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UNHCR ELIGIBILITY GUIDELINES FOR ASSESSING THE INTERNATIONAL PROTECTION NEEDS OF ASYLUM-SEEKERS FROM ERITREA

United Nations High Commissioner for Refugees (UNHCR)
April 2009

NOTE

UNHCR *Eligibility Guidelines* are issued by the Office to assist decision-makers, including UNHCR staff, Governments and private practitioners, in assessing the international protection needs of asylum-seekers from a given country. They are authoritative legal interpretations of the refugee criteria in respect of specific groups on the basis of objectively assessed social, political, economic, security, human rights, and humanitarian conditions in the country of origin concerned. The pertinent protection needs are analyzed in detail and recommendations made as to how the applications in question should be decided upon in line with the relevant principles and criteria of refugee law as per, notably, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the UNHCR Statute and relevant regional instruments such as the Cartagena Declaration, the 1969 OAU Convention and the EU Asylum Directives. The recommendations may also touch upon, as relevant, complementary or subsidiary protection regimes.

UNHCR issues its *Eligibility Guidelines* pursuant to its responsibility to promote the accurate interpretation and application of the above-mentioned refugee criteria as envisaged by Article 8 of its Statute, Article 35 of the 1951 Convention and Article II of its 1967 Protocol and based on the expertise it has developed over several years in eligibility and refugee status determination matters. It is expected that the positions and guidance contained in the *Guidelines* should be weighed heavily by the relevant decision-making authorities in reaching a decision on the asylum applications concerned. The *Guidelines* are researched strictly and are written based on factual evidence provided by UNHCR's global network of field offices and information from independent country specialists, researchers and other sources which is rigorously reviewed for reliability. The *Guidelines* are posted on UNHCR's Refworld website at http://www.refworld.org.

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I. Introduction

For some years now, Eritrean nationals have been seeking protection as refugees in neighbouring countries and much further afield in ever increasing numbers. This paper provides guidelines for use by UNHCR and State adjudicators in properly deciding on the claims lodged by Eritrean asylum-seekers, and in otherwise understanding and responding appropriately to their protection needs.[1] The Guidelines supersede the Declaration of cessation of the refugee status of Eritrean refugees issued in 2002, entitled "*Applicability of the "Ceased Circumstances" Cessation Clauses to Eritrean Refugees Who Fled Their Country as a Result of the War of Independence Which Ended in June 1991 or as a Result of the Border Conflict Between Ethiopia and Eritrea Which Ended in June 2000"*.[2]

The Guidelines are divided in five sections including this Introduction (Part I). Part II contains a brief résumé of background information, including an overview of the current political and security situation in Eritrea and the domestic legal framework, with a view to setting the broad context in which asylum claims are lodged by Eritrean nationals today. Part III provides an outline of Eritrean asylum trends and their causation factors, and summarizes the main types of claims dealt with by UNHCR in its operations. Part IV outlines the approach being advised by UNHCR as to how the claims should be dealt with. It elaborates the relevant country of origin information and the accompanying refugee law analysis for purposes of inclusion and exclusion from refugee status in light of the most common types of claims, namely draft evasion/desertion, political opinion, religion, women with particle profiles and sexual orientation and sets out UNHCR's conclusions on the international protection needs of Eritrean asylum-seekers. Guidance is also provided on assessing the availability of an internal flight or relocation alternative. The Guidelines conclude with a summary, in Part V, of further human rights considerations potentially giving rise to the need for complementary forms of protection.

II. Background information and developments

The increasing number of Eritreans being forced into exile as refugees is rooted in developments of a political, military, human rights and broad social and economic nature, which have taken place in the period since Eritrea's independence from Ethiopia. Eritrea formally became a nation state in 1993 following a referendum in which the overwhelming majority of Eritreans voted in favour of independence from

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[1] These Guidelines are based on information available up to February 2009, unless otherwise stated. Access to independently verifiable information on the situation in Eritrea is difficult to obtain given the Eritrean Government's control over virtually every aspect of life in the country, the lack of independent media and the curtailment of NGOs activities. The available information does nevertheless suggest that the political, economic, human rights and humanitarian situation continues to deteriorate.

[2] UNHCR, *Applicability of the "Ceased Circumstances" Cessation Clauses to Eritrean Refugees Who Fled Their Country as a Result of the War of Independence Which Ended in June 1991 or as a Result of the Border Conflict Between Ethiopia and Eritrea Which Ended in June 2000*, 18 February 2002, available at http://www.unhcr.org/refworld/docid/4165729f4.html (hereafter "UNHCR Cessation Declaration").

Ethiopia.[3] President Isayas Afewerki is the official head of the armed forces and the People's Front for Democracy and Justice (PFDJ) party. As a one-party state, Eritrea has been governed by the PFDJ since independence. There is no effective opposition in Eritrea[4] able to operate openly. The only functioning opposition exists in the diaspora.[5] Presidential and legislative elections, planned for 1997 and 2001, respectively, have been postponed indefinitely.[6] The Constitution,[7] which was approved by referendum in 1997, remains unimplemented.[8]

Established by decree in 1993, the judiciary is reportedly subject to executive interference.[9] The judicial system consists of civil, military and executive-controlled "special courts". The Office of the Attorney General decides which cases are to be tried by the special courts, including the retrial of civilian court cases. No legal representation or right of appeal is available before the special courts, and judges are military officers with little or no legal training.[10] The judicial system also reportedly suffers from a lack of trained personnel, inadequate funding, and poor infrastructure.[11] Members of the armed forces (including conscripts) are subject to military jurisdiction. Military courts, however, do not function and punishments for military offences, including draft evasion and desertion, are administered by local commanders without judicial control.[12]

The Government exercises control over the media, which is entirely State-owned.[13] The activities of human rights monitors and domestic and international non-governmental organizations (NGOs) have been significantly curtailed following the

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[3] BBC, *Country Profile Eritrea*, 17 June 2008, available at http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1070813.stm (hereafter "BBC *Country Profile Eritrea*").

[4] See, for instance, US Department of State, *2008 Country Reports on Human Rights Practices – Eritrea*, 25 February 2009, available at http://www.unhcr.org/refworld/docid/49a8f18faa.html (hereafter "US Department of State, *2008 Country Reports on Human Rights Practices*"); and The Economist Intelligence Unit, *Eritrea Country Profile* 2008.

[5] Economist Intelligence Unit, *Eritrea Country Profile* 2008.

[6] See, for instance, BBC, *Country Profile Eritrea*, above footnote 3, and US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[7] *Constitution of Eritrea*, 23 May 1997, available at http://www.unhcr.org/refworld/docid/3dd8aa904.html (hereafter "Constitution").

[8] See, for instance, Human Rights Watch, *World Report 2009 – Eritrea*, 14 January 2009, available at http://www.unhcr.org/refworld/docid/49705fa350.html (hereafter "HRW, *World Report 2009*"). Eritrean law derives from transitional laws which incorporate pre-independence statutes of the Eritrean People's Liberation Front, revised Ethiopian laws, customary laws, and post-independence enacted laws; see Dr. David Winslow, *Crime and Society A Comparative Criminology Tour of the World*, San Diego State University, available at http://www-rohan.sdsu.edu/faculty/rwinslow/africa/eritrea.html [accessed 2 December 2008].

[9] Freedom House, *The Worst of the Worst – Eritrea*, 5 May 2008, available at http://www.unhcr.org/refworld/docid/483f82a62.html (hereafter "Freedom House, *The Worst of the Worst*"). See also HRW, *World Report 2009*, above footnote 8.

[10] The special courts were established as an extraordinary jurisdiction in 1996. Initially mandated to deal with embezzlement cases, the courts have reportedly tried politically motivated cases. See Amnesty International, *Eritrea: 'You have no right to ask' – Government resists scrutiny on human rights*, AFR 64/003/2004, 19 May 2004, p. 24, available at http://www.unhcr.org/refworld/docid/4129dcf54.html (hereafter "AI, *Eritrea: 'You have no right to ask'*").

[11] US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4; see also Freedom House, *The Worst of the Worst*, above footnote 9.

[12] AI, *Eritrea: 'You have no right to ask'*, above, footnote 10.

[13] See, for instance, HRW, *World Report 2009*, above footnote 8.

adoption of new guidelines in May 2005.[14] Having failed to receive Government approval under the new registration process, many international NGOs were required to leave the country.[15]

In the past decade, territorial disputes over undemarcated borders with neighbournig countries have led to, *inter alia*, a sustained high-level military mobilization in Eritrea.[16] In 1998, a border dispute with Ethiopia around the town of Badme erupted into a full-scale war between the two countries. The conflict ended following a ceasefire agreement in June 2000,[17] leaving both sides with tens of thousands of soldiers dead. Subsequently, a demilitarized Temporary Security Zone (TSZ) was established along the Eritrea-Ethiopia border, and UN peacekeeping troops were deployed under the auspices of the UN Mission in Ethiopia and Eritrea (UNMEE) to monitor the ceasefire.[18] In April 2002, an independent Boundary Commission, established under the terms of the Algiers Agreements,[19] issued its recommendations for the demarcation of the border in favour of Eritrea's territorial claim. Thus far, Ethiopia has not implemented these recommendations, leading to what has been a continuing state of tension between the two countries.[20] Meanwhile, deteriorating

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[14] *Proclamation No. 145/2005, a Proclamation to Determine the Administration of Non-governmental Organizations*, 11 May 2005, available at http://www.unhcr.org/refworld/docid/493507c92.html, regulates the activities of non-governmental organizations. Under the Proclamation, international NGOs are limited to relief and rehabilitation work, and may not engage directly with the local communities (Articles 5-9).

[15] Freedom House, *The Worst of the Worst*, above footnote 9. See also HRW, *World Report 2009*, above footnote 8. At the end of 2008, only seven international NGOs were still registered in Eritrea and three PFDJ-aligned domestic NGOs were allowed to operate. See US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[16] Failure to demarcate the border with Ethiopia provides justification for the country to remain on a "war footing". See HRW, *World Report 2009*, above footnote 8.

[17] *Agreement on Cessation of Hostilities Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea*, UN Treaty Series Volume 2138, I-37273, 18 August 2000, available at http://untreaty.un.org/unts/144078_158780/17/8/8238.pdf. The parties reconfirmed their commitment to cease the hostilities in a further agreement signed and effective on 12 December 2000, i.e. *Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia for the resettlement of displaced persons, as well as rehabilitation and peacebuilding in both countries*, 12 December 2000, UN Treaty Series, Volume 2138, I-37274, p. 94, available at http://treaties.un.org/doc/Publication/UNTS/Volume_2138/v2138.pdf. These Agreements are generally referred to as the "Algiers Agreements".

[18] UN Security Council, *Security Council resolution 1320 (2000) [on deployment of troops and military observers within the UN Mission in Ethiopia and Eritrea (UNMEE)]*, S/RES/1320 , 15 September 2000, available at http://www.unhcr.org/refworld/docid/3b00efba18.html. See also International Crisis Group, *Ethiopia and Eritrea: Preventing the War*, 22 December 2005, available at http://www.unhcr.org/refworld/docid/43bd4a222.html.

[19] UN Security Council, Special *report of the Secretary-General on the United Nations Mission in Ethiopia and Eritrea*, S/2008/226, 7 April 2008, available at http://www.unhcr.org/refworld/docid/47ff86ea2.html.

[20] Alexandra Hudson, *Ethiopia-Eritrea Commission Ends, Border Unresolved*, Reuters, 1 December 2007, available at http://africa.reuters.com/top/news/usnBAN129629.html. The final report of the Eritrea-Ethiopia Boundary Commission was published on 3 October 2008; see UN Security Council, *Letter dated 2 October 2008 from the Secretary-General addressed to the President of the Security Council (United Nations Mission in Ethiopia and Eritrea)*, S/2008/630, 3 October 2008, available at http://www.un.org/Docs/sc/unsc_presandsg_letters08.htm. See also UN Security Council, *Security Council resolution 1827 (2008) [on termination of the mandate of the United Nations Mission in Ethiopia and Eritrea (UNMEE)]*, S/RES/1827 (2008), 30 July 2008, available at

relations between Eritrea and UNMEE, including the stoppage of fuel supply, denial of access to large sections of the TSZ and the opportunity to engage in aerial observation, resulted in the temporary relocation of UNMEE's military personnel and, eventually, the termination of its mandate in July 2008.[21]

Between 10 and 12 June 2008, after several weeks of military build-up, serious clashes were reported between the Djibouti Armed Forces (DAF) and the Eritrean Defence Forces (EDF) along the undemarcated border between the two countries. The incident reportedly concerned territorial claims to an area known as Doumeira, and resulted in over 35 deaths and dozens of wounded, according to an UN investigation.[22]

These developments have resulted in the establishment and maintenance of a large army and the country as a whole has been effectively on a military footing since its independence. With an estimated personnel of 200,000-320,000, Eritrea has one of the largest armies in Africa, and the largest in sub-Saharan Africa.[23] It spends approximately 6.3 percent of its gross domestic product (GDP) on the military, placing it ninth globally in per capita military expenditure.[24] An estimated 35 percent of its population is reported to be in active military service.[25] The requirements for

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http://www.unhcr.org/refworld/docid/4891d36a2.html (hereafter "UN Security Council Resolution 1827(2008)").

21 UN Security Council Resolution 1827(2008), above footnote 20.

22 Most of the border between Djibouti and Eritrea was never officially demarcated. Eritrea claims that both Ras Doumeira and Doumeira Island occupied by EDF forces since March 2008 form part of its territory in accordance with an unratified 1935 agreement between France and Italy allocating Doumeira Island to the then Italian-ruled Eritrea. See UN Security Council, *Letter dated 11 September 2008 from the Secretary-General addressed to the President of the Security Council : report of the United Nations fact-finding mission on the Djibouti-Eritrea crisis*, S/2008/602, 12 September 2008, available at http://www.unhcr.org/refworld/docid/49997ad80.htm. By January 2009, Eritrea had not withdrawn its forces to the *status quo ante*; see UN Security Council, *Security Council resolution 1862 (2009) [on resolving the border dispute between Djibouti and Eritrea and the withdrawal of Eritrean forces from the area of conflict]*, S/RES/1862(2009), 14 January 2009, available at http://www.unhcr.org/refworld/docid/49744ed52.html.

