

**Gender-based findings in the final (full-length) report of the Commission of Inquiry on Human Rights in Eritrea (UN Doc. A/HRC/32/CRP.1)**

As detailed below, gender-findings can be found in the following sections of the final (full-length) report of the Commission of Inquiry on Human Rights in Eritrea (UN Doc. A/HRC/32/CRP.1) of 8 June 2016:

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## I. Introduction

### C. Methodology

#### **Gender integration in the work of the Commission**

19. The Commission integrated a gender perspective and analysis into its work. It decided to devote specific attention to sexual and gender-based violence (SGBV), including violence against women and girls, and to assess the gender dimension and impact of other violations. In this context, the services of a gender advisor/SGBV expert-investigator were made available to the Commission by UN-Women. The SGBV expert provided advice, training, and guidance to the Commission.

20. In addition to the challenges already mentioned in its first report,<sup>1</sup> the Commission faced further obstacles to the investigation of sexual and gender-based violence, in particular sexual violence suffered by women and girls, as well as by men and boys.

#### *Sexual violence suffered by women and girls*

21. Collecting evidence on cases of sexual violence suffered by women and girls in Eritrea proved difficult due to cultural, social, and religious beliefs associated with marriage and sexuality. Victims' reluctance to disclose information stems from the trauma and general shame they feel as well as the stigma which attaches to them if the harm they have suffered is known.<sup>2</sup> Indeed, many women mentioned the cultural emphasis on their virginity, chastity or monogamy as one of the reasons to fear speaking about sexual violence. As a woman's virginity and chastity are highly regarded in much of Eritrea, many victims of rapes are unable to marry and therefore prefer to remain silent.<sup>3</sup> On top of the trauma, "[t]he honour system causes additional shame".<sup>4</sup> As a result, in some instances, women and girls who were raped committed suicide.<sup>5</sup> The Commission also heard evidence that, within some ethnic or religious groups, if a woman is raped, she is rejected by her community.<sup>6</sup> Finally, women and girls suffer even more stigma if they have a child from the rape.<sup>7</sup> For all these reasons, rape is an underreported crime in Eritrea and most of the victims of such acts live in a culture of silence.<sup>8</sup>

#### *Strategies to overcome such challenges*

22. In order to identify and contact survivors and eyewitnesses of sexual and gender-based violence willing to provide evidence, the Commission established contact with various intermediaries, including female intermediaries. The Commission stressed its desire to speak with women and girls in order to highlight their experiences in its report. In particular, the Commission contacted female activists, women's associations, networks, and groups, as well as care providers working with Eritrean women and male and female survivors of sexual violence. The Commission also stressed to male representatives of some groups, such as refugees and ethnic minorities, its willingness to interview women and girls of their groups to ensure that their voices are equally represented.

23. When conducting interviews with survivors of sexual and gender-based violence, efforts were made to identify male and female interpreters with experience in interpreting for survivors of sexual and gender-based violence and/or victims of

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<sup>1</sup> A/HRC/29/CRP.1, paras. 45-51.

<sup>2</sup> See also A/HRC/29/CRP.1, paras. 50, 1331.

<sup>3</sup> See, e.g., TBA065, TCDP041, TSH050, TSH088, TSS202. See also A/HRC/29/CRP.1, para. 1331.

<sup>4</sup> See, e.g., TSH088.

<sup>5</sup> See, e.g., TAA216, TBA224, TSH075.

<sup>6</sup> See, e.g., TMM212, TSH081.

<sup>7</sup> See, e.g., TBA062, TMM209, TSH095.

<sup>8</sup> See, e.g., TAM003, TBA202, TCDP022, TNR002, TSH043, TSH081, TSH104.

trauma. A glossary of terms relating to sexual violence in English and Tigrinya was also made available to interpreters.

24. The Commission gathered information not only from primary sources such as survivors and eyewitnesses, but also from second-hand sources. These included representatives of women's associations/networks working directly with Eritrean women, as well as expert witnesses such as medical and psycho-social service providers working directly with Eritrean male and female survivors of sexual violence.

25. Prior to as well as during interviews, the Commission duly took into account cultural and gender considerations and ensured that its security arrangements were age and gender-sensitive and that specific protection and confidentiality measures for survivors of sexual and gender-based violence were implemented. In particular, the Commission endeavoured to enable a supportive, confidential and safe environment in which women and girls, as well as survivors and witnesses of sexual violence, felt sufficiently secure and comfortable to come forward and report such violations and crimes. In line with the overall standard procedures on witness protection, locations of interviews were carefully chosen to respect the security and confidentiality concerns of the interviewees and age and gender-sensitive investigative methods were used during interviews. The Commission demonstrated flexibility in scheduling interviews with survivors of sexual and gender-based violence and made sure that those interviews did not conflict with counselling and/or medical appointments. Before initiating interviews, the Commission also endeavoured to identify options for referring survivors of sexual and gender-based violence for assistance and support. When necessary, the Commission ensured that a support person be available during breaks and immediately after the interview. Prior, during, and after interviews with women and girls, the Commission highlighted the importance of their participation in its work, thereby contributing to the empowerment of survivors of sexual and gender-based violence through participation in the documenting/justice process. The Commission wishes to acknowledge the courage and strength of the Eritrean survivors who spoke in detail of the rapes they suffered.

26. The Commission endeavoured to collect gender-sensitive information and disaggregated data broken down by sex and age and, where possible, on the basis of other parameters relevant for identification of potential discriminatory practices, such as ethnicity, religion, etc. However, with respect to statistics, gender-disaggregated data remains scarce.

*Obstacles in collecting evidence on cases of sexual violence suffered by men and boys*

27. During its investigation, the Commission gathered evidence about sexual violence committed against men in detention, including instances where men were either forced by a unit leader to have sex with other male detainees or were raped directly by him.<sup>9</sup> When trying to collect further evidence on rape perpetrated against men and boys, the Commission faced particular difficulties in collecting first-hand accounts, although expert witnesses working with survivors of such violence confirmed the existence of sexual violence against men in Eritrea.<sup>10</sup>

28. The Commission is of the view that the Eritrean patriarchal society, as well as assumptions about "normal" gendered behaviour within a simple male-female binary, contributes to such violence being under-reported and under-acknowledged, thereby preventing survivors of such violence from benefiting from much needed assistance and from accessing justice.<sup>11</sup> In the words of one psychotherapist

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<sup>9</sup> See, e.g., TBA054. See also TAA210, TMM208, TSS202.

<sup>10</sup> See, e.g., TMM204.

<sup>11</sup> See also TBA203 ("[M]ale rape is almost unreported. Generally it is a taboo."), TBA204 ("Homosexuality is a big taboo in Eritrea.").

working with survivors of sexual violence, “[i]t is really hard for women to talk about rape. They always tell you that they have not told anyone and that they are embarrassed. They fear that they will be discriminated [against]. So, [...] men would be even more stigmatised than women, because in the society it is generally more accepted for a woman to be assaulted than for a man to be assaulted. [...]. This is [...] one of the reasons why men do not report sexual violence.”<sup>12</sup>

29. Further, discomfort with discussing issues of sexuality in general in Eritrean society, and homosexual behaviour in particular,<sup>13</sup> prevents any contemplation of the perpetration of sexual violence against men within the Eritrean society. In this context, the Commission notes the stigmatisation created by the domestic legislation of Eritrea, which is in breach of international human rights law.<sup>14</sup> The definition of rape in the Transitional Penal Code of Eritrea is gender-exclusive and limits the definition of the offence of rape to women.<sup>15</sup> Moreover, both the new Penal Code of Eritrea of 15 May 2015 and the Transitional Penal Code of Eritrea criminalise consensual same-sex acts and impose a penalty of a term of imprisonment for such conduct.<sup>16</sup> In addition, while non-consensual same-sex act was/is also criminalised, the Commission notes that it is not criminalised as rape but as an “aggravated unnatural carnal offence” under the Transitional Penal Code of Eritrea and as an “aggravated homosexual conduct” under the new Penal Code of Eritrea.<sup>17</sup> In light of the above, the Commission is of the view that the risk and fear to be labelled as homosexual with all the stigma, discrimination, exclusion and/or the possible prosecution and detention which that labelling entails further contributed to discouraging male survivors of sexual violence to report such incidents.<sup>18</sup>

30. Despite its efforts and the strategies put into place to overcome the difficulties in investigating sexual violence suffered by men and boys, the Commission is of the view that its inquiry may have only partially captured the extent and details of such violence.

