooperation with the special procedures of the Human Rights Council and regional human rights mechanisms and respond to their communications in a timely manner;

ARTICLE 19 recommends that Eritrea consider amending its Criminal Code to reflect the obligation on states to recognise crimes against freedom of expression as particularly serious as they represent a direct attack on all fundamental human rights.

### **Recommendations:**

- The offences of criminal defamation and insult should be abolished. In particular, the law should not provide heightened protections for the reputations of public officials, nor protect the reputational interests of public institutions, or national emblems or symbols.
- Articles 259, 260, and 261 should be redrafted to strike the appropriate balance between the right to freedom of expression and the protection of national security. Freedom of expression should only be restricted in circumstances where there was intent to incite imminent violence, where it is likely that such violence would be incited, and where there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

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<sup>97</sup>ARTICLE 19, "Statement: UN HRC two special rapporteurs both call for those who violate journalists' rights to be held accountable", 19 June 2012; available at: <http://www.article19.org/resources.php/resource/3333/en/un-hrc:-two-special-rapporteurs-both-call-for-those-who-violate-journalists%E2%80%99-rights-to-be-held-accountable>.

- The Criminal Code should be amended to include crimes against freedom of expression.

### **Proclamation to Determine the Administration of Non-governmental Organizations**

The Proclamation to Determine the Administration of Non-governmental Organizations No. 145/2005 includes a number of provisions that are problematic from a freedom of expression perspective.<sup>98</sup> This includes the provision in Article 7 that “the activities of every NGO shall be limited to relief and/or rehabilitation works.” All such works must be in conjunction with and subject to the approval of the relevant government ministry.

It is therefore unlawful to establish an NGO in Eritrea or enter Eritrea as an international NGO if one has purposes that are not related to “providing relief and/or rehabilitation works”. This would seemingly include any organisation advocating for stronger adherence to international human rights law or working for greater media freedom.

The Proclamation to Determine the Administration of Non-governmental Organisations directly restricts the right to freedom of expression and information. ARTICLE 19 recalls that in General Comment No.34, the HR Committee emphasised that the right to freedom of expression and information applies to information and ideas of all kinds, including discussion of human rights.<sup>99</sup> Similarly, the UN Declaration on Human Rights Defenders<sup>100</sup> recognises at Article 16 that:

Individuals, non-governmental organizations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through activities such as education, training and research in these areas to strengthen further, inter alia, understanding, tolerance, peace and friendly relations among nations and among all racial and religious groups, bearing in mind the various backgrounds of the societies and communities in which they carry out their activities.

The UN Declaration on Human Rights Defenders further protects in Article 1 the right of people, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.

### **Recommendations:**

- The Proclamation to Determine the Administration of Non-governmental Organisations should be amended to lift the restriction in Article 7 on the operation of organisations seeking to promote and protect human rights.

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<sup>98</sup>Proclamation No. 145/2005, A Proclamation to Determine the Administration of Non-governmental Organizations [Eritrea], No. 145/2005, 11 May 2005, available at: <http://www.unhcr.org/refworld/docid/493507c92.html>

<sup>99</sup> HR Committee, General Comment No. 34, CCPR/C/GC/34, at Para 11.

<sup>100</sup>UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms,A/RES/53/144, adopted by the UN General Assembly on 8 March 1999; available at:<http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>

## Conclusion

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This report demonstrates the stark gulf that exists in Eritrea between formal legal protections for the right to freedom of expression and information at the international and regional level, and the realities for journalists who have attempted to navigate repressive domestic laws and arbitrary interference with their rights on the ground. This dire situation for media freedom is a consequence of a culture of censorship and impunity brought about through disregard for the protection of fundamental human rights in the promulgation and application of domestic law and the government's self-interest in repressing any form of criticism.

The release of all journalists and politicians from imprisonment is an essential first step that would signal the willingness of the Eritrean government to make further progress on this issue. This must be accompanied with the immediate development of an agenda for wholesale legal reform to bring all domestic legislation into compliance with international standards on the right to freedom of expression and information. This agenda must recognise that the impact of legal reform will only be felt if it is complemented by a proactive government-led effort to tackle the endemic culture of censorship and impunity for human rights abuses in Eritrea, and clear efforts - with assistance from the international community - to develop the technological infrastructure that is necessary to support a modern free media in the country.