23 For sources estimating the Eritrean army at 200,000 personnel, see, for instance, EuropaONline, *Eritrea Profile*, as quoted in the United Kingdom Home Office, *Country of Origin Information Report – Eritrea*, 13 September 2008, para. 10.06, available at http://www.unhcr.org/refworld/docid/48f357592.html; and Jane's Information Group, *Sentinel Security Assessment - North Africa: Armed forces (Eritrea)*, 18 March 2008, available at http://www.janes.com/articles/Janes-Sentinel-Security-Assessment-North-Africa/Armed-forces-Eritrea.html. Other sources estimate the Eritrean army at 320,000; see Reuters, *In Eritrea, youth say frustrated by long service*, 18 July 2008, available at http://www.reuters.com/article/latestCrisis/idUSL14124755. In comparison, in 2008, the Ethiopian armed forces were estimated at 150,000; see Jane's Information Group, *Sentinel Security Assessment - North Africa: Armed forces (Ethiopia)*, 28 November 2008, available at http://www.janes.com/articles/Janes-Sentinel-Security-Assessment-North-Africa/Armed-forces-Ethiopia.html.

24 US Central Intelligence Agency, *The World Factbook: Eritrea*, last updated 5 March 2009, available at https://www.cia.gov/library/publications/the-world-factbook/geos/er.html#Military. In comparison, Ethiopia's estimated military spending represented 3 percent of the GDP; see US Central Intelligence Agency, *The World Factbook: Ethiopia*, last updated 5 March 2009, available at https://www.cia.gov/library/publications/the-world-factbook/geos/et.html#Military.

25 Immigration and Refugee Board of Canada, *Eritrea: Military service, including age of recruitment, length of service, grounds for exemption, penalties for desertion from and evasion of military service and availability of alternative service (2005 – 2006)*, ERI102026.E, 28 February 2007, available at http://www.unhcr.org/refworld/docid/469cd6b83.html (hereafter "IRB, *Eritrea: Military service*").

compulsory national service are enforced strictly as elaborated further below in these Guidelines, leading to one of the most important reasons for the new phase of flight from the country by Eritreans.

For 2008, the estimated GDP per capita stands at less than USD 307.[26] The country has practically no exports, while the cost of imports account for roughly 40 percent of the GDP. The cost of living, particularly in urban areas, is steadily increasing beyond the reach of most Eritreans.[27] There is a growing scarcity of basic staples such as bread, sugar and fuel, and, despite Government programmes designed to ensure food security, two thirds of the population are still reliant on food aid.[28] Social services in Eritrea remain basic and poverty is reportedly widespread. In 2006, electricity blackouts in the country, including in the capital, Asmara, were common due to energy shortages.[29]

III. Trends and types of Eritrean asylum claims

Thousands of Eritreans were externally displaced as a result of the war for independence from Ethiopia which raged between 1961 and 1991. The greater part of those refugees fled to and was hosted for years in Sudan until Eritrea's independence in 1993. While many of them returned home thereafter, a significant number is still living in eastern Sudan.[30]

The contemporary phase of flight into exile of Eritrean nationals with which these Guidelines are concerned is much broader. Since the 2000 Algiers Agreements, which marked the end of hostilities between Eritrea and Ethiopia and prompted the repatriation of thousands of refugees, ongoing tensions over the border demarcation between the two countries and recent border clashes with Djibouti have resulted in an increased military mobilization in Eritrea.[31] This mobilization, coupled with a deterioration of the human rights and humanitarian situation, has led to new flows of refugees.

Most Eritrean asylum-seekers flee to neighbouring Djibouti, Ethiopia and Sudan. In 2008 alone, over 8,000 Eritreans sought asylum in Ethiopia.[32] As of May 2008, there were approximately 18,000 Eritrean asylum-seekers and refugees in Shimelba Camp,

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[26] In 2006, the GDP per capita was less than USD 267. See International Monetary Fund, *World Economic Outlook Database*, April 2008, available at http://www.imf.org/external/pubs/ft/weo/2008/01/weodata/index.aspx.

[27] Awate.com, *Eritrea: sightings, hearings and movements*, 29 April 2008, available at http://www.awate.com/portal/content/view/4826/3/.

[28] HRW, *World Report 2009*, above footnote 8.

[29] Bertelsman Transitional Index 2008, *Eritrea Country Report*, 2008, available at http://www.bertelsmann-transformation-index.de/75.0.html?L=0.

[30] Precise numbers are currently not available due to an ongoing verification exercise, which is targeting over 168,000 Eritreans formerly registered with UNHCR. See UNHCR, *UNHCR Global Appeal 2008-2009 – Sudan*, 1 December 2007, available at http://www.unhcr.org/home/PUBL/474ac8cb0.pdf. Some 147,000 asylum-seekers and refugees, mostly Eritrean, have found refuge in eastern Sudan, among whom almost 96,000 live in 12 camps in Central, Gedaref, Sinar and Kassala States. See UNHCR, *Protracted Refugee Situations. High Commissioner's Initiative*, December 2008, p. 14, available at http://www.unhcr.org/refworld/docid/496f041d2.html.

[31] President Afwerki reportedly uses the border demarcation dispute with Ethiopia as a justification to maintain Eritrea on a "war footing". See, for instance, HRW, *World Report 2009*, above footnote 8.

[32] Figures provided by UNHCR Office in Ethiopia.

and a second refugee camp, in Mayani, had been established to cater for arrivals averaging 500 persons per month.[33]

In 2008, some 13,000 new asylum-seekers, a large number of whom were Eritrean, had been registered by UNHCR in Sudan by the end of October.[34] Most of the new arrivals are young (aged 17-25 years) and of urban background. The majority of them are men, but there are also women of the same age group. Virtually all have claimed to be fleeing Eritrea because of military service. Many are totally destitute.

Many Eritrean asylum-seekers move onward to other parts of the world, notably the Middle East and Europe. In the Middle East, they are frequently subjected to detention for long periods of time. For instance a group has allegedly been held in the Gizan Detention Center, in Saudi Arabia, for over seven years.[35] Reports also indicate that large numbers have been detained at various sites throughout Egypt,[36] and many have been sentenced by military tribunals for illegally entering the country or attempting to cross illegally into Israel.[37] Eritrean asylum-seekers in North Africa are also at risk of *refoulement*.[38]

In 2008, the number of Eritreans seeking asylum in industrialized countries increased to 12,311 applications from 9,160 in 2007, representing a 34 percent increase.[39] While the majority is fleeing the country's military service, claims are also based on other or cumulative grounds. In 2007, Eritrea was the world's third largest country of origin for individual asylum-seekers/refugees after Iraq and Somalia.[40]

According to UNHCR's analysis of the claims lodged by Eritreans and information provided by the States concerned, three main trends in the claims can be identified. First, a significant number of Eritrean nationals are fleeing military conscription. Secondly, there are Eritreans fleeing the country on account of religious persecution. The third typology in the asylum claims can be grouped together under the broad

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[33] Refugees International, *Ethiopia-Eritrea: Stalemate takes toll on Eritreans and Ethiopians of Eritrean origin*, 30 May 2008, available at http://www.refugeesinternational.org/sites/default/files/Ethiopia_stateless0530.pdf.

[34] See UNHCR, *Protracted Refugee Situations. High Commissioner's Initiative*, December 2008, p. 14, available at http://www.unhcr.org/refworld/docid/496f041d2.html.

[35] Journal Chretien, *Eritreans in Saudi Detention Center Begin Hunger Strike to Call for Resettlement,* 28 August 2008, available at http://journalchretien.net/breve14140.html.

[36] In June 2008, UNHCR had collected the names of some 1,400 Eritreans detained in various locations in Egypt. See UNHCR, *UNHCR interviews 179 Eritrean asylum seekers detained in Egypt*, 2 July 2008, available at http://www.unhcr.org/news/NEWS/486b9e9f4.html. See also AFROL News, *Eritreans forcibly returned "to torture"*, 12 June 2008, available at http://www.afrol.com/articles/29352, according to which, in June 2008, over 150 Eritreans were detained in police stations near Aswan city, and around 700, near the Red Sea cities of Hurghada and Marsa Alam.

[37] According to Human Rights Watch, women are generally sentenced to about six months' and men, to one year's imprisonment for such offences. See Human Rights Watch, *Sinai Perils: Risks to Migrants, Refugees and Asylum Seekers in Egypt and Israel*, 12 November 2008, p. 67, available at http://www.unhcr.org/refworld/docid/491aebbd2.html. See also Amnesty International, *Eritrean asylum-seekers face deportation from Egypt*, 19 December 2008, available at http://www.unhcr.org/refworld/docid/49509c20c.html.

[38] For more information on *refoulement*, please refer to Section V.2. Forcible return to Eritrea.

[39] According to UNHCR statistics. For 2008, the top countries of asylum for Eritrean claimants were Switzerland, Italy and the United Kingdom..

[40] UNHCR, *UNHCR Statistical Yearbook 2007*, December 2008, available at http://www.unhcr.org/statistics/STATISTICS/4981b19d2.html.

category of human rights violations owing to, *inter alia*, political opinion, freedom of speech/press and association. In addition, potential claims by women with specific profiles and homosexuals are also considered. These are the main groupings according to which the analysis and guidance in these Guidelines is organized.

IV. Eligibility for international protection

1. General approach

UNHCR considers that most Eritreans fleeing their country should be considered as refugees according to the criteria contained in the 1951 Convention relating to the Status of Refugees (1951 Convention)[41] and its 1967 Protocol,[42] and/or the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa (OAU Convention),[43] particularly on the grounds of "political opinion" (both real and imputed) and "religion". In this respect, the groups considered to have a presumption of eligibility include, but are not limited to, draft evaders/deserters, political opponents or dissidents (real or perceived), journalists and other media professionals, trade unionists and labour rights activists, members of religious minorities, women with particular profiles and homosexuals. In countries in which asylum claims are determined on an individual basis, they should be so duly considered in light of the 1951/OAU Conventions' criteria. All claims by Eritrean asylum-seekers should be considered on the basis of their individual merits according to fair and efficient refugee status determination procedures. In countries where Eritrean asylum-seekers have arrived in very large numbers, represent a discernible and similar pattern in the nature of their claims, and where refugee status determination exceeds the local capabilities, UNHCR encourages the adoption of a *prima facie* approach in processing claims.

Given the situation in Eritrea, some of the claims lodged by Eritrean asylum-seekers may give rise to possible exclusion from refugee status as explained in Part IV(3) of these Guidelines. Individuals already recognized as refugees, whether on a *prima facie* basis or following individual status determination, should retain this status. UNHCR also advises against return of Eritrean asylum-seekers to countries they may have transited or in which they may have been granted status, but from which there is a risk of *refoulement* or deportation. Should an individual demonstrate other needs for which a complementary form of protection would be appropriate, the needs and appropriate response should be assessed accordingly. In this regard, States' obligations under international human rights law remain unaffected.

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41 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, UN Treaty Series, Vol. 189, p. 137, available at http://www.unhcr.org/refworld/docid/3be01b964.html.

42 UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, UN Treaty Series, Vol. 606, p. 267, available at http://www.unhcr.org/refworld/docid/3ae6b3ae4.html.

43 Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45, available at http://www.unhcr.org/refworld/docid/3ae6b36018.html.

2. Inclusion for refugee status under the criteria of the 1951 and OAU Conventions

Article 1A(2) of the 1951 Convention and Article I(1) of the OAU Convention provide that the term "refugee" should apply to any person who

> "*owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*"

The above definition contains both a subjective and an objective element. The former refers to an individual's fear of harm in the event of return to Eritrea. The objective element refers to the applicant's fear being well-founded, which means that there is a reasonable likelihood that the harm feared or some other form of harm would occur upon return.[44] The well-founded fear of persecution must relate to one or more of the 1951 Convention or, where applicable, OAU Convention grounds, i.e. "race", "religion", "nationality", "political opinion" or "membership of a particular social group". The Convention ground concerned must be a relevant contributing factor, though it need not be the sole, or dominant, cause.[45]

Whether a fear is well-founded needs to be determined in the context of the situation in Eritrea, taking into account the personal profile, experiences and activities of the applicant, which would put him or her at risk.[46] Even where an individual may not have personally experienced actual harm or threats or risks of harm, events in his or her area of residence or relating to others with similar profiles may nonetheless give rise to a well-founded fear of persecution. The analysis of an asylum application should, therefore, include a full picture of the asylum-seeker's background and personal circumstances, and the prevailing situation in his or her area of origin or previous residence in Eritrea.

There is no definition of the term "persecution". It may, however, be inferred that a threat to life or freedom, other serious harm or serious violations of human rights, on account of race, religion, nationality, political opinion or membership of a particular social group, would constitute persecution.[47] Moreover, persecution is not limited to acts which cause physical harm. Severe discrimination could also amount to persecution, in particular where livelihood is threatened. Measures which restrict

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[44] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, paras. 37-41, available at http://www.unhcr.org/refworld/docid/3ae6b3314.html (hereafter "UNHCR Handbook").

[45] See, for instance, UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002, para. 20, available at http://www.unhcr.org/refworld/docid/3d36f1c64.html (hereafter "UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution*").

[46] UNHCR Handbook, above footnote 44, para. 45.