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<sup>12</sup> TMM209.

<sup>13</sup> See, e.g., TAA210, TBA203, TBA204, TFM030, TSH043, S048. See also TSS210; U.S. Department of State, *Eritrea 2014 Human Rights Report*, p. 22 (“In general society stigmatized discussion of LGBT issues”), available at: <http://www.state.gov/documents/organization/236568.pdf>.

<sup>14</sup> A/HRC/29/23, Discrimination and violence against individuals based on their sexual orientation and gender identity, 4 May 2015, paras. 41, 43 (“States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination”), 45; E/C.12/GC/22, General Comment No. 22 (2016) on the Right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 4 March 2016, para. 23. See also A/HRC/31/57, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 January 2016, para. 15.

<sup>15</sup> See Transitional Penal Code of Eritrea, Article 589.

<sup>16</sup> See Transitional Penal Code of Eritrea, Article 600; Penal Code of the State of Eritrea of 15 May 2015, Article 310(1). The Commission notes that any offence committed on a date before the entry into force of the new Penal Code of Eritrea of 15 May 2015 shall be prosecuted according to the law in force at the time of the offence, i.e. according to the Transitional Penal Code. See Penal Code of the State of Eritrea of 15 May 2015, Article 4(1).

<sup>17</sup> See Transitional Penal Code of Eritrea, Article 601(2); Penal Code of the State of Eritrea of 15 May 2015, Article 310(2)(d).

<sup>18</sup> See, e.g., TBA204, TSH033, TSH043.

## II. Written submissions

### B. Substances of the submissions

[...]

#### (c) Rape

50. Correspondents were especially adamant in asserting that there is no rape in Eritrea and that sexual violence is intolerable in Eritrean culture. The Commission recalls that, based on substantial evidence, it found that rape and other forms of sexual violence occurred, inter alia, not only in the context of the military/national service and in detention, but also in the private sphere by military officers.<sup>19</sup> The Commission found that “there [was] a complete denial by the State of the extent of violence against women within its borders,”<sup>20</sup> which contributed to silencing Eritrean women and hindering their ability to seek recourse to justice. It concluded that Eritrea failed in its due diligence obligation to protect, prevent, punish, and remedy acts of sexual violence committed against women. This failure further contributed to creating an environment of impunity in which such violations lead to further acts of violence against women.<sup>21</sup> Thus, the Commission is of the view that the submissions do not undermine its conclusions with respect to sexual violence in Eritrea.<sup>22</sup>

[...]

#### (f) Discrimination against women

53. The Commission is aware of the role women played in Eritrea’s independence struggle. Its first report highlighted in detail that “a women’s movement for gender equality emerged and was subsumed into the national struggle” and “[w]omen’s involvement in the liberation [f]ronts (the ELF and the EPLF) began the transformation of gender relations in Eritrea.”<sup>23</sup> Similarly, the Commission noted in its first report that “[p]roclamation No. 86/1996 reserved 30 per cent of the seats [of the regional assemblies] for women” and stressed that this was “welcomed by CEDAW in its 2006 concluding comments”.<sup>24</sup> It further noted that 30 percent of high level positions are reserved to women and that 30 percent of the community courts’ judges elected in 2008 were women.<sup>25</sup> Thus, the thousands of submissions the Commission received on this common theme support the findings of its first report on these issues.

54. That being said, the Commission found that discrimination against women exists in various areas of Eritrean society<sup>26</sup> and that some of the legal reforms which appear gender-neutral, such as the new land tenure system, indirectly discriminate against women in practice.<sup>27</sup> As expressed by CEDAW in 2015, temporary special measures to ensure that women are represented in legislative and judicial bodies seem to “benefit only women sharing the views of the political party in power”.<sup>28</sup> The Commission further found that discrimination against women intersects with a

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<sup>19</sup> A/HRC/29/CRP.1, paras. 706-707, 1046, 1074-1076, 1123, 1310-1333, 1376-1382, 1390. See also *ibid.*, paras. 708-709.

<sup>20</sup> A/HRC/29/CRP.1, para. 716.

<sup>21</sup> A/HRC/29/CRP.1, para. 723.

<sup>22</sup> A/HRC/29/CRP.1, para. 716.

<sup>23</sup> A/HRC/29/CRP.1, para. 230. See also *ibid.*, paras. 228-230, 231-237.

<sup>24</sup> A/HRC/29/CRP.1, para. 264, referring to CEDAW/C/ERI/CO/3, para. 5.

<sup>25</sup> A/HRC/29/CRP.1, paras. 252, 317, fn. 338.

<sup>26</sup> A/HRC/29/CRP.1, paras. 241-253, 368, 395-399, 703-721, 723, 921-922, 937-941, 953-957, 967, 1046, 1074-1076, 1123, 1148-1155, 1170, 1201-1205, 1256, 1310-1333, 1376-1382, 1390, 1521.

<sup>27</sup> A/HRC/29/CRP.1, paras. 1148-1152, 1170.

<sup>28</sup> CEDAW/C/ERI/CO/5, Concluding observations on the fourth and fifth periodic reports of Eritrea, 12 March 2015, para. 24. See also *ibid.*, para. 16.

number of other human rights violations in Eritrea, placing women in a position of vulnerability.<sup>29</sup> The general assertion that there is no discrimination against Eritrean women and girls is also contradicted by the recent findings of UN human rights treaty bodies.<sup>30</sup>

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<sup>29</sup> For example, the generally harsh conditions and the risk of sexual violence which is known to occur within the national service cause many girls, often at the behest of their families, to avoid national service through marriage and motherhood, which often goes hand and hand with withdrawal from education at an early stage. See A/HRC/29/CRP.1, paras. 1201-1205.

<sup>30</sup> See, *e.g.*, CEDAW/C/ERI/CO/5, Concluding observations on the fourth and fifth periodic reports of Eritrea, 12 March 2015, paras. 6-43; CRC/C/ERI/CO/4, Concluding observations on the fourth periodic report of Eritrea, 8 June 2015, paras. 24-25, 36, 38-43, 51-52, 59-60.

### III. Recent developments with respect to the human rights situation in Eritrea

#### C. Current human rights concerns

##### 7. Sexual and gender-based violence

##### 7. Sexual and gender-based violence

120. Sexual and gender-based violence persists in Eritrea. The Commission collected evidence that some cases of rape committed by men against women in local communities had been adjudicated by courts and that the perpetrators had been sentenced to terms of imprisonment.<sup>31</sup> However, rapes committed in military training centres, in the army, and in detention by military officials, trainers, as well as detention officials and guards continue to be committed with impunity.<sup>32</sup> The Commission also collected evidence about recent cases of domestic servitude imposed on some young women in the national service or in the army.<sup>33</sup> Similarly, evidence collected recently confirm that rape in the society, including by soldiers, continue to be committed without fear of prosecution.<sup>34</sup>

121. Furthermore, women and girls who try to flee the country are at increased risk of sexual and gender-based violence. The Commission heard evidence about recent cases of women and girls being raped in Eritrea when trying to leave the country, including a 14 year-old girl who was raped by soldiers and became pregnant.<sup>35</sup> Although women are aware of the possibility to be raped when trying to flee the country, many still prefer to leave Eritrea. One witness explained that:

“Before our attempted [flight in June 2015], fearing what could happen on our journey, [two female relatives] had a contraceptive injection [...] to prevent unwanted pregnancy. Because you hear about rapes, this is why they had this injection. Women trying to flee often have this injection, because we know what can happen.”<sup>36</sup>

122. Moreover, in some instances, women and girls who tried to flee the country and were arrested by soldiers guarding the border were forced to strip naked, or nearly naked, and submitted to acts of sexual violence, which in some cases amounted to rape, as described by one witness who tried to flee in April 2015:

“What was really sad...we were men, women and children...they obliged everyone to take off all their clothes so they could search them. [...] All the guards were men. They searched the women and were touching them. The women couldn't say no. They felt bad and we felt bad but could do nothing. They searched everywhere, even the genitals, with their hands. They even laughed about it. Even put their fingers inside the women's genitals and the little girls' genitals – 5-year-old girl, a 9-year-old girl. The girls cried.”<sup>37</sup>

123. In nearly all the cases documented by the Commission, the rape led to physical and/or mental suffering and pain – including post-traumatic stress disorder – and, in some instances, to unwanted pregnancy or transmission of sexually-transmitted diseases, such as HIV. This resulted not only in the violation to be free

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<sup>31</sup> See, e.g., TMS205.

<sup>32</sup> See, e.g., TAA222, TBA217, TBA229, TMM204, TMM207, TMM208, TMM209, TMS201, TRS202, TSS220.

<sup>33</sup> See, e.g., TAA222, TMM204, TMM212.

<sup>34</sup> See, e.g., TBA217, TMM204, TMM209, TMM212, TMM213.

<sup>35</sup> See, e.g., TAA207, TMM207, TMM209, TMM212, TMM213.

<sup>36</sup> TMM207.

<sup>37</sup> TRS207. See also, e.g., TMM207.

from torture and from cruel, inhuman or degrading treatment or punishment but also to the right to sexual and reproductive health.<sup>38</sup>

124. Victims of rape infected by HIV suffered additional human rights violations. For example, a young girl who was only 10 year-old when raped by a soldier described to the Commission the discrimination and stigmatisation she faced at school, outside school, and while in detention because of her illness.<sup>39</sup>

125. Recent evidence collected by the Commission show that detention continues to have a discriminatory effect on women. The special needs of pregnant and nursing mothers and women with children in detention continue not to be met; in some recent instances leading to miscarriage or an infant becoming seriously ill.<sup>40</sup>

126. The Commission collected evidence which confirms that harmful practices, such as forcible marriage of underage girls, including for reasons relating to poverty, persist in Eritrea, even though the legal minimum age for marriage is 18 years.<sup>41</sup> Discrimination against women also continues to intersect with a number of other human rights violations. Girls continue to be pulled out of school and/or forced into a marriage arranged by their family in order for them to avoid the harsh conditions and the possibility of sexual abuse committed in the military training camp in Sawa.<sup>42</sup> Female and child relatives of men who have been subjected to an enforced disappearance are often victims of various forms of discrimination. For example, the wives of such men often lose their job and encounter difficulties in getting car insurance or in renting a house. Their children also face discrimination at school, in some cases to such an extent that they drop their studies.<sup>43</sup>

127. Finally, sexual violence against men continues to be committed in detention. The Commission collected evidence about recent cases of prison guards beating men on – and/or applying electric shock to – their sexual organs, in some instances with the intent of ensuring that these men will no longer be able to reproduce.<sup>44</sup> It also documented the case of a 14 year-old boy who was raped in detention by co-detainees and subsequently beaten by detention officials to provide the names of the perpetrators.<sup>45</sup>

128. The Commission is of the view that the above-mentioned acts of sexual and gender-based violence are in violation of many of Eritrea's human rights obligations, including Articles 2, 7, 8, 9, 10, 16, 17, 23, and 26 of the ICCPR, Articles 2, 3, 4, 5, 6, 16, 17, 18, and 19 of the ACHPR, Articles 2, 4, 11, 13, 14, and 16 of the CAT, Articles 2, 5, 10, and 12 of the CEDAW, Articles 2, 3, 24, and 28 of the CRC, as well as Articles 21 and 30 of the African Charter on the Rights and Welfare of the Child.

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<sup>38</sup> See, *e.g.*, TAA207, TMM204, TMM208. See also E/C.12/GC/22, General Comment No. 22 (2016) on the Right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 4 March 2016.

<sup>39</sup> See, *e.g.*, TMM211.

<sup>40</sup> See, *e.g.*, TMM207, TMM209, TRS216.

<sup>41</sup> See, *e.g.*, TMM209.

<sup>42</sup> See, *e.g.*, TRS206, TRS209, TRS215. See also A/HRC/29/CRP.1, paras. 1201-1204.

<sup>43</sup> See, *e.g.*, TBA211, TBA215, TMM202, TRS203.

<sup>44</sup> See, *e.g.*, TAA210, TMM204, TMM205, TMM209, TMM212, TMM213, TSS210.

<sup>45</sup> TAA210.



#### IV. Crimes against humanity

##### C. Crimes against humanity in Eritrea

### 2. Enslavement

*The law*

[...]

#### *b. Sexual slavery as a form of enslavement*

195. The Commission notes that Article 7(1)(g) of the Rome Statute criminalises “sexual slavery” as a separate crime against humanity. According to the Elements of Crimes of the ICC, the two non-contextual elements of Article 7(1)(g) of the Rome Statute are as follows: (i) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; and (ii) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. When compared with the definition of enslavement as a crime against humanity under Article 7(1)(c) of the Rome Statute, the crime of sexual slavery under Article 7(1)(g) of the Rome Statute adds a requirement, namely factual proof of at least one act of a sexual nature.

196. While enslavement has been criminalised as a distinct crime against humanity under customary international law for decades,<sup>46</sup> it has not been established that sexual slavery as a distinct crime against humanity existed from the beginning of the 1990s under customary international law.

197. In this regard, it is worth noting that the Slavery Convention of 1926 “does not delineate any *sine qua non*, or specific task or purpose for which one is a slave.”<sup>47</sup> The tasks that a slave may be required to perform, or the conditions in which a slave may be held, are only factors indicative of enslavement but are not elements constitutive of the crime of enslavement under customary international law.<sup>48</sup> The ICTY Appeals Chamber has confirmed that, under the definition of enslavement as a crime against humanity under customary international law, “control of sexuality” is a possible indicator to be taken into consideration in determining whether a person is enslaved.<sup>49</sup> The Special Rapporteur of the former Sub-Commission on Prevention of Discrimination and Protection of Minorities concluded that “sexual slavery is slavery” and that “[t]he term ‘sexual’ is used...as an adjective to describe a form of slavery, not to denote a separate crime.”<sup>50</sup> In other

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<sup>46</sup> See *supra*, para. 193.

<sup>47</sup> See Patricia Viseur Sellers, “Wartime Female Slavery: Enslavement?”, in 44 *Cornell International Law Journal* (2011) 115-143, at 123. See also *amicus curiae* brief submitted by 16 international experts in the treatment of sexual violence under international criminal law: *Prosecutor v. Hissène Habré*, Extraordinary African Chambers, Rape and Other Forms of Sexual Violence as Crimes Against Humanity, War Crimes, and Torture Under Customary International Law: *Amicus Curiae* Brief of the Human Rights Center at the University of California, Berkeley, School of Law, and International Experts on Sexual Violence Under International Criminal Law, 8 December 2015, Annex A, para. 107.

<sup>48</sup> *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, paras. 542-543.

<sup>49</sup> *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 543; *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002, para. 119.

<sup>50</sup> *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, U.N. Doc. E/CN/Sub.2/1998/13, 22 June 1998, para. 30. See also Christopher K. Hall, Joseph Powderly, Niamh Hayes, “Article 7: Crime against Humanity”, in Otto Triffterer and Kai

words, under customary international law, sexual slavery is a sub-set of enslavement as a crime against humanity. Accordingly, the Commission has dealt with acts of sexual slavery under the crime against humanity of enslavement in order to fully respect the principle of legality.

198. Furthermore, the Commission is of the view that the reality of Eritrean women and girls enslaved as described below is better encapsulated under the crime against humanity of enslavement. Narrowing down female enslavement to its sexual manifestation under the crime of sexual slavery while playing down the non-sexual acts of ownership is legally unsatisfactory and ignores the full spectrum of the violations suffered by women and girls as an interrelated whole set of conduct integral to female enslavement.<sup>51</sup> In addition, “[s]uch legal splintering results in inadequate judicial redress. The reality of female slaves’ sexual abuse is torn from the reality of their non-sexual burdens”.<sup>52</sup> Another benefit in this approach is that it avoids labelling and, therefore, stigmatising victims of such offences as “sex slaves”.<sup>53</sup> Finally, incorporating acts of sexual slavery under the crime against humanity of enslavement allows describing and assessing the gender dimension and impact of this gender-neutral crime.<sup>54</sup> For all these reasons, the Commission has dealt with acts of sexual slavery under the crime against humanity of enslavement.<sup>55</sup>

#### *The facts*

[...]