[47] See Article 33(1) of the 1951 Convention, above footnote 41, and Article II(3) of the OAU Convention, above footnote 43.

one's ability to earn a living so that survival is threatened would thus amount to persecution. Discriminatory measures that are not of a serious character by themselves may amount to persecution on a cumulative basis.[48]

Bearing in mind these considerations, the groups of Eritreans considered particularly at risk in view of the military, political and human rights situation in the country, and from which most of those who have fled the country and applied for asylum have originated, are examined below.

(a) Draft evaders/deserters

National service[49] is mandatory for every Eritrean, male or female, between the ages of 18 and 50.[50] "Active" national service consists of six months of training in the National Service Training Center and 12 months of active military service and development tasks in the military forces for a total of 18 months,[51] save in situations of mobilization or war when the active national service can be extended.[52] Persons suffering from disabilities may be exempted from national service,[53] while students and those medically unfit may be temporarily exempted.[54] Following the completion of 18 months of active national service, citizens are subject to compulsory service in the reserve army until the age of 50,[55] and as such are liable to be called for national mobilization, (further) military training or "defence in artificial or natural disasters".[56] For female conscripts, some sources assert that, in practice, the upper limit for conscription has been reduced to 27 years.[57] Although the Proclamation on National Service makes no reference to gender-based exemptions, some official Eritrean Government sources indicate that women in the military who marry are discharged.[58] In addition, Muslim women, nursing mothers and women with children are also reportedly exempted.[59]

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48 UNHCR Handbook, above footnote 44, paras. 54-55.

49 Pursuant to Article 2(2) of the *Proclamation on National Service No. 82/1995*, 23 October 1995, available at http://www.unhcr.org/refworld/docid/3dd8d3af4.html (hereafter "*Proclamation on National Service*"), "national service" encompasses "active national service" and "reserve military service" (i.e. service that a person who has undertaken active service will be called upon to perform in times of mobilization or other circumstances). For the purposes of these Guidelines, the terms "national service" and "military service" will be used interchangeably.

50 Articles 6 and 9 of the *Proclamation on National Service*, above footnote 49. "Active national service" is mandatory for all Eritreans between the ages of 18 and 40 (Article 8).

51 Article 8 of the *Proclamation on National Service*, above footnote 49.

52 Articles 18 and 21 of the *Proclamation on National Service*, above footnote 49.

53 Article 15 of the *Proclamation on National Service*, above footnote 49. Those who have been declared unfit to undertake military training must perform 18 months of national service in Government administrative functions (Article 13(1)).

54 Article 14 of the *Proclamation on National Service*, above footnote 49.

55 Article 23 of the *Proclamation on National Service*, above footnote 49.

56 Article 28 of the *Proclamation on National Service*, above footnote 49.

57 IRB, *Eritrea: Military service*, above footnote 25. See also HRW, *World Report 2009*, above footnote 8. According to the US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4, 47 constitutes the upper age limit for women.

58 In such cases, women must provide their marriage certificate in order to obtain their discharge documents. See Immigration and Refugee Board of Canada, *Eritrea: Whether women serving in the military are discharged when they marry; if so, evidence required to prove marriage*, ERI102729.E, 28 January 2008, available at http://www.unhcr.org/refworld/docid/47d6544d23.html.

59 UK Home Office, *Country of Origin Information Report – Eritrea*, 13 September 2008, paras. 11.32 and ff., available at http://www.unhcr.org/refworld/docid/48f357592.html (hereafter "UK

Conscription is reportedly enforced through routine "round-ups" (*giffa*) by police or the EDF, work-place and house searches, street abductions and detention of suspected evaders, as well as identity document checks, including at military road blocks on major roads.[60] Although the minimum age for military conscription is 18, forced underage recruitment, detention and ill-treatment of children has been reported.[61] A militarization of education is also reported.[62] The University of Asmara, prior to its closure in September 2006,[63] had reportedly denied enrollment to prospective students, who were instead required to attend vocational programmes.[64] Since 2003, a mandatory final year (12th grade) has been added to the secondary school curriculum, which students must attend at Sawa military training centre under military authority and including military-type training.[65] Students approaching conscription age have reportedly fled the country in the thousands or have gone into hiding.[66] Furthermore, Eritreans are reportedly subjected to repeated periods of service far exceeding the statutory limit of 18 months.[67]

Home Office, *2008 COI Report*"). There are, however, reports of round-ups for military service of women, including mothers. Based on the evidence available, the UK Asylum and Immigration Tribunal found in *WA (Draft Related Risks Updated – Muslim Women) Eritrea* CG [2006] UKIAT 00079, 30 October 2006, available at http://www.unhcr.org/refworld/docid/467f97062.html, that Muslim women were not *per se* exempt from military service, and thus could still be at risk of punishment for draft evasion.

60 See AI, *Eritrea: 'You have no right to ask'*, above footnote 10, p. 24. Those resisting conscription are reportedly shot. In an official communication on 27 January 2005, the Government indicated that four persons had been fatally wounded in one such round-up; see UN Commission on Human Rights, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Addendum*, E/CN.4/2006/52/Add.1, 27 March 2006, paras. 82-85, available at http://www.unhcr.org/refworld/docid/49997ae020.html.

61 UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: concluding observations: Eritrea*, CRC/C/ERI/CO/3, 23 June 2008, paras. 40 and 70, available at http://www.unhcr.org/refworld/docid/4885cfaad.html (hereafter "UN CRC, *Convention on the Rights of the Child: concluding observations: Eritrea*"); Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2008 – Eritrea*, 20 May 2008, available at http://www.unhcr.org/refworld/docid/486cb0fdc.html. In Eritrea birth registration is used to identify children for forced conscription. See UNICEF, Innocenti Research Group, *Birth Registration and Armed Conflict*, 2007, p. 10, available at http://www.unicef.at/fileadmin/medien/pdf/birth_registration_and_armed_conflict.pdf. In February 2006, a reported round-up in the Anseba region included a sweep of all high schools in the region. All students in grades 10 and 11, who were 17 years or older, were put on buses and sent to a remote military location in Wia, in the north of the country. See IRB, *Eritrea: Military service*, above footnote 25.

62 BBC, *Eritrea rapped for 'military' schooling*, 11 January 2004, available at http://news.bbc.co.uk/2/hi/africa/3386965.stm. The Government requires final year (11th grade) secondary students and all university students to do up to 2-3 months summer vacation work service on development projects.

63 Awate.com, *Lamenting my university: the de-institutionalization of the University of Asmara in commemoration of the 50th anniversary of the University*, 20 January 2008, available at http://www.awate.com/portal/content/view/4739/5/ .

64 Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

65 See AI, *Eritrea: 'You have no right to ask'*, above footnote 10; and Freedom House, *Freedom in the World 2008 – Eritrea*, 2 July 2008, available at http://www.unhcr.org/refworld/docid/487ca208a5.html.

66 US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

67 The Government reportedly justifies its open-ended draft on the basis of the undemarcated border with Ethiopia. See HRW, *World Report 2009*, above footnote 8. See also *MA (Draft Evaders – Illegal Departures – Risk) Eritrea* CG [2007] UKAIT 00059, 26 June 2007 (UK Asylum and Immigration Tribunal), para. 307, available at http://www.unhcr.org/refworld/docid/

The Proclamation on National Service sets out the penalties for military violations, including for attempting to avoid national service by deceit or self-inflicted mutilation, escape from, and flight from active national service or registration.[68] The standard sanction is a fine of 3,000 Bir (now ca. 4,600 Nakfa)[69] and/or two years' imprisonment. For those who fled abroad specifically to avoid military service and who did not return before the age of 40, the punishment increases to five years' imprisonment or until the person reaches the age of 50. Rights to own land, to obtain an exit visa, to work and other "privileges" can also be suspended.[70]

In addition to the penalties imposed under the Proclamation on National Service, the penalties stipulated in the Eritrean Transitional Penal Code (ETPC)[71] also cover military violations, including failure to enlist, or re-enlist, seeking fraudulent exemptions, desertion, absence without leave, refusal to perform military service and infliction of unfitness (injury to avoid service). The punishment ranges from six months' to 10 years' imprisonment depending on the gravity of the act. During emergencies or mobilizations, the penalties are significantly more severe. Desertion is the most severely sanctioned and entails imprisonment for up to five years, but in times of mobilization or emergency this can increase from five years to life, or, in the gravest cases, death, for desertion from a unit, post or military duties or for failure to return to them after an authorized period of absence.[72] Since military courts are not operative, punishment for military offences is carried out extrajudicially, and has been widely reported to include "shoot to kill" orders,[73] detention for long periods, torture and forced labour.[74] Draft evaders/deserters are reported to be frequently subjected to torture,[75] while conscientious objectors can face extreme physical punishment as a

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46822c3f2.html (hereafter "*MA (Draft Evaders – Illegal Departures – Risk)*"); and US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

68 Article 37 of the *Proclamation on National Service*, above footnote 49.

69 Articles 6 and 9 of the *Proclamation on National Service*, above footnote 49.

70 Articles 6 and 9 of the *Proclamation on National Service*, above footnote 49.

71 *Eritrea Transition Penal Code (Proclamation No. 158 of 1957)*, 23 July 1957, available at http://www.unhcr.org/refworld/docid/49216a0a2.html (hereafter "ETPC").

72 Articles 296 to 302 of the ETPC, above footnote 71.

73 Reports claim that the Government authorized the use of lethal force against anyone resisting or attempting to flee during military searches for deserters and draft. See, for instance, HRW, *World Report 2009*, above footnote 8; US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4; and UNHCR, *Registration of refugees begins in eastern Sudan*, 4 March 2008, available at http://www.unhcr.org/news/NEWS/47cd36042.html. There were also reports of "shoot to kill" orders for illegal border-crossers, including those fleeing national service; see Reuters, *Ethiopia says Eritrea forces shot at deserters*, 25 January 2008, available at http://www.reuters.com/article/africaCrisis/idUSL25768510. See also Christian Solidarity Worldwide, *Eritrea: Repression of religious freedom, torture and arbitrary detention*, 1 July 2007, available at http://www.online2.church123.com/attach.asp?clientURN=christiansolidarityworldwide&attachFileName=001ce79a6a106404529f57fd49f4de4e.attach&attachOriginalFileName=CSW_briefing_Eritrea_June_2007.pdf, and Suwera Centre for Human Rights, *The State of Human Rights in Eritrea, 2006*, April 2007.

74 Draft evaders and deserters, who have not attempted to leave the country, have been used as labourers on Government development projects as punishment. See, for example, US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4; and WRITENET, *Eritrea: Challenges and Crisis of a New State*, 1 October 2006, available at http://www.unhcr.org/refworld/docid/4538821e4.html. This was also confirmed by information obtained during UNHCR-conducted interviews with Eritrean deserters in 2008.

75 Human Rights Watch, *Human Rights Watch World Report 2007 – Eritrea*, 11 January 2007, available at http://www.unhcr.org/refworld/docid/45aca29eb.html. See also AI, *Eritrea: 'You have no right to ask'*, above footnote 10. Deserters and draft evaders are reportedly subjected to, *inter*

means of forcing them to perform military service.[76] Furthermore, extrajudicial executions are allegedly ordered by local commanders and carried out in front of military units for what might be serious military offences.[77] In practice, the punishment for desertion or evasion is thus severe and disproportionate such as to constitute persecution.[78]

Although fear of prosecution and punishment on the grounds of desertion or draft evasion does not in itself constitute a well-founded fear of persecution, a deserter/draft evader may be considered a refugee "if it can be shown that he [or she] would suffer disproportionately severe punishment for the military offence on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he [or she] has a well-founded fear of persecution on [those] grounds […] and beyond the punishment for desertion."[79]

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alia, prolonged sun exposure in high temperatures, binding of hands, elbows and feet for extended periods of time, suspension from trees with hands tied behind back (i.e. the "almaz" or diamond technique), tying of hands to the feet (i.e. the "helicopter" technique). See also BBC News, *Eritrean Christians tell of torture*, 27 September 2007, available at http://news.bbc.co.uk/2/hi/africa/7015033.stm.

[76] US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[77] AI, *Eritrea: 'You have no right to ask'*, above footnote 10, pp. 24 and 31.

[78] UNHCR Handbook, above footnote 44, paras. 170-173. Many jurisdictions have granted asylum to Eritrean draft evaders and deserters on this basis. See, for example, *Ukashu Nuru, aka Ukasha Nuru v. Alberto R. Gonzales, Attorney General*, 03-71391; A77-954-387, 21 April 2005 (United States Court of Appeals for the Ninth Circuit), available at http://www.unhcr.org/refworld/docid/428482de4.html, where the Court held, *inter alia*, that "torture is *per se* disproportionately harsh; it is inherently and impermissibly severe; and it is *a fortiori* conduct that reaches the level of persecution"; *Refugee Appeal No. 75668*, 25 May 2006 (Refugee Status Appeals Authority New Zealand), available at http://www.unhcr.org/refworld/docid/48abd57cd.html (hereafter "*Refugee Appeal No. 75668*"); *L.H. Erytrea*, JICRA 2006/3, 20 December 2005 (Commission suisse de recours en matière d'asile), available at http://www.ark-cra.ch/emark/2006/03.htm; *IN (Draft Evaders – Evidence of Risk) Eritrea* CG [2005] UKIAT 00106, 24 May 2005 (UK Immigration Appeal Tribunal), available at http://www.unhcr.org/refworld/docid/46836aa5d.html (hereafter "*IN (Draft Evaders – Evidence of Risk)*"). The latter was supplemented and amended by *MA (Draft Evaders – Illegal Departures – Risk)*, above footnote 67. In *MA*, the Tribunal held that:

> "*[a] person who is reasonably likely to have left Eritrea illegally will in general be at real risk on return if he or she is of draft age, even if the evidence shows that he or she has completed Active National Service […]. By leaving illegally while still subject to National Service, (which liability in general continues until the person ceases to be of draft age), that person is reasonably likely to be regarded by the authorities of Eritrea as a deserter and subjected to punishment which is persecutory and amounts to serious harm and ill-treatment. […] Illegal exit continues to be a key factor in assessing risk on return. A person who fails to show that he or she left Eritrea illegally will not in general be at real risk, even if of draft age and whether or not the authorities are aware that he or she has unsuccessfully claimed asylum in the United Kingdom*."