#### *b. Domestic servitude*

224. In addition to the treatment and punishment that all conscripts face, Eritrean women – and sometimes girls – are at risk of a further form of enslavement which is domestic servitude in military training camps, as well as to a lesser extent in the army. Although the military/national service is intended, inter alia, to put men and women on an equal footing, just as they were during the liberation struggle,<sup>56</sup> many young women in military training camps as well as in the army are discriminated against on the basis of their gender and sex and used as slaves.<sup>57</sup>

225. The Commission has heard how some young women are placed in servile positions to military leaders and trainers in Sawa, Wi’a, and in other military training camps. These women were compelled to perform non-military activities such as cooking, cleaning, doing laundry, preparing and serving coffee, and performing other domestic duties. Some were also forced to provide sexual services constituting rape.<sup>58</sup>

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Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck/Hart/Nomos, 2016 (3<sup>rd</sup> edition), p. 212, mn. 61, fn. 404.

<sup>51</sup> See also Patricia Viseur Sellers, “Wartime Female Slavery: Enslavement?”, in 44 *Cornell International Law Journal* (2011) 115-143, at 138-139. Cf. also Valerie Oosterveld, “The Special Court for Sierra Leone, Child Soldiers, and Forced Marriage: Providing Clarity or Confusion?”, in 45 *Canadian Yearbook of International Law* (2007) 131-172, at 155.

<sup>52</sup> See also Patricia Viseur Sellers, “Wartime Female Slavery: Enslavement?”, in 44 *Cornell International Law Journal* (2011) 115-143, at 138-139.

<sup>53</sup> See *supra*, para. 21. See also Patricia Viseur Sellers, “Wartime Female Slavery: Enslavement?”, in 44 *Cornell International Law Journal* (2011) 115-143, at 142.

<sup>54</sup> This is in line with the Commission’s methodology. See *supra*, para. 19.

<sup>55</sup> See *infra*, paras. 224-233, 235.

<sup>56</sup> A/HRC/29/CRP.1, para. 1175. See also *ibid.*, paras. 228-237.

<sup>57</sup> A/HRC/29/CRP.1, para. 1312.

<sup>58</sup> A/HRC/29/CRP.1, para. 1378. See also *ibid.*, paras. 1312-1323, 1377, 1380. See also, e.g., TAA215, TAA222, TAM003, TAM018, TBA001, TBA002, TBA005, TBA012, TBA029, TBA091, TBA222, TCDP004, TCDP005, TCDP007, TCDP022, TCDP068, TCDP071, TFM003, TFM004, TMM204, TMM216, TNR001, TNR009, TNR045, TNR084, TRS201, TRS208, TSH017, TSH018, TSH022, TSH024, TSH030, TSH031, TSH075, TSH079, TSH081, TSH086, TSH088, TSH095, TSS205, TSS224, S047, S077k, S148. For instances of rape, see also *infra*, paras. 301-307, 312.

226. A former female trainee in Sawa, who described the situation of these young women stated that “[t]hey are their personal slave.”<sup>59</sup> Another female military trainee reported a typical day to her friend: “Dreadful life starts in the morning: I prepare his breakfast, wash his clothes, prepare lunch, prepare coffee ceremony, prepare dinner, and then prepare to be ‘his wife’. I have had this life for the last six years.”<sup>60</sup> A male soldier in Sawa also provided the following explanation:

“We watched sexual abuses. Systematically, they forced girls to obey their instructions; to have a relationship with them. If she doesn’t obey, they find any kind of military punishment. It is commonly the [d]ivision leaders, the highest ranks who would do that. All people would go back to their [d]ivision at the end of the day. The leaders select girls personally. After six months, he would change her, take a newly arrived. The 11th grade students...have to pass their last year’s exam in Sawa. They take them. Once a woman is assigned to a General, they stay there [to] do office work, chores, etc. ‘there is no rule, no law.’ Sometimes when the girls see the car of the General approaching they hide. What if they become pregnant? [...] When it happens, they make abortion traditionally. The girl doesn’t even want to let the colonel know. One of my best friends was a ‘personnel’ of the Colonel. He told me that the nick name used to get a girl is ‘goat’. Sometimes when newcomers arrive they asked assistants to bring new ones.”<sup>61</sup>

227. The Commission is of the view that, in addition to the tasks the women are forced to perform, the exercise of powers attaching to the right of ownership over these young women is further illustrated by four factors.

228. The first factor which reveals the exercise of powers attaching to the right of ownership is the way young women victims of this crime are selected and allocated to military officers. Officers in military training camps select the young women they want and have them allocated to their service or training team, placing them under their control.<sup>62</sup> As with all conscripts, these young women are unable to refuse their allocation.<sup>63</sup> A former male soldier explained: “When women come...in[to] the military training [in the first 6 months], officers go and look at them. They choose the ones they find attractive and make note of their name. When they [have] finished their military training the officers ensure the ones they have selected are allocated to them. This is common knowledge. The officers even talk about it as their right.”<sup>64</sup>

229. In some other cases, officials in military training camps instruct their assistants to bring a particular woman to their quarters. Military personnel in subordinate positions are tasked with collecting the young woman from her quarters and delivering her to their superior.<sup>65</sup> These methods, as well as the fact that military officials “talk about it as their right”, show that military officials treat the victims as if they owned them.

230. The second factor is that the non-sexual and sexual acts of powers attaching to the right of ownership exercised over these women take place within an overall environment of control, intimidation, and coercion. Indeed, military officials

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<sup>59</sup> TNR009. See also, e.g., TAA222 (“[...] was under [the General’s] ownership”), TBA005 (“[The major brigadier] made us his slaves”), TBA224 (“Battalion leaders considered these things [– i.e. sexual and gender-based violence –] as their right. Everyone under a commander was considered as his slave.”), TCDP005 (“They treat you as a slave”).

<sup>60</sup> See TFM004.

<sup>61</sup> See TCDP004.

<sup>62</sup> A/HRC/29/CRP.1, paras. 1316, 1377. See also, e.g., TAA215, TCDP004, TCDP005, TCDP022, TNR009, TRS208, TSH017, TSH075.

<sup>63</sup> A/HRC/29/CRP.1, para. 1377. See also, e.g., TCDP004, TCDP005, TSH017, TSH075.

<sup>64</sup> See TSH017.

<sup>65</sup> A/HRC/29/CRP.1, para. 1317. See also, e.g., TAM018, TCDP004, TCDP068, TNR001.

exploit the military hierarchy and structure, which requires that subordinates obey and perform the orders given by their superiors, in order to exercise their powers attaching to the right of ownership over these young women.<sup>66</sup> Moreover, young women are subjected to physical and mental punishment or at least fear such punishment if they do not submit to orders to serve military officials.<sup>67</sup> These forms of physical and/or mental coercion are further indicia of this form of enslavement.<sup>68</sup>

231. The third factor which reveals the exercise of powers attaching to the right of ownership is the control of these young women's movements. In addition to the control of movement exercised over all the conscripts in the military/national service or in the army, some of these women are victims of an additional deprivation of liberty, being sometimes even locked up:

“One day, ...a female soldier...from my unit was...assigned to General [...] to prepare food and do cleaning; it was also made clear to her that she [was] supposed to please [the General] in bed whenever he wanted. [...] She provided this service to [the General] for many years. [Three years after it started], she got pregnant [from] him and gave birth to a baby girl... She told me that she did not do this voluntarily but [because] she was afraid. She said she was not allowed to leave the house and sometimes she was locked up.”<sup>69</sup>

232. The fourth factor is that, in some cases, military officers also exercise control over the sexuality of these women, sexually abusing or raping them.<sup>70</sup> In some instances, these women are also submitted to forced abortion.<sup>71</sup>

233. The Commission is of the view that the non-contextual element of enslavement as a crime against humanity is therefore met. Finally, the Commission finds that, given the context in which these acts of enslavement are committed, i.e. during the military/national service and/or in military training centres or camps, they are part of the widespread or systematic attack committed against the Eritrean civilian population.

#### *Conclusion*

[...]

235. The Commission is also of the view that there are reasonable grounds to believe that enslavement as a crime against humanity has been committed in Eritrea against some young women in military training camps, as well as to a lesser extent in the army, where young women are forced into domestic servitude and, in some cases, also raped.

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<sup>66</sup> A/HRC/29/CRP.1, para. 1319.

<sup>67</sup> A/HRC/29/CRP.1, paras. 1321, 1380. See also, *e.g.*, TBA221, TBA222, TCDP004, TCDP005, TCDP022, TCDP068, TNR002, TNR045, TRS201, TSH017, TSH022, TSH024, TSH030, TSH031, TSH107, TSS205, S077k.

<sup>68</sup> *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 543; *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002, para. 119. See also *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 976.

<sup>69</sup> See TSS224.

<sup>70</sup> See *infra*, paras. 301-307, 312.

<sup>71</sup> See, *e.g.*, TMM202. See also *infra*, para. 267.

### 3. Imprisonment or other severe deprivation of physical liberty

#### *The law*

[...]

#### *The facts*

[...]

247. Finally, with respect to the impact of the crime, the Commission recalls that men and women experience detention in unique ways. While conditions of detention in Eritrea may not be discriminatory as such, the special needs of women are not taken into account in a system primarily design for men. For example, the Commission found that women's particular sanitation and hygiene needs are not being met, causing unnecessary humiliation for female detainees. It also documented that the special needs of pregnant and nursing mothers and women with children were not met, in some instances leading to miscarriage or infant mortality. This results in detention having a discriminatory effect on women.<sup>72</sup> Moreover, while women are generally kept in different cells than men, they are almost always under the responsibility of male guards and prison officers, a situation which put them at increased risk of sexual and gender-based violence.<sup>73</sup>

#### *Conclusion*

[...]

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<sup>72</sup> A/HRC/29/CRP.1, paras. 921, 953-957. See also, *e.g.*, TMM214, TRS216.

<sup>73</sup> A/HRC/29/CRP.1, para. 967. See also *infra*, paras. 267, 308-311.

#### 4. Enforced disappearances

##### *The law*

[...]

##### *The facts*

[...]

256. While the majority of the cases of enforced disappearances documented by the Commission concern men, Eritrean women are also victims of this crime for the same reasons as men – including real or perceived opposition or threat to the Government – or because of their relationships with real or perceived political opponents, particularly as spouse.<sup>74</sup> Given the situation of extreme vulnerability these women are put in because of their removal from the protection of the law, some of these women have been known to suffer of other forms of gender-based violence, including being disproportionately at risk of sexual violence. These women are sometimes detained in isolation for months or years, which lead to further human rights violations.<sup>75</sup>

257. In addition, female relatives of men who disappeared also suffer from the consequences of such crimes, as they are left behind to pick up the pieces after a disappearance. The victimisation of family members is also greater when men who forcibly disappeared were the breadwinners and heads of household. In these cases, the family structure is disrupted and, due to prevailing gender inequalities, Eritrean women are not only discriminated against, but often negatively affected economically and socially, leading to further human rights violations.<sup>76</sup> These women and their children are often left in a vulnerable position, children being sometimes forced to drop school because of the way they are treated in repercussion of the disappearance of their father, and family members of the men who disappeared are often placed under tight control and followed by agents from the national security.<sup>77</sup>

##### *Conclusion*

[...]

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<sup>74</sup> See, e.g., TBA201, TBA215, TMM201. See also A/HRC/29/CRP.1, para. 786.

<sup>75</sup> See, e.g., TBA201, TBA215, TMM201, TRS206. See also A/HRC/WGEID/98/2, General comment on women affected by enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012), 14 February 2013, paras. 7-8.

<sup>76</sup> See, e.g., TBA211, TBA215, TMM202, TRS202, TRS203, TRS215, TSH032, TSH055, TSH073. See also A/HRC/WGEID/98/2, General comment on women affected by enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012), 14 February 2013, para. 12.

<sup>77</sup> See, e.g., TBA211, TBA215, TMM202, TNR003, TNR010, TRS203, TSH032, S025.

## 5. Torture

### *The law*

[...]

### *The facts*

[...]

266. The Commission notes that, while some methods of torture are used against both men and women, other forms of torture committed against the Eritrean civilian population are gender-specific or disproportionately affect women. As mentioned in greater detail below, rape - including as a form of torture - is predominantly inflicted on women.<sup>78</sup> In addition to the physical injuries and other possible consequences such as loss of reproductive abilities, unwanted pregnancy and/or transmission of sexually-transmitted disease such as HIV,<sup>79</sup> “the mental pain and suffering inflicted on victims of rape and other forms of sexual violence is often long-lasting due, inter alia, to subsequent stigmatisation and isolation”<sup>80</sup> as described by several victims of such practice, as well as by psychological and medical experts working with Eritrean survivors of such methods of torture.<sup>81</sup>

267. Moreover, the Commission collected evidence of the following instances of gender-specific forms of torture committed against women: (a) preventing a lactating mother in detention from breastfeeding or otherwise relieving the build-up of milk in her breasts, thereby causing her immense physical pain; (b) beating pregnant women in military training camps or in the army to induce abortion; (c) forcing a mother to watch her baby being thrown from one person to another like a ball while being interrogated on the whereabouts of her husband who had fled Eritrea; and (d) refusing to provide women in detention with necessary sanitary pads as a form of punishment and humiliation, thereby creating severe mental suffering.<sup>82</sup>

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<sup>78</sup> See *infra*, para. 311. The Commission recalls that rape can be constitutive of torture as a crime against humanity. See, e.g., *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 2 September 1998, paras. 596-598; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, paras. 495-496; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, paras. 163, 171; *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, para. 207.

<sup>79</sup> A/HRC/29/CRP.1, paras. 1330-1333, 1381-1382. See also *infra*, para. 305 and references cited therein.

<sup>80</sup> A/HRC/31/57, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 January 2016, para. 51. See also A/HRC/7/3, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 15 January 2008, para. 36.

<sup>81</sup> See, e.g., TMM204, TMM209, TMM212, TMM213. See also *supra*, paras. 21, 24 and references cited therein.

<sup>82</sup> See, e.g., TAA220, TAM074 (“Since I was I was menstruating so much, all the prisoners who had an undershirt, they cut it for me to use it to stop the bleeding. They were not able to help me. They just said this was part of the punishment. When all our under clothes were all cut and finished, the old woman in detention with us had a cloth which she gave me and we cut it. We used it as a pad.”), TBA001 (“Due to the stress and the beatings, the women had their periods, and lots of blood, but they were not allowed any sanitary pad. [...] There was no place to wash, they were very smelly due to the blood [...]. We could not take it anymore, some of us tried to help them. [...] We prepared some sheets of tissues to help them and put a can of water in the toilet so that they could wash and use the sheets as sanitary pads. We also got oil for them [...] to disinfect their wounds. They washed but not too much, so that they would not appear too clean and left their hair dirty, to hide that we were helping them.”), TBA212, TBA221, TMM202, TMM209, TSH015, TSH026, TSH079, S035, S143g. See also A/HRC/29/CRP.1, para. 1076.

268. As mentioned above, the majority of cases of enforced disappearances documented by the Commission concern men.<sup>83</sup> Thus, female and child relatives of men who disappeared are also predominantly, but not exclusively, victims of a specific form of torture. Indeed, the Commission heard evidence from such family members whose severe mental pain or suffering is nearly impossible to convey.<sup>84</sup> As previously found, “the uncertainty about the fate of their loved-ones is a source of continued anguish and anxiety”,<sup>85</sup> which results from the refusal to acknowledge the deprivation of freedom or to give information about the whereabouts of these persons. Not knowing whether the disappeared is still alive, and if so in what state of health and under which conditions, cause a level of mental distress and suffering so severe which, in numerous cases documented by the Commission, rises to the level of torture as a crime against humanity under customary international law.<sup>86</sup>

269. Finally, the Commission also documented instances of sexual torture committed against men, including beating and applying electric shocks to the sexual and reproductive organs of detainees, tying up a five-litre jerry can or a one-kilo weight to their penis, and in one instance burning the genitals of a detainee with a cigarette lighter.<sup>87</sup> In some instances, this was done intentionally to ensure that the men will no longer be able to reproduce. In the words of an Eritrean man who was detained and tortured for trying to flee the country:

“For 6 months, I was tortured every other day, while the other day I was left in a cell with 40 other detainees. A lot of them were also tortured. [...] During the torture, all of them said that they do not want someone like me to have children, as children of persons like me are not welcomed. They said that they will make sure that I cannot reproduce. [...] My left testicle is seriously harmed from the torture and I cannot produce sperm. They used the device applying electricity against my genitals as well as against the palms of my hands and under my feet. [...] I have liquid in my testicles. I cannot reproduce. [...] In Eritrea, they do not want educated men to reproduce; they want to break the heredity. This is why they torture men like they did with me. This is what they said to me when they tortured me.”<sup>88</sup>

### Conclusion

[...]