See also *Said v. The Netherlands*, Application No. 2345/02, 5 July 2005 (European Court of Human Rights), available at http://www.unhcr.org/refworld/docid/42ce6edf4.html, where the Court found a violation of Article 3 of the European Convention for Human Rights.

[79] UNHCR Handbook, above footnote 44, para. 169. Punishment for refusing to perform military service may constitute persecution if, *inter alia*, owing to a 1951 Convention (or OAU Convention) reason: the punishment is applied in a discriminatory manner; the punishment is aggravated; or the person is denied due process of law. See, for instance, UNHCR, *Basis of Claims and Background Information on Asylum-Seekers and Refugees from the Republic of Belarus*, 8 October 2004, para. 11, available at http://www.unhcr.org/refworld/docid/4166b71a4.html.

Even where a claim is not based on actual political opinion, or not perceived by the draft evader or deserter as being an expression of political opinion, refusal to perform military service may nevertheless amount to imputed political opinion. "Military service and objection thereto, seen from the point of view of the State, are also issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of State authority; it is a political act."[80] Military service has become politicized in Eritrea and actual or perceived evasion or desertion from military service is regarded by the Eritrean authorities as an expression of political opposition to the regime.[81] Persons who evade or desert military service are regarded as disloyal and treasonous towards the Government,[82] and are punished for their perceived disloyalty. Hence, persons of, or approaching, military service age, who are medically fit, are at risk of persecution

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[80] Guy S. Goodman-Gill and Jane McAdam, *The Refugee in International Law*, Oxford, 3rd edition, 2007, p. 111. See also *Refugee Appeal No. 75378*, 19 October 2005 (New Zealand Refugee Status Appeals Authority), para. 116, available at http://www.unhcr.org/refworld/docid/477cfbc20.html (hereafter "Guy S. Goodman-Gill and Jane McAdam, *The Refugee in International Law*"):

> "*Under any circumstance, an objection by an individual to a law requiring compulsory military service is inherently an expression of an opinion as to the boundaries of state power in relation to the individual; it is inherently political.*";

and *Refugee Appeal No. 76183*, 13 May 2008 (New Zealand: Refugee Status Appeals Authority), paras. 50-51, available at http://www.unhcr.org/refworld/docid/4835286d2.html. See also *Erduran v. Minister for Immigration & Multicultural Affairs* [2002] FCA 814, 27 June 2002 (Federal Court of Australia), available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2002/814.html; and *Zolfagharkhani v. Canada (Minister of Employment and Immigration)* [1993] 3 F.C. 540, 15 June 1993 (Federal Court of Canada), available at http://www.unhcr.org/refworld/docid/48abd5710.html.

[81] See *IN (Draft evaders – evidence of risk)*, above footnote 78, para. 44. *IN* was affirmed, to this extent, by subsequent country guidance, including *MA (Draft Evaders – Illegal Departures – Risk)*, above footnote 67. In *MA*, the Tribunal held that:

> "*that a person of military service age or who is approaching military service age who leaves Eritrea illegally before undertaking or completing Active National Service (as defined in Article 8 of the 1995 Proclamation) […], is reasonably likely to be regarded by the Eritrean authorities as a deserter and punished accordingly. The evidence of a "shoot to kill" policy in respect of deserters, the imprisoning of parents and the process known as "the giffa", together with the more general objective evidence regarding the oppressive nature of the Eritrean regime, confirms that any such punishment is likely to be both extra-judicial and of such a severity as to amount to persecution, serious harm and ill-treatment. What also emerges plainly from the evidence, is that a person of draft age, who has left illegally and who is not medically unfit will be similarly regarded even if he has completed Active National Service and has been "demobilised" therefrom because, in the absence of special factors, he or she is still regarded as being subject to National Service. The country guidance in IN […] is therefore modified so as to include this category of persons amongst those who are in general at real risk.*" (paras 445-446).

See also *GM (Eritrea); YT (Eritrea); MY (Eritrea) v. Secretary of State for the Home Department* [2008] EWCA Civ 833. United Kingdom: Court of Appeal (England and Wales), 17 July 2008, available at http://www.unhcr.org/refworld/docid/4880598b2.html, and *Refugee Appeal No. 75668*, above footnote 78. The politicization of the military service is evidenced, *inter alia*, by the armed forces being under the personal control of the President, the special courts being staffed with military officers, and the use of military service as a repressive measure against real or perceived opponents of the Government. See, for instance, HRW, *World Report 2009*, above footnote 8.

[82] In 2008, President Afewerki claimed that international reports of increasing number of Eritrean refugees were deliberate distortions and that defections were caused by an "orchestrated, organized operation financed by the CIA." See HRW, *World Report 2009*, above footnote 8; see also Jack Kimball and Andrew Cawthorne, *Eritrean leader blames CIA plot for youth exodus*, Reuters, 13 May 2008, available at http://www.reuters.com/article/latestCrisis/idUSL13745161.

on return to Eritrea as actual or perceived draft evaders or deserters on the ground of imputed political opinion.

There are also cases where the performance of military service would require the individual's participation in military action contrary to his or her genuine political, religious or moral convictions, or to valid reasons of conscience. Refusal to perform military service on the ground of religious convictions may give rise to a well-founded fear of persecution, where such convictions are proved genuine and they are not taken into account by the authorities in requiring the applicant to perform military service. Moreover, conscientious objection itself may be regarded as a form of political opinion,[83] and conscientious objectors, or some particular class of them, could constitute a particular social group.[84] While a State has a justifiable interest in ensuring national security, the measures taken to that end must be "reasonably necessary in a democratic society".[85] Whether an objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in light of developments in this field, including the fact that an increasing number of States have introduced alternatives to compulsory military

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[83] Not taking a position because of religious beliefs, may also amount to imputed political opinion, for example in situations of civil conflict. See, for instance, *Jose Roberto Canas-Segovia, Oscar Iban Canas-Segovia v. Immigration and Naturalization Service*, 902 F.2d 717, 24 April 1990 (United States Court of Appeals for the Ninth Circuit), available at http://www.unhcr.org/refworld/docid/3ffd6f7e4.html:

> "*The [appellants'] refusal to do military service because of their religious beliefs also necessarily places them in a position of political neutrality in the Salvadoran civil conflict. […] An expression of political neutrality is no less an expression of political opinion than is the decision to affiliate with an organized political faction.*"

Later confirmed on this issue in *Jose Roberto Canas-Segovia, Oscar Iban Canas-Segovia v. Immigration and Naturalization Service*, 970 F.2d 599, 10 July 1992 (United States Court of Appeals for the Ninth Circuit), available at http://www.unhcr.org/refworld/docid/40016ecc4.html.

[84] The Federal Court of Australia adopted the same view in *SZAOG v. Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 316, 29 November 2004, available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2004/316.html:

> "*While it may be possible for conscientious objection itself to be regarded as a form of political opinion, the question would still need to be asked whether the conscientious objection to military service had a political or religious basis or whether conscientious objectors, or some particular class of them, could constitute a particular social group. If a person would be punished for refusing to undergo military service by reason of conscientious objection stemming from political opinion or religious view, or the conscientious objection is itself political opinion, it may be possible to find that the person is liable to be persecuted for a Convention reason.*"

See also *Erduran v. Minister for Immigration & Multicultural Affairs* [2002] FCA 814, 27 June 2002 (Federal Court of Australia), available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2002/814.html.

[85] Guy S. Goodman-Gill and Jane McAdam, *The Refugee in International Law*, above footnote 80, p. 111. The European Court of Human Rights interprets this phrase as meaning "justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued". See, for instance, *Beldjoudi v. France*, 12083/86, 26 February 1992, available at http://www.unhcr.org/refworld/docid/4029f4bc4.html. In *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, CCPR/C/88/D/1321-1322/2004, 23 January 2007, available at http://www.unhcr.org/refworld/docid/48abd57dd.html (hereafter "*Yeo-Bum Yoon*"), the UN Human Rights Committee held that restrictions on one's right to manifest religious beliefs "must be prescribed by law and be necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others".

service.[86] In the absence of substitute or alternative military service, as is the case in Eritrea, the likelihood of prosecution and/or the severity of punishment must be examined in order to determine whether they amount to persecution.[87] To this effect, disproportionate, excessive or arbitrary punishment may well amount to persecution.[88]

While the unimplemented Eritrean Constitution guarantees freedom of thought, conscience and belief,[89] conscientious objection is not recognized under Eritrean law.[90] In addition, no alternative or substitute service is offered to conscientious objectors, including members of the Jehovah's Witness faith affiliation, who make themselves available for national service on condition that they are not required to carry arms.[91] Although members of other religious groups, including Muslims – one of the four State-sanctioned religions –, have been reportedly imprisoned for failure to undertake military service, Jehovah's Witnesses continue to be subjected to harsher treatment, such as dismissal from civil service; revocation of business licenses; eviction from Government housing; and denial of identity cards, passports and exit visas.[92] Conscientious objectors, particularly Jehovah's Witnesses, may thus be at risk of persecution, on the ground of their religion, imputed political opinion or membership of a particular social group, for draft evasion or desertion.

Moreover, a pattern of sexual violence against female conscripts exists within the military. Some female conscripts are reportedly subjected to sexual harassment and violence, including rape.[93] There have been reports of female conscripts coerced into having sex with commanders, including through threats of heavy military duties, harsh postings, and denial of home leave. Refusal to submit to sexual exploitation and

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[86] UNHCR Handbook, above footnote 44, paras. 170-173. See also *Yeo-Bum Yoon*, above footnote 85, where the UN Human Rights Committee held that in the absence of an alternative to compulsory military service, under pain of criminal prosecution and imprisonment, the Republic of Korea breached the applicants' rights under Article 18 of the International Covenant on Civil and Political Rights (freedom of thought, conscience and religion).

[87] UNHCR Handbook, above footnote 44, para. 169. See also Guy S. Goodman-Gill and Jane McAdam, *The Refugee in International Law*, above footnote 80, p. 112.

[88] In a recent case, the Refugee Review Tribunal of Australia held that a Jehovah's Witness who objected to military service in Lebanon on account of his religious beliefs and who, as a result, had been detained and ill-treated, had suffered serious harm amounting to persecution on the ground of his religion. See *RRT Case No. 071370063* [2007] RRTA 118, 27 June 2007, available at http://www.unhcr.org/refworld/docid/47f396722.html. See also *RRT Case No. 071843748* [2008] RRTA 37, 20 February 2008, available at http://www.unhcr.org/refworld/docid/482052062.html, where the Tribunal held that a Christian from South Korea faced a real chance of persecution on the ground of his religion for refusing to undergo compulsory military service by reason of his conscientious objection. Although the Tribunal found that the law allowing for compulsory service was, on its face, a "non-discriminatory law of general application", it indirectly discriminated against the applicant on the ground of religion. Amongst the factors considered were: the absence of a legislative limit on the number of times a person could be recalled or subjected to penalties of up to three years imprisonment for evading, as well as the absence of alternative military service.

[89] Article 19 of the Constitution, above footnote 7.

[90] US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[91] WRITENET, *Eritrea: Challenges and Crisis of a New State*, above footnote 74.

[92] US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[93] See, for instance HRW, *World Report 2009*, above footnote 8; and US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4. See also Cecilia M. Bailliet, *Examining Sexual Violence in the Military Within the Context of Eritrean Asylum Claims Presented in Norwa*", International Journal of Refugee Law, 2007, Vol. 19, Issue 3, pp. 471-510 (hereafter "Bailliet, *Examining Sexual Violence in the Military*").

abuse is allegedly punished by detention, torture and ill-treatment, including exposure to extreme heat and limitation of food rations. No effective mechanism for redress or protection exits within or outside the military, and perpetrators generally go unpunished. Women, who become pregnant as a result, are decommissioned and are likely to experience social ostracism from their families and communities as unmarried mothers,[94] and may resort to committing suicide to escape the cycle of abuse.[95] In light of the pervasive gender-based violence within the military and its serious consequences, women draft evaders/deserters may be at risk of persecution as a particular social group.[96]

Family members and relatives of draft evaders and deserters may also be at risk of persecution due to the practice of substitute service and/or punitive fines and imprisonment, and could be considered, in this respect, as a particular social group. Since 2005, the Government has instituted measures to address the widespread evasion of and desertion from military service, including: arrest of family members, mostly parents, of children who have not reported to the military training camp at Sawa for their final year of high school or have not reported for national service;[97] imposition of fines on families of draft evaders;[98] forced conscription of family members, particularly the father, of the draft evader;[99] and withdrawal of trade

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[94] AI, *Eritrea: 'You have no right to ask'*, above footnote 10; and Bailliet, *Examining Sexual Violence in the Military*, above footnote 93, pp. 471-510. Moreover, abortion is illegal in Eritrea. See Articles 528 and ff. of the ETPC, above footnote 71.

[95] Bailliet, *Examining Sexual Violence in the Military*, above footnote 93, pp. 471-510.

[96] See UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution*, above footnote 45; and UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002, available at http://www.unhcr.org/refworld/docid/3d36f23f4.html (hereafter "UNHCR, *Guidelines on International Protection No. 2: Membership of a Particular Social Group*). In *VSAI v. Minister for Immigration & Multicultural and Indigenous Affairs* [2004] FCA 1602, 8 December 2004 (Federal Court of Australia), available at http://www.unhcr.org/refworld/docid/48abd57d0.html, the Federal Court of Australia held that the Refugee Review Tribunal erred in finding that the incidence of rape and sexual abuse by military officers of Eritrean female draftees did not occur on a sufficient scale to constitute persecution. It further held that the Tribunal misdirected itself by not asking whether rape, sexual abuse and impregnation by military officers (of which facts it was satisfied) was deliberate or pre-meditated conduct, exposure to which the applicant could not be expected to tolerate. The Court also recognized that Eritrean "female draftees" constituted a particular social group within the meaning of Article 1A(2) of the 1951 Convention.