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<sup>83</sup> See *supra*, para. 256.

<sup>84</sup> See, e.g., TBA211, TBA215, TCDP078-082, TMM202, TNR003, TNR010, TRS203, S012, S015 (“that is killing me day by day”), S023, S045.

<sup>85</sup> A/HRC/29/CRP.1, para. 789. See also *ibid.*, para. 791.

<sup>86</sup> Christopher K. Hall and Carsten Stahn, “Article 7: Crime against Humanity”, in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck/Hart/Nomos, 2016 (3<sup>rd</sup> edition), p. 270, mn. 132, fn. 807 and references cited therein; Working Group on Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearances, para. 4 (“the enforced disappearance causes ‘anguish and sorrow’ [...] to the family, a suffering that reaches the threshold of torture”). See also A/RES/47/133, Declaration on the Protection of All Persons from Enforced Disappearance, 18 December 1992, Article 1(2) (“Any act of enforced disappearance [...] inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, [...] the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.”). Cf. *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005, para. 653. For the definition of torture as a crime against humanity under customary international law, see, e.g., *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002, paras. 142-156.

<sup>87</sup> See, e.g., TCDP049, TCDP051, TCDP069, TMM204, TMM205, TMM209, TMM212, TMM213, TRS214, TSH026, TSH035, TSS210, TSS217.

<sup>88</sup> TMM205.



## 8. Rape

### *The law*

297. Rape has been criminalised as a distinct crime against humanity under customary international law for decades.<sup>89</sup> Article 7(1)(g) of the Rome Statute also criminalises rape as a separate crime against humanity.

298. The definition of rape as a crime against humanity under customary international law as identified by the *ad hoc* international criminal tribunals has evolved from a conceptual into a more mechanical definition, including first the concept of coercion before concentrating on the concept of consent.<sup>90</sup> According to the Elements of Crimes of the ICC, the two non-contextual elements of rape as a crime against humanity under Article 7(1)(g) of the Rome Statute are: (a) “The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body”; and (b) “The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”.

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<sup>89</sup> See, e.g., Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity), 20 December 1945, Article II(1)(a); *Trial of General Tomoyuki Yamashita*, United Nations War Crimes Commission, Law Report of Trials of War Criminals, Vol. IV, Case No. 21, United States Military Commission, Manila, 8 October-7 December 1945, p. 7; The International Crimes (Tribunals) Act, 20 July 1973, Article 3(2)(a). See also *amicus curiae* brief submitted by 16 international experts in the treatment of sexual violence under international criminal law: *Prosecutor v. Hissène Habré*, Extraordinary African Chambers, Rape and Other Forms of Sexual Violence as Crimes Against Humanity, War Crimes, and Torture Under Customary International Law: *Amicus Curiae* Brief of the Human Rights Center at the University of California, Berkeley, School of Law, and International Experts on Sexual Violence Under International Criminal Law, 8 December 2015, Annex A, paras. 62-68; Valerie Oosterveld and Patricia Viseur Sellers, “Issues of Sexual and Gender-Based Violence at the ECCC”, in Simon M. Meisenberg and Ignaz Stegmüller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law*, T.M.C. Asser Press, 2016, pp. 339-341, 344.

<sup>90</sup> See, e.g., *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 2 September 1998, paras. 598, 688 (“The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”); *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 185 (“the Trial Chamber finds that the following may be accepted as the objective elements of rape: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.”); *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 460 (“the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim”); *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002, paras. 128-130; *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-01-64-A, Judgement, 7 July 2006, paras. 151-157.

299. The concept of “invasion” in this mechanical definition is gender-neutral as to the victim and the perpetrator.<sup>91</sup> Footnote 16 of the Elements of Crimes of the ICC further specifies that “[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity”. However, outside of this specific situation, the Elements of Crimes of the ICC do not refer to the absence of consent on the part of the victim and, therefore, this does not have to be demonstrated.<sup>92</sup>

#### *The facts*

300. The Commission conducted interviews detailing incidents of rape against women, girls, and men.<sup>93</sup> As explained in more detail below, the evidence collected indicates that instances of rape which can be legally qualified as a crime against humanity, given that they were committed as part of a widespread or systematic attack directed against the Eritrean civilian population, occurred in two distinct circumstances. The first is in military training centres and in the army, the second is in detention. A third occurrence concerns rape of women and girls from the Afar ethnic minority by military officers.<sup>94</sup> However, given its limited resources, the Commission has not been able to investigate further these instances of rape and to establish whether these rapes were also committed as part of a widespread or systematic attack directed against the Eritrean civilian population. Accordingly, the Commission is of the view that its inquiry may have only partially captured the extent and details of rape as a crime against humanity.

#### *a. Rape in military training centres and in the army*

301. Women are at a disproportionate risk of discrimination and violence within the military/national service and in the army and are targeted for sexual abuse on account of their gender. As described above in the section on enslavement as a crime against humanity, many women in military training centres, as well as to a lesser extent in the army, are raped by military officials and trainers.<sup>95</sup>

302. The extent of the rape in the military/national service is best described by a male military officer:

“Sexual violence and rape are very common in the national and military service especially against recruits; it also happens a lot when soldiers are conducting raids. [...] They take the young ladies there as wives and they have children by them and discard them. They do this to many recruits; when the women don’t agree they force them and threatened them sometimes [...] in the public; they are forced when they refuse to have sex with the commanders. It is not just the commanders but even common soldiers do that, but the commanders start this first; they select the women first. When new ones arrived they do the same thing to them. [...] I remember that one lady refused to have sex with the commander; after a while the commander got drunk and put the lady at gunpoint and raped her. There are many girls who were raped like this during training or when already in services. All these sexual violence

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<sup>91</sup> See also Elements of Crimes of the ICC, fn. 15.

<sup>92</sup> See *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014, para. 965. See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 105.

<sup>93</sup> With respect to men, for the reasons explained in more detail above, the Commission is of the view that its inquiry may have only partially captured the extent and details of rape against men. See *supra*, paras. 27-30.

<sup>94</sup> See, e.g., THS050, TSH053, TSH056, TSH072, TSH068.

<sup>95</sup> See also, e.g., TAA202, TAA208, TAA214, TAA215, TAA216, TAM003, TAM018, TBA001, TBA002, TBA012, TBA217, TBA221, TCDP004, TCDP005, TCDP007, TCDP022, TCDP068, TCDP071, TFM004, TMM202, TMM204, TMM209, TMM212, TMM213, TMM216, TNR045, TNR084, TRS201, TRS208, TRS215, TSH017, TSH018, TSH030, TSH079, TSH081, TSH095, TSS205, TSS224, S047, S148.

crimes took place in Sawa military training centre [during a period of six years until I left the national service]. I can't give you an estimate of the number of victims but they are many; they complained to other colleagues about the rape but not to the commanders. On several occasions the women raised the problems with the overall commander of the Sawa military training school [...]; all times the commander responded that please deal with this issues directly with the persons you have problem with. The reason for not addressing this problem against the perpetrators is very simple; because these commanders know each other so nothing happens when reported. They also reported the problem to [...] at the cadre school but he responded that people should take care so that these things should not backfire in the public. [...] At the time we received many cases and complaints [...]; you will imagine that if this bad things happened in the main training centre and nothing happen[s], what do you think is happening in the remote training camps? [...] I [am aware] of information from all training centres across the country [...]. Very bad things happened to these women; women get pregnant and bore children. They are told to return home and no one takes care of the children and the women. These women don't have a future; some have ended up in the streets as prostitutes just to earn money to feed their children and themselves. Most of these women are released from the national service without paying them salary or anything.”<sup>96</sup>

303. The instances of rape in military training centres and in the army concern the penetration of the vagina of the victim by the penis of the perpetrator. In some cases, victims reported being raped only once,<sup>97</sup> but the vast majority of the survivors reported being raped multiple times, including for a certain length of time.<sup>98</sup> Some also reported being raped by one perpetrator for a certain length of time before then being raped by another perpetrator during another time period.