[97] Amnesty International, *Eritrea: Over 500 parents of conscripts arrested*, AFR 64/015/2006, 21 December 2006, available at http://www.amnestyusa.org/document.php?lang=e&id=ENGAFR640152006. See also Human Rights Watch, *Human Rights Watch World Report 2007 – Eritrea*, 11 January 2007, available at http://www.unhcr.org/refworld/docid/45aca29eb.html; IRB, *Eritrea: Military service*, above footnote 25; Amnesty International, *Amnesty International Report 2008 – Eritrea*, 28 May 2008, available at http://www.unhcr.org/refworld/docid/483e27893c.html (hereafter "AI Report 2008").

[98] HRW, *World Report 2009*, above footnote 8. Since 2005, families of draft evaders have reportedly been fined at least 50,000 Nakfa (US $3,300). This amount is more than 10 times the amount envisaged in the *Proclamation on National Service*, above footnote 49, (3,000 Bir/4,600 Nakfa) as a sanction for draft evaders and no provisions exist for vicarious liability in the Proclamation (Articles 6 and 9).

[99] Human Rights Watch, *World Report 2008 – Eritrea*, 31 January 2008, available at http://www.unhcr.org/refworld/docid/47a87c0141.html. See also Awate.com, *Thousands of Eritrean Parents Arrested in the Southern Region; Government Also Targets Young Females*, 17 July 2005, available at http://www.awate.com/artman/publish/article_4186.shtml. According to information obtained through UNHCR-conducted interviews with Eritrean deserters in 2008, the

licenses and closure of businesses held by members of the nuclear family of a deserter/draft evader.[100]

Furthermore the authorities reportedly do not grant exit visas to those of military age. Among those routinely denied exit visas are men up to the age of 54, regardless of whether they have completed national service, and women under the age of 47,[101] as well as students wanting to study abroad.[102] Individuals of, or approaching, draft age, who leave Eritrea illegally, will be at risk of persecution as a (perceived) deserter or draft evader upon return to Eritrea. This is equally true for those who have completed active national service or have been demobilized, given that all persons of draft age are subject to national service and, as such, are liable to be recalled.

(b) Political opponents and critics

(i) Members of opposition political groups and dissidents

The unimplemented Eritrean Constitution guarantees to every citizen the right to form organizations for political ends.[103] The People's Front for Democracy and Justice (PFDJ), which came to power in 1993 by popular referendum, is however the only authorized political party.[104] As a result, opposition groups have been driven out of the country and, since late 2004, operate only in exile.[105]

Opposition groups abroad, most of which are based in neighbouring Ethiopia and Sudan, are split into two major affiliations, namely (i) the Democratic Party, which has agreed a common set of objectives with two older parties (the Eritrean Liberation Front (ELF) and the Eritrean Liberation Front-Revolutionary Council (ELF-RC, a splinter group of the ELF)); and (ii) the Eritrean National Alliance (ENA), an umbrella organisation consisting of several and varied opposition groups.[106] Some of

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parents (whether father or mother) will de detained and/or interrogated every time a member of the (immediate) family deserts.

[100] Information obtained through UNHCR-conducted interviews.

[101] Mail & Guardian Online, *In Eritrea, youth frustrated by long service*, 18 July 2008, available at http://www.mg.co.za/article/2008-07-18-in-eritrea-youth-frustrated-by-long-service. See also United Kingdom decision relating to exit visas for soldiers: *IN (Draft evaders – evidence of risk)*, above footnote 78. Note the ages of those denied visas do not coincide with the maximum age limits for compulsory service and are much higher particularly for women. In 2006, the authorities began refusing exit visas to children as young as 11 on the grounds that they were approaching the age of eligibility for national service. The authorities also have refused exit visas to children as young as five either on the grounds that they were approaching the age of eligibility for national service or because their expatriate parents had not paid the two percent income tax required of all citizens residing abroad. See US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[102] US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[103] Article 19 of the Constitution, above footnote 7. Article 14 also states that no one may be discriminated against on account of their political views.

[104] US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4. See also The Economist Intelligence Unit, *Eritrea Country Profile* 2008.

[105] Economist Intelligence Unit, *Eritrea Country Profile* 2008.

[106] Economist Intelligence Unit, *Eritrea Country Profile* 2008. Further information on opposition and disapora groups is available at: Eritrean Liberation Front-Revolutionary Council (ELF-RC), www.awate.com / http://www.nharnet.com; Eritrean Liberation Front (ELF), www.awate.com / http://www.omaal.net; Eritrean National Alliance, http://www.erit-alliance.com/Info/organstruct.asp. See also UK Home Office, *2008 COI Report*, above footnote 59.

these groups broadcast radio and television programmes to Eritrea via satellite,[107] and maintain active websites highly critical of the Eritrean Government.

The viability of freely operating from Sudan has, however, become restricted following the restoration of diplomatic ties in 2006 between Sudan and Eritrea,[108] and the subsequent Sudanese Government's pledge to ban the Eritrean opposition groups operating within its territory.[109] Since then, Sudan has reportedly provided Eritrea with intelligence on the military bases of Eritrean opposition groups, opposition activists, and the type of assistance previously provided to the Eritrean opposition by the Sudanese Government.[110] Soon after, the opposition radio station, *Al Sharq*, which was broadcasting from Khartoum, was shut down.[111]

In September 2001, 11 PFDJ Government ministers and four former independent movement leaders, known as the Group of 15 (G15), were arrested after publicly calling for democratic reforms, including the implementation of the Constitution and holding of elections.[112] They have reportedly been held at the Eiraeiro prison complex, in solitary confinement and *incommunicado*,[113] and subjected to torture and other ill-treatment.[114] It has been reported that at least nine have died in detention, and four were still held without a charge.[115] There are further reports of politically motivated arrests and detention,[116] including that of General Ogbe Abraha, the former

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[107] UK Home Office, *2008 COI Report*, above footnote 59. AllAfrica.com, *Eritrea: Opposition Launches Satellite TV Against President*, 28 February 2008, available at http://allafrica.com/stories/200802281127.html.

[108] UNHCR, *UNHCR Global Report 2006, Sudan – Chad Situation*, June 2007, available at http://www.unhcr.org/refworld/docid/466d20a32.html.

[109] Sudan Tribune, *Eritrean opposition groups call on Sudan to lift imposed ban*, 9 June 2008, available at http://www.sudantribune.com/spip.php?article27455. Sudan has also reportedly denied these groups the possibility to conduct their meetings on Sudanese territory. See *Eastern Sudan Peace Agreement*, available through Sudan Tribune at http://www.sd.undp.org/doc/Eastern_States_Peace_Agreement.pdf.

[110] Although UNHCR is not in a position to corroborate them, there are reports that Sudan has condoned the abduction of Eritreans from its territory by Eritrean intelligence services. See, for instance, Sudan Tribune, *Eritrea reportedly abducting 4,000 Eritreans from Sudan*, 26 December 2007, available at http://www.sudantribune.com/spip.php?article25321. See also, Sudan Tribune, *Asmara and Khartoum accused of deporting Eritrean from Sudan*, 11 December 2007, available at http://www.sudantribune.com/spip.php?article25120.

[111] Awate.com, *Restricting The Opposition's Influence*, 26 November 2006, available at http://www.awate.com/portal/content/view/4398/19/.

[112] US Department of State, *Background Note on Eritrea*, April 2008, available at http://www.state.gov/r/pa/ei/bgn/2854.htm.

[113] UK Home Office, *2008 COI Report*, above footnote 59, para. 6.06.

[114] UK Home Office, *2008 COI Report*, above footnote 59, para. 6.06.

[115] UK Home Office, *2008 COI Report*, above footnote 59. Some were reportedly charged with treason, but had not yet been prosecuted. See also AI Report 2008, above footnote 97; and US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[116] According to UN Human Rights Council, *The right to freedom of opinion and expression: report of the Special Rapporteur, Ambeyi Ligabo: addendum*, A/HRC/4/27/Add.1, 26 March 2007, para. 224, available at http://ap.ohchr.org/documents/dpage_e.aspx?c=61&su=69, some 65 political prisoners, including former ministers, high-ranking civil and military officers, members of the opposition and journalists are held at the Eiraeiro detention centre, the majority having been arrested in the aftermath of the September 2001 protests. At the time of the publication of the report, charges were yet to be brought against the prisoners. Further politically-motivated arrests were reported; see AI Report 2008, above footnote 97.

Chief of staff of the Eritrean Armed Forces, who allegedly died in detention due to the harsh prison conditions and denial of medical treatment.[117]

In light of the crackdown which led up to, *inter alia*, the arrest and detention of the G15 and the banning of all privately owned newspapers, and given the subsequent politically motivated arrests, members of, or persons associated with or perceived to be associated with, opposition political groups, as well as political dissidents or persons perceived as political dissidents, may have a well-founded fear of persecution on the basis of their political opinion.[118]

(ii) Journalists and other media professionals

There are constitutional guarantees regarding freedom of speech and expression, including freedom of the press and other media.[119] Notwithstanding these provisions, the Government closed down all privately-owned press and media outlets in September 2001 on national security grounds.[120] The crackdown on independent media followed the publication of dissenting or critical viewpoints by some National Assembly members, and resulted in the arrest and detention of several journalists.[121] In 2008, only three reporters representing foreign news organizations (AFP, Reuters, Al-Jazeera) were allowed to operate in the country, albeit frequently prevented from filing stories with their news organizations.[122] Foreign newspapers are rarely sold and their importation is prohibited.[123] Eritrea was the last country in Africa to enable local

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[117] AI Report 2008, above footnote 97.

[118] Several national jurisdictions have recognized that actual or perceived political dissenters faced a real risk of persecution upon return to Eritrea. See, for instance, *RRT Case No. 0806040* [2008] RRTA 431, 20 November 2008 (Refugee Review Tribunal of Australia), available at http://www.unhcr.org/refworld/docid/498c49aa2.html. The Tribunal held that the applicant had a well-founded fear of persecution on the basis of her political opinion. The Tribunal found that the applicant's unauthorized departure from Eritrea, her application for refugee status, her criticism of the Eritrean government, and her family background, had and would continue to attract the adverse interest of the Eritrean. The country of origin information clearly indicated that the Eritrean Government did not tolerate dissent (real or perceived) and citizens targeted by the authorities had no means of defending themselves.

[119] Article 19 of the Constitution, above footnote 7.

[120] UN Commission on Human Rights, *Promotion and protection of human rights : human rights defenders: report: addendum / submitted by the Special Representative of the Secretary-General on Human Rights Defenders, Hina Jilani*, E/CN.4/2006/95/Add.5, 6 March 2006, para. 563, available at http://ap.ohchr.org/documents/dpage_e.aspx?c=61&su=69 (hereafter "UN Commission on Human Rights, *Promotion and protection of human rights defenders*"). The Eritrean *Press Proclamation No. 90/1996*, 10 June 1996, available at http://www.unhcr.org/refworld/docid/48512e992.html, provides the legal framework for journalists and media operators. Intentional reporting of falsehoods, but also any material deemed to be contrary to national or public interest or that could be construed to cause societal divisions and dissension will constitute a violation of the *Press Proclamation*.

[121] In 2004, the BBC correspondent was expelled from Eritrea; see BBC *Country Profile Eritrea*, above footnote 3. See also Committee to Protect Journalists, *Attacks on the Press in 2001 – Eritrea*, February 2002, available at http://www.unhcr.org/refworld/docid/47c5662223.html. See also Jonah Fisher, *Quick exit: BBC expelled from Eritrea*, BBC, 10 September 2004, available at http://news.bbc.co.uk/2/hi/africa/3644630.stm

[122] US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[123] Freedom House, *Freedom of the Press 2008 – Eritrea*, 29 April 2008, available at http://www.unhcr.org/refworld/docid/4871f60124.html. Additionally, in 2003, the Government prohibited access to the UNMEE-operated information centres by posting guards outside the offices. See UN Commission on Human Rights, *Promotion and protection of human rights defenders*, above footnote 120, para. 564.

Internet access, with Internet connections reported to be limited, unreliable or censored.[124]

In November 2006, the Government reportedly conducted a round-up of State journalists and media professionals without providing any explanation as to the charges investigated. At least nine State-owned media workers were reportedly arrested.[125]

Since the major police operations in 2001 and the ensuing crackdown on the private press and dissident journalists, the freedom of the press has been seriously curtailed, and Eritrea is currently ranked last in Reporters Without Borders' worldwide press freedom index.[126] Journalists expressing, or perceived as holding, dissenting views, or merely reporting on opposition groups activities, remain at particular risk of arbitrary arrest and detention, and, as such can demonstrate a well-founded fear of persecution on the ground of (imputed) political opinion.

(iii) Trade unionists and labour rights activists

Non-governmental political, civic, and social organizations are largely prohibited from operating in Eritrea, and any group of more than seven persons cannot assemble without the prior approval of the Government, despite the right to freely assemble being entrenched in the Constitution.[127] Although, union leaders are typically Government employees, and thus union activities are generally sanctioned, the Government did not approve the formation of any unions in 2008.[128] Furthermore, given past arbitrary arrests and detention of prominent trade unionists and labour rights activists,[129] such individuals may be at risk of persecution on the basis of (imputed) political opinion.

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[124] UN Economic Commission for Africa, *Eritrea Internet Connectivity*, available at http://www.uneca.org/aisi/nici/country_profiles/Eritrea/erinter.htm. See also, The World Bank, *Eritrea Country Brief*, April 2008, available at http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/ERITREAEXT/0,,menuPK:351396~pagePK:141132~piPK:141107~theSitePK:351386,00.html. It is also reported that in 2004, the Government placed all internet cafes under its supervision. See UN Commission on Human Rights, *Promotion and protection of human rights defenders*, above footnote 120.

[125] UN Human Rights Council, *The right to freedom of opinion and expression: report of the Special Rapporteur, Ambeyi Ligabo: addendum*, A/HRC/4/27/Add.1, 26 March 2007, para. 225, available at http://ap.ohchr.org/documents/dpage_e.aspx?c=61&su=69.

[126] Reporters Without Borders, *Annual Report 2008 – Eritrea*, 13 February 2008, available at http://www.unhcr.org/refworld/docid/47b418b215.html. It was reported that, as of October 2008, there were 18 "verifiable" cases of detained Eritrean journalists or Ministry of Information employees. See Reporters Without Borders, *State TV journalist secretly sentenced in 2006 to five years of forced labour*, 30 October 2008, available at http://www.unhcr.org/refworld/docid/4917f24117.html.

[127] Article 19(4) of the Constitution, above footnote 7, guarantees that every person has the right to assemble and to demonstrate peacefully together with others, as well as to form organizations for "political, social, economic and cultural ends."

[128] US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[129] UN Commission on Human Rights, *Promotion and protection of human rights defenders*, above footnote 120, paras. 555, 558 and 561. In early 2005, three high-profile trade unionist were arrested, one of whom had allegedly urged workers at a Coca-Cola plant to engage in industrial action to protest against the worsening of their living standards. All three are still believed to be detained and held *incommunicado*. See International Federation for Human Rights, *Observatory for the Protection of Human Rights Defenders Annual Report 2006 – Eritrea*, 14 March 2007, available at http://www.unhcr.org/refworld/docid/48747cd278.html.

(c) Members of minority religious groups

The unimplemented Eritrean Constitution guarantees freedom of religion,[130] yet such rights are severely restricted for all but the four officially recognized religions, i.e. Sunni Islam, the Eritrean Orthodox Church, the Roman Catholic Church and the Evangelical Lutheran Church.[131]

In 2002, the Government required all religious groups, other than the four officially recognized, to close their places of worship and register prior to engaging in religious activities. This invitation was not extended to certain groups, including the Jehovah's Witness.[132] An additional requirement to publish membership lists has prevented some groups from applying for registration due to fear of reprisals. Although the Baha'i faith, the Faith Mission Church, the Orthodox Presbyterian Church and Seventh Day Adventists have completed the registration process, they are not allowed to worship publicly.[133]

Members of non-registered religions risk punitive measures for worshiping, including the confiscation of church property, arrests and detention, torture and other abuses, sometimes resulting in death.[134] Many followers of minority faiths are arrested,[135] and detained *incommunicado* in harsh conditions, often in army camps and police headquarters throughout the country, without charge or trial.[136] Security forces are

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[130] See Articles 14 and 19 of the Constitution, above footnote 7. Pursuant to Article 14(2), no one should be discriminated against on the ground of religion. Article 19 guarantees the freedom of conscience and religion.

[131] US Department of State, *2008 Report on International Religious Freedom – Eritrea*, 19 September 2008, available at http://www.unhcr.org/refworld/docid/48d5cbb0e.html (hereafter "US Department of State, *2008 Report on International Religious Freedom*"). See also US Commission on International Religious Freedom, *USCIRF Annual Report 2008 – Eritrea*, 1 May 2008, available at http://www.unhcr.org/refworld/docid/48556998c.html (hereafter "*USCIRF Annual Report 2008*"). No confirmed figures on religious affiliation are available, but approximately half of the Eritrean population is Sunni Muslim, and some 30 percent, Orthodox Christian. The remainder includes Easter Rite and Roman Catholics, Protestants, smaller numbers of Seventh Day Adventists and Jehovah's Witnesses, and a small number of Baha'is. Approximately two percent of the population practices traditional indigenous religions. See, for instance, US Library of Congress – Federal Research Division, *Country Profile: Eritrea*, September 2005, available at http://lcweb2.loc.gov/frd/cs/profiles/Eritrea.pdf. According to the UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child : 2nd and 3rd periodic reports of States parties due in 2006: Eritrea*, CRC/C/ERI/3, 23 October 2007, available at http://www.unhcr.org/refworld/docid/474ae57a2.html (hereafter "UN CRC, *2nd and 3rd periodic reports of States parties due in 2006: Eritrea*"), "a child shall be registered by any of the religious institutions (the Muslim, Orthodox, Catholic and Evangelical Churches), before the child is two months old" (para. 55).

[132] *USCIRF Annual Report 2008*, above footnote 131.

[133] Minority Rights Group International, *State of the World's Minorities 2008 – Eritrea*, March 2008, available at http://www.unhcr.org/refworld/docid/48a7ead33c.html.

[134] See US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[135] AI Report 2008, above footnote 97.

[136] Persecution.org, *The dismantling of the Eritrean Orthodox Church*, 7 May 2008, available at http://www.persecution.org/suffering/newsdetail.php?newscode=7582. Helena Berhane, a gospel singer and member of the Rema church, had been detained incommunicado without charge or trial for two and a half years at Mai Serwa military camp, prior to her release in October 2006. She reportedly spent most of her detention in inhuman and degrading conditions inside a metal shipping container and was tortured many times to make her recant her faith. In October 2006, she was admitted to hospital in Asmara as a result of new beatings, and was said to be confined to a wheelchair due to the injuries she sustained to her feet and legs; see Amnesty International, *Helen Berhane – Eritrea*, 7 November 2006, available at http://www.amnesty.org.uk/actions_

reportedly using force, sometimes amounting to torture, to compel detainees to renounce their religious beliefs as a pre-condition of release.[137] Children belonging to unrecognized faiths are allegedly arrested and held in the same detention facilities as adults.[138] In addition, the practice of one of the four recognized faiths is sometimes not allowed in the armed forces or during national service.[139]

Jehovah's Witnesses have been particularly targeted by the authorities. Some members have been detained for more than a decade for refusing to undertake military service,[140] and many are reportedly denied the rights of citizenship in Eritrea, including access to public services, issuance of passports, national identity cards, business licenses and exit visas.[141]

Although there is no officially-designated State religion in Eritrea, the Government has traditionally maintained close ties with the Orthodox Church. In recent years, however, Eritrean Orthodox church leaders, previously exempt from military service, have been reportedly sent to military camps.[142] The 2005 dismissal of the Patriarch Abune Antonios, who reportedly objected to Government interference in church activities and the arrest of three priests, also indicates that the Government does not tolerate any dissent or criticism, even from the established religious groups.[143]

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details.asp?ActionID=10; and UN Human Rights Council, *Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir: addendum*, A/HRC/4/21/Add.1, 8 March 2007, para. 129, available at http://ap.ohchr.org/documents/dpage_e.aspx?c=61&su=69 (hereafter "*2007 Report of the Special Rapporteur on Freedom of Religion or Belief*").

137 *USCIRF Annual Report 2008*, above footnote 131. See also *2007 Report of the Special Rapporteur on Freedom of Religion or Belief*, above footnote 136, paras. 131-133; and UN Human Rights Council, *Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir: addendum*, A/HRC/7/10/Add.1, 28 February 2008, para. 89, both available at http://ap.ohchr.org/documents/dpage_e.aspx?c=61&su=69 (hereafter "*2008 Report of the Special Rapporteur on Freedom of Religion or Belief*").

138 AI Report 2008, above footnote 97. See also US Department of State, *2008 Report on International Religious Freedom*, above footnote 131, and UN CRC, *Convention on the Rights of the Child: concluding observations: Eritrea*, above footnote 61, para. 36. In 2003, 57 Christian girls and boys were reportedly held in metal containers for possessing bibles. See Amnesty International, *Eritrea: 57 Christian girls and boys held in metal containers for possessing bibles*, 19 September 2003, available at http://www.amnesty.org.uk/news_details.asp?NewsID=14897. In December 2007, 35 men, women, and children belonging to the Faith Missions Church, were imprisoned and eventually sent to the Wi'a Military Camp.

139 US Department of State, *2008 Report on International Religious Freedom*, above footnote 131.

140 See *2008 Report of the Special Rapporteur on Freedom of Religion or Belief*, above footnote 137, para. 94. According to reports, at least three Jehovah's Witnesses had been imprisoned since 24 September 1994 in Sawa prison for conscientious objection. In 2008, the Government arrested 19 Jehovah's Witnesses; see US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

141 Christian Solidarity Worldwide, *Eritrea: Repression of religious freedom, torture and arbitrary detention*, 1 July 2007, available at http://www.online2.church123.com/attach.asp?clientURN=christiansolidarityworldwide&attachFileName=001ce79a6a106404529f57fd49f4de4e.attach&attachOriginalFileName=CSW_briefing_Eritrea_June_2007.pdf.

142 Persecution.org, *The dismantling of the Eritrean Orthodox Church*, 7 May 2008, available at http://www.persecution.org/suffering/newsdetail.php?newscode=7582.

143 BBC, *Eritrea church leader 'dismissed'*, 26 August 2005, available at http://news.bbc.co.uk/2/hi/africa/4187362.stm. Cf. Compass Direct News, *Government announces 'election' of new Orthodox patriarch*, 4 May 2007, available at http://www.compassdirect.org/en/display.php?page=news&length=long&lang=en&idelement=4870; and BBC, *Eritrea denies patriarch sacked*, 31 August 2005, available at http://news.bbc.co.uk/2/hi/africa/4201654.stm. In February

State persecution of non-sanctioned religious minorities, including Pentecostals, Evangelicals and Jehovah's Witness, appears widespread and systematic.[144] Several jurisdictions have recognized that religious minorities face severe discrimination amounting to persecution and continue to be targeted by the Eritrean authorities on the ground of their religion.[145] Although, in many cases, religious affiliation is the main factor for persecutory measures,[146] political opinion is increasingly linked to religious affiliation. For instance, non-traditional Christian groups are, alongside Muslim extremists, perceived as threats to national security.[147] Although Islamic militants based in Sudan had in the past engaged in a low-level insurgency against the Eritrean Government, it is believed that Muslim suspects detained without charge by the security forces are being held primarily for their political views, including their criticism of anti-Muslim discrimination or their opposition to the Government-recognized leadership of the Muslim community, rather than for supporting or engaging in violence.[148]

2008, it was reported that Mr. Antonios had been held *incommunicado* for five months and that his health was at serious risk as a result of being deprived of adequate medical assistance for his diabetes. See *2008 Report of the Special Rapporteur on Freedom of Religion or Belief*, above footnote 137, para. 91.

144 In 2005, the US Government declared Eritrea a "country of particular concern" on account of its restrictions on religious freedom. See *USCIRF Annual Report 2008*, above footnote 131.

145 In *YT (Minority Church Members at Risk) Eritrea* CG [2004] UKIAT 00218, 9 August 2004, available at http://www.unhcr.org/refworld/docid/46836b130.html, the UK Immigration Appeals Tribunal allowed the appeal of an Eritrean who had converted to the Pentecostal Church given the evidence as to the continued arrests on the basis of religion, and the Eritrean authorities' attitude towards minority churches. See also *Refugee Appeal No. 75028*, 13 May 2004, available at http://www.unhcr.org/refworld/docid/477e12142.html, where the RSAA held that the appellant, a Pentecostal Christian, had a well-founded fear of persecution on the ground of her religion. The RSAA was satisfied that the appellant faced a real chance of being identified as a Pentecostal Christian during her military service, and thus, would be at risk of being detained and physically mistreated in an effort to force her to reconvert to the Orthodox Church.

146 See UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 April 2004, available at http://www.unhcr.org/refworld/docid/4090f9794.html.

147 *USCIRF Annual Report 2008*, above footnote 131. The report further states that:

> *"[t]he The government's concerns regarding religious activities appear to be linked to real or perceived security threats, and government spokespersons have cited Pentecostals, along with Muslim extremists, as threats to national security. Islamic militants operating out of Sudan have engaged in a low-level insurgency against the government, occasionally employing terrorism as a tactic in their campaign to establish an Islamic state. However, human rights organizations report that they consider it likely that many of the Muslim suspects detained without charge by the security forces are being held primarily for their views, including their criticism of alleged anti-Muslim discrimination or their opposition to the government-recognized leadership of the Muslim community, rather than for supporting or engaging in violence.*"

See also BBC, *Eritrea targeting 'permitted' churches*, 20 April 2006, available at http://news.bbc.co.uk/2/hi/africa/4924252.stm.

148 In September 2008, a group of Muslim scholars, students and clerics were arrested and held *incommunicado*. See Amnesty International, *Eritrea Torture,* AFR 64/005/2008, 5 September 2008, available at http://www.amnesty.org/en/library/info/AFR64/005/2008/en. See also Christian Solidarity Worldwide, *Eritrea: Repression of religious freedom, torture and arbitrary detention*, 1 July 2007, available at http://dynamic.csw.org.uk/article.asp?t=report&id=86.

(d) Women

Violence against women, including domestic violence and rape, is reportedly widespread in Eritrea, despite criminalization of such practices.[149] However, rape inside marriage is not considered a crime.[150] Incidents of rape are generally not addressed openly in Eritrea due to the stigma attached to the victim and her family.[151] When rape is reported, the authorities reportedly encourage the perpetrator to marry the victim.[152] Furthermore, cases of domestic violence are rarely prosecuted and no legal penalties for such crimes are enshrined into law.[153] Abortion is illegal[154] and pregnancy out-of-wedlock is strongly condemned by the community, and could lead to physical and psychological violence, or even death.[155]

Although recently banned,[156] FGM is still prevalent in the country, continuing to affect an estimated 90 percent of the female population; the enforcement of Proclamation No. 158/2007 abolishing FGM is still difficult to ascertain.[157]

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[149] See US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4; and UK Home Office, *2008 COI Report*, above footnote 59, paras. 35.18-25.24.