304. For example, one young woman assigned to a specific military camp for six months described her ordeal:

“[A military officer] came every night [...]. I had no interest, no feeling for him. He would just come and rape me. He raped me and then went [...]. I always lost when I tried to oppose [him]. He would start to kick me, so I let him finish quickly and leave [...]. So later, I did not resist to avoid more problems. I had no sexual feelings, I was praying to God to take me in his hand, for that pain to stop, I wanted to die. I had no feeling for [that military officer], I hated him, during the intercourse, I had no vaginal secretion, it was scratching, it hurt.”<sup>99</sup>

305. Moreover, in most instances, the perpetrators did not use condoms, which in some cases led to unwanted pregnancies and/or transmission of sexually-transmitted diseases, such as HIV.<sup>100</sup> Finally, in many occasions, rape resulted in physical and psychological impairment.<sup>101</sup> In light of the above, the Commission is satisfied that the first element of rape as a crime against humanity is met given that these women were vaginally penetrated by the sexual organ of the perpetrator(s).

306. In addition, given that these instances of rape were committed in the military/national service or in the army, i.e. by taking advantage of an environment of control and coercion where military officials use the military hierarchy and

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<sup>96</sup> TSS205.

<sup>97</sup> See, *e.g.*, TMM214.

<sup>98</sup> See, *e.g.*, TBA221.

<sup>99</sup> TBA221.

<sup>100</sup> A/HRC/29/CRP.1, paras. 1330, 1332, 1382. See also, *e.g.*, TAA215, TAM003, TBA012, TBA091, TBA212, TBA221, TCDP004, TCDP005, TCDP022, TCDP068, TMM214, TNR001, TNR009, TRS208, TSH018, TSH030, TSH075, TSH079, TSH081, TSH095, TSS205, TSS224, S047.

<sup>101</sup> A/HRC/29/CRP.1, para. 1333.

structure according to which subordinates are forced to obey and perform the orders given by their superiors, and are – in many instances – often committed by force, threat of force, or coercion caused by fear of punishment, abuse of power, and/or psychological oppression, the Commission finds that the second element of rape as a crime against humanity is also met.<sup>102</sup>

307. Finally, the Commission finds that, given the context in which these acts of enslavement are committed, namely during the national service and/or in military training centres or camps, they are part of the widespread or systematic attack committed against the Eritrean civilian population.

*b. Rape in detention*

308. While the vast majority of cases of rape in detention concern the penetration of the vagina of the victim by the penis of the perpetrator,<sup>103</sup> the Commission also documented other forms of rape, including: (a) objects, such as pens, being inserted in the anus of women;<sup>104</sup> (b) metal rods being inserted in the vagina of a woman up to her womb;<sup>105</sup> (c) male detainees being raped by male perpetrators;<sup>106</sup> as well as (d) male detainees being forced to have sex with other male detainees.<sup>107</sup> In some cases, victims reported being raped only once by one single perpetrator.<sup>108</sup> In other instances, survivors provided evidence about being raped multiple times or gang raped, including over extended period of time.<sup>109</sup> For example, one woman detained in a police station reported that:

“[The chief of a particular police station] frequently called me out of [my] cell and raped me. I stayed there for [nearly] six months and nearly every day he raped me. He penetrated my vagina with his penis. There were two other men who did similar things to me. They ejaculated inside me. That was very painful. Even after I was released I was not sure I would survive. They would take turn. While one was raping me, the other would wait outside and come one after the other. [The chief of that particular police station] raped me every day. The two other came every few days, it depends. The names of the two other persons who raped me are [...]. They are also police officer[s] but [...] is the chief of that police station. When [he] came to rape me, if I would refuse, he would slap me and ask why I would refuse. I responded that I want to protect myself and do not want to have this kind of intercourse with anyone. He beat me and raped me. After he finished, he [threatened] me not to say anything. [He] told me that if I would report the rapes he would find me wherever I go and kill me. I asked [him] about my fault/wrongdoings. He told me to stay here and that I would learn about my problems. None of them use[d] condoms.”<sup>110</sup>

309. All of the above-mentioned cases of invasion meet the first element of rape as a crime against humanity, which is also satisfied when the perpetrator does not engage in the act of penetration himself/herself but causes or prompts someone else to be penetrated<sup>111</sup> such as male detainees being forced to have sex with other male detainees.<sup>112</sup>

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<sup>102</sup> See *supra*, para. 230.

<sup>103</sup> See, e.g., TAA220, TMM208, TSS220.

<sup>104</sup> See TSH035, TCDP037. See also A/HRC/29/CRP.1, para. 1075.

<sup>105</sup> See TRS207.

<sup>106</sup> See TBA054. See also A/HRC/29/CRP.1, para. 1075.

<sup>107</sup> See TBA054. See also A/HRC/29/CRP.1, para. 1075.

<sup>108</sup> See, e.g., TMM207.

<sup>109</sup> See, e.g., TCDP037, TLA030, TMM208, TSH035. See also A/HRC/29/CRP.1, para. 1075.

<sup>110</sup> See TMM208.

<sup>111</sup> See *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014, para. 963.

<sup>112</sup> *Prosecutor v. Ranko Češić*, Case No. IT-95-10/1-S, Sentencing Judgement, 11 March 2004, paras. 13-14, 33, 35-36 (where the accused plead guilty – and was convicted – of rape as a

310. In addition, given that these instances of rape are committed in detention, i.e. by taking advantage of the coercive environment of detention centres, and are – in most cases – often committed by force or threat of force, the Commission is of the view that the second element of rape as a crime against humanity is also met.

311. Although the Commission does not consider that there is an official governmental policy promoting rape, the frequent incidences of rape in detention – often carried out as a form of torture to intimidate, punish, humiliate and/or instil additional fear among the population<sup>113</sup> – committed by, or at the instigation of, detention officials form part of the overall widespread and systematic attack against the Eritrean civilian population. Moreover, like in the military/national service and in the army, cases of rape in detention are a direct and foreseeable consequence of the general environment of impunity and unchecked power that prison guards, military or police officers, and other detention officials enjoy.

#### *Conclusion*

312. The Commission documented many instances of rape, repeated rape, and gang rape committed by military officials and trainers as well as by detention officials against a significant number of women and a few men. These rapes were committed by taking advantage of a coercive environment and, in many cases, by force or threat of force. Moreover, these rapes were part of the widespread and systematic attack committed against the Eritrean civilian population. In light of the above, the Commission is of the view that there are reasonable grounds to believe that rape, a crime against humanity, has been committed in Eritrea in military training centres and in the army, as well as in detention, since 1991.

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crime against humanity for forcing two brothers detained to perform fellatio on each other). Instances of rape where male detainees are forced to have sex with other male detainees would definitely qualify as rape as a crime against humanity under customary international law under the definition of rape identified in the *Akayesu* case given its wider ambit which would include rape between two victims. See *supra*, fn. 90. See also Valerie Oosterveld and Patricia Viseur Sellers, “Issues of Sexual and Gender-Based Violence at the ECCC”, in Simon M. Meisenberg and Ignaz Stegmiller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law*, T.M.C. Asser Press, 2016, pp. 336-338.

<sup>113</sup> See *supra*, para. 266.

## **VI. Conclusion and recommendations**

### **A. Conclusions**

341. The Commission finds that there are reasonable grounds to believe that crimes against humanity have been committed in Eritrea since 1991. Eritrean officials have engaged in a persistent, widespread and systematic attack against the country's civilian population since 1991. They have committed, and continue to commit, the crimes of enslavement, imprisonment, enforced disappearance, torture, other inhumane acts, persecution, rape and murder.

[...]