[150] Article 589 of the ETPC, above footnote 71.

[151] UNICEF, *Assessment of Violence against Children in the Eastern and Southern Africa Region: Results of an Initial Desk Review for the UN Secretary General's Study on Violence against Children*, May 2005, available at http://www.unicef.org/southafrica/SAF_resources_vac_esarassessment.doc.

[152] See US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4. The most serious transgressions occur in the military context, often as a result of military conscription, as discussed in more detail in Section IV.2.(a) Draft evaders/deserters of these Guidelines. See also World Organisation Against Torture, *The World Organisation Against Torture (OMCT) expresses its concern regarding violence against girls in Eritrea at the 33rd session of the Committee on the Rights of the Child*, 20 May 2003, available at http://www.omct.org/index.php?id=&lang=eng&actualPageNumber=1&articleId=4703&itemAdmin=article.

[153] See US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[154] Pursuant to Articles 528 and ff. of the ETPC, above footnote 71, abortion is illegal even in cases of rape and incest. Intentional abortions can result in sentences of between three months to five years for the mother. Assisting in an abortion will receive more severe minimum sentences although the maximum is also five years. See also UN Department of Economic and Social Affairs, Population Division, *Eritrea, Abortion Policy*, 2002, available at http://www.un.org/esa/population/publications/abortion/doc/eritre1.doc

[155] World Organisation Against Torture, *The World Organisation Against Torture (OMCT) expresses its concern regarding violence against girls in Eritrea at the 33rd session of the Committee on the Rights of the Child*, 20 May 2003, available at http://www.omct.org/index.php?id=&lang=eng&actualPageNumber=1&articleId=4703&itemAdmin=article. In the Gash-Barka region, pregnancy before marriage is reportedly viewed as a crime and pregnant girls may be outcast from their homes and communities, beaten, stoned or even killed by members of their family or community. See HABEN and CARE, *Research Study on sexual and gender-based violence in eleven target communities in refugee returnee populations in the Gash Barka area of Eritrea*, 2002, available at http://www.preventgbvafrica.org/Downloads/GashBarkaResearch.pdf.

[156] *Proclamation 158/2007, A Proclamation to Abolish Female Circumcision*, 20 March 2007, available at http://www.unhcr.org/refworld/docid/48578c812.html, came into force on 20 March 2007. The penalties for those performing FGM range from two to three years in prison, including a significant fine, and five to ten years' imprisonment if the performance of such practices results in death (Article 4.1). Accessories to the perpetration of the procedure are subject to six months to one year imprisonment and a smaller fine (Article 4.2). Medical professionals who perform FGM face aggravated penalties imposed at the discretion of the court and may be banned from medical practice for up to two years (Article 4.3).

[157] Amongst the FGM awareness-raising measures, the Eritrean Government has reportedly distributed of the Proclamation No. 158/2007 to all administrative regions and 400 Anti-FGM/C committees, which were established in six regions; mobilized 400 religious leaders of all faiths-Muslim,

Failure to conform to conventional roles and the legal restrictions concerning women's sexual and reproductive rights may expose women and girls to violence, harassment or discrimination in Eritrea. As such, women with particular profiles, including victims of domestic violence or other serious forms of violence, such as rape, women who have undergone abortion or have conceived out-of-wedlock, women and girls at risk of harmful traditional practices, may be at risk of persecution on the ground of membership of a particular social group.[158] Where non-conformity to traditional roles is perceived as opposing traditional power structures, the risk of persecution may be linked to the ground of religion and/or political opinion.[159]

(e) Homosexuals

Homosexuality is illegal in Eritrea.[160] Pursuant to the ETPC, sexual, or any other "indecent", act performed with a person of the same sex is prohibited,[161] and offenders are prosecuted and punished.[162] Those, who have previously come to the attention of the authorities due to their sexual orientation, may be targeted.[163]

Orthodox, Catholic, and Evangelical Lutheran churches to denounce the practice of FGM/C; developed and broadcast 20 radio slots on the abandonment of FGM/C in nine local languages to raise public awareness on the harmful effects of FGM/C; developed 5,000 FGM/C training manuals in two local languages and distributed them to the regions. See UN Committee on the Rights of the Child, *Written replies by the Government of Eritrea to the list of issues*, CRC/C/ERI/Q/3/Add.1, 18 July 2008, paras. 71-73, available at http://tb.ohchr.org/default.aspx?country=er. See also UN CRC, *2nd and 3rd periodic reports of States parties due in 2006: Eritrea*, above footnote 131, paras. 183-190. Despite these awareness-raising efforts, , the UN Committee on the Rights of the Child remains "concerned that such measures need to be strengthened and mainstreamed in a sustainable manner", through, *inter alia*, effectively enforcing the criminalization of female genital mutilation; allocating adequate resources for the implementation of the national plan of action, particularly in rural areas; retraining, where appropriate, for practitioners of female genital mutilation and support them to find alternative sources of income. See UN CRC, *Convention on the Rights of the Child: concluding observations: Eritrea*, above footnote 61, para. 61.

[158] See UNHCR, *Guidelines on International Protection No. 2: Membership of a Particular Social Group*, above footnote 96. See also *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, 25 March 1999 (United Kingdom House of Lords), available at http://www.unhcr.org/refworld/docid/3dec8abe4.html, where women in Pakistan (at risk of domestic violence) were considered to constitute a particular social group. The Court found that State protection was not available as discrimination against women was partly tolerated and partly sanctioned by the State.

[159] See UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution*, above footnote 45, paras. 25-26.

[160] Several sources incorrectly state that homosexuality is not illegal. See, for instance, UK Home Office, *2008 COI Report*, above footnote 59; and Immigration and Refugee Board of Canada, *Eritrea: Legislation and legal protection available to homosexuals; their treatment by society and government authorities*, ERI102153.E, 28 February 2007, available at http://www.unhcr.org/refworld/docid/469cd6b815.html.

[161] See Article 600 ("Unnatural carnal offences") of the ETPC, above footnote 71. See also See also International Lesbian and Gay Association, *State-sponsored Homophobia – A world survey of laws prohibiting same sex activity between consenting adults*, April 2007, available at http://www.ilga.org/statehomophobia/State_sponsored_homophobia_ILGA_07.pdf.

[162] UK Home Office, *2008 COI Report*, above footnote 59.

[163] See letter of 9 September 2005 from the UK Foreign and Commonwealth Office, as quoted in UK Home Office, *2008 COI Report*, above footnote 59, para. 23.04:

> "*[…] homosexuality is dealt with severely in Eritrea and that anybody with a known history of this kind would find it very difficult to return and reside in the country. If the individual had*

Homosexuals are reportedly arrested and detained in the same facilities as (suspected) political dissidents.[164] Furthermore, homosexuals face severe societal discrimination.[165] The Government has reportedly openly accused foreign governments of promoting homosexual practices in order to undermine its authority.[166]

Homosexuals in Eritrea may, thus, be at risk of persecution or ill-treatment on the ground of their membership of a particular social group, i.e. their sexual orientation,[167] since they do not, or are perceived not to, conform to prevailing legal, cultural and social norms.[168] Furthermore, the existence of criminal sanctions for homosexual activities in Eritrea is likely to impede access to State protection where persecutory acts are perpetrated by non-State actors, such as family or community members.[169]

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previously come to the attention of the authorities in the context of his/her sexuality there could be problems in gaining entry to Eritrea and he/she would certainly be 'ear-marked'."
There were uncorroborated reports that known homosexuals in the military were subjected to severe abuse; see US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[164] Behind the Mask, *6 men arrested in Asmara*, 6 November 2003, available at http://www.mask.org.za/article.php?cat=&id=213. See also GlobalGayz, *Eritrea: Asmara Military Police arrested 6 gay men in October 11/03*, 5 November 2003, available at http://www.globalgayz.com/eritrea-news.html.

[165] See, for instance, Immigration and Refugee Board of Canada, *Eritrea: Legislation and legal protection available to homosexuals; their treatment by society and government authorities*, ERI102153.E, 28 February 2007, available at http://www.unhcr.org/refworld/docid/469cd6b815.html; and US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4. In 2004, the Government reportedly expelled a number of foreigners from Eritrea on the basis of their sexual orientation.

[166] US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4.

[167] See UNHCR, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, available at http://www.unhcr.org/refworld/docid/48abd5660.html (hereafter "UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation*"); see also UNHCR, *Guidelines on International Protection No. 2: Membership of a Particular Social Group*, above footnote 96. Many jurisdictions have recognized that homosexuals may constitute a "particular social group". See, for instance, *Matter of Toboso-Alfonso*, 20 I& N. Dec 819, 12 March 1990 (US Board of Immigration Appeals), available at http://www.unhcr.org/refworld/docid/3ae6b6b84.html;; *Re GJ, Refugee Appeal No. 1312/93*, 30 August 1995 (New Zealand RSAA), available at http://www.unhcr.org/refworld/docid/3ae6b6938.html; *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71, 9 December 2003 (High Court of Australia), available at http://www.unhcr.org/refworld/docid/3fd9eca84.html.

[168] UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, above footnote 167, para. 7. See also UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution*, above footnote 45, paras. 6-7; and UNHCR, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004, para. 3, available at http://www.unhcr.org/refworld/docid/4551c0d04.html.

[169] Even in the absence of conclusive country of origin information regarding the enforcement of the legal provisions criminalizing homosexual conduct, the pervading or generalized climate of homophobia, as evidence by Government display of anti-homosexual rhetoric, societal attitudes, etc., may be sufficient indication of the risk of persecution faced by homosexuals in Eritrea. See UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, above footnote 167, paras. 21-22.

3. Exclusion from international refugee protection

The exclusion clauses contained in Article 1F of the 1951 Convention and Article I(5) of the OAU Convention provide for the denial of refugee status to individuals who otherwise would meet the refugee definition set out in Article 1A of the 1951 Convention and Article I(1) of the OAU Convention, but who are deemed not deserving of international protection on account of the commission of certain serious acts. Given the potential serious consequences of exclusion from international refugee protection, it is important to apply the exclusion clauses with great caution and only after a full assessment of the individual circumstances of the case.[170]

Due to the human rights situation in Eritrea, exclusion considerations may be of relevance in the cases of applicants with certain backgrounds and profiles, including members of the Eritrean military and police forces, members of the executive branch of the Government, including the Cabinet, members of opposition groups involved in armed attacks, prison wardens and guards, Government informants and agents, and Islamic fundamentalists[171] who have committed terrorist acts.

In the relevant cases, it should be determined whether the excludable act falls within the definition of the acts specified in Article 1F or Article I(5), as well as whether there are serious reasons for considering that the person concerned was individually responsible for the act in question. Such responsibility flows from the person having committed or participated in a criminal act, or on the basis of command/superior responsibility for persons in positions of authority. In this regard, the fact that a person was at some point a senior member of a repressive regime or a member of an organization involved in unlawful violence does not in itself entail individual liability for excludable acts. Moreover, individual responsibility is not established if any defences to criminal responsibility apply.[172]

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[170] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, available at http://www.unhcr.org/refworld/docid/3f5857684.html (hereafter "UNHCR *Guidelines on Exclusion*"); and UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, available at http://www.unhcr.org/refworld/docid/3f5857d24.html (hereafter "UNHCR *Background Note*").

[171] These groups include the Eritrean Islamic Jihad Movement (Harakat al Jihad al Islami), an armed opposition group largely based in Sudan credited with terrorist activities such as planting of land mines in Eritrean territory, especially in farming and pastoral areas; attacks on civilians; destruction of property. See Immigration and Refugee Board of Canada, *Eritrea: Al Jihad Al Islammiya*, ERT36701.E, 16 March 2001, available at http://www.unhcr.org/refworld/docid/3df4be2e24.html. See also Human Rights Watch, *Global Trade Local Impact: Arms Transfers to all Sides in the Civil War in Sudan*, 1 August 1998, available at http://www.unhcr.org/refworld/docid/3ae6a8500.html; and United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 2006 – Eritrea*, 6 March 2007, available at http://www.unhcr.org/refworld/docid/45f056772.html. For a detailed profile of the Eritrean Islamic Jihad Movement, please see National Consortium for the Study of Terrorism and Responses to Terror (START), *Terrorist Organization Profile: Eritrean Islamic Jihad Movement (EIJM)*, available at http://www.start.umd.edu/start/data/tops/terrorist_organization_profile.asp?id=4535 [accessed on 13 March 2009].

[172] Detailed guidance in applying the exclusion clauses can be found in UNHCR *Guidelines on Exclusion* and *Background Note*, above footnote 170.

In that respect, several jurisdictions have recognized the availability of the defence of duress in cases involving Article 1F (and by analogy I(5)).[173] The issue of duress will often arise in the case of forcibly conscripted soldiers.[174] In such cases, "the consequences of desertion plus the foreseeability of being put under pressure to commit certain acts are relevant factors".[175] The Federal Court of Canada has recently held that an asylum-seeker who had been forcibly recruited into the Ethiopian army, and forced to stand guard while civilian homes were raided for ammunition and to assist in the transport of people to a camp where he was aware they would be tortured, was not excluded under Article 1F because he had acted under duress.[176]

4. Internal flight or relocation alternative

In the assessment of a claim to refugee status in which a well-founded fear of persecution has been established in some localized part of the country of origin, the assessment of whether or not there is a relocation alternative in the individual case requires two main sets of analysis, namely its relevance and its reasonableness. For both, the personal circumstances of the individual applicant and the conditions in the country of origin need to be considered.[177]

With regard to the "relevance" of an internal flight or relocation alternative, it is important to assess the willingness and ability of the State to protect from risks emanating from the agent of persecution. In the context of Eritrea, the relevance

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[173] See, for example, *SRYYY v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] FCAFC 42, 17 March 2005 (Federal Court of Australia), available at http://www.unhcr.org/refworld/docid/42d1211a4.html; *Gurung v. Secretary of State for the Home Department* [2003] EWCA Civ 654, 1 May 2003 (England and Wales Court of Appeal), available at http://www.unhcr.org/refworld/docid/403e4ac42.html; *Refugee Appeal No. 2142/94*, 20 March 1997 (New Zealand Refugee Status Appeals Authority), available at http://www.unhcr.org/refworld/docid/49997b001a.html.

[174] See *Refugee Appeal No. 2142/94*, above footnote 173. The RSAA held that where a person acted on the orders of other persons in the organization, consideration should be given to whether the person "could reasonably have been expected simply to renounce his or her membership [in the organization], and indeed whether he or she should have done so earlier if it was clear that the situation in question would arise."

[175] UNHCR *Background Note*, above footnote 170, para. 70.

[176] *Minister of Citizenship and Immigration v. Asghedom* [2001] FCT 972, 30 August 2001 (Federal Court of Canada), available at http://www.unhcr.org/refworld/pdfid/403dce354.pdf. In a recent case, the US Supreme Court granted certiorari to address whether duress is relevant as a full or partial defense to the allegation that an asylum-seeker assisted in the persecution of others. The applicant, an Eritrean national, had been forcibly conscripted into the Eritrean military but refused to fight. After two years' imprisonment, he was forced to work as a prison guard in a military camp where the prisoners he guarded were persecuted on account of a 1951 Convention ground. Concluding that he assisted in the persecution of prisoners by working as an armed guard, the Immigration Judge denied relief on the basis of the persecutor bar, but granted deferral of removal under CAT because petitioner was likely to be tortured if returned to Eritrea. Both the Board of Immigration Appeals and the Court of Appeal for the Fifth Circuit affirmed the decision. See *Negusie v. Holder, Attorney General*, No. 07–499, 3 March 2009 (US Supreme Court), available at http://www.unhcr.org/refworld/docid/49c254e72.html; and UNHCR, *Negusie v. Mukasey, Brief Amicus Curiae*, 23 June 2008, available at http://www.unhcr.org/refworld/pdfid/486230652.pdf.

[177] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, HCR/GIP/03/04*, 23 July 2003, p. 3, available at http://www.unhcr.org/cgi-bin/texis/vtx/ refworld/rwmain?docid=3f2791a44.

criterion of the internal flight alternative test will normally not be met given that the agent of persecution is the State itself in almost all categories of claims.

In the absence of a risk of persecution or other serious harm upon relocation, it must also be "reasonable" for a claimant to relocate. Such an assessment must take into account the elements of safety and security, human rights standards and options for economic survival in order to evaluate if the individual would be able to live a relatively normal life without undue hardship given his or her situation.[178]

In so far as the risk of persecution emanates from the State and its agents, internal flight or relocation to another part of the country cannot be considered as available, given the omnipresence of the military, a well-established network of Government informants, and, generally, the State agents' countrywide control and reach over the population, including through round-ups, house searches, setting roadblocks and targeting family members. Consequently, where the agent of persecution is the State, the relevance criterion of the internal flight alternative test is not met.

For categories of claimants, such as homosexuals and women with specific profiles, who fear persecution at the hands of non-State agents, i.e. local communities and family members, internal relocation to another part of the country may be relevant. Whether such relocation is reasonable must be determined on a case by case basis taking fully into account the current economic, security and human rights environment in Eritrea. Relocation to other tribal or ethnic areas may not be possible due to latent or overt conflicts between such groups, lack of acceptance, and other societal and cultural barriers. Relocation to urban centers, such as Asmara, would have to be assessed for reasonableness given the reported difficulties surrounding the human rights, social and economic situation prevailing in the city.

5. Cessation of refugee status

Under Article 1C of the 1951 Convention, refugee status may cease either through a change in the personal circumstances of the refugee or through changes in objective circumstances in the country of origin upon which refugee status was based. With respect to the latter, the changes must be fundamental, durable and effective.

In May 2002, following the end of the conflict between Ethiopia and Eritrea, UNHCR announced that, in its view, cessation pursuant to Article 1C(5) of the 1951 Convention and Article I(4)(e) of the OAU Convention could be invoked vis-a-vis Eritrean refugees, effective 31 December 2002 (Cessation Declaration).[179] The cessation clauses were strictly limited to those who had fled Eritrea as a result of the war of independence and the Ethiopian-Eritrean border conflict seemingly resolved by the Algiers Agreements, and, thus, did not apply to refugees who had fled for other reasons.

Since the 2002 Cessation Declaration,[180] the human rights situation in Eritrea has seen a sustained deterioration as illustrated in the present Guidelines which has created new international protection needs. A declaration of general cessation cannot serve as

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[178] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative"*, above footnote 177 p. 3.
[179] UNHCR Cessation Declaration, above footnote 2.
[180] UNHCR Cessation Declaration, above footnote 2.

an automatic bar to refugee claims made either at the time of a general declaration or subsequent to it.[181] Hence the 2002 Declaration has no bearing on Eritreans who have since fled, or were already outside Eritrea at the time of the Declaration, and are unwilling or unable to return due to a well-founded fear of persecution as a result of subsequent developments as described in these Guidelines.

V. Further human rights considerations

1. Prison conditions

Prison conditions in Eritrea are, as reported by several sources and claimants themselves, very poor.[182] Prisoners are reportedly held in unventilated metal shipping containers in extreme temperatures or in dark underground cells.[183] Overcrowded and unhygienic conditions are reported and medical treatment is rarely provided.[184] Torture is allegedly common, as is long-term solitary confinement, minimal food rations, lack of sanitation, hard labour, and death in captivity. No independent monitoring organization is allowed access to Eritrean prisons.[185]

2. Forcible return to Eritrea

Eritreans who are forcibly returned may, according to several reports, face arrest without charge, detention, ill-treatment, torture[186] or sometimes death at the hands of the authorities. They are reportedly held *incommunicado*, in over-crowded and unhygienic conditions, with little access to medical care, sometimes for extended periods of time. According to credible sources, 1,200 persons were forcibly returned from Egypt to Eritrea in June 2008,[187] where the majority was detained in military

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[181] Paragraph 25, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, UNHCR, HCR/GIP/03/03, 10 February 2003, available at http://www.unhcr.org/refworld/docid/3e50de6b4.html.

[182] Committee to Protect Journalists, *New revelations about Eiraeiro prison camp – The journalist Seyoum Tsehaye is in cell No. 10 of block A01"*, 30 January 2008, available at http://www.rsf.org/article.php3?id_article=25251. See also US Department of State, *2007 Country Reports on Human Rights Practices*, above footnote 57. See also AI Report 2008, above footnote 97.

[183] HRW, *World Report 2009*, above footnote 8.

[184] AI Report 2008, above footnote 97. See also *2008 Report of the Special Rapporteur on Freedom of Religion or Belief*, above footnote 137, para. 94.

[185] HRW, *World Report 2009*, above footnote 8. See also particularly for deaths in custody and prison conditions Reporters Without Borders, *Annual Report 2008 – Eritrea*, 13 February 2008, available at http://www.unhcr.org/refworld/docid/47b418b215.html. See also US Department of State, *2007 Country Reports on Human Rights Practices*, above footnote 57. See also *AI Report 2008*, above footnote 97.

[186] In October 2008, Ethiopia accused Eritrea of torturing 166 of those returned by Egypt whom Eritrea determined were not Eritrean but Ethiopian nationals and were subsequently repatriated to Ethiopia under the auspices of the ICRC; see Agence France Presse, *Ethiopia accuses Eritrea of torturing detainees*, 12 October 2008, available at http://www.canada.com/edmontonjournal/news/story.html?id=a1853477-9da5-457e-9f91-f15775a82aaa, and Reuters, *Ethiopia accuses Eritrea of torturing deportees*, 12 October 2008, available at http://www.alertnet.org/thenews/newsdesk/LC582562.htm.. Furthermore, a communication by the Israeli embassy in Asmara indicating that Eritrean officials had advised that persons returned "will be placed in rows and shot or thrown into torture chambers." See Haaretz, *Eritrean ambassador: Jerusalem must repatriate 'deserters'*, 25 March, 2008, available at http://www.haaretz.com/hasen/spages/968145.html.

[187] UNHCR, *UNHCR alarmed over reports of forcible returns of Eritreans from Egypt*, 19 June 2008, available at http://www.unhcr.org/news/NEWS/485a52832.html. See also Amnesty International,

facilities.[188] UNHCR is aware of at least two Eritrean asylum-seekers who have arrived in Sudan having escaped from detention following deportation from Egypt in June 2008. Eritreans forcibly returned from Malta in 2002 and Libya in 2004 were arrested on arrival in Eritrea and tortured. The returnees were sent to two prisons on Dahlak Island and on the Red Sea coast, where most are still believed to be held *incommunicado*.[189] There are also unconfirmed reports that some of those returned from Malta were killed.[190] In another case, a rejected asylum-seeker was detained by the Eritrean authorities upon her forcible return from the United Kingdom.[191] On 14 May 2008, German immigration authorities forcibly returned two rejected asylum-seekers to Eritrea. They were reportedly detained at Asmara airport upon arrival and are being held *incommunicado*, and believed to be at risk of torture or other ill-treatment.[192]

For some Eritreans, being outside the country may be sufficient cause on return to be subjected to scrutiny, reprisals and harsh treatment. Individuals may be suspected of having sought asylum, participating in diaspora-based opposition meetings or otherwise posing a (real or perceived) threat to the Government,[193] particularly where they have exited the country illegally.[194] It has been reported that, as of September 2008, a blanket restriction on passport and exit visa requests has been imposed by the

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Egypt must stop flights to torture in Eritrea, 13 June 2008, available at http://www.unhcr.org/refworld/docid/485618e21a.html. See also Human Rights Watch, *Sinai Perils: Risks to Migrants, Refugees and Asylum Seekers in Egypt and Israel*, 12 November 2008, p. 68, available at http://www.unhcr.org/refworld/docid/491aebbd2.html. It has recently been reported that Egypt forcibly returned a further 45 Eritrean migrants; see Human Rights Watch, *Egypt: Stop Deporting Eritrean Asylum Seekers*, 8 January 2009, available at http://www.unhcr.org/refworld/docid/49670ba41e.html.

[188] Some of the returnees, including pregnant women and women with children, were released after weeks of detention. As of December 2008, at least 740 returnees were still detained in military detention facilities in Eritrea. See Human Rights Watch, *Egypt: Stop Deporting Eritrean Asylum Seekers*, 8 January 2009, available at http://www.unhcr.org/refworld/docid/49670ba41e.html; and Amnesty International, *Eritrean asylum-seekers face deportation from Egypt*, 19 December 2008, available at http://www.unhcr.org/refworld/docid/49509c20c.html.

[189] Amnesty International, *Eritrea: Fear of torture/Incommunicado detention/Arbitrary killings: Thousands of people held at Adi Abeto army prison*, 9 November 2004, available at http://www.amnesty.org/en/library/asset/AFR64/008/2004/en/dom-AFR640082004en.html.

[190] US Department of State, *U.S. Department of State Country Report on Human Rights Practices 2003 – Eritrea*, 25 February 2004, available at http:/www.unhcr.org/refworld/docid/403f57b010.html.

[191] Amnesty International, *Eriteria: Fear of torture/incommunicado detention/forcible return: Miskir Semerab Goitom*, 29 November 2007, available at http://www.amnesty.org/en/library/info/AFR64/010/2007/en.

[192] Amnesty International, *Eritrea/Germany: Fear of torture or ill-treatment/incommunicado detention/forcible return*, AFR 64/002/2008, 29 May 2008, available at http://amnesty.org/en/library/info/AFR64/002/2008/en.

[193] President Isaias Afwerki publicly accused the CIA and other Western agencies of luring young people away from Eritrea in a plot to weaken a nation seen as a threat to U.S. interests in the region. See Jack Kimball and Andrew Cawthorne, *Interview – Eritrean leader blames CIA plot for youth exodus*, Reuters, 13 May 2008, available at http://www.reuters.com/article/latestCrisis/idUSL13745161.

[194] *Proclamation No. 24/1992 issued to regulate the issuing of travel documents, entry and exit visa from Eritrea, and to control residence permits of foreigners in Eritrea*, 1992, available at http://www.unhcr.org/refworld/docid/3ae6b4e014.html, strictly prohibits departure from Eritrea without an exit visa (Article 12). Violation of the exit provisions can lead to sentencing upon conviction of up to five years imprisonment or a fine of up to 10,000 Bir (now ca. 15.000 Nakfa) or to both imprisonment and a fine (Article 29.2).

Government.[195] Given the efficiency and reach of the State intelligence apparatus, there is a reasonable possibility that those in possession of exit visas obtained through bribery would be identified as having illegally left the country.

In light of the above, UNHCR urges States to exercise caution when considering the return of individuals not found to be refugees under the criteria of the 1951 and/or OAU Conventions following a determination of their claims in fair and efficient refugee status determination procedures, including the right of appeal. UNHCR further advises against the return of Eritrean asylum-seekers to countries they may have transited or in which they may have been granted status, but from which there is a risk of *refoulement*[196] or deportation. Should an individual demonstrate other needs for which a complementary form of protection would be appropriate, the needs and appropriate response should be assessed accordingly.[197] In this regard, States' obligations under international human rights law remain unaffected.

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[195] See US Department of State, *2008 Country Reports on Human Rights Practices*, above footnote 4. See also Awate.com, *No Legal Exit; No Limit On Exodus*, 25 September 2008, available at http://www.awate.com/portal/content/view/4965/3/.

[196] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at http://www.unhcr.org/refworld/docid/45f17a1a4.html.

[197] The term "complementary forms of protection" is used in these Guidelines to refer to the range of mechanisms which have been adopted by States to complement the protection accorded under the 1951 and/or OAU Conventions.