343. The Commission finds that the gross human rights violations it documented in its previous report persist, including arbitrary detention, enforced disappearances, torture, killings, sexual and gender-based violence, discrimination on the basis of religion and ethnicity, and reprisals for the alleged conduct of family members. In addition, many of those subjected to enforced disappearance in the past remain unaccounted for.

[...]

### **B. Recommendations**

347. The recommendations made by the Commission in its first report remain valid. The Commission highlights below those recommendations that are specifically relevant to its new mandate, and makes new ones.

#### **1. Government of Eritrea**

##### **(a) *General recommendations***

348. The Commission of Inquiry recommends that the Government of Eritrea:

[...]

(b) Respect the obligations prescribed by the international human rights treaties to which Eritrea is a party, and ratify and implement other international human rights instruments, including the International Convention for the Protection of All Persons from Enforced Disappearance, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption.

##### **(b) *Governance and administration of justice***

349. The Commission also recommends that the Government of Eritrea:

[...]

(c) Establish without delay an independent, impartial and transparent judiciary, and ensure access to justice for all;

[...]

(e) Bring into force the Penal Code, the Criminal Procedure Code, the Civil Code and the Civil Procedure Code of May 2015, and amend them to reflect all international human rights standards;

[...]

(g) Establish an independent national human rights institution with a protection mandate, including to investigate human rights violations;

(h) Permit human rights defenders and independent civil society organizations, including gender-specific organizations, to operate without interference.

**(c) *Military/national service***

350. The Commission further recommends that the Government of Eritrea:

(a) Discontinue indefinite military/national service by limiting it to 18 months for all current and future conscripts, as stipulated by the Proclamation on national service;

(b) Put an immediate end to torture and ill-treatment, sexual violence and the enslavement of conscripts;

(c) Provide conscripts with humane living conditions, including with regard to food, health care and shelter;

[...]

(e) Establish an independent complaint mechanism for conscripts to raise allegations of ill-treatment and to obtain redress;

(f) Ensure that military commanders responsible for human rights abuses are held accountable.

**(d) *Arbitrary arrest, detention and enforced disappearances***

351. The Commission recommends that the Government of Eritrea:

(a) Put an end to the practice of arrests and detention carried out without legal basis, and release immediately and unconditionally all those unlawfully and arbitrarily detained;

(b) Provide information on the fate and whereabouts of all those deprived of physical liberty;

(c) Review all cases of detainees who have been convicted of an offence in judicial or similar proceedings but were not accorded the procedural rights guaranteed in the international instruments to which Eritrea is party;

[...]

(e) Allow access to detainees by legal representatives and family members;

(f) Close all secret places of detention;

(g) Improve the conditions of detention to bring them into line with international standards and, in particular, ensure access to medical treatment for all detainees;

(h) Ensure that solitary confinement remains an exceptional measure of limited duration;

(i) Allow independent monitoring of all places of detention with regard to both legality and conditions of detention;

(j) Immediately permit unhindered access by independent monitors, including the Office of the United Nations High Commissioner for Human Rights and other recognized organizations, to all places of detention, official and unofficial, to monitor the legality of detentions and the treatment of detainees and prison conditions, and allow them to conduct regular and unannounced visits, and act promptly on their recommendations.

(e) ***Torture and other cruel, inhuman or degrading treatment or punishment***

352. The Commission also recommends that the Government of Eritrea put an immediate end to the use of torture and other forms of ill-treatment, establish adequate complaints mechanisms and ensure that prompt and effective investigations are conducted into all allegations of torture and ill-treatment with a view to bringing perpetrators to justice.

[...]

(g) ***Sexual and gender-based violence***

354. The Commission recommends that the Government of Eritrea:

(a) Adopt a comprehensive strategy to eliminate stereotypes and harmful practices that discriminate against women and girls, including forced marriage, and ensure that the minimum age of marriage, set at 18 years of age, is strictly enforced;

(b) Take measures to ensure de facto gender equality, and address all forms of violence and discrimination against women, including sexual and gender-based violence, particularly within State institutions, such as military camps and places of detention;

(c) During mandatory military training, prohibit the assignment of women and girls to officials' quarters for forced domestic servitude, and implement a zero-tolerance policy for sexual abuse in the army and in detention centres;

(d) Ensure that all forms of sexual violence are criminalized in national law, and take appropriate legislative and policy steps to establish complaint mechanisms and to ensure the prompt and adequate investigation, prosecution and accountability of perpetrators, including by strengthening the capacity of the criminal justice system;

(e) Adopt gender-sensitive procedures to avoid reprisals and stigmatization of survivors of sexual and gender-based violence by, inter alia, establishing special protection units and gender desks in police stations, and provide rehabilitation and support services, including safe houses, legal aid resources and health care;

(f) Ensure that national laws and policies comply with the State's international human rights obligations and are non-discriminatory by, inter alia, permitting prosecution of marital rape in all circumstances and abolishing legal provisions criminalizing consensual same-sex sexual activity.

[...]

(j) ***Accountability***

357. The Commission recommends that the Government of Eritrea:

(a) Ensure accountability for past and persistent human rights violations and crimes, including enslavement, imprisonment, enforced disappearance, torture, and other inhumane acts, persecution, rape and murder, through the establishment of independent, impartial and gender-sensitive mechanisms, and provide victims with adequate redress, including the right to truth and reparations;

(b) Ratify and implement the Rome Statute of the International Criminal Court;



(c) Cooperate with, and accept and implement the decisions of, any accountability mechanisms.

## **2. Human Rights Council**

358. The Commission recommends that the Human Rights Council:

(a) Renew the mandate of the Special Rapporteur on the situation of human rights in Eritrea, and request the mandate holder to, inter alia, promote and report on the implementation of the present recommendations, and provide the mandate holder with the necessary additional human and financial resources;

(b) Bring to the attention of relevant special procedures, for appropriate action, the human rights violations and crimes identified by the Commission in its reports, including the situation of minorities, such as the Kunama and the Afar;

(c) Keep the situation in Eritrea on its agenda, and invite the United Nations High Commissioner for Human Rights to report periodically on the situation of human rights;

(d) Transmit the present report to the General Assembly, the Secretary-General and the Security Council for follow-up on its recommendations;

(e) Support the establishment of a structure by the Office of the United Nations High Commissioner for Human Rights with a protection and promotion mandate, in particular to assist in ensuring accountability for human rights violations in Eritrea, especially where such violations amount to crimes against humanity.

## **3. Office of the United Nations High Commissioner for Human Rights**

359. The Commission recommends that the Office of the High Commissioner report annually to the Human Rights Council and other appropriate United Nations organs on the situation of human rights in Eritrea, and assist the Government of Eritrea in the implementation of the recommendations made by the Commission, and those made at the sessions of the Working Group on the Universal Periodic Review and by the treaty bodies and special procedures.

## **4. General Assembly**

360. The Commission recommends that the General Assembly put the human rights situation in Eritrea on its agenda.

## **5. Security Council**

361. The Commission recommends that the Security Council:

(a) Determine that the situation of human rights in Eritrea poses a threat to international peace and security;

(b) Refer the situation in Eritrea to the Prosecutor of the International Criminal Court;

(c) Impose targeted sanctions, namely travel bans and asset freezes, on persons where there are reasonable grounds to believe that the said persons are responsible for crimes against humanity or other gross violations of human rights.

## **6. African Union**

362. The Commission recommends that the African Union establish an accountability mechanism, under the aegis of the African Union and supported by the international community, to investigate, prosecute and try individuals reasonably believed to have committed crimes against humanity.

## **7. Member States and international organizations**

### **363. The Commission recommends that Member States and international organizations:**

(a) Keep Eritrea under close scrutiny until consistent and tangible progress with regard to the situation of human rights is evident, and ensure the centrality of human rights in all engagement with the State;

[...]

(e) Provide Eritrean nationals seeking protection with refugee status in accordance with the provisions of the international law governing asylum, and in particular the Convention relating to the Status of Refugees;

(f) Exercise jurisdiction over crimes against humanity when any alleged offender is present on the territory of a Member State or extradite him or her to another State in accordance with its international obligations;

(g) Increase attention and the resources allocated to the situation of human rights in Eritrea by strengthening engagement with the Government with the aim of implementing the present recommendations and those made during the sessions of the Working Group on the Universal Periodic Review and by other human rights mechanisms.

[...]